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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RUINS-CA et al.,

Plaintiffs and Appellants,

v.

eBAY, INC.,

Defendant and Respondent.

G045540

(Super. Ct. No. 30-2009-00124542)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, B. Tam Nomoto Schumann, Judge. Affirmed.

Law Offices of Joel R. Bennett and Joel R. Bennett for Plaintiffs and Appellants

Weil, Gotshal & Manges, LLP, Christopher J. Cox, Bruce A. Colbath and Mark J. Fiore for Defendant and Respondent.

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Plaintiffs Ruins-CA and Lisa Genesta appeal from a judgment entered in favor of eBay, Inc., after the court sustained its demurrer without leave to amend plaintiffs' cause of action for intentional interference with prospective economic advantage. Plaintiffs argue the court erred in sustaining the demurrer because they adequately alleged eBay engaged in conduct which both interfered with their customer relationships and was "independently wrongful." Plaintiffs also contend that even if their pleading was factually deficient, the court abused its discretion in denying them leave to amend.

We affirm the judgment. Plaintiffs' primary contention on appeal is that eBay's communications with plaintiffs' customers, which allegedly reflected eBay's policy of prohibiting sellers and buyers who first made contact on eBay from engaging in transactions with each other outside of eBay, was anti-competitive and designed to "maintain and preserve eBay's monopoly for auction services," and therefore qualified as independently wrongful conduct under Section 2 of the Sherman Antitrust Act ("the Sherman Act"). (15 U.S.C. § 2.) But plaintiffs failed to sufficiently allege eBay engaged in conduct that violated the Sherman Act. Indeed, as plaintiffs acknowledged in the trial court, their fifth amended complaint made no reference to the elements of a Sherman Act violation. Even on appeal, plaintiffs fail to persuasively explain how eBay's alleged conduct might constitute an actionable violation of the Sherman Act. Plaintiffs' alternate theory, based on eBay's alleged violation of its own standards for addressing complaints, likewise provides an insufficient basis for establishing eBay engaged in independently wrongful conduct. Finally, plaintiffs have failed to identify additional facts which might cure the defects in their cause of action, or to explain how they could amend the cause of action to state a cognizable claim. We therefore conclude the trial court did not abuse its discretion in denying them leave to amend.

I

FACTS

According to the fifth amended complaint, plaintiffs have been selling “high-end, high quality, imported authentic European and American antique and vintage textiles, fabrics, pillows and trims” for 18 years. Plaintiffs allegedly began selling their wares on eBay in 1999, and continued to do so without incident until July 2008, when eBay allegedly removed their items from the site based on reports of “unspecified ‘misrepresentations.’” Plaintiffs’ account was thereafter suspended for seven days, and they allegedly promised never to do “‘it’” again – although they dispute having done anything wrong.

There followed a series of suspensions and reinstatements of plaintiffs’ eBay account, which plaintiffs allege was the product of a sustained campaign by their competitors to discredit them with eBay through unsubstantiated complaints about the authenticity of plaintiffs’ items.¹

Ultimately, in April 2009, eBay put a “permanent sales block” on plaintiffs’ account, which prohibited plaintiffs from selling their items on eBay. As a result, plaintiffs are allegedly “out of business.”

Plaintiffs initially alleged nine causes of action against eBay and certain of plaintiffs’ competitors, including anti-competitive behavior in violation of the Cartwright Act (Bus. & Prof. Code, §§ 16700, et.seq.),² breach of contract (against eBay only), breach of the implied covenant of good faith and fair dealing (against eBay only), unfair

¹ Plaintiffs also named the competitors as codefendants, and continue to prosecute their claims against those defendants in the trial court.

² The Cartwright Act embodies California’s antitrust law, and defines an illegal “trust” as “a combination of capital, skill or acts by two or more persons” for the purpose of fixing prices or inhibiting competition. (Bus. & Prof. Code, § 16720.)

competition, intentional interference with contractual relations, intentional interference with prospective business advantage, trade libel, negligence (against eBay only), and intentional and negligent infliction of emotional distress.

