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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

HOUSING RIGHTS COMMITTEE OF SAN FRANCISCO, Plaintiff and Appellant, v. HOMEAWAY, INC, Defendant and Respondent.	A146178 (San Francisco City & County Super. Ct. No. CGC-15-543932)

I. INTRODUCTION

Housing Rights Committee of San Francisco (HRC) filed this lawsuit against HomeAway, Inc. (HomeAway) on behalf of itself and a proposed class of San Francisco residents, challenging HomeAway's operation of a "hosting platform" that can be used to arrange short-term apartment rentals in San Francisco. HRC sought damages and injunctive relief for violations of local ordinances restricting the rental of residential units for transient or tourist use; unlawful business practices in violation of California's Unfair Competition Law (the UCL); and creating a public and private nuisance. HRC also attempted to hold HomeAway liable as an aider and abettor for encouraging unnamed landlords to violate local ordinances, and for breach of the implied covenant of quiet enjoyment. The trial court entered judgment in favor of HomeAway after sustaining a demurrer to HRC's second amended complaint without leave to amend. We affirm.

II. STANDARD OF REVIEW

"We review an order sustaining a demurrer de novo to determine whether the complaint states facts sufficient to constitute a cause of action. [Citations.] We construe the complaint 'liberally . . . with a view to substantial justice between the parties' [citation] and treat it ' " 'as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." ' [Citations.]" (*Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299, 303-304.)

III. BACKGROUND

On February 2, 2015, HRC and two individuals filed a complaint on behalf of themselves and members of a proposed class against HomeAway and 100 Doe defendants, seeking damages and injunctive relief. In response to a demurrer, HRC alone filed an amended complaint on behalf of itself individually and a proposed class. On June 1, 2015, HRC filed a second amended complaint (SAC), which was captioned as a class action for damages and injunctive relief, and which became the operative pleading for purposes of this appeal.

According to the SAC, HRC is a nonprofit, formed to protect the interests of tenants in San Francisco. HomeAway is described as "the world's leading online marketplace for the vacation rental industry, with sites representing over one million paid listings of vacation rental homes in 190 countries." HomeAway's "portfolio" of "leading vacation rental websites" in the United States includes HomeAway.com, VRBO.com and VacationRentals.com. The proposed class that HRC seeks to represent consists of San Francisco tenants who live in buildings that contain units that were rented "through" HomeAway's Web sites as well as residents of adjacent buildings. The SAC contains an unwieldly set of general, often conclusory, allegations from which we distill several material contentions.

First, there is a housing crisis in San Francisco, which is due in large part to the "conversion of residential units into tourist or transient hotels" and the proliferation of

illegal short-term rentals of residential units. According to HRC's calculations, more than 5,000 residential properties in San Francisco are currently being rented as illegal short-term rentals. Furthermore, "[t]here are at least 1,270 vacation rentals listed on VRBO.COM and 1,226 rentals listed on HOMEAWAY.COM for rent in San Francisco at any one time, the majority in violation of Local and State laws."

Second, the use and/or conversion of residential units to short-term rentals has numerous adverse effects on San Francisco residents who live in or near buildings that contain these short-term rental units, including the removal of rent-controlled apartments from use and a corresponding dramatic rise in residential rents. Such usages also interfere with and disrupt the use of buildings by permanent residents by, among other things, increasing security problems, foot traffic, fire hazards, and noise that would not occur if the units were subject to long term use. Furthermore, according to HRC, "guests" who secure short-term rentals are "inconsiderate, destructive, violent, smoke in prohibited areas, have more guests than allowed, and [are] dangerous to the people in the surrounding apartments and neighborhoods, which have resulted in break ins in the buildings."

Third, HomeAway provides "material assistance" to "Hosts," a term HRC uses to refer to owners and lessees of property who use HomeAway's Web site platforms to offer short-term rentals in San Francisco. According to HRC, HomeAway "directly partners with Hosts, and provides material assistance to them, by dividing profits, by providing the Host with everything needed to operate a short-term rental business including an individual, publicly accessible online listing for the rental, free professional photography services, advertising, calendaring software, pricing guidelines, payment processing, cleaning services, key pick-ups for cleaning services, correspondence services, alerts for messages and scheduling, automated guest rental features, standard language for rental rules, detailed renter advice reviews, downloadable application, insurance, 24 hour support, legal information, advice on how to promote a rental, recommendations and phone support."

Fourth, Hosts who use HomeAway to rent units located in San Francisco violate any number of local laws. Alleged violations include provisions of the San Francisco Planning Code that establish conditional use procedures and requirements for operating a hotel, prohibit the conversion of residential housing to tourist use without a permit, and impose zoning restrictions in areas where it is lawful to operate a hotel. Hosts also allegedly violate provisions of the San Francisco Administrative Code that prohibit the use of a residential hotel unit for tourist purposes without permission, and the use of any residential unit for a transient purpose.

Fifth, HomeAway knows its hosting platform is routinely used to effectuate illegal short-term rentals and could easily prohibit this practice, but it refuses to do so. Furthermore, HomeAway has a "direct financial incentive to facilitate this tortious conduct.

