

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION THREE

TIMOTHY W. SCHULZ, JR.,

Plaintiff and Appellant,

v.

NEOVI DATA CORPORATION et al.,

Defendants and Respondents.

G033879

(Super. Ct. No. 03CC00185)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, C. Robert Jameson, Judge. Affirmed in part and reversed and remanded in part.

Lakeshore Law Center and Jeffrey Wilens for Plaintiff and Appellant.

Law Offices of Eric D. Morton and Eric D. Morton for Defendant and Respondent Neovi Data Corporation.

Kelly, Herlihy & Klein, Thomas M. Herlihy, Michael G. Glanzberg; and Mukesh Advani for Defendant and Respondent Ginix, Inc.

Gibson, Dunn & Crutcher, Gail E. Lees, Elizabeth A. Brem and Christopher Chorba for Defendant and Respondent PaySystems, Inc.

Cooley Godward, Michael G. Rhodes, Lori R.E. Ploeger and James R. Patterson for Defendant and Respondent PayPal, Inc.

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Plaintiff Timothy W. Schulz, Jr., appeals from a judgment entered after the demurrer to his seconded amended complaint was sustained without leave to amend. He contends he sufficiently pleaded a cause of action for unfair competition under Business and Professions Code section 17200 et seq., specifically alleging that defendants Neovi Data Corporation, Ginix, Inc., PaySystems, Inc., and PayPal, Inc. aided and abetted the operation of an illegal lottery. The first cause of action against Ginix sufficiently pleads a cause of action for aiding and abetting and we reverse on that basis. We remand to give plaintiff an opportunity to amend that cause of action to allege facts required under the unfair competition law as amended by Proposition 64. As to the remaining defendants we affirm the judgment because Proposition 64 bars plaintiff from proceeding them.

## FACTS

On appeal from a judgment entered after a demurrer is sustained without leave to amend, we assume all facts properly pleaded in the complaint are true. (*Construction Protection Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 193.) In his second amended complaint (complaint) plaintiff alleged that defendant EZ Expo (not a party to this appeal) operated an “Internet Matrix.” He described it as an Internet site where a consumer is given the opportunity to “receive expensive electronic products for a fraction of the price. The catch is that the participant receives the expensive prize only by paying a fee to enter a ‘matrix’ and then only if a number of consumers also join the ‘matrix’ after him.”

On EZ’s site, to obtain a 50-inch plasma television valued at \$5,500, a participant enters the plasma television matrix by purchasing the required three “E-books” for \$150. Upon payment, he or she receives a link to download the E-books and

has his or her name placed on the list of those eligible to receive the television. “[W]hen 50 persons have each paid \$150, the first person to enter will receive the plasma television ‘for free’ and his name is removed from the list.” In that event, the person second on the list moves to the top and 50 more people need to enter for that person to receive the television. EZ “encourages participants to recruit others to enter the matrix.”

Plaintiff alleged he entered five matrices, including the plasma television matrix, paying more than \$500. When he realized the EZ matrix “was a scam,” he asked for a refund, which EZ refused. He further alleges the E-books have minimal, if any, value, and that “[b]y offering the chance to win valuable prizes, EZ . . . has sold the worthless [E]-books for millions of dollars.”

Plaintiff alleged that “PaySystems and Ginix are the former and current credit card processing and billing services for EZ” whom many of the matrix participants used to pay for their purchases. He pleaded that EZ requested these defendants process credit card orders and sent its website to them for their review. PaySystems and Ginix realized EZ’s site was an unlawful lottery and knew EZ was making false claims and engaging in unfair business practices, but authorized EZ to use their payment services “with the knowledge and specific intent of aiding and abetting and facilitating the illegal lottery . . . .” Plaintiff further alleged that these defendants perceived that use of credit cards “would lend an aura of respectability” to the site, deceive consumers into believing the activity was legal, and make participation easier, thereby generating more revenue.

Plaintiff alleged PaySystems and Ginix contracted with EZ to display their logos and create links to so they could process payments. The orders were actually placed on defendants’ websites, where defendants charged the credit cards, collected the money, and then paid EZ after deducting what EZ owed them for processing the transactions.

As to PayPal, plaintiff alleged it is a payment processor, which “allows consumers to create virtual accounts by depositing money with [it].” When a customer

does business with a company that contracts with PayPal, the customer is transferred to PayPal's website where the transaction is completed. After deducting its commission, PayPal then pays EZ. Plaintiff also alleged PayPal contracted with EZ after reviewing its website and determining that it operated an illegal lottery. It authorized a link with EZ "with the knowledge and intent of aiding and abetting and facilitating the operation of the EZ Expo website in a manner similar to that described . . . with respect to Ginix and PaySystems."

