

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Code Rebel, LLC,)	CV 13-4539 RSWL (MANx)
)	
Plaintiff,)	ORDER RE: DEFENDANT AQUA
)	CONNECT, INC.'S MOTION
v.)	TO DISMISS, TO STRIKE,
)	AND FOR A MORE DEFINITE
)	STATEMENT [9]
Aqua Connect, Inc.)	
)	
)	
Defendant.)	
_____)	

20 Currently before the Court is Defendant Aqua
21 Connect, Inc.'s ("Defendant") Motion to Dismiss and to
22 Strike Plaintiff Code Rebel, LLC's ("Plaintiff")
23 Complaint and Defendant's Motion for More Definite
24 Statement [9]. The Court, having reviewed all papers
25 submitted pertaining to these Motions, **NOW FINDS AND**
26 **RULES AS FOLLOWS:**

27 The Court **GRANTS in part** and **DENIES in part**
28 Defendant's Motion to Dismiss, **GRANTS in part** and

1 **DENIES in part** Defendant's Motion to Strike, and **DENIES**
2 Defendant's Motion for a More Definite Statement.

3 **I. BACKGROUND**

4 Plaintiff is a Hawaiian company that has developed
5 multiple types of remote access software, known by the
6 names iRAPP and iRAPP TS (collectively, the "iRAPP
7 programs"), that allow one or more users to view and
8 fully interact with a remote or locally networked Apple
9 Macintosh computer. Compl. ¶ 6. Defendant is a Nevada
10 corporation and is a direct competitor of Plaintiff, in
11 that Defendant also markets and sells a computer
12 program designed to allow users to remotely access and
13 interact with an Apple Macintosh computer and/or
14 server. Id. at ¶ 9. Defendant's program is called
15 Aqua Connect Terminal Server, commonly known as "ACTS."
16 Id.

17 Plaintiff has marketed and sold its iRAPP programs
18 to the public since approximately September of 2007.
19 It alleges that Defendant became aware of the existence
20 of Plaintiff's iRAPP programs no later than April of
21 2008. Id. at ¶¶ 7,8. Plaintiff alleges that once
22 Defendant became aware that it was a direct competitor
23 of Plaintiff, Defendant embarked on a pattern of
24 defamation and disparagement of both Plaintiff's
25 programs and Plaintiff itself, with the intent to
26 interfere with Plaintiff's economic interests and
27 destroy competition. Id. at ¶ 10. Specifically,
28 Plaintiff alleges that Defendant knowingly and/or with

1 a reckless disregard for the truth made false
2 representations of fact to third parties, including
3 Plaintiff's customers and potential customers,
4 regarding Plaintiff and/or the iRAPP programs. Such
5 false representations include (1) asserting that
6 Plaintiff's iRAPP programs infringe on Defendant's
7 patents (when Defendant holds no patents) and (2)
8 asserting that the controversial "Cherry OS" product
9 was Plaintiff's product. Plaintiff also alleges that
10 Defendant offered for sale and sold Defendant's ACTS
11 program at prices below Defendant's cost in violation
12 of the Clayton Antitrust Act. Id. at ¶ 11.

13 On June 21, 2013, Plaintiff filed the instant
14 Action against Defendant [1] alleging that Defendant
15 engaged in trade libel, intentional interference with
16 prospective economic advantage, negligent interference
17 with prospective economic advantage, violation of the
18 Clayton Antitrust Act, and unfair business practices.
19 Id. at ¶ 13. Plaintiff seeks damages for lost sales,
20 injuries to Plaintiff's reputation, and injuries to the
21 iRAPP brand. Id. On August 12, 2013, Defendant filed
22 this Motion to Dismiss, to Strike and for a More
23 Definite Statement [9].

24 II. LEGAL STANDARD

25 A. Motion to Dismiss

26 Federal Rule of Civil Procedure 12(b)(6) allows a
27 party to move for dismissal of one or more claims if
28 the pleading fails to state a claim upon which relief

1 can be granted. Dismissal can be based on a lack of
2 cognizable legal theory or lack of sufficient facts
3 alleged under a cognizable legal theory. Balistreri v.
4 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
5 1990). However, a party is not required to state the
6 legal basis for its claim, only the facts underlying
7 it. McCalden v. Cal. Library Ass'n, 955 F.2d 1214,
8 1223 (9th Cir. 1990), cert. denied, 112 S. Ct. 2306
9 (1992). In a Rule 12(b)(6) motion to dismiss, a court
10 must presume all factual allegations of the complaint
11 to be true and draw all reasonable inferences in favor
12 of the non-moving party. Klarfeld v. United States,
13 944 F.2d 583, 585 (9th Cir. 1991).

