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DEPUTY CLERK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SRC, LLC,

Plaintiff,

vs.

CLARITAS INC.,

Defendant.

CASE NO. CV 99-03815 MMM (RCx)

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND

This case involves a dispute between SRC, LLC and Claritas, Inc. regarding the termination of their joint venture, the Survey of Buying Power Online ("SBP Online"), and ownership of the software used to run SBP Online. SRC entered into a contract with a company called Market Statistics in 1997 to launch SBP Online. The venture was designed to market geodemographic data to end users via the Internet. In January 1999, Claritas, one of SRC's competitors, acquired Market Statistics, and succeeded to its rights and obligations under the SBP Online Agreement. Three months later, in April, SRC filed this action for breach of contract and breach of the covenant of good faith and fair dealing, alleging that Claritas had failed to fulfill its obligations under the Agreement, and that it was initiating new ventures to compete directly with SBP Online.

SRC now seeks leave to file a First Amended Complaint adding eleven new causes of action: (1) breach of the duty of loyalty; (2) statutory unfair competition; (3) common law unfair competition; (4) reformation of contract based on mutual mistake; (5) declaratory relief; (6) violation of the Sherman Antitrust Act; (7) violation of the Clayton Act; (8) violation of the Cartwright Act; (9) fraud; (10) negligent misrepresentation; and (11) reformation of contract based on unilateral mistake.[1] SRC maintains that these proposed new claims are based on "willful and intentional acts" by Claritas intended to "undermine and injure" SBP Online, and to compete with it unfairly in order to achieve monopoly power.

Claritas argues that leave to amend should be denied because SRC has delayed bringing the motion and because the addition of so many new claims will dramatically change the nature of the case, require additional discovery, and necessitate a continuance of the trial date. Claritas maintains that it will suffer prejudice as a result, and also that the "frivolous" nature of SRC's proposed claims warrants denial of the motion. SRC counters that any delay is due to Claritas' failure to respond to discovery in a timely fashion, and that any minimal prejudice Claritas might suffer is outweighed by the merit of the claims and the liberal policy favoring amendment.

Both parties bear some responsibility for the delayed filing of this motion. While certain of SRC's new claims are based on information first disclosed in untimely discovery responses served by Claritas in October, several others have been known to SRC since at least May 1999. There is no doubt that Claritas will suffer some prejudice if SRC is allowed to amend the complaint at this stage of the litigation — SRC's eleven new claims will greatly expand the case, necessitate additional discovery, and require the extension of dates governing the prosecution of the action. With the exception of the Cartwright Act claim, however, Claritas has failed to demonstrate that the claims are "frivolous" or futile.

Mindful of the liberal policy favoring amendment, and not convinced that the claims are futile, the court grants SRC's motion. In order to alleviate any possible prejudice to Claritas,

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[1]The proposed amended complaint also appears to add a claim for breach of the implied covenant of good faith and fair dealing. This cause of action, however, was subsumed within the breach of contract claim originally pleaded, and does not constitute new matter.

however, the court will authorize additional discovery beyond that permitted by the Federal Rules of Civil Procedure and the Local Rules, and extend the dates governing prosecution of the action to allow time for orderly and adequate trial preparation. SRC will be directed to file a new amended complaint deleting its claim for violation of the Cartwright Act unless, consistent with Rule 11, it can amend the claim to address the deficiencies highlighted in this order.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In March 1997, SRC and Market Statistics formed a joint venture to launch SBP Online. The purpose of SBP Online was to market and provide geodemographic data to end users via the Internet. According to SRC, it undertook to build and maintain the SBP Online website, while Market Statistics agreed to provide proprietary data, marketing, advertising, and public relations services. Market Statistics also allegedly assumed administrative responsibility for customer accounts and pledged to pay SRC $2,000 per month for maintenance and management of the server.

SRC and Claritas are direct competitors. SRC alleges, in fact, that it is Claritas' *only* viable competitor, and that it has been able to challenge Claritas' market position successfully because of its "superior technology." This technology, SRC asserts, is "exemplified by its software product, Allocate."[2]

In January 1999, Claritas acquired Market Statistics. Shortly thereafter, SRC filed this action, alleging breach of contract and breach of the covenant of good faith and fair dealing. SRC asserted that Claritas had breached the joint venture agreement because (1) it was no longer paying the monthly fee for server maintenance; (2) it was not processing customer orders in a timely fashion; (3) it was competing directly with SBP Online; (4) it was not promoting and marketing SBP Online in any meaningful way; (5) it would not permit SRC to promote SBP Online; and (6) it was deliberately trying to destroy SBP Online.[3]

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[2]Proposed First Amended Complaint ("PFAC"), ¶ 10.

[3]Complaint, ¶ 9.

On May 13, 1999, Claritas answered the complaint and counterclaimed for breach of contract, unfair business practices, and declaratory relief. Claritas' counterclaim asserted that as one of the terms of the joint venture agreement, Market Statistics had been granted ownership "of the entire product known as SBP Online."[4] It alleged further that, since it had assumed Market Statistics' rights and obligations under the agreement, it was now the owner of SBP Online, including the "Allocate" software SRC had produced to make the site operational.[5]

On October 14, 1999, SRC filed its first motion seeking leave to file an amended complaint. The proposed pleading would have added five new claims, including one for unfair business practices.[6] The parties did not meet and confer regarding the motion prior to its filing as required by Local Rule 7.4.1. Consequently, at a status conference on October 18, 1999, the court directed the parties to comply with the rule, and further directed SRC to file a revised notice of motion on or before October 25, 1999 indicating that a Rule 7.4.1 conference had taken place.[7] SRC filed an amended notice, representing that the parties had met and conferred regarding the proposed amendment immediately following the status conference. Because Claritas disputed that the discussions after the status conference constituted a proper Rule 7.4.1 conference, SRC took its motion off-calendar so that the parties could meet and confer a second time.

