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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ANA-MARIA MORAR, Plaintiff and Appellant, v. ABC FINANCIAL SERVICES, INC., Defendant and Respondent.	A153508 (Alameda County Super. Ct. No. RG17849792)

Plaintiff entered into a contract with two entities for use of a fitness facility, and four months later was diagnosed with various medical conditions that precluded her from using that facility. She sought to cancel the contract based on disability, which by statute fitness service providers must do. She was referred to an agent of the other contracting parties responsible for processing such cancellation and refund requests and was told she had not met the requirements for cancellation. Eventually, she sued the two entities with which she had contracted as well as their agent, the company that had declined her requests. The agent twice demurred on the ground that she failed to state a claim against it.

Plaintiff now appeals from the judgment dismissing the action as against the agent, claiming the trial court erred in sustaining the demurrer and denying her another opportunity to amend. We find error in the trial

court's ruling sustaining the demurrer as the HSSCA, UCL and declaratory relief causes of action. In all other respects, we affirm the judgment.

I.

BACKGROUND

A. Procedural History

Plaintiff and Appellant Ana-Maria Morar, on behalf of herself and others similarly situated, filed a class action complaint against respondent ABC Financial Services, Inc. (ABC) and two other entities who are not parties to this appeal, Accettura Bros., Inc. dba California Ripped Fitness (Ripped Fitness) and National Financial Systems, Inc. dba National Fitness Financial Systems (NFFS) and 20 unnamed Doe defendants, asserting claims for violation of the Health Studio Services Contract Act (HSSCA), Civ. Code, §§ 1812.80-1812.98; the Consumer Legal Remedies Act (CLRA), Civ. Code, §§ 1750-1784; the Unfair Competition Law (UCL), Bus. & Prof. Code, §§ 17200-17210; and for conversion and declaratory relief.[1] Thereafter, Morar filed a First Amended Complaint asserting the same causes of action. ABC demurred to the First Amended Complaint, contending Morar had failed to state a cause of action against it under any of the above statutes or for conversion or declaratory relief. After briefing and argument, the trial court sustained the demurrer but granted Morar leave to amend.

Morar then filed a Second Amended Complaint, again asserting the same causes of action. ABC again demurred to the entire complaint, and after briefing and argument the trial court again sustained the demurrer, this time without leave to amend. The court then entered a judgment dismissing Morar's claims against ABC. Morar timely appealed.

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[1] Except as otherwise specified, "section" or "sections" as used in this opinion refer to provisions of the Civil Code.

B. Allegations

Morar alleged she entered into a health studio services contract with Ripped Fitness and NFFS in March 2015 and paid (in rounded numbers) a card fee of $10, the first month's dues of $25 and a "processing fee" of $324 that "constituted the first year's membership fees paid as a lump sum." Ripped Fitness "is a California corporation and is engaged in the business of owning and operating fitness and training facilities open to the public" and "is a Health Studio within the meaning of" the HSSCA. Under the contract, Morar was to make monthly payments to NFFS who would "process[] and collect[]" them "on behalf of [Ripped Fitness]." NFFS, Morar further alleged, is a Utah corporation that provides health club management services and provides such services to more than 1,000 health clubs throughout the country. NFFS "was the agent for [Ripped Fitness] for purposes of merchant processing and the collection of membership dues of health studio services customers."

Morar alleged that ABC "is an Arkansas corporation and claims to be the nation's leading software and billing provider for the health and fitness industry. According to Defendant ABC Financial's website, the company has been in business since 1981 and currently works with over 8,000 health clubs." Further, Morar alleged, ABC "was the agent for [Ripped Fitness] with respect to billings, consumer interactions, and handling the cancellation process for health studio services consumers" and was also "the agent for [Ripped Fitness] . . . with respect to . . . issuing refunds to consumers."

About four months after she entered into the contract with Ripped Fitness and NFFS, Morar was diagnosed with "at least 10 different disorders," including "symptoms related to Multiple Sclerosis and Lupus," that prevented her from being able to use the gym and other facilities. When

she contacted Ripped Fitness to cancel her contract because her doctor had informed her she could not engage in strenuous activity and she was therefore unable to use Ripped Fitness's facilities, Ripped Fitness instructed her "to contact [its] agent, ABC . . . , to process the cancellation of the contract" and provided her with a business card identifying ABC "as the entity responsible for handling all customer service issues, including handling cancellation requests and issuing refunds to customers." ABC's card indicated to Morar that she "could contact [ABC] either telephonically or via email and could create an 'iCLUB' account through [ABC]'s website that would allow her to make payments for her health services contract, change billing information, view health club policies for [Ripped Fitness], update contact information, print a copy of her membership agreement, and view and print payment history and gym usage history." Morar stated she was "informed and believes" that ABC "acts as the agent for Defendants [Ripped Fitness] and [NFFS] with respect to handling customer cancellations and issuing refunds to customers."

