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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Appellant, v. MACKONE DEVELOPMENT, et al., Defendants and Respondents.	B268991 (Los Angeles County Super. Ct. No. BC563601)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Reversed.

Michael N. Feuer, City Attorney, Tina Hess, Assistant City Attorney, Jessica B. Brown, Deputy City Attorney, and Jeremy Berzon, Deputy City Attorney for Plaintiff and Appellant.

Isaacs Friedberg, Jeffery B. Isaacs, Paul G. Murtagh and Robert F. Gookin for Defendants and Respondents.

The City of Los Angeles filed a complaint against Mackone Development and its owner, Scott Yang, seeking civil penalties under California's unfair competition law (Bus. & Prof. Code, §§ 17200, 17206) and false advertising law (Bus. & Prof. Code, §§ 17500, 17536.) The City alleged Mackone had failed to comply with the prevailing wage law and overtime requirements in connection with a public works project, and then attempted to conceal its misconduct by submitting falsified payroll records to a government entity.

Defendants filed demurrers arguing that: (1) the City's claims were uncertain because they failed to identify which employees had been denied prevailing wage and overtime pay; (2) the complaint failed to allege any conduct that violated the false advertising law; and (3) Scott Yang could not be held personally liable for the misconduct of his company. The court sustained the demurrers without leave to amend.

We reverse the judgment, concluding that the City's pleadings state claims against Mackone and Yang for violation of the unfair competition law. We affirm the court's order sustaining the demurrers to the City's false advertising law claims.

FACTUAL BACKGROUND

A. First Amended Complaint

1. Summary of first amended complaint

a. Factual allegations

In November of 2014, the City of Los Angeles filed a complaint against Mackone Development, Scott Yang (the company's owner) and several entities that had worked with

Mackone on a public works project The first amended complaint (FAC) alleged the City had hired Mackone to serve as the general contractor on the construction of a $10 million public animal shelter. Before construction began, representatives from the City's Office of Contract Compliance (OCC), a local agency responsible for ensuring compliance with labor laws on public works projects, met with Mackone and Yang to review the requirements of California's prevailing wage law.[1] As a condition of being awarded the project, Yang, acting on behalf of Mackone, signed a "Pledge of Compliance" confirming the company and its subcontractors would comply with all applicable wage and hour laws. As a further condition, Mackone and its subcontractors agreed to submit certified payroll records to the OCC on a weekly basis. The records were to be signed under penalty of perjury, and list each employee's name, work classification, regular time hours, overtime hours and earnings.

The FAC further alleged that despite Mackone's representations to the City, the company failed to pay "one or more of its employees a prevailing wage," and also failed to "pay its employees lawful wages for [work performed] on Saturdays." The City also alleged Mackone excluded hours its employees had

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[1] The prevailing wage law is a "minimum wage law" (*Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 15 (*Azusa*)), that requires "workers employed on public works projects" to be paid "not less than the general prevailing wage of per diem wages for work of a similar character in the locality in which the public work is performed." (Lab. Code, § 1771.) The Director of Industrial Relations is responsible for determining the prevailing wage for each category of worker. (See Lab. Code, § 1773; *Azusa*, *supra*, 191 Cal.App.4th at p. 15.)

worked on Saturdays from the "certified payroll records it submitted to OCC, thus submitting false documents."

The FAC alleged several subcontractors Mackone had hired to work on the project also failed to comply with "state and local labor and employment laws," which included the "failure to pay a prevailing wage [and] failure to pay overtime." Subcontractor No Sung Pak (Pak) allegedly failed to pay the prevailing wage to any of his employees. Pak also denied overtime pay to his employees, who regularly worked 12-hour days on weekdays, and up to 10 hours on Saturdays. Pak attempted to "conceal that he was not paying prevailing wages [or] overtime" by submitting false "timesheets to OCC," paying his employees in cash and directing his employees to make false statements to City inspectors. A second subcontractor, Lectrfy, was also alleged to have violated prevailing wage and overtime requirements, and then attempted to conceal its misconduct by submitting false certified payroll records to OCC and directing employees to make false statements regarding overtime hours to inspectors.