Sixth, HomeAway violates local law by partnering with and providing material assistance to Hosts who violate the Planning Code and the Administrative Code. HomeAway also violates state law by facilitating violations of local law; acting as a real estate broker without a license; failing to disclose that short-term rentals advertised on its websites are illegal; and knowingly assisting Hosts in breaching duties to lawful tenants and neighbors who are entitled to the quiet enjoyment of their homes and neighborhoods.

Based on these contentions, HRC attempted to allege causes of action against HomeAway for (1) violating section 41.20 of the Residential Hotel Conversion and Demolition Ordinance, San Francisco Administrative Code, Chapter 41 (section 41.20); (2) violating section 41A.5, subdivision (a) of the Residential Unit Conversion and Demolition Ordinance, San Francisco Administrative Code, Chapter 41A (section 41A.5(a)); (3) aiding and abetting violations of section 41.20 and section 41A.5(a); (4) unlawful business practices under the UCL, Business and Professions Code section 17200; (5) creating a private nuisance; (6) creating a public nuisance; and (7) aiding and abetting breaches of the implied covenant of quiet enjoyment.

On July 8, 2015, the trial court held a hearing and then sustained HomeAway's demurrer to the SAC without leave to amend. In an eight-page order filed on July 10, the

court outlined its reasons for finding that HRC did not state a claim under any of the pleaded theories. Applying our de novo standard of review, we reach many of the same conclusions set forth in the trial court's order.

IV. DISCUSSION

A. The San Francisco Housing Ordinances

HRC contends the first two causes of action in the SAC state valid claims against HomeAway for violating San Francisco housing ordinances that restrict short-term rentals of residential rental units located in San Francisco.

1. The Residential Hotel Unit Ordinance

The Residential Hotel Unit Conversion and Demolition ordinance (Residential Hotel Unit Ordinance) establishes the "status" of residential hotel units, regulates the demolition and conversion of residential units to other uses, and establishes administrative and judicial remedies for failing to comply with this ordinance. (S.F. Admin. Code, ch. 41, § 41.2.) The purpose of this ordinance is "to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition." (*Ibid*.)

Section 41.20, subdivision (a) states: "(a) **Unlawful Actions**. It shall be unlawful to: [¶] (1) Change the use of, or to eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter; [¶] (2) Rent any residential unit for a term of tenancy less than seven days except as permitted by Section 41.19 of this Chapter; [¶] (3) Offer for rent for nonresidential use or tourist use a residential unit except as permitted by this Chapter."

In its first cause of action, HRC attempted to allege that HomeAway violated section 41.20, subdivisions (a)(2) and (a)(3). Notably, those two provisions are not limited to residential hotels. They restrict the acts of renting or offering to rent any residential unit for a term of less than seven days except as permitted by section 41.19, or some other provision of the ordinance. Section 41.19, titled "TEMPORARY CHANGE

OF OCCUPANCY," establishes a procedure pursuant to which a tourist unit may be temporarily rented to a permanent resident and a residential unit may be temporarily rented as a tourist unit without changing the legal designation of the unit.

The SAC does not state a valid claim under section 41.20 because HRC did not allege facts to establish that HomeAway (1) owned or had a possessory interest in any residential unit in San Francisco; or (2) had the legal authority to rent or offer to rent any residential hotel unit in San Francisco. Furthermore, since section 41.19 constitutes an express exception for temporary changes in occupancy, a properly pleaded claim would also require factual allegations establishing that this exception did not apply. Thus, the demurrer to this cause of action was properly sustained.

HRC alleged that HomeAway violated section 41.20 by "unlawfully offering to rent residential units for less than seven days and by renting residential units for less than seven days." HRC contends that this "simple allegation" states a valid claim because it charges HomeAway with conduct that is expressly prohibited by the ordinance. This allegation is a conclusion of law unsupported by any properly pleaded facts to show that HomeAway offered to rent or rented a unit in San Francisco. While we treat the demurrer as "admitting all material facts properly pleaded," we "do not assume the truth of contentions, deductions or conclusions of law. [Citations.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) Furthermore, HRC expressly alleged that HomeAway operates a business that assists Hosts who rent their units, thus implicitly acknowledging that HomeAway does not directly rent or offer to rent residential units.[1]

Nevertheless, HRC argues that the only requirements for violating section 41.20, subdivisions (a)(2) and (a)(3) are "renting" or "offering" the residential unit for a tenancy

[1] HRC contends it can amend the SAC to identify specific units that were improperly rented and specific residential units that were improperly converted to tourist use. This offer rings hollow as HRC does not identify even one such unit. In any event, the promised information would not cure the defect with respect to this claim. HRC would have to supply facts establishing that HomeAway had the legal authority to rent or to offer to rent a San Francisco residential unit. Absent that authority, HomeAway cannot be in violation of the ordinance.

of less than seven days and, because the statutory language is clear, it is legal error to impose an additional requirement of either ownership or authority over the unit. However, ownership or authority over a residential unit is not an additional requirement, but a *prerequisite* for engaging in the conduct that is prohibited by the ordinance.

