

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Docket No. 08-55114

CORTNEY REYNOLDS, et al.

Plaintiff - Appellee

vs.

PHILIP MORRIS USA, INC.,

Defendant - Appellant

On Appeal under 28 U.S.C. § 1292(b)
From the United States District Court for the
Southern District of California, Case No. 05-cv-1876- JAH (BLM)
The Honorable John A. Houston, United States District Judge

BRIEF OF APPELLEE CORTNEY REYNOLDS

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INTRODUCTION

Plaintiff-Appellee Courtney Reynolds, on behalf of herself and a putative class of similarly situated consumers, (“Reynolds”) hereby respectfully responds to the Opening Brief of Defendant-Appellant Philip Morris USA (“PMUSA”).

The certified legal question is whether “Marlboro Miles incentives distributed by PMUSA fall under the purview of California Civil Code §1749.5.” (Order of September 5, 2007 at page 1 [E.R.1]).¹

As amended in 1997, Civil Code §1749.5(c) and (d) reads in relevant part as follows:

(c) A gift certificate sold without an expiration date is valid until redeemed or replaced.

(d) This section does not apply to any of the following gift certificates issued on or after January 1, 1998, provided the expiration date appears in capital letters in at least 10-point font on the front of the gift certificate:

(1) Gift certificates that are distributed by the issuer to a consumer pursuant to an awards, loyalty, or promotional program without any money or other thing of value being given in exchange for the gift certificate by the consumer.

Cal. Civil Code §1749.5(d)(1).²

In applying this law to the facts of this case, the District Court ruled as

¹ Because this question is the predominate controlling question in this case the parties jointly applied to certify the order for interlocutory appeal, which the District Court granted, although “the Court believes its analysis is correct.” [E.R.1-2].

² Unsurprisingly given the devastating effect of the plain language of the statute, PMUSA does not quote the relevant language of Civil Code §1749.5(d) until page 34 of the Appellant’s Opening Brief (“AOB”).

follows:

In applying this definition [Cal. Civil Code §1749.5(d)(1)] to the facts of this case, this Court finds that Defendant's Marlboro Miles incentive fall under the purview of Cal. Civ. Code §1749.5. The Marlboro Miles incentive program is awarded "pursuant to an awards, loyalty or promotional program." *Id.* Moreover, Marlboro Miles are given to consumers "without any money or other thing of value being given [in] exchange" for the incentive certificates." *Id.* The 1997 amended definition, therefore, negates Defendant's argument that the "plain language of the statute" precludes the inclusion of Defendant's Marlboro Miles certificates in its definition. Accordingly, this Court finds that the plain language of the statute supports Plaintiff's claim that the Marlboro Miles incentives fall under the purview of California Civil Code §1749.5. [E.R. 22-23].³

The District Court also found as follows: PMUSA promoted their Marlboro cigarette brand "through its program 'Marlboro Miles.'" (Order of February 23, 2006 at p.1 [E.R.18].) "The Marlboro Miles program allows a customer to collect 'Marlboro Miles' incentives which are printed directly on the package of each cigarette pack." (Order at p.2 [E.R.19]. The Marlboro Miles incentive "program works by allowing customers to exchange the collected Marlboro Miles for merchandise from the Defendant.

³ The District Court also concluded that this "language [Cal. Civil Code §1749.5(d)(1)] suggests that gift certificates are not always purchased from a retailer and instead can have no value attached to them, in direct contravention to Defendant's limited construction." [E.R. 23]. The District Court's ruling renders nonsensical the PMUSA argument that Civil Code §1749.5 only applies to gift certificates with a stated monetary value that are "sold." Moreover, as set forth in detail herein, Marlboro Miles have a currency value of 2¢ to 4¢ per Mile or 10¢ to 20¢ per pack as there was a 5 Mile certificate on each package of Marlboro cigarettes sold. [E.R. 17, 191].

The program is an incentive program because ‘more valuable gifts could be acquired for more certificates.’” (Order at p.2 [E.R.19].⁴

The Marlboro Miles were distributed as the “**currency**” for use in the PMUSA retail catalog.⁵ [E.R.105]. The Marlboro Miles program was like a “retail business” where the only “currency” which could be “redeemed” was the collected Marlboro Miles. [E.R.316-317].

According to PMUSA, **the Marlboro Miles program was created for the following purposes:**

- **To “reward adult smokers” for collecting Marlboro Miles from the sides of Marlboro packs; and**
- **To Make Marlboro Miles an “equity” for the Marlboro brand, identifiable to adult smokers as “added value.”**

(PMUSA document #2070793994 [E.R.171].)

Marlboro Miles certificates were printed on the packages of Marlboro cigarettes sold in California. (See Plaintiff’s Separate Statement of Genuine Issues (“PSS”) at ¶1 [Supplemental Excerpts of the Record (“Suppl E.R.”) at page 2]; [E.R.19].) There was no expiration stated on the pack at the time the Marlboro Miles were distributed. (PSS ¶¶21, 27 [Supp E.R.19-21]; [E.R.19, 247].) PMUSA admits that these Marlboro Miles certificates “added value” to the consumer’s cigarette purchase. (PSS ¶¶7, 13 [Supp E.R.8, 12]; [E.R.171]; [Suppl E.R.111].) PMUSA instructed consumers to “collect” Miles so that they could be redeemed at a later date. (PSS ¶1

⁴ Emphasis added and internal citations omitted unless otherwise stated.

⁵ The Marlboro Miles catalog operation when in existence was admittedly one of the largest mail-order operations in the country, ranking in size “between L.L.Bean and Land’s End.” [E.R. 95].

[Supp E.R.2]; [E.R.134, 171].) The Marlboro Miles were “currency” to be used in PMUSA’s retail catalogs. See (PSS ¶¶6, 22 [Supp E.R.7, 19]; [E.R.105, 171].) These Marlboro Miles certificates contained no limitation as to time when issued.⁶ (PSS ¶¶21, 27 [Supp E.R.19-21]; [E.R. 19, 247].)

Under the terms of Civil Code §1749.5(c) and (d), the issued Marlboro Miles remain “valid” “currency” which PMUSA could not subsequently expire. (PSS ¶¶19, 20 [Supp E.R.19].) Although PMUSA did not charge more for Marlboro cigarette packages with Marlboro Miles certificates affixed thereto, PMUSA received valuable consideration in the form of the increased purchases of Marlboro cigarettes and increased market share. (PSS ¶¶7, 15 [Supp E.R.8, 15-16]; [E.R.250]; [Suppl E.R.106-111].)

As stated by marketing expert Bryan Kleckner, “The benefit derived to PMUSA from the Marlboro Miles program would be to get repeat customers, increase their market share against competition, separate them from competition in their marketing, differentiate their product from their competition, and offer an incentive to the average cigarette consumer to buy their product.” [E.R.250]. PMUSA began issuing Marlboro Miles as currency for use in their retail catalogs following the success of their competitor’s “Camel Cash” program. See United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 638-9 (D.D.C. 2006).

PMUSA’s *ex post facto* cancellation of distributed Marlboro Miles certificates without an expiration date on the Miles certificates violates Civil

⁶ Even an examination of the fine print of the catalogs for 1998, 1999, 2000, 2001 and 2002 will not reveal an expiration date for the “old” Marlboro Miles distributed throughout that this period. [E.R.419-549]. Nor does one appear in the 2004 and 2005 catalogs for the “new” Marlboro Miles. [E.R.591-713].

Code §1749.5(c) and (d).⁷ Though the catalog may change from year to year, as with any “retail business”, PMUSA’s legal, ethical and contractual obligations to honor the Marlboro Miles certificates as if they were “currency” remains unchanged. PMUSA’s admitted failure to state or disclose any expiration date on the Miles certificates when issued compels this conclusion.

To be within the safe harbor of Civil Code §1749.5(d), the expiration date need only be disclosed on the certificate at the time of issuance, not subsequently imposed after the company has already enjoyed the benefit of consumer loyalty.⁸ Consumers like Reynolds who collected their Marlboro Miles certificates, saving them like currency, under PMUSA’s position are left with nothing, while PMUSA has already reaped the rewards in terms of revenue and market share. Nothing in the context of these facts could be more unlawful, unfair and deceptive.⁹ The decision of the District Court is

⁷ PMUSA first announced the invalidation of the 1998 through 2003 Marlboro Miles in the PMUSA 2003 Marlboro Miles catalog. “New” Miles were issued beginning in late 2003 through 2006, which were then again invalidated in the 2006 catalog without any prior expiration date announced.

⁸ PMUSA relies heavily on hyperbole that other programs not at issue in this case (cereal box tops, credit card points and wrapper cash) will be adversely affected by affirmance of the District Court decision. The Court need only examine the evidence presented to see that these other companies complied with Civil Code §1749.5(d)(1). [See E.R.817-852]. PMUSA deserves no special treatment and PMUSA’s exaggerated claims are therefore entitled to no weight as PMUSA has provided no citation or evidence in the record of any other company that has been sued for violating Civil Code §1749.5(d)(1).

⁹ PMUSA also obtained a mailing list of loyal customers as a result of this loyalty program. With this valuable mailing list, PMUSA sent members

most certainly correct as this is respectfully not a close case.

SUMMARY OF RESPONSE TO ARGUMENTS BY PMUSA

Appellant PMUSA makes only two (2) arguments in seeking to have the ruling of the District Court reversed. (AOB at pp.12-15). Both of these arguments are respectfully without merit as previously found by the District Court and should be given short shrift.

PMUSA first argues that Marlboro Miles are not “gift certificates” within the meaning of Civil Code §1749.5 “as that terms is commonly understood.” (AOB at 12-14). In finding that under the facts of this case, Marlboro Miles fall with the purview of Civil Code §1749.5, the District Court first looked to the plain language of the statute, and noted that the 1997 version of the law “explicitly provides an exception for ‘gift certificates that are distributed to a consumer pursuant to an awards, loyalty, or promotional program.’” [E.R.21]. As a result of this amendment, the District Court held that Civil Code §1749.5 “include[s] certificates awarded pursuant to an awards, loyalty or promotional program **without any money or other thing in value being given in exchange for the gift certificate by the consumers.**” [E.R.22]. Contrary to the argument by PMUSA, the District Court disagreed with PMUSA’s analysis by holding that the narrow definition argued by PMUSA was inconsistent with the “plain language of the statute.” [E.R.22-23].

