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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| ANNA ALEXIS, as Trustee, etc., et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>AIRBNB, INC.,<br><br>Defendant and Respondent. | B290917<br><br>(Los Angeles County Super. Ct. No. BC664611) |

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Affirmed.

Law Office of Robert A. Waller, Jr. and Robert A. Waller, Jr. for Plaintiffs and Appellants.

Boies Schiller Flexner, Albert Giang, Michael D. Roth and Noah Perez-Silverman for Defendant and Appellant.

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Plaintiffs, Anna Alexis, as trustee of the Amare Trust (Alexis), and B M Properties (collectively plaintiffs), own residential properties subject to rent stabilization ordinances (RSOs) in, respectively, Los Angeles and Santa Monica. Plaintiffs, both individually and as representatives of a putative class of property owners, sued Airbnb, Inc. (Airbnb) under California's Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.), alleging Airbnb engaged in unfair and unlawful conduct by competing with plaintiffs as "landlords" without complying with RSOs governing landlords' conduct. Specifically, plaintiffs contend Airbnb failed to register as a landlord with, and pay all necessary fees to, the appropriate municipality or regulating board in all jurisdictions governed by RSOs. Further, Airbnb failed to procure business licenses in categories that reflect its actual business model, and charged a fee for use of its online platform that is properly characterized as "rent" generated by plaintiffs' properties.

As a result of Airbnb's alleged conduct, plaintiffs assert they suffered two kinds of harm. The first, which was pleaded in their operative complaint but only minimally pursued in this appeal, is that Airbnb collected "rent" in the form of a fee charged to tenants who leased their properties. The fee represented 3 percent of the cost paid to plaintiffs' tenants by subtenants who leased the properties through Airbnb, and which ostensibly compensated Airbnb for the use of its online platform.

The second type of harm was an alleged loss in market share occasioned by Airbnb's intrusion into the rental market. Plaintiffs contend that, as a result of Airbnb's unfair competition, tenants in rent-controlled markets are electing to keep leases they would otherwise vacate in favor of subleasing their units at

above-market prices. With less turnover, landlords like plaintiffs—who are only able to raise rents to market rates when units are vacated—are losing income and suffering reduced property valuations.

The trial court sustained Airbnb's demurrer without leave to amend, holding plaintiffs' alleged harm was insufficient to establish "lost money or property" for purposes of standing under the UCL. We affirm on that ground, and for the additional reason that plaintiffs have not adequately alleged Airbnb's conduct was the cause of their harm. The harm, if any, that plaintiffs have suffered has been caused by their own failure to pursue contractual remedies against their tenants for subletting plaintiffs' properties. As plaintiffs have disclaimed pursuit of any theory of liability involving wrongdoing by their tenants, the complaint cannot be amended to cure this defect and the trial court did not abuse its discretion in denying leave to amend.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. RSOs

The cities of Los Angeles and Santa Monica[1] enacted RSOs, which govern the maximum allowable rent landlords may charge

[1] We note plaintiffs included substantial discussion of the RSOs for the city of West Hollywood in the record and on appeal. Yet neither plaintiff is alleged to own property in West Hollywood, nor is any particular property in that city identified in any of plaintiffs' pleadings. Accordingly, we will disregard all references on appeal to the West Hollywood RSOs.

their tenants.[2] RSOs are designed to protect tenants from, among other things, oppressive rent increases by landlords, while simultaneously ensuring landlords receive a fair and reasonable return.[3] To accomplish that goal, the RSOs generally restrict the landlord's ability to raise rents for existing tenants to a certain percentage each year. (Civ. Code, § 1954.53, subd. (a); LAMC, §§ 151.04, 151.06; SMRSO, §§ 1804-1805.)

## II. Airbnb's Business

While not specifically alleged, the parties agree Airbnb is a company that provides an internet platform and marketplace through which persons (guests) wanting to book accommodations

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[2] The RSOs for Los Angeles and Santa Monica are codified at, respectively, chapter XV, article 1 of the Los Angeles Municipal Code (LAMC), section 151.00 et seq.; and article XVIII of the Charter of the City of Santa Monica (SMRSO), section 1800 et seq.

[3] See, e.g., SMRSO section 1800 ["A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens. The purpose of this Article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return"]; see also LAMC section 151.01.

can search for and locate persons offering accommodations for booking (hosts).

