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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WILLIAM A. KENT,

Plaintiff and Appellant,

v.

AVIS RENT A CAR SYSTEM LLC,

Defendant and Respondent.

G044884

(Super. Ct. No. 30-2009-00323892)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Affirmed.

Quintilone & Associates, Richard E. Quintilone II and Michelle E. Harvey, for Plaintiff and Appellant.

DLA Piper LLP, William P. Donovan, Jr., Nancy Nguyen Sims and Benjamin W. Turner, for Defendant and Respondent.

INTRODUCTION

Appellant William Kent appeals from a judgment dismissing his complaint after the trial court sustained three demurrers, the last one without leave to amend. Kent has abandoned the majority of his causes of action to concentrate on those based on California's consumer protection statutes. He alleged defendant and respondent Avis Rent A Car System, LLC, violated these statutes when it paid parking tickets he acquired while renting an Avis car, billed his credit card for the amount of the tickets, and charged him an additional fee. He envisions a nationwide class action lawsuit on behalf of Avis customers whose parking tickets Avis has paid.

We affirm the judgment. Kent has failed to state causes of action under the relevant statutes, and he has not explained how he could amend his complaint to remedy the deficiencies. The court properly sustained the last demurrer without leave to amend and dismissed the case.

FACTS

In his second amended complaint, Kent alleged he was a member of Avis' Wizard Program, a preferred customer program allowing car renters to obtain faster service at Avis lots. A Wizard Program member submits information to Avis in advance, such as rental preferences and credit card data, so he or she can skip the counter and go straight to the car.

On September 2, 2007, Kent picked up an Avis car in Washington, D.C. During the five days he was there, his car was ticketed three times for illegal parking, for a total of \$80. Avis paid the parking tickets and charged an administrative fee, in addition to the amount of the tickets, to Kent's credit card. The administrative fee was \$25 per ticket.

Kent filed a class action suit against Avis, on the grounds that Avis had no right to pay the parking tickets and charge its customers a fee for doing so. According to Kent, Avis must let its customers handle their own parking tickets; Avis' role, when

notified of an unpaid parking ticket, is to transmit the name of the offending car renter to the issuing agency and then to step aside.¹ Kent originally alleged causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory relief, and violations of the Consumers' Legal Remedies Act (CLRA), the False Advertising Law (FAL), and the Unfair Competition Law (UCL). The second amended complaint added a cause of action for money had and received to the ones in the original complaint.

The trial court sustained a total of three demurrers, the last one without leave to amend, and dismissed the action. In its final ruling, the court referred to three allegations in the second amended complaint that sank Kent's attempts to allege breach of contract, unfair or fraudulent business practices, or false advertising: (1) the rental agreement placed the responsibility for paying parking tickets on the customer; (2) the agreement allowed Avis to bill its customers for charges for parking tickets; and (3) Avis advertised parking tickets as the customers' responsibility and informed the public (through advertising) that Avis could bill charges for such tickets to the customer without an additional signature. Because these allegations contradicted all of Kent's conclusory allegations regarding unfair and fraudulent conduct, as well as breach of contract, Kent could not amend to set forth a claim against Avis.

Kent now appeals from the judgment of dismissal, but only as to the CLRA, UCL, and FAL causes of action.² He also maintains that he should be allowed to amend yet again and questions whether a potential class action may be dismissed on demurrer.

¹ Kent alleged that the practice of just paying the parking tickets represented a change in Avis' policy, of which Kent and the other Wizard Program members had no notice. The old policy, Kent alleged, was to forward the customer's name and address to the agency issuing the ticket and let the agency and the customer settle the problem.

² An issue not raised in the opening brief is deemed abandoned. (*Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 753, fn. 2.) Kent's opening brief identified and discussed only the statutory claims of the second amended complaint, plus unjust enrichment. His contract-based causes of action and the claim for declaratory relief are therefore not at issue in this appeal.

DISCUSSION

“In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, we must assume the truth of all facts properly pleaded by the plaintiff-appellant. Regardless of the label attached to the cause of action, we must examine a complaint’s factual allegations to determine whether they state a cause of action on any available legal theory. . . . [¶] We will not, however, assume the truth of contentions, deductions, or conclusion of fact or law and may disregard allegations that are contrary to the law or to a fact which may be judicially noticed.” (*Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1554-1555.) We affirm a judgment based on the sustaining of a demurrer on any properly supported ground, regardless of the trial court’s reasons. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.)

We review the refusal of the trial court to permit amendment after the sustaining of a demurrer for abuse of discretion. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 110.) The appellant must explain what the proposed amendments are and how they would cure the initial pleading deficiencies. (*Ibid.*)

Kent amended his complaint twice before the court dismissed the action. Ordinarily, an amended complaint supersedes all prior pleadings. An exception to this rule, however, permits the consideration of allegations from prior complaints ““where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. . . .’ [Citation.]” (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.)³ Accordingly, we will consult the original complaint when appropriate. (See *People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.)

³ The “Factual Background” portion of the statement of facts in Kent’s opening brief is devoid of citations to the record. Presenting a factual statement without citation to the record violates California Rule of Court, rule 8.204(a)(C). It provides grounds for us to decline to consider parts of the statement of facts lacking such citations. (See *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 990.)

