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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JANET SEASTROM,

Plaintiff and Appellant,

v.

CALIFORNIA LOTTERY et al.,

Defendants and Respondents.

A131285

(Marin County

Super. Ct. No. CIV-1001509)

Plaintiff brings this appeal from a judgment entered after the trial court sustained a demurrer to her third amended complaint without leave to amend and dismissed all of plaintiff's causes of action against defendant California State Lottery (the Lottery). Plaintiff claims that she has properly alleged a cause of action for wrongful interference with prospective economic advantage, or may be able to cure any defects in her pleading by amendment. We conclude that plaintiff cannot state a cause of action against the Lottery, and affirm the judgment.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

According to the pleading at issue before us, the first amended complaint, on February 11, 2009, at the "Quick N Easy" retail store in San Anselmo, plaintiff "selected

<sup>1</sup> Our recitation of the pertinent facts is taken from allegations of the first amended complaint, which we must accept as true in our review of the judgment of dismissal after the trial court sustained a demurrer. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Coast Plaza Doctors Hospital v. Blue Cross of California* (2009) 173 Cal.App.4th 1179, 1183.)

the winning numbers for the SuperLottoPlus” game conducted by the Lottery. Plaintiff submitted the winning numbers on a data form into the SuperLottoPlus computer lottery network at the Quick N Easy store. Due to defects in the Lottery’s electronic software and hardware supplied by its vendors, the computer system failed to accurately read or record plaintiff’s winning numbers and generated an erroneously printed ticket that was delivered by the retailer to her. Plaintiff alleges that the “winning numbers” submitted by her are recorded and retained in “internal memory of the lottery computer network system.” The Lottery refused to pay plaintiff the \$7,000,000 SuperLottoPlus prize, “even though its data and metadata contained in its computer system” demonstrated that she “submitted the winning data.”

The first amended complaint asserts causes of action against the Lottery and other named and fictitious defendants for abuse of elder or dependent adult, negligent design, manufacture and control of the Lottery’s computer network, breach of contract, wrongful interference with prospective economic advantage, breach of warranty, and unfair business practices.<sup>2</sup> As pertinent to this appeal, plaintiff’s essential complaint is that the Lottery breached its duty of contract with her to accurately enter data into the SuperLottoPlus game computer system, and negligently supervised or controlled operation of the computer network of the SuperLottoPlus game to prevent errors that resulted in failure to pay her winning ticket.

The Lottery filed a general demurrer to the first amended complaint, on the ground that plaintiff failed to state facts sufficient to constitute any of the causes of action included in the pleading.<sup>3</sup> Following a hearing on the demurrer on December 21, 2010, the trial court issued a ruling that sustained the demurrer without leave to amend and dismissed the action against the Lottery. This appeal followed.<sup>4</sup>

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<sup>2</sup> The Lottery is not named as a defendant in the unfair business practices cause of action.

<sup>3</sup> The Lottery attached governing regulations to the demurrer, and requested judicial notice of them.

<sup>4</sup> Plaintiff’s action against the other defendants named in the first amended complaint were all subsequently dismissed in separate rulings, which are the subject of another appeal (A133669).

## DISCUSSION

Plaintiff's appeal focuses solely on the cause of action for wrongful interference with prospective economic advantage. She argues that "her existing First Amended Complaint contained a proper claim for interference with prospective economic advantage," that was neither referred to in the Lottery's demurrer nor ruled on by the trial court.<sup>5</sup> Plaintiff claims that the "Lottery had a duty" to accurately retain her numbers, and damaged her "prospective [economic] advantage by failing to give her a ticket that matched the numbers written by plaintiff on her play slip." Her economic advantage was denied, plaintiff asserts, by the Lottery's failure to "match the written instructions" and grant her "the winning pari-mutuel payout for the Super Lotto Plus lottery." She further argues that if her first amended complaint was defective, the trial court erred by failing to grant her the opportunity to amend the pleading to "fine tune" the cause of action for "wrongful interference with prospective economic advantage."

We review the trial court's ruling on the demurrer in accordance with "well-settled principles." (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 28; *Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137 Cal.App.4th 466, 471.) "A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law." (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.) "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory.

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<sup>5</sup> We point out that plaintiff's cause of action for wrongful interference with prospective economic advantage was not disregarded by either the Lottery in its demurrer or the trial court in its ruling. The Lottery explicitly argued that plaintiff failed to properly state a cause of action for wrongful interference with prospective economic advantage, and the trial court ruled that all of plaintiff's causes of action must fail due to the absence of any proper claim of mandatory duty on the part of the Lottery, the lack of any valid winning ticket by plaintiff, and the lack of any contractual or economic relationship between plaintiff and the Lottery.