Rental prices for properties listed on Airbnb are set by the hosts. Airbnb's website provides a search engine to allow a potential host to estimate the amount of money he or she might earn from residential rentals in the host's geographical area. Once a host signs up, he or she is given access to tools to assist with setting rental prices by providing information on travel trends and prices for similar rentals.

A host who uses the Airbnb service to rent out accommodations "never ha[s] to deal directly with money"—Airbnb charges guests before they arrive and electronically remits the rental money (minus a "3[ percent] host service fee" on each reservation[4]) to the host 24 hours after the guest checks in. Airbnb provides a search engine on its website that allows a host to estimate the amount that might be earned for hosting a property in a particular geographic area, accounting for variables such as season of the year, listing type, and guest capacity.

Airbnb also provides general information regarding regulations that may apply to a host's property, including taxes,

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[4] Plaintiffs repeatedly refer to the amount charged by Airbnb as "four" percent of the amount paid to rent properties. However, the image plaintiffs incorporated into their first amended complaint—a "screenshot" of a portion of one of Airbnb's web pages—indicates the "host service fee" retained by Airbnb is 3 percent. Since it is the fact a service fee is retained by Airbnb that is material to this appeal, and not the exact amount of that service fee, we will disregard plaintiffs' references to the percentage of the fee and assume the amount in the incorporated screenshot is correct. (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.)

permits or registrations, and rent control/stabilization. Airbnb provides more specific regulatory information for certain rental markets, including Santa Monica. In both cases, Airbnb puts the onus on the host to determine the applicability and effect of local regulations to the host's property. For example, Airbnb instructs the host to "[e]nsure you look up any local taxes or business license requirements that may apply," as well as "any [applicable] permitting, zoning, safety, and health regulations." Airbnb also advises the host who "live[s] in rent controlled or stabilized housing" to "[c]ontact your local [r]ent board to ask questions about this topic."

## III. Plaintiffs' Original and Amended Complaints

### A. *The Complaint and First Demurrer*

Alexis filed her original complaint in June 2017, alleging she owned residential property on Fuller Avenue in Los Angeles (Fuller property) that was subject to the Los Angeles RSO. Alexis brought the action as a representative of a putative class of owners of residential properties in Los Angeles, Santa Monica, and West Hollywood, as well as the County of Los Angeles and the State of California, in general, whose properties are subject to RSOs and whose properties were rented through Airbnb. Plaintiffs alleged the potential members of the class could exceed 110,000.

The action was based on Airbnb's "unlawful and/or unfair business practice" of "renting, sub-renting, leasing, and/or subleasing through its internet platform[,] 'www.airbnb.com[,]' residential properties which are subject to rent control and/or rent stabilization statutes, ordinances and/or regulations." Alexis asserted Airbnb engaged in unlawful conduct and unfairly

competed with Alexis and other members of the class by: (1) failing and refusing to register as a landlord with municipal agencies charged with enforcement of rent control laws and to pay the fees associated with registration, (2) failing to notify those persons renting from Airbnb that property being rented was subject to rent control, and (3) charging and collecting rent greater than the maximum amount allowed by the relevant rent control ordinances. Specifically, Alexis contended Airbnb allowed the Fuller property to be rented through its online platform without her consent or authorization, and never paid Alexis any of the rent received from the tenant who rented the property.

Alexis asserted claims for unlawful and unfair business practices under the UCL, conversion, and unjust enrichment, and sought disgorgement of the amounts collected by Airbnb as rent and fees, as well as injunctive relief and punitive damages.

Airbnb demurred to the complaint on the grounds that, among other deficiencies, Alexis lacked standing to pursue an unfair competition claim against Airbnb under the UCL and could not state a claim for conversion. Alexis elected to amend its complaint rather than to oppose the demurrer.

B. *The First Amended Complaint and Second Demurrer*

In November 2017, plaintiffs[5] filed their first amended complaint for violations of the UCL only, dropping Alexis's prior causes of action for conversion and unjust enrichment. Plaintiffs alleged that, in July 2016, Airbnb allowed a unit in Alexis's Fuller property to be rented without Alexis's consent, and

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[5] B M Properties was added as a plaintiff in the first amended complaint.

allowed the rental of a unit in property located at 1328 3/4 14th Street in Santa Monica (14th Street property) without B M Properties' consent. Neither Alexis nor B M Properties received any of the rent or the 3 percent fee paid by the tenants to whom Airbnb rented these units. Plaintiffs alleged Airbnb rented a "multitude" of other properties in Santa Monica which were subject to rent control laws, including two specifically-identified properties on Idaho Street and Ocean Avenue. The fact that both properties were registered with the Santa Monica Rent Control Board was subject to independent verification by Airbnb.