14 The question presented by a motion to dismiss is
15 not whether the plaintiff will prevail in the action,
16 but whether the plaintiff is entitled to offer evidence
17 in support of its claim. Bell Atl. Corp. v. Twombly,
18 550 U.S. 544, 583 (2007). "While a complaint attacked
19 by a Rule 12(b)(6) motion to dismiss does not need
20 detailed factual allegations, a plaintiff's obligation
21 to provide the 'grounds' of his 'entitle[ment] to
22 relief' requires more than labels and conclusions, and
23 a formulaic recitation of a cause of action's elements
24 will not do." Id. at 555 (internal citation omitted).
25 Although specific facts are not necessary if the
26 complaint gives the defendant fair notice of the claim
27 and the grounds upon which the claim rests, a complaint
28 must nevertheless "contain sufficient factual matter,

1 accepted as true, to state a claim to relief that is
2 plausible on its face." Ashcroft v. Iqbal, 556 U.S.
3 662, 678 (2009) (internal quotation marks omitted).

4 If dismissed, a court must then decide whether to
5 grant leave to amend. The Ninth Circuit has repeatedly
6 held that a district court should grant leave to amend
7 even if no request to amend the pleadings was made,
8 unless the court determines that the pleading could not
9 possibly be cured by the allegation of other facts.

10 Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

11 The court has discretion to deny leave to amend where
12 deficiencies cannot be cured. Keniston v. Roberts, 717
13 F.2d 1295, 1300 (9th Cir. 1983).

14 **B. Motion to Strike**

15 Federal Rule of Civil Procedure 12(f) states that
16 "[t]he court may strike from a pleading an insufficient
17 defense or any redundant, immaterial, impertinent, or
18 scandalous matter." Fed. R. Civ. P. 12(f).

19 "Immaterial" matter is that which has no essential or
20 important relationship to the claim for relief or the
21 defenses being pleaded. Fantasy, Inc. v. Fogerty, 984
22 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other

23 grounds, Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).

24 "Impertinent" matter consists of statements that do not
25 pertain, and are not necessary, to the issues in
26 question." Id.

27 The purpose of Rule 12(f) is "to avoid the
28 expenditure of time and money that must arise from

1 litigating spurious issues by disposing of those issues
2 prior to trial." Sidney-Vinsein v. A.H. Robbins Co.,
3 697 F.2d 880, 885 (9th Cir. 1983). However, motions to
4 strike are regarded with disfavor; the challenged
5 pleading therefore must be viewed in the light most
6 favorable to the pleader. See Colaprico v. Sun
7 Microsystems, Inc., 758 F. Supp. 1335, 1339 (N.D. Cal.
8 1991). See also Pepsico, Inc. v. J.K. Distributors,
9 Inc., No. 8:07CV00657, 2007 WL 2852647, at *2 (C.D.
10 Cal. Sept. 14, 2007) Further, such motions are
11 generally denied unless the allegations have no
12 possible relation to the subject matter of the
13 litigation. See Colaprico, 758 F. Supp. at 1339.

14 **C. Motion for a More Definite Statement**

15 If a pleading to which a responsive pleading is
16 permitted is so vague or ambiguous that a party cannot
17 reasonably be required to frame a responsive pleading,
18 the party may move for a more definite statement before
19 interposing a responsive pleading. Fed. R. Civ. P.
20 12(e). Rule 12(e) motions are disfavored and rarely
21 granted. Cellars v. Pac. Coast Packaging, Inc., 189
22 F.R.D. 575, 578 (N.D. Cal. 1998). A motion for more
23 definite statement fails where the complaint is
24 specific enough to apprise the moving party of the
25 substance of the claim being asserted. See Bureerong
26 v. Uvawas, 922 F. Supp. 1450, 1461 (C.D. Cal. 1996).
27 Where the information sought by the moving party is
28 available, the motion should be denied. Famolare, Inc.

1 v. Edison Bros. Stores, Inc., 525 F. Supp. 940, 949
2 (E.D. Cal. 1981).

3 **III. ANALYSIS**

4 **A. Defendant's Request for Judicial Notice**

5 As a preliminary matter, Defendant has filed a
6 request for this Court to take judicial notice of
7 Defendant's pending patent applications. This Court,
8 however, finds that such documents are not necessary
9 for the Court's analysis. As such, the Court **DENIES**
10 Defendant's request **as Moot**.

11 **B. Defendant's Motion to Dismiss**

12 1. Plaintiff's Trade Libel and Disparagement Claim

13 Defendant argues that Plaintiff's trade libel claim
14 regarding Defendant's alleged statements about patent
15 infringement is preempted by patent law. Although it
16 is true that § 154(d) allows a patentee to make its
17 rights known to a potential infringer so that the
18 infringer can determine whether to cease its infringing
19 activity, the patentee must act in good-faith.