On November 1, 1999 the parties met again. While Claritas was apparently willing to stipulate to the filing of the proposed amendment, it demanded that it, and not SRC, be permitted to take additional discovery.[8] SRC would not stipulate on these terms, and on November 1, 1999, refiled its motion for leave to amend and relodged its proposed amended complaint.

SRC alleges that, over the course of the next week, it reviewed documents produced by

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[4]Answer, ¶ 20.

[5]*Id.*

[6]Reply Memorandum In Support of Motion for Leave to Amend Complaint ("Pl.'s Reply"), at 4.

[7]See Civil Minutes, October 18, 1999.

[8]Gallo Decl., ¶ 20.

Claritas the previous month, and determined that additional claims should be added.[9] Thus, on November 8, 1999, counsel again met and conferred. SRC gave Claritas a proposed amended complaint containing twelve causes of action. Claritas did not immediately stipulate to the filing of this complaint.[10] Later the same day, therefore, SRC took its original motion off-calendar, and filed a new motion accompanied by the revised amended complaint. As lodged, the proposed pleading contained the twelve causes of action presented to Claritas earlier in the day, and an additional claim for reformation of contract.[11]

The current version of SRC's proposed first amended complaint alleges that Claritas' counterclaim asserting ownership rights in Allocate constitutes "sham litigation" designed to eliminate SRC as a competitor and give it a monopoly in the market for "desktop . . .

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[9]*Id.* at ¶¶ 22-25.

[10]The parties dispute what occurred at this meeting. SRC apparently believed it needed to file a motion to amend on or before November 8, 1999, and thus informed Claritas that it needed to know whether it would stipulate to the amendment that same day. (SRC was mistaken, since the deadline for amending pleadings was a deadline for the filing of motions, not for the hearing of them.) Because the complaint added seven new claims, Claritas told SRC it needed more than one day to review the pleading and determine if it could stipulate to its filing. SRC decided that Claritas did not intend to stipulate, and proceeded to file a new motion and proposed amended complaint that added a thirteenth claim not included in the pleading given to Claritas for review.

[11]A good deal of the parties' briefing addresses whether or not SRC has complied with Local Rule 7.4.1. That rule provides that "counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution . . . . [This] conference shall take place at least (20) days prior to the filing of the motion." At the October 18 status conference, the court ordered the parties to meet and confer regarding the original motion, and directed SRC to file a revised notice within a week indicating that the conference had taken place. SRC filed the notice, but withdrew it in light of Claritas' objections. Claritas asserts that SRC should have scheduled a new conference when it presented its revised complaint on November 8, 1999. SRC maintains that the court's October 18 order superseded the requirements of Rule 7.4.1. The court's order was directed only to the initial motion filed in October, however, and was not intended to relieve the parties of their meet and confer obligations respecting subsequent motions to amend. SRC thus should have scheduled a second conference, and given Claritas adequate time to consider the new claims it proposed to add. Despite this failure to comply with Rule 7.4.1, the court will consider SRC's motion on the merits, since it is clear from the parties' briefs that their discussions have reached impasse.

demographic information and consumer segmentation applications."[12] SRC also alleges that documents produced by Claritas in October (in response to discovery propounded in June[13]), demonstrate that it has embarked deliberately upon a course of conduct designed to put SRC out of business and achieve monopoly power. Based on Claritas' counterclaims, and this recent discovery, SRC now seeks to add claims for (1) breach of the duty of loyalty; (2) statutory unfair competition; (3) common law unfair competition; (4) reformation of contract due to mutual mistake; (5) declaratory relief; (6) violation of the Sherman Antitrust Act; (7) violation of the Clayton Act; (8) violation of the Cartwright Act; (9) fraud; (10) negligent misrepresentation; and (11) reformation of contract due to unilateral mistake.

II. DISCUSSION

A. Standard Governing Motions For Leave To Amend

Rule 15 of the Federal Rules of Civil Procedure mandates that leave to amend be freely given whenever justice requires.[14] This policy is applied with "extraordinary liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Nonetheless, courts may deny leave to amend where the proposed amendment is sought (1) under circumstances that would

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[12]PFAC, ¶ 46.

[13]Pl.'s Reply at 2.

[14]Once the district court issues a pretrial scheduling order that sets a deadline for the amendment of pleadings, motions seeking leave to amend are governed by Rule 16 of the Federal Rules of Civil Procedure. See *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Pretrial scheduling orders entered before a final pretrial conference may be modified only upon a showing of "good cause." Fed.R.Civ.Proc. 16(b). If a motion for leave to amend de facto requires amendment of the scheduling order, plaintiff must show good cause pursuant to Rule 16(b). *Johnson*, *supra*, 975 F.2d at 609. At the status conference in this case, the court set a November 29, 1999 deadline for the amendment of pleadings. SRC's motion was filed before this deadline, and thus is governed by the more liberal standard of Rule 15. The court recognizes, however, that the nature and scope of the proposed amendment are such that granting the motion will require amendment of the scheduling order to allow adequate time for discovery and trial preparation. Consequently, it will consider scheduling issues in assessing whether Claritas will suffer prejudice if amendment is allowed.

cause undue delay; (2) in bad faith or for a dilatory motive; (3) where allowing the amendment would be futile or the amended complaint would be subject to dismissal; or (4) where allowing the amendment would result in "undue prejudice to the opposing party." See *Forman v. Davis*, 371 U.S. 178, 182 (1962); *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987); *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973).