The FAC also alleged Mackone knew Pak and Lectrfy were not complying with prevailing wage and overtime requirements. According to the complaint, Mackone and Yang were aware that the "subcontractors' [initial] bids [on the project] were far too low to reasonably cover the work required." After construction began, Mackone supervisors and managers monitored Pak and Lectrfy's "hours and work," and knew both subcontractors had made misrepresentations in the certified payroll records they submitted to the OCC. The FAC further alleged that Mackone employees had "witnessed the excessive hours worked by Pak's employees, and . . . [were] aware that Pak was not paying its workers overtime. Rather than reporting and resolve the obvious

violation[s], Mackone instructed Pak's employees to remain silent about the [overtime work]." Mackone supervisors also failed to remedy the "falsified hours on [Lectrfy's] payroll records."

The FAC included additional allegations regarding Yang's control over Mackone, asserting that he was "the owner, principal, chief executive officer, sole proprietor and secretary of [the company]." The FAC further alleged Yang had "unbridled control over all aspects of Mackone," and "exercised direct control over the [company's] daily operations, employees, and important business decisions." According to the FAC, Yang "personal[ly] participat[ed]" in Mackone's "deceptive practices and failure to pay one or more of its employees a prevailing wage throughout his/their employment on the Project." Yang also "personally participated in, and exercised control over, the work performed by [Mackone's subcontractors] in connection with the . . . the Project."

b. Summary of the City's individual causes of action

The FAC alleged four causes of action against Mackone and Yang. The first cause of action alleged Mackone and Yang had violated Business and Professions Code section 17200, commonly referred to as the "unfair competition law" (the UCL) (see *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 169, fn. 2 (*Cel-Tech*)), by failing to comply with numerous wage and hour laws, including the prevailing wage law (Lab. Code, § 1771[2]), overtime compensation (§§ 1811, 510, subd. (a)) and payroll record requirements (§ 1812).

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[2] Unless otherwise noted, all further statutory citations are to the Labor Code.

The first cause of action also alleged Mackone and Yang had falsified evidence and committed perjury (see Pen. Code, §§ 118, 132, 134) by submitting certified payroll records that were known to contain inaccurate information regarding their employees' wage rates and hours. The City's second and third causes of action alleged Mackone and Yang had violated the UCL by conspiring with subcontractors Pak and Lectrfy to commit similar wage and hour violations against their employees.[3]

The City's seventh cause of action alleged Mackone, Yang and several subcontractors had violated Business and Professions Code section 17500, commonly referred to as "the false advertising laws" (*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1395), by knowingly submitting false payroll records to the OCC.

2. Mackone and Yang's demurrers to the FAC

a. Summary of the demurrers to the FAC

Mackone and Yang each filed a demurrer to the FAC. Mackone argued the City's first cause of action was "impermissibly uncertain" because the FAC failed to identify which Mackone employees had been subjected to wage and hour violations, and failed to specify the time period during which such violations had occurred. Mackone also argued the second and third causes of action were impermissibly uncertain because the

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[3] The second and third causes of action also alleged UCL claims against Pak and Lectrfy. The fourth, fifth and sixth causes of action alleged similar UCL claims against other subcontractors who had worked on the project, but did not name Mackone and Yang as defendants in those claims. None of the subcontractors named in the complaint are parties to this appeal.

FAC did not explain how the company had conspired with Pak or Lectrfy to underpay those subcontractors' employees. According to Mackone, by excluding such information, the City had "deprived [the defendants] of the ability to respond to [the complaint] in a meaningful manner."

Mackone argued the City's seventh cause of action for violation of the false advertising law failed to state a claim because the submission of inaccurate payroll records to a government agency did not fall within the conduct proscribed under Business and Professions Code section 17500. According to Mackone, section 17500 only applied to deceptive statements that were disseminated to the public with the intent to induce the purchase of goods or services. Mackone contended the City's section 17500 claim failed to satisfy either requirement because the allegations in the FAC showed that: (1) Mackone had submitted the payroll records to a local government agency, which did not qualify as a statement to "the public"; and (2) Mackone had submitted the payroll records "for regulatory purposes," not to "solicit[] business."