20 "[F]ederal patent law preempts state law that punishes
21 merely publicizing a patent in the marketplace[,]
22 unless the plaintiff can show that the patentholder
23 acted in bad faith." Sandisk Corp v. LSI Corp, No. C
24 09-02737, 2009 WL 3047375, at *2 (N.D. Cal. Sept. 18,
25 2009); Globetrotter Software, Inc. v. Elan Computer
26 Group, Inc., 362 F.3d 1367, 1377 n.9 (Fed. Cir. 2004).

27 If the patentee knows that the patent is invalid,
28 unenforceable, or not infringed, yet represents to the

1 marketplace that a competitor is infringing the patent,
2 a clear case of bad faith representations is made out.
3 Sandisk, 2009 WL 3047375 at *2; Zenith Elecs. Corp. v.
4 EXZEC, 182 F.3d 1340, 1354 (Fed. Cir. 1999); see also
5 Bylin Heating Systems, Inc v. M & M Gutters, LLC, No.
6 2:07-CV-00505-FCD-KJM, 2008 WL 744706, at *2 (E.D. Cal.
7 March 18, 2008). A plaintiff asserting that the
8 defendant patent holder acted in bad faith must
9 establish that the claims of infringement were
10 objectively baseless. Sandisk, 2009 WL 3047375 at *2.
11 Here, Plaintiff has alleged sufficient facts that
12 Defendant acted in bad faith when it engaged in false
13 and misleading statements that Plaintiff was infringing
14 on non-existent patents. Moreover, Plaintiff's
15 allegations establish that Defendant's statement of
16 infringement was objectively baseless because Plaintiff
17 indicates in its Complaint that Defendant holds no
18 patents. Compl. ¶ 5. Presuming such allegations to be
19 true, the Court finds that Plaintiff's trade libel
20 claims as to patent allegations are not preempted by
21 federal law.

22 Even though Plaintiff's trade libel claims as to
23 patent allegations are not preempted by federal law,
24 Plaintiff fails to plead its trade libel claim with
25 requisite particularity. In California, a disparaging
26 statement about a competitor's product that causes the
27 competitor to suffer pecuniary damages is actionable as
28 trade libel. See Microtec Research, Inc. v. Nationwide

1 Mut. Ins. Co., 40 F.3d 968, 972-73 (9th Cir. 1994). To
2 state a claim for trade libel, a plaintiff must allege
3 facts demonstrating a "(1) publication, (2) which
4 induces others not to deal with plaintiff, and (3)
5 special damages." Aetna Cas. and Sur. Co., Inc. v.
6 Centennial Ins. Co., 838 F.2d 346, 351 (9th Cir. 1988).
7 Trade libel is not, however, a true libel and is not
8 actionable as defamation. Id. (citing Polygram
9 Records, Inc. v. Superior Court, 170 Cal. App. 3d 543,
10 548-49 (1985)); First Advantage Background Services
11 Corp. v. Private Eyes, 569 F. Supp. 2d 929, 937 (N.D.
12 Cal. 2008); Films of Distinction, Inc. v. Allegro Film
13 Prods., Inc., 12 F. Supp. 2d 1068, 1081 (C.D. Cal.
14 1998).

15 Although trade libel is not actionable as
16 defamation, this difference does not diminish the
17 pleading requirements in a trade libel claim, which
18 requires that the claim be based on specific
19 statements. Private Eyes, 569 F. Supp 2d at 937; See,
20 e.g., Eldorado Stone v. Renaissance Stone, Inc., No.
21 04-cv-2562 JM, 2005 WL 5517731, at *3 (S.D. Cal. Aug.
22 9, 2005) (dismissing trade libel claim where plaintiff
23 failed to identify the author or speaker, recipient,
24 time, and location of each allegedly libelous
25 statement); Films of Distinction, 12 F. Supp. 2d at
26 1081 n.8 ("In the Ninth Circuit, a product defamation
27 or trade libel claim must be based on specific
28 statements, and the defamatory character of the

1 language must be apparent from the words themselves.").
2 At a minimum, necessary defamation allegations must
3 identify the time and place of publication as well as
4 the speaker, the recipient of the statement, the
5 substance of the statements, and, in the case of trade
6 libel, special damages. Eldorado, 2005 WL 5517731 at
7 *10-11; see also Private Eyes, 569 F. Supp. 2d at 937.
8 For example, in Private Eyes, the court dismissed a
9 claim for trade libel, holding that the plaintiff gave
10 no indication of who made the allegedly libelous
11 statements, to whom they made those statements, when
12 they made the statements, or what exactly they said.
13 569 F. Supp. 2d at 937.