According to the complaint, about six months later, Morar contacted ABC and communicated with it by telephone and email on multiple occasions from January 2016 through July 2016 attempting to cancel her contract, and each time was informed that the information she provided, including a note from her physician, was not sufficient to justify cancellation and that her physician was required to provide detail about her condition and to verify she had a "permanent or substantial disability." Morar alleged that the "onerous" requirements imposed by the contract, including the form verification of disability the contract references, are "designed to discourage physicians from certifying that their patients are suffering from a disability that would enable them to cancel their [contracts]" and violate the HSSCA.

In August 2016, Morar alleges, she received a collection notice from an agency "pursuing collection efforts on behalf of [Ripped Fitness] in the amount of $614.77." She alleges that the acts of ABC in refusing to cancel her contract and issue her a refund violate the HSSCA and constitute wrongful conduct by ABC.

Finally, Morar alleges that ABC is a "holder" of the health services studio contract she entered with Ripped Fitness and NFFS.

The above factual allegations appear in both complaints, with minor differences not relevant here.

C. The Demurrers

In the demurrer to the First Amended Complaint, ABC argued that the complaint failed to allege facts showing ABC, as the alleged agent of Ripped Fitness and NFFS, met the prerequisites under section 2343 for imposing liability on an agent for acts within the scope of the agency. Section 2343, as we will further discuss, permits such liability to be imposed only where (1) the agent, with its consent, receives credit as a principal in a transaction, (2) the agent enters a contract on behalf of his principal without a good faith belief that he has authority to do so, or (3) the agent's acts are "wrongful in their nature." (§ 2343.) ABC argued Morar's allegations failed to show any of these prerequisites, and it was not a proper party to the complaint.

ABC further argued that the allegations in the First Amended Complaint about ABC failed to allege any conduct on its part that violated the HSSCA because that law regulates fitness services contracts but imposes no obligation on non-parties to ensure that the contract complies and does not require a non-party to cancel a contract or refund monies obtained by the maker of the contract from the customer.

Similarly, ABC argued there were no factual allegations showing it violated the CLRA, which governs transactions involving the sale or lease of services to a customer, because ABC did not engage in any transaction to sell or lease services to Morar. It argued Morar's conversion claim failed because there were no allegations that ABC had accepted or received any payments from her or withdrawn any funds from her bank account. ABC argued plaintiff's unfair competition claim failed for the same reasons her other claims failed, namely, because the allegations did not show any unlawful, fraudulent or unfair acts by ABC. Finally, there were no other allegations that supported a declaratory relief claim, ABC contended, and that cause of action thus failed as well.

The trial court agreed with ABC. In a minute order sustaining the demurrer, it observed that while plaintiff specifically alleged ABC was the agent for Ripped Fitness, she did "not directly respond to ABC's argument that its liability, if any, must fall within the scope of [section] 2343, and point[ed] to no allegations in the [First Amended Complaint] that ABC's alleged act[s] were 'wrongful in their nature' or that would otherwise make ABC 'responsible' to Plaintiff as a third party to the agency relationship." The court rejected Morar's reliance "on her conclusory allegations that ABC is the 'holder' of the Contract, and the argument that 'it seems apparent that Plaintiff's contract was assigned to Defendant ABC . . .' The court agrees with ABC that the 'holder' allegation, without facts backing it up, is insufficient, and there are no allegations in the [First Amended Complaint] about an assignment." Finally, the court concluded, "Plaintiff's responses to ABC's other arguments directed to the separate causes of action all fall short because [they] are premised on the validity of her agency and/or her conclusory 'holder' allegations." The court expressed skepticism of Morar's

ability to amend to allege additional facts stating a claim against ABC but granted her leave to amend.[2]

Morar thereafter amended the complaint. The only significant difference between the First and Second amended complaints is the addition to the latter of allegations, entirely absent from the former and made on information and belief, that at an unspecified time after Morar entered the contract with Ripped Fitness and NFFS, her "contract, including all rights, benefits, and obligations therein, was assigned to Defendant ABC Financial along with some or all of the funds Plaintiff paid to Defendants." In support of the assignment allegation, Morar reiterated several allegations she had previously made, including (1) that when she sought to cancel the contract with Ripped Fitness, it instructed her to contact ABC for "any and all matters related to her contract, including cancelling the contract and obtaining a refund of her monies from Defendant ABC Financial"; (2) that she proceeded to have nine different interactions with ABC "via telephone, email, and written correspondence, in which she attempted to cancel her contract and obtain a refund"; and (3) that ABC's "customer service department responded substantively to each of Plaintiff's inquiries, although each response was a denial of her requests." Morar also added the allegation that in July 2016, ABC "altered the terms of the contract by informing Plaintiff that 'the automatic renewal of your agreement has been deleted.' "

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[2] The parties also briefed and argued, and the trial court decided, an issue that has not been raised on appeal. The plaintiff had alleged each defendant was the agent of each other defendant, which she argued meant that Ripped Fitness was an agent of ABC and that this made ABC liable as a principal. The court rejected this argument because plaintiff had more specifically alleged that ABC was the agent of Ripped Fitness, rather than the other way around, with respect to the matters of cancellation of contracts between Ripped Fitness and its customers. The court concluded the more specific allegations governed over the general ones.