Yang's demurrer raised identical arguments, asserting the City's UCL claims were impermissibly uncertain, and that the submission of falsified payroll records to a government agency did not qualify as a violation of section 17500. In addition, Yang argued that all of the City's claims against him failed because he could not be held "vicariously liable" for the actions of his company. According to Yang, the complaint contained "no factual allegations whatsoever relating to [his] conduct or his personal participation in the alleged wrongdoing." He further asserted that while the FAC alleged he had conspired with Mackone, Pak and Lectrfy to violate the UCL, "no facts [we]re stated that [he]

knowingly entered into an agreement with anyone to commit any of the violations or offenses alleged in the [FAC]."

b. The trial court's ruling on the demurrers

The trial court sustained Mackone's demurrer to the City's first cause of action with leave to amend. In a written order, the court explained that the FAC provided "a lack of specificity" as to the "unlawful actions" Mackone had committed against its own employees.

The court sustained Mackone's demurrer to the City's second and third causes of action, which alleged the company had violated the UCL by conspiring with Pak and Lectrfy to commit wage and hour violations against the subcontractors' employees, without leave to amend. The court's order explained that although the City had "attempt[ed] to allege conspiracy[, there] is no independent tort of conspiracy. The significance of such allegations is to impose joint liability as a tortfeasor to an actor who did not participate in the act itself, but had knowledge of it. [Citation.] There are insufficient factual allegations of knowledge." The court also sustained Mackone's demurrer to the City's section 17500 claim without leave to amend, explaining that the claim lacked "particularity as to which defendant said what, when, etc."

Finally, the court sustained Yang's demurrer to all claims without leave to amend, and entered a judgment dismissing him from the action. The court's order explained the FAC contained "insufficient allegations that Yang personally did something

unlawful. There is no vicarious liability for section 17200 and 17500 claims."[4]

B. The Second Amended Complaint

1. Summary of the second amended complaint

The City filed a second amended complaint (SAC) alleging a single UCL claim against Mackone that was essentially identical to the first cause of action set forth in the FAC. The claim alleged Mackone had engaged in unfair and unlawful business practices by violating prevailing wage and overtime pay requirements, and submitting falsified payroll records to the OCC. In the general allegations section of the SAC, the City asserted Mackone "did not pay all of its employees prevailing wages," and had denied premium pay for "for overtime . . . hours." The SAC further alleged Mackone had excluded numerous overtime hours from its certified payroll records, including all work its employees had performed on Saturdays.

Although the trial court had dismissed the City's claims that Mackone conspired with subcontractors to commit similar wage and hour violations without leave to amend, the SAC included allegations regarding Mackone's role in the subcontractors' misconduct. According to the SAC, Mackone had directed Lectrfy and Pak to "underbid the project," and knew the subcontractors' bids were too low to comply with prevailing wage requirements. As in the FAC, the SAC specifically alleged Mackone was aware that its subcontractors were violating

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[4] The trial court entered the judgment dismissing Yang from the action on October 15, 2015. The City filed a notice of appeal from the judgment on December 11, 2015.

prevailing wage and overtime laws, and submitting falsified payroll records: "Pak and Lectrfy employees often worked 12 to 16 hour days. Mackone officers and supervisors were present at the Project when the subcontractors' employees were working overtime hours on weeknights. Mackone knew that the subcontractors' employees worked overtime hours. These hours were not reflected in the certified payroll records submitted by those contractors to Mackone. Mackone took no action to correct these errors, and continued to submit these false payroll records to OCC even though it was aware that the records contained false information."

The SAC also asserted that a foreman for Lectrfy had "discussed the long hours Lectrfy employees were working . . . with Mackone supervisors. These hours were not reported on the certified payroll records. Mackone supervisors also witnessed Pak's employees work . . . up to 70 hours a week, including work performed on Saturdays, and also knew Pak was not paying its workers overtime. Rather than reporting and resolving the obvious violations, Mackone instructed Pak's employees to remain silent about the Saturday work."

2. Demurrer to the second amended complaint

Mackone filed a demurrer to the SAC arguing that the pleading had "failed to allege any new facts that Mackone underpaid its own workers." According to the demurrer, the SAC "remained fatally vague and uncertain. In particular, . . . [the City] fails to state with any certainty . . . the essential facts of its claim against Mackone, including the identity and number of Mackone employees who were allegedly underpaid [and] . . . the pay periods and hours involved." Mackone argued that because

the allegations underlying the UCL claim "remaine[d] almost unchanged," the court should sustain the demurrer without leave to amend.