Plaintiff alleged Neovi's relationship with EZ was similar to that of Ginix and PaySystems, except customers paid with a "'virtual' check." Plaintiff alleged Neovi knew EZ's operations were illegal but "knowingly and intentionally aided and abetted the operation" and "directly profited . . . by receiving a percentage of each check transaction or collecting a fee . . . ."

In the first cause of action for unfair competition, plaintiff alleged the conduct of all defendants was an "'unlawful' business act or practice within the meaning of [Business and Professions Code] section 17200 because the EZ Expo Internet Matrix constitutes a 'lottery' within the meaning of California Penal Code section 319 and/or an 'Endless Chain Scheme' within the meaning of California Penal Code section 327." This cause of action showed plaintiff acting in an individual capacity, as a private attorney general under Business and Professions Code sections 17203 and 17204, and as the representative in a class action.

Plaintiff brought the second, third, and fourth causes of action for unfair competition solely as a private attorney general under Business and Professions Code sections 17203 and 17204 against Ginix, PaySystems, and PayPal, respectively, for their payment processing services to entities other than EZ.

Ginix, PaySystems, and PayPal each demurred to the causes of action alleged against them; Neovi joined in PaySystems's demurrer. Essentially, all defendants argued the complaint did not sufficiently allege facts to support a cause of action for

aiding and abetting unfair competition. The trial court sustained the demurrers without leave to amend and entered judgment.

After the appeal was filed and briefing was completed, on November 2, 2004, the voters passed Proposition 64, which amended several sections of the Unfair Competition Law. We asked the parties for letter briefs addressing whether the amendments applied to this case.

## DISCUSSION

### *Proposition 64*

The amendments to the Unfair Competition Law in Proposition 64 became effective on November 3, 2004. (Cal. Const., art II, § 10, subd. (a).) Prior to the amendment, Business and Professions Code section 17204 authorized “any person acting for the interests of itself, its members or the general public” to bring an action to enjoin and to seek restitution for unfair competition. The amended section now allows a party other than a public prosecutor to file or maintain an action only if the party “has suffered injury in fact and has lost money or property as a result of such unfair competition.” (Bus. & Prof. Code, § 17204.) In addition, a private plaintiff must now “compl[y] with Section 382 of the Code of Civil Procedure [dealing with class actions] . . . .” (Bus. & Prof. Code, § 17203.) As we explained in *Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887, 905, the amendments apply to causes of action in which no final judgment has been entered by the effective day of the amendments.

The complaint in its current form does not meet the new pleading requirements. However, plaintiff represented in his letter brief and at oral argument that he used the payment processing services of Ginix and is able to amend the first cause of action to allege the requisite facts as to that defendant. It is appropriate to allow plaintiff

this opportunity to amend. (*Benson v. Kwikset Corp.*, *supra*, 126 Cal.App.4th at pp. 907-908.)

Plaintiff acknowledged in his supplemental brief and at oral argument that he did not use the services of any defendant except Ginix. Thus, he has not “suffered injury in fact [or] lost money or property as a result of [alleged] unfair competition” by the other three defendants. (Bus. & Prof. Code, § 17204.) As such, he is not entitled to pursue this action under Business and Professions Code section 17200 as amended by Proposition 64.

Counsel for plaintiff argues he has alternative parties he could substitute in as plaintiffs that were directly harmed by those defendants. In *Benson*, we rejected a similar request based primarily on the time-bar of the statute of limitations. (*Benson v. Kwikset Corp.*, *supra*, 126 Cal.App.4th at p. 908.)

In *Branick v. Downey Savings & Loan Assn.* (2005) 126 Cal.App.4th 828, in an appeal from a judgment on the pleadings in an unfair competition class action subject to Proposition 64, the plaintiffs sought “to amend the complaint to substitute an affected plaintiff to preserve the claims of the represented group.” (*Id.* at p. 844.) The court ruled that “substitution of new plaintiffs *may* be allowed under the circumstances of this case.” (*Id.* at p. 845.) It relied on Code of Civil Procedure section 473 that allows an amendment to add a party and the policies of liberally allowing amendments and trying cases on their merits, but cautioned that such considerations must be weighed against factors including the prohibition against amending to present entirely new facts or prejudice to the defendant. (*Id.* at pp. 844-845)

Here, plaintiff conceded he did not intend to bring a class action against any defendant except Ginix; he sued only as a private attorney general. Thus, unlike *Branick*, there are no claims of a represented class to preserve. Rather, the case is factually similar to *Benson* which had no class claims either. (*Benson v. Kwikset Corp.*, *supra*,

126 Cal.App.4th at pp. 896, 907.) Under these circumstances there is no basis for allowing an amendment to add new parties.

Likewise, the second, third, and fourth causes of action allege purely private attorney general actions involving matrix websites other than EZ in which plaintiff did not participate. Again, amending those causes of action would require adding new parties and a new theory of recovery, i.e., a class action case. These claims have nothing to do with plaintiff and the judgment is affirmed as to them.