Defendant demurred to the Second Amended Complaint on grounds similar to those it raised in its demurrer to the earlier complaint. The trial court again sustained the demurrer, this time without leave to amend. Noting that it had sustained ABC's earlier demurrer to the First Amended Complaint because of "Plaintiff's failure to include any allegations of acts on the part of ABC that were 'wrongful in their nature' under Civil Code section ('CC') 2343," the court held that the Second Amended Complaint did not cure this defect. The "only new allegations that attempt[ed] to fit ABC's acts within the scope of CC 2343"—that " '[ABC] has repeatedly failed to comply with California law and its constant refusal to cancel Plaintiff's contract and issue her a refund constitutes wrongful conduct by [ABC]' "—"fail[ed] to do so. These alleged acts were clearly done by ABC as [Ripped Fitness's] agent, and did not constitute an independent tort or breach of contract." Nor, the court continued, did "the addition of conclusory allegations, made on information and belief, regarding the assignment of Plaintiff's contract to ABC . . . serve to bring ABC within the definition of 'Holder' in [Civil Code section] 1812.94." Finally, "[a]s was the case with Plaintiff's opposition to ABC's demurrer to the [First Amended Complaint], her responses to the additional arguments directed by ABC to each of the causes of action individually fall short because they are premised on the validity of her agency and/or holder allegations."

DISCUSSION

A. Standard of Review

The rules governing appellate review of an order sustaining a demurrer are well established. We must " 'give[ ] the complaint a reasonable interpretation, and treat[] the demurrer as admitting all material facts properly pleaded.' [Citation.] Because only factual allegations are considered

on demurrer, we must disregard any 'contentions, deductions or conclusions of fact or law alleged [in the complaint].' [Citation.] Further, because the demurrer at issue is to an amended complaint, we may properly consider allegations asserted in the prior complaints: ' "A plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading." [Citation.]' [Citation.] [¶] Where, as here, the trial court has sustained a demurrer, we must determine whether the plaintiff has pleaded facts sufficient to state a cause of action. [Citation.] 'The judgment must be affirmed "if any one of the several grounds of demurrer is well taken." [Citation.]' " (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957 (*Pacific Lumber*).) However "[i]t is error for the trial court to sustain a demurrer if the plaintiff has stated a cause of action under any possible legal theory, and it is an abuse of discretion for the court to sustain a demurrer without leave to amend if the plaintiff has shown there is a reasonable possibility a defect can be cured by amendment." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

B. Substantive Legal Principles

1. *Agency Law*

Section 2343 provides that, "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency" in three circumstances only. (§ 2343.) Morar has asserted only that one of those circumstances applies here, namely, "When [the agent's] acts are wrongful in their nature." (*Id.*)

In *Kurtin v. Elieff* (2013) 215 Cal.App.4th 455, the Fourth District discussed section 2343 and the "wrongful in their nature" clause. "Case law explicating section 2343 shows that the 'acts are wrongful in their nature'

clause arises in juxtaposition to the normal rule that agents are not liable for the torts or breaches of contract of their principals. [Citation.] The 'wrongful in their nature' clause codifies a corollary rule that agents *are* responsible for their *own* independent torts and breaches of contract in connection with 'acts in the course of their agency.' " (*Id.* at p. 480.)

" '[I]f a tortious act has been committed by an agent acting under authority of his principal, the fact that the principal thus becomes liable does not of course exonerate the agent from liability.' [Citations.] The fact that the tortious act arises during the performance of a duty created by contract does not negate the agent's liability. [Citation.] . . . 'A tort may grow out of or be coincident with a contract, and the existence of a contractual relationship does not immunize a tortfeasor from tort liability for his wrongful acts in breach of the contract.' " (*Bayuk v. Edson* (1965) 236 Cal.App.2d 309, 320.)

Neither party has cited a case in which the rule codified in section 2343 has been applied to an alleged wrong committed by an agent in carrying or failing to carry out the principal's obligations under a statute. Our own research yields one, which involved corporate officers. In *PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368 (*PMC*), the court held the liability of defendants, majority shareholders, officers and directors of a corporation, for trade secret misappropriation committed on behalf of the corporation could be imposed under principles of agency law, including where the exceptions under section 2343 applied. (*Kadisha,* at p. 1381.) In applying the "wrongful acts" exception to the defendants' acts, the court relied both on the fact that "all persons who are shown to have participated in an intentional tort are liable" and that "defendants had an independent obligation under the Uniform Trade Secrets Act to refrain from a tortious invasion of plaintiffs' proprietary rights." (*Id*. at pp. 1382-1383.)

2. *Health Services Studio Contract Act*

The HSSCA governs contracts "for health studio services," defined by the statute as "contract[s] for instruction, training or assistance in physical culture, body building, exercising, reducing, figure development, or any other such physical skill, or for the use by an individual patron of the facilities of a health studio, gymnasium or other facility used for any of the above purposes." (§ 1812.81.) Section 1812.82 requires such contracts to be in writing and requires that a copy be handed or mailed to the customer at the time he or she signs it. It and subsequent provisions govern duration of such contracts, financing, disclosure requirements, cancellation rights and procedures, and refunds in the case of death or disability (§§ 1812.83-1812.89). Section 1812.91 and 1812.92 provide that contracts that do not comply with these requirements or were fraudulently entered shall be void and unenforceable, and section 1812.94 provides a remedy of treble damages and reasonable attorney fees for injured buyers. (§ 1812.94, subd. (a).)