14 Here, the Court finds that Plaintiff has failed to
15 plead its trade libel claim with requisite
16 particularity. Although Plaintiff indicates in its
17 Complaint that the alleged defamatory statements were
18 made within the last two years by Defendant's officers,
19 employees, and/or agents, to actual and prospective
20 customers, (Compl. ¶¶ 15,16), Plaintiff fails to
21 identify the specific time and location of each alleged
22 statement. Private Eyes, 569 F. Supp. 2d at 937,
23 (citing Eldorado, 2005 WL 5517731 at *3). This alone
24 is a sufficient basis to grant Defendant's Motion to
25 Dismiss Plaintiff's trade libel claim.

26 Moreover, Plaintiff has also failed to allege facts
27 demonstrating special damages. In New.Net, Inc. v.
28 Lavasoft, the court held that a plaintiff could not

1 satisfy the special damages requirement for trade libel
2 by simply referring to an amount to be ascertained at
3 trial rather than specifying the amount of damage. 356
4 F. Supp. 2d 1090, 1113 (C.D. Cal. 1990). The court in
5 New.Net noted that "a bare allegation of the amount of
6 pecuniary loss is insufficient for the pleading of a
7 trade libel claim." Id.; See also Isuzu Motors Ltd. v.
8 Consumers Union of United States, Inc., 12 F. Supp. 2d
9 1035, 1047 (C.D. Cal. 1998). In Private Eyes, the
10 court noted that the plaintiff merely alleged that the
11 libelous statements "harmed PEI's business relationship
12 with [a third party]." 569 F. Supp. 2d at 937.
13 However, the court noted that the plaintiff did not
14 allege the amount of business it had from the third
15 party prior to the defendant allegedly making these
16 statements, how much it had after, or the value of the
17 business. Id. The court thereby held that the
18 plaintiff had not adequately pled special damages.

19 Here, Plaintiff provides only a bare allegation
20 that it has or will sustain damages in excess of
21 \$100,000.00, but acknowledges that the exact amount
22 will be proven at trial. Compl. ¶ 19. Moreover,
23 Plaintiff does not allege the amount of business it had
24 prior to Defendant allegedly making these statements,
25 how much it had after those statements were made, or
26 the value of the business. See Private Eyes, 569 F.
27 Supp. 2d at 937. Accordingly, the Court finds that
28 Plaintiff has failed to satisfy the special damages

1 requirement for a trade libel claim.

2 Accordingly, because Plaintiff has failed to plead
3 its trade libel claim with requisite particularity, the
4 Court **GRANTS** Defendant's Motion to Dismiss Plaintiff's
5 claim for trade libel with leave to amend.

6 2. Plaintiff's Intentional Interference with
7 Prospective Economic Advantage and Negligent
8 Interference with Economic Advantage Claims

9 As a preliminary matter, Defendant argues that
10 Plaintiff's claims for intentional interference with
11 prospective economic advantage and negligent
12 interference with prospective economic advantage must
13 be dismissed since they allege fraud without meeting
14 the heightened pleading standard of Rule 9(b); however,
15 both claims need not be dismissed on this ground. In
16 cases where fraud is not a necessary element of a
17 claim, a plaintiff may nonetheless choose to allege in
18 the complaint that the defendant has engaged in
19 fraudulent conduct. Vess v. Ciba-Geigy Corp. USA, 317
20 F.3d 1097, 1103 (9th Cir. 2003). In cases where a
21 plaintiff chooses to allege some fraudulent and some
22 non-fraudulent conduct, only the allegations of fraud
23 are subject to Rule 9(b)'s heightened pleading
24 requirements. Id. at 1104. The text of Rule 9(b)
25 requires only that in "all averments of fraud . . . ,
26 the circumstances constituting fraud . . . shall be
27 stated with particularity." Id. (citing Fed. R. Civ.
28 P. 9(b)). The rule does not require that allegations

1 supporting a claim be stated with particularity when
2 those allegations describe non-fraudulent conduct. Id.
3 at 1105. Thus, if particular averments of fraud are
4 insufficiently pled under Rule 9(b), a district court
5 should "disregard" those averments, or "strip" them
6 from the claim. Id. The court should then examine the
7 allegations that remain to determine whether they state
8 a claim. Id. Here, Plaintiff does not allege a claim
9 for fraud, but only alleges "fraud" to the extent that
10 "fraud" is part of allegations that Defendant committed
11 the acts alleged with "malice, oppression, or fraud"
12 and with intent to injure Plaintiff. Opp'n 5:13-16.
13 Moreover, Plaintiff's allegation of fraud is not a
14 necessary element of Plaintiff's claims of trade libel,
15 intentional interference with economic advantage, and
16 negligent interference with economic advantage.
17 Accordingly, the Court hereby disregards those fraud
18 averments, and examines the allegations that remain to
19 determine whether they state a claim.