B. Application Of The Standard To This Case

1. Undue Delay

In assessing whether a party has unduly delayed seeking leave to amend, the court considers (1) the time between amendments; (2) whether the moving party knew or should have known the facts and theories raised by the amendment when it filed its original pleading; and (3) whether the delay is justified. See *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990) ("Relevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised by the amendment" and whether the delay was "justified"); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989) (affirming the district court's denial of leave to amend where the original complaint was filed four years earlier and plaintiff had been given two prior opportunities to amend); *In re Circuit Breaker Litigation*, 175 F.R.D. 547, 550 (C.D.Cal. 1997) (the interval between the filing of the original pleading and the motion to amend is a relevant factor in determining whether to grant the motion).

Claritas asserts that the delay in this case is significant since SRC first discussed amending its complaint in June and has itself represented that "the additional claims all arise from essentially the same facts pled in the original complaint."[15] See, e.g., *Kaplan v. Rose*, 49 F.3d 1363, 1370

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[15]In support, Claritas cites a statement allegedly found in SRC's brief that "the additional claims all arise from essentially the same facts pled in the original complaint." (See Def.'s Opp. at 3:27-4:1, citing Pl.'s Motion at 7.) The court has been unable to locate this statement. Even if made, however, the statement must be read in context. SRC does not concede that it knew the factual underpinnings of its proposed claims at the time it filed its original complaint; rather, it asserts that facts recently discovered relate to and explain those originally alleged, and that, taken together, they form the basis for the new claims. (See Pl.'s Motion at 3:19-22 ("a more complete

(9th Cir. 1995) ("Late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action"). SRC replies that the additional claims did not actually come to light until Claritas filed its counterclaim and subsequently produced documents purportedly evidencing the deliberately anti-competitive motive for the filing. Thus, SRC argues, the delay is attributable entirely to Claritas, which did not respond to June document requests until October.

Neither party is completely blameless in this matter. Claritas' late production of documents obviously impeded SRC's ability to discover the evidence upon which it bases the new claims. Several of the claims in SRC's proposed complaint, however, (all, in fact, except the antitrust and unfair competition claims) should have been evident to SRC as soon as Claritas filed its counterclaim in May.[16]

Given the expanded factual basis for and breadth of SRC's proposed new claims, its delay in seeking leave to amend militates against allowing the amendment. Generally, however, delay alone is not a sufficient reason for denying amendment. See, e.g., *Morongo Band of Misision Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) ("The delay of two years, while not alone enough to support denial, is nevertheless relevant"). See also W. Schwarzer, W. Tashima and J. Wagstaffe, FEDERAL CIVIL PROCEDURE BEFORE TRIAL, ¶ 8:417 (The Rutter Group 1999). This is particularly true where defendant is responsible for some portion of the delay. Thus, it is

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review of the facts and documents produced in this case now reveals that Claritas willfully and intentionally has sought to undermine and destroy the success of SBP [Online]")).

[16]SRC predicates the misrepresentation and fraud claims on allegations that Marketing Statistics employee Frank Pinizzotto misrepresented the effect of the Agreement's "ownership clause." SRC allegedly believed that the clause only gave Market Statistics control over the name "SBP Online." (PFAC, ¶ 71). Claritas now asserts that the ownership clause is more broad, giving it rights to Allocate. Thus, the facts underlying the tort claims based on misrepresentations were known to SRC as soon as the counterclaim was filed. Also, the breach of the duty of loyalty claim is based on Claritas' allegedly competing with SBP Online, a fact known and pled in the original complaint, though certainly fleshed out in the PFAC. Finally, the declaratory relief claim is predicated entirely on Claritas' counterclaim alleging an ownership interest in Allocate; thus, SRC knew of this claim in May.

necessary to consider other factors, such as prejudice to Claritas and the futility of the amendments, before determining whether the motion should be granted.

2. Prejudice To Defendant

"A trial court may deny [a motion for leave to amend] if permitting an amendment would prejudice the opposing party." *Jackson, supra*, 902 F.2d at 1387 (citing *Forman, supra*, 371 U.S. at 182). See also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971) (stating that the trial court is "required" to consider potential prejudice in deciding a Rule 15(a) motion). Prejudice to the opposing party is, in fact, the most important factor in evaluating whether to grant leave to amend. *Jackson, supra*, 902 F.2d at 1387. "The party opposing amendment bears the burden of showing prejudice." *DCD Programs, supra*, 883 F.2d at 187 (citing *Beeck v. Aqua-Slide 'N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977)).

Claritas asserts it will suffer prejudice because (1) the new claims effect a significant change in the nature of the case; (2) Claritas exhausted its allowed written discovery addressing SRC's existing claims because SRC's delay in seeking amendment led it to believe no new claims would be added; and (3) SRC's delay will necessitate extension of the pretrial and trial dates. SRC counters that there is no prejudice since Claritas showed it believes no further discovery is necessary by conditioning its offer to stipulate to the amendment on a unilateral grant of discovery rights. SRC also contends that no trial continuance is required because defense counsel has the resources to prepare for trial. These arguments are unpersuasive.