3. *Consumer Legal Remedies Act*

The CLRA, sections 1750-1784, governs transactions for the sale or lease of goods or services to consumers. (See §§ 1750, 1770.) It provides that specified "acts . . . undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful," such as passing off goods or services as those of another, making various misrepresentations about the goods or services, disparaging the goods or services of another by misrepresenting facts and engaging in various advertising practices. (§ 1770.) It precludes third-party liability for those acts unless, as relevant here, "the third party had actual knowledge of, or participated in, the unfair or deceptive transaction." (*Id.*, subd. (a)(23)(B).) It provides a cause of action for consumers who suffer damages as a result of

such acts for actual damages, injunctive relief, restitution, punitive damages and other relief a court deems proper. (§ 1780, subd. (a).)

4. *Conversion*

The tort of conversion was recently described by our high court. "Conversion is an 'ancient theory of recovery' with roots in the common law action of trover. [Citation.] 'This action originated at an early date as a remedy against the finder of lost goods who refused to return them to the owner but instead "converted" them to his own use.' [Citation.] Over time, the action was extended to cases involving 'dispossession, or . . . withholding possession by others than finders.' [Citation.] Today, the tort of conversion is understood more generally as 'the wrongful exercise of dominion over personal property of another.' [Citation.]

"As it has developed in California, the tort comprises three elements: '(a) plaintiff's ownership or right to possession of personal property, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and (c) resulting damages.' [Citations.] Notably absent from this formula is any element of wrongful intent or motive; in California, conversion is a 'strict liability tort.' " (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1150, fn. omitted.)

"The particular question before us concerns the applicability of the conversion tort to a claim for money. Although the question was once the matter of some controversy, California law now holds that property subject to a conversion claim need not be tangible in form; intangible property interests, too, can be converted. [Citation.] But the law has been careful to distinguish proper claims for the conversion of money from other types of monetary claims more appropriately dealt with under other theories of recovery. Thus, although our law has dispensed with the old requirement that 'each coin or

bill be earmarked,' it remains the case that 'money cannot be the subject of an action for conversion unless a specific sum capable of identification is involved.' [Citations.] '[W]here the money or fund is not identified as a specific thing the action is to be considered as one upon contract or for debt'—or perhaps upon some other appropriate theory—but 'not for conversion.' [Citations.]

"Equally important, the 'specific thing' at issue [citation] must be a thing to which the plaintiff has a right of ownership or possession—a right with which the defendant has interfered by virtue of its own disposition of the property. This means that '[a] cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff's *possessory interest* in a specific, identifiable sum'; 'the simple failure to pay money owed does not constitute conversion.' [Citation.] Were it otherwise, the tort of conversion would swallow the significant category of contract claims that are based on the failure to satisfy ' "mere contractual right[s] of payment." ' [Citations.] Contractual provisions may, of course, determine whether the plaintiff has a possessory right to certain funds in the defendant's hands. [Citation.] But to put the matter simply, a 'plaintiff has no claim for conversion merely because the defendant has a bank account and owes the plaintiff money.' " (*Voris*, *supra*, 7 Cal.5th at pp. 1151-1152.)

5. *Unfair Competition Law*

The UCL addresses unfair competition, defined to mean "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.) In proscribing unlawful business practices, section 17200 " ' "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable.' " (*De La Torre v. CashCall, Inc.* (2018)

5 Cal.5th 966, 980; see 13 Witkin, Summary of Cal. Law (11th ed. 2017) Equity § 116.) "However, the law does more than just borrow. The statutory language referring to 'any unlawful, unfair *or* fraudulent' practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. 'Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. "In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." ' " (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).)

The UCL provides restitution and injunction remedies for unlawful, unfair or fraudulent business practices (Bus. & Prof. Code, §§ 17203, 17206, 17206.1; *Cel-Tech*, *supra*, 20 Cal.4th at p. 179) even where the statute or other law violated does not create a private cause of action. (*De La Torre v. Cash Call*, *supra*, 5 Cal.5th at p. 980.)

C. Morar Stated Certain Causes of Action and Failed to State Others.

1. *Morar Failed to Allege Facts Indicating ABC's Acts* As an Agent of Other Defendants *Fall Within the Exception to the Rule Against Agent Liability.*

On appeal, as it did in the trial court, ABC argues the facts Morar alleged do not fall within the "wrongful acts" exception of section 2343 to the normal rule that agents are not liable for the torts or breaches of contract of their principals.

As set forth above, Morar alleged in the Second Amended Complaint that Ripped Fitness is in the business of owning and operating fitness and training facilities, that she entered a contract with Ripped Fitness and NFFS, and that she paid up front a card fee, the first month's dues and a "processing fee" that "constituted the first year's membership fees paid as a lump sum."