HRC's heavy reliance on *Hellum v. Breyer* (2011) 194 Cal.App.4th 1300, 1311 is misplaced. That case involved section 25504 of the Corporations Code, a statute that imposes collateral liability for violations of the securities law on outside directors based solely on their status as directors without requiring proof that they actually controlled the illegal transaction. Perhaps other than the general discussion concerning canons of statutory construction (*id.* at pp. 1309-1312), this division's opinion in *Hellum* is not relevant as that decision had nothing to do with the rental ordinance at issue in this case, section 41.20. Moreover, section 41.20 is not a collateral liability statute as was Corporations Code section 25504 in *Hellum*.

Taking a different approach, HRC contends that even if legal authority over a rental unit is required, HRC stated a valid claim under section 41.20 by alleging that HomeAway handled "cleaning services" and "key pick-ups for cleaning services" for its Host clients. HRC argues these allegations establish that HomeAway had "access, possessory rights and authority over the units." Obviously, the authority to enter and clean a rental unit is factually and legally very different from the authority to rent or offer to rent that unit to a third party. As pointed out by the trial court, if that type of nonpossessory, tangential involvement could be construed as the act of renting or offering to rent units, the net of entanglement would cover those providing the cleaning services, financial institutions processing rent payments, and utility companies. Indeed, HRC's logic would also extend to newspapers, periodicals and Web sites such as Craigslist that might "facilitate" short term rentals in San Francisco through publishing advertisements, among other service providers.

Finally, HRC contends that limiting the reach of section 41.20 contravenes the purpose of the law, while "assigning responsibility" to any party who participates in the conversion of residential housing will further that purpose. But, as discussed above, the

purpose of this law is not to prohibit the conversion of residential housing, but to regulate the conversion or demolition of residential hotel units. (S.F. Admin. Code, ch. 41, § 41.2.) The San Francisco Board of Supervisors made extensive findings in support of this regulatory scheme including that "[r]esidential hotel units are endangered housing resources and must be protected" (§ 41.3, subd. (f)), but also that "[t]ourism is essential for the economic well being of San Francisco," and that "it is in the public interest that a certain number of moderately priced tourist hotel units be maintained." (§ 41.3, subd. (j).) In any event, HRC's policy argument is better made to lawmakers. The language in section 41.20 is unambiguous. To violate this section a person or entity must have a legal right to rent or offer to rent a residential housing unit in San Francisco.

2. The Residential Unit Ordinance

In its second cause of action, HRC attempted to allege that HomeAway violated section 41A.5(a), the unlawful conduct provision of the Residential Unit Conversion and Demolition ordinance (Residential Unit Ordinance). (S.F. Admin Code, ch. 41A.) An amendment to this ordinance went into effect on February 1, 2015 (the February 2015 amendment), the day before HRC filed this lawsuit against HomeAway. The parties disagree about whether or how the February 2015 amendment impacts HRC's ability to state a claim against HomeAway. For clarity, we briefly review some pertinent legislative history before proceeding to our review of the SAC allegations.[2]

a. Background

The Residential Unit Ordinance regulates the conversion of residential units to tourist and transient use and establishes administrative and judicial remedies for failing to comply with the regulatory scheme. (S.F. Admin. Code, ch. 41, § 41A.2.) The purpose of this ordinance is "to benefit the general public by minimizing the adverse impacts on the housing supply and on persons and households of all income levels resulting from the loss of residential units through their conversion to tourist and transient use." (*Ibid.*)

[2] During the demurrer proceedings, the trial court took judicial notice of legislative history materials pertaining to this ordinance.

A 2012 amendment extended the ordinance's "restrictions against converting apartment units to short-term occupancies to tenants or guests of business entities that rent such apartments." (S.F. Ord. No. 224-12, File No. 120299, App. 11/1/2012, Eff. 12/1/2012, p. 1.) Accordingly, section 41A.5(a) was amended to state: "(a) Unlawful Actions: It shall be unlawful for (1) any owner to offer a residential unit for rent for tourist or transient use, (2) any owner to offer a residential unit for rent to a business entity that will allow the use of a residential unit for tourist or transient use, or (3) any business entity to allow the use of a residential unit for tourist or transient Use." (*Id*. at p. 4.) The term "business entity" was not defined in the ordinance. However, "Tourist or Transient Use" was a defined term. The 2012 amendment modified that term to define a Tourist or Transient Use as follows: "Use of a residential unit for occupancy for less than a 30-day term of tenancy, or occupancy for less than 30 days of a residential unit leased or owned by a business entity, whether on a short-term or long term basis, including any occupancy by employees or guests for less than 30 days where payment for the residential unit is contracted for or paid by the business entity." (*Id*. at pp. 3-4.)

