

**FILED**  
San Francisco County Superior Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA APR 17 2019

IN AND FOR THE COUNTY OF SAN FRANCISCO

CLERK OF THE COURT  
BY: Heidi Green  
Deputy Clerk

LOI TRUONG, MY NGUYEN, KEITH  
ARMSTRONG, SUMMER SIMPSON,  
KAROL NAVARRETE, AND LUIS  
HERNANDEZ

Plaintiffs,

vs.

XIAO ZHEN WU, SIXIAN HUANG,  
HAISHENG WU; AND DOES 1 THROUGH  
20,

Defendants.

Case No. CGC-17-558076

**Reasoning For Denying Plaintiffs'  
Unfair Business Practices Claim;  
Business And Professions Code §§  
17200-17208**

UCL Trial Date: June 22, 2018

Time: 9:00 a.m.

Dept.: 303

Trial: March 26, 2018

On June 22, 2018, the Plaintiffs' claim for Unfair Business Practices under Business and Professions Code ("UCL") §§ 17200-17208 came for argument before the above entitled court and was DENIED. The court issues its reasoning to memorialize its decision.

The Court considered the evidence presented at the jury trial on the legal claims, as well as briefings from each party, opposition to the briefings, and a reply to the opposition to the briefings by each party.

"The UCL defines 'unfair competition' as 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.' (Bus. & Prof. Code, §1700.) By proscribing 'any unlawful' business act or practice (*ibid.*), the UCL 'borrows' rules set out in other laws and makes violations of those rules independently actionable. (Citations omitted) "

*(Zhang v. Superior Court (2013) 57 Cal.4<sup>th</sup> 364, 370)*

The Defendant was found to have constructed residential units without permits and rented them to Plaintiffs without certificates of occupancy. Defendant's rentals violated San Francisco Building Code §109A. "An unlawful business practice under [Business and Professions Code] section 17200 is 'an act or practice, committed pursuant to business activity, that is at the same time *forbidden by law*.'" (*Durell v. Sharp Healthcare (2010) 183 Cal.App.4<sup>th</sup> 1350, 1361*)

Business and Professions Code §17204 reads, in relevant part... "Actions for relief pursuant to this chapter shall be prosecuted in a court of competent jurisdiction ...by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Emphasis added.) "¶Prevailing plaintiffs are generally limited to injunctive relief and restitution. [Citations.] Plaintiffs' may not receive damages ... or attorney fees. (Citations omitted.) Restitution under [Business and Professions Code] section 17203 is confined to restoration of any interest in 'money or property, real or personal, which may have been acquired by means of such unfair competition.'" (*Zhang v. Superior Court (2013) 57 Cal.4<sup>th</sup> 364, 371*)

### Injunctive Relief

"Section 17203 makes injunctive relief 'the primary form of relief available under the UCL,' while restitution is merely 'ancillary.'" (*In re Tobacco II Cases (2009) 46 Cal.4<sup>th</sup> 298, 319 parallel cite omitted*) But "...the right to seek injunctive relief under section 17203 is not dependent on the right to seek restitution; the two are wholly independent remedies." (Citations omitted) *Clayworth v. Pfizer, Inc. (2010) 49 Cal.4<sup>th</sup> 758, 790*

"Although past acts are now sufficient to state a §17200 claim, obtaining an injunction still requires the exercise of the equitable powers of a court. Hence, a court has the discretion to

withhold an injunction under §17200 as to past conduct if there is no reasonable likelihood that the conduct will recur. Thus, *California Service station & Automotive Repair Assn.* and *Midpeninsula Citizens for Fair Housing*, which deny injunctive relief where conduct has been discontinued and is unlikely to recur, are still good law. This is clear from several §17200 cases decided since the 1992 amendments that still impose this likely-to-recur requirement on the §17200 remedy.” (Bus. & Prof. C. 17200 Practice Ch. 2-D “Subsequent Amendments to §17200 [2:36] PRACTICE POINTER) “Indeed, ‘[a]n injunction should not be granted as punishment for past acts where it is unlikely that they will recur.’ (Citations omitted.)” (*In re Tobacco II Cases* (2009) at 320)

Plaintiffs’ Loi Troung and My Nguyen vacated the subject property prior to the filing of this litigation. They had no standing to assert a UCL claim. “...regardless of the broad scope of the injunctive relief afforded under the unfair business practices act, we conclude that appellant has failed to allege a cause of action for such relief. Appellant is not now in possession of any of the properties owned or managed by the defendants; therefore, she has no need of or standing to seek an injunction on her own behalf. *Stoiber v. Honeychuck* (1980) 101 Cal.App.3<sup>rd</sup> 903, 928

Plaintiffs Keith Armstrong, Summer Simpson, Karol Navarette and Luis Hernandez vacated their units during the pendency of the trial and before the §17200 hearing. The units themselves were then subject to the City’s Bureau of Building Inspections abatement procedure to remedy the lack of permitting and certificates of occupancy. Testimony at trial enumerated the Bureau’s actions and defendant’s response in acquiesce to those actions. According to the evidence at trial all the rental units were vacant and subject to a noticed Department of Building Inspections abatement process by the time of the §17200 B&P hearing.