She also alleged that ABC advertised itself as "the leading software and billing provider for the health and fitness industry" and served as "the agent for [Ripped Fitness] with respect to billings, consumer interaction . . . handling the cancellation process for health studio services consumers" and "issuing refunds to consumers." When Morar informed Ripped Fitness she wished to cancel her contract because of her health conditions and related inability to use its facilities and obtain a refund, it told her to contact its "agent," ABC, and provided her with ABC's business card stating it was the entity responsible for cancellation and refund requests and providing contact information for those purposes. As she further alleged, Morar contacted ABC for those purposes on multiple occasions, and it responded but ultimately declined to cancel the contract or refund any amounts she had paid.

On appeal, Morar acknowledges that she alleged ABC was Ripped Fitness's agent but contends she alleged "wrongful acts" on ABC's part to establish its liability for its acts as an agent under section 2343. Specifically, she contends her communications with ABC and its denial of her right to cancel her contract were wrongful acts within the meaning of section 2343. By "willfully and/or negligently refus[ing] [Morar's] requests to cancel her contract," Morar alleges, ABC "was directly involved in [Ripped Fitness's and NFFS's] continuing violations of California law."

ABC argues the Second Amended Complaint fails to allege facts showing it violated the HSSCA. The HSSCA does not prohibit the conduct ABC is alleged to have engaged in, including refusing to allow consumers to cancel their contracts when they are disabled and continuing to charge consumers after their cancellation requests have been submitted. Rather, ABC contends, the HSSCA simply requires that the contract include

provisions allowing for cancellation in the event of disability. As to refunds, ABC acknowledges the HSSCA requires a refund if a disabled consumer has prepaid a sum for services but points out that the statute only requires " 'the party agreeing to furnish such services' " to refund a proportionate amount of the prepaid sums. (Quoting § 1812.89, subd. (a)(2).)

Morar does not contend ABC committed either a tort or a breach of any contract between her and it as the basis for her assertion that it engaged in "wrongful acts." She relies solely on ABC's allegedly having violated the HSSCA as the basis for her claim that the wrongful act element of section 2343 was met.

ABC is correct that Morar has not alleged any violation by ABC of the HSSCA in refusing to cancel the contract insofar as it was acting as an *agent* of the other defendants. The provision she contends was violated is section 1812.89. That section provides that the contract "shall contain a clause providing that if, by reason of death or disability, the person agreeing to receive services is unable to receive all services for which he has contracted, he and his estate shall be relieved from the obligation of making payment for services other than those received prior to death or the onset of disability, and that if he has prepaid any sum for services, so much of such sum as is allocable to services he has not taken shall be promptly refunded to him or his representative." (§ 1812.89, subd. (a)(1).) Morar does not allege that ABC played any role in drafting the contract or that it executed or was a party to the contract. Rather, she alleges she entered the contract with Ripped Fitness and NFFS. Thus, to the extent she alleges the contract failed to satisfy the requirements of the HSSCA, there is no basis for imposing liability on ABC for any such failure.

Further, as to the failure to refund monies, she alleges she paid those monies at the time she entered the contract with Ripped Fitness and NFFS, and there is no basis for inferring she paid them to anyone other than one or both of those entities. Section 1812.89 does require that a partial refund of prepaid funds be made in every case where death or disability renders the consumer unable to receive all of the services purchased; it specifies that "*the party agreeing to furnish such services* shall, on request, immediately refund to such person or his personal representative such amount of the sum prepaid as is proportionate to the amount of services not received." (*Id*., subd. (a)(2), italics added.)[3] In alleging that ABC was the agent of Ripped Fitness with respect to billing and related services, there is no suggestion or implication that it agreed to provide any fitness services to her was even engaged in the business of owning or operating fitness facilities or providing fitness services. Thus, insofar as ABC was acting as Ripped Fitness's agent, even assuming ABC's failure to issue a refund may have constituted a violation of the HSSCA by Ripped Fitness, the allegations do not show an independent violation by ABC.[4]

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[3] The section defines "disability" to mean "a condition which precludes the buyer from physically using the facilities and the condition is verified by a physician." (§ 1812.89, subd. (a)(3).)

[4] *PMC,* the only case we have found addressing whether an agent's acts that contribute to a principal's statutory violation may be considered "wrongful" for purposes of section 2343, does not support the imposition of liability here. In *PMC*, the court held liability could be imposed on corporate officers for common law and statutory trade secret misappropriation based on evidence they had "knowingly invested . . . in a corporation whose sole business assets consisted of stolen confidential information and processes, and subsequently controlled the entity which was engaging in unlawful conduct." (*PMC*, *supra*, 78 Cal.App.4th at p. 1385.) There was evidence that would support a finding that defendants participated in the corporation's tortious misappropriation, and the officers had an "independent obligation

2. *Morar's Allegations That ABC Was an Assignee or "Holder" Are Sufficient to State an HSSCA Cause of Action Against ABC.*

In her Second Amended Complaint, Morar added the allegation that ABC was an assignee of the contract between her and the other defendants. Specifically, she alleged, on information and belief, that at an unspecified time after Morar entered the contract with Ripped Fitness and NFFS, her "contract, *including all rights, benefits, and obligations therein*, was assigned to [ABC] along with some or all of the funds Plaintiff paid to Defendants." (Italics added.) She also alleged that ABC was a "holder" of the contract within the meaning of the HSSCA. Assuming the truth of these allegations, which we must, the question whether Morar has alleged that ABC violated the HSSCA requires a different analysis.