20 To state a claim for intentional interference with
21 prospective economic advantage, a plaintiff must allege
22 (1) an economic relationship between plaintiff
23 and a third party, with probable future economic
24 benefit to plaintiff; (2) defendant's knowledge
25 of the relationship; (3) intentional acts by
26 defendant designed to disrupt the relationship;
27 (4) actual disruption of the relationship; and
28 (5) economic harm to plaintiff proximately

1 caused by acts of defendant.

2 Metal Lite, Inc. v. Brady Const. Innovations, Inc., 558
3 F. Supp. 2d 1084, 1094 (C.D. Cal. 2007).

4 Here, the Court finds that Plaintiff has
5 sufficiently pled the necessary facts to support the
6 elements of this claim. As to the first element,
7 Plaintiff alleges that an economic and business
8 relationship existed between Plaintiff and its actual
9 and prospective customers of the iRAPP programs.

10 Compl. ¶ 22. Although Plaintiff does not specifically
11 identify existing third parties with whom there was an
12 existing economic or business relationship, Plaintiff's
13 allegation of interference with "actual and potential
14 customers" is sufficient to satisfy federal pleading
15 requirements. See Aagard v. Palomar Builders, Inc.,
16 344 F. Supp. 2d 1211, 1219 (E.D. Cal. 2004). Second,
17 Plaintiff maintains that as a direct competitor of
18 Plaintiff, Defendant knew, or should have known of said
19 economic relationships. Third, Plaintiff alleges facts
20 that Defendant engaged in intentional acts to disrupt
21 those relationships by embarking on a pattern of
22 defamation and disparagement of the iRAPP programs and
23 Plaintiff itself. Compl. ¶¶ 10, 24. Fourth, Plaintiff
24 alleges that due to Defendant's intentional acts, its
25 relationships with actual and potential customers were
26 disrupted. The court can draw the inference, although
27 not specifically pleaded, that as a direct competitor
28 of Plaintiff, Defendant's statements adversely affected

1 the potential customers' willingness to purchase
2 Plaintiff's products. Finally, Plaintiff alleges that
3 it sustained damages in an amount in excess of \$100,000
4 as a result of Defendant's statements being a
5 substantial factor in causing harm to Plaintiff's
6 business. Id. at ¶¶ 23, 26. Accordingly, because
7 Plaintiff has pled sufficient facts for a claim of
8 intentional interference with prospective economic
9 advantage, the Court **DENIES** Defendant's Motion to
10 Dismiss this claim.

11 To state a claim for negligent interference with
12 prospective economic advantage, Plaintiff must
13 demonstrate that:

14 (1) an economic relationship existed between
15 the plaintiff and a third party which contained
16 a reasonably probable future economic benefit
17 or advantage to plaintiff;

18 (2) the defendant knew of the existence of the
19 relationship and was aware or should have been
20 aware that if it did not act with due care its
21 actions would interfere with this relationship
22 and cause plaintiff to lose in whole or in part
23 the probable future economic benefit or
24 advantage of the relationship;

25 (3) the defendant was negligent; and

26 (4) such negligence caused damage to plaintiff
27 in that the relationship was actually
28 interfered with or disrupted and plaintiff lost

1 in whole or in part the economic benefits or
2 advantage reasonably expected from the
3 relationship.

4 Unical Enters., Inc. v. Am. Ins. Co., No. CV 05-3511
5 CBM (PJWx), 2005 WL 6133691, at *5 (C.D. Cal. Dec. 14,
6 2005) (quoting N. Am. Chem. Co. v. Sup. Ct., 59 Cal.
7 App. 4th 764, 786 (1997)).