[Citation.]’ [Citation.]” (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 352; see also *Lee v. Blue Shield of California* (2007) 154 Cal.App.4th 1369, 1377–1378.)

The properly pleaded material allegations in the action filed by plaintiff “must be accepted as true. [Citations.] In addition, the Supreme Court has held: “[T]he allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties.” [Citations.]’ [Citations.]” (*C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 382–383.) “In addition to the complaint’s allegations, we consider matters that must or may be judicially noticed. [Citations.] We also consider the complaint’s exhibits. [Citations.] Under the doctrine of truthful pleading, the courts ‘will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.’ [Citation.] ‘False allegations of fact, inconsistent with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded . . . .’ [Citations.]” (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400; see also *Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044–1045.)

Our task as a “reviewing court, therefore, ‘is to determine whether the pleaded facts state a cause of action on any available legal theory.’ [Citation.]” (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 266.) “If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer.” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) However, “We may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court.” (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 412.)

“On appeal from a judgment of dismissal after a demurrer has been sustained without leave to amend, the plaintiff has the burden of proving error. [Citation.] ‘Because the trial court’s determination is made as a matter of law, we review the ruling

de novo.’ [Citation.]” (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.)

### ***I. The Cause of Action for Interference with Prospective Economic Advantage.***

We examine plaintiff’s cause of action for wrongful interference with prospective economic advantage. “[T]he law is settled that ‘a stranger to a contract may be liable in tort’ ” for wrongfully “ ‘interfering with the performance of the contract.’ [Citations.]” (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148.) “ ‘The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition.’ [Citation.]” (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1544.) The elements plaintiff must plead and prove to prevail on her cause of action for wrongful interference with prospective economic advantage are: “(1) an economic relationship between plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) defendant’s knowledge of the relationship;” (3) a wrongful act by the defendant either designed to or that is reasonably foreseeable to interfere with plaintiff’s economic relationship; “(4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant’s wrongful act, including an intentional act by the defendant that is designed to disrupt the relationship between the plaintiff and a third party.” (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 944; *Reeves, supra*, at p. 1148; *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 51.)<sup>6</sup>

We first observe that in her first amended complaint plaintiff has improperly merged theories of breach of contract and wrongful interference with prospective economic advantage. The theories are mutually exclusive. A party to a contract cannot be liable under any tort claim for interference with contractual rights or expectancies if the defendant is a party to the contract; the plaintiff is relegated to a cause of action for

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<sup>6</sup> “Our courts recognize four types of claims for interference with contractual rights or expectancies: Intentional or negligent interference with an existing contract and intentional or negligent interference with prospective economic advantage.” (*Woods v. Fox Broadcasting Sub., Inc.* (2005) 129 Cal.App.4th 344, 350.)

breach of that contract. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 513, 517–518; *Woods, supra*, 129 Cal.App.4th 344, 350.) We treat the cause of action as one solely for wrongful interference with prospective economic advantage.

Second, plaintiff has not alleged any *intentional* act on the part of the Lottery designed to induce a breach or disruption of a contractual relationship. She has proceeded on a theory that some form of *negligent* act or omission of the Lottery – resulting from a computer system malfunction – caused her loss of economic benefit or advantage derived from a winning SuperLottoPlus ticket. Therefore, we consider whether plaintiff has alleged that it was reasonably foreseeable the Lottery’s conduct would interfere with or disrupt her economic relationship with a third party if it failed to exercise due care – that is, was negligent. (*J’Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804.)

The direct and uncomplicated response is that plaintiff did not have a cognizable economic relationship with a third party that was disrupted by the Lottery. Plaintiff asserted a contract “with defendants” to have her data “properly entered” into the SuperLottoPlus game, that was breached by errors in the computer system. What is missing from the pleading, and from plaintiff’s claim against the Lottery, is an economic relationship between her and any third party that was disrupted by the Lottery’s acts or omissions. Under established law, plaintiff did not even have a contractual relationship with the Lottery. (*Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 830; *Brown v. California State Lottery Com.* (1991) 232 Cal.App.3d 1335, 1339.) The Lottery acts as merely a stakeholder for wagers by paying off on winning bets or collecting losing bets, and does not enter into any contract with bettors. (See *Western Telcon, Inc. v. California State Lottery* (1996) 13 Cal.4th 475, 488–489, and fn. 4; *Brown, supra*, at p. 1339.) Moreover, whatever duty to plaintiff that existed on the part of the named defendants or anyone else, including the Lottery or other participants in it, did not arise from her economic relationship with them.

Plaintiff also failed to allege any “independently wrongful conduct” by the Lottery. A “plaintiff seeking to recover for interference with prospective economic advantage must also plead and prove that the defendant engaged in an independently wrongful act in disrupting the relationship. [Citation.] In this regard, ‘an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.’ [Citation.]” (*Reeves v. Hanlon, supra*, 33 Cal.4th 1140, 1152; see also *Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 504; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 241.) The defendant’s interference must be wrongful “ ‘by some measure beyond the fact of the interference itself.’ [Citation.]” (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393, fn. omitted; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1158.)

