

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



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMERICAN BULLION, INC.,)	Case No. CV 14-01873 DDP (ASx)
)	
Plaintiff,)	ORDER DENYING DEFENDANTS' MOTION
)	TO DISMISS
v.)	
)	[Dkt. 10]
REGAL ASSETS, LLC et al.,)	
)	
Defendants.)	
)	

Presently before the court is a Motion to Dismiss filed by Defendants Regal Assets and Tyler Gallagher (collectively, "Defendants"). (Dkt. 10.) Having considered the parties' submissions, the court denies the motion and adopts the following order.

I. Background

The parties are business competitors in the field of adding gold and other precious metals to individual retirement accounts. (Compl. ¶ 1.) They also convert existing retirement accounts into precious metals. (Id.) American Bullion, Inc. ("Plaintiff") generates business by relying on word of mouth, but also by promoting itself online. (Compl. ¶ 17.)

1 Plaintiff advertises its services online via third-party
2 affiliates, who are paid for referred business. (Compl. ¶ 20.)
3 Plaintiff alleges that Defendants Regal Assets ("Regal"), Kelly
4 Felix ("Felix") and Tyler Gallagher ("Gallagher") have created and
5 are operating such affiliate websites. Plaintiff identifies Felix
6 as the part owner and Gallagher as the CEO of Regal Assets. (Id. ¶
7 12.) The Complaint alleges that there is a unity of interests
8 between Regal and the individual defendants, and that Gallagher and
9 Felix are alter egos of Regal. (Id.) Defendant Felix has not
10 responded or otherwise participated in this action.

11 Although the websites operated by Defendants purport to
12 contain independent consumer reviews, Plaintiff contends that in
13 reality, Defendants use the websites to falsely advertise
14 Defendants and to disparage Plaintiff. (Comp. ¶ 23.) Plaintiff
15 alleges that the websites are in no way independent, and that the
16 Defendants do not publicly disclose their connection to the
17 websites. (Compl. ¶ 25.) Reviews on the websites praise
18 Defendants and give negative reviews about Plaintiff's services.
19 (Compl. ¶ 45.) Some reviews include false information, while
20 others allegedly plagiarize information. (Id.)

21 Certain of Defendants' websites claim that Plaintiff was a
22 defendant in a lawsuit accusing it of fraud, and that Plaintiff was
23 found guilty and later sued by the U.S. Commodities Futures Trading
24 Commission. (Compl. ¶ 37; Ex. 4.) Plaintiff contends that this is
25 false and that a business with a similar name, American Bullion
26 Exchange, was in fact the party found guilty in that action.
27 (Compl. ¶ 38.)

28

1 Many of the websites use allegedly use Plaintiff's name to
2 misdirect potential customers. (Compl. ¶ 40.) Plaintiff asserts
3 that the websites urge customers to "click here to visit American
4 Bullion," but are then linked to Defendants' website upon clicking.
5 Id. Plaintiff further alleges that it requested Defendants remove
6 the materials and stop the dissemination of false information, to
7 no avail. (Compl. ¶ 41.)

8 The Complaint alleges causes of action for false and
9 misleading advertising under the Lanham Act, 15 U.S.C. 1125(a), and
10 state law, as well as state law causes of action for unfair
11 competition, unfair business practices, trade libel, defamation,
12 and intentional interference with prospective economic advantage.
13 Defendants now move to dismiss.

14 **II. Legal Standard**

15 A complaint will survive a motion to dismiss when it contains
16 "sufficient factual matter, accepted as true, to state a claim to
17 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
18 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
19 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
20 "accept as true all allegations of material fact and must construe
21 those facts in the light most favorable to the plaintiff." Resnick
22 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
23 need not include "detailed factual allegations," it must offer
24 "more than an unadorned, the-defendant-unlawfully-harmed-me
25 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
26 allegations that are no more than a statement of a legal conclusion
27 "are not entitled to the assumption of truth." Id. at 679. Even
28 under the liberal pleading standard of Federal Rule of Civil

1 Procedure 8(a)(2), under which a party is only required to make a
2 "short and plain statement of the claim showing that the pleader is
3 entitled to relief," a "pleading that offers 'labels and
4 conclusions' or a 'formulaic recitation of the elements of a cause
5 of action will not do.'" Id. 678 (quoting Twombly, 550 U.S. at
6 555).

