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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA EXPANDED METAL PRODUCTS CO., a California company,

Plaintiff,

v.

CLARKWESTERN DIETRICH BUILDING SYSTEMS LLC doing business as CLARKDIETRICH BUILDING SYSTEMS, an Ohio limited liability company;
JAMES A. KLEIN, an individual,

Defendants.

) Case No. CV 12-10791 DDP (MRWx)

)
) **ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS AMENDED COUNTERCLAIM**

) [Dkt. No. 129]

Presently before the court is Plaintiff California Expanded Metal Products Company ("CEMCO")'s Motion to Dismiss ClarkWestern's Amended Counterclaim.¹ Having considered the submissions of the parties, the court grants the motion and adopts the following Order.

¹Although Defendant is now known as ClarkWestern Dietrich Building Systems LLC, and does business as ClarkDietrich Building Systems, the court refers to Defendant and its predecessor as ClarkWestern for the sake of consistency.

1 **I. Background**

2 Plaintiff CEMCO is a California corporation. (Third Amended
3 Complaint ("TAC") ¶ 1.) Defendant James A. Klein ("Klein") was,
4 at one time, a CEMCO employee. (TAC ¶ 8.) CEMCO alleges it
5 entered into a contract ("the Agreement") with Klein, under which
6 he promised CEMCO exclusive negotiation rights for an exclusive
7 license to any construction-related technology that Klein might
8 invent. (TAC ¶ 9.) Under the Agreement, in the event CEMCO and
9 Klein were unable to agree on license terms, CEMCO would enjoy a
10 right of first refusal on any licensing agreement that Klein
11 reached with a third party. (Id.)

12 Klein later patented a new construction technology, but did
13 not grant an exclusive license to CEMCO. (TAC ¶ 10.) Instead,
14 Klein licensed his new "Blazeframe" technology to CEMCO's biggest
15 competitor, Defendant ClarkWestern.² (Id.)

16 Klein later filed a patent infringement action against CEMCO
17 in the Western District of Washington. See CV 13-04669 DDP-MRW.
18 CEMCO then initiated this action against Klein and ClarkWestern.
19 Clarkwestern filed a counterclaim against CEMCO, alleging a
20 single claim for Tortious Interference with Prospective Economic
21 Advantage. (Dkt. 115.)

22 ClarkWestern's counterclaim alleged that CEMCO intentionally
23 interfered with license discussions between Klein and
24 ClarkWestern by "maintaining uncertainty" regarding CEMCO's own
25 claims regarding Klein's patent. (Counterclaim ¶ 11.)

27 ²The court refers to Klein and his company, BlazeFrame
28 Industries Ltd. ("Blazeframe") interchangeably.

1 Specifically, CEMCO allegedly misrepresented that its exclusive
2 licensing Agreement with Klein applied to the BlazeFrame
3 invention, disputed Klein's ownership of the patented technology,
4 misrepresented its willingness to settle the ownership dispute,
5 and amended its own patent applications to avoid resolution of
6 ownership issues. Because of these intentional acts,
7 ClarkWestern alleged that its license agreement with Klein was
8 delayed by two years, during which time CEMCO sold its "FAS
9 Track" version of Klein's product royalty-free.

10 CEMCO moved to dismiss the Counterclaim. This court,
11 concluding that the existence and timing of any economic
12 relationship between Klein and ClarkWestern was not adequately
13 pleaded, granted the motion and dismissed the Counterclaim with
14 leave to amend. CEMCO now moves to dismiss the Amended
15 Counterclaim ("AC").

16 The general substance of the Amended Counterclaim has not
17 changed significantly. In short, ClarkWestern alleges that CEMCO
18 intentionally interfered with license discussions between Klein
19 and ClarkWestern by maintaining uncertainty regarding CEMCO's own
20 claims regarding Klein's patent and, therefore, Klein's ability
21 to license the BlazeFrame technology to ClarkWestern. (AC ¶ 20.)
22 Specifically, CEMCO allegedly misrepresented that its exclusive
23 licensing Agreement with Klein applied to the BlazeFrame
24 invention, disputed Klein's ownership of the patented technology,
25 misrepresented its willingness to settle the ownership dispute,
26 and amended its own patent applications to avoid resolution of
27 ownership issues. (AC ¶¶ 29, 33, 38, 46). In the interim, CEMCO
28

1 allegedly sold its own, unlicensed FAS Track version of the
2 BlazeFrame technology . (Id. ¶ 52.)