As noted, another amendment to the ordinance went into effect on February 1, 2015. (S.F. Ord. 218-14, File No. 140381, App. 10/27/2014, Eff. 11/26/2014, Oper. 2/1/2015.)[3] The February 2015 amendment added section 41A.5, subdivision (g) (section 41A.5(g)) and related provisions, which created a regulatory scheme for lawfully offering residential rental units for short term uses. (*Id*. at p. 17.) In other words, this amendment created a statutory exception to the unlawful conduct codified in section 41A.5(a), as the language of that provision *now* reflects. As amended, section 41A.5(a) states: "(a) **Unlawful Actions**. Except as set forth in subsection 41A.5(g), it shall be unlawful for [¶] (1) any Owner to offer a Residential Unit for rent for Tourist or Transient Use; [¶] (2) any Owner to offer a Residential Unit for rent to a Business Entity that will

[3] We take judicial notice of the ordinance adopting the February 2015 amendment. (Evid. Code, §§ 451, 425.) We note that some provisions added by this ordinance were amended after judgment was entered in this case.

allow the use of a Residential Unit for Tourist or Transient Use; or [¶] (3) any Business Entity to allow the use of a Residential Unit for Tourist or Transient Use."

Section 41A.5(g), titled "Exception for Short-Term Residential Rental," established a regulatory scheme pursuant to which the "Permanent Resident" of a residential unit may offer his or her "Primary Residence" as a "Short Term Residential Rental" without violating section 41A.5(a). (§ 41A.5(g)(1)-(g)(3).) To qualify for this exception, the permanent resident must, among other things, occupy the residential unit for a specified number of days per calendar year; maintain records pertaining to short-term rentals of the unit; comply with a panoply of regulatory requirements, including collection and payment of applicable taxes and maintenance of insurance; register the residential unit on a "Short-Term Residential Rental Registry"; and include the unit's registration number on any listing used to offer a short-term rental, including specifically on any "Hosting Platform listing." (§ 41A.5(g)(1)-(g)(3).)

The February 2015 amendment introduced the term "Hosting Platform," which was defined as: "A person or entity that provides a means through which an Owner may offer a Residential Unit for Tourist or Transient Use. This service is usually, though not necessarily, provided through an online platform and generally allows an Owner to advertise the Residential Unit through a website provided by the Hosting Platform and provides a means for potential tourist or transient users to arrange Tourist or Transient Use and payment, whether the tourist or transient pays rent directly to the Owner or to the Hosting Platform." (S.F. Ord. No. 218-14, *supra*, at p. 11.) The February 2015 amendment also drew an express distinction between a Hosting Platform and a Business Entity by adding the following definition a "Business Entity": "A corporation, partnership, or other legal entity that is not a natural person that owns or leases one or more residential units." (*Ibid*.)

The February 2015 amendment imposed new requirements on Hosting Platforms in subsection 41A.5(g)(4). (S.F. Ord. No. 218-14, *supra*, at pp. 21-22.) First, all Hosting Platforms were required to provide a notice to any user of its service who listed a residential unit located in San Francisco. (*Id*. at p. 21.) The notice had to include

information about the Administrative Code provisions regulating short-term rentals and other pertinent regulatory requirements. (*Ibid*.) Second, Hosting Platforms were required to comply with specified Business and Tax Code requirements and keep records of their compliance. (*Id*. at p. 22.) A Hosting Platform that failed to comply with the notice requirement of this ordinance was subject "to the administrative penalties and enforcement provisions of this Chapter, including but not limited to payment of civil penalties . . . ." (*Ibid*.)

b. Analysis

Importantly, HRC does not contend that it stated a claim under the February 2015 version of section 41A.5(g), which imposed new requirements on Hosting Platforms. Instead, the theory pleaded in the SAC and pursued throughout this litigation is that HomeAway is directly liable for violating section 41A.5(a). By its express terms, section 41A.5(a) applies only to an "Owner" of a residential unit or a "Business Entity" that allows a residential unit to be used for a tourist or transient use. As noted, a Business Entity is defined as a "corporation, partnership, or other legal entity that is not a natural person that owns or leases one or more residential units." (§ 41A.4.) In this case, as we have already discussed, HRC failed to allege facts to establish that HomeAway either owns or leases any San Francisco rental unit that has or could be put to a transient or tourist use. Thus, HRC failed to state a claim against HomeAway for violating section 41A.5(a).

HRC contends that the definition of a "Business Entity" in section 41A.4 is irrelevant because the SAC states a claim under section 41A.5(a) based on activities HomeAway allegedly engaged in before the February 2015 amendment went into effect. Pointing out that the term Business Entity was not defined prior to February 2015, HRC takes the view that the former version of section 41A.5 made it unlawful for *any* business entity to allow the use of a residential unit for tourist or transient use. Thus, HRC maintains that it stated a valid claim by alleging that HomeAway was a business entity that allowed the use of residential units for transient or tourist use.

To be sure, the February 2015 amendment made substantive changes to the ordinance. Most notably, it established a new set of rules authorizing short term residential rentals under specified circumstances. (§ 41A.5(g).) However, HRC's theory that the February 2015 amendment changed the substantive meaning of the phrase "Business Entity" in section 41A.5(a) is factually unreasonable and legally unsupported. Indeed, as we note above, the legislative history of section 41A.5(a) indicates that the reason the unlawful conduct provision of the ordinance was amended in 2012 was to address the problem of business entities that were renting residential units for short term uses.

