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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

GINA WOOD, Plaintiff and Appellant, v. LINK2GOV CORP., Defendant and Respondent.	B271920 (Los Angeles County Super. Ct. No. BC594787)

APPEAL from judgment of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Affirmed.

Franceschi Law Corporation, Ernest J. Franceschi, Jr., for Plaintiff and Appellant.

Markun Zusman Freniere & Compton, Edward S. Zusman and Kevin K. Eng, for Defendant and Respondent.

Plaintiff and appellant Gina Wood appeals from a judgment dismissing her first amended complaint following an order sustaining a demurrer without leave to amend. The trial court ruled that Wood's complaint did not state a cause of action under Civil Code section 1748.1,[1] and Business and Professions Code section 17200 et seq. (Unfair Competition Law, "UCL"). On appeal, Wood contends (1) the court erred in sustaining the demurrer as to her first cause of action under section 1748.1, and (2) the court should have granted her leave to amend to assert a new cause of action under the unfair practices prong of the UCL. We affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Wood filed a first amended complaint against defendant Link2Gov Corp. for violations of section 1748.1 and the UCL. Link2Gov is a business that processes a wide variety of credit card tax payments to governmental agencies, including property tax payments made to the County of Los Angeles. Wood sent Link2Gov a written demand for $1,467.21, equivalent to the amount Wood alleges Link2Gov unlawfully charged her for property tax credit card payments.

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[1] All statutory references are to the Civil Code unless otherwise indicated.

Link2Gov filed a demurrer to the first amended complaint. Link2Gov agreed that it charges customers a fee for using its service to pay their property taxes by credit card. However, section 1748.1 applies to credit card surcharges only in a "dual-pricing system" whereby cardholders elect to use a credit card "'*in lieu* of payment by cash, check, or similar means.'" Link2Gov does not employ a dual-price system because it does not accept payments by cash or check. "Like any other tax-payer, if Plaintiff does not think Link2Gov's service is worth the cost, she can write a check and mail it to the County directly, or pay by check or cash in person at the County tax collector's office." Link2Gov also argued that Wood's second cause of action under the UCL fails as a matter of law because it is derivative of a section 1748.1 violation, and its conduct is lawful under Government Code section 6159, which authorizes third-party servicers to process certain county transactions.

Wood filed an opposition to the demurrer, arguing that Government Code section 6159 did not apply to Link2Gov as a credit card transaction company, because it only covers electronic fund transfers. Although Wood brought her claim "under the 'unlawful' prong of the UCL, Plaintiff reserves the right to assert additional claims under the 'unfairness' prong if discovery reveals that Defendant has engaged in unfair and/or deceptive business practices . . . ."

In its reply, Link2Gov reiterated that the county is authorized under Government Code section 6159 to impose a

fee for the use of a credit card to pay for property taxes, which may include a fee for using a funds processor. Section 1748.1 does not apply to the alleged conduct, so Wood's second cause of action "must fail because it lacks a predicate violation of the law." Link2Gov further argued that Wood does not have the right to conduct discovery to substantiate purely hypothetical conduct, and she did not support her arguments with any authority.

On February 23, 2016, the trial court issued its ruling.[2] "[A]s a matter of law, the type of transaction alleged in the FAC does not violate section 1748.1." Section 1748.1 only prohibits "dual-price" systems. Link2Gov processes tax payments by credit card only, so the charges cannot be a "surcharge." Wood did not allege that "Link2Gov charges a higher fee for processing payments if the processing fee is paid on a credit card than with cash." If Wood wanted to pay for property taxes in cash, she could have without being charged for using Link2Gov's service. In enacting Government Code section 6159, the legislature explicitly approved public entities accepting tax payments by credit cards and imposing a fee for using a credit card. Using Link2Gov's business as a processor does not make that

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[2] This court ordered the parties to address whether the failure to provide a reporter's transcript or suitable substitute of the relevant proceedings warranted affirmance based on the inadequacy of the record. We proceed on the merits because both parties agree they did not argue over the demurrer at a hearing.

conduct unlawful. The court sustained the demurrer to the first cause of action without leave to amend.

The court also sustained the demurrer to Wood's second cause of action under the unlawful prong of the UCL without leave to amend because it was predicated upon a violation of section 1748.1. The court noted that Wood did not state she was able to amend her complaint to allege facts to establish a claim under the unfair prong of the UCL.

Wood filed a timely notice of appeal. She now appears to agree that section 6159 applies to Link2Gov's conduct as a service provider. She contends, however, that section 6159 requires compensation be paid by the county directly under a service contract rather than by means of a surcharge on credit card transactions. To Wood, this raises an inference that the fees are excessive and provide double compensation to Link2Gov. She also contends that she should be granted leave to amend because "over the course of many years," she paid thousands of dollars to Link2Gov, an amount she questions as being "reasonably related to the cost of processing the credit card transaction."