Plaintiffs alleged the " 'rent' and/or other monetary benefit in the form of [3] percent . . . of the amount paid" to Airbnb by guests who rented properties owned by plaintiffs and other class members "rightfully belong[ed] to [p]laintiffs and the [c]lass [m]embers by virtue of their ownership of the [rented] properties." Plaintiffs further alleged Airbnb refused or failed to register as a landlord with the applicable rent control boards, refused or failed to pay the requisite landlord registration fee, and refused or failed to obtain a business license to conduct business in the cities of Santa Monica, West Hollywood, and Beverly Hills. Plaintiffs alleged Airbnb had actual or constructive knowledge of the legal obligation to obtain a business license from "whatever city or municipality in which it operates and conducts business through its internet platform" because Airbnb obtained a business license in the city of Los Angeles as a " 'travel arrangement [and] reservation service.' " Specifically, Airbnb failed to obtain business licenses in Santa Monica, West Hollywood, and Beverly Hills under business categories "consistent with its admitted business model" such as

home sharing, real estate services, rental of residential services, and the like.

Plaintiffs alleged Airbnb's conduct violated the UCL's proscription against unfair and unlawful business practices, and Airbnb should be made to "disgorge and restore" to plaintiffs and the class members the 3 percent fee it charged hosts to use its internet platform.

Airbnb again demurred on the ground plaintiffs lacked standing under the UCL because they had not alleged—and could not amend to allege—they " 'lost money or property' " as a result of Airbnb's conduct. As to the alleged failure to register with local rent control boards, Airbnb asserted any registration fees would have been due to the municipalities, not to plaintiffs. With respect to Airbnb's collection of a service fee for use of its platform, Airbnb argued that plaintiffs had no right to the service fee because they "conce[ded] that they did not consent to listing of their properties on the Airbnb platform and therefore had no involvement with such transactions." Even if plaintiffs " 'lost money or property,' " Airbnb asserted the loss was not the " 'result of' " its alleged conduct.

Airbnb also argued plaintiffs failed to allege unfair or unlawful conduct by Airbnb, which was fatal to plaintiffs' sole cause of action. In particular, Airbnb argued it did not interfere with plaintiffs' landlord operations by preventing plaintiffs from renting their units and collecting the maximum allowable rent permitted under the RSOs, and engaged in no unlawful conduct as an "unregistered" landlord. Moreover, according to Airbnb, the allegation that Airbnb is a landlord for purposes of the RSOs is a legal conclusion that was subject to rejection on demurrer.

Plaintiffs opposed the demurrer, arguing they "lost money or property" sufficient to confer standing under the UCL because Airbnb exercised control over plaintiffs' properties and rented them to persons other than those plaintiffs authorized or permitted to occupy the properties, and received financial benefits from the use of plaintiffs' properties which rightfully belonged to plaintiffs. Specifically, plaintiffs asserted that Airbnb's alleged conduct caused plaintiffs to lose "a degree of market[ s]hare in the rental market," and to lose money generated by use of the properties in the form of the 3 percent fee received and retained by Airbnb.

The trial court rejected plaintiffs' market share theory, finding Airbnb did not affect plaintiffs' share of the landlord market. "[Plaintiffs] never lost a tenant to [a] competing landlord . . . on account of Airbnb. If anything, tenants' revenues from Airbnb increased the likelihood [plaintiffs] would get [their] rent payments on time and in full."

As to plaintiffs' allegation they lost money or property in the form of the 3 percent fee paid by guests to Airbnb, the trial court found plaintiffs failed to allege a legal entitlement to that fee in the first instance. "Landlords get their rent. If tenants do not harm the premises, rent is all landlords get. A landlord's right to monetary benefits from activities connected with the rental property does not exist."

While we disagree with the breadth of the trial court's reasoning, we affirm its ruling in full because plaintiffs failed to plead, and cannot amend to state, a viable theory of standing or causation.