I. Demurrer to the CLRA Cause of Action

The CLRA prohibits a list of “unfair methods of competition and unfair or deceptive acts or practices” used in the sale or lease of consumer goods or services. (Civ. Code, § 1770, subd. (a).) A consumer who has “suffer[ed] any damage” as a result of the prohibited acts or practices can bring an action on his own behalf and also on behalf of “other consumers similarly situated” who have also been damaged. (Civ. Code, §§ 1780, subd. (a); 1781, subd. (a).) Thus, “[r]elief under the CLRA is specifically limited to those who suffer damage” (*Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754.)

Kent has limited the appeal of his CLRA claim to one under Civil Code section 1770, subdivision (a)(5), which prohibits “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.” Kent argues that Avis violated this subdivision when it failed to disclose to him that it had abandoned its old laissez-faire policy regarding parking tickets in favor of paying them and charging the amount, plus an administrative fee, to his credit card.

Civil Code section 1770, subdivision (a)(5), in effect, prohibits certain kinds of misrepresentations in transactions involving the sale or lease of consumer goods and services; a seller or lessor cannot misrepresent the uses, benefits, characteristics, and so on of these goods and services. In this case, the “services” at issue are Avis’ car rental services⁴; Avis cannot tell its consumer customers it has a policy about paying parking tickets on its rental cars it does not have.⁵

⁴ At one point in the second amended complaint, Kent refers to the goods and services at issue as “insurance policies and services.”

⁵ We assume for purposes of argument that a policy regarding paying parking tickets is a “characteristic” or a “benefit” of a car rental service.

The second amended complaint contains no allegations about Avis representing anything to Kent or to its customers regarding a parking ticket policy it does not have. Kent alleged Avis had a long-standing practice of forwarding names and addresses of customers with parking tickets to the ticketing agency. He did not allege how this practice was communicated to him.⁶ At some point, things changed – according to Kent. He did not allege, however, that Avis ever represented to him (or to anyone else) that the old policy was still in effect and thereby induced him to rent a car under the mistaken belief that if he got a parking ticket, he could fight it out with the ticketing agency himself. (Cf. *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1366-1367 [CLRA plaintiff must allege facts showing reliance on deception]; Civ. Code, § 1770, subd. (a) [unfair act “results in” sale or lease of goods or services].) On the contrary, Kent alleged that Avis expressly advertised it could charge parking tickets to its customers’ credit cards without any additional signature.⁷ He has also admitted, twice, in his opening brief that the rental agreement includes a provision permitting Avis to charge an administrative fee for processing parking tickets.

For an omission to be actionable under the CLRA, it must be contrary to a representation actually made by the defendant, or the defendant must have had a duty to disclose the omitted fact. (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal App.4th 824, 835; see also *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1276.) Kent alleges no contrary representation or any facts giving rise to a duty to disclose more than what Avis did disclose, as alleged in the second amended complaint.

Kent relies only on *Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30 (*Outboard Marine*) to support his contention that Civil Code section 1770, subdivision (a)(5), covers omissions as well as actual misrepresentations. *Outboard*

⁶ In his opening brief, Kent asserted he “infrequent[ly]” received traffic tickets during the 20-plus years of his membership in the Wizard Program.

⁷ Kent did not attach a copy of the rental agreement to any of his complaints, and Avis strove valiantly, but unsuccessfully, to get the court to take judicial notice of its terms.

Marine dealt with a different situation. At the time that case was decided, the CLRA was the exclusive remedy for any of the prohibited actions, in this case false representations regarding the capabilities of an off-road vehicle. (*Outboard Marine, supra*, 52 Cal.App.3d at pp. 33, 35.) The trial court sustained a demurrer to the original complaint on that ground, and the plaintiff filed an amended complaint alleging two causes of action: one for fraudulent concealment of the vehicle's defects and the other under the CLRA (Civ. Code, § 1770, subd. (a)(5)) for fraudulent misrepresentation of the vehicle's virtues. (*Id.* at p. 34.) This time the trial court overruled the demurrer.

The appellate court viewed the amended complaint as a transparent attempt to plead around the CLRA by alleging concealment of the truth rather than misrepresentations. For example, the CLRA cause of action alleged a false representation about the vehicle's excellent braking system. The non-CLRA cause of action alleged concealment of the fact that the braking system was "totally defective." (*Outboard Marine, supra*, 52 Cal.App.3d at p. 37.)

The reviewing court was not having any of this: "We find no demonstrable difference between the allegations of the first and second causes of action. They allege the same conduct, the same causal relation (the reliance being in each case the purchase of the [vehicle]) and the same damage, all resulting from conduct clearly proscribed by Civil Code section 1770." (*Outboard Marine, supra*, 52 Cal.App.3d at p. 37.) In effect, the court would not allow the plaintiff to plead the opposite of the affirmative misrepresentation alleged under the CLRA in a separate cause of action for failure to disclose. *Outboard Marine*, however, does not endorse a CLRA cause of action under Civil Code section 1770, subdivision (a)(5) based solely on concealed or omitted facts.