Claritas' demand that only it have an opportunity to conduct further discovery does not reflect that it feels additional discovery is not needed. If anything, it shows the opposite, as well as a desire to gain a tactical advantage in exchange for its stipulation. SRC's argument that no adjustment of the scheduling order is necessary is similarly flawed. SRC seeks to add eleven new causes of action, several of which assert somewhat novel antitrust claims. By SRC's own admission, most of these claims did not come to light until Claritas' production of documents in October. Thus, neither party has had an opportunity to conduct discovery regarding them. Particularly given the nature of the eleven new claims asserted, it is not reasonable to expect that Claritas will be able to conduct the discovery required to address them in the four months

remaining before the discovery cut-off date.[17]

The court thus concludes that Claritas will suffer prejudice if the proposed amendment is permitted, and that militates in favor of denying the motion. See, e.g., *Morongo*, 893 F.2d at 1079 ("The new claims set forth in the amended complaint would have greatly altered the nature of the litigation and would have required defendants to have undertaken, at a late hour, an entirely new course of defense. Again this factor is not fatal to amendment . . . but it enters into the balance."). While prejudice in the form of delay cannot be avoided, the court notes that Claritas' other concerns can be addressed through appropriate orders that authorize additional discovery, and give Claritas sufficient time to prepare for trial. Thus, much of the prejudice Claritas asserts it will suffer can be eliminated by modifying the court's existing scheduling order to account for the new claims.

3. Denial Of Leave To Amend For Futility

a. Governing Standard

A proposed amendment is futile if there is no set of facts under which it could plead a valid claim. See *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). The Ninth Circuit has stated that the "proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." *Id.*

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Fed.R.Civ.P. 12(b)(6). Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A C. Wright and A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 1356 (1990).

A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See also *Moore v. City of Costa Mesa*,

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[17]In effect, SRC suggests that while the parties needed ten months to conduct discovery on a single breach of contract claim, they can conclude their work on eleven additional claims in approximately a third of that time.

886 F.2d 260, 262 (9th Cir. 1989); *Haddock v. Board of Dental Exam'rs*, 777 F.2d 462, 464 (9th Cir. 1985) (stating that a court should not dismiss a complaint if it states a claim under any legal theory, even if the plaintiff erroneously relies on a different theory). In other words, Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). The court must accept all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the non-moving party. See *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995). The court need not, however, accept as true unreasonable inferences or conclusory legal allegations cast as factual allegations. See *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

Because of the policy favoring amendment, and because the court must accept all of plaintiff's allegations as true, defendant bears the burden of establishing futility. See, e.g., *Jackson Nat'l Life Ins. Co. v. Greycliff Partners, Ltd.*, 2 F.Supp.2d 1164, 1168 (E.D.Wis. 1998) ("defendants ha[ve] the burden of proof to show that the amendment would be futile"); *ACME Printing Ink Co. v. Menard, Inc.*, 881 F.Supp. 1237, 1243 (E.D.Wis. 1995) ("The burden on the objecting parties to show futility of amendment is . . . substantial . . .").

b. Sufficiency Of The Claims

Claritas asserts that several of SRC's proposed claims are "frivolous," including its Sherman, Clayton and Cartwright Act antitrust claims, fraud, negligent misrepresentation, and unfair competition claims, and reformation of contract claim based on scrivener's error.[18] With respect to several of these, Claritas asserts only that they are "vague" and "unspecific," and requests that the court stay discovery pending its filing of a motion to dismiss.[19] In a similar vein,

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[18]Defendant apparently does not challenge SRC's claims for breach of the covenant of good faith and fair dealing, breach of the duty of loyalty, reformation of contract based on unilateral mistake, and declaratory relief.

[19]See Def.'s Opp. at 20.

SRC argues that objections to the legal sufficiency of the claims are best addressed in a later motion to dismiss.[20] Particularly given the scope and nature of the claims, the court must address the futility of amendment now, utilizing the analysis prescribed for the consideration of motions to dismiss under Rule 12(b)(6).

(i) The Tort Claims

(a) Statutory Unfair Business Practices

SRC's fourth cause of action alleges that Claritas engaged in unfair competition in violation of California Business & Professions Code § 17200. Statutory "unfair competition" includes "any unlawful, unfair or fraudulent business act or practice and unfair deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. See also *ABC International Traders, Inc. v. Matsushita Electric Corp. of America*, 14 Cal.4th 1247, 1268, n. 11 (1997). Business conduct need not be illegal to violate § 17200. *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal.App.4th 1093, 1103-05 (1996) (holding that a breach of the duty of good faith and fair dealing will support an injunction under § 17200). Rather, the "test . . . is that a practice merely be unfair." *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal.App.3d 432, 452 (1988). In the context of an action by a competitor alleging anticompetitive practices, conduct is "unfair" if it "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 565 (1999).

Under § 17203, the only available forms of relief for a violation of § 17200 are restitution and an injunction. Cal. Bus. & Prof. Code § 17203 ("Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition . . . or as may be necessary to restore to any person in interest any money or property, real or personal, which

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[20]Pl.'s Reply at 12.

may have been acquired by means of such unfair competition"); *ABC Traders*, *supra*, 14 Cal.4th at 1271; *Shaolian v. Safeco Insurance Co.*, 71 Cal.App.4th 268, 83 Cal.Rptr.2d 702, 706 (1999).