### *Sufficiency of Allegations Against Ginix*

The trial court ruled plaintiff had not adequately pleaded a cause of action against Ginix for aiding and abetting the operation of an illegal lottery or pyramid scheme. We disagree.

“Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act . . . .’ [Citations.] . . .” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325.) This is consistent with Restatement Second of Torts, which recognizes a cause of action for aiding and abetting in a civil action when it provides: “For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he [¶] . . . [¶] (b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . . .” (Rest.2d Torts, § 876, subd. (b).) “Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. . . . It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act.” (Rest.2d Torts, § 876, com. d, p. 317.)

Here, the complaint contains facts satisfying those elements. As to knowledge, plaintiff alleges Ginix reviewed EZ's website and "recognized that the site was an illegal lottery, but also realized that it generated substantial revenue and could be very profitable . . . ." He also alleges Ginix "knew [it was] facilitating orders for an unlawful pyramid scheme and/or lottery, and that the EZ . . . website made false, misleading and deceptive claims and engaged in unfair business practices"; and "[knew] the money being paid by the consumer [was] for purposes of participation in the lottery."

In addition to pleading the requisite knowledge, these allegations also dispense with Ginix's argument that plaintiff's theory of the case requires Ginix to investigate EZ's website or monitor its conduct to determine whether it was illegal. The complaint alleges Ginix knew. Likewise, this theory does not violate public policy. We do not quarrel with the claim that payment processors provide useful services to consumers. But this does not give them license to aid and abet illegal activity.

The complaint also satisfies the element of substantial assistance or encouragement. It alleges Ginix authorized EZ to configure its site to display Ginix's logo so that consumers could link directly to Ginix's site to process credit card payments. It further pleads Ginix did this "with the knowledge and specific intent of aiding and abetting and facilitating [EZ's] illegal lottery operations . . . . Ginix hoped and believed that by allowing EZ . . . to take credit card orders, more persons would be able to participate in the illegal lottery, resulting in more revenue for [itself]. . . . Ginix also realized that by providing [its] services to EZ . . . , this would lend an aura of respectability and further encourage participation." The complaint goes on to state that, after PaySystems terminated its relationship with EZ, a specified person from Ginix "personally assured [EZ] that Ginix did not have any problem with the operation of the



lottery site and would not freeze funds paid by consumers [as PaySystems had done] . . . . Ginix . . . essentially promised it would have a ‘stronger stomach.’”

These allegations defeat Ginix’s claim that plaintiff made no required showing of knowing and active participation in the alleged acts of unfair competition. We also reject the argument that substantial assistance is not sufficiently pleaded because the complaint alleges Ginix was doing no more than providing its usual, legitimate service of processing credit card payments. The language quoted above alleges Ginix went far beyond merely processing credit cards.

Some cases seem to hold that in addition to the elements of knowledge and substantial assistance, a complaint must allege the aider and abettor had the specific intent to facilitate the wrongful conduct. For example, in *Gerard v. Ross* (1988) 204 Cal.App.3d 968, the court states, “In the civil arena, an aider and abettor is called a cotortfeasor. . . . A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted with the intent of facilitating the commission of that tort. [Citation.]” (*Id.* at p. 983.) Again, *Howard v. Superior Court* (1992) 2 Cal.App.4th 745 notes, “[A]iding and abetting . . . necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. A plaintiff’s object in asserting such a theory is to hold those who aid and abet in the wrongful act responsible as joint tortfeasors for all damages ensuing from the wrong. [Citation.]” (*Id.* at p. 749.)

We need not decide whether this is a required element. Plaintiff made such an allegation when he pleaded that Ginix acted with the “specific intent of aiding and abetting and facilitating [EZ’s] illegal lottery operations . . . .”

Ginix relies heavily on *Emery v. Visa Internat. Service Assn.* (2002)

95 Cal.App.4th 952 (*Emery*). While superficially it might seem applicable, a more thorough analysis reveals that neither its facts nor its legal principles support defendant's position. In *Emery*, the plaintiff, as a private attorney general, sued for unfair competition and false advertising under Business and Professions Code sections 17200, 17500, and 17535. California residents were solicited to participate in illegal lotteries that allowed payment with Visa cards. The defendant was a clearinghouse comprised of more than 20,000 member financial institutions worldwide. Its member institutions generally fell into one of two types. One contracted with merchants to accept Visa cards for payments; the other issued credit cards to consumers. The defendant itself did not issue cards and was "not involved either in transferring funds to merchants or in billing cardholders. Nor [did it] receive any fee from either the cardholder or the merchant involved in a particular transaction." (*Emery, supra*, 95 Cal.App.4th at p. 956.)