Furthermore, the fact that the February 2015 amendment imposed new but discrete requirements on Hosting Platforms is additional evidence that San Francisco lawmakers never intended that the term "Business Entity" in section 41A.5(a) would apply to Hosting Platforms like HomeAway. The February 2015 version of section 41A.5(g)(4) limited the responsibility of Hosting Platforms to providing notices to short term renters, collecting and remitting transient occupancy taxes and maintaining records relating to the collection and remittance of such. (S.F. Ord. No. 218-14, *supra*, at p. 21.) By carving out these discrete responsibilities of Hosting Platforms, the Residential Unit Ordinance specifically limited the role and liability of Hosting Platforms to the aforementioned duties. Had the ordinance intended to make such "facilitators" subject to general liability under section 41A.5(a), the drafters would have explicitly referenced Hosting Platforms as well as "Owners" and "Business Entities" in that subdivision as well.

Finally, both before and after the February 2015 amendment, section 41A.5(a) has expressly applied only to business entities that "allow" the use of residential units for a tourist or transient use. In its SAC, HRC made conclusory allegations that HomeAway is a business entity "implicated" by the ordinance, but it alleged no facts to support that contention. Specifically, HRC did not allege that HomeAway had the authority to "allow" any residential unit in San Francisco to be used for a tourist or transient purpose.

HRC contends that neither ownership nor authority over the unit is required by the plain wording of section 41A.5(a); grafting additional requirements onto this provision

would be improper; and, in any event, HomeAway did have possessory rights over units because it arranged cleaning services on behalf of the owners. The flaws in each of these arguments are outlined above in our discussion of the first cause of action.

Before the February 2015 amendment, section 41A.5(a) made specific actions unlawful: renting a residential unit for transient or tourist use; or allowing the use of a residential unit for a tourist or transient use. An entity could not engage in this prohibited conduct unless it owned or had legally cognizable authority over the unit in question. These same conclusions apply with equal or greater force after the February 2015 amendment. While HomeAway may have wholly separate obligations under section 41A.5(g), its hosting activities do not give rise to direct liability under section 41A.5(a).[4]

B. Aiding and Abetting Claims

HRC contends that, regardless of whether HomeAway can directly violate section 41.20 or section 41A.5(a), the third cause of action in the SAC states a valid claim for aiding and abetting violations of these ordinances based on HomeAway's facilitation of short-term rentals. HRC also relies on an aider and abettor theory to support its claim in the seventh cause of action that HomeAway is jointly liable for breaches of the implied covenant of quiet enjoyment allegedly committed by Hosts who use HomeAway's services.

1. The Aider and Abettor Rule

"California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort." (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1144 (*Casey*).) " 'Liability may . . . be imposed on one who aids and

[4] In its reply brief on appeal, HRC contends that a pending amendment to section 41A that was approved while this case was on appeal confirms that HomeAway is regulated by the Housing Conversion Ordinance. In support of this argument, HRC filed a request for judicial notice of the amendment, which was approved by the San Francisco Board of Supervisors on June 14, 2016. This 2016 amendment pertains to the expansion of responsibilities imposed on Hosting Platforms under section 41A.5, in the future. As such it has no relevance to this litigation brought under the ordinance existing at the time suit was filed. Therefore, HRC's request for judicial notice is denied.

abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.' [Citations.]" (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326 (*Fiol*).) "Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. [Citation.] 'As a general rule, one owes no duty to control the conduct of another . . . .' [Citations.]" (*Id.* at p. 1326; see also *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879.) "[W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749.) The defendant must have "acted with the intent of facilitating the commission of that tort. [Citation.]" (*Gerard v. Ross* (1988) 204 Cal.App.3d 968, 983.)

2. The Housing Ordinances

Initially we note that HRC is attempting to invoke a common law tort remedy not in connection with a tort cause of action, but instead to expand civil liability for an alleged violation of municipal ordinances. It cites no authority allowing this application, and this cause of action fails for this reason alone.[5]

Moreover, our discussion above makes clear that section 41.20 and section 41A.5(a) do not hold a facilitator of a rental transaction jointly liable for a violation committed by a party who rents or offers to rent a residential unit for a prohibited short-term use. As we have pointed out earlier in this opinion, the trial court observed that

[5] HRC insists that the common law aider and abettor rule expands the scope of liability for any "wrong," even an ordinance violation that does not itself prohibit facilitation. HRC fails to provide authority for this contention. Instead, it erroneously relies on *Steuve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 324, a case that involved a claim for aiding and abetting fraud, an intentional common law tort.

under HRC's expansive interpretation, "facilitating a rental" would potentially embrace "[a]ll sorts of entities—from banks, cleaning services, utilities, and so on— . . . but these surely are not liable under the ordinance." Furthermore, the February 2015 amendment reinforces the conclusion that these ordinances impose separate and distinct obligations on owners of residential units, business entities with the authority to rent residential units, and hosting platforms.

For these reasons we conclude that HRC failed to state a cause of action for aiding and abetting violations of the housing ordinances by owners or lessors.