The court sustained the demurrer without leave to amend, and entered a judgment in Mackone's favor. In a written order, the court explained: "Lack of specificity as to the unlawful actions as to Mackone itself."[5]

DISCUSSION

A. Standard of Review

"The standard of review on appeal from a judgment dismissing an action after the sustaining of a demurrer without leave to amend is well established." (*First Aid Services of San Diego, Inc. v. California Employment Development Dept.* (2005) 133 Cal.App.4th 1470, 1476.) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.]. . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The

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[5] The trial court entered the judgment in Mackone's favor on January 19, 2016. The City filed a notice of appeal from the judgment on January 21, 2016.

burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "[T]he showing as to how the complaint may be amended need not be made to the trial court and can be made for the first time to the reviewing court. [Citation.]" (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098.)[6]

B. The Trial Court Erred in Dismissing the City's UCL Claims Against Mackone

The City alleged two categories of UCL claims against Mackone. First, it alleged Mackone had violated the UCL by failing to pay its own employees the lawful prevailing wage and overtime, and submitting falsified payroll records to the OCC. Second, the City alleged Mackone had violated the UCL by conspiring with two of its subcontractors, Pak and Lectrfy, to commit similar violations with respect to Pak and Lectrfy's employees and payroll records.

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[6] In this case, the trial court dismissed most of the claims set forth in the FAC without leave to amend, only allowing the City to amend its claim that Mackone had violated the UCL by underpaying its own employees and submitting false payroll records with respect to those employees. Although the SAC did not re-plead the claims the court had dismissed without leave to amend, the SAC does contain additional allegations that are relevant to those claims. For the purposes of this appeal, we will consider these additional allegations in determining whether the trial court properly dismissed the claims in the FAC without leave to amend.

1. Overview of the UCL

"The purpose of the UCL 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.' [Citation.] The UCL prohibits any 'unlawful, unfair or fraudulent business act or practice.' [Citation.] 'Because [the UCL] is written in the disjunctive, it establishes three varieties of unfair competition — acts or practices which are unlawful, or unfair, or fraudulent.' [Citation.]" (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1374 (*Klein*).)

"The definitions of unlawful and fraudulent business practices are straightforward and well established." (*Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1254 (*Morgan*).) "A business practice is 'unlawful' if it is 'forbidden by law.' [Citations.] The unfair competition law thus creates an independent action when a business practice violates some other law." (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169-1170; see also *Cel-Tech*, *supra*, 20 Cal.4th at p. 180 ["By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable"].) "A business practice is 'fraudulent' within the meaning of section 17200 if it is "likely to deceive the public. [Citations.]" (*Klein*, *supra*, 202 Cal.App.4th at p. 1380.)

Although the definition of an "unfair business practice" is "less settled" in UCL cases that do not involve claims between business competitors (*Morgan*, *supra*, 177 Cal.App.4th at p. 1254), this court has adopted a three-part test that defines a practice as unfair "if (1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to

consumers or competition; and (3) the injury could not reasonably have been avoided by consumers themselves." (*Klein*, *supra*, 202 Cal.App.4th at p. 1376.)[7]

The UCL authorizes the Attorney General or a district attorney to bring an action for civil penalties "in the name of the people of the State of California upon their own complaint." (See Bus. & Prof. Code, §§ 17203, 17204 and 17206.) Each violation of the UCL is punishable by a civil penalty in the maximum amount of $2,500. (Bus. & Prof. Code, § 17206, subd. (a).)

2. The City's claim that Mackone violated the UCL by failing to comply with wage and hour requirements is not uncertain

The City's pleadings allege Mackone engaged in "unlawful" business practices within the meaning of section 17200 by violating numerous provisions of the Labor Code and the Penal Code, including (among others): failing to pay its workers the prevailing wage (§ 1771); failing to pay its employees overtime for all work beyond eight hours in a day, or 40 hours in a week (§§ 510, 1811); failing to keep accurate payroll records (§§ 1776, 1812); certifying as true a material matter it knew to be false (Pen. Code, § 118); and preparing a false instrument for an inquiry authorized by law (Pen. Code, § 134).

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[7] As we explained in *Klein*, "[t]here is currently a split of authority with respect to the proper definition of the term 'unfair' in the context of consumer cases arising under the UCL." (*Klein*, *supra*, 202 Cal.App.4th at p. 1376, fn. 14; see also *Morgan*, *supra*, 177 Cal.App.4th at p. 1254.) This court, however, has "consistently followed" the three-part test stated above, which was first enunciated in *Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394. (*Ibid.*)

Mackone does not dispute that the violation of any one of these statues qualifies as an "unlawful" business practice within the meaning of section 17200. It contends, however, that the trial court correctly concluded the City's UCL claim was "impermissibly uncertain" because it failed to adequately describe how Mackone had violated the statutes.