8 Here, as discussed above, Plaintiff has provided
9 sufficient facts to support that economic and business
10 relationships existed between Plaintiff and its actual
11 and prospective customers. Further, as Plaintiff's
12 direct competitor, Plaintiff has alleged sufficient
13 facts to show that Defendant knew, or should have
14 known, that if it did not act with due care, its
15 actions would interfere with those relationships.
16 Compl. ¶¶ 33, 34. Plaintiff further alleges that
17 Defendant failed to exercise reasonable care. Id. at
18 ¶¶ 35, 37-39. Although not specifically pleaded, the
19 Court can infer from the facts in the Complaint that
20 Defendant acted with a reckless disregard for the truth
21 if it asserted that Plaintiff's iRAPP programs
22 infringed on Defendant's existing patents to potential
23 customers without knowing whether or not such a
24 statement was in fact true. Moreover, although not
25 specifically pleaded, the Court can infer that as a
26 direct competitor, Defendant's statements caused
27 economic damage to the extent that potential customers
28 were less willing to purchase products from Plaintiff

1 after hearing Defendant's statements. Accordingly,
2 because Plaintiff has pled sufficient facts for a claim
3 of negligent interference with prospective economic
4 advantage, the Court **DENIES** Defendant's Motion to
5 Dismiss this claim.

6 3. Plaintiff's Federal Antitrust Claim

7 Defendant argues that Plaintiff's Antitrust claims
8 cannot apply to Defendant because software is not a
9 commodity. Section 2(a) of the Clayton Antitrust Act
10 (as amended by the Robinson-Patman Act) prohibits any
11 person engaged in commerce to ". . .discriminate in
12 price between different purchasers of commodities . .
13 ." 15 U.S.C. § 13. The Robinson-Patman Act's
14 prohibition on price discrimination thus extends only
15 to transactions involving commodities. See May Dep't
16 Store v. Graphic Process Co., 637 F.2d 1211, 1214 (9th
17 Cir. 1980); see also Baun v. Investors Diversified
18 Services, Inc., 409 F.2d 872, 873 (7th Cir. 1969). A
19 sale of commodities is a "sale of 'goods, wares, or
20 merchandise' and is not merely a contract for
21 services." May, 637 F.2d at 1214 (quoting Rangen, Inc.
22 v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir.
23 1965)). The Ninth Circuit stated in May that there
24 were "no congressional discussions on the distinction
25 between goods and services," and that "[l]egislative
26 history reveals only that Congress intended the Act to
27 apply to *tangible* goods and not services." May, 637
28 F.2d at 1214 (emphasis added); Windsor Auctions, Inc.

1 v. eBay, Inc., No. C-07-06454, 2008 WL 2622791, at *3;
2 Innomed Labs., LLC v. Alza Corp., 368 F.3d 148, 155 (2d
3 Cir. 2004); See also Tele Atlas N.V. v. Navteq Corp.,
4 397 F. Supp. 2d 1184, 1192-93 (N.D. Cal. 2005) (holding
5 that the word, "commodity," means a "tangible good,"
6 such as products or merchandise).

7 When a transaction involves both goods and
8 services, the May court adopted the "dominant nature"
9 test to determine how to characterize the transaction
10 for the purposes of the Robinson-Patman Act. Windsor,
11 2008 WL 2622791 at *4; Standfacts Credit Services,
12 Inc., v. Experian Information Solutions, Inc., 405 F.
13 Supp. 2d 1141, 1156 (C.D. Cal. 2005) (quoting May, 637
14 F.2d at 1215). However, courts only apply the dominant
15 nature test where "the subject of the contract is a
16 combination of goods and intangible rights and
17 services." Windsor, 2008 WL 2622791 at *4; Innomed
18 Labs., 368 F.3d at 156.

19 Although there is no clear judicial consensus
20 regarding whether software is a "commodity," for
21 purposes of the Robinson-Patman Act, courts have
22 strictly construed the term "commodity" and held that
23 "it denotes only *tangible* products of trade." Windsor,
24 2008 WL 2622791 at *3 (emphasis added). Furthermore,
25 Windsor recognized that software lacks the requirement
26 of a "tangible component." Id. at *4. On this basis,
27 the Court can infer that software is not a commodity
28 and is not subject to the Robinson-Patman Act.

1 Moreover, Plaintiff's Complaint indicates that the
2 Parties develop multiple types of remote access
3 software; however, Plaintiff provides no evidence or
4 allegations suggesting that Defendant's ACTS program is
5 anything but an *intangible* product. In Tele Atlas, in
6 which the court dismissed plaintiff's antitrust claim,
7 the court noted that the plaintiff did not allege that
8 the defendant had sold a physical item and thus there
9 was no reason to apply the dominant nature test to
10 determine how to characterize the transaction for the
11 purposes of the Robinson-Patman Act. 397 F. Supp. 2d
12 at 1192-93. Similarly here, Plaintiff does not allege
13 that Defendant has sold a physical product. Rather,
14 Plaintiff only alleges that Defendant sells a computer
15 program, but it is unclear whether or not such a
16 program includes physical items. Id. If such a
17 program includes physical items, the Court may apply
18 the "dominant nature" test to characterize the
19 transaction for the purposes of the Robinson-Patman
20 Act. However, because it is unclear whether the
21 program is a combination of goods and intangible rights
22 and services, the Court cannot engage in such an
23 analysis. See Windsor, 2008 WL 2622791 at *4. Because
24 Plaintiff fails to provide sufficient facts to support
25 that Defendant's software includes physical items or is
26 a tangible product, the Court **GRANTS** Defendant's Motion
27 to Dismiss Plaintiff's Clayton Antitrust claim with
28 leave to amend.