The plaintiff alleged the defendant's "advertising, licensing of its logo, and utilization of its payment system create[d] either an actual or ostensible agency relationship with its merchants." (*Emery, supra*, 95 Cal.App.4th at p. 954.) He also claimed the defendant aided and abetted the lottery "by failing to prevent the exploitation of its logo and failing to sufficiently repudiate the acts of merchants who accept[ed] VISA bank cards. [Citations.]" (*Ibid.*) The trial court granted the defendant's summary judgment, and the court of appeal affirmed.

Here, by contrast, plaintiff alleged that Ginix, with prior knowledge of its operations, contracted directly with EZ and received payment based on its activity. In addition, plaintiff is not pleading Ginix aided and abetted by failing either to prevent use of its logo in the solicitations or to repudiate EZ's actions. Rather, he alleges Ginix had a direct stake in the success of the website and contracted for use of its services to encourage participation and make more money.

Moreover, the basis for exonerating the defendant in *Emery* from aiding and abetting liability is not applicable here. There, the focus of the aiding and abetting

allegation was that the defendant failed to stop the lottery solicitations. The court ruled that in that context, the availability of the credit card for payment was not itself sufficient. (*Emery, supra*, 95 Cal.App.4th at p. 963.) It found there was no evidence “that [the defendant] knew of the unlawful solicitations, facilitated their distribution, or in any manner ‘rendered aid with an intent or purpose of either committing, or of encouraging or facilitating,’ violation of the antilottery penal statutes of this state. [Citation.]” (*Ibid.*) Here, the facts in the complaint are to the contrary.

The plaintiff in *Emery* also sought to impose liability based on the defendant’s use of the Visa logo in the solicitations, arguing it “implied to consumers that the merchants’ statements were true.” (*Emery, supra*, 95 Cal.App.4th at p. 964.) Again, the court ruled it would not impose liability merely based on the defendant’s act of omission, i.e., failing to police use of its mark. (*Ibid.*) It noted there was no evidence of “any wrongful motives” on the defendant’s part. (*Id.* at p. 965.) “The worst that can be said is that [the defendant] did not take more aggressive corrective steps to curtail the use of its mark on the solicitations.” (*Ibid.*) Here, contrary to Ginix’s claim, the allegation is not merely that it licensed its logo to EZ. Rather, plaintiff pleads that Ginix, with full knowledge of the alleged illegal website, actively participated in processing payments, hoping use of the direct link from EZ’s site to its site would generate more revenue.

As an alternative argument, Ginix asserts the operative complaint should be disregarded because it contains allegations inconsistent with the prior complaint. It maintains that the prior pleading alleged Ginix was processing EZ’s credit card transactions but that the complaint at issue contrarily alleged Ginix aided and abetted the illegal website. We see nothing inconsistent about these statements. The latter allegation is more detailed but it does not contradict the previous pleading. Nor is it merely conclusory. Plaintiff alleges facts about how Ginix aided and abetted, as repeated at length above. Ginix has not persuaded us this was a sham pleading.

## DISPOSITION

The judgment as to respondents PaySystems, PayPal, and Neovi Data Corporation on the first cause of action and the judgment on the second, third, and fourth causes of action is affirmed. Respondents are entitled to their costs on appeal. The judgment as to respondent Ginix on the first cause of action is reversed and remanded to allow appellant an opportunity to file a motion to amend the complaint to plead facts satisfying the standing and class action requirements for an unfair competition claim as required by Proposition 64's amendment to Business and Professions Code section 17200 et seq. The motion shall be filed within 30 days of the filing of the remittitur. If appellant fails to plead his right to maintain the action, the court shall enter a judgment dismissing the complaint. Appellant and respondent Ginix shall bear their own costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.

**CERTIFIED FOR PARTIAL PUBLICATION**  
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(Super. Ct. No. 03CC00185)

ORDER GRANTING REQUEST  
FOR PARTIAL PUBLICATION  
AND ORDER MODIFYING  
OPINION; NO CHANGE IN  
JUDGMENT

Appellant and The Furth Firm LLP have requested that our opinion filed on April 11, 2005 be certified for publication. It appears that part of the opinion meets the standards set forth in California Rules of Court, rule 976(b). As to all portions of the opinion except the section labeled "Proposition 64," commencing on page 5 and concluding on page 7, the request is GRANTED. The designated portion of the opinion is ordered published in the Official Reports with the following modifications:

1. On page 2, delete the last two sentences of the first paragraph and replace them with the following:

As discussed in the unpublished portion of this opinion, we remand to give plaintiff an opportunity to amend that cause of action to allege facts required under the unfair competition law as amended by Proposition 64. As further set out in the unpublished portion of this opinion, as to the remaining defendants on the first cause of

action, and on the second, third, and fourth causes of action, we affirm the judgment because Proposition 64 bars plaintiff from proceeding.

This modification does not change the judgment.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.