"'In order to plead a cause of action, the complaint must contain a 'statement of the facts constituting the cause of action, in ordinary and concise language.' [Citation.] . . . . '[T]he complaint as a whole [must] contain sufficient facts to apprise the defendant of the basis upon which the plaintiff is seeking relief. [Citations.]' [Citation.]" (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1098-1099 (*Doheny Park*).) "[D]emurrers for uncertainty are disfavored," and are generally "granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond." (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶ 7:85, pp. 7-35 ["demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her"].)

"The particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff; less particularity is required where the defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff. [Citation.]" . . . . There is no need to require

specificity in the pleadings because 'modern discovery procedures necessarily affect the amount of detail that should be required in a pleading." [Citation.]' [Citation.]" (*Doheny Park*, *supra*, 132 Cal.App.4th at p. 1099; see also *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616. ["A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures"]; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 976, pp. 389-390 [demurrer for uncertainty "will be overruled" where "the facts as to which the complaint is uncertain are presumptively within the knowledge of the defendant"].)

In this case, the City's pleadings allege Mackone did not pay all of its employees who worked on the project the required prevailing wage. The pleadings further allege Mackone failed to pay its employees overtime, and for hours they worked on Saturdays. Finally, the pleadings allege Mackone knowingly submitted certified payroll records to the OCC that underreported the number of hours worked by its employees, omitted overtime hours and falsely claimed the company had complied with prevailing wage requirements. Thus, the City's pleadings make clear its UCL claim is based on allegations that Mackone paid employees who worked on the project less than the prevailing wage, failed to pay its workers overtime and knowingly submitted false certified payroll records. These allegations were "sufficiently clear to apprise the defendant of the issues which he is to meet." (*People v. Lim* (1941) 18 Cal.2d 872, 882-883.)

Mackone, however, contends the City's claim is impermissibly uncertain because the allegations fail to "identify the allegedly underpaid Mackone workers, or provide . . . when, how and by how much they had allegedly been underpaid." Mackone has cited no legal authority (nor are we aware of any) suggesting this level of specificity is required at the pleading stage. As explained above, the City was only required to "'give[] notice of the issues sufficient to enable preparation of a defense.'" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549–550.) Moreover, the specific facts that Mackone alleges to be uncertain – the names of the employees who were underpaid and the amounts they were underpaid – are matters that are presumptively within the company's knowledge. (See *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 30 ["A demurrer for uncertainty will not lie for failure to 'particularize matters "presumptively within the knowledge"' of the defendant"]; *Dumm v. Pacific Valves* (1956) 146 Cal.App.2d 792, 799 ["Demurrer for uncertainty does not lie . . . where the facts are presumptively within the knowledge of the demurring parties"].) The allegations in the complaint, combined with Mackone's presumptive knowledge of its own labor practices, provide the company adequate notice to defend against the City's UCL claim.[8]

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[8] Because we conclude the City has adequately pleaded a UCL claim under the "unlawful" prong of section 17200, we need not decide whether the conduct in the complaint also adequately alleges claims under the "unfair" and "fraudulent" prongs. (See generally *Morgan, supra,* 177 Cal.App.4th at p. 1255 [where plaintiff had adequately alleged a UCL claim under fraudulent prong, it was unnecessary for court to determine "whether the

3. The trial court erred in dismissing the City's claim that Mackone violated the UCL by conspiring with subcontractors to commit wage and hour violations

The second and third causes of action in the City's FAC alleged Mackone had violated the UCL by conspiring with two subcontractors, Pak and Lectrfy, to pay those subcontractors' employees less than the prevailing wage, deny the employees overtime pay and submit false payroll records. The trial court dismissed these UCL claims, concluding the City had pleaded "insufficient factual allegations [that Mackone had] knowledge" of its subcontractors' unlawful conduct.