A plaintiff alleging unfair competition under § 17200 "must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. May's of California*, 14 Cal.App.4th 612, 619 (1993). Claritas contends that SRC has not alleged facts establishing a violation. The court concludes that SRC has described in sufficient detail the conduct that purportedly constitutes an unfair business practice.[21] It has alleged, for example, that Claritas acquired Market Statistics in order to gain control of SBP Online, to undermine SRC's position in the market, and to assert an ownership interest in Allocate. SRC contends that the acquisition of Market Statistics was designed to lessen competition in the relevant market since Claritas intends to discontinue the software products that company sold. It alleges also that asserting ownership rights to Allocate is intended to eliminate the competitive threat posed by that product. This states the facts with "reasonable particularity," and is sufficient to place Claritas on notice of the nature of the claim. See, e.g., *Chara v. Southern Monterey County Memorial Hospital, Inc.*, 1994 WL 564566, * 6 (N.D.Cal. 1994) (the pleading of a § 17200 claim was sufficient where the complaint alleged that defendants sought to deprive plaintiff of his radiology practice and caused consumers to be "double-billed" for services); see also Fed.R.Civ.P. 8(a)(2) (the Federal Rules require only "a short and plain statement of the claim showing that the pleader is entitled to relief").[22]

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[21]SRC alleges, for example, that Claritas intentionally acquired Market Statistics primarily to gain control of SBP Online with the intended purpose of undermining and damaging SBP Online and SRC. (See PFAC, ¶ 34.) SRC also alleges that it was Claritas' documented intent to offer SBP Online's content on Connect, its unilateral venture, in direct competition with SBP Online, and that Claritas used the SBP subscriber database to promote Connect. (*Id.* at ¶ 21.) These are only two of the various specific allegations that could constitute unfair business practices.

[22]See PFAC, ¶ 34. Claritas asserts that SRC must allege whether its conduct was "unfair", "unlawful" or "fraudulent," but cites no case law supporting its position. Claritas also objects that SRC does not allege "how" its conduct was unfair, unlawful or fraudulent. As revealed by the allegations summarized in text, this is clearly not true.

The allegations, moreover, satisfy the California Supreme Court's definition of "unfair" conduct, in that they concern anticompetitive behavior of the type targeted by the antitrust laws. SRC's allegations regarding the relief it seeks, however, are more problematic. SRC seeks restitution "of all benefits" Claritas has obtained through unfair competition, "including without limitation the value of the goodwill of SBP Online willfully destroyed and/or appropriated by Claritas, . . . the value of SRC's increased costs, and any and all rights and interests acquired by Claritas pursuant to the [joint venture] Agreement."[23] While certain of the requested forms of relief appear to be available under the statute, others do not. The "value of SRC's increased costs," for example, does not appear to be a cognizable form of restitution. Similarly, it is questionable whether damages for loss of goodwill can be categorized as a restitutionary recovery. See, e.g., *MAI Systems Corp. v. UIPS*, 856 F.Supp. 538, 542 (N.D.Cal. 1994) (plaintiff could not receive damages for "lost business opportunity" because statute only provides for restitution). To the extent that SRC seeks relief authorized by § 17203, however, the cause of action states a claim and cannot be said to be futile.

(b) Common Law Unfair Competition

Claritas objects generally to SRC's common law unfair competition claim on the basis that it lacks "specificity." Claritas cites no case law, however, suggesting that a special pleading standard applies, and the allegations summarized above in connection with discussion of the § 17200 claim adequately describe the factual basis upon which the claim is based. See Fed.R.Civ.Proc. 8(a).

The tort of common law unfair competition is narrower in scope than § 17200, and historically denominated "passing off" one's goods as those of another. See, e.g., 11 B. Witkin, SUMMARY OF CALIFORNIA LAW, Equity § 86 ("[I]f goods or services are known to the public by . . . name, design or physical appearance, any imitation which has the effect of deceiving buyers as to the origin of the goods or services may be enjoined as unfair competition"). Several California cases highlight this distinction between common law unfair competition and its statutory

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[23] *Id.*, ¶ 35.

counterpart, found originally in § 3369 of the Civil Code, and later codified as Business and Professions Code § 17200 et seq. See, e.g., *Cel-Tech Communications*, *supra*, 83 Cal.Rptr.2d at 548 ("At common law, before the enactment of any statutory prohibition against unfair competition, 'unfair competition' had a stable and relatively narrow meaning that focused on business practices that harmed competitors by deceiving customers"); *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1263 (1992) ("The common law tort of unfair competition is generally thought to be synonymous with the act of 'passing off' one's goods as those of another"); *Cisneros v. U.D. Registry*, 39 Cal.App.4th 548, 562 (1995) ("the Supreme Court rejected an argument that [§17200] should be limited to common law unfair competition cases where a business enterprise presented itself, or its merchandise, to the public in a deceptive manner so as to defraud consumers"). Other formulations are somewhat broader, but contain, as a necessary element, a competitive relationship between the parties. See, e.g., *American Cyanamid Co. v. American Home Assurance Co.*, 30 Cal.App.4th 969, 976-77 (1994) ("Historically, the common law tort of 'unfair competition' was a remedy for injury to a business rival. The cornerstone of the tort was misappropriation of another's commercial advantage: misappropriation by one business of the 'organization [or] expenditure of labor, skill, and money' of another"); *Balboa Ins. Co. v. Trans Global Equities*, 218 Cal.App.3d 1327, 1341-42 (1990) (discussing alternate theories that fall under the common law unfair competition "umbrella", including breach of confidence, breach of fiduciary duty, theft of trade secrets, and common law misappropriation).