Plaintiffs filed a first amended complaint before eBay responded to their initial complaint. eBay then demurred to each of the causes of action alleged in the first amended complaint, but took its demurrer off calendar shortly before plaintiffs filed their second amended complaint.

eBay again demurred to plaintiffs' second amended complaint. In attacking plaintiffs' cause of action for violation of the Cartwright Act, eBay relied on state and federal anti-trust cases to support its argument plaintiffs failed to plead specific facts to support their claim and failed to define the relevant market for anti-trust purposes.³

The court sustained eBay's demurrer. Plaintiffs' third amended complaint realleged only seven of their initial causes of action against eBay, limiting their cause of action for trade libel to other defendants and omitting the cause of action for intentional interference with prospective business advantage entirely. eBay again demurred to each of the causes of action, reasserting many of the same arguments it had relied upon in its prior demurrer.

The hearing on eBay's demurrer to the third amended complaint was heard by a different trial judge than the one who ruled on eBay's demurrer to the second amended complaint. The court noted that while it considered plaintiffs' cause of action for intentional interference with contract to be incurably deficient, it believed the "allegations contained therein may support a cause of action for intentional interference

³ "“Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance.”” (*In re Cipro Cases I & II* (2011) 200 Cal.App.4th 442, 456-457, quoting *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 334.)

with prospective economic advantage.” eBay objected, explaining that plaintiffs previously had alleged the identical theory of recovery, but had voluntarily abandoned it when they filed their third amended complaint.

Plaintiffs conceded they had omitted the claim from their third amended complaint, and acknowledged that in doing so, “we dropped the wrong claim.” Plaintiffs agreed that none of their relationships with customers qualified as existing contracts, and “so to the degree that one of those claims from the second amended complaint makes sense and the other didn’t, we clearly and mistakenly went with the wrong one.” Plaintiffs also argued the court should grant leave to amend for all causes of action because while their most recent amendments addressed the concerns of the prior judge, they now faced different issues raised by a new judge. The court sustained the demurrer with leave to amend on all causes of action.

Plaintiffs’ fourth amended complaint realleged the same causes of action contained in their third amended complaint, with the exception of the cause of action for intentional interference with contractual relations, which they dropped in favor of a renewed claim for intentional interference with prospective business advantage. That renewed cause of action alleged in conclusory terms that: (1) plaintiffs had engaged in repeat business with multiple customers during “their nine-year use of eBay as a sales channel”; (2) eBay was aware of those customer relationships; (3) eBay violated the Cartwright Act and California’s unfair competition law when it committed independently wrongful acts with the objective of interfering with and disrupting plaintiffs’ customer relationships; and (4) eBay’s wrongful conduct interfered with and disrupted plaintiffs’ customer relationships.

eBay again demurred, arguing the cause of action for the Cartwright Act violation was deficient in several respects, including plaintiffs’ failure to define the relevant market for anti-trust purposes. eBay also asserted plaintiffs failed to amend any

of the other causes of action included in the third amended complaint, and therefore those causes of action were “defective as a matter of law.” On the resurrected cause of action for intentional interference with prospective business advantage, eBay first argued plaintiffs had waived reliance on this legal theory when they elected not to include it in their third amended complaint after the court had given them leave to do so. But eBay also argued the cause of action was insufficiently alleged because plaintiffs failed to include facts demonstrating eBay’s conduct was independently wrongful “by some legal measure other than the fact of the interference itself” (quoting *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1060).

The court sustained eBay’s demurrer, without leave to amend, to each of plaintiffs’ causes of action other than intentional interference with prospective business advantage, but gave plaintiffs leave to amend that single cause of action “one last time.” The court noted plaintiffs had offered no significant amendment to their causes of action for breach of contract, breach of the covenant of good faith and fair dealing, negligence, and negligent infliction of emotional distress, and did not oppose the demurrer to those causes of action. On the cause of action for the Cartwright Act violation, the court explained plaintiffs again had failed to allege the elements with sufficient particularity, and failed to identify the relevant “market” for purposes of an anti-trust violation. Finally, the court pointed out that plaintiffs’ allegations for intentional interference with prospective business advantage was deficient because it was stated in conclusory terms and relied on eBay’s presumed liability for the other causes of action to demonstrate “independently wrongful” conduct. Because the court sustained eBay’s demurrer to those other causes of action without leave to amend, plaintiffs could not rely on those claims to support the intentional interference claim. Consequently, the court gave plaintiffs one final opportunity to state the cause of action with sufficient specificity, and

without relying on eBay’s purported liability on legal theories to which it had successfully demurred.