"Civil conspiracy is not an independent cause of action. [Citations.] Instead, it is a theory of co-equal legal liability under which certain defendants may be held liable for 'an independent civil wrong' [citations] committed by others. A participant in the conspiracy 'effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy.' [Citation.] ""[. . . . In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity."" [Citation.] "'The essence of the claim is that it is merely a mechanism for imposing vicarious liability. . . . Each member of the conspiracy becomes liable for all acts done by others pursuant to the conspiracy, and for all damages caused thereby.'" [Citation.]" (*Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1291 (*Navarrete*).)

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conduct alleged [also] meets . . . the definition[] of 'unfair' (or . . . 'unlawful')"].)

"[F]or conspiracy liability, the conspiring defendants must have actual knowledge that a tort is planned and concur in the scheme with knowledge of its unlawful purpose. [Citation.] Knowledge of the planned tort must be combined with intent to aid in its commission. [Citation.] 'An agreement may be tacit as well as express. [Citation.] A conspirator's concurrence in the scheme """"may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances."""" [Citation.]" (*Navarrete, supra,* 237 Cal.App.4th at p. 1292.)[9]

The City's pleadings contain several allegations supporting its claim that Mackone conspired with subcontractors to underpay their employees and submit falsified payroll records. First, the City alleges that although Mackone had pledged to ensure its subcontractors would comply with all applicable wage and hour laws, the company specifically directed Pak and Lectrfy to "underbid the Project" at an amount that "was below what could reasonably ensure payment of prevailing wages to their workers." The City further alleges Mackone knew the bids Pak and Lectrfy ultimately submitted were too low to comply with prevailing wage and overtime requirements.

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[9] The parties do not dispute that conspiracy liability applies in the context of UCL claims. (*People v. Toomey* (1984) 157 Cal.App.3d 1, 15 (*Toomey*) [defendant who conspires to commit, or aids and abets the commission of, an unlawful practice is liable under section 17200]; cf. *American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 697 [defendant liable for inducing another to engage in common law unfair competition].)

Second, the City's pleadings allege Mackone knew Pak and Lectrfy were not paying their employees the prevailing wage or overtime. According to the pleadings, Mackone's supervisors and managers observed employees of Pak and Lectrfy work overtime and weekend hours, and knew the subcontractors were not recording any overtime or weekend hours on their payroll records. Mackone is also alleged to have instructed Pak's employees "to remain silent" about the unreported work time, and to have spoken with a Lectrfy foreman regarding the "long hours" Lectrfy employees were working. Although Mackone allegedly knew Pak and Lectrfy's payroll records omitted overtime and weekend hours, Mackone took no action to remedy the misrepresentations, and submitted the records to the OCC without comment.

In sum, the City's pleadings allege Mackone: (1) encouraged, and then accepted, bids that were too low to comply with prevailing wage or overtime requirements; (2) was aware its subcontractors were underpaying their employees; and (3) knowingly passed along falsified payroll records to the OCC. Liberally construed and read in the light most favorable to the City (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1557), these allegations are sufficient to support a claim that Mackone conspired with its subcontractors to violate the UCL by encouraging them to underpay their employees and submit falsified certified payroll records, and by aiding them in the commission of such acts.

C. The Trial Court Erred in Dismissing the City's UCL Claims Against Scott Yang

The City also argues it adequately pleaded UCL claims against Mackone's owner, Scott Yang, in his individual capacity. The City's UCL claims against Yang are predicated on the same misconduct alleged against Mackone: underpaying the company's employees, submitting falsified payroll records and conspiring with the company's subcontractors to commit similar violations with respect to the subcontractors' employees and payroll records. The trial court concluded the claims failed because the FAC: (1) failed to identify any unlawful act that Yang had "personally" committed; and (2) a principal cannot be held "vicarious[ly] liabl[e] under section 17200" for his or her company's conduct.

"[C]orporate directors cannot be held vicariously liable for the corporation's torts in which they do not participate. Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise. [Citation.] '[A]n officer or director will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to which he has not consented. . . . While the corporation itself may be liable for such acts, the individual officer or director will be immune unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct.' [Citation.]" (*Frances T. v. Village Green Owners Assn*. (1986) 42 Cal.3d 490, 503–504.) "A corporate director or officer's participation in tortious conduct may be shown not solely by direct action but also by knowing consent to or approval of unlawful acts" (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1380), or "when they knew

or had reason to know about but failed to put a stop to tortious conduct." (*Id.* at p. 1387.)