Preliminarily, we reject ABC's argument that the allegation is too conclusory and that further facts were required. It provides no authority for requiring detailed pleading, although in some respects we find the allegation wanting. Morar does not allege when the assignment was made, and whether it preceded the acts of ABC on which she attempts to predicate its liability, but a reasonable interpretation of the complaint is that such assignment was made before some or all of ABC's alleged communications with Morar occurred. It is also true that the assignment allegation is arguably in tension with the allegations of the earlier complaints and the Second Amended Complaint itself that ABC an *agent* of Ripped Fitness and

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under the Uniform Trade Secrets Act to refrain from a tortious invasion of plaintiff's proprietary rights." (*Id*. at p. 1383.) Here, as we have discussed, Morar has failed to allege facts sufficient to establish that ABC, as the agent of Ripped Fitness, had or breached any "independent obligation" under the HSSCA.

NFFS and acting as their agent. ABC could not at once be both an agent acting on behalf of Ripped Fitness and NFFS and an assignee of all Ripped Fitness's and NFFS's rights and obligations under the contract.

However, a reasonable reading of the complaint is that ABC was initially acting as the other defendants' agent and that they later assigned ABC their contract with Morar. It was at that point, according to the complaint, that ABC assumed all the other defendants' obligations. Even apart from that, as Morar's counsel pointed out at oral argument, even if the agency and assignment allegations were inconsistent, dismissal is unwarranted because plaintiffs are permitted to plead inconsistent factual and legal theories. (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1388.)

Morar's allegations that ABC was an assignee or "holder" of her contract with Ripped Fitness and NFFS do not necessarily rescue her claim that ABC violated the HSSCA. Although there is ambiguity as to when such assignment allegedly occurred, Morar specifically alleges she entered into a contract with Ripped Fitness and NFFS, not ABC. That and the allegation that sometime thereafter Ripped Fitness and NFFS "assigned Plaintiff's contract to Defendant ABC Financial" indicate that any obligations ABC undertook toward Morar by virtue of the assignment arose *after* the contract was entered into. She has failed thus to allege that ABC violated the HSSCA requirement that the contract contain certain terms, including terms regarding disability and cancellation. (See § 1812.89, subd. (a)(1).) There is no allegation or reasonable inference that ABC played any role in drafting the contract or was a party to the contract at the outset. To the extent the contract was assigned to ABC, any failure to include the required terms

might affect ABC's ability to enforce it,[5] but Morar fails to explain how the HSSCA imposes liability on an assignee for defects in a contract it did not prepare.

However, Morar's allegations that ABC repeatedly failed to refund her monies present a different issue. Section 1812.89, subdivision (a)(2) provides, "In every case in which a person has prepaid a sum for services under a contract for health studio services, and by reason of death or disability, is unable to receive all such services, *the party agreeing to furnish such services* shall, on request, immediately refund to such person or his personal representative such amount of the sum prepaid as is proportionate to the amount of services not received." (Italics added.) The question is whether ABC as an assignee of the contract became "the party agreeing to furnish such services," i.e., "health studio services," within the meaning of this section.

A fitness services provider like Ripped Fitness could assign all its assets and liabilities to a third party, who would then step into its shoes as "the party agreeing to furnish" health studio services within the meaning of that section. Morar alleges the assignment "include[ed] *all rights, benefits, and obligations*" in the contract. (Italics added.) While that may seem unlikely here given the allegations describing ABC as a software and billing provider rather than an owner and operator of health and fitness facilities, we must accept Morar's allegations as true. If ABC became an assignee or "holder" of the contract as Morar alleges, its failure to refund monies Morar prepaid to Ripped Fitness and NSSF arguably violated section 1812.89, subdivision (a)(2) of the HSSCA.

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[5] See § 1812.91 ("Any contract for health studio services which does not comply with the applicable provisions of this title shall be void and unenforceable as contrary to public policy.")

Section 1812.94 of the HSSCA defines a "[h]older" as "the seller who acquires the contract or, if the contract is purchased by a financing agency or other assignee, the financing agency or other assignee." (§ 1812.94, subd. (b).) In excusing a failure to comply with the HSSCA if "corrected within 30 days after the execution of the contract" and providing that "if so corrected, *neither the seller nor the holder shall be subject to any penalty under this title*" (*ibid.*, italics added), section 1812.94 implies there are circumstances in which an assignee may be liable for the damage and treble damage remedies provided by subdivision (a) of that section to "[a]ny buyer injured by a violation of this title."

Morar has pointed to no provision in the HSSCA that clearly and expressly imposes such liability on assignees. The only HSSCA provision our own research revealed that addresses assignments precludes any assignment that would cut off a buyer's rights against the seller unless certain conditions are met. (§ 1812.88.)