## DISCUSSION

### I. Standard of Review

Plaintiffs challenge the judgment of dismissal following the order sustaining Airbnb's demurrer to plaintiffs' first amended complaint, without leave to amend. They incorrectly assert that, in reviewing a judgment of dismissal following an order sustaining a demurrer without leave to amend, this court examines the trial court's action de novo. Airbnb, in turn, properly states that this court applies two separate standards of review. (*Boyd v. Freeman* (2017) 18 Cal.App.5th 847, 853.) We first review the complaint de novo to determine whether the complaint alleges facts sufficient to state a cause of action under any legal theory to or determine whether the trial court erroneously sustained the demurrer as a matter of law. (*Harmony Gold U.S.A., Inc. v. County of Los Angeles* (2019) 31 Cal.App.5th 820, 830.) " 'We treat the demurrer as admitting all material facts which were properly pleaded. [Citation.] However, we will not assume the truth of contentions, deductions, or conclusions of fact or law [citation], and we may disregard any allegations that are contrary to the law or to a fact of which judicial notice may be taken. [Citation.]' " (*Boyd*, *supra*, at p. 853; accord, *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.) "We must affirm if the demurrer would be properly sustained on any theory, even if not articulated by the trial court." (*Harmony Gold U.S.A., Inc.*, *supra*, at p. 830.)

Second, we determine whether the trial court abused its discretion by sustaining the demurrer without leave to amend. (*Harmony Gold U.S.A., Inc. v. County of Los Angeles*, *supra*, 31 Cal.App.5th at p. 830.) Under both standards, the appellant has

the burden of demonstrating the trial court erred. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) "An abuse of discretion is established when 'there is a reasonable probability the plaintiff could cure the defect with an amendment.' " (*Ibid.*; accord, *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

## II. Plaintiffs Lack Standing Under the UCL

The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) "Its purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.' " (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320 (*Kwikset Corp.*); accord, *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) "In service of that purpose, the Legislature framed the UCL's substantive provisions in ' "broad, sweeping language" ' . . . ." (*Kwikset Corp.*, *supra*, at p. 320; accord, *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181.) "The UCL does not proscribe specific activities, but in relevant part broadly prohibits 'any unlawful, unfair or fraudulent business act or practice.' (§ 17200.) ' " 'Because . . . section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. . . .' " ' [Citations.]" (*Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1184.)

While the reach of the UCL is still expansive, Proposition 64 imposed a new standing requirement for plaintiffs seeking to invoke its use: "where once private suits could be brought by 'any

person acting for the interests of itself, its members or the general public' (former [Bus. & Prof. Code,] § 17204, as amended by Stats. 1993, ch. 926, § 2, p. 5198), now private standing is limited to any 'person who has suffered injury in fact and has lost money or property' as a result of unfair competition ([Bus. & Prof. Code,] § 17204, as amended by Prop. 64, as approved by voters, Gen. Elec. (Nov. 2, 2004) § 3; see *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227-228 . . . .) The intent of this change was to confine standing to those actually injured by a defendant's business practices and to curtail the prior practice of filing suits on behalf of ' "clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant . . . ." ' (*Californians for Disability*, [*supra*,] at p. 28, quoting Prop. 64, § 1, subd. (b)(3).) [¶] While the voters clearly intended to restrict UCL standing, they just as plainly preserved standing for those who *had* had business dealings with a defendant and had lost money or property as a result of the defendant's unfair business practices. (Prop. 64, § 1, subds. (b), (d); see [Bus. & Prof. Code,] § 17204.)" (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 788.)

"To satisfy the narrower standing requirements imposed by Proposition 64, a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice . . . that is the gravamen of the claim." (*Kwikset Corp.*, *supra*, 51 Cal.4th at p. 322.) " '[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and

degree of evidence required at the successive stages of the litigation. [Citations.] At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." ' [Citations.]" (*Kwikset Corp.*, *supra*, at p. 327.) At the demurrer stage, plaintiffs need only allege economic injury as a result of Airbnb's conduct.

Plaintiffs alleged only one type of loss in their first amended complaint: they lost money "in the form of [3 percent] . . . of the amount paid by those who rent [p]laintiffs' and [c]lass [m]embers' properties through [Airbnb's] internet platform—money which rightfully belongs to [p]laintiffs and the [c]lass [m]embers by virtue of their ownership of the properties being rented by [Airbnb] . . . ." In opposition to Airbnb's demurrer, plaintiffs argued for the first time they also lost a degree of market share in the rental market as a result of Airbnb's conduct. On appeal, plaintiffs abandon their service fee theory and assert only their lost market share theory.[6] Although

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[6] In their reply brief, plaintiffs attempt to resurrect the theory that they lost money or property in the form of "excess rents" Airbnb allegedly collected from guests. Plaintiffs originally proffered this theory in their complaint, where they contended Airbnb "charges and collects 'rent' from those who rent through and pay directly to [Airbnb] amounts in excess of the maximum rents allowable" under the RSOs. Plaintiffs asserted this "rent" constituted "unlawful and unfair monetary gains to which [Airbnb] would not otherwise receive or be entitled but for its unlawful/unfair business practice and unfair competition."