PMUSA next argues that even if Marlboro Miles are gift certificates within the meaning of Civil Code §1749.5, PMUSA’s subsequent imposition

of the putative Class direct-mail marketing. (AOB at 7).

of an expiration date does not violate the law because the Marlboro Miles were not “sold.” This argument completely ignores the fact that in the 1997 amendment, Civil Code §1749.5 defined gift certificates to include certificates that were “distributed by the issuer to a consumer pursuant to an awards, loyalty, or promotional program **without any money or other thing of value being given in exchange**”, which expressly negates the argument by PMUSA.

The District Court soundly rejected PMUSA’s narrow construction that the statute should only apply to “certificates that are purchased by a consumer and given as gifts.” [E.R.23]. Based upon the current version of the law [Cal. Civ. Code §1749.5(d)(1)] which expressly applied to certificates “distributed by the issuer to a consumer pursuant to... a promotional program *without any money or other thing*”, the District Court concluded that the statutory “language suggests that gift certificates are not always purchased from a retailer and instead can have no value attached to them, in direct contravention to Defendant’s limited construction.” (Emphasis in original [E.R.23].)

Without any further argument as to the certified question, PMUSA goes on to argue the merits of the contract claim and the equitable relief sought in the form of restitution. (AOB 14-15). The Court should respectfully not rule on these intensely factual issues at this time.¹⁰

PMUSA first argues that the claim for breach of the Implied Covenant

¹⁰ These factual issues are not part of the certified controlling question of law and this Court need not burden itself with deciding these issues as part of this interlocutory appeal at this time. These factual issues should be left for decision after the evidence is fully presented. See e.g. Link v. Mercedes-Benz of N. Amer., Inc., 550 F.2d 860, 863 (3rd Cir. 1977).

of Good Faith and Fair Dealing fails because factually there was no contract to honor. To the contrary, California law clearly provides that a promotional offer can form the basis of a unilateral contract “if it calls for the performance of a specific act.” See Harris v. Times, Inc., 191 Cal. App. 3d 449, 455 (1987); Donovan v. RRL Corp., 26 Cal. 4th 261, 272 (2001); Restatement 2d of Contracts at §29. Here, the Marlboro Miles offer by PMUSA called for consumers like Reynolds to purchase Marlboro cigarettes and collect the Marlboro Miles certificates like currency for redemption in the annual catalog. [See e.g. E.R.101, 134-5]. As stated by PMUSA, “to obtain rewards, adult smokers must collect and redeem Marlboro Miles from the sides of Marlboro packs.” [E.R.171]. PMUSA, having made the offer for consumers to collect and redeem Marlboro Miles without a statement as to expiration or any limitation as to time, should not later be allowed to disclaim the existence of a contractual relationship.

The District Court Order held that “[v]iewing the record in the light most favorable to Plaintiff, the non-moving party, this Court finds a genuine issue of material fact regarding whether there existed a unilateral contract between the parties.” (Order at p.8 [E.R.12].) As a result, summary judgment of this claim was properly denied.

As to the equitable claim for restitution, PMUSA argues that Reynolds claim for restitutionary relief fails because Reynolds obtained Marlboro Miles through her purchases of PMUSA’s cigarettes and gave no additional money beyond her cigarette purchase to PMUSA for the Marlboro Miles certificates. Contrary to PMUSA’s assertion, Reynolds may recover restitution equal to the value of her property interest in the Marlboro Miles she collected because PMUSA obtained ill-gotten gains from Reynolds by

failing to honor the obligation to redeem the Marlboro Miles certificates.

As held by the District Court, “California case law provides restitutionary damages under the UCL not only for money or property that was once in the plaintiff’s possession, but also for property in which a plaintiff has a vested interest.” [E.R.16]. The District Court found that Reynolds presented evidence of the value of Marlboro Miles incentives being “quantifiable as between 2 cents and 4 cents per Mile” based upon the testimony of PMUSA’s executives. [E.R.17]. Accordingly, the District Court concluded that “Plaintiff may be entitled to any value that Defendant may have gained from the alleged unfair competition act.” [E.R.17].¹¹

STATEMENT OF THE ISSUES

The Brief of PMUSA incorrectly states the issues on appeal and improperly attempts to modify the issue that was certified for appeal. The District Court certified only one controlling issue for interlocutory appeal:

Do Marlboro Miles incentives distributed by PM USA fall under the purview of California Civil Code §1749.5?

(Order of September 5, 2007 at p.1 [E.R.1]).

This is the only controlling issue upon which this Court granted permission to appeal. (Order of January 10, 2008 [E.R.28]).¹²

¹¹ There is no question that by invalidating the outstanding Marlboro Miles certificates in 2003 and then again in 2006, PMUSA saved many millions of dollars in goods not provided that were owed to Reynolds and the putative class as a result of their collection of the Marlboro Miles currency certificates. [Suppl E.R.140-141].

¹² The Brief of PMUSA at page 5 attempts to alter the controlling issue identified by the District Court and raise additional issues that were not part

STATEMENT OF THE FACTS

A. Facts Presented to the District Court

The undisputed facts that Reynolds presented to the District Court fully supported the District Court's Order of June 5, 2007 and mandated denial of PMUSA's motions for summary judgment.¹³

of the District Court's decision and are not necessary to the disposition of the case. See e.g. Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1219-20 (11th Cir. 2001). While the consideration of additional issues contained in the Order is within this Court's discretion, the controlling issue identified by the Court is the basis of the parties' agreement to an interlocutory appeal in this case. [E.R.1]. These additional fact-bound issues should therefore not be entertained on interlocutory appeal. Swint v. Chambers County Comm'n, 514 U.S. 35, 46 (1995); Link, *supra*, at 863.

¹³ Reynolds objects to PMUSA's continued reference to matters outside of the record. For example, the brief of PMUSA refers to irrelevant gift certificate website and dictionary definitions which were never presented to the District Court and are not contained in the record. (AOB at 15 and 17-18). PMUSA also improperly refers to purported evidence regarding Ebay to attack the evidence in the record concerning monetary value, which again was never presented to the District Court and is not contained anywhere in the record. (AOB at 31). Finally, at pages 26 of the AOB, PMUSA discusses the statutes of other states some of which were never raised or argued in the District Court, and the remainder of which the Court held "do not suggest there are adjudicative facts that are beyond reasonable controversy" in this case. [E.R.25]. "It is a basic tenet of appellate jurisprudence . . . that parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below." Lowry v. Barnhart, 329 F.3d 1019, 1024 (9th Cir. 2003), *citing* Tonry v. Sec. Experts, Inc., 20 F.3d 967, 974 (9th Cir. 1994); see also Japan Air Lines v. Dole, 801 F.2d 483, 488 (D.C. Cir. 1986) ("prohibition against reference to factual matters outside the record" on appeal). This rule prohibiting enlargement of the record is strictly construed. Daly-Murphy v. Winston, 837 F.2d 348, 351 (9th Cir. 1987). "Only in extraordinary situations should the record on appeal be supplemented with material that was not before the district court."

In opposing summary judgment, Reynolds established several important facts which preclude summary judgment and are undisputed in the record. Marlboro Miles certificates were printed on the packages of Marlboro cigarettes sold in the United States. (PSS at ¶1 [Suppl E.R.2]; [E.R. 171, 178-9].) PMUSA admitted that these Miles certificates “added value” to the consumer’s cigarette purchase. (PSS ¶¶7, 13 [Suppl E.R.8, 13]; Confidential Exhibit #29 [Suppl E.R.111].) PMUSA conceded that PMUSA instructed consumers to “collect” Miles so that they could be redeemed at a later date. (PSS ¶1 [Suppl E.R.2]; and [E.R.171].) As stated by PMUSA, “to obtain rewards, adult smokers must collect and redeem Marlboro Miles from the sides of Marlboro packs.” [E.R.171]. There was no expiration stated on the pack at the time the Miles were distributed. (PSS ¶¶21, 27 [Suppl E.R.19-21]; [E.R.19, 247].) The Miles were “currency” to be redeemed in PMUSA’s retail catalogs. [E.R.94, 105]. As a result of the Marlboro Miles program, PMUSA “became one of the largest mail-order firms in the country... ..rank[ing] in size somewhere between L.L.Bean and Land’s End.” [E.R.95].

PMUSA received valuable consideration in the form of the increased purchases of Marlboro cigarettes and increased market share. [E.R.396]. The purpose of this loyalty or awards program was not to increase the price of Marlboro cigarettes, but rather, as stated in PMUSA documents, the purpose was to provide “added value” and “continuity of purchase” during “high

Barilla v. Ervin, 886 F.2d 1514, 1521 n.7 (9th Cir. 1989). The above material and the argument that the District Court decision will adversely impact other promotional campaigns not before this Court were not raised in the District and are unsupported by any evidence in the record, and are therefore improper. Romain v. Shear, 799 F.2d 1416, 1419 (9th Cir. 1986).

price gap periods.” (Confidential Exhibit #29, [Suppl E.R.108]; see also [E.R.171].) PMUSA admits that “Miles add value to a pack of cigarettes” because “Marlboro smokers feel that the value of Marlboro cigarettes is significantly better ‘with Miles’ than ‘without Miles.’” [Supp. E.R.111]. PMUSA estimates that the elimination of Marlboro Miles would result in the loss of “market share.” (Confidential Exhibit #29 [Suppl E.R. 104].) Indeed, PMUSA documents concede that “One in five [Adult Smokers] made a greater effort to smoke Marlboro (versus competitive brands) since collecting Miles.” [Suppl E.R.110].