Kent has not alleged any misrepresentations about parking tickets by Avis to match up against fraudulent concealments. He has not alleged any misrepresentations at all on this subject. Unless the concealed fact is contrary to a representation actually made by the defendant, it is not actionable under Civil Code section 1770, subdivision

(a)(5). (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022.) The court properly sustained Avis' demurrer to the CLRA cause of action based on this subdivision.

II. Demurrer to the UCL Cause of Action

The UCL, Business and Professions Code sections 17200 et seq., prohibits unfair, unlawful, or fraudulent business acts or practices and false advertising. Its “purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.” (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) It prohibits both anti-competitive business practices as well as injuries to consumers.

A. Ability to Demur to UCL Cause of Action

Kent appears to be challenging the trial court's ability to sustain a demurrer to a UCL cause of action. A UCL cause of action enjoys no immunity from demurrer. It is subject to demurrer for the same reason that any other cause of action would be: the plaintiff has failed to state facts sufficient to constitute a cause of action (among other possible defects). (See Code Civ. Proc., § 430.10, subd. (e).) If a UCL plaintiff meets this criterion, a demurrer is properly sustained. (See *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144) [affirming rulings sustaining demurrers to UCL causes of action]; *Searle v. Wyndham International, Inc.* (2002) 102 Cal.App.4th 1327 [affirming demurrer sustained on UCL and FAL causes of action].)

B. Failure to Allege “Unlawful” Business Practice

An “unlawful” business practice includes any business practice forbidden by law. (*Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, 539.) The inclusion of unlawful business acts or practices in the definition allows a UCL plaintiff to “borrow” other laws, and their violation is independently actionable. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).)

In the second amended complaint, Kent grounded his unlawful UCL claim on violations of the CLRA and the FAL. In his opening brief, however, he refers only to the CLRA as the basis for this claim and merely observes that this claim has merit only if the CLRA has merit. We take him at his word. We have already decided that the CLRA claim lacks merit. It is therefore unnecessary to discuss this aspect of the UCL further.

C. Failure to Allege “Fraudulent” Business Practice

A business practice is fraudulent under the UCL if it is likely to deceive the public. Actual deceit is not necessary. (*People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 516-517; *Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1160.) Under this prong of the UCL, a plaintiff must plead and prove that the misrepresentations were “an immediate cause of the injury-causing conduct,” although they need not be the sole or even the decisive cause. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 328.) Moreover, under Business and Professions Code section 17204, a UCL plaintiff must plead facts establishing that he or she was injured in fact and lost money or property as a result of the deceptive practice.

The second amended complaint identified the following as the sole fraudulent business practice: “[T]he public will be and are deceived into thinking that they [*sic*] will be responsible for their own parking violations, that [Avis] will not interfere with the renter’s right to contest the violation and/or be responsible for the violation and receive notices concerning the violation, and will not have to incur significant administrative fees.” This is not a business practice; it is, allegedly, the *result* or the *effect* of a business practice, which we infer to be Avis’ paying its customers’ parking tickets, billing their credit cards for these amounts, and charging them an administrative fee in addition to the amounts of the parking tickets.

Whether the public is likely to be deceived is, at this point in the proceedings, a secondary issue; the primary issue is whether Kent has alleged facts

establishing that he was likely to be deceived by Avis' practice and that he suffered injury in fact and lost money or property as a result of the practice.

Factual allegations of the second amended complaint contradict Kent's conclusory allegation of deception. In the first place, the "public" (including Kent) is indeed responsible for its own parking violations; Kent alleged as much: "Avis' written policy entered into with customer's [*sic*] states, 'You'll pay all charges, fines, penalties, court costs, and recovery expenses for parking, traffic, toll, and other violations . . .'" Kent also alleged that the rental agreement expressly permitted Avis to bill its customers for parking tickets.⁸ According to Kent's admissions, the rental agreement expressly allowed Avis to charge an administrative fee for paying tickets. Avis therefore did not act deceptively, but rather in accordance with the terms of the rental agreement – as alleged and admitted by Kent – when it billed his credit card and charged a fee.

Finally, Kent did not allege facts showing that Avis "interfered" with his right to get notice of the parking tickets. Once again, his factual allegations are to the contrary. He collected the actual tickets from his rental car; he certainly had notice of the parking violations. He alleged the tickets informed him of a 60-day window of time within which to contest them. Kent alleged no facts from which it could be concluded that Avis tried to conceal the existence either of the tickets or of this time period from him.

The facts alleged also contradict Kent's assertion that Avis "deceived" him into thinking it would not "interfere" with his ability to contest the parking tickets. Kent alleged that the ticketing agency sent a notice of delinquent violation to Avis, informing

⁸ Kent alleges that the rental agreement was "silent" about whether Avis would *pay* its customers' parking tickets, notwithstanding his allegation regarding agreement's express permission to Avis to *bill* the tickets to its customers. Unless Kent is prepared to allege that Avis billed its customers for parking tickets it did not pay – and it does not appear he is so prepared – the permission to bill the customer clearly implies a prior payment by Avis.