7 **III. Discussion**

8 A. False Advertising

9 Defendants briefly contend that Plaintiff's Lanham Act claim
10 must be dismissed because 1) Plaintiff has not alleged ownership of
11 a trademark and 2) Plaintiff has failed to state a claim because
12 Defendants' alleged statements "do not appear to be for the purpose
13 of influencing consumers to buy Defendant's products, rather to
14 refrain from contracting with Plaintiff." (Mot. at 4-5.)

15 As to the first ground, as Defendants themselves acknowledge,
16 Plaintiff does not assert a trademark claim. Rather, Plaintiff
17 brings a false advertising claim under the Lanham Act. "[T]he
18 Lanham Act . . . prohibits the use of false designations of origin,
19 false descriptions, and false representations in the advertizing
20 [sic] and sale of goods and services." Jack Russell Terrier
21 Network v. Am. Kennel Club, Inc., 407 F.3d 1027, 1036 (9th Cir.
22 2005). A Lanham Act claim for false advertising requires "(1) a
23 false statement in a commercial advertisement about its own or
24 another's product; (2) the statement actually deceived or has a
25 tendency to deceive . . .; (3) the deception is material . . .;"
26 (4) causation; and (5) injury. Southland Sod Farms v. Stover Seed
27 Co., 108 F.3d 1134, 1139 (9th Cir. 1997) (emphasis added). A false
28

1 statement is one that is literally false, or one that is literally
2 true and likely to cause confusion. Id.

3 The thrust of Defendants' contention that the statements at
4 issue seek not to promote its own product, but rather to besmirch
5 Defendants', is unclear. Furthermore, the Complaint clearly
6 alleges that Defendants disseminate ostensibly independent reviews
7 that promote Defendants' services and direct consumers to
8 Defendants' own site. (Compl. ¶¶ 4, 28-31.) Nor do Defendants
9 dispute Plaintiffs' allegation that the statement regarding the
10 fraud suit and enforcement action pertained not to Plaintiff, but
11 to another entity. The Lanham Act claims is adequately pled.¹

12 B. Privilege

13 Defendants contend that certain claims must be dismissed
14 because Defendants acts are protected by the litigation privilege.
15 (Mot. at 6.) The privilege attaches where a communication is made
16 (1) in judicial or quasi-judicial proceedings; (2) by litigants or
17 other participants authorized by law; (3) to achieve the objects of
18 the litigation; and (4) to have some connection or logical relation
19 to the action." Am. Products Co., Inc. v. Law Offices of Geller,
20 Stewart & Foley, LLP, 134 Cal. App. 4th 1332, 1340, (2005).

21 Defendants' argument has no merit. Neither Defendants nor
22 Plaintiffs were parties to the fraud suit brought by the U.S.
23 Commodities Futures Trading Commission against American Bullion

24
25 ¹ For similar reasons, Plaintiff's state law false advertising
26 claim survives. See Cal. Bus. & Prof. Code § 17500; iYogi Holding
27 Pvt. Ltd. v. Secure Remote Support Inc., No. C-11-0592 CW, 2011 WL
28 6291793 * 14 (N.D. Cal. Oct. 25, 2011) ("To prevail on a claim for
false advertising, a plaintiff must show that the defendant, with
the intent to perform professional or other services, made a
statement concerning those services that is untrue or
misleading.").

1 Exchange. Defendants do not identify any other judicial or quasi-
2 judicial proceeding that might possibly be relevant. The
3 litigation privilege is no bar to Plaintiff's claims.