Plaintiffs’ fifth amended complaint included the intentional interference claim as its third cause of action.⁴ Consistent with a common – albeit generally unfortunate – practice, plaintiffs incorporated the first 62 paragraphs of its complaint into their cause of action for intentional interference, which otherwise begins with paragraph 63 of the fifth amended complaint.⁵

Starting at paragraph 63, plaintiffs allege they had engaged in repeat business with a number of customers during their nine year reliance on eBay as a “sales channel.” eBay was, or should have been, aware of those existing relationships. eBay adopted a policy prohibiting members from using eBay to contact each other and arrange business transactions outside of eBay.

⁴ Plaintiffs’ fifth amended complaint also retained causes of action for violation of the Cartwright Act, unfair competition, trade libel, intentional interference with contractual relations, and intentional infliction of emotional distress – albeit alleged only against defendants other than eBay.

⁵ We say “unfortunate” because as this case illustrates, plaintiffs’ wholesale incorporation by reference of each cause of action alleged in a complaint into each successive cause of action generally results in confusion. Here, eBay reasonably interprets plaintiffs’ intentional interference cause of action to be based in part on eBay’s suspension and termination of plaintiffs’ account because those alleged acts are clearly set forth in the earlier paragraphs of plaintiffs’ complaint and plaintiffs chose to incorporate *all of those paragraphs* by reference into their cause of action alleged against eBay. Plaintiffs, in turn, deny reliance on those facts in the apparent belief that only some of the allegations incorporated by reference into their cause of action *actually matter*. eBay correctly interpreted the pleading, however, because the content of a complaint is determined by what’s set forth on paper, rather than the plaintiff’s subjective intent. That being said, it is plaintiffs’ burden on appeal from a judgment following an order sustaining a demurrer to demonstrate why the allegations of their complaint are sufficient to state a cause of action. To satisfy that burden, plaintiffs may rely on only selected allegations.

eBay allegedly contacted plaintiffs' customers and instructed them not to purchase items directly from plaintiffs. Specifically, plaintiffs alleged eBay informed plaintiffs' customers of the items it removed from the site and "if you were a bidder or the buyer of this item: we understand that you may still want the item. We hope you'll bid on it again if the seller relists it. Sometimes, instead of relisting an item, a seller will suggest that you buy it directly from him or her, off eBay. If that happens, please do not accept. If anything goes wrong with the purchase, we won't be able to help you." eBay also allegedly told plaintiffs: "Do not respond to the sender if this message requests that you complete the transaction outside of eBay. This type of offer is against eBay policy, may be fraudulent, and is not covered by buyer protection programs."⁶ Plaintiffs alleged, in conclusory terms, that such communications constitute "acts of trade libel."

eBay also allegedly solicited input about plaintiffs' items from their competitors, knowing that input would be negative, and then failed to assess the veracity of those negative comments before removing plaintiffs' items from eBay, thus violating its own policy for addressing complaints. Plaintiffs allegedly were deprived of the opportunity to defend the authenticity of their items before removal, also in violation of eBay's own policy. These eBay policies allegedly qualified as a "determinable legal standard," the violation of which is sufficient to constitute "independently wrongful conduct" to support a cause of action for intentional interference with prospective business advantage.

⁶ In their fifth amended complaint, plaintiffs allege this communication was sent to their customers. But the complaint incorporates by reference an exhibit reflecting the communication, which demonstrates it was included within a communication to *plaintiffs*. "If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence." (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447, citing *Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567-568.) In their opening brief, plaintiffs acknowledge the communication was sent to them, rather than to customers.