The Lottery did not violate a statutory or any other legal standard by declining to pay plaintiff the winning share for the SuperLottoPlus game based on presentation of a ticket that did not bear the winning numbers. According to the Lottery regulations,<sup>7</sup> the player is solely responsible for data printed on the ticket, and the Lottery has no liability for tickets printed in error. The lotto ticket issued to the player is the only proof of number selections and the only valid receipt for claiming a prize. A ticket is void and will not be paid if the play specifications on the ticket fail to correspond to the recorded data in the Lottery’s central computer system. Thus, the Lottery complied with governing standards, and plaintiff does not contend otherwise. Plaintiff has alleged that an error occurred in the recording of the numbers she submitted, not that the Lottery violated regulations by failing to pay a ticket bearing the winning numbers. No conduct that qualifies as independently wrongful has been alleged by plaintiff.

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<sup>7</sup> The Lottery commission is empowered to promulgate regulations specifying the types of lottery games to be conducted, the shares and prizes in each lottery game, and the method for determining winners in each lottery game. (Gov. Code, §§ 8880.28, 8880.29, 8880.30; see also Cal. State Lottery Regulations (Lotto Regulations) 3(b)(1), 3(b)(4), 3(e)(1), & 3(e)(3) <http://www.calottery.com/media/lottery-regulations>.)

Finally, the Lottery has immunity from liability for the tort cause of action for wrongful interference with prospective economic advantage. “ “Government Code section 815 declares that “[e]xcept as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.” The statute amounts to a legislative declaration that governmental immunity from suit is the rule and liability the exception. “ ‘Thus, in the absence of some constitutional requirement, public entities may be liable *only* if a statute declares them to be liable.’ ” [Citations.]’ [Citation.]” (*Bates v. Franchise Tax Bd.* (2004) 124 Cal.App.4th 367, 381; see also *Vernon v. State of California* (2004) 116 Cal.App.4th 114, 121–122.)

No statutory liability is imposed on the Lottery for the occurrence alleged by plaintiff. The regulations belie plaintiff’s allegation that the Lottery had a mandatory duty to award her the SuperLottoPlus prize absent a ticket that reflected the winning numbers. In the event the numbers on a ticket issued to a player fail to correspond to the numbers recorded in the Lottery’s central computer system, the ticket is considered void and “will not be paid.” Nor does the statutory scheme require the Lottery to guarantee that the play selection numbers are accurately reproduced on the printed ticket. To the contrary, the player, not the Lottery, is “solely responsible” for the accuracy of play selections and errors on the printed ticket.

Plaintiff seeks to impose on the Lottery a mandatory “legal duty” to consumers to properly select and supervise vendors and suppliers by reference to Government Code section 8880.24, which provides that the Lottery Commission exercises all powers necessary to effectuate the purposes of the California State Lottery Act of 1984, and must “act to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the Lottery.”<sup>8</sup> While Government Code section 815.6 imposes liability

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<sup>8</sup> Government Code section 8880.24 reads in full: “(a) The California State Lottery Commission shall exercise all powers necessary to effectuate the purposes of this chapter. In all decisions, the commission shall take into account the particularly sensitive nature of the California State Lottery and shall act to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the Lottery.

on a public entity for the “particular kind of injury” caused “by its failure to discharge a mandatory duty imposed by statute,”<sup>9</sup> to “maintain a private civil action for the breach of a mandatory duty,” the plaintiff “must demonstrate, among other things, the statute was intended to protect against the type of harm suffered, and breach of the statute's mandatory duty was a proximate cause of the injury suffered.” (*Janis v. California State Lottery Com.*, *supra*, 68 Cal.App.4th 824, 832; see also *Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 631.) “[T]here are three elements to a cause of action under Government Code section 815.6. First, the enactment at issue must be obligatory, not merely discretionary or permissive in its directions to the public entity. [Citation.] Typically, an enactment imposing a mandatory duty also includes specific rules and guidelines for implementation. Second, the duty imposed must be designed to protect against the *particular kind of injury* the plaintiff suffered. ‘We examine the “language, function and apparent purpose” of each cited enactment “to determine if any or each creates a mandatory duty designed to protect against” the injury allegedly suffered by [the] plaintiff.’ [Citation.] The requirement is not satisfied if the enactment merely confers some incidental benefit upon the class to which the plaintiff belongs. The third and final requirement is that the breach of the duty must have been a proximate cause of the plaintiff’s injury.” (*Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, 991, italics added.) “ ‘The plaintiff must show the injury is “ ‘one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty.’ ” ’ [Citation.]” (*Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372, 1392.)