These provisions suggest that in enacting the HSSCA, the Legislature was concerned that fitness services providers not use the mechanism of assignment to evade their responsibilities under that statute. The parties have not addressed in their briefs, and therefore we will not here decide, the meaning of section 1812.94 and its implication that there can be holder liability in some contexts. But we are not prepared at this juncture to hold an assignee may never be liable under the HSSCA. Such a determination should await discovery and presentation of evidence either at summary judgment or trial. Expressing no view on whether Morar ultimately will prevail on the issue, we conclude the trial court erred in sustaining the demurrer to Morar's HSSCA cause of action against ABC.

3. *Morar's Contention That She Has Pled a Violation of the CLRA Lacks Merit.*

As we have discussed above, the CLRA governs transactions for the sale or lease of goods or services to consumers and makes unlawful specified "acts . . . undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." (§ 1770.) It specifically precludes third-party liability for prohibited acts unless "the third party had actual knowledge of, or participated in, the unfair or deceptive transaction." (*Id.*, subd. (a)(23)(B).)

Morar's claims that ABC violated the HSSCA provisions governing the contract, which we have rejected in part C.1 *ante*, cannot be the basis for a CLRA claim. Morar contends she has alleged another violation of the HSSCA, specifically, that the contract exceeded three years in violation of section 1812.84, subdivision (a). That section states in relevant part "that a contract for health studio services may not require payments or financing by the buyer to exceed the term of the contract, nor may the term of the contract exceed three years." Morar has failed to allege that ABC violated this section since she does not allege ABC was a party to the contract when it was entered into or had any hand in drafting it.

Morar further contends the HSSCA violations she has alleged also constitute a violation of CLRA section 1770, subdivision (a)(14), which makes it unlawful to "[r]epresent[] that a transaction confers or involves rights, remedies, or obligations that it does not have or involve, or that are prohibited by law." Morar argues ABC's acts fall within this subdivision because the CLRA defines "[t]ransaction" to mean "an agreement between a consumer and another person, . . . and includes the making of, *and the performance pursuant to*, that agreement." (§ 1761, subd. (e), italics added.)

This argument fails for the following reason. Section 1770, subdivision (a) only makes unlawful the acts described in that section when "undertaken by any person in a transaction *intended to result or that results in the sale or lease of goods or services to any consumer*." (Italics added.) Even had Morar alleged a misrepresentation by ABC about her rights, remedies or obligations within the meaning of section 1770, subdivision (a)(14), she has not alleged any representation by ABC that was intended to or did result in a sale or lease of goods or services. That is because all the alleged communications between ABC and Morar occurred months *after* she entered the fitness services agreement with Ripped Fitness and NFFS. Morar fails to allege any other contemplated sale of goods or services that could have been the intended or actual "result" of the alleged communications between her and ABC.

Finally, in support of her CLRA claim, Morar repeats the arguments about agency that we have already rejected in the context of her HSSCA claims. Nor do her assignment allegations demonstrate a violation of the CLRA.

4. *Morar States a Claim Against ABC Under the UCL and for Declaratory Relief.*

ABC argues, in essence, that Morar's UCL and declaratory relief fall for the reasons her other claims fall. However, we have held that the trial court erred in sustaining the demurrer to Morar's HSSCA claim, and to that extent she has also stated a claim against ABC for a violation of the UCL with the predicate acts for that claim consisting of the same claimed violation of the HSSCA. Likewise, to the extent she has alleged such a claim, she has also demonstrated the live controversy that supports her declaratory relief claim.

5. *Morar Has Failed to Allege a Cause of Action Against ABC for Conversion.*

Plaintiff's conversion cause of action fares no better than her statutory claims. She bases that claim on ABC's rejection of her requests for a refund along with cancellation of her contract. As ABC points out, "A cause of action for conversion requires allegations of plaintiff's ownership or right to possession of property; defendant's wrongful act toward or disposition of the property, interfering with plaintiff's possession; and damage to plaintiff. (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.) Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491.)

Morar alleged she made certain up-front payments to Ripped Fitness and thereafter made monthly payments to NFFS. The money she seeks to have returned is that portion of the prepaid amounts attributable to the period following the onset of her disabilities and possibly (the complaint is unclear) monthly installment payments she should not have had to make thereafter. Morar does not allege she made any payments to ABC.[6] Nor does her allegation that Ripped Fitness and NFFS "transferred Plaintiff's monies

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[6] In her conversion cause of action, she alleges "Defendants," collectively and without distinction, received payments from her. In the factual section of the complaint she specifically alleges she entered a contract with *Ripped Fitness and NFFS* on March 25, 2015, and *was charged $359.37 that day*, including first month dues, a card fee and a processing fee she understood constituted the first year's membership fees. She further alleges all monthly payments thereafter were *"to be 'processed and collected' by [NFFS] on behalf of [Ripped Fitness]."* (Italics added.) The first time she alleges any interaction between herself and ABC Fitness was in January 2, 2016, after having asked Ripped Fitness to cancel her contract and being informed she should contact its agent, ABC, for that purpose.

to Defendant ABC Financial" in connection with the assignment allege a cause of action for conversion.