4 C. Trade Libel and Defamation

5 "Trade libel is the publication of matter disparaging the
6 quality of another's property, which the publisher should recognize
7 is likely to cause pecuniary loss to the owner." ComputerXpress,
8 Inc. v. Jackson, 93 Cal.App.4th 993, 1010 (2001). Trade libel
9 encompasses "all false statements concerning the quality of
10 services or product of a business". Id. (internal quotation and
11 citation omitted). The tort requires the intentional publication
12 of a false and unprivileged statement of fact. Mann v. Quality Old
13 Time Serv., Inc., 120 Cal.App.4th 90, 104 (2004). Defamation is
14 similar, but involves injury to the reputation of a business,
15 rather than disparagement of quality of goods or services. Mann v.
16 Quality Old Time Serv., Inc., 139 Cal.App.4th 328, 340 (2006).

17 The Complaint alleges that certain of Defendants' affiliate
18 websites have falsely stated "that American Bullion was a defendant
19 in a lawsuit accusing it of 'running a precious metals scam' and a
20 'Ponzi like scheme,' and that its owner (falsely identified as Ryan
21 Nassbridges) was found guilty of fraud and later sued by the U.S.
22 Commodities and Futures Trade Commission." (Compl. ¶ 37.) The
23 Complaint also attached an example of this statement at Exhibit 4.

24 Defendants argue that "[g]iven the similarity of the names
25 involved, it is unclear to which company the unidentified speaker
26 was referring." (Mot. at 7.) The court disagrees. First, the
27 allegations of the Complaint, which the court takes as true at this
28 stage, aver that Defendants statements refer to Plaintiff.

1 Further, it is clear from Exhibit 4 that the statement referred to
2 Plaintiff, as the statement is clearly preceded by a heading
3 reading "American Bullion, Inc." Defamation and trade libel are
4 adequately pled.

5 D. Intentional Interference with Prospective Economic
6 Advantage

7 To satisfy the elements of the tort of intentional
8 interference with prospective economic advantage, a plaintiff must
9 show (1) an economic relationship between the plaintiff and some
10 third party, with the probability of future economic benefit to the
11 plaintiff; (2) the defendant's knowledge of the relationship; (3)
12 intentional acts on the part of the defendant designed to disrupt
13 the relationship; (4) actual disruption of the relationship; and
14 (5) economic harm to the plaintiff proximately caused by the acts
15 of the defendant. Korea Supply Co. v. Lockheed Martin Corp., 29
16 Cal.4th 1134, 1153. To meet the third element, plaintiff must
17 "plead and prove that the defendant's acts are wrongful apart from
18 the interference itself." Della Penna v. Toyota Motor Sales,
19 U.S.A, Inc., 11 Cal.4th 376, 393 (1995).

20 Defendants argue that the Complaint fails to identify any
21 economic relationships between Plaintiff and a third party. (Reply
22 at 7.) The Complaint alleges, however, that Plaintiff has lost
23 several customers to Regal, and that those customers cited
24 Defendants' "review sites" as their reason for leaving Plaintiff.
25 (Compl. ¶ 37.) The claim is sufficiently pled.

26 E. Unfair Competition

27 For the reasons stated above, Plaintiffs' claim for unfair
28 competition under California Business & Professions Code

1 § 17200 also survives to the extent it is derivative of
2 Plaintiff's other claims. See Cal. Bus. & Profs. Code § 17200
3 ("[U]nfair competition shall mean and include any unlawful, unfair
4 or fraudulent business act"); see also Daugherty v. Am.
5 Honda Motor Co., Inc., 144 Cal.App.4th 824, 837 (2006).

6 **IV. Conclusion**

7 For the reasons stated above, Defendants' Motion is DENIED.²

8
9 IT IS SO ORDERED.

10
11
12 Dated: July 15, 2014



DEBRA D. PREGERSON

United States District Judge

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

² The court notes that it is not persuaded that Defendants "substantially complied" with Local Rule 7-3 merely because they discussed "failure to state a claim" with Plaintiff prior to filing the instant motion. Nevertheless, in the interests of deciding matters on the merits, the court has considered Defendants' arguments. The court expects full compliance with all rules of civil procedure, including the local rules.