California and Washington, D.C., statutes make both a car's owner and its operator liable for parking penalties and allow an owner that pays a parking penalty to recover the amount from the operator. (See Veh. Code, § 40200, subd. (b); D.C. Code, § 50-2303.04, subd. (a).)

Avis that it had 14 days left to respond to the violation. Washington, D.C., law requires the mailing of a notice to the registered owner no later than 50 days after the parking ticket was issued, letting the owner know about the infraction and warning that the deadline to contest the ticket (within 60 days of issuance) is looming. (See D.C. Code, § 50-2303.05, subd. (d)(2).)⁹ This notice is mailed, however, only after an initial 30-day period to answer the violation has expired without any response to the parking ticket, either to contest it or to pay it. According to Kent's own allegations, therefore, Avis did not even learn about the parking tickets until they were a month-and-a-half old and until only two weeks were left to pay up. Kent had ample time to tell both Avis and the ticketing agency in Washington, D.C., that he wished to contest the parking tickets.¹⁰ After having received the notice, and with so little time left before the deadline, Avis was entitled to assume that Kent was not going to take care of them.

Kent has not alleged any business practice likely to deceive the public. According to the factual allegations of the second amended complaint, Avis did not misrepresent how it handles parking tickets, and it did not interfere with Kent's right to contest the parking tickets he received in Washington, D.C. The demurrer to the cause of action for fraudulent business practices was properly sustained.

D. Failure to Allege "Unfair" Business Practice

Courts have long struggled with a proper test for the unfairness prong of the UCL. On the one hand, the statutory language is "sweeping" so as not to hamper the

⁹ The statute rather inelegantly refers to the mailed notice as a "notice of the outstanding notice of infraction and of the impending deemed admission."

¹⁰ In his initial complaint, Kent alleged that he "made up" a letter to send to the D.C. ticketing agency complaining about getting the parking tickets. He did not allege when he sent the letter. He also alleged he contacted the agency "at some point in the fall of 2007" to inquire about his tickets. "Some point in the fall" could be any time before December 21. He alleged that, at this "point in the fall," he spoke to a supervisor, who said the agency had received his letter. Again, no dates. After speaking with the supervisor, Kent "then checked his credit card statements" and discovered Avis' charges, made on December 17, 18, and 19, 2007. The 60-day period to contest the parking tickets expired in early November.

The second amended complaint, the operative complaint, entirely omits allegations concerning the letter and the conversation with the D.C. agency supervisor.

courts' ability to put a stop to whatever new tricks the fertile human mind can invent to extract money or property from the unsuspecting. (*Cel-Tech, supra*, 20 Cal.4th at p. 181.) On the other hand, the statute cannot be so sweeping that “the courts will roam across the landscape of consumer transactions picking and choosing which they like and which they dislike.” (*Morris v. BMW of North America, LLC* (N.D. Cal., Nov. 7, 2007, No. C 07-02827 WHA) 2007 U.S. Dist. Lexis 85513, *22; see also *Cel-Tech, supra*, 20 Cal.4th at p. 182, 185.)

In *Cel-Tech*, the California Supreme Court crafted a test for UCL unfairness when the parties were direct competitors. (*Cel-Tech, supra*, 20 Cal.4th at p. 187.) Unfortunately, the court was not as obliging when the aggrieved parties are consumers; in fact, it explicitly stated it was *not* devising a test to be used in the consumer context. (*Id.* at p. 187, fn. 12.) The court also regarded as “too amorphous” two prior attempts to define an unfair practice: (1) it “offends an established public policy” or is “immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers” and (2) the gravity of the harm to the consumer outweighs the utility of the defendant’s conduct. (*Id.* at pp. 184-185.)

Since *Cel-Tech*, appellate courts have continued to search for a proper unfairness test for practices directed at consumers. The results are summarized in *Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 256-257, and they appear to consist in doing either what the Supreme Court said not to do or what it criticized. One line of cases uses the *Cel-Tech* test, despite the court’s explicit caveat that the test applied only to actions between direct competitors, not to consumer actions. Another line of cases uses the “immoral, unethical, oppressive” test the court criticized as too amorphous. The third uses the weighing test the court also said was too amorphous and, like the “immoral” test, provided “too little guidance to courts and businesses.” (*Cel-Tech, supra*, 20 Cal.4th at pp. 184-185.)

Because we agree with Falstaff that the better part of valor is discretion, we refrain from entering these lists. Regardless of what test applies, the law is clear that if a practice is sanctioned by a specific statute or regulation (see, e.g., *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1505-1506) or has been agreed to in a valid and enforceable contract (see, e.g., *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 881-882), it is not unfair.

Kent apparently does not claim that the contract (i.e., the rental agreement) through which he availed himself of an Avis car is invalid or unenforceable. On the contrary, he sought to enforce it through causes of action for breach of contract and breach of the implied covenant, now abandoned.