In Philip Morris Inc. v. Cigarettes for Less, 69 F.Supp.2d 1181 (N.D Cal. 1999), a trade-mark case involving Marlboro Miles, Michael Mahan, Vice-President of PMUSA swore to the following under penalty of perjury:

In late November 1992, Philip Morris USA launched the first of a series of Marlboro continuity merchandise redemption programs featuring “Miles” in the United States. These programs, which have run sequentially since their inception and are an integral part of **Philip Morris USA’s business strategy**, allow smokers age 21 or older to acquire and redeem Marlboro Miles, which are printed exclusively on side panels of genuine domestic Marlboro cigarette packs together with the Universal Product Code (“Miles UPCs”)...

The “Miles” merchandise redemption programs were designed to provide high quality awards to loyal adult smokers...

Philip Morris has extensively advertised and promoted the Marlboro merchandise redemption programs. In fact, advertising has appeared in over thirty-five widely distributed magazines.

(Declaration of Mahan (¶11-¶15), dated July 8, 1999 [E.R. 178-179]).¹⁴

¹⁴ PMUSA argues to this Court that PMUSA never instructed consumers like the Plaintiff to collect Marlboro Miles certificates for redemption and that Marlboro Miles are worthless proofs of purchase. Yet in Cigarettes for Less, supra, before another court, PMUSA stated exactly the opposite under

At this trademark trial, Vice President Mahan in fact testified that the Marlboro Miles have a cash value as currency. Contrary to PMUSA's unsupported assertion to this Court, Mr. Mahan testimony at the Cigarettes for Less trial was as follows:

Q: On a per pack basis, what do you think the miles on a pack are worth?

A: The miles on a pack of cigarettes, they are, the value is based largely on the items we buy for our catalogs. **And they have a value of about two cents, two cents a mile wholesale. We would estimate about four cents a mile retail** because Marlboro buys in very, very large quantities...

[E.R.191].

In this trial, PMUSA officially took the position that the sale of Marlboro cigarettes without "Miles" devalued the Marlboro cigarettes, a position which the Court adopted:

This Court concludes that there is a possibility that PMI ultimately will be able to show a likelihood of confusion by virtue of the absence of "Miles" on foreign cigarette packs and **the fact that a substantial number of consumers deem these "Miles" of some significance** insofar as they actually redeem them for merchandise.

Cigarettes for Less, *supra*, 69 F.Supp. at 1189.

When asked about whether the Marlboro customer is buying the Miles with his cigarette purchase, Mr. Mahan's sworn answer was again the opposite of what PMUSA now asserts to this Court:

The Marlboro brand is more than just the cigarettes. It is a bundle of attributes that include value to the customer, confidence in terms of they know the Marlboro they are buying is the Marlboro they've grown accustomed to purchasing and have developed a loyalty to. **They know the Miles are part of the value equation.**

[E.R.190].

oath, a fact which PMUSA fails to mention here.

Finally, Mr. Mahan's sworn explanation of the Marlboro Miles program in Cigarettes for Less is diametrically opposed to PMUSA's position in this appeal:

I'm sure most of you have heard of the Marlboro Gear programs. Since 1993, we have printed "Miles" on every pack of Marlboro 's sold in the U.S. Adult smokers can collect these Miles and redeem them for gear in our catalogs. Marlboro will continue to offer gear for Miles in 2000 - for consumers who have grown accustomed to the gear program. However, **we are expanding our Rewards program behind Marlboro Miles to add new value behind what has become currency among Marlboro Miles smokers.**

[E.R.233-234].

PMUSA's Brief fails to even mention or attempt to explain this sworn executive testimony in the record regarding the "value of the Miles on the pack" [E.R.191], and documents admitting that the Marlboro Miles rewards program "has become currency among Marlboro Miles smokers" [E.R.234]. PMUSA documents concede "Marlboro Miles have become an equity' for the Marlboro brand, identifiable to adult smokers as 'added value' to purchasing Marlboro." [E.R.171]. Instead, PMUSA's Brief disingenuously uses the fabricated term "Proofs of Purchase" to describe the Marlboro Miles rewards program. (AOB at 1).

In PMUSA's contemporaneous documents, there is no mention of "proofs of purchase" and not even a distinction between miles, they are simply called Miles, and they are used to purchase goods:

Another new Miles initiative is called Party-in-a-box, which we tested in **San Diego** and New Orleans earlier in the year. This program offers adult smokers with the opportunity to **pool 5,000 miles** with four of their friends for a Party Kit.

[E.R.237-8].¹⁵

The egregious spin used by PMUSA to argue facts which are disputed by evidence in the record, without disclosing these admitted and verified facts to which PMUSA testified to under oath in Cigarettes for Less, misrepresents the relevant facts and the record to this Court. PMUSA must be estopped to argue facts contrary to what was presented under oath to the United States District Court.¹⁶

¹⁵ At the same time PMUSA criticizes Reynolds for obtaining some miles from her family and friends, PMUSA fails to tell this Court that PMUSA ran programs, in San Diego and nationally, where consumers were explicitly instructed to “pool” their miles. Moreover, PMUSA’s admits that “two-thirds of adult smokers state that other adult smokers help them save Miles.” [E.R. 242]. Contrary to what is argued by PMUSA in their Brief, at the deposition of PMUSA’s employee Suzanne LeVan, PMUSA conceded that PMUSA has never objected to the transfer of Miles purchased one person to be redeemed by another. (LeVan Depo, at p.57, ln.14-19 [E.R. 60].) In fact, PMUSA was well aware that there was a secondary market in the exchange and selling of Marlboro Miles, a trend called “miling” which PMUSA invented and encouraged. [E.R. 110-111 and 122].

¹⁶ The doctrine of judicial estoppel provides that a party may not gain an unfair advantage by taking one position, and then later taking an inconsistent position. Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996). Judicial estoppel safeguards the orderly administration of justice and the dignity of judicial proceedings protects against a litigant playing “fast and loose” with the courts. Having gained judicial advantage in Cigarettes for Less by arguing that Marlboro Miles have a specific “added value,” PMUSA is now judicially estopped from asserting an inconsistent position in this case. In light of PMUSA’s position in Cigarettes for Less, PMUSA’s factual contentions on appeal lack evidentiary support and PMUSA should be estopped to argue facts contrary to what was presented under oath to the United States District Court for the Northern District of California in Cigarettes for Less.

The “extensively” advertised Marlboro Miles program instructed consumers to “collect” and “save” their Miles for redemption, and examples are cited in the record. [E.R. 101, 134-135, 178-179]. PMUSA made no showing to the District Court that these public representations to collect and save Marlboro Miles were in any way qualified by time or expiration date. [Suppl E.R. 50-53]. PMUSA never disclosed at the time of distribution that the Marlboro Miles currency were subject to an expiration date. (Order at 2:2-4 [E.R. 19].) Therefore, “the average consumer would conclude that these is no expiration on the Marlboro Miles certificates” [E.R.249].

Nor did the catalogs at the time of Mile issuance inform consumers that their Marlboro Miles would expire. An examination of the catalog exhibits lodged with PMUSA’s summary judgment motion in the District Court reveals that with respect to the Marlboro Miles distributed from 1998 through 2003 (“Old Miles”), none of the catalogs from 1998 through 2002 stated that these Marlboro Miles would expire until PMUSA first announced in 2003 that the previously distributed Miles would not be honored after 2003. (PMUSA’s Exhs. #3-7 [E.R.419-549].) Further, with respect to the Marlboro Miles distributed from 2003 through 2006 (“New Miles”), the 2004 and 2005 catalogs gave no indication of an expiration during issuance [E.R.591-713], and not until the 2006 catalog, was PMUSA secret intention to expire Marlboro Miles disclosed. (AOB at 8; and [Suppl E.R.123].)¹⁷

The evidence in the record also shows how PMUSA intentionally

¹⁷ The catalogs were **not** sent to all consumers. As a result, even the belated disclosures in the catalogs did not give reasonable notice of the expiration date to consumers. [E.R. 58 (catalog “sent to consumers who requested it if they were on the database”); E.R. 745-6 (catalog was hard to get)].

deceived consumers by failing to disclose the planned expiration date. The documents establish that during 2002, PMUSA harbored the secret intent to expire the “Old Miles” [E.R.107], but did not announce the expiration until 2003, and only then in the catalog and not with the cigarette packages. In 2005, PMUSA again secretly planned to expire the “New Miles” [Suppl E.R.122-123], but did not announce the expiration until 2006, and again, only in the catalog and not in the cigarette packages being purchased by the members of the putative Class. None of these planned expiration dates were disclosed as PMUSA continued to distribute the Marlboro Miles to consumers like Reynolds, who continued to purchase Marlboro cigarettes over other brands, believing they were also receiving the added value without additional charge of Marlboro Miles currency. [E.R.247].

These facts overwhelmingly refute PMUSA’s litigation argument that the Marlboro Miles certificates were not a valuable form of “currency” to be used to purchase merchandise from their retail mail-order catalog. [E.R. 94, 105, 106]. In fact, PMUSA has admitted that the Marlboro Miles were issued to consumers with each package of Marlboro cigarettes and were issued pursuant to a promotional and customer loyalty program.¹⁸ [E.R.933]. PMUSA admits that the Marlboro Miles program was a “phenomenal” success in obtaining market share and keeping consumers loyal to Marlboro. [E.R.94, 145-7]. PMUSA’s business records actually evidence that PMUSA referred to Marlboro Miles as “gift certificates” and “Marlboro Miles

¹⁸ Reynolds submitted to the District Court a sampling of consumer complaints regarding PMUSA’s refusal to accept the Old Miles. [E.R.117-120]. Like Reynolds, these consumers complain that they were never given notice of the expiration.

certificates.” [E.R.137-139].

In this case, therefore, Appellee Cortney Reynolds is a typical Marlboro smoker who collected and saved her Marlboro Miles for redemption. [E.R.247]. Like any reasonable consumer, she understood that Marlboro Miles were valuable for redemption.¹⁹ [E.R. 247]. She testified that she bought Marlboro, in part, to obtain the Miles currency. [E.R.154]. Ms. Reynolds was collecting enough Marlboro Miles to purchase something she really desired, when PMUSA announced that they would no longer accept her Miles.²⁰ [E.R.247]. Most of her Marlboro Miles were collected from her own cigarette purchases and some Miles were given to her from friends and family because they knew she was collecting.²¹ [E.R.247].

¹⁹ In fact, before PMUSA repudiated the certificates, Marlboro Miles were collected and sold over the Internet (e-bay). [E.R.122]. Indeed, as evidenced by the existence of a secondary market, PMUSA achieved its goal of making Marlboro Miles into “currency.” [E.R.94, 105].

²⁰ This Court should note that many of the catalog items required thousands of Marlboro Miles for redemption, which requires substantial expense and dedication to the collection of Marlboro Miles. (PMUSA’s Exhs. #3-9 [E.R.419-589].) Marlboro Miles were the only currency which could be used at the Marlboro retail store catalog. [E.R.94, 436]. Further, consumers used their Marlboro Miles to purchase several items (up to 10) in a single order in order to save on shipping and handling charges, which again encouraged consumers to save their Marlboro Miles currency for a large order instead of multiple small orders. [E.R.504].

²¹ Though PMUSA makes much of the fact that some of Reynolds’ Marlboro Miles certificates were given to her by others, PMUSA fails to inform this Court that this sharing of Marlboro Miles certificates was perfectly acceptable under the program, and there is not one piece of evidence indicating otherwise as the Miles were “currency” for the bearer. PMUSA’s admits that “two-thirds of adult smokers state that other adult

Although PMUSA attempts to rewrite the facts on appeal, the contemporaneous documents and prior sworn testimony of PMUSA officers establish that Marlboro Miles had a very real monetary value to the bearer when issued. Marlboro Miles had a benchmark redemption value of 300 Miles for \$10 towards a carton of Marlboro cigarettes, which meant that each Mile was worth \$0.033. [E.R.249, 688]. This benchmark is consistent with the testimony of Mr. Mahan that the Marlboro Miles were valued between two cents and four cents. [E.R.191]. The “cents per Mile” valuation is exactly how PMUSA measured the value of Marlboro Miles and the benefit to the consumer. (LeVan Depo at pp.92-93 [E.R.73-74].) PMUSA documents show that PMUSA consistently valued Marlboro Miles using this “cents per Mile” analysis. [E.R.122, 191; Suppl E.R.103]. PMUSA states that consumers perceived the “value of a Marlboro Mile” to be 12¢, and used that figure to assess cigarette pricing. [Suppl E.R.113; see also Suppl E.R.103]. PMUSA documents evidence that “[o]verall, the ‘Miles’ program is a valuable program to redeemer and non-redeemers” [Suppl E.R.103].

The plain truth is that PMUSA understood and their prior testimonial documents admit that there was a benefit to PMUSA and a “value added” in these Marlboro Miles as “currency” for consumers like Reynolds. This is no different than a certificate which could be used to purchase items from any other catalog, whereas the catalog may change, the currency remains valid

smokers help them save Miles.” [E.R.242]. In fact, PMUSA encouraged this sharing of Marlboro Miles and made offers which required smokers to “pool” their Miles to obtain a certain special offer. [E.R.60-61, 110, 238].

and redeemable.²²

SUMMARY OF THE DISTRICT COURT'S RULINGS

The District Court issued two rulings which are relevant to this appeal. The first ruling was the Order Denying Defendant's Motion to Dismiss on February 23, 2006 [E.R.18-27], and the second ruling was the Order Denying Defendant's Motions for Summary Judgment and for Partial Summary Judgment on June 5, 2007 [E.R.5-17], which was the order certified for interlocutory appeal. [E.R.1]. The Order Denying the Motion to Dismiss [E.R.18-27] is relevant to this appeal because the Order Denying Summary Judgment relied on the legal ruling from the earlier Order to deny summary judgment. [E.R.14]. Reynolds therefore addresses both rulings.

PMUSA moved to dismiss this case, arguing that Civil Code §1749.5 could not be applied to consumer awards or loyalty programs like the Marlboro Miles incentives. The District Court's Order of February 23, 2006 denying the motion to dismiss correctly summarized the Marlboro Miles program at issue:

The Marlboro Miles program allows a customer to collect

²² PMUSA attempts to confuse the continuing validity of Marlboro Miles as a form of "currency" with the limited duration of each catalog. The Marlboro Miles issued during 1998 through 2003 were the currency for each successive annual catalog, and the same is true for the 2004 through 2006 period. Like any other mail-order company, seasonal or annual catalogs and inventories come and go, however, the Marlboro Miles are bearer certificates of "currency" with value which must be accepted by PMUSA as "valid until redeemed or replaced." PMUSA admits that the catalog was a retail business making PMUSA "one of the largest mail-order firms in the country... ..rank[ing] in size somewhere between L.L.Bean and Land's End." [E.R.95].

“Marlboro Miles” incentives, which are printed directly on the package of each cigarette. The Marlboro Miles incentives do not have any other wording or terms printed on the cigarette package, including any applicable expiration date. The program works by allowing customers to exchange the collected Marlboro Miles for merchandise from the Defendant. **The program is an incentive program because “more valuable gifts could be acquired for more certificates.”**

(Order of February 23, 2006 at pp.1-2 [E.R.18-19].)

The District Court first looked to the plain language of the statute, and noted that the 1997 version of the law “explicitly provides an exception for ‘gift certificates that are distributed to a consumer pursuant to an awards, loyalty, or promotional program.’” [E.R.21]. As a result of this amendment, the District Court correctly held that Civil Code §1749.5 “include[s] certificates awarded pursuant to an awards, loyalty or promotional program **without any money or other thing in value being given in exchange for the gift certificate by the consumers.**” [E.R.22].

After performing this exhaustive analysis of the statute and the legislative history, the District Court concluded that under the plain language of the amended statute, **the definition of gift certificates within the meaning of the current version of §1749.5 “include[s] certificates awarded pursuant to an awards, loyalty or promotional program without any money or other thing of value being given in exchange for the gift certificate by the consumer.”** [E.R.22]. The District Court found that Marlboro Miles incentives were (i) awarded pursuant to an awards, loyalty or promotional program, and (ii) given without any money or other thing of value being given in exchange. [E.R.22].

The District Court rejected PMUSA’s narrow construction that the statute should only apply to “certificates that are purchased by a consumer and given as gifts.” [E.R.23]. First, the District Court reasoned that the

current version of the law expressly applied to certificates “distributed by the issuer to a consumer pursuant to... a promotional program *without any money or other thing.*” (Emphasis in original [E.R.23].) Accordingly, the court concluded that this “language suggests that gift certificates are not always purchased from a retailer and instead can have no value attached to them, in direct contravention to Defendant’s limited construction.” [E.R.23]. Second, the District Court noted that the legislative history cited by PMUSA related to the initial enactment which expressly excluded such certificates, however, this exclusion was changed by the 1997 amendment. [E.R.23]. Third, the District Court distinguished the decisions in Freeman and Waul, finding that these cases actually weaken PMUSA’s argument. [E.R.24]. Finally, the District Court analyzed certain statutes from other states, noting that “Washington gives a very broad definition of gift certificates,” and held “since the other state statutes support varying constructions of ‘gift certificate,’ this Court finds those statutes, singly or in combination, do not suggest there are adjudicative facts that are beyond reasonable controversy.” [E.R.25].

As a result of the analysis of the District Court’s construction of the statute and the facts alleged, the District Court ruled as follows:

In applying this definition to the facts of this case, this Court finds that Defendant’s Marlboro Miles incentive fall under the purview of Cal. Civ. Code §1749.5.

(Order at p.5 [E.R.22]).

Accordingly, the Court held that because PMUSA failed to include any expiration on the Marlboro Mile certificates at the time of distribution, PMUSA’s attempt to later unilaterally impose an expiration date violates

Civil Code §1749.5. [E.R.22-26].

Following discovery, PMUSA moved for summary judgment, arguing that Civil Code §1749.5 does not apply to the Marlboro Miles incentives which were distributed pursuant to an awards, loyalty and promotional program under the facts of this case. Again, the District Court rejected PMUSA's argument:

This Court, in its motion to dismiss Order, looked at the plain language of the statute, as well as the accompanying legislative history and the available case law in determining that the "Marlboro Miles incentive program fall under the purview of Cal. Civ. Code §1749.5."

(Order of June 5, 2007 at p.11 [E.R.11].)

In rejecting PMUSA's argument, the District Court found that it had "already thoroughly considered the majority of Defendant's arguments presented in the instant motion for summary judgment, and thus rejects any suggestion by Defendant that it reconsider its order now." [E.R.10]. In fact, the District Court admonished PMUSA that in "contrast to Defendant's contentions, the arguments provided by Defendant almost precisely mirror the arguments presented in its motion to dismiss." [E.R.11].²³ As a result, the District Court concluded that PMUSA did not demonstrate that the "Court committed clear error" in the prior legal ruling, and therefore rejected

²³ PMUSA concedes that the legal arguments in both motions were nearly identical, except for the argument in the summary judgment motion that the Marlboro Miles were not "sold." This argument, however, was also addressed in the Order of February 23, 2006 when the District Court held that the statutory language "suggests that gift certificates are not always **purchased from a retailer** and instead can have no value attached to them, in direct contravention to Defendant's limited construction." [E.R.23].

summary judgment with respect to the UCL and CLRA claims. [E.R.11-12].²⁴

In the motion for summary judgment, PMUSA also argued that the “Court should deny Plaintiff’s claim for restitutionary relief” because Plaintiff paid nothing for her Marlboro Miles. [E.R.16]. Reynolds argued that restitutionary relief includes the loss by plaintiff, and resulting gain by the defendant, of a plaintiff’s interest in money or property. The District Court correctly held that “California case law provides restitutionary damages under the UCL not only for money or property that was once in the plaintiff’s possession, but also for property in which a plaintiff has a vested interest.” [E.R.16]. Plaintiff presented evidence of the value of Marlboro Miles being “quantifiable as between 2 cents and 4 cents per Mile” based upon the testimony of PMUSA’s executives. [E.R.17]. The evidence discovered in PMUSA’s contemporaneous documentation shows that consumers valued the Marlboro Miles between “14¢ and 24¢” per pack (five miles). [Suppl E.R.103, 113]

Accordingly, the District Court concluded that a “review of the record before this Court appears to support the presence of disputed issues of material facts... Plaintiff may be entitled to any value that Defendant may have gained from the alleged unfair competition act.” [E.R.17].

Finally, the District Court denied summary judgment of the claim for breach of the Implied Covenant of Good Faith and Fair Dealing. [E.R.12].

²⁴ Notably, because the District Court found actionable claims under the UCL and CLRA based upon Civil Code §1749.5, the District Court did not address Reynolds’ other arguments concerning why PMUSA violated the UCL for reasons independent of Civil Code §1749.5. [E.R.16].

The Court found “a genuine issue of material fact regarding whether there existed a unilateral contract between the parties.” [E.R.12]. Based upon the evidence submitted by Reynolds, the District Court held that “Plaintiff disputes Defendant’s contentions that she was not familiar with the terms and conditions of Defendant’s Marlboro Miles promotions” and “disputes Defendant’s contentions regarding the lack of clear and definite terms of the incentive program.” [E.R.12]. Accordingly, the District Court ruled that “a genuine issue of material fact is present... precluding dismissal here on summary judgment.” [E.R.12].

Reynolds respectfully submits that the District Court’s decisions were thoroughly analyzed and well-reasoned, and should therefore be affirmed on appeal.

STANDARD OF REVIEW

Although the decision to grant or deny summary judgment is reviewed *de novo*, this Court reviews “any determination underlying the court’s decision by the standard that applies to that determination,” United States v. Alisal Water Corp., 431 F.3d 643, 654 (9th Cir. 2005). Therefore, the standard for review to be applied for the District Court’s findings of fact is “clear error” and the District Court’s construction of the law is reviewed *de novo*. See e.g. Drollinger v. State of Arizona, 962 F.2d 956, 958 (9th Cir. 1992); Metropolitan Life Ins. Co. v. Parker, 436 F.3d 1109, 1113 (9th Cir. 2006). This Court is to determine, when “viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied substantive law.” United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003).

ARGUMENT

I. The District Court Correctly Ruled That Marlboro Miles Incentives Distributed by PMUSA Fall Within the Purview of California Civil Code §1749.5

California Civil Code §1749.5 codified the consumer protection policy that “a gift certificate sold without an expiration date is valid until redeemed or replaced.” Civil Code §1749.5(c). This law establishes a general prohibition against expiration dates, and an absolute prohibition against undisclosed expiration dates. The purpose of the original enactment of the statute in 1996 was “to require retailers to honor gift certificates after the gift certificates have expired.” [E.R.1128]. “The supporters argue that gift certificates ought to retain all the characteristics of cash itself and remain valid in perpetuity...” [E.R.1124].

The original enactment of the statute in 1996, however, excluded programs like PMUSA’s Marlboro Miles as follows: “(c) This section shall not apply to gift certificates that are distributed to a consumer for promotional purposes without any money or other thing of value being given in exchange for the gift certificate by the consumer.” [E.R.22].

This language of the statute, however, was amended in 1997, when the Legislature repealed this provision and amended the statute.²⁵ [E.R.22]. The 1997 amendment specifies that these types of certificates would be exempt from the prohibition, but only if they meet certain

²⁵ The Legislative Counsel’s Digest for Assembly Bill No. 1054 provides “It would also revise the existing exemption to make it applicable to specified gift certificates **distributed** by the issuer after January 1, 1998, to a consumer pursuant to an awards, loyalty or promotional program”. [E.R.1083].

requirements:

(d) This section does not apply to any of the following gift certificates issued on or after January 1, 1998, **provided the expiration date appears in capital letters in at least 10-point font on the front of the gift certificate:**

(1) Gift certificates that are distributed by the issuer to a consumer **pursuant to an awards, loyalty, or promotional** program without any money or other thing of value being given in exchange for the gift certificate by the consumer.

Cal. Civil Code §1749.5(d)(1).

The Marlboro Miles certificates issued by PMUSA do not meet the exemption requirements of subsection (d) because there was no statement of the expiration on the certificate or cigarette package. [E.R.2]. In fact, PMUSA failed to disclose anywhere any indication of an expiration at the time of issuance or distribution to consumers. As a result, PMUSA's subsequent attempt years later to unilaterally rescind all previously issued Marlboro Miles certificates violates Cal. Civil Code §1749.5.

Reynolds alleges that PMUSA has a promotional awards program entitled "Marlboro Miles" through which customers purchase packs of Marlboro cigarettes and receive a paper Marlboro Miles "certificate" affixed to the package without an expiration date. [E.R.178-9, 233]. The paper "Miles" certificate is provided to the customer as part of the PMUSA's promotional, awards and loyalty program with their purchase which entitle loyal consumers to redeem the Marlboro Miles certificates for gifts, like clothing, jackets, or even outdoor equipment. [E.R. 19, 50-54, 105, 178-9, 233]. In reliance on this program, Reynolds accumulated years of Marlboro Miles certificates, loyally purchasing Marlboro cigarette packages with the certificates affixed to the package without an expiration or limitation stated. [E.R.247].

In this appeal, PMUSA argues that each cause of action fails to allege a legally sufficient claim because PMUSA's awards, loyalty, or promotional program is not subject to Civil Code §1749.5 as a matter of law. This argument fails for multiple reasons.

PMUSA's appeal argues that Reynolds' entire case hinges on the application of Civil Code §1749.5, and because §1749.5 does not apply to the Marlboro Miles certificates, the Order denying summary judgment must be reversed. **In support of this argument, PMUSA erroneously cites to the 1996 version of the law, and fails to discuss the 1997 amendment which expressly clarified that section 1749.5 governed certificates “distributed by the issuer to a consumer pursuant to an awards, loyalty, or promotional program.”** See Civil Code §1749.5(d)(1). [E.R.22]. PMUSA's failure to discuss this crucial 1997 amendment, and instead rely on the repealed provisions, speaks volumes.

The legislative history for section 1749.5 is also no aid to PMUSA because the history cited by PMUSA relates to the 1996 enactment, which expressly **exempted** certificates issued through an awards, loyalty or promotional program. As explained by the District Court, “A.B. 1054 ‘revise[d] the existing exemption to make it applicable to specified gift certificates distributed by the issuer... to a consumer pursuant to an awards, loyalty or promotional program, as specified.’ 1997 Cal. Legis. Serv. ch.472 (West 1997).” [E.R.22]. Thus, the current version of the statute expressly applies to the category of certificates once excluded under the legislative history cited by PMUSA.

Moreover, PMUSA cannot, as a matter of law, use legislative history to contradict the clear language of the law. PMUSA's narrow construction

of the term “certificate” to expressly exclude, without reference, any customer awards or loyalty program is most certainly unsupported by the language of subsection (d)(1) of §1749.5.

Where as here express exemptions are specified in a statute, the Court may not under the maxim of statutory construction, *expressio unius est exclusio alterius*, imply additional exemptions. Sierra Club v. State Bd. of Forestry, 7 Cal. 4th 1215, 1230 (1994). To exclude Marlboro Miles from the scope of Civil Code §1749.5, all PMUSA would need to do is disclose the expiration at the time of distribution. PMUSA failed to disclose the true facts regarding expiration because to do so would not create the Marlboro Miles “currency” that provided “added value” to the cigarette purchase. Instead, PMUSA secretly harbored the undisclosed intent to expire the Marlboro Miles while distributing the Marlboro Miles without limitation as to time.

PMUSA argues that the “ Marlboro Miles” are not subject to the scope of Civil Code §1749.5, however PMUSA does not have any actual authority for this argument.²⁶ In fact, as noted by the District Court, the

²⁶ PMUSA cites two cases in support of the argument that the term “gift certificate” should be narrowly construed to include only certificates purchased by a consumer from a retailer. PMUSA discusses these cases, and yet fails to address the fact that the District Court already soundly distinguished these cases on page 7 of the February 23, 2006 Order. [E.R.24]. Freeman v. Wal-Mart Stores Inc., 111 Cal. App. 4th 660 (2003) and the unpublished opinion in Waul v. Circuit City Stores Inc., 2004 WL 1535825 (Cal.Ct. App. July 9, 2004) are inapposite because both dealt with whether a gift card should have an expiration date. These decisions do not address the claim in this case that Marlboro Miles are award certificates that fall under the exception to Civil Code §1749.5, and therefore can only impose an expiration date if an expiration date is printed on the certificate at

express language in Cal. Civil Code §1749.5(d)(1) supports Reynolds' position that the Marlboro Miles program is an "awards, loyalty or promotional program."

This definition clearly applies to PMUSA's Marlboro Miles program. The Legislature provided regulations which address the precise situation here and PMUSA should not be allowed to bypass the law by arguing that the "Marlboro Miles" distributed as "currency" for use in their retail catalogs are "Proofs of Purchase" and not "Certificates." This is form over substance and such semantics does not except PMUSA from the law. For example, if PMUSA's "Marlboro Miles" program is excepted, then so too would be earned credit card miles or rewards. In the future, credit card companies could simply wipe away earned Credit Card Miles without disclosing the expiration in advance, and miles credits which consumers accumulated by loyally using that credit card in lieu of a competitor's card.²⁷

Because the express language of the statute evidences that the Marlboro Miles program is subject to Civil Code §1749.5, there is no need to resort to legislative history:

The plain language of the statute establishes what was intended by the Legislature." (*People v. Statum* (2002) 28 Cal.4th 682, 690 [122 Cal. Rptr. 2d 572, 50 P.3d 355].) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to [extrinsic] indicia of the intent of the Legislature"

Jarrow Formulas v. LaMarche, 31 Cal. 4th 728, 735 (2003).

Thus, PMUSA's reliance upon legislative history regarding the original

the time of issuance.

²⁷ In fact, PMUSA argues this point with earned frequent flyer miles. (AOB at pp.41-42).

enactment, but not the 1997 amendment is not only inapposite, but is also misplaced here, where the statute contains express language as is the case here.²⁸

Moreover, PMUSA's narrow construction of Civil Code §1749.5 cannot be accepted and does not advance the obvious consumer protection purpose of the statute. PMUSA's argument for a narrow construction of the consumer protection statute, providing less protection to consumers, plainly contradicts the accepted consumer protection purpose of the law and principles of statutory construction. Jackson v. Grant, 890 F.2d 118, 120 (9th Cir. 1989); Lovejoy v. AT&T, 119 Cal. App. 4th 151, 159 (2004) ("Legislation designed to protect the public should be broadly construed to effectuate its purpose.").

PMUSA argues that the "Marlboro Miles" are not "gifts" to others, and therefore fall outside of the scope of the statute.²⁹ PMUSA also argues

²⁸ The Legislative Counsel opinion cited by PMUSA dealt with the 1996 version of the law, which was changed substantially in 1997. PMUSA's exclusive citation to the legislative history relating to the 1996 enactment is not relevant to construing the provisions which substantially amended the enactment and were added in 1997. In the 1996 enactment, PMUSA's Miles program was subject to an express exemption. **In 1997, however, the law was amended significantly, and Reynolds' claim is based upon the amendment which expressly requires disclosure of the expiration for awards, loyalty or promotional programs to be exempt and permitted to impose an expiration on the certificates they issued.** Reynolds' Request for Judicial Notice includes relevant portions of the Legislative History for the 1997 amendment of Civil Code §1749.5. [E.R.1066].

²⁹ This argument by PMUSA ignores the obvious fact that PMUSA was the entity giving the Marlboro Miles to consumers as part of their purchase to give "added value." [E.R.171].

that the “Miles” do not have a cash value, and therefore fall outside the scope of the statute. This construction, however, does violence to the actual language of the statute and would render Civil Code §1749.5(d)(1), a nullity. **All of the specific regulations in subsection (d) deal with certificates which are given to consumers for their own use and do not have cash value.** PMUSA’s construction of Civil Code §1749.5 which narrows the scope and renders the language of subsection (d) surplusage must be avoided. See, e.g., Williams v. Superior Court 5 Cal. 4th 337, 357 (1993) (“An interpretation that renders statutory language a nullity is obviously to be avoided”).

Finally, the “Proof of Purchase” exemption now argued by PMUSA, whereby certificates issued for merchandise redemption under an awards, loyalty or promotion program may avoid the requirements of Civil Code §1749.5 by labeling the certificates as “proof of purchases” is an exemption never contemplated by the Legislature. Here, where the legislature has specifically provided how and in what way certificates are exempted, courts may not create or imply other exemptions. Again, pursuant to “the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary” Sierra Club v. State Bd. of Forestry, 7 Cal. 4th 1215, 1230 (1994).

Here, there can no dispute that PMUSA’s Marlboro Miles award program never complied with the requirements for exemption under Civil Code §1749.5(d)(1). PMUSA’s Marlboro Miles future programs may be exempted from the general proscription against refusing to redeem certificates issued to consumers simply by PMUSA complying with Civil

Code §1749.5(d)(1).

There is no dispute that the Marlboro Miles did not comply with the minimum disclosure requirements of Civil Code §1749.5(d)(1) for an expiration. As such, the Marlboro Miles program at issue here does not qualify for an exemption and remains subject to the prohibition against expiring certificates already issued to consumers without an expiration date after the 1997 amendment. The District Court correctly ruled that under the facts and circumstances of this case, the Marlboro Miles program at issue here are within the purview of Civil Code §1749.5.

A. Marlboro Miles Were Distributed as “Gift Certificates” to Consumers and “Sold” as “Added Value” to the Cigarette Purchase

PMUSA admits that Marlboro Miles were distributed to consumers pursuant to an awards, loyalty or promotional program, but claims that Marlboro Miles are not “gift certificates” and are not “sold” in accordance with the dictionary meaning of these words, and are therefore not within the purview of Civil Code §1749.5. This argument is contrary to the “plain language of the statute.”

Civil Code §1749.5(d) lists several different kinds of “gift certificates,” which are statutorily defined as gift certificates in subsection (d) which are never “sold” within the meaning of the dictionary. In fact, subsection (d) expressly refers to certificates that are “distributed” “without any money or other thing of value being given.”

In considering this same argument, the District Court ruled as follows:

In applying this definition [Cal. Civil Code §1749.5(d)(1)] to

the facts of this case, this Court finds that Defendant's Marlboro Miles incentive fall under the purview of Cal. Civ. Code §1749.5. The Marlboro Miles incentive program is awarded "pursuant to an awards, loyalty or promotional program." *Id.* Moreover, Marlboro Miles are given to consumers "without any money or other thing of value being given [in] exchange" for the incentive certificates." *Id.* The 1997 amended definition, therefore, negates Defendant's argument that the "plain language of the statute" precludes the inclusion of Defendant's Marlboro Miles certificates in its definition. Accordingly, this Court finds that the plain language of the statute supports Plaintiff's claim that the Marlboro Miles incentives fall under the purview of California Civil Code §1749.5.

[E.R.22-23].

As PMUSA Vice-President Mahan testified, "[t]he Marlboro brand is more than just the cigarettes... **They know the Miles are part of the value equation.**" [E.R. 190]. PMUSA's position that the Marlboro Miles were part of the cigarette purchase was adopted by the U.S District Court for the Northern District of California, "**the fact that a substantial number of consumers deem these 'Miles' of some significance** insofar as they actually redeem them for merchandise." *Cigarettes for Less, supra*, 69 F.Supp. at 1189. PMUSA admits, "Miles add value to a pack of cigarettes. Marlboro smokers feel that the value of Marlboro cigarettes is significantly better "with Miles" than "without Miles." (Confidential Exhibit #29 at PM3007141470 [Suppl E.R. 111].)

Absent an expiration date on the gift certificate that comes within the purview of the exemption provided under Cal. Civil Code §1749.5(d), the sale of the merchandise with the gift certificate comes within the scope of

Cal. Civil Code §1749.5.

B. The Scope of Civil Code §1749.5 Is Not Limited to Certificates Given as a Gift, and in Any Event, The Marlboro Miles Certificates Were Certificates for Gifts From PMUSA to Loyal Consumers

PMUSA also argues that certificates which are not given as a gift are not covered by Civil Code §1749.5. Such an anti-consumer argument concerning a consumer protection statute is entitled to short shrift. This argument opens up an exception to Civil Code §1749.5 which is big enough to swallow the rules. Unscrupulous companies could distribute certificates as part of the sale of another product and then refuse to honor the certificates, arguing that the consumer did not receive the certificate as a “gift.”

“The Miles merchandise redemption programs were **designed to provide high quality awards** to loyal adult smokers...” [E.R. 178-179]. Thus, Marlboro Miles were intended by PMUSA as a reward, or a gift, for loyal purchasers of Marlboro cigarettes, which is intended to be controlled by Cal. Civil Code §1749.5.

C. The Scope of Civil Code §1749.5 Is Not Limited to Certificates With a Stated Dollar Amount, and in Any Event, PMUSA Admitted that the Marlboro Miles Certificates Were “Currency”

As ruled by the District Court, the PMUSA argument that the only certificates covered by Civil Code §1749.5 are those certificates with a state dollar amount is also untenable because the statutory “language suggests that gift certificates are not always purchased from a retailer and instead can have

no value attached to them, in direct contravention to Defendant's limited construction." [E.R. 23].

Here again, the distinction is inapplicable because PMUSA testified that the Marlboro Miles were "currency" and had value:

Q: On a per pack basis, what do you think the miles on a pack are worth?

A: ...they have a value of about **two cents**, two cents a mile **wholesale**. We would estimate about **four cents** a mile **retail**...

[E.R. 191].

In fact, PMUSA documents make clear that the Marlboro Miles were PMUSA's own form of currency:

CURRENCY = MARLBORO MILES

[E.R. 105].

We felt that Marlboro required its own **currency – and so we created one called Marlboro Miles**.

Simply stated we, in conjunction with our fulfillment house partners, have become a **significant mail-order player**.

[E.R. 106].

Internal PMUSA documents admit that consumers accept Marlboro Miles as currency: "**we are expanding our Rewards program behind Marlboro Miles to add new value behind what has become currency among Marlboro Miles smokers.**" [E.R. 233-234]. A reasonable consumer would not believe that currency would expire, especially when there is no disclosure of an expiration at the time of distribution.

PMUSA's argument really asserts that a gift certificate for a dollar (\$1) is subject to the statute, but a certificate for a smaller amount, for example two cents (2¢), would not be subject to the statute. This argument finds no support in the law. Indeed, the certificates with a small value that need to be collected over time to purchase merchandise are precisely the

type of certificate for a gift that needs the protection of the statute to prevent customers who loyally purchase a product to collect the certificates two cents at a time from being left with nothing by undisclosed expirations.