Plaintiffs also alleged eBay wrongfully acted with knowledge it would disrupt plaintiffs' business relationships and intended to achieve that result. Absent eBay's wrongful and disruptive acts, plaintiffs alleged there was a "high probability" its customers would have continued to purchase items from plaintiffs.

eBay again demurred. It argued plaintiffs could not support an intentional interference with prospective business advantage claim by relying on allegations eBay violated its own policies for addressing complaints, since an assertion that a defendant breached its contract with plaintiff is insufficient as a matter of law to support a tort claim for intentional interference. eBay also argued its alleged communications with plaintiffs' potential customers were not libelous and therefore could not constitute "trade libel." Moreover, eBay noted that plaintiffs' characterization of the communications as "notifying [p]laintiffs[]" prospective buyers not to do business with [p]laintiffs" was contradicted by the content of the communications.

Plaintiffs opposed the demurrer, arguing for the first time that eBay's alleged policy of prohibiting eBay buyers and sellers from completing their transactions outside of eBay, or from using information obtained through eBay to contact each other about future transactions, was independently wrongful because it violated the Sherman Act's anti-monopoly provision.

The court sustained the demurrer without leave to amend. The court first noted that plaintiffs' Sherman Act claim "has not been plead[ed] anyplace except in plaintiff's opposition to the demurrer. Plaintiffs cannot raise this allegation by way of their opposition. The operative facts must be pleaded in the complaint." The court also explained that plaintiffs attempt to rely on eBay's alleged violations of its own policies to establish "independently wrongful conduct" was unavailing because eBay's policies could not be considered "well-defined established rules or standards of a trade, association or profession." Moreover, the court noted that eBay's allegedly wrongful

removal of plaintiffs' items from its site "have already been considered under both contract and tort theories, and the previous demurrer on these points have been sustained without leave to amend. If these actions have been determined to not constitute breach of the contract between plaintiffs and eBay and do not form a tort 'claim,' they should not constitute the basis for claiming independent wrongful conduct by eBay for purposes of pleading a cause of action for interference with prospective economic advantage."

Finally, the court explained that plaintiffs' allegation of a prospective economic advantage was, in any event, insufficient to support the cause of action: "An allegation of past economic relationships is not sufficient to prove that at the time of the alleged interference there was an existing economic relationship between the plaintiff and those third parties. . . . Nowhere in the fifth amended complaint is it plead[ed] that at the time of the defendant's alleged interference, that any of the listed individuals had an existing economic relationship. For example, that they were bidding on a pulled listing, that they had said they would purchase a specified item or otherwise indicated other than being past customers, that they intended to bestow an economic benefit upon the plaintiff."

Plaintiffs' counsel urged the court to give them another opportunity to amend the complaint: "I can fix it up and make it proper in every way shape and form. I can allege the section 2 [anti-monopoly] violation. There was a violation of the anti-trust laws. Each and every one of the elements that you've mentioned I can easily satisfy. My client has all these facts. Just give me one more chance and I'll be able to do it. And we can allege the existing economic relationships with those customers. . . . [W]e have the facts that this happened to her and she shouldn't lose this [cause] of action just because we haven't alleged it properly." The court denied the request.

II DISCUSSION

A. *Standard of Review*

“We review the order sustaining the demurrer de novo, exercising our independent judgment to determine whether a cause of action has been stated under any legal theory.” (*Sierra Club v. Department of Parks and Recreation* (2012) 202 Cal.App.4th 735, 740.) And “[i]n reviewing the sufficiency of a complaint against a demurrer, we accept as true all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.” (*Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 251, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Further, “[w]hen the demurrer to the complaint has been sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion in sustaining the demurrer and we reverse the decision.” (*Whittemore v. Owens Healthcare-Retail Pharmacy, Inc.* (2010) 185 Cal.App.4th 1194, 1199.) But “the burden of proving a reasonable possibility exists that a complaint’s defects can be cured by amendment rests ‘squarely on the plaintiff.’” (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091; see also *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 544 [“the plaintiff must demonstrate a reasonable possibility that the complaint’s defects can be cured by amendment”].) Specifically, plaintiffs “must show in what manner [they] can amend [their] complaint and how that amendment will change the legal effect of [their] pleading.” (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

B. *Plaintiffs Did Not Waive Their Right to Plead a Cause of Action for Intentional Interference with Prospective Economic Advantage*

eBay renews its contention that plaintiffs irrevocably waived their right to rely on the theory of intentional interference with prospective economic advantage when they voluntarily dropped that cause of action from their third amended complaint despite having been given leave to amend it. None of the cases cited by eBay, however, supports this contention.