3 CEMCO now moves to dismiss the Amended Counterclaim.

4 **II. Legal Standard**

5 A complaint will survive a motion to dismiss when it
6 contains "sufficient factual matter, accepted as true, to state a
7 claim to relief that is plausible on its face." Ashcroft v.
8 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.
9 Twombly, 550 U.S. 544, 570 (2007)). When considering a Rule
10 12(b)(6) motion, a court must "accept as true all allegations of
11 material fact and must construe those facts in the light most
12 favorable to the plaintiff." Resnick v. Hayes, 213 F.3d 443, 447
13 (9th Cir. 2000). Although a complaint need not include "detailed
14 factual allegations," it must offer "more than an unadorned, the-
15 defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at
16 678. Conclusory allegations or allegations that are no more than
17 a statement of a legal conclusion "are not entitled to the
18 assumption of truth." Id. at 679. In other words, a pleading
19 that merely offers "labels and conclusions," a "formulaic
20 recitation of the elements," or "naked assertions" will not be
21 sufficient to state a claim upon which relief can be granted.
22 Id. at 678 (citations and internal quotation marks omitted).

23 "When there are well-pleaded factual allegations, a court
24 should assume their veracity and then determine whether they
25 plausibly give rise to an entitlement of relief." Id. at 679.
26 Plaintiffs must allege "plausible grounds to infer" that their
27 claims rise "above the speculative level." Twombly, 550 U.S. at
28 555. "Determining whether a complaint states a plausible claim

1 for relief" is a "context-specific task that requires the
2 reviewing court to draw on its judicial experience and common
3 sense." Iqbal, 556 U.S. at 679.

4 **III. Discussion**

5 As explained in this court's prior Order, a claim for
6 intentional interference with prospective economic advantage
7 requires (1) an economic relationship between the plaintiff and a
8 third party with the probability of future economic benefit to
9 the plaintiff, (2) defendant's knowledge of that relationship,
10 (3) defendant's intentional, independently wrongful act to
11 disrupt the relationship, (4) actual disruption, and (5) economic
12 harm to the plaintiff. Marsh v. Anesthesia Serv. Med. Group.
13 Inc., 200 Cal.App.4th 480, 504 (2011) (citing Korea Supply v.
14 Lockheed Martin Corp., 29 Cal.4th 1134, 1153 (2003)). An act's
15 independent wrongness depends on its unlawfulness. Id. CEMCO
16 argues, as it did with respect to the Counterclaim as previously
17 pled, that ClarkWestern's Amended Counterclaim fails because (1)
18 the AC does not allege a sufficient economic relationship between
19 ClarkWestern and Klein and (2) CEMCO's alleged acts were not
20 unlawful.

21 Intentional interference claims protect "the expectation
22 that the [economic] relationship eventually will yield the
23 desired benefit, not necessarily the more speculative expectation
24 that a potentially beneficial relationship will arise." Korea
25 Supply, 29 Cal.App.4th at 1164 (quotation marks and citation
26 omitted). The tort can be established by showing interference
27 with "a contract which is certain to be consummated." Kasparian
28 v. County of Los Angeles, 38 Cal.App.4th 242, 261 (1995).

1 Here, ClarkWestern's earlier Counterclaim alleged that it
2 began an economic relationship with BlazeFrame in 2010 "as a
3 result of BlazeFrame's claims to ownership of the BlazeFrame
4 Technology and [ClarkWestern's] interest in obtaining a license.
5 . . ." (Counterclaim ¶ 8.) The Counterclaim also alleged that
6 BlazeFrame and ClarkWestern "began discussing a possible license"
7 in January 2010 and "engaged in on-going discussions with
8 BlazeFrame for the next two-plus years regarding a potential
9 license" (Id. ¶ 9.)