1 4. Plaintiff's Claim of Unfair Business Practices
2 in Violation of California Business &
3 Professions Code § 17043

4 Defendant argues that Defendant is not a "vendor"
5 within the meaning of Cal. Bus. & Prof. Code § 17025
6 and is therefore not liable under § 17043. A vendor is
7 defined as a "seller," and Plaintiff has alleged that
8 Defendant is the seller of a computer program. BLACK'S
9 LAW DICTIONARY 1590 (9th ed. 2004). As such, Defendant is
10 a vendor within meaning of § 17025. However, Plaintiff
11 nonetheless fails to satisfy the pleading requirements
12 of § 17043.

13 To satisfy the pleading requirements of § 17043, a
14 plaintiff must allege the defendant's sales price, its
15 cost in the product and its cost of doing business.
16 Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., 12-
17 CV-05847-JST, 2013 WL 3242245, at *15 (N.D. Cal. June
18 25, 2013), (citing G.H.I.I. v. MTS, Inc., 147 Cal. App.
19 3d 256, 275 (1983)). Here, Plaintiff provides a bare
20 allegation that Defendant sold its ACTS program at a
21 price below cost, for the purpose of injuring its
22 competitors, in violation of § 17043. However,
23 Plaintiff has completely failed to allege Defendant's
24 sales price, its cost in the product, and its cost of
25 doing business. Accordingly, the Court **GRANTS**
26 Defendant's Motion to Dismiss Plaintiff's § 17043 claim
27 with leave to amend.

1 5. Plaintiff's Claim of Unfair Business Practices
2 in Violation of California Business &
3 Professions Code § 17000

4 California Business & Professions Code § 17000
5 prohibits "unlawful, unfair or fraudulent business
6 act[s] or practice[s]" and "unfair, deceptive, untrue
7 or misleading advertising." Rolling v. E*Trade Sec.,
8 LLC, 756 F. Supp. 2d 1179, 1192 (N.D. Cal. 2010)
9 (citing Cal. Bus. & Prof. Code § 17200). To state a
10 claim under § 17000, a plaintiff must plead that (1)
11 the defendant engaged in one of the practices
12 prohibited by the statute, and (2) the plaintiff
13 suffered actual injury in fact as a result of
14 defendant's actions. Id. Section 17000 provides a
15 cause of action for any activity "that can properly be
16 called a business practice and that at the same time is
17 forbidden by law." Microsoft Corp v. A-Tech Corp., 855
18 F. Supp. 308, 313 (C.D. Cal. 1994) (citing Farmers Ins.
19 Exch. v. Superior Ct., 2 Cal.4th 377, 383 (1992)). In
20 essence, "an action based on § 17000 to redress an
21 unlawful business practice 'borrows' violations of
22 other laws and treats these violations, when committed
23 pursuant to a business activity, as unlawful practices
24 independently actionable under § 17000." Id.

25 When a plaintiff who claims to have suffered injury
26 from a direct competitor's unfair act or practice
27 invokes § 17000, a plaintiff must plead conduct that
28 threatens an incipient violation of an antitrust law or

1 violates the policy or spirit of one of those laws
2 because its effects are comparable to or are the same
3 as a violation of the law, or otherwise significantly
4 threatens or harms competition. Cel-Tech Commc'ns,
5 Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163,
6 187 (1999). Here, Plaintiff alleges in its Complaint
7 that Defendant engaged in both intentional and
8 negligent interference with economic advantage, which
9 have negatively affected Plaintiff's business
10 reputation and goodwill. Moreover, Plaintiff has
11 alleged that Defendant engaged in such actions with the
12 intent to destroy competition. Compl. ¶ 3. Presuming
13 such allegations to be true, the Court finds that
14 Plaintiff has sufficiently pled a claim for unfair
15 business practices and **DENIES** Defendant's Motion to
16 Dismiss Plaintiff's § 17000 claim.