Following receipt of Airbnb's demurrer to their original complaint, plaintiffs voluntarily amended this allegation to read:

plaintiffs' first amended complaint did not allege this market share theory as grounds to establish injury in fact under the UCL, plaintiffs contend they can sufficiently amend their complaint to do so.

We find that neither alleged injury constitutes a loss or deprivation of money or property to plaintiffs sufficient to qualify as injury in fact under the UCL. (*Kwikset Corp.*, *supra*, 51 Cal.4th at p. 322.)

A. *Three Percent Fee*

Proposition 64 requires that a plaintiff have lost money or property sufficient to qualify as injury in fact to have standing to sue. (*Kwikset Corp.*, *supra*, 51 Cal.4th at p. 323.) "There are

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"The result of [Airbnb's] unlawful/unfair business practice and unfair competition as herein alleged is that [Airbnb] has realized and continues to realize substantial unlawful and unfair monetary gains *in the form of four percent (4%) of the amount paid to rent [p]laintiffs' and the [c]lass [m]embers' properties* to which [Airbnb] would not otherwise receive or be entitled but for its unlawful/unfair business practice and unfair competition." (Italics added.)

Plaintiffs assert they did not waive the rent-collected theory in their first amended complaint, citing to an unrelated paragraph that purports to identify common questions of law and fact for purposes of establishing the class of plaintiffs. That allegation, even if credited for the purpose offered, is insufficient to breathe life back into the "excess rent" theory since plaintiffs made no effort to make the "excess rent" argument in their opening brief. "[P]oints raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier . . . ." (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583.)

innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." (*Ibid*.) There is no requirement that a plaintiff's injury meet some minimum monetary threshold to state a claim under the UCL: "it suffices to . . . ' "allege[ ] some specific, 'identifiable trifle' of injury." ' [Citations.]" (*Id*. at p. 324; accord, *Danvers Motor Co., Inc. v. Ford Motor Co.* (3d Cir. 2005) 432 F.3d 286, 294.)

Plaintiffs argued to the trial court they were entitled to seek restitution of the 3 percent fee paid to Airbnb by guests for the rental of properties " 'in which [the plaintiffs] had a vested interest.' " In other words, plaintiffs asserted that, "[a]s owners of the properties Airbnb rents, [p]laintiffs have a recognizable legal interest in all financial benefits derived by Airbnb from unlawful and unfair use or occupation of [p]laintiffs' rental properties, including all monies paid to Airbnb by anyone for that use or occupation."

The trial court rejected plaintiffs' claim, noting, "[t]enants and others are entitled to make money from rentals so long as they comply with the lease and commit no waste. [Citation.] Landlords get their rent. If tenants do not harm the premises, rent is all landlords get. A landlord's right to monetary benefits from activities connected with the rental property does not exist."

"A leasehold estate gives the lessee the exclusive possession of the premises against all the world, *including the owner*, for the

term of the lease." (*Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183, 1190 (*Avalon Pacific*), italics added.) The lessee has a present possessory interest in the property, while the lessor has a future reversionary interest and fee title. (*Ibid*.) "Thus, the lessee has the right during the term of the lease to the full use and enjoyment of the leased property limited only by a restriction not to commit waste and by the terms of the lease." (*Id.* at pp. 1190-1191.)

We do not view the 3 percent fee as anything other than a fee paid by hosts (i.e., plaintiffs' tenants) to use the extensive online platform and services offered by Airbnb. Plaintiffs do not provide any authority supporting their claim to the 3 percent fee and do not argue that Airbnb's collection of the fee violates the applicable lease. Since plaintiffs have not demonstrated any right to the 3 percent fee, they suffered no loss of money or property under this theory within the meaning of the UCL. We now move to plaintiffs' "market share" theory.