10 The Amended Counterclaim changes certain factual allegations
11 and adds others. ClarkWestern now alleges that it entered into
12 an economic relationship with Klein earlier, in 2009, and that
13 the relationship continued through 2012 when ClarkDietrich
14 licensed the BlazeFrame technology. (AC ¶ 9.) As this court has
15 noted, "[t]o show an economic relationship, the cases generally
16 agree that it must be reasonably probable the prospective
17 economic advantage would have been realized but for defendant's
18 interference." Rheumatology Diagnostics Lab., Inc. v. Aetna,
19 Inc., No. 12-cv-5847-WHO, 2014 WL 524076 at *14 (N.D. Cal. Feb.
20 14, 2014) (internal quotation and citation omitted). Here, the
21 the AC alleges that ClarkWestern and Klein had "preliminary
22 discussions" in August 2009 and had "progressed beyond the
23 exploratory stage" by November 25, 2009. (Id.) After that date,
24 BlazeFrame and ClarkWestern entered into a confidentiality
25 agreement that apparently only then allowed for discussions of
26 the actual terms of a "possible license." (Id. ¶¶ 9-10). As
27 stated in this court's prior Order, however, initial talks such
28 as these, concerning only the possibility of a future license

1 agreement, do not give rise to a reasonable probability that an
2 agreement would ultimately be reached. See Google Inc. v. Am.
3 Blind & Wallpaper Factory , Inc., No. C 03-5340, 2005 WL 832398
4 at *9 (N.D. Cal. Mar. 30, 2005) ("Allegations that amount to a
5 mere hope for an economic relationship and a desire for future
6 benefit are inadequate to satisfy the pleading requirements . . .
7 .") (internal quotation and citation omitted); Sole Energy Co. v.
8 Petrominerals Corp., 128 Cal.App.4th 212, 243 (2005); Kasparian,
9 38 Cal.App.4th 242, 261 (1995).

10 The Amended Counterclaim, therefore, now alleges additional
11 facts, which, according to ClarkWestern, support the contention
12 that ClarkWestern's economic relationship with Klein began "in at
13 least January 2010 and continued through 2012 when Clark[Western]
14 and BlazeFrame executed a license" (Opp. at 4). The AC
15 now alleges that BlazeFrame presented an initial term sheet for a
16 license to ClarkWestern in December 2009. (AC ¶ 10.)

17 ClarkWestern did not accept those terms, but nevertheless,
18 announced to the public in January 2010 that it was venturing
19 with BlazeFrame. (Id. ¶ 11.) ClarkWestern further alleges that
20 that public announcement spurred CEMCO to contact ClarkWestern on
21 February 5, 2010 in an attempt to discourage the latter from
22 entering into a license with BlazeFrame. (Id. ¶ 12.)

23 That communication and its fallout allegedly stalled license
24 negotiations until December 2010, when BlazeFrame presented a
25 revised term sheet to ClarkWestern. (Id. ¶¶ 15-16). Although
26 ClarkWestern alleges that the companies exchanged drafts of a
27 "substantially final form" of the license between then and March
28 2011, the license was not "finalized" until August, and the

1 license agreement was not signed until March 2012, over two and a
2 half years after the relationship between Klein and ClarkWestern
3 allegedly began. (Id. ¶¶ 17.)

4 ClarkWestern alleges that the economic relationship between
5 itself and BlazeFrame "probably would have resulted in an
6 economic benefit to Clark[Western] in the form of a license to
7 the BlazeFrame Technology and [resulting] revenues . . . much
8 sooner, if not for CEMCO's improper interference." (AC ¶ 20.)
9 Notably, the Amended Counterclaim does not provide detailed
10 allegations regarding any of the terms proposed in the various
11 term sheets. The AC does allege that the license agreement was
12 finally executed in March 2012 "only after Clark[Western]
13 received repeated assurances from BlazeFrame that the related
14 legal issues between CEMCO and Klein had been resolved"
15 (Id.)