Reynolds v. Bement, *supra*, 36 Cal.4th 1075, stands for the proposition that when a plaintiff obtains leave to amend a complaint, but elects to stand on the complaint and argue its sufficiency on appeal, the appellate court will “‘presume[] that the plaintiff has stated as strong a case as he can’” (*id.* at p. 1091), and will not consider potential amendment. Similarly, in *Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, the trial court gave plaintiffs leave to assert any other claims they could allege, but the plaintiffs “did not take the opportunity” and therefore on appeal they “forfeited the right to do so and remain a part of the action.” (*Id.* at p. 1038.)

And in *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, the plaintiffs voluntarily dropped two causes of action from their complaint after the trial court granted them leave to amend, and *never sought to reinstate them while the case remained in the trial court*. They later appealed when the trial court sustained a demurrer without leave to amend to a later version of the complaint. On appeal, the court refused to consider the omitted causes of action because “‘an appellate court will not consider the allegations of a superseded complaint.’” (*Id.* at p. 77, quoting *Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 209.)

In each of these cases, the appellant abandoned an opportunity *in the trial court*, and made no effort to reclaim it before appealing. The appellate courts’ refusal to consider such issues is consistent with the notion that a claim “abandoned below, cannot be reopened on appeal.” (*People v. Lancaster* (2007) 41 Cal.4th 50, 71.)

In contrast, plaintiffs reasserted their claim for intentional interference with prospective business advantage while the case was pending in the trial court, at the express invitation of the judge. In offering that invitation – which effectively *reopened* the time for plaintiffs to amend that cause of action – the court followed the general rule of liberality in allowing amendments to pleadings. “California courts have a policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others. Indeed, it is a rare case in which a court will be justified in refusing a party leave to amend his [or her] pleading so that he [or she] may properly present his [or her] case.” (*Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 158, internal citations and quotation marks omitted.)

Because eBay failed to demonstrate – either in the trial court or on appeal – that it was *prejudiced* by the court’s decision to reopen plaintiffs’ amendment period for the intentional interference with prospective business advantage claim, the court did not abuse its discretion in allowing that amendment. And because plaintiffs elected to amend the cause of action, they did not waive their right to do so. We therefore review their amended pleading on the merits.

C. *Plaintiffs Failed to Allege Facts Demonstrating eBay Engaged in Independently Wrongful Conduct*

The elements of a claim for intentional interference with prospective economic advantage are: “(1) an economic relationship between plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the relationship; (3) an intentional act by the defendant, designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant’s wrongful act” (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 944.)

Our focus here is on the third element of the claim – the intentional act of interference. It is well-settled that plaintiffs must demonstrate not only that eBay’s alleged act interfered with their economic relationships, but also that the act was *wrongful*, independent of its interfering character. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393.) “[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, fn. omitted.) In other words, the act must be “‘independently actionable.’” (*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.* (2006) 138 Cal.App.4th 1215, 1220.)

Here, plaintiffs rely primarily on eBay’s direct communications with plaintiffs’ customers, following its removal of plaintiffs’ items from its site, as evidence of independently actionable conduct. Specifically, plaintiffs point to the following communication, allegedly sent to their prospective customers after eBay removed their items: “If you were a bidder or the buyer of this item: we understand that you may still want the item. We hope you’ll bid on it again if the seller relists it. Sometimes, instead of relisting an item, a seller will suggest that you buy directly from him or her, off eBay. If that happens, please don’t accept. If anything goes wrong with the purchase, we won’t be able to help you.”⁷

⁷ Plaintiffs also point to a separate communication, which they alleged in their fifth amended complaint had been sent to their prospective customers, but admit in their brief was sent to them instead: “‘Do not respond to the sender [a prospective customer] if the message requests that you complete the transaction outside of eBay. This type of offer is against eBay policy, may be fraudulent, and is not covered by buyer protection programs.’” While plaintiffs argue in their brief this communication “threaten[ed] and intimidate[ed]” them; that it “chilled” their relationships with prospective customers because it caused them to fear “that if they did complete a sale outside eBay such sale would be ‘fraudulent’”; and that it “falsely accus[ed]” them of “‘fraudulent’ conduct,” those assertions are both conclusory and inherently implausible.