B. *Market Share*

Plaintiffs assert that Airbnb, by acting as the "agents" of tenants who sublet plaintiffs' rental units, "has reduced the number of vacancies which occur in [plaintiffs'] units as their tenants are now electing to sublet their units rather than vacating the unit when their financial, personal and work circumstances change." In other words, plaintiffs' tenants are realizing it can be profitable to sublease their rent-controlled units, and are holding onto their leased properties even when these tenants no longer need to reside in them. This cycle allegedly "prevents [plaintiffs] from raising rents to the current

fair market value which they otherwise would have been entitled to do." As a result of this "decrease in vacancies," plaintiffs allegedly have suffered losses "not only in the form of lost income from higher rental rates allowed when vacancies occur, but also as a result in the diminution in the present and future value of [plaintiffs'] properties," values which are measured by the actual and potential income received from tenants of the rental properties. Plaintiffs argue this loss in "market share" constitutes lost money or property sufficient to qualify as injury in fact under the UCL. (*Kwikset Corp.*, *supra*, 51 Cal.4th at p. 323.)

Plaintiffs cite the Fourth District's decision in *Law Offices of Mathew Higbee v. Expungement Assistance Services* (2013) 214 Cal.App.4th 544 (*Higbee*) in support of their theory that a loss in market share confers standing under the UCL. In *Higbee*, attorney Higbee sued an online legal services provider for unfair competition based on the unauthorized practice of law. (*Id.* at p. 548.) Higbee asserted Expungement Assistance Services (EAS) undercut the competition, including Higbee, by using unlicensed persons to perform legal work, thereby saving on attorney fees, and by employing unbonded and unregistered legal document assistants, thereby saving on the costs of posting statutorily mandated bonds and paying registration fees. (*Ibid.*) More specifically, Higbee contended EAS maintained websites on which it informed prospective customers wishing to expunge their records about the legal remedies available to them, described the rights and privileges afforded by those remedies, told prospective customers what legal documents were necessary to achieve their goals, and represented that its lawyers would prepare or review a customer's court filings and offer legal advice. (*Id.* at p. 550.)

Higbee, who competed with EAS for the same customers, alleged EAS's actions usurped his own opportunities, resulting in lost revenue. (*Ibid*.)

The appellate court agreed. In reaching its conclusion, the reviewing court was persuaded by several decisions of the California and federal courts that upheld the original purpose of the UCL: "to protect against 'wrongful conduct in commercial enterprises which resulted in business loss to another, ordinarily by the use of unfair means in drawing away customers from a competitor.' " (*Higbee*, *supra*, 214 Cal.App.4th at p. 561; accord, *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838 [allegations by court reporters they were undercut by competing court reporters who provided discounted deposition transcripts to insurance companies as part of a "direct contracting" arrangement were sufficient to confer standing under UCL]; *Allergan, Inc. v. Athena Cosmetics, Inc.* (Fed. Cir. 2011) 640 F.3d 1377, 1382 [the plaintiff's lost sales, revenue, market share and asset value allegedly caused by the defendants' competing sale of eyelash growth serum without a prescription, federal or state approval, or proper labeling constituted injury in fact sufficient to confer UCL standing]; *VP Racing Fuels, Inc. v. General Petroleum Corp.* (E.D.Cal. 2009) 673 F.Supp.2d 1073, 1087 [the plaintiff's allegation that the defendant misrepresented the octane rating of racing fuel, enabling the defendant to price its 100 octane product below the true market value of bona fide, 100 octane fuel, alleged a loss of market share sufficient to demonstrate injury under UCL].)

The court in *Higbee*, relying on this line of business competition cases, held that the plaintiff, "having alleged that he had been forced to pay increased advertising costs and to reduce

his prices for services in order to compete, and that he had lost business and the value of his law practice had diminished, succeeded in alleging at least an identifiable trifle of injury as necessary for standing under the UCL." (*Higbee*, *supra*, 214 Cal.App.4th at p. 561.)

Plaintiffs urge us to fall in line with *Higbee* because "Airbnb's unlawful and unfair conduct in violating the law by failing to register and pay fees has caused a loss of market share and diminution in the present and future value of [plaintiffs'] properties and business." Airbnb concedes market share harm, "if it exists and is properly pleaded," can support standing under the UCL, but argue "*actual* market share harm—and a causal link between [Airbnb's] conduct and the alleged market share harm—must be alleged." Airbnb contends plaintiffs failed to satisfy this burden, "refus[ing] to confirm that, as a result of Airbnb's conduct, they *actually* lost a single tenant or lowered rent on a single unit."