3. The Covenant of Quiet Enjoyment

We also find no authority supportive of HRC's assumption that the aider and abettor rule can be applied to hold a third party liable for a landlord's breach of the implied covenant of quiet enjoyment. As discussed above, California recognizes the common law rule of aider and abettor liability for the commission of a tort. (*Casey*, *supra*, 127 Cal.App.4th at p. 1144.) However, the implied covenant of quiet enjoyment is not an intentional tort, but a theory of constructive eviction arising out of a lease. (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 588.) "Civil Code section 3300 provides the measure of contract damages for breach of the covenant of quiet enjoyment implied in a lease. [Citations.]" (*Nativi v. Deutsche Bank National Trust Co*. (2014) 223 Cal.App.4th 261, 293 (*Nativi*).)

On appeal, HRC contends that a breach of this covenant can be premised on the actions of a third party who, with the landlord's permission, interferes with the lessee's quiet enjoyment with the landlord's permission. (Citing *Nativi*, *supra*, 223 Cal.App.4th at p. 307.) The *Nativi* court found that there was a triable issue of material fact as to whether a bank, *as landlord*, was liable for breach of the implied covenant caused by the interference of a third party acting on the landlord's behalf. It did not find that *the third party* also could be held liable for breaching the covenant.

Even if the aider and abettor rule can be applied to hold a third party liable for a landlord's breach of the implied covenant of quiet enjoyment, there are other defects in HRC's claim. As noted, the implied covenant is an obligation the landlord owes the

tenant. " '[A]ny disturbance of the tenant's possession by the lessor or at his procurement . . . which has the effect of depriving the tenant of the beneficial enjoyment of the premises, amounts to a constructive eviction, provided the tenant vacates the premises within a reasonable time. [Citations.]' [Citations.] The Supreme Court stated in *Standard Livestock Co. v. Pentz* (1928) 204 Cal. 618, 625 . . . , that 'the covenant of quiet possession in a lease is not breached until there has been an actual or constructive eviction.' Nevertheless, some authorities recognize that a tenant may sue for breach of the covenant while remaining in possession. [Citations.]" (*Nativi*, *supra*, 223 Cal.App.4th at p. 292.)

In this case, the SAC allegations show that HRC is not a tenant of a rental unit who suffered a constructive eviction. Implicitly conceding this fact, HRC contends that it has standing to bring this claim because it represents tenants. Even if this contention is sound, HRC did not allege facts to establish that a landlord affiliated with HomeAway breached the implied covenant owed to a tenant affiliated with HRC. HRC generally alleged that "guests" of short-term rentals create all sorts of disturbances, but it did not allege any facts to establish that a tenant it represents was constructively evicted as a result of disturbances caused by a "guest" in possession of an illegal short-term rental.

Under HRC's theory of the law, it can establish that HomeAway knowingly participated in a breach of the implied covenant simply by showing that HomeAway renders assistance in completing "tourist rentals." This is clearly wrong. If aider and abettor liability can attach to breach of the implied covenant, HRC would still have to show that (1) HRC (or its member) was constructively evicted by his or her landlord's breach of the implied covenant (*Nativi*, *supra*, 223 Cal.App.4th at p. 292); and (2) HomeAway made the conscious decision to assist the landlord in effectuating that constructive eviction (*Howard*, *supra*, 2 Cal.App.4th at p. 749). The SAC contains insufficient facts to satisfy either of these requirements.

C. The UCL

HRC contends it stated a valid claim against HomeAway for multiple violations of the UCL arising out of HomeAway's operation of a short-term rental business. The UCL

prohibits "unfair competition," which is defined to mean and include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (§ 17500 et seq.)]." (Bus. & Prof. Code, § 17200; see generally *Drum v. San Fernando Valley Bar Assn*. (2010) 182 Cal.App.4th 247, 252.)

In its fourth cause of action, HRC alleged that HomeAway engaged in two categories of unlawful conduct: (1) directly violating local and state laws; and (2) aiding and abetting renters who violate local and state law. HRC further alleged that it was injured by HomeAway's conduct because it (1) paid for apartments without being able to enjoy those apartments due to "increased safety and security risks, noise, increased foot traffic, and other disturbances," and (2) paid rent for apartments "where the value of their apartments was reduced due to the short-term rentals." As damages for these alleged injuries, HRC sought restitution from HomeAway "including without limitation, all monies collected due to the conversion of residential units to tourist units and for a portion of their rentals paid while units in the building were rented out."

The trial court found the SAC allegations did not establish that HRC has standing to bring a UCL claim, or that HomeAway committed a substantive violation of the UCL. With regard to the issue of standing, allegations that the plaintiffs suffered injury were carried over from an earlier complaint that was filed on behalf of individual tenant plaintiffs who are no longer parties to this litigation. However, the trial court found it was reasonably likely the standing problem could be cured by amending the SAC to allege that HRC acquired organizational standing by spending money and staff resources to investigate claims against HomeAway on behalf of its members. (See *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270, 1280, but see *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223.) On appeal, the parties disagree about whether HRC can allege UCL standing. We decline to address this issue because, assuming HRC can allege standing, it has not demonstrated that it can allege a substantive violation of the UCL.