Kent's deployment of the rental agreement in this appeal is decidedly opportunistic. When it suits him, he proffers or alleges terms of the agreement; when it does not, he denies knowing anything about any rental agreement. He cannot have it both ways. Factual allegations of a complaint are judicial admissions. (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324; see also *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271 [admission of fact in answer judicial admission].) Statements made in a brief also constitute judicial admissions that are binding upon the party making them. (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752; *Electric Supplies Distributing Co. v. Imperial Hot Mineral Spa* (1981) 122 Cal.App.3d 131, 134; *Williams v. Superior Court* (1964) 226 Cal.App.2d 666, 674.)

Kent alleged in the second amended complaint as follows: "Avis rents motor vehicles to the general public. Avis' written policy entered into with customer's [sic] states, 'You'll pay all charges, fines, penalties, court costs and recovery expenses for parking, traffic, toll, and other violations . . .'" What, one wonders, does the ellipsis cover? Anything important to this case? Kent fills in the missing text in his opening brief: " , including storage liens and charges, plus an administrative fee, with respect to

the use of the car while on rental to you, unless due solely to our fault.”” Kent further alleges in the second amended complaint itself that the agreement “merely states that Avis ‘may’ (**not** ‘shall’) bill charges, parking/traffic tickets included, to [Kent]”

In his brief, Kent has identified four “unfair” practices by Avis: (1) failure to disclose that it will “automatically” charge its customers for parking tickets, thereby interfering with the customers’ right to contest the tickets; (2) charging an administrative fee; (3) charging an excessive fee; and (4) charging the customer more than the amount of the ticket. We discuss each in turn, keeping in mind that Kent must also allege facts showing that he suffered injury in fact and lost money and property as a result of each of the practices alleged. (Bus. & Prof. Code, § 17204.) We also keep in mind that we accept as true only factual allegations, not conclusions or contentions.

As to the first practice, Kent himself alleged that Avis’ rental agreement includes a provision allowing it to bill its customers for parking tickets. This factual allegation contradicts his conclusory allegation that Avis “failed to disclose” this practice and takes precedence over the latter allegation. As to the “automatic” billing interfering with Kent’s rights, once again Kent’s own factual allegations contradict it. According to Kent, the parking tickets informed him that he had 60 days to contest them, that is, until early November 2007. Kent also alleged that Avis received a “notice of delinquent violation” from the D.C. ticketing agency informing Avis that it had only 14 days left to contest the ticket.¹¹ Therefore at least 46 days, approximately one-and-a-half months, had elapsed between the time the parking tickets were issued and the time when Avis learned about them, in mid- to late October. Finally, Kent alleged that Avis billed his

¹¹ Kent alleged that he did not contact Avis about the parking tickets until after he had spoken to someone at the D.C. ticketing agency. He does not allege any other way that Avis could have discovered the existence of the tickets before it received the notice referred to in the allegations.

credit card for the parking tickets in mid-December 2007, over three months after the tickets had been issued.¹²

Kent's own factual allegations contradict his conclusion that Avis interfered with his ability to contest the parking tickets. He had over a month to contest the tickets before Avis even knew of their existence. He had the same amount of time to inform Avis of his intention to contest the parking tickets; he does not allege that he made any efforts in that direction. When Avis received notice of the outstanding (that is, unanswered) notice of infraction, it had only two weeks to respond. (See D.C. Code, § 50-2303.05, subd. (d)(2).) It was certainly not "unfair" at that point for Avis to assume that Kent was not going to take care of the parking tickets and to pay them itself.¹³

Kent's objection to Avis' "automatically" charging its customers for parking tickets is obscure. How Avis charges customers for parking tickets has no effect on whether the customers can contest them. Kent in particular was not charged for the parking tickets until over three months had elapsed since their issuance. By that time, the right to contest the tickets had long expired. If Kent means that Avis *paid* his parking tickets so quickly that he was unable to contest them, his factual allegations contradict

¹² Avis repeatedly asserts that it paid the parking ticket charges in December 2007. Be that as it may, the second amended complaint alleged only that Avis *charged Kent's credit card* in December 2007; it did not allege when Avis paid the Washington, D.C., ticketing agency. We can assume only that Avis paid the agency sometime between the date when it got the notice of the unpaid parking tickets (in October) and the dates when it charged Kent's card (in December).

¹³ Kent argues several times that Avis could have protected itself from the consequences of unpaid parking tickets and absolved itself from all responsibility for them by resorting to California's Vehicle Code sections 40215 and 40209. Vehicle Code section 40215, subdivision (a), permits, but does not require, a person to request a telephone review of a parking ticket from the issuing agency. Sections 40208 and 40209 permit, but do not require, a car rental company to return an affidavit of nonliability for a parking violation to the issuing agency. Because Kent got his tickets in D.C., we are at a loss to understand how or why California statutes would get Avis either a telephone review from a D.C. agency or the ability to send an effective affidavit of nonliability to a D.C. agency for parking tickets issued in D.C. If there are comparable sections in the Washington, D.C., traffic statutes, Kent has not pointed them out to us.