SRC's common law unfair competition claim alleges the same competitive injury as its § 17200 claim. While none of the facts alleged suggest that Claritas has attempted to deceive the consuming public by "passing off" its goods as those of SRC, the acts clearly involve "competitive injury," and satisfy the broader formulations of common law unfair competition cited above. See *Cel-Tech Communications*, *supra*, 83 Cal.Rptr.2d at 548 ("Originally, [unfair competition] was the deceptive 'passing off' of one's goods or services as those of another, commonly accomplished by appropriating the trade name of another. . . . Even though the tort has been extended to situations other than classic 'passing off,' deceptive conduct has remained at the heart of unfair competition. . . . [T]he principles of unfair competition 'apply to all cases where fraud is

practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent.'") Consequently, the claim is not futile, and Claritas' objection to amendment on this basis fails.

(c) Fraud And Negligent Misrepresentation

Claritas contends SRC's fraud and negligent misrepresentation claims are futile because they are "vague." Rule 9(b) of the Federal Rules of Civil Procedure requires that the "circumstances constituting fraud or mistake . . . be stated with particularity." Thus, a plaintiff "must set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Yourish v. California Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999) (quoting *In re GlenFed Securities Litigation*, 42 F.3d 1541, 1548 (9th Cir. 1994)). SRC's pleading clearly satisfies this standard.

SRC alleges that Frank Pinizzotto, a Market Statistics employee, represented to SRC that the joint venture agreement gave Market Statistics rights only to SBP Online's "product identity," i.e., the *name* SBP Online.[24] Claritas, however, now asserts that the ownership clause in the agreement vests it with rights to all of the software used to operate SBP Online, including SRC's Allocate. SRC asserts that Claritas' claim to the software constitutes an admission that Pinizzotto's representation was false when made, and fraudulently induced it to enter into the contract. These allegations adequately detail the statement and its alleged falsity, as well as when and by whom it was made. They also specify with reasonable particularity why SRC contends the statement was false.[25] Claritas' contention that the fraud claims are vague, therefore, cannot

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[24]PFAC, ¶ 71.

[25]Citing the fact that Pinizzotto was subsequently hired by SRC, and arguing that SRC would not hire an individual who had misled it, Claritas asserts the fraud claims are predicated on a "bizarre" set of facts and thus are frivolous. SRC counters that it employed Pinizzotto long before it had any reason to believe the statements he made were false. In analyzing the futility of a proposed claim, the court must accept all factual allegations as true, and must construe them and draw all reasonable inferences from them in favor of the non-moving party. See *Cahill, supra*, 80 F.3d at 337-38. SRC's pleading does not contain legal conclusions cast as factual allegations, and does not require the drawing of unreasonable inferences. Accordingly, however the allegations are characterized, it cannot be said that SRC's proposed amendment is futile.

be sustained.[26]

(d) The Antitrust Claims

Claritas attacks the proposed antitrust claims on a number of bases. First, it argues that its counterclaim asserting a contractual right to Allocate cannot be a violation of the antitrust laws. "Sham" litigation commenced for the purpose of "interfer[ing] directly with the business relationships of a competitor" can result in antitrust liability, however. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 56 (1993) (quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961)); *Ameral v. Connell*, 102 F.3d 1494, 1518 (9th Cir. 1997); *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155, 157 (9th Cir. 1993). "Sham" litigation is that which is objectively unreasonable, not that which the opponent has a "subjective intent" of losing. *Professional Real Estate Investors, supra,* 508 U.S. at 57. SRC alleges that Claritas has no reasonable claim to Allocate, and that its counterclaim is intended solely to injure SRC's ability, *inter alia*, to raise capital and attract customers. While Claritas disputes this, the court cannot, at this juncture, resolve factual issues. Rather, it must accept SRC's allegations as true. So viewed, they state a claim under the Sherman Antitrust Act.

Claritas also argues that SRC has failed to plead "antitrust injury." Specifically, it asserts that the injury alleged by SRC has yet to occur because Claritas has not yet proved that it is the owner of the Allocate software. Claritas cites *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977), for the proposition that "[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which

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[26]Claritas makes no separate argument regarding the claim for negligent misrepresentation. In California, "[w]here the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit." *Diediker v. Peelle Financial Corp.*, 60 Cal.App.4th 288, 297 (1997), (quoting *Bily v. Arthur Young & Co.*, 3 Cal.4th 370, 407 (1992)). See also 5 B. Witkin, SUMMARY OF CALIFORNIA LAW, Torts, § 720. SRC pleads that Market Statistics' Pinizzotto represented, without reasonable grounds for believing it was true, that the ownership clause gave his company rights only to the SBP Online name. This is sufficient to plead a claim for negligent misrepresentation.

makes defendant's acts unlawful." *Id.* at 489 (interpreting the Clayton Antitrust Act). While the harm alleged in *Brunswick* was past harm, nothing in the case precludes a plaintiff from filing the type of contingent claim SRC asserts here. In *Brunswick*, the court held that no "antitrust injury" had been proven because defendant's acts had "preserved competition" rather than undermined it. *Id.* at 488. It concluded that increased competition, not monopolistic power, had injured plaintiffs, and thus that no violation of the antitrust laws had occurred. *Id.* Here, by contrast, SRC alleges that it is the only company able to compete effectively with Claritas, and that Claritas has illegally attempted to undermine its market position in order to stifle competition and gain monopoly power.[27] This is precisely the type of injury the antitrust laws were designed to prevent, and precisely the type of injury *Brunswick* instructed must be pled and proved. More fundamentally, SRC pleads present injury flowing from Claritas' illegal tying of its products,[28] and from the fact that Claritas' counterclaim has "interfered with SRC's [present] ability to capitalize its growth by selling equity in its business."[29] Consequently, it appears that SRC's damage allegations are sufficient.