While we disagree with Airbnb's characterization of plaintiffs' allegations (or lack thereof), we do agree with Airbnb's conclusion. Plaintiffs' argument on appeal is not that they lost tenants or were forced to lower rents, but rather that they lost opportunities to raise rents on rent-controlled units when tenants who might otherwise have vacated these units elected to keep their leases and sublet the units through Airbnb.[7] However,

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[7] This allegation appears nowhere in plaintiffs' operative pleading. Nonetheless, plaintiffs correctly note that, in determining whether their complaint states a claim on any theory, we may consider the sufficiency of allegations proposed for the first time on appeal. (Code Civ. Proc., § 472c; *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 226.)

plaintiffs make this allegation in only the most general manner. While plaintiffs presumably intended to keep the scope of their pleading broad in order to preserve the status of the proposed class, they failed to allege their own properties, i.e., Alexis's Fuller property or B M Properties' 14th Street property, suffered these lost opportunities. Despite multiple opportunities to do so as part of their voluntary amendment of their complaint, in opposition to Airbnb's demurrer, and on appeal, neither Alexis nor B M Properties can identify even a single tenant of the subject properties who "elect[ed] to sublet their units rather than vacating the unit when their financial, personal and work circumstances change[d]."

While plaintiffs need only " ' "allege[ ] some specific, 'identifiable trifle' of injury," ' " (*Kwikset Corp.*, *supra*, 51 Cal.4th at p. 324), the injury must be "identifiable." As the Supreme Court recognized in *Kwikset Corp.*, at page 322, the alleged injury must be " 'an invasion of a legally protected interest which is (a) concrete and particularized, [citations]; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " ' " Plaintiffs did not allege in either of their complaints below and do not contend on appeal that either the Fuller property or the 14th Street property was held "captive" by tenants who refused to vacate these properties in favor of subleasing them through Airbnb. Instead, plaintiffs allege only that these properties were sublet by Airbnb without plaintiffs' knowledge or permission, and that plaintiffs "never received nor realized" any of the rent or any portion of the 3 percent fee received by Airbnb. These allegations are too speculative to confer standing under a lost market share theory.

Even assuming plaintiffs could amend their pleading to show concrete, particularized, non-hypothetical harm, however, we find that plaintiffs' injury could not result from Airbnb's RSO-related conduct, a topic we address next.

C. *No Causation*

In order to satisfy the Proposition 64 standing requirements, a party must establish an economic injury and in addition "show that that economic injury was the result of, i.e., *caused by*, the unfair business practice . . . that is the gravamen of the claim." (*Kwikset Corp.*, *supra*, 51 Cal.4th at p. 322.) " 'The phrase "as a result of" in its plain and ordinary sense means "caused by" and requires a showing of causal connection or reliance on the alleged misrepresentation.' [Citations.]" (*Id.* at p. 326; *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1349 ["the phrase 'as a result of' connotes an element of *causation* (i.e., [the plaintiff] lost money *because of* [the defendant's] unfair competition)].)

Plaintiffs allege Airbnb engaged in three separate acts of unlawful conduct: (1) receiving the 3 percent of the rent paid by guests who lease plaintiffs' properties through Airbnb's internet platform; (2) refusing or failing to register as a landlord with, and pay the appropriate fees to, the municipal departments or regulatory boards vested with enforcement of the RSOs; and (3) failing to procure a license or tax certificate to conduct business in the cities of Santa Monica, West Hollywood, and Beverly Hills.[8] As a result of this conduct, plaintiffs claim they

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[8] Plaintiffs concede Airbnb applied for and obtained a business license from the City of Los Angeles as a "travel arrangement [and] reservation service." But plaintiffs complain

"have lost market share, income and suffered a diminution in the value of their properties." Also, plaintiffs "have been unable to raise the rents to current market value on properties which would have been vacated but for Airbnb's conduct in demanding, collecting, and receiving rent for the subletting" of plaintiffs' properties.

Airbnb contends there is no causal connection between the allegedly unlawful acts and plaintiffs' harm, and we agree. Instructive on the question of causation is the First District's opinion in *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1086, in which tenants of an apartment building asserted a UCL claim against their landlords, alleging the landlords committed an unfair business practice by selling or attempting to sell subdivided interests in the building without obtaining the " 'public report' " that must be provided to potential buyers pursuant to the Subdivided Lands Act (Bus. & Prof. Code, § 11000 et seq.). The landlords then utilized the Ellis Act (Gov. Code, § 7060 et seq.) to evict tenants and remove the buildings from the rental market. (*Daro*, *supra*, at p. 1086.)