“Injunctive relief will be denied if at the time of the order of judgment, there is no

reasonable probability that the past acts complained of will recur, i.e., where the defendant voluntarily discontinues the wrongful conduct.” (Citations omitted.) *California Service Station etc. Assn. v. Union Oil Co.* (1991) 232 Cal.App.3<sup>rd</sup> 44, 57

At the time of the hearing Plaintiffs had vacated their units and the units were subject to a Department of Building Inspections abatement process. The court finds that there was no reasonable probability of recurrence and declines to issue an injunction in this matter.

### Restitution

Plaintiffs’ argued that the rent paid, being wrongfully received, should be returned to the Plaintiffs.

Proposition 64 requires that a plaintiff have lost money or property to have standing to sue. “Taken in the context of the statutory scheme, the definition suggests that section 17204 operates only to return to a person those measurable amounts which are wrongfully taken by means of an unfair business practice.” (*Day v. AT&T Corp.* (1998) 63 Cal.App.4<sup>th</sup> 325, 338-339)

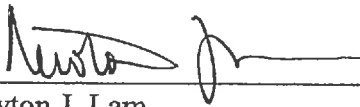
Case law speaks to restitution as “restoration” to a plaintiff of what was wrongfully paid to a defendant. “Indeed, the section itself provides for ‘restoration’ of money or property acquired by means of unfair competition. We think it significant that the Legislature chose to use the word ‘restore’ in labeling that which an offending defendant may be ordered to do. The verb, as defined by the Oxford English Dictionary, means ‘[t]o give back, to make return, or restitution of (anything previously taken away or lost).’ (Citation omitted.) Taken in context of the statutory scheme, the definition suggests that section 17203 operates only to return to a person those *measurable amounts* which are *wrongfully taken* by means of an unfair business practice. The intent is to make whole, equitably, the victim of an unfair practice. While it may be that an

order of restitution will also serve to deter future improper conduct, in the absence of a measurable loss the section does not allow the imposition of a monetary sanction merely to achieve this deterrent effect. Nor is the section intended as a punitive provision, though it may fortuitously have that sting when properly applied to restore a victim to wholeness.” *Day v. AT & T Corp.* (1988) 63 Cal.App.4<sup>th</sup> 325, 338-39 No matter what Plaintiffs’ views were of Defendant’s unlawful conduct here “...restitution under the UCL may not be based ‘solely on deterrence, no matter how egregious the defendant’s conduct.’” *In re Tobacco Cases II* (2009) 240 Cal.App.4<sup>th</sup> 779 at 892

In *Safeway, Inc. v. Superior Court* (2015) 238 Cal.App.4<sup>th</sup> 1138, 1162 the appropriate measure of restitution was determined to be “...the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received.” In other wording “...the difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution.” *In re Tobacco Cases II at 894* The court finds that the principles set forth in *Safeway, Inc. v. Superior Court* and *In re Tobacco Cases II* to be the appropriate measure of restitution here.

Plaintiffs’ expert testified at trial that the fair market rent of similar units were more than what the plaintiffs paid to defendant for rent. Plaintiffs did not show by a preponderance of the evidence any payment of rent in excess of the value of the rentals. The court finds that the Plaintiffs did not suffer any injury in fact or lost money or property as a result of unfair competition as defined in Business and Professions Code §§17200-17208.

DATED: April 17, 2019

  
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Newton J. Lam  
Judge, San Francisco Superior Court

**SUPERIOR COURT OF CALIFORNIA  
County of San Francisco**

LOI TRUONG, et al.,

Plaintiff(s),

vs.

XIAO ZHEN WU, et al.,

Defendant(s).

Case No. CGC-17-558076

**CERTIFICATE OF MAILING  
(CCP 1013a (4))**

I, Felicia Green, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On April 17, 2019, I served the attached **REASONING FOR DENYING PLAINTIFFS' UNFAIR BUSINESS PRACTICES CLAIM; BUSINESS AND PROFESSIONS CODE 17200-17208** by placing a copy thereof in a sealed envelope, addressed as follows:

Joseph O'Neil  
Norman Chong  
Chris Tarkington  
TARKINGTON, O'NEILL BARRACK &  
CHONG  
201 Mission Street, Suite 710  
San Francisco, CA 94105

Mark Hooshmand  
HOOSHMAND LAW GROUP  
22 Battery Street, Suite 610  
San Francisco, CA 94111

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: **APR 17 2019**

T. MICHAEL YUEN, Clerk

By:   
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Felicia Green, Deputy Clerk