"Although . . . cash ordinarily cannot be the subject of a cause of action for conversion . . . , when the money at issue is a specific identifiable sum *held for the benefit of another* that has been misappropriated, a conversion claim can be made." (*SP Investment Fund I, LLC v. Cattell* (2017) 18 Cal.App.5th 898, 907, italics added.) "The gravamen of the tort is the defendant's hostile act of dominion or control over a specific chattel to which the plaintiff has the right of immediate possession. [Citations.] That is why money can only be treated as specific property subject to being converted when it is 'identified as a specific thing.' " (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 (*PCO, Inc.*).)

"California cases permitting an action for conversion of money typically involve those who have misappropriated, commingled, or misapplied specific funds held for the benefit of others. [Citations.] In each of these cases, the amount of money converted was readily ascertainable.

"In contrast, actions for the conversion of money have not been permitted when the amount of money involved is not a definite sum. [Citations.] For example, in *Vu v. California Commerce Club, Inc.* [1997] 58 Cal.App.4th 229, the court affirmed a summary judgment on a conversion claim against two gamblers who lost 'approximately $1.4 million' and 'approximately $120,000,' respectively, at a specific card club during specified periods of time, due to alleged cheating. (*Id.* at pp. 231-232.) The court held, 'neither by pleading nor responsive proof did plaintiffs identify any specific, identifiable sums that the club took from them. That rendered

the generalized claim for money not actionable as conversion.' " (*PCO, Inc.*, *supra*, 150 Cal.App.4th at pp. 396-397.)

Here, as ABC argues, plaintiff's allegation of a "transfer" of her funds to ABC is too conclusory to state a claim for conversion against ABC.[7] Even if Ripped Fitness or NFFS had "transferred" funds to ABC, Morar alleges no facts or circumstances indicating such funds were entrusted to ABC to hold for her or that ABC engaged in any "hostile act of dominion" over such funds. (Compare *SP Investment Fund I LLC v. Cattell*, *supra*, 18 Cal.App.5th at p. 907 [allegation that defendant received monetary distributions from partnership that he held in trust for plaintiff's benefit and refused to turn those funds over to plaintiff was a claim for specific identifiable sum received by defendant for plaintiff's benefit sufficient to state cause of action for conversion].) At most, Morar has alleged ABC failed to refund monies she was due, not that it converted monies it was holding in trust for her benefit.

D. Morar Has Failed to Demonstrate a Reasonable Possibility That the Defects in the Second Amended Complaint Can Be Cured by Amendment.

In the proposed Third Amended Complaint she submitted with her opposition to the demurrer, Morar added no new factual allegations. Rather, she added two new causes of action against ABC based on her existing allegations, one for negligent misrepresentation and the other for fraudulent misrepresentation. On appeal, she again suggests no different or additional factual allegations she could make but contends the facts previously alleged

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[7] ABC also points out that Morar alleges that she sought from ABC only a "refund of all amounts pre-paid since July 2015," when her disability was diagnosed, not a refund of the up-front payments she made four months earlier. Morar accuses ABC of misquoting her, but the quote is accurate and not out of context. It renders Morar's complaint even less clear. That is, there is no indication of any identifiable sum that was transferred to ABC for purposes of a conversion claim.

support claims for misrepresentation. In her own words, she "is merely asserting additional theories of liability against Respondent based on the same set of facts as before."

ABC makes several arguments as to why the trial court did not abuse its discretion in denying leave to further amend. We agree with one and need not, therefore, address the others. As ABC correctly points out, fraud and negligent misrepresentation claims must be pled with particularity. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184-185.) The requirement applies to most, if not all, of the elements of such a claim, from the misrepresentations themselves (how and by whom and when they were made) to reliance. (*Id.* at p. 184.) Conclusory language does not suffice. (*Ibid.*) As to reliance, the court in *Small* explained what would be sufficient in the case of a party claiming it had held stock in reliance on misrepresentations. "[A] plaintiff must allege specific reliance on the defendants' representations: for example, that if the plaintiff had read a truthful account of the corporation's financial status the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place. The plaintiff must allege actions, as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the plaintiff actually relied on the misrepresentations." (*Ibid.*)

In her proposed Third Amended Complaint, Morar alleges ABC misrepresented that she had to comply with unlawful provisions of the contract and that it would cancel the contract and refund her monies if she complied. She also alleges ABC concealed the fact that the cancellation requirements in the contract were unlawful. She alleges in conclusory fashion that she reasonably relied on these misrepresentations and

concealment when attempting to cancel her contract and as a result sustained damages. These allegations fail to meet the particularity requirement with respect to reliance. Morar does not allege that she was unaware the provisions of her contract were illegal (as she now alleges they were). Nor has she explained what she would have done differently if she had known of the alleged illegality and thereby have avoided suffering damages. She does not describe what damages, if any, she suffered. Her inability to allege with particularity that she relied on the alleged representations to her detriment vitiates her claim that the new theories asserted in her proposed Third Amended Complaint would have cured the defects in her Second Amended Complaint. The trial court did not abuse its discretion in denying amendment for the causes of action she failed to allege.

DISPOSITION

We affirm the superior court's judgment dismissing Morar's causes of action against ABC under the CLRA and for conversion. We reverse its judgment dismissing her claims against ABC for violation of the HSSCA and the UCL and her claim seeking declaratory relief. The parties shall bear their own costs on appeal.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

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