HRC attempts to invoke the "unlawful" business practice prong of the UCL, which " ' "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable. [Citation.]" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) HRC contends that it stated a claim under the unlawful prong of the UCL by alleging valid causes of action against HomeAway for violating section 41.20 and section 41A.5(a). This contention fails for the reasons outlined earlier in this opinion, which establish that the SAC does not state a valid claim under either ordinance. Beyond that, the SAC contains only conclusory allegations that HomeAway's business practices violated other local and state laws; an assertion that does not sufficiently plead HomeAway's liability under any of those statutes.

D. Nuisance

HRC contends that it stated valid claims against HomeAway for creating a private and public nuisance by allowing and promoting short-term rentals in San Francisco to the detriment of both plaintiffs and the general public.

1. Overview of the Law

A nuisance is defined by statute as "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway." (Civ. Code, § 3479.)

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) Every nuisance that is not a public nuisance is a private nuisance. (Civ. Code, § 3481.)

To hold HomeAway liable for a public nuisance, HRC would have to establish the following elements: (1) HomeAway created a condition that interfered with the comfortable enjoyment of life or property; (2) the condition affected a substantial number

of people; (3) an ordinary person would be unreasonably annoyed or disturbed by the condition; (4) the seriousness of harm outweighs the social utility of HomeAway's conduct; (5) HRC did not consent to the conduct; (6) HRC suffered harm that was different from the type of harm suffered by the general public; and (7) HomeAway's conduct was a substantial factor in causing HRC's harm. (See *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 (*Birke*); *Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352 (*Department of Fish*); Judicial Council of Calif., Civ. Jury Instns. (2011) CACI No. 2020.)

To establish that HomeAway's conduct constituted a private nuisance, HRC would have to satisfy all of the elements listed above, except it would not have to show that a substantial number of people were harmed or that HRC suffered harm that was different from that suffered by the general public. (*Department of Fish*, *supra*, 197 Cal.App.4th at p. 1352.) Instead, HRC would have to plead that HRC owned, leased, occupied or controlled real property; that the condition HomeAway created interfered with HRC's use of its property; and that HRC was harmed as a result of that interference. (*Ibid.*; see also Judicial Council of Calif., Civ. Jury Instns., *supra*, CACI No. 2021.)

2. Analysis

In the SAC, HRC alleged that HomeAway created a nuisance by operating a short-term rental business that assists hosts who complete short-term rentals because guests of short-term rentals caused disturbances that harmed plaintiffs and the general public. According to the SAC, "Plaintiffs were disturbed" by parties, smoking, noise, traffic, pollution and lack of security; these disturbances were due to "short-term rentals"; and these disturbances interfered with the enjoyment of property. These allegations are deficient for at least two independent reasons.

First, HRC did not allege that it suffered any cognizable harm entitling it to maintain a public or private nuisance claim against HomeAway. Indeed, the SAC contains an implicit admission that HRC did not suffer such harm because it states that plaintiffs "other than [HRC] are individuals who own, lease, occupy, or control property affected by Defendant's conduct." As the trial court noted, this and other allegations that

plaintiffs were injured by HomeAway's conduct were carried over from a prior version of the complaint when there were individual plaintiffs in this case. HRC is now the only plaintiff in this case and it failed to allege facts to establish either that (1) it suffered some harm that was different than that suffered by the general public; or (2) it had a possessory interest in property that was harmed by the condition that HomeAway allegedly created. Thus, HRC did not state a valid claim for a public or private nuisance. (*Department of Fish, supra*, 197 Cal.App.4th at p. 1352.)

Second, as noted above, to state a claim for a public or private nuisance, HRC had to allege that HomeAway created a condition that unreasonably interfered with the comfortable use and enjoyment of property. (*Department of Fish, supra*, 197 Cal.App.4th at p. 1352.) Liability for nuisance is limited to damage "proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others." (*Martinez v. Pacific Bell* (1990) 225 Cal.App.3d 1557, 1565.) Here, HRC did not allege facts which would establish that HomeAway was responsible for creating any of the disturbances that allegedly interfered with the use or enjoyment of property. As the trial court found, HRC did not identify any conduct by HomeAway that proximately caused the disturbances about which it complains. Instead, it rested its case on the purely speculative conclusion that the alleged disturbances were "due to . . . short-term rentals."

HRC contends that its nuisance claims are sufficient to withstand demurrer because it expressly alleged that HomeAway participated in the creation of a nuisance by facilitating short-term rentals in San Francisco, citing *Birke, supra,* 169 Cal.App.4th 1540. In *Birke*, a minor resident of an apartment complex sued her landlord for personal injuries caused by exposure to secondhand smoke pursuant to a theory that the landlord failed to limit secondhand smoke in outdoor areas of the apartment complex. The *Birke* court found that the plaintiff's allegations were sufficient to establish that the landlord participated in the creation of a public nuisance when her complaint stated that (1) the landlord encouraged smoking in common areas where smoking was prohibited by placing ashtrays in those areas; and (2) the landlord's agent admitted that the landlord made an

affirmative business decision not to restrict smoking in common areas so that the apartments would be more marketable. (*Id*. at p. 1552.) The *Birke* court also found that to the extent the complaint could be construed as alleging only a failure to act, a valid nuisance claim was nevertheless stated because "plainly" the landlord had a "duty to maintain its premises in a reasonably safe condition. [Citations.]" (*Ibid*.)