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“(b) In decisions relating to advertising and promotion of the California State Lottery, the commission shall ensure that the California State Lottery complies with both the letter and spirit of the laws governing false and misleading advertising, including Section 17500 et seq. of the Business and Professions Code. The commission shall also ensure that the overall estimated odds of winning some prize or prizes in a particular lottery game are posted on all television and print advertising, exclusive of outdoor advertising displays, signs, or banners, related to that game.”

<sup>9</sup> Government Code section 815.6 provides: “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.”

Section 8880.24 describes the powers of the state lottery commission, and “was intended to protect against harm caused by false and misleading advertising of lottery games.” (*Janis v. California State Lottery Com.*, *supra*, 68 Cal.App.4th 824, 832.) Section 8880.24 does not seek to protect against the risk of the “*particular kind of injury*” suffered by plaintiff within the meaning of section 815.6. Plaintiff’s injuries allegedly occurred through some sort of computer error or mistake by the retail clerk in the recording of the numbers on plaintiff’s ticket, not due to the Lottery Commission’s failure to act to control advertising or to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the Lottery. “In order to construe a statute as imposing a mandatory duty, the mandatory nature of the duty must be phrased in explicit and forceful language. [Citation.]” (*Quackenbush v. Superior Court* (1997) 57 Cal.App.4th 660, 663.) We discern nothing in section 8880.24 that requires the Lottery to investigate the computer system provided by its vendors. (See *Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 615.) As we have observed, neither statutory law nor the lottery regulations impose a mandatory duty on the Lottery – in forceful language or otherwise – to ensure that play selections are accurately printed on the player’s ticket. Section 8880.24 does not provide redress for the particular kind of injury suffered by plaintiff. (See *Sutherland v. City of Fort Bragg* (2000) 86 Cal.App.4th 13, 23; *Janis, supra*, at p. 832.)

This court has declared: “The Lottery Act was not intended to create liability in the event that terminals malfunction or are improperly maintained. Moreover, nothing in the act lends color to the proposition that the lottery must bear the consequences for the ineptitude or intransigence of retail clerks who have virtually no employment relationship with the State.” (*Brown v. California State Lottery Com.*, *supra*, 232 Cal.App.3d 1335, 1343.) Plaintiff has not properly stated a cause of action against the Lottery for interference with prospective economic advantage.

## ***II. The Trial Court’s Refusal to Grant Plaintiff Leave to Amend the Pleading.***

Plaintiff also claims that the trial court erred by denying her leave to amend the first amended complaint to “fine tune” her cause of action for wrongful interference with

prospective economic advantage. Plaintiff proposes to amend her pleading to state that her economic relationship with “The Pari-Mutuel Pool of February 14, 2009 Super Lotto Plus participants” was disrupted by the Lottery’s “failure to issue a ticket with the same numbers that Plaintiff selected on her playslip,” which resulted from the Lottery’s wrongful failure to manufacture, maintain and operate “the central computer system and terminal.” (Bold deleted.)

Where, as here, a demurrer is sustained without leave to amend, we also review the decision to deny leave to amend under the abuse of discretion standard, even when no request to amend the pleading was made. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) In doing so, we decide whether there is a reasonable possibility that the defect can be cured by amendment. (*Whittemore v. Owens Healthcare-Retail Pharmacy, Inc.* (2010) 185 Cal.App.4th 1194, 1199.) “The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Blank v. Kirwan, supra*, 39 Cal.3d 311, 318.) “As a general rule, if there is a reasonable possibility the defect in the complaint could be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend.” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459; see also, e.g., *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810; *Quelimane Co. v. Stewart Title Guaranty Co., supra*, 19 Cal.4th 26, 39.) “Nevertheless, where the nature of the plaintiff’s claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result.” (*City of Atascadero, supra*, at p. 459.)

We conclude that there is no reasonable possibility the defects in the first amended complaint may be cured by yet another amendment of plaintiff’s pleading. Plaintiff’s first amended complaint is unsuccessful not because she is an imperceptive or inartful pleader, but because neither the asserted facts nor the remaining conclusory allegations state the requisite elements of her causes of action. (*Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949, 961.) She cannot plead an economic relationship with the other SuperLottoPlus participants that was disrupted by the Lottery; she cannot plead any independently wrongful conduct by the Lottery; and, she cannot plead a cause of

action for wrongful interference with prospective economic advantage that constitutes a violation of a mandatory duty by the Lottery. Plaintiff's suggested amendments to her first amended complaint do not cure the defects of the pleading, and her pleading is not curable by amendment. Therefore, the trial court did not abuse its discretion by sustaining defendant's demurrer without leave to amend. (*Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1205.)

Accordingly, the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Margulies, J.