Kent also refers in his opening brief to Civil Code section 1747.02, subdivision (f), part of the definition section of the Song-Beverly Credit Card Act of 1971, as bolstering the unfairness prong of his UCL cause of action. Subdivision (f) defines "unauthorized use" of a credit card for purposes of the act. The act itself, however, does not prohibit unauthorized use of a credit card. The definition applies to those portions of the act dealing with who has to absorb the loss – the cardholder or the issuer – for unauthorized use. (See Civ. Code, §§ 1747.10, 1747.20.) We fail to see the relevance of this definition to the issues in this appeal.

this contention. As discussed above, according to Kent’s allegations Avis could not have learned of his parking tickets until sometime in mid- to late October. Kent had more than a month to contest them and to inform Avis of his intention to do so. The second amended complaint contains no allegations of Kent’s efforts on either front, let alone allegations of efforts thwarted by Avis.

The second and fourth “unfair” practices are basically the same thing: charging extra for paying parking tickets. The valid and enforceable rental agreement, as Kent had admitted, gave Avis express permission to charge an administrative fee.¹⁴ It therefore cannot be unfair for Avis to do so.

Finally, Kent accuses Avis of charging an “excessive” administration fee. This accusation invites us to start roaming the commercial landscape of consumer transactions in search of excessive prices, a mission we choose not to accept. A court is ill-equipped to determine whether a charge allowed by an otherwise valid contract is “excessive” without some statutory or regulatory framework for such a determination. (See *Lazarreschi Investment Co. v. San Francisco Federal Savings & Loan Assn.* (1971) 22 Cal.App.3d 303, 311 [price control should be by statute and regulation, not individual court cases].)

We have uncovered no UCL cases in which a court has found a charge to be “excessive” in the absence of deceptive or misleading information about it. *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457 (*McKell*) is instructive here. In that case, home loan borrowers accused Washington Mutual of overcharging them for various services connected to their loans. They alleged the bank actually paid only a few dollars for these services, while charging the borrowers hundreds of dollars. (*Id.* at p.

¹⁴ “You’ll pay all charges, fines, penalties, court costs and recovery expenses for parking, traffic, toll, and other violations, including storage liens and charges, plus an administrative fee, with respect to the use of the car while on rental to you, unless due solely to our fault.”

1466.) The bank listed the inflated underwriting costs on the loan papers, leading the borrowers to believe it was simply passing through these costs.

Washington Mutual argued on appeal that the court should not get involved in deciding whether its charges for underwriting services were “too high.” (*McKell, supra*, 142 Cal.App.4th at p. 1474.) As the court pointed out, the borrowers were not complaining about the amount of the fees per se, but rather that Washington Mutual led them to believe it was charging them what the services cost the bank. (*Ibid.*) Although the court found the borrowers had stated a cause of action for unfair business practices, the claim was not based on an excessive fee.¹⁵

People v. Dollar Rent-A-Car Systems, Inc., a suit about overcharging rental car customers for car repairs, had a similar issue. The car rental companies misled their customers into thinking they were paying what it cost the companies to repair the cars, when actually the companies were paying wholesale prices and charging the customers retail prices. (*People v. Dollar Rent-A-Car Systems, Inc.* (1989) 211 Cal.App.3d 119, 125; see also *Schnall v. Hertz Corp.*, *supra*, 78 Cal.App.4th at p. 1160 [court refused to determine whether refueling service charge too high in absence of limit set by Legislature].)

Avis disclosed and provided in its rental agreement, as Kent alleged and admitted, that it would charge an administrative fee if it paid its customers’ parking tickets. Kent could have avoided the fees if he had taken care of the ticket within 30-day time limit set by D.C. Code section 50-2303.05, subdivision (d)(1). If he had done so, Avis would not have received a “notice of outstanding notice of infraction and of impending deemed admission” from the D.C. ticketing agency, would not even have

¹⁵ The case Kent cites to support his excessive fee argument, *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, includes no allegation of excessive fees as an unfair business practice. The alleged UCL violations were the improper use of the bank’s signature card to authorize charges for overdrafts and the waiver of these charges for some favored customers. (*Id.* at p. 929.) The court discussed excessive fees in the context of breach of contract and liquidated damages, not the UCL. (*Id.* at pp. 924-926, 930-931.) Liquidated damages are not at issue here because Kent did not breach the rental agreement by getting a parking ticket. (See Civ. Code, § 1671.)

known about the parking tickets, and would not have had occasion to pay them itself. We can discern no unfair business practice here.

III. Demurrer to the FAL Cause of Action

Business and Professions Code section 17500 prohibits the making or disseminating of advertising that is “untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading” Actual deception is not required; advertising that tends to deceive or mislead, even if accurate at some level, is also actionable under this statute. (*Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 332 (*Day*)). Whether an advertisement is misleading or deceptive is ordinarily judged by the effect it would have on a reasonable consumer. (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360.)

Kent alleged several statements he claimed constitute false advertising.

They are:

“Any parking ticket or traffic violations are the responsibility of the renter;¹⁶

“[Avis] may bill all charges, parking/traffic tickets included, to the card I [the customer] use for payment, without additional signature by me on a voucher;

“We [Avis] will honor all commitments to our customers, employees, and shareholders;

“We [Avis] will conduct business with unwavering high standards of honesty, trust, professionalism and ethical behavior;

“We [Avis] will communicate openly and frequently, sharing what we know, when we know it; and

“Avis, we try harder.”