Plaintiffs contend the communications were independently actionable because they furthered eBay’s policy of prohibiting buyers and sellers who made initial contact through eBay from doing business with each other directly – a policy designed to “maintain [eBay’s] monopoly . . . in this channel of distribution in violation of Section Two the Sherman Act . . . which prohibits actual or attempted monopolization of a relevant product market.” According to plaintiffs, eBay’s communication “intimidate[ed]” plaintiffs’ prospective customers, and suggested to them “a parade of possible disasters” if they purchased the item in question directly from plaintiffs: i.e., “that bidders may not receive the item, that the quality of said items may be wanting, or even ‘fraudulent.’”⁸

There are several problems with plaintiffs’ argument. First, as they acknowledged in the trial court, plaintiffs failed to plead *the elements* of a claim for violation of section 2 of the Sherman Act as part of their cause of action. Instead, plaintiffs expressly alleged that eBay’s conduct was independently wrongful for other reasons – allegations which plaintiffs have largely abandoned on appeal.

By its terms, the missive simply warns plaintiffs that a *third party’s offer* may be fraudulent. It accuses them of nothing, and contains no threats.

⁸ eBay contends plaintiffs’ reliance on the Sherman Act to demonstrate independently wrongful conduct fails as a matter of law because the gravamen of the Sherman Act violation would be eBay’s alleged interference with plaintiffs’ business relationships. According to eBay, this allegation fails because “[t]he conduct supporting [plaintiffs’] independent wrong theory *is the same conduct* constituting the alleged interference – namely, eBay’s policy prohibiting members from using eBay to conduct business outside of eBay.” (Italics added.) We disagree. The gravamen of a claim under section 2 of the Sherman Act is not the interference with business relationships; it’s the abuse of monopoly power. (*Mercy-Peninsula Ambulance Inc. v. San Mateo County* (9th Cir. 1986) 791 F.2d 755, 759 [“The gravamen of a section 2 claim is the deliberate use of market power by a competitor to control price or exclude competition”].) A defendant’s mere interference with plaintiff’s business does not constitute a section 2 violation of the Sherman Act. The interference becomes wrongful only if defendant achieves it by improperly wielding its monopoly power.

Given plaintiffs' emphasis on a theoretical Sherman Act violation as the foundation of their intentional interference claim, their failure to include the elements of this claim in their complaint is no small omission: in essence, plaintiffs concede the allegations of their fifth amended complaint are insufficient. Nor have plaintiffs argued they can rectify the omission. Indeed, despite plaintiffs' focus on the purported Sherman Act violation as the basis of their claim, they failed to discuss the elements of this violation in their opening brief, let alone persuasively explain why we should conclude the alleged facts of this case satisfied those elements. Instead, plaintiffs merely suggest in conclusory fashion that "[f]orbidden prospective customers from doing business outside of eBay's channel of distribution *arguably* constitutes exclusionary and predatory conduct forbidden by Section Two." (Italics added.)

We are not convinced by that arguable assertion. Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." (15 U.S.C. § 2.) Section 4 of the Clayton Act, title 15 United States Code section 15(a), provides a private right of action for damages caused by a Sherman Act violation. "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C. § 15(a).)