Finally, Claritas asserts that SRC's Cartwright Act claim fails to plead a conspiracy. The Cartwright Act authorizes recovery for "the activities of a combination [that] result in a restraint of trade." *G.H.I.I. v. MTS, Inc.*, 147 Cal.App.3d 256, 265 (1983). To plead a cause of action

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[27]See, e.g., PFAC, ¶¶ 48, 53.

[28]See *id.*, ¶ 58.

[29]See *id.*, ¶ 56. Claritas argues in passing that SRC has failed to plead the relevant market. SRC, however, has included specific allegations addressing this very subject. In paragraph 46, it asserts:

> "SRC is informed and believes that Defendant Claritas controls approximately 80%-90% of the market for desktop (personal computer based) demographic information and consumer segmentation applications. These applications consist of two primary components: (1) A database search and retrieval engine (computer software) and (2) a large database containing demographic data. The engine processes information from the user, retrieving data from the database, performing calculations, and reporting the result. A 'consumer segmentation' feature then allows a user to generate a profile for its best customers and to identify other markets with consumers matching that profile." (PFAC, ¶ 46.)

under the Cartwright Act, one must allege (1) the formation and operation of a conspiracy; (2) illegal acts performed pursuant to the conspiracy; (3) a purpose to restrain trade; and (4) damages caused by these acts. *Id.* A conspiracy and its purpose to restrain trade are essential elements of the cause of action. See *Jones v. H.F. Ahmanson & Co.*, 1 Cal.3d 93, 119 (1969) ("The lack of factual allegations of specific conduct directed toward furtherance of a conspiracy to eliminate or reduce competition . . . render the complaint insufficient"); see also *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1987) (the Cartwright Act "does not address unilateral conduct"). Cartwright Act violations require a "high degree of particularity . . . [in] pleading," and "the alleged unlawful combination or conspiracy must be alleged with specificity." *G.H.I.I., supra*, 147 Cal.App.3d at 265.

Citing *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal.2d 305 (1968), SRC contends a conspiracy is not required to prove liability under the Cartwright Act. *Chicago Title* states that the Cartwright Act is patterned after the Sherman Act and Section 3 of the Clayton Act, and notes that cases interpreting these federal statutes are instructive in Cartwright Act cases.[30] It does not state, however, that the Cartwright Act is as broad as its federal counterparts, nor does it indicate that conspiracy is not an essential element of the claim. In fact, the *Chicago Title* court dismissed plaintiff's complaint because it failed, *inter alia,* to plead conspiracy adequately. *Id.* at 327. Thus, SRC's argument that any violation of the Sherman or Clayton Acts also constitutes a violation of the Cartwright Act is incorrect. See, e.g., *Dimidowich, supra*, 803 F.2d at 1477 (rejecting the assertion that the Cartwright Act does not differ in material respects from the Sherman Act — "'similar' does not mean identical").

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[30]The *Chicago Title* court stated:
"The California law of antitrust, commonly known as the Cartwright Act . . . is patterned upon the federal Sherman Act and both have their roots in the common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act. . . . In 1961 California incorporated in essence also section 3 of that federal legislation known as the Clayton Act . . . which goes beyond common law and the Sherman Act to inhibit trade restraints at their inception, and federal interpretations thereof are similarly persuasive." *Chicago Title, supra*, 69 Cal.2d 305 at 315.

SRC contends alternatively that the facts of this case satisfy the conspiracy element of a Cartwright Act claim. It states:

> "Claritas has defined its acquisition of Market Statistics from Bell Communications as a mere 'transfer,' denying there was any associated negotiation and implying there was no consideration for it and perhaps no documentation of it. But Claritas and Bell Communications are separate corporations. The two companies must have conspired to transfer something of value without any consideration."[31]

The conspiracy that underlies a Cartwright Act claim must be pleaded with a "high degree of particularity" and "specificity." *G.H.I.I., supra*, 147 Cal.App.3d at 265. SRC's suggestion that there "must have" been a conspiracy does not meet this standard. Even if it did, SRC's proposed amended complaint contains no allegations to this effect. Argument contained in SRC's brief does not satisfy its pleading burden. See *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197, n. 1 (9th Cir. 1998) (the court cannot consider factual allegations in memoranda that are not found in the complaint "because such memoranda do not constitute pleadings under Rule 7(a)," quoting 2 Moore, FEDERAL PRACTICE, § 12.34[2] (Matthew Bender 3d ed.)). Because SRC's proposed complaint contains no conspiracy allegations, its Cartwright Act cause of action is deficient and does not state a claim upon which relief can be granted. Unless SRC can replead to allege a conspiracy, any amendment asserting a violation of the Cartwright Act will be futile.[32]

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[31]Pl.'s Reply at 14:18-22.