These principles apply equally in the context of unfair business practices. Although "a person does not become liable under [the UCL] merely by virtue of his status as a business owner" (*Toomey*, *supra*, 157 Cal.App.3d at p. 14), a principal can be held personally liable if he or she was "in a position of control, yet permitted the unlawful practices to continue despite . . . knowledge thereof." (*People v. First Federal Credit Corp.* (2002) 104 Cal.App.4th 721, 735; see also *Toomey*, *supra*, 157 Cal.App.3d at p. 14 ["if the evidence establishes defendant's participation in the unlawful practices, either directly or by aiding and abetting the principal, liability under sections 17200 and 17500 can be imposed"]; *People v. Conway* (1974) 42 Cal.App.3d 875, 886 (*Conway*) [affirming judgment finding defendant liable for business's false advertising where the evidence showed he had "tolerat[ed], ratif[ied] or [authoriz[ed] [the employees] illegal actions"].) The critical inquiry is "what control or knowledge [the defendant] had of his employee's activities." (*People v. Regan* (1979) 95 Cal.App.3d Supp. 1, 4.)[10]

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[10] Several prior decisions contain language suggesting a principal may be held liable for the acts of his corporation based solely on the level of control he or she exerted over the operation of the business. For example, in *Toomey, supra*, 157 Cal.App.3d 1, the court affirmed a judgment finding a business owner liable for false advertising practices under sections 17200 and 17500 based on evidence showing he had "had unbridled control over the [unlawful] practices. His position in the corporation and operation of the business subjects him to liability for misleading solicitations made by his employees." (*Id.* at p. 15.) Similarly, in *Conway*, *supra*, 42 Cal.App.3d 875, the court found the president

In this case, the City's pleadings allege Yang "exercised direct control over the daily operations, employees, and important business decisions of Mackone on the Project." The pleadings further allege that Mackone's failure to pay overtime or prevailing wages to its employees was the result of Yang's "personal participation in the daily management and control" of the project. Yang is also alleged to have known "the subcontractors were not complying with labor laws," and that the subcontractors' certified payroll records contained false information. Finally, Yang is alleged to have known the subcontractors' bids were insufficient to comply with prevailing wage and overtime requirements. Thus, considered as a whole, the allegations in the pleadings assert Yang directly controlled Mackone's operations, had knowledge of the company and its subcontractors' unlawful activities and did nothing to remedy them. These allegations are sufficient to state a UCL claim against Yang in his individual capacity.

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of a car dealership could be held "liable for false advertising" based on evidence showing he was "in a position to *control* the activities of the dealership." (*Id*. at p. 886 [emphasis in original]; see also *People v. Sarpas* (2014) 225 Cal.App.4th 1539, 1564 [defendant liable under section 17200 where evidence showed that "as operations manager, [he] was in a position of control over its daily operations"].) These decisions imply that a principal who exerts unbridled control over a business may be held vicariously liable even in the absence of evidence showing he had any knowledge of the unlawful practices. For the purposes of this appeal, we need not determine whether a business owner may be held personally liable under section 17200 based solely on the level of control he or she exerted over the business entity because, as discussed below, the City's pleadings allege Yang had knowledge of the unlawful actions.

D. The City Has Failed to State a Claim Under the False Advertising Law

The trial court also sustained Mackone and Yang's demurrers to the City's claim that they had violated the false advertising law (Bus. & Prof Code, § 17500) by submitting certified payroll records to the OCC that were known to contain false information regarding employee pay rates and work hours. Mackone and Yang argue that these acts do not fall within the conduct proscribed under section 17500.[11]

Section 17500 states, in relevant part: "It is unlawful for any person, . . . corporation or association, or any employee thereof with the intent . . . . to dispose of real or personal property or to perform services, . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, . . . any statement, concerning that real or personal property or those services, . . . , which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. . . ."

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[11] Although defendants raised this argument in their demurrers, the trial court did not reach the issue, concluding the City's false advertising law claims failed because the pleadings lacked sufficient detail regarding the nature of the misrepresentations in the payroll records. On an appeal following a sustained demurrer, however, "we affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons." (*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 111.)