"In order to state a valid monopolization claim, [plaintiff] must allege: (1) possession of monopoly power *in a relevant market*; (2) willful acquisition or

maintenance of that power; and (3) causal antitrust injury.” (*Nugget Hydroelectric, L.P. v. Pacific Gas and Electric Co.* (9th Cir. 1992) 981 F.2d 429, 436, italics added, citing *Catlin v. Washington Energy Co.* (9th Cir. 1986) 791 F.2d 1343, 1347.) “Market definition requires both a geographic and a product dimension.” (*Bhan v. NME Hospitals, Inc.* (9th Cir. 1991) 929 F.2d 1404, 1413.) Moreover, a private plaintiff seeking damages for violation of the Sherman Act must demonstrate it is “a proper party to bring an antitrust action against the defendants.” (*Bhan v. NME Hospitals, Inc.* (9th Cir. 1985) 772 F.2d 1467, 1469-1470 [plaintiff’s alleged injury must be of “‘the type that the antitrust statute was intended to forestall’”].) “The requirement that the alleged injury [is] related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors.” (*Id.* at p. 1470.)

Plaintiffs have not addressed any of these requirements in their briefing. More to the point, our record reflects that despite several attempts in the trial court, plaintiffs never satisfactorily defined the relevant market to support their anti-trust claim alleging a Cartwright Act violation. Consequently, the trial court ultimately sustained eBay’s demurrer to that cause of action without leave to amend – a ruling plaintiffs do not challenge on appeal.

Although plaintiffs dismiss the significance of their earlier failure to plead a cognizable cause of action against eBay under the Cartwright Act – arguing that earlier claim relied on “a conspiracy between eBay and [p]laintiffs’ . . . competitors,” rather than on its alleged “monopolistic conduct,” we cannot. Both types of anti-trust claim require a plaintiff to define the relevant market. (See *Thurman Industries Inc. v. Pay’N Pak Stores, Inc.* (9th Cir. 1989) 875 F.2d 1369; *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 325.) Nor can we ignore the fact plaintiffs have failed in several efforts to satisfy this requirement.

In any event, even if we assume plaintiffs might, in theory, define the relevant market to support a claim against eBay under section 2 of the Sherman Act, we remain unconvinced eBay's alleged communications with plaintiffs' customers would provide a sufficient basis for such a claim. In arguing eBay engaged in wrongful conduct, plaintiffs mischaracterize the tenor and the content of eBay's alleged communications with their customers. Specifically, plaintiffs characterize eBay's communications as both "threatening and intimidating," and maintain they "preclud[ed] buyers and sellers from dealing with each other outside of eBay." But nothing in the communications eBay allegedly sent to plaintiffs' customers imposed such a stricture – or, more important, threatened any consequences for its violation.

Significantly, the cases plaintiffs rely on to demonstrate actionable monopolistic behavior, *Lorain Journal Co. v. United States* (1951) 342 U.S. 143; *United States v. Dentsply International, Inc.* (3d Cir. 2005) 399 F.3d 181; and *United States v. Microsoft Corp.* (D.C. Cir. 2001) 253 F.3d 34, involved a defendant which had either engaged in or threatened *reprisals* against those who sought to do business with competitors. There is no allegation that occurred here.

Instead, the pleaded communications in this case merely reflect eBay's *request* that customers who previously bid on a specific item removed from its site not purchase the item directly from the seller, warning them eBay's buyer protection programs would not cover the sale. That warning is merely factual, not threatening or retaliatory; it is even preceded by the word "please." These alleged communications bear faint resemblance to the retaliatory conduct described in the antitrust cases cited by plaintiffs. Consequently, even if we assume eBay's warnings had the effect of discouraging plaintiffs' prospective customers from completing specific sales transactions after their items had been removed from the site, we remain unconvinced they constitute prohibited conduct under section 2 of the Sherman Act.

Nor does eBay's alleged policy – as distinct from its direct communications with plaintiffs' prospective customers – prohibit sellers from developing business relationships independently of eBay, as plaintiffs imply. Unlike the newspaper defendant in *Lorain Journal Co. v. United States*, *supra*, 342 U.S. 143, which refused to accept advertising from any business which also advertised on a local radio station, and the denture manufacturer in *United States v. Dentsply International, Inc.*, *supra*, 399 F.3d 181, which prohibited its customers from also selling other brands of dentures, eBay's alleged policy does not force users to *choose* between transacting business on its site or doing so independently of it; instead, the policy merely seeks to protect eBay's own interest in profiting from the specific commercial relationships it fosters. Thus, the policy is limited to buyers and sellers *who initially made contact about an item through eBay*, and requires they not complete the sale for *that item* outside of eBay, and it also prohibits buyers and sellers from *using eBay's site or information obtained through eBay* to contact each other about buying or selling the listed items outside of eBay.