¹⁶ Kent interprets the word “responsibility” to mean that it is solely up to the renter how to “respond” to the traffic ticket, with no input from Avis.

Only the first two representations deal specifically with parking tickets; according to the allegations of the second amended complaint, neither one is untrue or misleading. Avis held Kent responsible for the parking tickets (instead of paying for them itself) and charged the amount of the tickets and the administrative fee (“all charges”) to Kent’s credit card without any further signature, as it said it would do. There is no false or misleading advertising here. (See *Consumer Advocates v. Echostar Satellite Corp.*, *supra*, 113 Cal.App.4th at p. 1360 [true statement does not violate FAL].)

A reasonable consumer would not understand the remaining representations as referring to Avis’ handling of parking tickets. None of them mentions parking tickets or paying for parking violations. They are, instead, representations about how Avis conducts its business generally. Assuming they are factual enough to be either true or false (see *Consumer Advocates v. Echostar Satellite Corp.*, *supra*, 113 Cal.App.4th at p. 1361), they could not mislead consumers as to Avis’ practices with regard to parking tickets.

An example of misleading advertising with the necessary specificity may be found in *Day*. Providers of pre-paid telephone cards, which sold “minutes” of telephone time, were sued for false advertising, because they rounded up the minutes used without disclosing this practice to the card buyers. For example, a call that lasted 10 seconds ate up one minute of card time; a call that lasted one minute and one second was debited as a two-minute call. (*Day*, *supra*, 63 Cal.App.4th at p. 328.) The cards’ packaging, however, advertised the cards as affording a buyer the number of minutes on their face, when in reality the buyer could easily get significantly less telephone time.¹⁷ (*Id.* at pp. 329-330.)

¹⁷ A card buyer who made 5 one-minute-one-second calls would use up a 10-minute card, even though he had had only five minutes and five seconds of actual phone time. A buyer who made ten 20-second calls would actually have had less than four minutes.

What distinguishes *Day* from Kent’s case is the close link between the deception and the deceptive advertising. The *Day* defendants were not accused of misleading the public through some general statements about how virtuous they were as companies; they were accused of specific misrepresentations on the packaging of their prepaid phone cards about the amount of telephone time the customer was purchasing. (*Day, supra*, 63 Cal.App.4th at pp. 329-330.) By contrast, the statements Kent has identified as false make no representations about how Avis will handle parking tickets or administrative fees. They are general statements about how Avis conducts its business.

Kent’s FAL cause of action as it applied to the general statements is defective for another reason. Under Business and Professions Code section 17535, as amended by initiative in 2004, a private person suing under section 17500 must allege that he or she has “suffered injury in fact and has lost money or property as a result” of the false advertising. (See *Durell v. Sharp Healthcare, supra*, 183 Cal.App.4th at p. 1359.) Kent did not allege any facts showing how the statement “We honor all commitments to our customers, employees and shareholders” – even if false or misleading – caused him to suffer injury in fact and lose money or property. The same can be said of the other general statements about high standards and communications. To maintain that the slogan “we try harder” caused Kent to believe he would be able to deal directly with issuing agencies about his parking tickets is simply fanciful. (See *State Board of Funeral Directors & Embalmers v. Mortuary in Westminster Memorial Park* (1969) 271 Cal.App.2d 638, 642 [strained and unjustified interpretation of advertisements not basis for FAL claim].)

Finally, Kent did not allege actual reliance on any of the general statements he alleged. He allegedly obtained these statements from Avis’ website. Yet he also claimed to have been a Wizard Program member for over 20 years in 2007.¹⁸ Kent did

¹⁸ In one court document, Kent stated he had been a Wizard Program member for 22 years.

not allege he relied on these or similar statements made on any Avis website in the early to mid-1980s to become a member of the program. He did not allege any facts suggesting that he renewed or continued his membership in the Wizard Program after seeing the statements on the website or that the statements had any effect whatsoever on his conduct with respect to renting the Avis car he drove in September 2007.¹⁹

In *In re Tobacco II Cases*, *supra*, 46 Cal.4th 298, the California Supreme Court concluded the “as a result of” language in Business and Professions Code section 17204, which was added by voter initiative in 2004 to curb frivolous lawsuits, “imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL’s fraud prong.” (*Id.* at p. 326.) The same language, for the same reason, was added at the same time to Business and Professions Code section 17535, the statute defining the relief available under the FAL. (See *Californians for Disability Rights v. Mervyn’s, LLC* (2006) 39 Cal.4th 223, 228, fn. 2.) Kent must therefore allege facts showing an actual reliance on the allegedly deceptive advertising. He has not done so.

Kent did not state a cause of action under the FAL. The statements he identified in the second amended complaint are either true or not specific enough to have the misleading effect he alleged. He also failed to allege facts supporting the reliance requirement. The demurrer was properly sustained.

IV. Unjust Enrichment

On appeal, Kent argues that the second amended complaint states facts sufficient to state a cause of action for unjust enrichment. The complaint does not mention unjust enrichment, and Kent did not make this argument before the trial court. It is our task, however, to determine whether the complaint states facts supporting a claim

¹⁹ As reliance, Kent alleged only that he “continued to rent with Avis as a Wizard Member because of Avis’ advertising that it would be easier and more convenient to rent his car when he travels.” The allegedly false advertising statements specified in the complaint, however, had nothing to do with the ease or convenience of renting an Avis car for travel.

that collecting an administrative fee for paying Kent’s parking tickets unjustly enriched Avis.²⁰ (See *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.)

“[T]here is no cause of action in California for unjust enrichment. ‘The phrase “Unjust Enrichment” does not describe a theory of recovery, but an effect: the result of failure to make restitution under circumstances where it is equitable to do so.’ [Citation.] Unjust enrichment is “a general principle, underlying various legal doctrines and remedies,” rather than a remedy itself. [Citation.] It is synonymous with restitution.” (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793; see also *Perdue v. Crocker National Bank, supra*, 38 Cal.3d at p. 922 [unjust enrichment “depends on a finding pursuant to some other cause of action” that charges were invalid or excessive].)

Unjust enrichment is not permitted when the parties have express binding agreements that define their rights. (*California Medical Assn. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94 Cal.App.4th 151, 172.) Unjust enrichment is based on quasi-contract, “an obligation (not a true contract . . .) created by the law without regard to the intention of the parties and . . . designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money.” (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 1013, p. 1102, italics omitted.) “When parties have an actual contract covering a subject, a court cannot – not even under the guise of equity jurisprudence – substitute the court’s own concepts of fairness regarding that subject in place of the parties’ own contract.” (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1420, fn. omitted.) Kent has not cited any case in which unjust enrichment recovery was allowed notwithstanding the existence of a valid and enforceable contract between the parties.

²⁰ Paying the parking tickets themselves and charging Kent for them could not have enriched Avis, because Avis had to turn this money over to the issuing agency in D.C.

Kent and Avis had an express contract, one that Kent clearly regarded as valid and binding, because he alleged its existence and sought at one time to recover damages for its breach. He has admitted the contract included a provision regarding the collection of administrative fees. He therefore cannot allege a quasi-contract covering the same subject. He cannot get his \$75 back through some kind of unjust enrichment claim.

V. Demurrer to Potential Class Action

In arguing that the court should not have dismissed the second amended complaint because was a potential class action, Kent puts the cart several furlongs ahead of the horse. If the defendant demurs, the trial court must ascertain whether the complaint states a cause of action before it can even consider a case as a class action. If the plaintiff cannot state a claim, no class of which he is a typical member would have a claim either.²¹ Under these circumstances, a trial court properly sustains a demurrer and dismisses the action, before even tackling class certification. (See, e.g., *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082 [affirming securities fraud class action dismissal on demurrer after plaintiffs failed to plead reliance]; *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117 [demurrer to potential class action sustained based plaintiffs' inability to plead duty to disclose].)

Kent had three chances to state causes of action against Avis for paying his parking tickets. He could not do so. Any class of which he was a typical member would have the same problem. The court did not err in dismissing the second amended complaint even though it was framed as a potential class action.

²¹ Kent criticizes the trial court for determining class suitability at the pleading stage. The court did not determine class suitability; it decided Kent had not stated a cause of action. The ruling had nothing to do with any potential class.

VI. Ability to Amend Complaint

Kent proposes to amend his complaint by (1) restoring allegations from the original complaint regarding his “actively contesting the tickets against him” (presumably the allegations about the letter to the D.C. ticketing agency) and (2) removing the paragraphs in which he alleges certain terms of the rental agreement. He also, rather confusingly, offers to drop the false advertising claim, reinstate the contract claims (but only for himself individually), and make class claims only under the CLRA, UCL, and FAL, even though he offered to drop the false advertising claim. He finally states that the court should have limited or redefined the class, instead of sustaining the demurrer.²²

It is hard to know what to make of these proposals. No doubt Kent would like to eliminate the allegations that put him out of court; the difficulty is that a plaintiff cannot simply ditch allegations that have become embarrassing or fatal to his claims. (See *Vallejo Development Co. v. Beck Development Co.*, *supra*, 24 Cal.App.4th at p. 946.) As for restoring the allegations about his efforts to challenge his tickets, we fail to see how these allegations would improve the UCL, the CLRA, and the FAL causes of action, and Kent has not explained how they would cure his pleading defects. We cannot tell whether the FAL claim is in or out of the proposed amended complaint; it hardly matters, however, because Kent failed to state a claim under the FAL.

Finally, the class definition was not before the trial court, which was concerned only with whether *Kent* could state a cause of action. As he could not, a more limited or different definition of the class is irrelevant.

It was Kent’s burden to explain to both the trial court and to us how he could amend the second amended complaint to state a cause of action. (*Paterno v. State*

²² To support this last argument, Kent states, “Appellant never saw that advertising, does not know if and when that advertising was actually made, where made, when made or who saw it.” We are even more baffled than Kent; we cannot tell what advertising he is talking about.

of California, supra, 74 Cal.App.4th at p. 110.) He has not done so. The trial court did not abuse its discretion in refusing Kent's request to amend a third time.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.