16 Prior to CEMCO's first allegedly interfering act on February
17 5, 2010, however, ClarkWestern had no indication that there were
18 any unresolved legal issues between CEMCO and Klein.
19 Nevertheless, ClarkWestern did not accept the license terms
20 proposed by BlazeFrame in December 2009. (AC ¶ 11.) Despite
21 that failure to reach an agreement, the Amended Counterclaim
22 alleges, somewhat conclusorily, that "[b]ased on the productive
23 licensing discussions and the content of the initial term sheet,
24 [ClarkWestern] had a reasonable expectation that the licensing
25 talks would bear fruit" (AC ¶ 11.) As stated above,
26 however, preliminary, exploratory negotiations do not give rise
27 to a reasonable expectation of a particular economic benefit.
28 The only additional subsequent fact alleged is that ClarkWestern

1 announced to the public in January 2010 that it was partnering
2 with BlazeFrame.³ While such a statement might conceivably
3 result from a reasonable expectation of an economic benefit, the
4 announcement itself does not constitute a fact upon which a
5 reasonable expectation could be based. Without more, such as
6 facts regarding the existing state of negotiations at the time of
7 the announcement, or perhaps a comparison between the terms on
8 the table in January 2010 relative to those ultimately agreed to
9 over two years later, the Amended Counterclaim's allegation that
10 ClarkWestern had a reasonable expectation upon which to base its
11 public announcement is little more than a legal conclusion.

12 Because the Amended Counterclaim fails to allege facts
13 suggesting that a contract was certain to be consummated,
14 ClarkWestern has not adequately alleged the existence of an
15 economic relationship between the plaintiff and a third party
16 with the probability of future economic benefit to the plaintiff,
17 and the Amended Counterclaim must be dismissed. The court need
18 not, therefore, address CEMCO's arguments regarding the
19 sufficiency of the Amended Counterclaim's allegations of
20 independently wrongful, intentional acts on CEMCO's part to
21 disrupt the purported relationship between Klein and
22 ClarkWestern.

23 The court notes, however, that ClarkWestern's theory appears
24 to attempt to shift ordinary business risks onto a competitor by
25 way of a tortious interference claim. In ClarkWestern's words,

27 ³ CEMCO's reaction to ClarkWestern's announcement would seem
28 to have little bearing on the reasonableness of ClarkWestern's
prior expectation.

1 "the crux of [the] counterclaim is based on the allegation that
2 CEMCO engaged in a deliberate and intentional course of conduct
3 to prevent or at least delay Clark[Western] and BlazeFrame from
4 entering a license agreement and to diminish the value of the
5 licensed technology." (Opp. at 16:6-9). That course of conduct
6 allegedly included "intentionally and repeatedly avoiding
7 resolution of the legal issues between CEMCO and Klein" and being
8 "unwilling to address the situation" with Klein through
9 discussions with ClarkWestern. (AC ¶¶ 38, 44). Even putting
10 aside the vagueness of these allegations, it strikes the court as
11 implausible to attribute a two-year licensing delay to avoidant
12 acts on CEMCO's part.

13 It is clear from the Amended Complaint that Klein and
14 ClarkWestern were in close communication, and that ClarkWestern
15 was fully apprised of the nature of the dispute between CEMCO and
16 Klein. (AC ¶¶ 13-14, 16.) ClarkWestern was fully capable,
17 therefore, of making an independent assessment of CEMCO's claims.
18 The nature of those claims did not change between 2010 and the
19 filing of the Amended Counterclaim. If, as ClarkWestern now
20 contends, CEMCO's claims against Klein were meritless or pursued
21 in bad faith, there is no reason why those claims should have
22 prevented ClarkWestern from entering into the licensing agreement
23 with Klein for two years. Thus, even if ClarkWestern did have an
24 established economic relationship with Klein sufficient to create
25 a reasonable expectation of a future benefit, ClarkWestern cannot
26 plausibly claim that years of delay in executing a licensing
27 agreement was the result of CEMCO's allegedly meritless
28 assertions of ownership of the BlazeFrame technology.

1 **IV. Conclusion**


2 For the reasons stated above, CEMCO'S motion is GRANTED.
3 ClarkWestern's Amended Counterclaim is DISMISSED, with prejudice.

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6 IT IS SO ORDERED.

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9 Dated: July 1, 2015



DEAN D. PREGERSON
United States District Judge

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