Nothing in eBay's alleged policy actually prohibits sellers such as plaintiffs from freely offering their items for sale through other means, or from developing and maintaining independent relationships with customers. And aside from their claim that eBay's implementation of the policy had a specific, deleterious effect on their business prospects, plaintiffs have not explained why the policy should be viewed as unfair, or as imposing *unreasonable* restrictions on competition in any relevant market; as a consequence, plaintiffs have failed to suggest even an arguable basis for finding that either the policy, or eBay's alleged communication of it to their customers, constitutes a Sherman Act violation.

As an alternative to their Sherman Act theory, plaintiffs also renew an argument they attempted to plead in their fifth amended complaint. Specifically, plaintiffs assert eBay's own internal policy for handling complaints qualifies as a

“determinable legal standard” under *Stevenson Real Estate Services, Inc. v. C.B. Richard Ellis Real Estate Services, Inc.*, *supra*, 138 Cal.App.4th 1215. Plaintiffs argue eBay violated that policy by removing plaintiffs’ items from the site and suspending plaintiffs’ account without sufficient investigation of third party complaints. Plaintiffs contend eBay’s violation of its own internal policy satisfied the requirement to show “independently wrongful” conduct for intentional interference.

We disagree. In *Stevenson*, the court concluded that the violation of “well-defined, established rules or standards of a trade, association or profession,” are “‘independently actionable,’” where the defendant agreed to follow these standards. The court explained failure to abide by industry standards “may constitute the type of wrongful conduct that will support a cause of action for intentional interference with prospective economic advantage.” (*Stevenson Real Estate Services, Inc. v. C.B. Richard Ellis Real Estate Services, Inc.*, *supra*, 138 Cal.App.4th at pp. 1223-1224.) Plaintiffs have not demonstrated those circumstances are present here.

Perhaps most significant, the alleged standard eBay allegedly violated was not promulgated by any “trade, association, or profession,” but by eBay itself. In effect, it is eBay’s own representation to users, including plaintiffs, about how it intends to resolve complaints. Even assuming eBay’s mere failure to comply with that standard were actionable, the claim would sound in contract, not tort, and thus would be an insufficient basis to support a tort cause of action for intentional interference with prospective economic advantage. “[A] breach of contract claim cannot be transmuted into tort liability by claiming that the breach interfered with the promisee’s business.” (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 183.)

Because plaintiffs have failed to allege facts demonstrating eBay engaged in conduct which is wrongful by some measure other than the fact it allegedly interfered with their prospective economic relationships, they have failed to plead a cognizable claim for intentional interference with prospective economic advantage. The court did not err in sustaining eBay's demurrer to the cause of action.

D. *Plaintiffs Have Not Established the Trial Court Abused Its Discretion by Denying Leave to Amend*

Plaintiffs' opening brief reflects that one of the two issues presented on appeal is "whether the [l]ower [c]ourt should have allowed [p]laintiffs to amend their [c]omplaint." The brief does not, however, include any argument suggesting why the court's denial of leave to amend was an abuse of discretion, or explain how they could amend their complaint to address its deficiencies. In their reply brief, plaintiffs' merely assert that they "should have been allowed one more opportunity to properly allege all of the elements of [their] claim for intentional interference with economic advantage," because it is "obviously meritorious."

This effort falls far short of satisfying plaintiffs' affirmative obligation to establish an abuse of discretion by "show[ing] in what manner [they] can amend [their] complaint and how that amendment will change the legal effect of [their] pleading." (*Goodman v. Kennedy, supra*, 18 Cal.3d at p. 349.) We find no abuse.

III

DISPOSITION

The judgment is affirmed. eBay is awarded its costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.