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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CORTNEY REYNOLDS,

Plaintiff - Appellee,

v.

PHILIP MORRIS USA, INC.,

Defendant - Appellant.

No. 08-55114

D.C. No. CV-05-01876-JAH

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted April 17, 2009
Pasadena, California

Before: SILVERMAN and CALLAHAN, Circuit Judges, and QUIST,** District
Judge.

Defendant Philip Morris filed this interlocutory appeal from the district
court's denial of its motion for summary judgment. We have jurisdiction under 28
U.S.C. § 1292(b), and we reverse and remand.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The Honorable Gordon J. Quist, U.S. District Judge for the Western
District of Michigan, sitting by designation.

The district court erred in concluding that California Civil Code § 1749.5 applies to Philip Morris’s “Marlboro Miles” promotional program. The little design on the cigarette pack that was to be cut out, saved, and eventually mailed in, is a *proof of purchase*, just like a cereal box top or an Ovaltine label. It is not a “gift certificate” as the term would ordinarily be understood. The ordinary meaning of “gift certificate” does not cover Marlboro Miles because Marlboro Miles are not typically given as gifts, are not certificates, and state no cash value. *See American Heritage Dictionary of the English Language* 742 (4th ed. 2000) (defining “gift certificate” as a “certificate, usually presented as a gift, that entitles the recipient to select merchandise of an indicated cash value at a commercial establishment”); *see also Synagogue v. United States*, 482 F.3d 1058, 1061-62 (9th Cir. 2007) (stating that when interpreting a statute, “we give undefined terms their ordinary meanings”). Moreover, the language of § 1749.5 confirms that covered gift certificates must have a “cash value” or “face value,” Cal. Civ. Code. §§ 1749.5(b)(1), (b)(2), (d)(2), which the symbol excised from the empty cigarette pack does not. Because these proofs of purchase are just that – proofs of purchase – and not gift certificates, Cal. Civ. Code. § 1749.5 does not apply.

Furthermore, subsection (d)(1) of the statute does not define what *is* a “gift certificate.” Cal. Civ. Code. § 1749.5(d)(1). That subsection merely identifies one

way a true gift certificate may be distributed, but it does not suggest that *any* item distributed in such a manner is in fact a gift certificate.

Finally, we express no opinion on whether Plaintiff has any other cause of action on account of the discontinuation of the Marlboro Miles promotion. We simply hold that Plaintiff has no claim under Cal. Civ. Code. § 1749.5.

REVERSED and REMANDED.