Mackone and Yang argue the act of submitting falsified certified payroll records to the OCC does not satisfy two aspects of section 17500. First, they contend the City's pleadings make clear they did not submit the payroll records "to dispose of" any good or service, or to "induce the public to enter into an obligation" with respect to such goods or services. Instead, the pleadings allege they submitted the records to the OCC as a regulatory requirement applicable to their public works contract. Second, Mackone and Yang argue the certified payroll records were not "disseminated before the public," but rather were submitted to a government agency.

We agree that submitting payroll records to a regulatory agency as the condition of a public works contract does not fall within the conduct proscribed under section 17500. The false advertising law was enacted to protect the public "from false or deceptive advertising." (*People v. Superior Court (Olson)* (1979) 96 Cal.App.3d 181, 190 (*Olson*); see also *Day v. AT & T Corp*. (1998) 63 Cal.App.4th 325, 332 ["the statutes are meant to protect the public from a wide spectrum of improper conduct in advertising"].) By its terms, the statute applies only to statements that are intended to "dispose of" goods or services, or to "induce the public to enter into an obligation" with respect to such goods and services. Although the statute does not specifically reference "advertising," it was derived from a model statute regulating false advertising (see *Olson, supra,* 96 Cal.App.3d at p. 190), and appears within a chapter and article of the Business and Professions Code that regulates "Advertising"

and "False Advertising." (See Bus. & Prof., Div. 7, Pt. 3, Ch. 1 & Art. 1; *People v. Hull* (1991) 1 Cal.4th 266, 272 ["it is well established that "'chapter and section headings [of an act] may properly be considered in determining legislative intent' [citation], and are entitled to considerable weight. [Citation.]"'"].) The language, history and intent of section 17500 therefore demonstrate that the statute is limited to statements that are intended to advertise or induce the purchase of goods or services. (See generally Stern, Cal. Practice Guide: Bus. & Prof. Code Section 17200 Practice (The Rutter Group 2017) § 4:6 [unlike section 17200, "[s]ection 17500 applies only to advertising"].)

As Mackone and Yang correctly note, the complaint does not allege they submitted falsified payroll information to the OCC to induce the City to purchase any good or service. Instead, the complaint alleges Mackone was required to submit the payroll records as a condition of its contract with the City, and that it falsified the payroll information to conceal their wage and hour violations.

The City nonetheless contends we should treat the defendants' submission of false payroll records as an attempt to advertise or sell their services because the Labor Code authorizes an awarding government entity to withhold payments on a public works contract if it determines the contractor has violated applicable wage and hour laws. (See Lab. Code, §§ 1776, 1771.66.) Thus, the City essentially argues that by submitting false information that purported to show compliance with wage and hour laws, the defendants induced the City to pay them for their services.

We do not agree that misstatements made to avoid what effectively amounts to a form of penalty—the withholding of contractual payments—qualify as false advertising under section 17500. The City has not alleged Mackone or Yang made any false statement that induced the City to enter into the public works contract itself. Instead, according to the complaint, the false information in the payroll records was intended to conceal conduct that would enable the City to lawfully withhold payments it had already agreed to pay under the contract. Although such conduct may well violate numerous other provisions in the Labor and Penal Codes,[12] we find no basis to conclude such conduct falls within the purview of the false advertising law.[13]

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12 The Labor Code contains an entire chapter regulating public works projects, which includes an enforcement scheme that allows the government to investigate compliance with wage and hour laws, and collect civil penalties for such violations. (See Labor Code, §§ 1770 et seq.) Moreover, the Penal Code makes it a crime to knowingly provide false information that was sworn to be true. (See Pen. Code, §§ 118, 134). In addition, as discussed above, the violation of these and other Labor Code requirements also supports a claim under the UCL. It is therefore clear that while the submission of false payroll records does not fall within the purview of the false advertising law, the government still has numerous potential remedies for such misconduct.

13 Because we conclude that submitting inaccurate payroll records to the OCC as a condition of a public works contract does not qualify as a statement intended to induce the sale of goods or services, we need not address defendants' alternative argument that submitting such information to a regulatory agency does not qualify as "disseminat[ing]" the information "to the public."

DISPOSITION

The judgments in favor of Mackone and Yang are reversed. The orders sustaining Mackone and Yang's demurrers to the City's claims under Business and Professions Code section 17500 without leave to amend are affirmed. Upon remand, the trial court is instructed to allow the City to amend its causes of action against Yang and Mackone for violation of Business and Professions Code section 17200. The City shall recover its costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

MENETREZ, 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.