DISCUSSION

Standard of Review

We apply a de novo standard of review on appeal from an order sustaining a demurrer. "[W]e exercise our independent judgment about whether the complaint states a

cause of action as a matter of law. [Citation.] First, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439 (*Stearn*).) "We accept as true all properly pleaded material factual allegations of the complaint and other relevant matters that are properly the subject of judicial notice, and we liberally construe all factual allegations of the complaint with a view to substantial justice between the parties." (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913, 919 (*Glen Oaks*).) "Then we determine whether the complaint states facts sufficient to constitute a cause of action." (*Stearn, supra,* at p. 439.) "We do not, however, assume the truth of contentions, deductions, or conclusions of law. [Citation.]" (*Id.* at p. 440.)

"When the trial court sustains a demurrer without leave to amend, we review that decision for abuse of discretion. [Citation.] We will reverse for abuse of discretion if we determine that there is a reasonable possibility the plaintiff can cure the pleading by amendment." (*Glen Oaks*, *supra*, 203 Cal.App.4th at p. 919.) The plaintiff bears the burden of proving that an amendment would cure the defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "'"To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this

burden." [Citation.] The plaintiff must clearly and specifically state "the legal basis for amendment, i.e., the elements of the cause of action," as well as the "factual allegations that sufficiently state all required elements of that cause of action." [Citation.]' [Citation.]" (*Aghaji v. Bank of America, N.A.* (2016) 247 Cal.App.4th 1110, 1118–1119.)

Surcharge Statutes

Link2Gov's conduct does not violate section 1748.1 as a matter of law. In construing a statute, "[o]ur role is to give effect to the Legislature's intent and to give the statute the commonsense interpretation to which it is entitled, not to defeat the Legislature's intent by means of a strained interpretation that encourages mischief or absurdity." (*Thrifty Oil Co. v. Superior Court* (2001) 91 Cal.App.4th 1070, 1079 (*Thrifty Oil Co.*).) "'If the statutory language is unambiguous, "we presume the Legislature meant what it said, and the plain meaning of the statute governs." [Citation.]' [Citation.]" (*Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 351 (*Wolski*).)

Section 1748.1 provides that "(a) No retailer in any sales, service, or lease transaction with a consumer may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means. [¶] . . . [¶] (c) A consumer shall not be deemed to have elected to use a credit card in lieu of another means of payment for

purposes of this section in a transaction with a retailer if only credit cards are accepted by that retailer in payment for an order made by a consumer over a telephone, and only cash is accepted at a public store or other facility of the same retailer." Section 1748.1 was intended "to promote the effective operation of the free market by encouraging the availability of discounts by retailers who wish to offer a lower price for cash purchases, and to protect consumers from deceptive price increases by prohibiting credit card surcharges." (*Thrifty Oil Co.*, *supra*, 91 Cal.App.4th at p. 1078.) The statute was also intended "to prevent a retailer from adding an *undisclosed* surcharge to a credit card purchase." (*Id.* at pp. 1078–1079.)

The plain language of section 1748.1 demonstrates that the statute only applies to conduct involving a cardholder who chooses ("elects") to use a credit card instead of ("in lieu of") other available forms of payment, namely payment by cash, check, or similar means. (§ 1748.1, subd. (a).) This conduct does not occur when a retailer only accepts credit card payments for orders made by a consumer. (See § 1748.1, subd. (c).)

Liberally construing the factual allegations of the first amended complaint, it is undisputed that Link2Gov processes property tax credit card payments for the County of Los Angeles. Wood was charged a fee for using Link2Gov's service. Wood does not allege that Link2Gov's service offers customers an option to pay property taxes by cash, check, or other means. In electing to use Link2Gov's

services, Wood had no choice over what form of payment she could use. Thus, she could not have "elected" to use anything but a credit card. If Wood wished to utilize another form of payment, she would be required to go directly to the county tax collector, an entity entirely distinct from Link2Gov. Wood's first amended complaint fails to state a cause of action as a matter of law.[3]

Leave to Amend to Allege New Cause of Action

As we understand it, Wood's secondary contention on appeal is a challenge to the amount of fees she was charged even if the fees are not proscribed by other law.[4] Under the

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[3] The demurrer to Wood's second cause of action under the UCL was properly sustained because it is predicated upon her first cause of action. (See *Wolski*, *supra*, 127 Cal.App.4th at p. 357.) Wood does not argue otherwise on appeal.

[4] Link2Gov contends that the issue of whether its conduct is "unfair" under the UCL should not be considered because Wood did not allege facts that it could plead in an amended complaint to the trial court. The rule barring new theories on appeal does not apply to appellate review of a trial court's order sustaining a demurrer. (*Morris v. Redwood Empire Bancorp.* (2005) 128 Cal.App.4th 1305, 1316, fn. 4; accord, *Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1483 [plaintiff's showing as to how a complaint can be amended may be made for the first time on appeal].)

UCL, "a practice may be deemed unfair even if not specifically proscribed by some other law." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).) "Unlike 'unlawfulness,' 'unfairness' is an equitable concept that cannot be mechanistically determined under the relatively rigid legal rules applicable to the sustaining or overruling of a demurrer. . . . '[S]ince the complaint is unlikely to reveal defendant's justification—if that pleading states a prima facie case of harm, having its genesis in an apparently unfair business practice, the defendant should be made to present its side of the story.' . . . (*Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 740, fn. omitted; *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839; cf. *People v. McKale* [(1979)] 25 Cal.3d 626, 635 ["'What constitutes 'unfair competition' or 'unfair or fraudulent business practice' under any given set of circumstances is a question of fact.'"].)" (*Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1167 (*Schnall*).)