D. There Is No Evidence In The Record Supporting PMUSA's Arguments Concerning Other Programs, Which Programs Are All Distinguishable

PMUSA's Brief relies extensively on the fact that other programs not at issue in this case ('cereal box tops, credit card points and bottle caps') will be adversely affected by the District Court decision. **Such a sky is falling argument merely questions the wisdom of the legislation which has no place in this appeal.**

More importantly, however, the other programs touted by PMUSA are exempt from Civil Code §1749.5 for the simple reason that each program disclosed the expiration, and were therefore exempted by subsection (d). [See E.R. 817-852]. This Court need only look to the record at E.R. 852 to see how companies comply with the law by disclosing the expiration or time limitations at the time of distribution. **Every single example put forward by PMUSA disclosed the expiration exempting the program from the scope of Civil Code §1749.5.**

Moreover, these other programs are not at issue, nor was there any evidence as to how the programs were administered or presented to consumers. Neither this Court nor the District Court was presented with evidence that these companies failed to disclose the limitation as to time for the promotion. Nor was there admissible evidence showing that these programs were used like currency to purchase items.

The question before this Court, as identified by the District Court,

deals exclusively with the PMUSA Marlboro Miles certificates, when considering the facts and circumstances of the program as presented on summary judgment. The acts of other companies are simply irrelevant to the facts and law of this case.

E. PMUSA Misstates Reynolds' Testimony Through Selective Citations, and In Any Event, Reynolds' Testimony Does Not Affect the Purview of the Law

PMUSA again selectively cites to the record to argue that Reynolds' testimony somehow precludes the application of Civil Code §1749.5. Not only is PMUSA disingenuously incomplete in representing the record to this Court³⁰, but importantly, the District Court properly concluded that **“Plaintiff’s alleged viewpoints or knowledge would play no role in this Court’s determination of the applicability of §1749.5 on the “Marlboro Miles” incentives.”** [E.R. 15].

The application of Civil Code §1749.5 to the Marlboro Miles program should be based upon the facts of the program itself, as articulated by the District Court and established by the evidence in the record. That is, Marlboro Miles certificates were issued to consumers if they purchased Marlboro brand certificates at a rate of five (5) Miles per pack, and the Miles were collected continuously from year to year for use in a retail catalog as “currency,” where more valuable gifts could be acquired for more certificates without any limitation as to time or expiration when issued.

³⁰ The actual testimony of Reynolds appears in her deposition at 174:20-175:3 [E.R. 162-3].)

II. PMUSA’s Practices With Respect to the Marlboro Miles Incentives Distributed to Consumers Violated the UCL and Therefore Summary Judgment of the UCL Claim Was Properly Denied.³¹

“California’s Unfair Competition Law (“UCL”) prohibits any ‘unlawful, unfair or fraudulent business act or practice.’ Cal. Bus. & Prof. Code § 17200.” Williams v. Gerber Prod. Co., 523 F.3d 934, 938 (9th Cir. 2008). Reynolds’ UCL claim is primarily based upon the violation of Civil Code §1749.5, which fully supports the District Court’s Order denying summary judgment, however, Reynolds’ UCL claim is independently established without regard to this statute as well.

PMUSA’s Brief fails to address the fact that Civil Code §1749.5 itself was a codification of the lawsuit settlement in Ligori v. T.R. Stuard, San Diego County Case No. N62405. (PMUSA’s Request for Judicial Notice, Exhibit “C”, [E.R. 1119].) In the 1994 lawsuit, the plaintiffs contended that the use of undisclosed (or inadequately disclosed) expiration date deprived consumers of the benefit of the bargain and violated the UCL. The Legislature agreed, and enacted the Civil Code §1749.5 regulation in response to the lawsuit.

Reynolds has demonstrated that the Marlboro Miles program violated Civil Code §1749.5 by reason of PMUSA’s unilateral refusal to honor “Marlboro Miles” certificates distributed as part of the loyalty program which also *ipso facto* violates the UCL, the CLRA, and the Implied Covenant of Good Faith and Fair Dealing.

³¹ This Court need not reach these issues as they were not certified questions for this interlocutory appeal. Nevertheless, in the unlikely event this Court considers these issues, Reynolds responds herein.

Only if PMUSA's Marlboro Miles practice is authorized by Civil Code §1749.5 would PMUSA's conduct be subject to the "safe harbor" doctrine in Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163 (1999), and only then if PMUSA could show compliance with the law, which PMUSA admittedly cannot do.³²

On the other hand, if the Marlboro Miles are held to be covered by the scope of Civil Code §1749.5, Reynolds may maintain claims under the UCL, the CLRA and the Implied Covenant of Good Faith and Fair Dealing. These claims allege that the unilateral imposition of an undisclosed expiration date by PMUSA after the purchase is actionable under Civil Code §1749.5 as the predicate act.³³

³² Under the Cel-Tech safe harbor doctrine, Reynolds could enforce the requirements of Civil Code §1749.5, but could not attack a practice governed by the statute on grounds inconsistent with the statute.

³³ As discussed in the Legislative History, the enactment of the statute was predicated upon litigation regarding the legality of expiration dates. [E.R. 1119]. In this 1994 case, the plaintiffs contended that the imposition of an undisclosed expiration date was likely to deceive consumers. The Legislature agreed and enacted Civil Code §1749.5 in 1996. PMUSA's attempt to exclude their program by using the label "proof of purchase" instead of "certificate" would defeat the clear purpose of the enactment to stop such sharp practices. Contrary to the position of PMUSA, the contemporaneous Legislative history shows that the supporters of the 1997 amendment referred to the provision of subsection (d)(1) to refer to "'awards and loyalty' certificates" and "award certificates earned by customers in connection with customer loyalty and frequent purchase incentive programs." (See Reynolds' Request for Judicial Notice at Exhibit #3, [E.R. 1086].) This history of the 1997 amendment refutes PMUSA's argument that the statute applies only to certificates with a stated cash value. The reports by Republican Caucus and the Department of Finance both show that the Legislature clearly intended to only provide an exemption where

A. PMUSA's Practice Was "Unlawful"

Because Marlboro Miles fall within the purview of Civil Code §1749.5, and PMUSA failed to comply with the exemption set forth in subsection (d), PMUSA may not, consistent with Civil Code §1749.5 subsequently impose an expiration as to the Marlboro Miles certificates which were already distributed to consumers, like Reynolds. This is the basis of Reynolds' claim that PMUSA's unilateral imposition of an expiration date as to Marlboro Miles in 2004 and then again in 2006 violates Civil Code §1749.5, and is therefore "unlawful" under the UCL.

The "unlawful" prong under the UCL includes any "practice forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory or court-made." Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-9 (1994); Goldman v. Standard Ins. Co., 341 F.3d 1023, 1036 (9th Cir. 2003) ("§ 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable."); Aron v. U-Haul Co. of California, 143 Cal. App. 4th 796, 805 (2006).

The California Supreme Court has consistently held that the predicate duty behind the UCL is to prevent conduct which victimizes consumers and cheats honest competition. Kasky v. Nike, Inc., 27 Cal. 4th 939, 949 (2002); Cel-Tech Communications, *supra*, 20 Cal. 4th at 180; Committee on Children's Television v. General Foods Corp., 35 Cal. 3d 197, 209 (1983);

"the date disclaimer must appear on the front of the certificate." [E.R. 1090, 1097].

Herr v. Nestle U.S.A., Inc., 109 Cal. App. 4th 779, 790 (2003).³⁴

B. PMUSA’s Practice Was “Unfair”

The test of whether a business practice is unfair with regard to consumers “involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim [Citations.]” State Farm Fire & Casualty Company v. Superior Court, 45 Cal.App.4th 1093, 1103-1104 (1996) quoting Motors, Inc. v. Times Mirror Co., 120 Cal.App.3d 735, 740 (1980).

PMUSA’s business practice with regard to Marlboro Miles certificates is “unfair” for several reasons. First, the practice of imposing an undisclosed expiration as to the Marlboro Miles certificates, after issuance, violates the public policy of Civil Code §1749.5. Second, PMUSA’s practice with respect to the subsequent undisclosed expiration of Marlboro

³⁴ PMUSA speculates without foundation that a finding that PMUSA should honor Marlboro Miles issued to consumers would lead to a result that would adversely impact the programs of other companies not at issue in this case. The fact that other companies (such as cereal companies or candy companies) may or may not hypothetically comply with Civil Code §1749.5 does not excuse PMUSA from liability for PM’s wrongful conduct. **More importantly, in every example cited by PMUSA, the expiration was plainly disclosed at the time of issuance. [See E.R. 817-852].** Therefore, none of the third-party programs cited by PMUSA would fail to meet the exemption under Civil Code §1749.5, because the expiration was disclosed at the time of distribution. This fact alone distinguishes Marlboro Miles from the third-party promotions, which distinction is conveniently ignored by PMUSA.

Miles certificates, especially, in light of the significant numbers of Marlboro Miles which must be collected to redeem for items in the catalog, is immoral, unethical, oppressive and unscrupulous because PMUSA caused consumers to loyally purchase their Marlboro brand of cigarettes, collect the Marlboro Miles faithfully, but then deprived consumers of the benefit of the Marlboro Miles currency which they collected for redemption. Third, the utility of PMUSA's practice is outweighed by the harm to the consumer.

When asked why the Marlboro Miles were expired, PMUSA's designated employee testified that there was no reason other than PMUSA no longer wanted to reward consumers who had been collecting Marlboro Miles for a long time. (See Depo of LeVan at pp.77-80, [E.R. 66-69].) Indeed, the PMUSA marketing documents show that the expirations were imposed specifically to save inventory costs. [Suppl E.R.140-141]. PMUSA's Brief provides no justification for their practice and there simply is no justification for this practice, other than to take advantage of consumer loyalty. See e.g. Pastoria v. Nationwide Ins., 112 Cal. App. 4th 1490, 1498 (2003) (holding that a failure to disclose impending changes to a program was unfair).