The trial court concluded the tenants suffered injury in fact by virtue of the threatened loss of their leasehold interests and entered an injunction preventing the landlords from taking any action toward selling the buildings. (*Daro v. Superior Court*,

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that Airbnb failed to procure business licenses in the named cities in "business categories which are consistent with its admitted business model[,] including[,] but not limited to[,] 'Home-Sharing,' 'Internet Services,' 'Miscellaneous Services,' 'Real Estate Services,' 'Rental of Residential Units,' 'Rental, Leasing,' . . . 'Travel' " and the like. As our determination on standing does not depend upon the issue, we do not address it.

*supra*, 151 Cal.App.4th at pp. 1090-1091.) The appellate court reversed: "When a UCL action is based on an unlawful business practice, as here, a party may not premise its standing to sue upon injury caused by a defendant's lawful activity simply because the lawful activity has some connection to an unlawful practice that does not otherwise affect the party. In short, there must be a causal connection between the harm suffered and the unlawful business activity. That causal connection is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law." (*Id.* at p. 1099, fn. omitted.) In *Daro*, the court found causation to be lacking where the tenants would have been evicted "regardless of whether the [landlords] complied with or violated the Subdivided Lands Act. Indeed, even if the [landlords] fully complied with the trial court's injunction, the tenants would still face eviction." (*Id.* at p. 1099, fn. omitted.)

We are compelled to reach the same conclusion here. As Airbnb aptly notes, plaintiffs would be in "precisely the same position" even if Airbnb had refrained from charging a fee to use their platform, registered as a landlord and paid all required fees, and procured licenses in Santa Monica, West Hollywood, and Beverly Hills in "business categories . . . consistent with its admitted business model." In other words, even if Airbnb had done everything plaintiffs allege the company failed to do, plaintiffs' *tenants* would likely still sublet the Fuller property and the 14th Street property through Airbnb's online platform, and plaintiffs would still "lo[se] market share [and] income[,] and suffer[ ] a diminution in the value of their properties." Based on the allegations of the first amended complaint, the only reasonable inference is that plaintiffs' harm was caused by their

own failure to pursue contractual remedies against their tenants for subletting plaintiffs' properties without first obtaining the landlord's consent. Had plaintiffs evicted those tenants who sublet their apartments without plaintiffs' knowledge or permission, presumably plaintiffs would have had the right and the ability to raise rents to current market value.

In short, since Airbnb's conduct, even if unlawful, did not cause the harm plaintiffs complain of in this action, plaintiffs lack standing to pursue their UCL claim against Airbnb.

Plaintiffs urge us to find the trial court abused its discretion in denying them leave to amend. However, we note that plaintiffs' prevailing theory, i.e., the standing argument they propose to flesh out in an amended pleading, continues to be the market share theory. Plaintiffs identified no other theory by which Airbnb engaged in unfair competition, nor did they elucidate any other viable claim. For example, when asked at oral argument whether they might have a cause of action against Airbnb sounding in civil conspiracy or interference with their contractual relationships with their tenants, plaintiffs were unable to explain how these theories would be both apparent and consistent with theories previously pleaded in the original and first amended complaint. (See, e.g., *CAMSI IV v. Hunter Technology Corporation* (1991) 230 Cal.App.3d 1525, 1542 ["an abuse of discretion could be found, absent an effective request for leave to amend in specified ways, only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case"].) Indeed, at the demurrer hearing in the trial court, plaintiffs' counsel described the tenants as "nonfactor[s]." According to plaintiffs "the reason the tenant[s are] a nonfactor is because Airbnb directly engages in the rental

of real property that is subject to rent stabilization ordinances. There's no dispute Ms. [Al]exis's property is subject to the RSO in Los Angeles. There's no dispute . . . her property was rented by Airbnb. And so the tenant is a nonfactor in this situation because this is directly between Airbnb who rented Ms. Alexis's property in competition with her and without her authorization." Since plaintiffs disclaim any theory that implicates the conduct of their tenants (such as conspiracy or interference with contract), and since they have identified no other viable claim against Airbnb, we are compelled to find the trial court did not abuse its discretion in denying plaintiffs leave to amend. (*Harmony Gold U.S.A., Inc. v. County of Los Angeles*, *supra*, 31 Cal.App.5th at p. 830.)

**DISPOSITION**

The judgment of dismissal is affirmed. Airbnb shall recover its costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J. WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.