However, "the unfair competition law's scope is not unlimited. Courts may not simply impose their own notions as to what is fair or unfair. (*Cel–Tech, supra,* 20 Cal.4th at p. 182.) If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination and declare the conduct unfair. 'When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor.' (*Ibid.*) [T]he

Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair." (*People v. Persolve, LLC.* (2013) 218 Cal.App.4th 1267, 1273.) "'To forestall an action under the [UCL], another provision must actually "bar" the action or clearly permit the conduct.' (*Cel-Tech*, *supra*, 20 Cal.4th at pp. 182–183.)" (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 377.)

In this case, the trial court did not abuse its discretion in finding that the legislature expressly permitted the type of conduct complained of by Wood. Counties are permitted to authorize the acceptance of a credit card for the payment of a "fee, charge, or tax." (Gov. Code, § 6159, subd. (b)(6).) Counties are further permitted to impose a fee for the use of a credit card not to exceed the costs incurred by the agency in providing for payment. These costs may include, but are not limited to, the payment of reasonable fees to a funds processor. (*Id.*, § 6159, subd. (d)(3); see *Two Jinn, Inc. v. Government Payment Service, Inc.* (2015) 233 Cal.App.4th 1321, 1341 ["Counties that operate section 6159 cash bail payment systems are expressly authorized to execute contracts with third party [electronic funds transfer] processors, and to allow those service providers to charge a fee for the cost of the transaction"].) The legislature requires that the costs be approved by the governing body responsible for the county's fiscal decisions. (Gov. Code, § 6159, subd. (h)(1).)

Contrary to her position at trial, Wood agrees that section 6159 authorizes Link2Gov's conduct as a funds

processor. Legislative authorization of a charge or fee "insulates the reasonableness of such charges from judicial scrutiny." (*Schnall*, *supra*, 78 Cal.App.4th at p. 1160 [sustaining demurrer without leave to amend plaintiff's claim that fuel service charge was "exorbitant" and therefore unfair under the UCL, because"[c]ourts are no more empowered 'to engage in complex economic regulation under the guise of judicial decisionmaking' [citation] under the UCL"].) Wood's newly asserted inference that Link2Gov's fees are excessive or amount to double compensation[5] are equally foreclosed on demurrer as in *Schnall*. (*Id.* at p. 1160 ["where the allegedly unfair business practice has been authorized by the Legislature, no factual or equitable inquiry need be made, as the court can decide the matter entirely on the law"].)

[5] The fees Wood complains of are not arbitrarily imposed or calculated (Gov. Code, § 6159, subd. (h)(1)), and they contemplate the use of businesses such as Link2Gov. (*Id.*, § 6159, subd. (d)(3).)

DISPOSITION

The judgment is affirmed. Cost on appeal are awarded to Link2Gov.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAPHAEL, J., concurring
Wood v. Link2Gov Corp.
B271920

I concur in the well-reasoned ruling that plaintiff Gina Wood's first amended complaint fails to state a cause of action, and I join in affirming the judgment. I do not join the final section of the opinion discussing leave to amend to allege a new cause of action under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) (the UCL).

Wood wishes to challenge under the UCL the amount of defendant Link2Gov's credit card processing fee. On the record we have, I cannot go so far as to agree that "the legislature expressly permitted the type of conduct complained of by Wood." The legislature has required an agency to "obtain the approval of [its] governing body" before entering into a contract requiring the payment of a credit card fee. (Gov. Code, § 6159, subd. (c).) After obtaining approval, the agency may enter into a contract allowing payment of a "reasonable fee" to the credit card processor. (*Id.*, § 6159, subd. (d)(3)). I do not see our record as establishing that Link2Gov complied with a contract executed after governing body approval, or the reasonableness of the fee charged.

I also cannot agree with the opinion's broad statement that legislative authorization of a charge or fee, by itself,

insulates the reasonableness of such a fee from judicial scrutiny under the UCL. Rather, such a determination must be made based upon whether a particular statute offers some type of safe harbor for the fee-charger. (See *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1160–1163 [reasoning that "by authorizing avoidable fuel service charges" a statutory subdivision "insulates the reasonableness of such charges from judicial scrutiny;" that is, the subdivision provides "an affirmative reason to conclude that the amount of charges . . . are immune from judicial scrutiny under the UCL"].) Here, it may be that a funds processor has a safe harbor protecting itself from a UCL reasonableness claim if it is acting in compliance with an approved contract, but this is not merely because the legislature has authorized a fee.

Despite my reservations with this language in the leave-to-amend section of the opinion, I agree that, in this case, Wood has not made a sufficient showing that leave to amend is warranted. Wood's briefs on appeal do not even cite Government Code section 6159, much less attempt to explain what theory she would proceed upon under that section.

RAPHAEL, J.*

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