[32]SRC attempts to avoid this result by arguing that any attacks upon the adequacy of the pleading "are properly addressed on a FRCP 12(b) Motion," and that pleading deficiencies should not preclude it from amending to state meritorious claims. As noted earlier, the Ninth Circuit has directed that the district court perform a Rule 12(b)(6) analysis when a proposed amendment is challenged as legally insufficient. See *Rykoff-Sexton, supra*, 845 F.2d at 214. As with any analysis of pleading deficiency, however, SRC should be afforded an opportunity to replead if amendment of the claim is possible. The court has not considered whether allegations of a purported conspiracy between Claritas and Market Statistics would support a Cartwright Act claim. While the court will afford SRC an opportunity to plead such a claim, SRC must do so only if the facts known to it suggest the existence of such a conspiracy. Furthermore, it must consider whether the law would recognize such a conspiracy, particularly given that SRC's Cartwright Act claim is based on acquisition of Market Statistics and its assertion of rights to

(e) Reformation Of Contract Due To A Scrivener's Error

Claritas' final claim of futility is directed to SRC's proposed claim for reformation of contract based on mutual mistake. Citing *McClure v. Cerati*, 86 Cal.App.2d 74, 83 (1948), Claritas argues that SRC must clearly plead "how, when and why" the alleged mistake occurred. In *McClure*, the complaint alleged only that "the omission of the [parties'] alleged oral agreement caused the parties to believe that the written contract was unambiguous." *Id.* at 82. Because the court found that this was "a mere conclusion," it held that the pleading was inadequate. *Id.* The court noted that plaintiff did not allege any "reason for the omission" such as "fraud, oversight, error of the scrivener, or how or why it was admitted." *Id.* Here, by contrast, SRC has alleged how, why and when:

> "At the time the Agreement was negotiated by the parties, it was at first agreed that the term of the Agreement would be for twelve months. However, the parties ultimately decided on a term of twenty-four months instead and further agreed that the monthly maintenance payments would accordingly continue for twenty-four months as well. Although the Agreement was correctly drafted with the new term of twenty-four months, by scrivener's error and mutual mistake, the above provision relating to the monthly maintenance payments was not corrected."[33]

SRC has sufficiently pled this claim, and it is not futile.

C. Conditions On Amendment

As detailed above, the court has determined that a majority of SRC's proposed new claims are not futile. It has further determined that SRC's delay is bringing this motion before the court is attributable, in part, to Claritas, and that any prejudice Claritas might suffer as a result of allowing the amendment can be ameliorated, if not eliminated, by imposing appropriate conditions on SRC's right to amend. "[T]he granting of leave to amend can be conditioned in order to avoid prejudice to the opposing party." *Strickler v. Pfister Associated Growers, Inc.*, 319 F. 2d 788,

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Allocate after the date the acquisition occurred.

[33]PFAC, ¶ 41.

791 (6th Cir. 1963). Given the nature of the new claims, and the stage of the litigation at which they are asserted, the court imposes the following conditions on amendment:

- The court has found that SRC's Cartwright Act claim is deficient as presently alleged. It has also questioned whether the damages SRC seeks on the § 17200 claim are recoverable under the statute. To permit SRC an opportunity to replead its Cartwright Act claim, and to consider whether all species of damage sought on the § 17200 claim are properly denominated restitution, the court directs SRC to file and serve a First Amended Complaint within ten (10) days of the date of this order. Consistent with Rule 11, the amended complaint should allege a Cartwright Act cause of action only if SRC believes there is a factual and legal basis for the claim. Similarly, it should seek damages for loss of goodwill and increased costs on the § 17200 claim only if SRC believes such damages may properly be claimed as restitution. Finally, it should replead the balance of SRC's claims as set forth in the proposed first amended complaint. The First Amended Complaint must be hand-served on counsel for Claritas to facilitate compliance with the additional directives set forth below.
- Within thirty (30) days of this order, the parties are directed to meet and confer regarding the continuation of the dates governing the prosecution of this matter, and to file a joint report setting forth proposed new dates for discovery cut-off, motion hearing cut-off, pretrial conference and trial. Prior to the date of the parties' conference regarding this subject, Claritas is directed to review the First Amended Complaint and determine if, consistent with the analysis set forth in this order, it is appropriate to file a motion to dismiss the First Amended Complaint pursuant to Rule 12(b)(6). If Claritas determines that such a motion is appropriate, the parties are directed to include in their joint report a proposed briefing schedule and hearing date for such motion. They are also directed to provide a recommendation to the court regarding the number of additional interrogatories, requests for admission, document requests and depositions they believe are required to address the new claims. In this regard, the court declines to stay discovery pending a hearing on Claritas' possible motion to dismiss.

III. CONCLUSION

SRC's motion to amend is granted. SRC is directed to file and hand-serve a First Amended Complaint consistent with the terms of this order within ten (10) days. Within thirty (30) days, the parties are directed to meet and confer, and to file a joint report proposing new discovery cut-off, motion hearing cut-off, pretrial conference and trial dates. They are further directed to propose a briefing schedule and hearing date for any motion to dismiss to be filed by Claritas, and to identify the additional discovery they believe is needed adequately to address the new claims. Claritas' request for a stay of discovery pending a hearing on a motion to dismiss is denied.

DATED: December 6, 1999

Margaret M. Morrow

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE