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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PARAMOUNT AUTO BODY SHOP, INC., Plaintiff and Appellant, v. MITCHELL INTERNATIONAL, INC., Defendant and Respondent.	D058664 (Super. Ct. No. 37-2009-00084102-CU-FR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed.

Plaintiff Paramount Auto Body Shop, Inc. (Paramount), appeals a judgment entered in favor of defendant Mitchell International, Inc. (Mitchell), after the trial court sustained Mitchell's demurrers to certain causes of action and then granted its motion for summary judgment on the sole remaining cause of action. On appeal, Paramount contends the trial court erred by: (1) sustaining Mitchell's demurrers to the causes of action for fraud, negligent misrepresentation, breach of the implied covenant of good

faith and fair dealing, conspiracy, breach of oral contract, breach of implied contract, intentional interference with prospective contractual relations, unfair business practices (Bus. & Prof. Code, § 17200),[1] unfair competition/false advertising, and intentional interference with present contractual relations; and (2) granting Mitchell's motion for summary judgment after finding there was no triable issue of material fact on the remaining cause of action for breach of written contract and entering judgment for Mitchell.

FACTUAL AND PROCEDURAL BACKGROUND

Mitchell supplies software and labor time estimate data to automobile repair shops and automobile insurance companies to assist them in estimating the time required to perform various automobile collision damage repairs. Paramount is an automobile body repair shop and a former customer of Mitchell.

On June 4, 2008, Mitchell and Paramount entered into an end user license agreement (Contract) with a one-year term that granted Paramount a license to use Mitchell's Ultramate software. That software provides data regarding the time required to perform certain automobile collision damage repairs.

On February 24, 2009, Paramount filed a complaint against Mitchell. On March 4, it filed a first amended complaint. Mitchell filed a demurrer to the first amended complaint. The trial court sustained the demurrer *without* leave to amend to the

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1 All statutory references are to the Business and Professions Code unless otherwise specified.

causes of action for fraud, breach of the implied covenant of good faith and fair dealing, conspiracy, negligent misrepresentation, and accounting. The court sustained the demurrer *with* leave to amend as to the sole remaining cause of action for breach of contract. On May 7, 2009, Mitchell sent Paramount a letter notifying Paramount that it would not be renewing the term of the Contract.

Paramount filed a second amended complaint alleging not only a cause of action for breach of written contract, but also causes of action for negligence, breach of oral contract, breach of implied contract, intentional interference with present contractual relations, intentional interference with prospective contractual relations, unfair business practices in violation of section 17200, and unfair competition/false advertising. Mitchell filed a demurrer to the second amended complaint. The trial court sustained the demurrer *without* leave to amend to the causes of action for negligence, breach of oral contract, breach of implied contract, intentional interference with prospective contractual relations, section 17200 unfair business practices, and unfair competition/false advertising. The court sustained the demurrer *with* leave to amend as to the causes of action for breach of written contract and intentional interference with present contractual relations.

Paramount filed a third amended complaint alleging causes of action for breach of written contract and intentional interference with present contractual relations. Mitchell filed a demurrer to the third amended complaint. The trial court sustained the demurrer *without* leave to amend to the cause of action for intentional interference with present contractual relations and overruled the demurrer as to the cause of action for breach of

written contract. The trial court thereafter denied Paramount's motion for leave to file a fourth amended complaint.

Mitchell filed a motion for summary judgment on the sole remaining cause of action for breach of written contract. Paramount opposed the motion. The trial court granted the motion for summary judgment, finding there were no triable issues of material fact and Mitchell was entitled to judgment on the cause of action for breach of contract. On October 7, 2010, the court entered judgment for Mitchell. Paramount timely filed a notice of appeal.

DISCUSSION

I

Demurrer Standard of Review

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, . . . we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has

occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law, and it raises only a question of law. [Citations.] On a question of law, we apply a de novo standard of review on appeal." (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.)

II

Fraud and Negligent Misrepresentation Causes of Action

Paramount contends the trial court erred by sustaining without leave to amend Mitchell's demurrer to the fraud and negligent misrepresentation causes of action alleged in the first amended complaint.

A

In demurring to the fraud and negligent misrepresentation causes of action alleged in the first amended complaint, Mitchell argued that Paramount did not state a cause of action because it had judicially admitted in the first amended complaint that it had not justifiably relied on any purported fraud or other misrepresentations in deciding to purchase Mitchell's software. Mitchell argued Paramount had expressly alleged, and thereby admitted, it purchased Mitchell's software because it was required by various insurance companies to purchase and use it to be paid for its repair services. In support of its argument, Mitchell cited paragraph 17 of the first amended complaint in which Paramount alleged: "Paramount and other body shops have been [required] by various insurance companies to purchase and use Mitchell software to determine damage."

Mitchell argued that allegation constituted a judicial admission and precluded Paramount from pleading or proving Mitchell's purported misrepresentations caused it to purchase the software and that absent those misrepresentations it would not, in all reasonable probability, have purchased the software. Therefore, the requisite element of justifiable reliance could not be proved.

Paramount opposed the demurrer, arguing that it did not make the judicial admission asserted by Mitchell and, to the contrary, alleged in paragraph 20 of the first amended complaint: "Paramount reasonably relied on the representations of Mitchell in purchasing and using Mitchell's software."

The trial court sustained Mitchell's demurrers to those causes of action, stating: "Paramount does not allege it justifiably relied upon misrepresentations resulting in damages. . . . Instead, Paramount alleges that insurance companies required it to use Mitchell software. The fraudulent misrepresentations by Mitchell, as alleged by Paramount, did not lead to the 'purchase and use' of Mitchell's software."

B

The trial court correctly recognized, and the parties agree, that justifiable reliance is an element of the torts of fraud and negligent misrepresentation. "The necessary elements of fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) *justifiable reliance*; and (5) resulting damage." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1108, italics added, superseded by statute on another ground as noted in *Aguilar v. Atlantic Richfield Co.* (2001 25 Cal.4th 826, 853, fn. 19 (*Aguilar*).)

Justifiable reliance is also an element of negligent misrepresentation.[2] (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, fn. 4.) If Paramount made a judicial admission to the effect that it did not justifiably rely on Mitchell's purported misrepresentations, it cannot state causes of action for fraud and negligent misrepresentation.

As quoted above, Paramount alleged in paragraph 17 of the first amended complaint that "Paramount and other auto body shops have been [required] by various insurance companies to purchase and use Mitchell software to determine damage." The only reasonable interpretation of that language is that Paramount purchased Mitchell's software because insurance companies required it to do so to calculate the labor required to perform repair work done on behalf of customers of the insurance companies. Although reasonable or justifiable reliance is usually a question of fact, that question can be decided as a question of law if reasonable minds can reach only one conclusion based on the facts. (*Alliance Mortgage Co. v. Rothwell, supra,* 10 Cal.4th at p. 1239.) As Mitchell asserts, Paramount's specific allegation that insurance companies required it to purchase Mitchell's software constitutes a judicial admission and precludes any contrary

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2 However, unlike fraud, "[t]he tort of negligent misrepresentation does not require scienter or intent to defraud." (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.)

general or conclusory allegation that it reasonably or justifiably relied on misrepresentations by Mitchell in deciding whether to purchase that software.[3]

A judicial admission may be made in pleadings (e.g., a complaint). (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 452, p. 585.) A judicial admission "is a waiver of proof of a fact by conceding its truth, and it has the effect of removing the matter from the issues. Under the doctrine of 'conclusiveness of pleadings,' a pleader is bound by well pleaded material allegations . . . ." (*Id*. at § 452, p. 585.) Therefore, Paramount's allegation that insurance companies required it to purchase Mitchell's software constituted a judicial admission of fact that it did not justifiably rely on any misrepresentations by Mitchell in deciding whether to purchase Mitchell's software.

To the extent Paramount contends the trial court should have granted it leave to amend its complaint to allege, instead, that insurance companies (apparently after various certain dates) no longer required it to purchase Mitchell's software and thereafter Paramount justifiably relied on Mitchell's purported misrepresentations, we conclude such an amendment would not have avoided the judicial admission it made in its first

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[3] To the extent Paramount cites comments made by the trial court at the hearing on Mitchell's demurrer that purportedly contradict its ruling, we disregard those comments because we independently determine, as a question of law, whether Paramount's first amended complaint stated causes of action for fraud and negligent misrepresentation. (*Holiday Matinee, Inc. v. Rambus, Inc.*, *supra*, 118 Cal.App.4th at p. 1420.) In any event, we presume the trial court's ruling is correct and review only its ruling and not its reasoning in determining whether it was correct in sustaining the demurrer. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16 (*J.B. Aguerre*).)

amended complaint.[4] "[W]hen a complaint contains allegations that are fatal to a cause of action, a plaintiff cannot avoid those defects simply by filing an amended complaint that omits the problematic facts or pleads facts inconsistent with those alleged earlier." (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044.) "Even if appellant were given leave to amend its complaint, it would not be allowed to amend the complaint to state a fact directly contradictory to one stated previously. '[A] plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading.' " (*Continental Ins. Co. v. Lexington Ins. Co.* (1997) 55 Cal.App.4th 637, 646; cf. *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, 1043, fn. 25.) It is not reasonably possible that the first amended complaint could be amended to state causes of action against Mitchell for fraud and negligent misrepresentation. Therefore, the trial court did not abuse its discretion by sustaining Mitchell's demurrers to those causes of action without leave to amend. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.)

III

Breach of Implied Covenant of Good Faith and Fair Dealing

Paramount contends the trial court erred by sustaining without leave to amend Mitchell's demurrer to the cause of action for breach of the implied covenant of good

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4 Contrary to Paramount's assertion, although it may plead alternative legal theories, it cannot plead different evidentiary facts in the same lawsuit. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) [¶]7:48.11, p. 7(I)-26.)

faith and fair dealing alleged in the first amended complaint. The trial court sustained the demurrer to that cause of action, stating in part: "A separate cause of action for a contractual breach of the covenant of good faith and fair dealing is superfluous. (*Guz v. Bechtel* [*National*], *Inc.* (2000) 24 Cal.4th 317, 349.) This claim shall be contained within the breach of contract cause of action."

We conclude the trial court correctly sustained Mitchell's demurrer to Paramount's cause of action for breach of the implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing cannot "impose substantive terms and conditions beyond those to which the contract parties actually agreed." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 349.) "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*." (*Ibid*.) To the extent Mitchell's acts were directly actionable as a breach of the parties' contract, "a claim that merely realleges that breach as a violation of the [implied] covenant is superfluous." (*Id*. at p. 352.) To the extent Paramount's breach of implied covenant seeks to impose obligations on Mitchell beyond those to which the parties actually agreed, the claim is invalid. (*Id*. at pp. 349, 352.) Therefore, the trial court correctly sustained the demurrer to the cause of action for breach of the implied covenant of good faith and fair dealing without leave to amend.

IV

Conspiracy Cause of Action

Paramount contends the trial court erred by sustaining without leave to amend Mitchell's demurrer to the conspiracy cause of action alleged in the first amended complaint.

A

In the conspiracy cause of action alleged in its first amended complaint, Paramount alleged that "[t]he conspirators [i.e., Mitchell and certain unnamed insurance companies] intended to create a data base and computer program which reduced the actual cost to repair automobiles, thus depriving auto body shops including Paramount from receiving full compensation for their services performed." It further alleged: "Mitchell conspired with other insurance companies to create options that are contrary to its own data base that would allow insurance companies to exert downward pressure on the prices paid to auto body shops."

In demurring to the conspiracy cause of action, Mitchell argued there is no independent tort cause of action for conspiracy under California law, but rather any such claim is dependent on the commission of an actual, underlying tort. It argued the conspiracy claim was significant only to the extent it alleged a coconspirator in the commission of that wrongful act was liable as a joint tortfeasor. Therefore, Mitchell argued Paramount could not state any separate cause of action for conspiracy and, in any event, had not alleged Mitchell had committed an actual, underlying tort. Mitchell argued Paramount's allegations did not state a cause of action for any cognizable tort.

Furthermore, to the extent Paramount alleged fraud by Mitchell, that claim was precluded based on Paramount's judicial admission in the first amended complaint (as discussed above).

In opposing the demurrer, Paramount argued it had alleged actual, underlying torts for its conspiracy claim (i.e., its fraud and negligent misrepresentation causes of action). Mitchell replied, arguing Paramount judicially admitted a lack of reliance on its purported misrepresentations, thereby defeating the fraud and negligent misrepresentation claims and, as a result, any conspiracy claim based thereon.

The trial court sustained the demurrer to the conspiracy cause of action without leave to amend, stating: "Civil conspiracy is not an independent cause of action. However, a plaintiff may allege a conspiracy to commit a tort. [Citation.] Paramount does not allege facts sufficient to maintain a claim for conspiracy to commit fraud nor is a co-conspirator named in this action to warrant a separate cause of action."

B

We conclude the trial court correctly sustained the demurrer to the conspiracy cause of action without leave to amend. First, as Mitchell argued below, conspiracy is not an independent cause of action. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510, 514.) Second, civil conspiracy requires the commission of an actual, underlying tort. (*Id.* at p. 511.) Based on our independent review of the first amended complaint, it appears that the crux of Paramount's allegations was fraud committed by Mitchell. Although the tort of fraud could constitute an actual, underlying tort for a conspiracy claim, Paramount cannot state a cause of action for fraud because, as

we concluded above, it made the judicial admission that it did not justifiably rely on Mitchell's purported misrepresentations in deciding to purchase and use Mitchell's software.

For the first time, Paramount argues on appeal that it alternatively alleged the tort of price-fixing as the actual, underlying tort for its conspiracy cause of action. However, Paramount has not carried its burden on appeal to persuade us that the factual allegations in its first amended complaint constitute unlawful price-fixing. Assuming arguendo Mitchell and certain insurance companies "create[d] a data base and computer program which reduced the actual cost to repair automobiles" and deprived Paramount from receiving "full compensation for its services," Paramount does not persuade us that conduct constituted unlawful price-fixing. Mitchell's software sets forth data regarding estimated amounts of labor time required to perform certain automobile repairs. To the extent insurance companies may have influenced Mitchell to reduce those amounts, we cannot ascertain that influence resulted in any fixing of repair prices between Mitchell and those insurance companies. Unlike the fixing of prices between two competing sellers (cf. *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1229), a reduction of labor time estimates for certain automobile repairs by an independent data provider that is neither a buyer nor seller of repair services does not appear to involve any fixing of repair prices, whether or not such purported reductions were based, in whole or in part, on influence from insurance companies (i.e., direct or indirect buyers of repair services). Paramount has not cited, and we are unaware of, any apposite case or other authority holding the alleged conduct constitutes unlawful price-fixing. Paramount's

conclusory assertion is insufficient to persuade us that alleged conduct constitutes unlawful price-fixing. Paramount did not meet its burden on appeal to present substantive legal analysis showing its allegations would support a finding of unlawful price-fixing. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) We conclude Paramount did not state a cause of action for conspiracy based on either an underlying fraud or unlawful price-fixing.

Furthermore, we conclude Paramount has not carried its burden to show how it could amend the first amended complaint to state a cause of action for conspiracy. (*Dey v. Continental Central Credit* (2008) 170 Cal.App.4th 721, 731 (*Dey*).) Because it is not reasonably possible to amend the first amended complaint to state a conspiracy cause of action, we conclude the trial court did not abuse its discretion by sustaining the demurrer to that cause of action without leave to amend.

V

Breach of Oral Contract

Paramount contends the trial court erred by sustaining without leave to amend Mitchell's demurrer to the cause of action for breach of oral contract alleged in the second amended complaint.

A

After the trial court sustained Mitchell's demurrer to the first amended complaint as to all causes of action without leave to amend except for the breach of contract cause of action, which it sustained with leave to amend, Paramount filed a second amended complaint alleging causes of action for breach of written contract, breach of oral contract,

breach of implied contract, and other causes of action described below. The second amended complaint attached as Exhibit A a copy of the Contract pursuant to which Mitchell granted Paramount a license to use its Ultramate software. Paragraph 11 of the Contract stated in part:

> "*Entire Agreement*. This Agreement . . . sets forth the entire agreement and understanding between the parties as to the subject matter hereof and supersedes all prior discussions or agreements . . . between them, oral or written, concerning the subject of this Agreement. THIS AGREEMENT MAY NOT BE AMENDED OR MODIFIED EXCEPT BY A WRITTEN AMENDMENT SIGNED BY CUSTOMER AND AN OFFICER OF MITCHELL. . . ."

Mitchell demurred to the cause of action for breach of oral contract, arguing the Contract was a fully integrated agreement and could only be amended by a written amendment. Therefore, Mitchell argued there could be no oral modification of the Contract. The trial court sustained without leave to amend the demurrer to the cause of action for breach of oral contract, stating that cause of action relied "on the same facts alleged in the breach of written contract claim. Paramount has not alleged any separate oral agreement to maintain its claim for breach of oral contract."

B

We conclude the trial court correctly sustained without leave to amend the demurrer to the cause of action for breach of oral contract. As quoted above, the Contract contained an express, complete integration clause. That clause barred any oral or other parol evidence offered to add to or vary the terms of the written agreement. If the parties' written contract contains an integration clause, parol evidence cannot be used to add to or

vary its terms.[5] (*250 L.L.C. v. PhotoPoint Corp.* (2005) 131 Cal.App.4th 703, 725; *Masterson v. Sine* (1968) 68 Cal.2d 222, 225; Code of Civ. Proc., § 1856, subds. (a), (b).) Paramount could not allege any prior or contemporaneous oral contract that added to or varied the terms of the Contract.

To the extent the integration clause did not bar parol evidence of an oral contract entered into subsequent to the Contract, our independent review of the second amended complaint shows that Paramount did not allege any subsequent oral agreement supported by any independent consideration. Accordingly, the trial court correctly sustained the demurrer to the cause of action for breach of oral contract. Furthermore, because Paramount has not shown how the second amended complaint could be amended to state a cause of action for breach of oral contract, we conclude it is not reasonably possible to amend that cause of action to state a cause of action. (*Dey, supra*, 170 Cal.App.4th at p. 731.) Therefore, the trial court did not abuse its discretion by sustaining the demurrer to that cause of action without leave to amend.

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[5] Code of Civil Procedure section 1856 provides: "(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. [¶] (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement."

VI

Breach of Implied Contract

Paramount contends the trial court erred by sustaining without leave to amend Mitchell's demurrer to the cause of action for breach of implied contract alleged in the second amended complaint.

A

After the trial court sustained Mitchell's demurrer to the first amended complaint as described above, Paramount filed a second amended complaint alleging a cause of action for breach of implied contract. In demurring to that cause of action, Mitchell argued an implied contract could not exist because the parties had a written contract on the same subject. Because the Contract was attached to and incorporated into the second amended complaint, Mitchell argued no implied contract could exist that would be inconsistent with it. The trial court sustained the demurrer to that cause of action without leave to amend, stating that it relied "on the same facts alleged in the breach of written contract claim. . . . Paramount cannot state a claim for breach of an implied contract because as a matter of law an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter."

B

We conclude the trial court correctly sustained without leave to amend the cause of action for breach of implied contract. There cannot be both an express (written or oral) contract and an implied contract that cover the same subject, but require different results. (*Haggard v. Kimberly Quality Care, Inc.* (1995) 39 Cal.App.4th 508, 521.)

"[A]n action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 203.) Our independent review of the second amended complaint shows Paramount did not allege any implied-in-fact contract on any subject matter other than that covered by the Contract. There can be no implied contract separate or different from the Contract. (*Haggard*, at p. 521; *Lance Camper*, at p. 203.) In any event, Paramount did not allege that any such implied contract was supported by any independent consideration. The trial court correctly sustained the demurrer to the cause of action for breach of implied contract. Furthermore, because Paramount has not shown how the second amended complaint could be amended to state a cause of action for breach of implied contract, we conclude it is not reasonably possible to amend that cause of action to state a cause of action. (*Dey*, *supra*, 170 Cal.App.4th at p. 731.) Therefore, the trial court did not abuse its discretion by sustaining the demurrer to that cause of action without leave to amend.

VII

Intentional Interference with Prospective Contractual Relations

Paramount contends the trial court erred by sustaining without leave to amend Mitchell's demurrer to the cause of action for intentional interference with prospective contractual relations alleged in the second amended complaint.

A

After the trial court sustained Mitchell's demurrer to the first amended complaint as to all causes of action without leave to amend except for the breach of contract cause

of action, which it sustained with leave to amend, Paramount filed a second amended complaint alleging causes of action for breach of written contract and intentional interference with prospective contractual relations.

In demurring to the cause of action for intentional interference with prospective contractual relations, Mitchell argued that Paramount's judicial admissions show it cannot prove the elements of disruption of prospective contractual relations or resulting damages. The trial court sustained the demurrer to that cause of action without leave to amend.

B

We conclude the trial court correctly sustained without leave to amend the demurrer to the cause of action for intentional interference with prospective contractual relations. As Mitchell argues (apparently for the first time on appeal), the trial court's order sustaining the demurrer to the *first* amended complaint gave Paramount leave to amend the complaint *only* as to the cause of action for breach of contract. The court did *not* grant Paramount leave to amend the first amended complaint to add *new* causes of action. Therefore, Paramount did not have the court's permission to file a second amended complaint that included new causes of action, such as a cause of action for intentional interference with prospective contractual relations, which had not been alleged in prior versions of its complaint. Because Paramount did not have the right to file the second amended complaint adding that new cause of action, it was required to, but did not, obtain the court's permission to so amend its complaint. (Code Civ. Proc., § 472 ["Any pleading *may be amended once* by the party *of course*, and without costs, at

any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party . . . ." (Italics added.)]; Code Civ. Proc., § 473, subd. (a)(1) ["The court may . . . , in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading . . . ."]; *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613 [" '[B]y virtue of its *inherent* power to prevent abuse of its processes' (italics added), a trial court may strike an amended complaint 'filed in disregard of established procedural processes,' and may strike an amended pleading 'because no request for permission to amend was sought.' "].) Addressing an analogous situation to this case, *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018 (*Harris*) affirmed the trial court's order sustaining a demurrer without leave to amend to a new cause of action included in an amended complaint without first obtaining the court's leave to so amend the complaint, stating:

> "*Following an order sustaining a demurrer . . . with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order*. [Citation.] *The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so*, unless the new cause of action is within the scope of the order granting leave to amend. [Citation.] Here, the new cause of action is not within the scope of the order granting leave to amend." (*Id*. at p. 1023, italics added.)

Like *Harris*, we conclude that because Paramount did not obtain leave of the trial court to add a new cause of action (i.e., the cause of action for intentional interference with prospective contractual relations) in its second amended complaint, the trial court correctly sustained Mitchell's demurrer to that cause of action without leave to amend.

(*Harris*, *supra*, 185 Cal.App.4th at p. 1023.) We affirm the trial court's ruling sustaining the demurrer without leave to amend even though the court may not have based its ruling on that ground. (*J.B. Aguerre*, *supra*, 59 Cal.App.4th at pp. 15-16 ["We do not review the trial court's reasoning, but rather its ruling. A trial court's order is affirmed if correct on any theory, even if the trial court's reasoning was not correct."].)

VIII

Section 17200 Unfair Business Practices
and Unfair Competition/False Advertising

Paramount contends the trial court erred by sustaining without leave to amend Mitchell's demurrer to the causes of action for unfair business practices in violation of section 17200 and unfair competition/false advertising alleged in the second amended complaint.

A

After the trial court sustained Mitchell's demurrer to the first amended complaint as to all causes of action without leave to amend except for the breach of contract cause of action, which it sustained with leave to amend, Paramount filed a second amended complaint that alleged causes of action for breach of written contract, section 17200 unfair business practices, and unfair competition/false advertising.

In demurring to the causes of action for section 17200 unfair business practices and unfair competition/false advertising, Mitchell argued that Paramount judicially admitted it cannot prove reliance and failed to allege particular facts and underlying

statutory violations. The trial court sustained the demurrer to those causes of action without leave to amend.

B

We conclude the trial court correctly sustained without leave to amend the demurrer to the causes of action for section 17200 unfair business practices and unfair competition/false advertising alleged in the second amended complaint. As we discussed above, the trial court's order sustaining the demurrer to the *first* amended complaint gave Paramount leave to amend the complaint *only* as to the cause of action for breach of contract. The court did *not* grant Paramount leave to amend the first amended complaint to add *new* causes of action. Therefore, Paramount did not have the court's permission to file a second amended complaint that included new causes of action, including causes of action for section 17200 unfair business practices and unfair competition/false advertising, which had not been alleged in prior versions of its complaint. Because Paramount did not have the right to file the second amended complaint adding those new causes of action, it was required to, but did not, obtain the court's permission to so amend its complaint. (Code Civ. Proc., §§ 472, 473; *Leader v. Health Industries of America, Inc.*, *supra*, 89 Cal.App.4th at p. 613.) As we discussed above, *Harris*, *supra*, 185 Cal.App.4th 1018 affirmed a trial court's order sustaining a demurrer without leave to amend to a new cause of action included in an amended complaint without first obtaining the court's leave to so amend the complaint, stating:

> "*Following an order sustaining a demurrer . . . with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order*. [Citation.] *The plaintiff may not amend the*

> *complaint to add a new cause of action without having obtained permission to do so*, unless the new cause of action is within the scope of the order granting leave to amend. [Citation.] Here, the new cause of action is not within the scope of the order granting leave to amend." (*Id*. at p. 1023, italics added.)

Like *Harris*, we conclude that because Paramount did not obtain leave of the trial court to add new causes of action (i.e., the causes of action for § 17200 unfair business practices and unfair competition/false advertising) in its second amended complaint, the trial court correctly sustained Mitchell's demurrer to those causes of action without leave to amend. (*Harris, supra*, 185 Cal.App.4th at p. 1023.) We affirm the trial court's ruling sustaining the demurrer to those causes of action without leave to amend even though the court may not have based its ruling on that ground. (*J.B. Aguerre, supra*, 59 Cal.App.4th at pp. 15-16 ["We do not review the trial court's reasoning, but rather its ruling. A trial court's order is affirmed if correct on any theory, even if the trial court's reasoning was not correct."].)

IX

Intentional Interference with Present Contractual Relations

Paramount contends the trial court erred by sustaining without leave to amend Mitchell's demurrer to the cause of action for intentional interference with present contractual relations alleged in the third amended complaint.

A

After the trial court sustained Mitchell's demurrer to the first amended complaint as to all causes of action without leave to amend except for the breach of contract cause of action, which it sustained with leave to amend, Paramount filed a second amended

complaint alleging causes of action that included breach of written contract and intentional interference with present contractual relations. After the trial court then sustained Mitchell's demurrer to the second amended complaint as to all causes of action without leave to amend except for causes of action for breach of written contract and intentional interference with present contractual relations, which it sustained with leave to amend, Paramount filed a third amended complaint alleging causes of action for breach of written contract and intentional interference with present contractual relations. In its cause of action for intentional interference with present contractual relations, Paramount alleged it "had established numerous contracts with various insurance companies as a 'preferred collision repair shop.' The preferred programs included, but were not limited to: State Farm Select Service Program, Progressive Casualty Insurance Corporation Network/Concierge Program, AIG Personal Care F.I.R.S.T. Program, 21st Century Insurance, American Family Insurance, Nationwide Blue Ribbon Repair Program, Allied Insurance, and AAA."

In demurring to the cause of action for intentional interference with present contractual relations, Mitchell argued that Paramount's factual allegations did not support the elements of that cause of action. Mitchell argued the preferred collision repair shop contracts Paramount alleged it had with various insurance companies were insufficiently pleaded and supported the inference that it had, at most, at-will contracts with those companies, which would support a cause of action, at most, for intentional interference with prospective (and not present) contractual relations. The trial court sustained without

leave to amend the demurrer to the cause of action for intentional interference with present contractual relations.

B

"[A] stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) "To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. [Citation.] To establish the claim, the plaintiff need not prove that a defendant acted with the primary purpose of disrupting the contract, but must show the defendant's knowledge that the interference was certain or substantially certain to occur as a result of his or her action." (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148 (*Reeves*).) "Whether the interference was justified as merely incidental to the defendant's legitimate pursuit of his own interests is a question of fact." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239.)

"Wrongfulness independent of the inducement to breach the contract is not an element of the tort of intentional interference with *existing* contractual relations . . . ." (*Quelimane Co. v. Stewart Title Guarantee Co.* (1998) 19 Cal.4th 26, 55.) "[A]n interference with an at-will contract properly is viewed as an interference with a

prospective economic advantage, a tort that similarly compensates for the loss of an advantageous economic relationship but does not require the existence of a legally binding contract." (*Reeves*, *supra*, 33 Cal.4th at p. 1152.) *Reeves* stated: "Consistent with the decisions recognizing that an intentional interference with an at-will contract may be actionable, but mindful that an interference as such is primarily an interference with the future relation between the contracting parties, we hold that a plaintiff may recover damages for intentional interference with an at-will employment relation under the same California standard applicable to claims for intentional interference with prospective economic advantage. That is, to recover for a defendant's interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act . . . ." (*Ibid.*)

C

We conclude Paramount's third amended complaint failed to state a cause of action for intentional interference with a present or existing contractual relationship. As shown by the above authorities, to state a cause of action for intentional interference with a present or existing contractual relationship, Paramount was required to allege it had contracts with specific insurance companies not terminable at-will (i.e., with specific durations or terms). If Paramount had only at-will contracts with the insurance companies, its cause of action would be for intentional interference with prospective (and not present) contractual relations. (*Reeves*, *supra*, 33 Cal.4th at p. 1152.) To distinguish those two causes of action and state a cause of action for intentional interference with present or existing contractual relations, Paramount was required to allege the specific

terms of certain existing contracts it allegedly had with the various insurance companies. As quoted above, Paramount alleged it "had established numerous contracts with various insurance companies as a 'preferred collision repair shop.' " It did not specifically allege that one or more of those alleged contracts had a specific term or duration and was not terminable at-will. Because Paramount did not specifically allege it had an existing contract with one or more insurance companies that had a certain term and therefore was not terminable at-will, its third amended complaint did not state a cause of action for intentional interference with present or existing contractual relations.[6] Based on Paramount's allegations in its third amended complaint, it alleged, at most, a cause of action for intentional interference with prospective contractual relations and, as we discussed above, the trial court previously had correctly sustained without leave to amend Mitchell's demurrer to that cause of action.[7] (*Reeves, supra,* 33 Cal.4th at p. 1152.)

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[6] Had such a contract existed, Paramount presumably would have specifically alleged its terms and could have attached the contract to the third amended complaint.

[7] Although we do not rely on other grounds on which the trial court may have sustained the demurrer to the cause of action for intentional interference with present contractual relations, we note the court *could* have sustained, *without* leave to amend, Mitchell's demurrer to that cause of action when it was initially included in the second amended complaint. As we discussed above, Paramount did not have authority, or leave of the court, to add any new causes of action on filing the second amended complaint. Rather, in sustaining Mitchell's demurrer to the first amended complaint, the trial court granted Paramount leave to amend only its breach of contract cause of action. (*Leader v. Health Industries of America, Inc.*, *supra*, 89 Cal.App.4th at p. 613 [" '[B]y virtue of its *inherent* power to prevent abuse of its processes' (italics added), a trial court may strike an amended complaint 'filed in disregard of established procedural processes,' and may strike an amended pleading 'because no request for permission to amend was sought.' "]; *Harris*, *supra*, 185 Cal.App.4th at p. 1023.) Furthermore, Mitchell may have been

To the extent Paramount may assert the trial court should have granted it leave to amend its cause of action for intentional interference with present contractual relations, it did not show below, nor has it shown on appeal, how it would have amended that claim to state a cause of action. (*Dey*, *supra*, 170 Cal.App.4th at p. 731.) Because it is not reasonably possible to amend the first amended complaint to state a cause of action for intentional interference with present contractual relations, we conclude the trial court did not abuse its discretion by sustaining the demurrer to that cause of action without leave to amend. (*Ibid*.; *J.B. Aguerre*, *supra*, 59 Cal.App.4th at p. 18 ["It was [appellant's] burden in the trial court, and it is its burden here, to show that the first amended complaint could be further amended to state a cause of action. [Citations.] [Appellant] made no such showing the in the trial court, and makes none here."].)

X

Breach of Written Contract

Paramount contends the trial court erred by granting Mitchell's motion for summary judgment after finding there was no triable issue of material fact on the remaining cause of action for breach of written contract and Mitchell was entitled to judgment.

A

After the trial court overruled Mitchell's demurrer to the breach of written contract cause of action alleged in the third amended complaint, Mitchell filed a motion for

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justified in not renewing the Contract, thereby precluding any liability for intentional interference with present contractual relations.

summary judgment on that sole remaining cause of action. Mitchell argued the undisputed evidence did not support Paramount's breach of written contract cause of action, the Contract precluded Mitchell's liability for the alleged damages, and Paramount admitted it could not prove any damages. Paramount opposed the motion. Mitchell filed a reply. The trial court granted the motion for summary judgment, finding there were no triable issues of material fact and Mitchell was entitled to judgment on the cause of action for breach of contract. The court stated:

> "Mitchell entered into two End User License Agreements (NOL Ex. 1 & 2) with Paramount and asserts Mitchell breached these agreements by: supplying inaccurate data that understated the actual time required for repairs; converting Paramount's EMS data; failing to renew the Agreements and giving less than 30 days written notice; failing to provide a quality product, frequent updates, and training. Yet, Paramount has not presented evidence of what Mitchell did or failed to do to actually: 1) breach the contract[s] and 2) cause it damage. For example, Mitchell was not required to renew the license under the terms of the written contract; Paramount does not offer any reason why the court should not enforce this provision as written, much less provide any evidence to support that contention. . . .
>
> "Paramount argues Mitchell's fraud (i.e., secret agreements with State Farm) prevents summary adjudication. [Citation.] Paramount does not have a fraud claim against Mitchell because it did not allege facts to support one when opposing a demurrer. . . .
>
> "Furthermore, Section[s] 9.01 and 9.02 of the End User License Agreements [bar] recovery of [lost] profits or other damages incurred from damages allegedly incurred due to the 'accuracy or completeness of the data or the results obtained through use of the products.' These are . . . exactly [the] damages sought by Paramount in its breach of contract claim. Liability limitations in this commercial setting are valid, enforceable, and preclude recovery of the damages sought by Paramount."

Accordingly, the trial court entered judgment for Mitchell.

B

A defendant meets its burden on a motion for summary judgment or summary adjudication if it proves "one or more elements of the cause of action . . . cannot be established . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) The defendant need not conclusively negate an element of the plaintiff's cause of action, but must only show that one or more of its elements cannot be established. (*Aguilar, supra*, 25 Cal.4th at p. 853.) To shift the burden to the nonmoving party, the evidence produced by the moving party must "persuade the court that there is no material fact for a reasonable trier of fact to find . . . ." (*Id*. at p. 850, fn. 11, italics omitted.) The moving party also bears a burden of production "to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Id*. at p. 850.)

"Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) In opposing the motion, the plaintiff may not simply rely on allegations or denials of the pleadings, but rather must set forth specific facts showing a triable issue of material fact exists. (*Ibid*.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.)

On appeal, we review the trial court's decision de novo, considering all of the evidence presented by the parties (except that which the trial court properly excludes) and the uncontradicted inferences the evidence reasonably supports. (*Merrill v. Navegar, Inc.*

(2001) 26 Cal.4th 465, 476-477.) In reviewing a summary judgment for the defendant, we construe the defendant's evidence strictly and the plaintiff's evidence liberally and resolve any doubts favorably to the plaintiff. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

C

We conclude the trial court correctly found there were no triable issues of material fact on Paramount's breach of contract cause of action and Mitchell was entitled to judgment as a matter of law. First, we reject Paramount's assertion made both below and on appeal that it alleged Mitchell breached many contracts other than the Contract. Paramount's third amended complaint, the operative complaint at the time of the summary judgment motion, alleged "Mitchell's written contract with Paramount dated December 17, 2008[,] is included herein as Exhibit A; [and] the written contract dated June 4, 2008[,] is included as Exhibit B . . . ." The written contract dated June 4, 2008, attached to the third amended complaint as Exhibit B thereto, constitutes the end user license agreement for the Ultramate software (i.e., the Contract) pursuant to which Mitchell provided data regarding the estimated amount of labor required to perform certain automobile collision repairs. As represented by Mitchell and not disputed by Paramount, the written contract dated December 17, 2008, attached to the third amended complaint as Exhibit A, was an end user license agreement for Mitchell's Shop Pak management software only and did not require Mitchell to provide labor time repair data. Therefore, the only written contract relevant to Paramount's specific allegations regarding breach of contract is the Contract. Although Paramount's third amended complaint refers

to and attaches other written documents, none of those documents constituted written agreements between Mitchell and Paramount and they were not incorporated expressly or by operation of law into the Contract. As noted above, the Contract contained an integration clause, stating in part:

> "*Entire Agreement*. This Agreement . . . sets forth the entire agreement and understanding between the parties as to the subject matter hereof and supersedes all prior discussions or agreements . . . between them, oral or written, concerning the subject of this Agreement. THIS AGREEMENT MAY NOT BE AMENDED OR MODIFIED EXCEPT BY A WRITTEN AMENDMENT SIGNED BY CUSTOMER AND AN OFFICER OF MITCHELL. . . ."

That clause barred any oral or other parol evidence offered to add to or vary the terms of the written agreement. If the parties' written contract contains an integration clause, parol evidence cannot be used to add to or vary its terms. (*250 L.L.C. v. PhotoPoint Corp.*, *supra*, 131 Cal.App.4th at p. 725; *Masterson v. Sine*, *supra*, 68 Cal.2d at p. 225; Code Civ. Proc., § 1856, subds. (a), (b).) Accordingly, Paramount could not allege any prior or contemporaneous oral contract that added to or varied the terms of the Contract. Therefore, any prior written or oral representations contained in any correspondence, catalogs, manuals, or other documents could not vary or add to Mitchell's obligations expressed in the Contract.[8] We conclude there is no triable issue of material fact regarding which written agreement was the subject of Paramount's breach of contract cause of action (i.e., the Contract).

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8 For example, Exhibit C (apparently correspondence in 2002 from Mitchell to Paramount) and Exhibit D (Mitchell's 2009 product catalog), attached to the third amended complaint, were not incorporated into the Contract.

The trial court correctly concluded there was no triable issue of material fact whether Mitchell had breached any of its obligations under the Contract. Contrary to Paramount's assertion, the Contract did *not* contain any obligation that Mitchell continually perform labor studies to ensure Paramount received the most complete and accurate database available. Rather, that purported obligation arose out of correspondence in 2002 from Mitchell to Paramount that, as stated above, was not incorporated into the Contract and could not add to or vary Mitchell's obligations under the Contract. Likewise, other purported obligations (regarding frequent updates up to 14 times a year and labor times backed by real-world time studies in body shops by Mitchell experts) arose out of another document that, as stated above, was not incorporated into the Contract and could not add to or vary Mitchell's obligations under the Contract. Also, contrary to Paramount's assertion, statements made by Mitchell in its 2009 catalog were not incorporated into the Contract and that catalog did not constitute a separate contract and could not add to or vary Mitchell's obligations under the Contract.[9]

Inaccurate Data/Improper Reduction of Labor Time Estimates

The crux of Paramount's breach of contract cause of action was that Mitchell breached its obligations under the Contract by depending on insurance companies in developing its databases that underestimated the time required to perform certain

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9 In that 2009 catalog, Mitchell allegedly stated its collision estimating database " 'has been trusted as an ***impartial*** source of quality estimating information for both shops and insurers for decades' " and it has " 'produce[d] labor allowances that are valid, meaningful and accurate.' "

collision damage repairs. In support of its motion for summary judgment, Mitchell submitted the declaration of Pat Rundel, Mitchell's director of product database information, who stated:

> "3. . . . [N]one of Mitchell's labor time estimating data is generated by any insurance company.
>
> "4. Mitchell's labor time estimating data is derived in part from labor and time data Mitchell obtains from Original Equipment Manufacturers ('OEMs') who manufacture replacement parts used for collision repair. The OEMs supply Mitchell with information about processes and procedures required to install their replacement parts.
>
> "5. Mitchell also considers service procedures published by automobile manufacturers and collision repair industry organizations in developing labor time estimates for collision repair.
>
> "6. Mitchell's labor time estimating data is also based on field labor time and motion studies conducted by Mitchell personnel known as labor editors. [¶] . . . [¶]
>
> "10. Mitchell's approach is to provide accurate, verified labor time allowances for an average repair worker to perform an operation. [¶] . . . [¶]
>
> "12. When Mitchell performs its labor time studies, Mitchell intentionally studies the labor of the workers in the auto body shop who are understood to work at an 'average' pace, and not the labor of workers who are recognized to be particularly slow or fast. Mitchell then normalizes the observed labor times based on the expertise of the observed worker. [¶] . . . [¶]
>
> "16. The information obtained from Mitchell's labor time studies in body shops provides actual labor times for particular repair work, which is then used as the basis for the time estimates which are included in the Ultramate labor time estimate data base."

Regarding customer complaints about its labor time estimates, Rundel stated:

> "25. Mitchell will not change a time estimate merely because a customer or a group of customers — whether body shops or insurers — questions or objects to the time estimate or requests a change.
>
> "26. Mitchell will only change a time estimate if it conducts additional labor time studies which justify a change to the estimate, which may be either an increase or a decrease in the time estimate depending on the results of the study. . . ."

Regarding allegations that insurance companies influence Mitchell's time estimates,

Rundel stated:

> "29. Insurance companies do not have any input on Mitchell's time estimate data before it is published in Mitchell's data base, or any other input on the time estimate data at any time other than as discussed above.
>
> "30. In summary, Mitchell derives its published time estimate data without any insurance company input whatsoever before the data is published.
>
> "31. After the data is published, an insurer may have input on the data the same way a body shop may have input on the data — i.e., by participating along with a body shop on Mitchell's advisory board, or by contacting Mitchell to discuss or question a time estimate.
>
> "32. If an insurer contacts Mitchell to discuss or question a time estimate, or to request that a time estimate be reduced, Mitchell will not change that time estimate unless it conducts further research, including additional labor time studies which provide objective results which justify a change — which may be either an increase or a decrease in the time estimate depending on the results of the study."

Regarding allegations made in Paramount's third amended complaint, Rundel stated:

> "33. Mitchell does not depend on insurance companies to obtain the estimating data in its Ultramate product . . . .

> "34. Mitchell does not knowingly develop or generate incorrect or underpriced repair estimates in its Ultramate product estimating database . . . .
>
> "35. The estimating data used in Mitchell's Ultramate product was developed based on independent, unbiased, industry-wide standard information . . . .
>
> "36. The estimating data used in Mitchell's Ultramate product was developed without the influence of the auto insurance industry . . . . [¶] . . . [¶]
>
> "38. Mitchell does not manipulate its Ultramate estimating database times to reduce overall charges paid to body shops in order to arbitrarily reduce the cost of reimbursable repairs due from large insurance companies . . . .
>
> "39. Mitchell does not participate in any conspiracy with State Farm, Progressive, or any other insurance companies to price fix or monopolize the price/time to fix the time to repair auto body shop repairs in its Ultramate estimating database . . . . [¶] . . . [¶]
>
> "42. Mitchell does not artificially reduce its data base information in order to reduce repair charges due to auto body shops in order to obtain contracts from insurance companies . . . .
>
> "43. Mitchell does not create software containing data that intentionally understates the cost to repair automobiles to accommodate State Farm, Progressive, or other auto insurance companies . . . ."

By submitting Rundel's declaration containing the foregoing statements, Mitchell carried its initial burden of production to make a prima facie case that there was no triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) In opposing Mitchell's motion for summary judgment, Paramount did not carry its burden of production to submit evidence refuting Rundel's statements or otherwise creating a triable issue of material fact regarding whether Mitchell had breached the Contract by, as Paramount

alleges, improperly reducing its labor time estimate data because of insurance company influence. (*Ibid.*; Code Civ. Proc., § 437c, subd. (p)(2).) On appeal, Paramount cites various documents it submitted in opposition to the summary judgment motion that purportedly show Mitchell improperly conspired with, or was improperly influenced by, State Farm Insurance Company (State Farm) in establishing its labor time estimates for repairs. Without discussing the substance of each document, our independent review of those documents shows none of them support a reasonable inference that Mitchell improperly conspired with, or was improperly influenced by, State Farm or any other insurance company or otherwise breached the Contract.[10] Paramount does not present any comprehensible, much less persuasive, argument showing there is a triable issue of material fact regarding that alleged breach.

EMS Data

Paramount asserts Mitchell breached the Contract by wrongfully procuring Paramount's electronic management standard (EMS) data and selling or giving that data

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10 For example, Paramount submitted a copy of a 1997 contract in which Mitchell granted a software license to State Farm to use its Ultramate software. Paramount cites paragraph 8 of that contract, which states in part: "Mitchell agrees to use reasonable efforts to correct any material errors in data as identified by State Farm and verified through applicable manufacturer (part prices) or verified through previously reported 'labor rates' and/or 'labor times' . . . and provide a replacement disc to State Farm within sixty (60) days." Contrary to Paramount's assertion, that language does not support a reasonable inference that State Farm was dictating prices or labor time estimates to Mitchell.

to insurance companies.[11] In support of its motion for summary judgment, Mitchell submitted the declaration of Paul Rosenstein, its vice president of claims solutions, who stated:

> "8. I am informed that Paramount alleges . . . that Mitchell improperly converts Paramount's EMS data (*i.e.*, the electronic data Paramount submits through the use of Mitchell's Ultramate product) and/or sells it to insurance companies. Mitchell does not do so. [¶] . . . [¶]
>
> "15. Mitchell did not provide Paramount's individual and identifiable labor rates to any insurers except to the extent that information was contained within an estimate Paramount submitted to an insurer through Mitchell's servers . . . or in an average labor rate report . . . . It should be noted, however, that since June 2008, Paramount has only licensed a version of Ultramate that does not provide for electronic communication of estimating information, so since that time Mitchell has not received any EMS data from Paramount.
>
> "16. Mitchell does make available to insurers, auto body shops, and other interested parties aggregated data regarding automobile repair costs, including labor rates. That data is aggregated by categories such as city or metropolitan area and does not identify any particular body shop's labor rates."

By submitting Rosenstein's declaration containing the foregoing statements, Mitchell carried its initial burden of production to make a prima facie case that there was no triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) In opposing Mitchell's motion for summary judgment, Paramount did not carry its burden of production to submit evidence refuting Rosenstein's statements or otherwise creating a

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11 EMS data apparently is electronic data that Paramount submits to insurers using Mitchell's Ultramate software product.

triable issue of material fact regarding whether Mitchell had breached the Contract by, as Paramount alleges, wrongfully procuring Paramount's EMS data and selling or giving that data to insurance companies. (*Ibid*.; Code Civ. Proc., § 437c, subd. (p)(2).) Paramount did not submit any evidence showing that during the term of the Contract (i.e., June 2008 through June 2009) Mitchell electronically communicated to specific insurance companies Paramount's estimating information.

Furthermore, to the extent Paramount argues Mitchell wrongfully procured its labor rate data and sold or gave that information to insurance companies, the related December 17, 2008, end user agreement licensing Paramount to use Mitchell's "Ultramate Shop Pak" software product expressly authorized Mitchell to use Paramount's data for totalization purposes. To the extent Mitchell provided labor rate information to insurance companies, Rosenstein stated that data was "aggregated by categories such as city or metropolitan area and [did] not identify [Paramount or] any particular body shop's labor rates." Paramount did not submit any evidence showing otherwise or that Mitchell breached the Contract in its collection, use, or distribution of Paramount's EMS data. Therefore, there is no triable issue of material fact regarding whether Mitchell breached the Contract in so dealing with that EMS data.

Nonrenewal of Contract

Paramount asserts Mitchell breached the Contract by refusing to renew it on expiration of its term. The printed form of the Contract stated in part:

> "3.01. This Agreement shall be effective as of the date set forth on the signature page ('Effective Date'). The 'Initial Term' of this Agreement shall [commence] upon the Effective Date and continue

> for a period of thirty-six (36) months from the Anticipated Start Date specified on Exhibit A, unless an alternative period is specified on Exhibit A, or unless terminated as provided herein.
>
> "3.02. SUBJECT TO SECTION 2.01, THIS AGREEMENT SHALL AUTOMATICALLY RENEW FOR SUCCESSIVE RENEWAL TERMS OF DURATION EQUIVALENT TO THE INITIAL TERM, UNLESS TERMINATED BY MITCHELL OR CUSTOMER AT THE END OF THE THEN CURRENT TERM BY GIVING THE OTHER PARTY AT LEAST THIRTY (30) DAYS WRITTEN NOTICE PRIOR TO THE END OF SUCH TERM. IF MITCHELL DOES NOT RECEIVE SUCH NOTICE FROM CUSTOMER, CUSTOMER SHALL BE DEEMED TO HAVE RENEWED THE AGREEMENT FOR AN ADDITIONAL TERM OF EQUIVALENT DURATION."

Exhibit A to the Contract contained the following handwritten provision by Tim Waldren (Paramount's authorized employee): "Please contact me again @ the end of the term to renew. All contracts shall be a 1 yr. term." Waldren's signature appears below that handwritten provision. Although the parties agree the handwritten provision modified the printed form of the Contract, they disagree regarding the nature of that modification. Mitchell asserts that provision acted to modify, and in effect supersede, the printed provision regarding automatic renewal of the Contract. Mitchell argues that handwritten provision made the term of the Contract one year instead of three years and further eliminated the provision regarding automatic renewal. Paramount argues that although the handwritten provision modified the term of the Contract from three years to one year, the printed form's automatic renewal provision continued in effect and therefore required Mitchell to give it written notice 30 days prior to the end of the original term (i.e., on or before May 5, 2009).

Based on our independent review of the Contract, we conclude it is unambiguous and the handwritten provision can only be reasonably construed as superseding and eliminating the automatic renewal provision. The express language of the handwritten provision states in part: "*Please contact me again @ the end of the term to renew*. All contracts shall be a 1 yr. term." (Italics added.) Therefore, to renew the Contract at the end of its one-year term, Mitchell was required to contact Paramount to renew the Contract. Therefore, the Contract's term would not automatically renew. Rather, affirmative action by Mitchell was required to renew the term of the Contract. It is undisputed that Mitchell did not take any action to renew the term of the Contract. On the contrary, on May 7, 2009, Mitchell gave Paramount written notice that it would not be renewing the Contract. Therefore, there is no triable issue of material fact on the issue of whether Mitchell breached the Contract by not renewing it on the expiration of its one-year term.

We, like the trial court, further reject Paramount's assertion that Mitchell's renewals of Ultramate software license agreements in prior years had the effect of waiving Paramount's handwritten provision in the Contract. We do not ascertain logic in, and Paramount does not cite any apposite authority for, that assertion. Furthermore, contrary to Paramount's apparent assertion, Mitchell did not terminate the Contract for a default by Mitchell, but rather allowed the Contract's term to end and elected not to agree to a renewal of its term in accordance with the handwritten provision.

Limitation of Liability

Because there is no triable issue of material fact whether Mitchell breached the Contract and Mitchell has shown Paramount cannot prove that element of a breach of contract cause of action, we need not address the remaining elements of that cause of action (e.g., damages). Nevertheless, assuming arguendo there was a triable issue of material fact regarding whether Mitchell breached the Contract, we nevertheless would uphold the trial court's summary judgment for Mitchell based on the Contract's limitation of liability provision. That provision states:

> "IN NO EVENT SHALL MITCHELL AND/OR ITS LICENSORS, THEIR AGENTS OR EMPLOYEES BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR LOSS OF PROFITS, REVENUE, DATA, COST OF SUBSTANTIALLY SIMILAR SOFTWARE, LOSS OF USE, LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, OR ANY OTHER INCIDENTAL, CONSEQUENTIAL, INDIRECT, CONTINGENT, SECONDARY, OR SPECIAL DAMAGES OR EXPENSES OF ANY NATURE WHATSOEVER AND HOWSOEVER ARISING, EVEN IF MITCHELL HAS BEEN ADVISED OF THE POSSIBILITY OR CERTAINTY OF SUCH DAMAGES. CUSTOMER AGREES THAT THE AGGREGATE LIABILITY OF MITCHELL AND/OR ITS LICENSORS HEREUNDER, WHETHER ARISING OUT OF CONTRACT, NEGLIGENCE, STRICT LIABILITY IN TORT OR WARRANTY, SHALL NOT EXCEED THE AMOUNTS PAID BY CUSTOMER TO MITCHELL DURING THE PRECEDING TWELVE (12) MONTHS FOR THE PRODUCT(S) RELATING TO THE EVENT GIVING RISE TO SUCH LIABILITY."

We believe the trial court correctly concluded the Contract's limitation of liability provision barred Paramount's breach of contract claim for damages for inaccuracy or incompleteness of Mitchell's data and the results obtained by using Mitchell's products. Contrary to Paramount's assertion, Civil Code section 1668 does not apply in the

circumstances of this case to bar application of the limitation of liability provision. That statute applies only in certain circumstances involving fraud, willful injuries to persons or property, or violations of law (whether willful or negligent). (Civ. Code, § 1668.) At the time of Mitchell's motion for summary judgment, Paramount's only remaining cause of action was for breach of contract (as its claims for fraud and price-fixing were previously dismissed when the trial court sustained Mitchell's demurrers). Accordingly, there was no basis on which to preclude application of the Contract's limitation of liability provision to bar Paramount's claim for damages for Mitchell's alleged breach of contract. Paramount does not persuade us to conclude otherwise.

Miscellaneous

Finally, we reject Paramount's assertions that the trial court did not consider all of the pleadings and exhibits it submitted in opposition to Mitchell's motion for summary judgment. We presume the trial court acted properly and considered all pleadings and documents submitted on a matter unless the record affirmatively shows otherwise. A trial court's judgment or order is presumed to be correct. In *Denham v. Superior Court, supra,* 2 Cal.3d 557, the court stated:

> "[I]t is settled that: 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown [by the appellant]. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Id*. at p. 564.)

"The burden of affirmatively demonstrating error is on the appellant." (*Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.) Here,

Paramount has not carried its burden on appeal to affirmatively show the trial court erred by not considering all of its properly filed pleadings and documents. Although Paramount makes assertions that the trial court failed to consider its corrected brief and all of its exhibits before ruling on the summary judgment motion, Paramount's brief does not contain specific citations to the record to support those assertions. Absent supporting citations to the record, we deem that argument to be waived. (Cf. *In re Marriage of Fink* (1979) 25 Cal.3d 877, 887; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Furthermore, to the extent Paramount argues the trial court erred in granting Mitchell's motion for summary judgment because it had previously made comments that may have shown it believed the Contract's limitation of liability provision might not be enforceable, on appeal we independently review the trial court's ruling and not its reasoning or grounds for its ruling. (*J.B. Aguerre, supra*, 59 Cal.App.4th at pp. 15-16 ["We do not review the trial court's reasoning, but rather its ruling. A trial court's order is affirmed if correct on any theory, even if the trial court's reasoning was not correct."].) Because we have independently reviewed the record and concluded the trial court correctly granted Mitchell's motion for summary judgment, any inconsistency, or even error, in the trial court's reasoning does not provide a basis on which we could reverse its ruling. (*Ibid*.)

XI

Denial of Leave to File Fourth Amended Complaint

Paramount contends the trial court abused its discretion by denying its request for leave to file a fourth amended complaint.[12] However, Paramount has failed, both below in the trial court and now on appeal, to specify how it would have amended the third amended complaint to state causes of action or would have otherwise amended its complaint. Absent such showing, Paramount has not carried its burden on appeal to show the trial court abused its discretion by denying its request for leave to file a fourth amended complaint. (Cf. *Dey, supra*, 170 Cal.App.4th at p. 731.) In any event, Paramount has not carried its burden on appeal to present substantive legal analysis showing the trial court abused its discretion by denying its request for leave to file a fourth amended complaint. Therefore, it has waived this contention. (*Benach v. County of Los Angeles, supra*, 149 Cal.App.4th at p. 852; *People v. Ham* (1970) 7 Cal.App.3d 768, 783, overruled on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700; *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3; *Colores v. Board of Trustees* (2003) 105

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12 The fourth amended complaint apparently would have added State Farm as a defendant and, in addition to the causes of action alleged in the third amended complaint, alleged antitrust, defamation, and conspiracy causes of action against Mitchell and/or State Farm.

Cal.App.4th 1293, 1301, fn. 2; *Bayside Auto & Truck Sales, Inc. v. Department of Transportation* (1993) 21 Cal.App.4th 561, 571.)

DISPOSITION

The judgment is affirmed. Mitchell is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.