Birke is inapposite for two reasons. First, in the present case HRC alleged that HomeAway facilitated short-term rentals by others, but it did not allege that HomeAway participated in the creation of the disturbances that it attributes to a third party (in this case, short-term renters) as did the landlord and landlord's agent in *Birke*. Second, unlike the *Birke* plaintiff, HRC has not alleged any facts imposing a duty on HomeAway to take some affirmative action to control the conduct of short-term renters. Once again, the absence of any ownership or possessory interest in the properties involved eliminates any such contention. Thus, *Birke* does not alter our conclusion that the SAC fails to allege facts to satisfy the proximate cause elements of either nuisance claim.

HRC attempts to avoid this conclusion by characterizing HomeAway's conduct as a nuisance per se. "The concept of a nuisance per se arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1206-1207 (*Beck*).) Courts have held that the determination whether a challenged action or condition constitutes a nuisance requires a balancing of factors. (*Id*. at p. 1207.) "However, where the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made and in this sense its mere existence is said to be a nuisance per se. [Citation.]" (*Ibid.*)

The nuisance per se rule does not excuse plaintiffs from having to allege and prove that the defendant is legally responsible for creating the nuisance. Thus, to the extent HRC relies on allegations that disturbances such as loud parties, noise, and safety created a condition that interfered with the comfortable enjoyment of life or property, the nuisance claims against HomeAway fail because HRC did not allege facts to show that

these disturbances were proximately caused by HomeAway. To the extent HRC is suggesting that the act of facilitating a short-term rental constitutes a nuisance in and of itself, HRC does not identify any specific law which expressly declares such conduct to be a nuisance. (*Beck*, *supra*, 44 Cal.App.4th at pp. 1206-1207.)

On appeal, HRC argues that it "pleaded" at least two "code violations" to support its nuisance per se claim. First, it relies on SAC allegations that HomeAway violated unspecified sections of the San Francisco Planning Code. However, these pleading allegations were vague and conclusory, and HRC did not clarify them in its appellate briefs.[6] Second, HRC relies on SAC allegations that HomeAway violated sections 10130 and 10131 of the Business and Professions Code by acting as a real estate broker without obtaining a license. Contrary to HRC's apparent assumption, these alleged violations do not support a nuisance per se cause of action because the law does not expressly declare such conduct to be a nuisance.

E. Leave to Amend

" 'While the decision to sustain or overrule a demurrer is a legal ruling subject to de novo review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion. [Citations.] When the trial court sustains a demurrer without leave to amend, we must also consider whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. If the defect can be cured, then the judgment of dismissal must be reversed to allow the plaintiff an opportunity to do so. The plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect by amendment. [Citations.] A trial court abuses its discretion if it sustains a demurrer without leave to amend when the plaintiff shows a reasonable possibility to cure any

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[6] This is not the only issue HRC raises but fails to support with analysis. " 'Appellate briefs must provide argument and legal authority for the positions taken. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." ' [Citation.] 'We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.' [Citations.]" (*Cahill v. San Diego Gas & Electric Co*. (2011) 194 Cal.App.4th 939, 956.)

defect by amendment. [Citations.] If the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed.' [Citation.]" (*Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 432 (*Green Valley*).)

"The plaintiff's 'burden of demonstrating a reasonable possibility to cure any defect' [citation] is not pro forma. ' "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 plaintiff must clearly and specifically set forth . . . factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary." ' [Citations.]" (*Green Valley*, *supra*, 241 Cal.App.4th at p. 432.)

In this case, HRC maintains there are no defects in the SAC, but nevertheless offers to make supplemental allegations in support of its claims that HomeAway (1) has authority over residential units that are rented through its hosting platform; and (2) has knowledge about ordinance violations allegedly committed by renters who use its services. These general offers are insufficient to establish that the denial of leave to amend amounted to an abuse of discretion. HRC has not set forth specific factual allegations that will alter the legal effect of its pleading in a way that will salvage any of the defective claims.

HRC contends it should be granted leave to amend because "key evidence" that can be obtained through further discovery will likely cure any defects in the SAC. As support for this contention, HRC misconstrues *Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612. The appellate court in that case found that the plaintiff stated a valid claim for breach of oral contract generally, and any uncertainty as to its precise terms could be clarified during discovery. Here, by contrast, HRC has failed to state any valid claim against HomeAway despite multiple opportunities. HRC's hope that discovery might produce facts that would support a legally cognizable claim against HomeAway provides no basis for concluding that the trial court abused its discretion in denying leave to amend.

V. DISPOSITION

The judgment is affirmed. In the interests of justice, the parties are ordered to bear their own costs of appeal.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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STREETER, J.