C. PMUSA's Practice Was "Deceptive"

The practice of imposing an undisclosed expiration as to the Marlboro Miles certificates, after issuance and distribution to consumers, is "likely to deceive" reasonable consumers. See Williams, *supra*, 523 F.3d at 938. In fact, the evidence is undisputed that the practice actually deceived Plaintiff Reynolds in this case, [E.R.247], and would be likely to deceive a the average consumer. [E.R.249]. This conclusion is undeniable as PMUSA

never disclosed the expiration of the Marlboro Miles, so in light of this omission, the average consumer would have been deceived.³⁵

PMUSA's motion made no evidentiary showing or legal argument [See Suppl E.R. 54-83], as is its burden, to establish that this practice was not "likely to deceive." Williams, *supra*, 523 F.3d at 938; Committee, *supra*, 35 Cal. 3d at 211; Aron, *supra*, 143 Cal. App. 4th at 806. Certainly, the factual question of whether this conduct is "likely to deceive," and deprived consumers of their right to enjoy the full benefits of their Miles certificates as promised cannot be decided as a matter of law on summary judgment. The unfair and deceptive prongs of the UCL provide independent grounds to affirm the District Court decision.

III. The District Court Correctly Found That Reynolds Presented Evidence Establishing a Disputed Issues of Fact with Respect to the Availability of Restitutionary Relief

PMUSA also incorrectly argues that Reynolds is not entitled to any restitution under the UCL because according to PMUSA, the Marlboro Miles were worthless junk with no discernable value, and PMUSA did not receive any money from Reynolds because she bought cigarettes from retailers and did not make any payments directly to PMUSA. PMUSA is incorrect on all counts because Reynolds suffered an economic injury to a vested property interest and is therefore entitled to restitution of the funds that may have been acquired by PMUSA by means of their UCL violations.

³⁵ A practice which is violative of the deceptive prong "is necessarily unfair" under the UCL. Blakemore v. Superior Court, 129 Cal. App. 4th 36, 49 (2005).

Bus. & Prof. Code §17203.³⁶ To be liable for restitution, PMUSA need not have acquired all the funds or have acquired them directly from consumers, but only need acquire a cut of the ill-gotten gains. American Philatelic Soc. v. Claibourne, 3 Cal. 2d 689, 696-97(1935).

Defendants argument that the Marlboro Miles had no discernable value is directly contrary to the evidence in the record and the sworn testimony given by Philip Morris executives in the Cigarettes For Less that the Marlboro Miles were valuable and PMUSA's testimony that actually quantified the monetary value of the Marlboro Miles as between "2 cents" and "4 cents" per Mile. [E.R. 191]. As discussed above, having convinced the District Court in Cigarettes for Less to adopt this position, PMUSA is judicially estopped from now arguing that Marlboro Miles have no value or claiming that such value cannot be quantified.

The UCL authorizes the recovery of restitution and injunctive relief for **loss of or injury to "property."** See Hall v. Time, 158 Cal. App. 4th 847 (2008) (emphasis added); see also Bus. & Prof. Code §§ 17202, 17203 and 17204. The holding in Hall is confirmed by the decision in Cortez v. Purolator Air Filtration Products Co., 23 Cal. 4th 163, 178 (2000), wherein the Supreme Court permitted the recovery of unpaid back wages as restitution, not because the employees were out of pocket, but rather because the employer retained the property right which rightfully belonged to the

³⁶ Bus.& Prof. Code § 17203 as amended by Proposition 64, is fully consistent with the principle that the UCL allows restitution to consumers who suffer an economic injury to either a monetary or property interest in providing that UCL suits may be brought "by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition."

employee. Cortez, supra, 23 Cal. 4th at 178. Thus, injury to or loss of property is subject to a restitutionary order under the UCL, and therefore an out-of-pocket monetary loss is not all that can be restored.

Here, as in Cortez, restitution will be appropriate if Reynolds prevails on the merits because consumers have a property interest in the Marlboro Miles they collected. PMUSA obtained an ill gotten gain from Reynolds by failing to honor its obligation to redeem the issued certificates.³⁷

IV. The District Court Correctly Found That Reynolds Presented Evidence Establishing a Genuine Issue of Fact with Respect to the Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

PMUSA also moved for summary judgment as to the claim that PMUSA's Marlboro Miles practice breached the implied covenant of good faith and fair dealing. The District Court denied this motion and concluded that "a genuine issue of material fact is present that cannot be resolved by this Court." (Order at p.8 [E.R. 12].)³⁸

³⁷ PMUSA in fact admits that they retained this ill gotten gain by not having to purchase any inventory at 2 cents per Mile wholesale to cover the Marlboro Miles redemptions. [See e.g. Suppl E.R.140-141]. PMUSA fails to disclose that to cover PMUSA's liability for Marlboro Miles redemption, PMUSA purchases inventory which requires PMUSA to expend \$100 million annually for this inventory. The inventory was then used to cover PMUSA's liability for Marlboro Miles (See Depo of Oramas at p.21-22 [E.R. 90-91]; Confidential Exhibit #32 [Suppl E.R. 126]; Confidential Exhibit #34 [Suppl E.R. 141-142].

³⁸ Because the Court found "a genuine issue regarding the existence of a unilateral contract between the parties," the District Court did not address the several other arguments raised by Reynolds in support of this claim.

The District Court was presented with multiple grounds for finding the existence of a triable issue of fact as to implied covenant of good faith and fair dealing claim. First, as held by the District Court, there are facts that support the claim that the PMUSA's Marlboro Miles program was intended by PMUSA to be a unilateral contract offer. [E.R. 11]. Second, there are facts presented that Reynolds and others similarly situated looked at the Marlboro Miles program as a unilateral contract offer. [E.R. 247].

Third, the applicable law in California is that a promotional offer can form the basis of a unilateral contract "if it calls for the performance of a specific act." See Harris v. Times, Inc., 191 Cal. App. 3d 449, 455 (1987); Donovan v. RRL Corp., 26 Cal. 4th 261, 272 (2001); Restatement 2d of Contracts at §29.

Fourth, these Marlboro Miles contained no expiration or limitation as to time. To the contrary, following Pilimai v. Farmers Insurance Exchange Co., 39 Cal. 4th 133, 138 (2006), "all applicable laws and ordinances in existence when the agreement is made become a part thereof as fully as if incorporated by reference." As a result, the Marlboro Miles offer incorporates the terms of Civil Code §1749.5, and creates an obligation on the part of PMUSA to redeem the issued Marlboro Miles as "valid" "currency" without later imposing an undisclosed and illegal expiration as to the collected certificates. Fifth, PMUSA received valuable consideration in the form of the increased purchases of Marlboro brand cigarettes and increased market share. [See e.g. Suppl E.R. 106, 110, 134].

Sixth, having received the benefit of the bargain of Reynolds'

(Order at p.8-9 [E.R. 12-13].)

performance through the purchase of Marlboro cigarettes, PMUSA is estopped to deny the existence of a contractual obligation to accept the issued Marlboro Miles for redemption by the bearer. The doctrine of promissory estoppel in California follows section 90 of the Restatement of Contracts. Indeed, under principles of promissory estoppel, PMUSA, having induced action on the part of the Plaintiff in the collection of these Miles, there is now an enforceable contractual obligation. See C & K Engineering Contractors v. Amber Steel Company, 23 Cal. 3d 1, 6 (1978).

Finally, PMUSA in fact admits that the Marlboro Miles were issued without limitation as to time and that PMUSA received the benefit of Reynold's Marlboro purchases. This was important to PMUSA because Marlboro Miles were a valuable incentive offer issued by PMUSA to insure loyalty to the Marlboro brand of cigarettes, and not some competitor's brand. [E.R.54, 171].

For these reasons, Reynolds' respectfully submits that PMUSA's motion for partial summary judgment as to the claim for breach of the implied covenant of good faith and fair dealing was properly denied.

V. The District Court Correctly Denied PMUSA's Motion for Summary Judgement With Respect to Reynolds' CLRA Claim

PMUSA incorrectly argues that Reynolds' CLRA claim is premised entirely on the application of Civil Code §1749.5. Plaintiff agrees that in large part, the adjudication of the CLRA claim follows this Court's ruling on the application of Civil Code §1749.5 to the Marlboro Miles certificates. Reynolds' CLRA claim, however, is also based upon deceptive conduct by PMUSA (Complaint at ¶42 [E.R. 1165]), which is an issue not addressed by

PMUSA's motion. [Suppl E.R.54-83]. Therefore, the motion as to the CLRA claim was properly denied because PMUSA did not sustain its burden.³⁹

The standards for determining whether conduct is misleading under the UCL apply equally to claims under the CLRA. Consumer Advocates v. Echostar Satellite Corp. 113 Cal.App. 4th 1351, 1360 (2003). Accordingly, conduct that is "likely to mislead a reasonable consumer" under the UCL also violates the CLRA. Nagel v. Twin Laboratories, Inc. 109 Cal.App.4th 39, 54 (2003). The conduct of issuing Marlboro Miles without an expiration date, while harboring the secret intent of intending to impose an expiration and refuse to honor the certificates, violates the CLRA (§1770(a)(5) and (16)). See Massachusetts Mutual Life Ins. Co. v. Superior Court, 97 Cal. App. 4th 1282 (2002).

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's Order of June 5, 2007.

Respectfully submitted,

Dated: June 24, 2008

BLUMENTHAL & NORDREHAUG

By: _____
Norman B. Blumenthal, Esq.
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³⁹ PMUSA's motion also failed to address this claim. As a result, PMUSA is not entitled to summary judgment of this claim.

Attorneys for Plaintiff / Appellee
Cortney Reynolds

STATEMENT OF RELATED CASES

Plaintiff-Appellee Cortney Reynolds is not aware of any relates cases that are currently pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief of Appellee is proportionally spaced, has a typeface of 14 points in Times New Roman font, and contains 13,795 words.

DATED this 24th day of June, 2008.

By: _____

Kyle R. Nordrehaug, Esq.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 24, 2008, copies of the foregoing BRIEF OF APPELLEE CORTNEY REYNOLDS were mailed via U.S. Postal Service, first class mail, to the following:

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The undersigned further certifies that on June 24, 2008, the original and four copies of the foregoing response to the motion were sent via Federal Express overnight delivery to the Clerk in San Francisco of the Ninth Circuit Court of Appeals.

DATED this 24th day of June, 2008.

By: _____

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