17 **C. Defendant's Motion to Strike**

18 Defendant seeks to strike Plaintiff's fraud
19 allegations to the extent that they lack the
20 specificity required by Rule 9(b) and are not capable
21 of amendment. Defendant presumably seeks to strike the
22 portions in the Complaint which allege that Defendant's
23 "acts of defamation were committed with malice,
24 oppression or *fraud* . . ." (Compl. ¶¶ 20, 29, 40)
25 (emphasis added), to the extent that those allegations
26 allege fraud. In Operating Engr's Pension Trust Fund
27 v. Fife Rock Prod. Co, defendants filed an affirmative
28 defense which alleged that plaintiff's claims were

1 barred by the doctrines of waiver, laches, estoppel,
2 *fraud*, judicial estoppel, prior breach, and legal
3 excuse. No. C 10-00697 SI, 2010 WL 2635782, at *4
4 (N.D. Cal. June 30, 2010) (emphasis added). The court
5 in Operating Engr's Pension granted the plaintiff's
6 motion to strike the affirmative defense of fraud given
7 that the defendants failed to "state with particularity
8 the circumstances constituting fraud." *Id.* (citing Fed.
9 R. Civ. P. 9(b)). Similarly here, the Complaint
10 alleges that Defendant's acts of defamation were
11 "committed with malice, oppression or *fraud*" without
12 stating with particularity the circumstances
13 constituting fraud. Accordingly, the Court **GRANTS**
14 Defendant's Motion to Strike Plaintiff's fraud
15 allegations with leave to amend.

16 Defendant also moves to strike those allegations
17 regarding patents, arguing that they are preempted by
18 federal law. However, as discussed above, such
19 allegations are not preempted by federal law.
20 Accordingly, the Court **DENIES** Defendant's Motion to
21 Strike Plaintiff's allegations regarding patents.

22 **D. Defendant's Motion for a More Definite Statement**

23 Defendant seeks a more definite statement regarding
24 Plaintiff's claims of trade libel, intentional
25 interference with prospective economic advantage, and
26 negligent interference with prospective economic
27 advantage. However, because the Court grants
28 Defendant's Motion to Dismiss Plaintiff's claim for

1 trade libel, the Court **DENIES as moot** Defendant's
2 Motion for a More Definite Statement for Plaintiff's
3 trade libel claim. As to Plaintiff's tortious
4 interference claims, Plaintiff alleges that Defendant
5 made false and misleading statements about Plaintiff's
6 iRAPP programs, i.e., that Plaintiff's iRAPP programs
7 infringe on Defendant's patents (when Defendant holds
8 no patents) and that the controversial "Cherry OS"
9 product was Plaintiff's product, which interfered with
10 Plaintiff's relationships with existing and potential
11 customers. Accordingly, the Court finds that the
12 Complaint is specific enough to apprise Defendant of
13 the substance of the claim being asserted and **DENIES**
14 Defendant's Motion for a More Definite Statement of
15 Plaintiff's tortious interference claims.

16 **IV. CONCLUSION**

17 Based on the foregoing, the Court **GRANTS in part**
18 **and DENIES in part** Defendant's Motion to Dismiss,
19 **GRANTS in part and DENIES in part** Defendant's Motion to
20 Strike, and **DENIES** Defendant's Motion for a More
21 Definite Statement as follows:

- 22 • The Court **GRANTS** Defendant's Motion to Dismiss
23 Plaintiff's Trade Libel claim and gives
24 Plaintiff twenty days to amend.
- 25 • The Court **DENIES** Defendant's Motion to Dismiss
26 Plaintiff's claim for Intentional Interference
27 with Prospective Economic Advantage.
- 28 • The Court **DENIES** Defendant's Motion to Dismiss

1 Plaintiff's claim for Negligent Interference
2 with Prospective Economic Advantage.

3 • The Court **GRANTS** Defendant's Motion to Dismiss
4 Plaintiff's claim for violation of the Clayton
5 Antitrust Act and gives Plaintiff twenty days
6 to amend.

7 • The Court **GRANTS** Defendant's Motion to Dismiss
8 Plaintiff's claim for violation of Unfair
9 Business Practices [Cal. Bus. & Prof. Code §
10 17043] and gives Plaintiff twenty days to
11 amend.

12 • The Court **DENIES** Defendant's Motion to Dismiss
13 Plaintiff's claim for violation of Unfair
14 Business Practices [Cal. Bus. & Prof. Code §§
15 17200 et seq.].

16 • The Court **GRANTS** Defendant's Motion to Strike
17 Plaintiff's fraud allegations and gives
18 Plaintiff twenty days to amend and **DENIES**
19 Defendant's Motion to Strike Plaintiff's
20 allegations regarding patents.

21 • The Court **DENIES** Defendant's Motion for a More
22 Definite Statement.

23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Additionally, the Court **DENIES as moot** Defendant's Request for Judicial Notice.

IT IS SO ORDERED.

DATED: September 24, 2013

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior, U.S. District Court Judge