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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DIRECTV, LLC, A CALIFORNIA)	Case No. 2:17-06110-DDP-PLA
LIMITED LIABILITY COMPANY,)	
)	ORDER RE: PLAINTIFF’S MOTION
Plaintiff / Counter-Defendant,)	TO DISMISS DEFENDANT’S FIRST
)	AMENDED COUNTERCLAIMS
v.)	
)	[Dkt. 47]
E&E ENTERPRISES GLOBAL, INC.,)	
)	
Defendant / Counterclaimant.)	
)	

This matter comes before the court on Plaintiff’s Motion to Dismiss Defendant’s First Amended Counterclaims, (Dkt. 47). Having considered the parties’ submissions and heard oral argument, the court adopts the following Order.

I. BACKGROUND

This case arises from a contractual dispute between Plaintiff DirecTV, LLC (“DirecTV”) and Defendant E&E Enterprises Global, Inc. (“E&E”). E&E is a General Services Administrator Schedule Contractor (“GSA”) contracted by federal government agencies to install, maintain, and repair satellite television equipment and to provide

1 satellite television programming. (First Am. Countercl. (“FAC”) ¶ 2.) In order to provide
2 the aforementioned services, E&E enters into contracts with other companies, among
3 them DirecTV. (*Id.* ¶¶ 10, 11.)

4 The court assumes the parties’ familiarity with the facts of this case, which have
5 been detailed in its prior Orders. (*See* Dkts. 33, 39.) As relevant here, DirecTV and E&E
6 entered into a series of contracts (the “Agreements”), whereby E&E would promote, sell,
7 and collect payment for DirecTV programming and services. (FAC ¶ 11.) In exchange,
8 E&E would receive a commission “based on the total billings of E&E’s customers.” (*Id.* ¶
9 15.) E&E alleges that DirecTV breached its contract by failing to pay E&E the
10 commissions owed. (*Id.* ¶ 29.) E&E further alleges that DirecTV improperly terminated
11 the Agreements because DirecTV failed to provide adequate written notice of the
12 termination to E&E in accordance with the Agreements. (*Id.* ¶ 36.)

13 Subsequently, DirecTV filed a Complaint and an application for a Temporary
14 Restraining Order alleging, *inter alia*, that E&E breached its contracts with DirecTV by
15 failing to remit payments and failing to perform the post-termination obligations
16 required by the Agreements. (Dkts. 1, 5.) E&E filed Counterclaims. (Dkt. 28.) The court
17 dismissed E&E’s Counterclaims for failure to state a claim. (Dkt. 39.) E&E filed its First
18 Amended Counterclaims, which include claims for breach of contract, tortious
19 interference with contractual relations, tortious interference with prospective economic
20 relations, accounting, and violations of the California Unfair Competition Law, Cal. Bus.
21 & Prof. Code § 17200 *et seq.* (*See generally* FAC, Dkt. 42).

22 DirecTV now moves to dismiss E&E’s First Amended Counterclaims.

23 **II. LEGAL STANDARD**

24 A complaint will survive a motion to dismiss when it contains “sufficient factual
25 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*
26 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
27 When considering a Rule 12(b)(6) motion, a court must “accept as true all allegations of
28 material fact and must construe those facts in the light most favorable to the plaintiff.”

1 *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint need not include
2 “detailed factual allegations,” it must offer “more than an unadorned, the-defendant-
3 unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. Conclusory allegations or
4 allegations that are no more than a statement of a legal conclusion “are not entitled to the
5 assumption of truth.” *Id.* at 679. In other words, a pleading that merely offers “labels and
6 conclusions,” a “formulaic recitation of the elements,” or “naked assertions” will not be
7 sufficient to state a claim upon which relief can be granted. *Id.* at 678 (citations and
8 internal quotation marks omitted).

9 “When there are well-pleaded factual allegations, a court should assume their
10 veracity and then determine whether they plausibly give rise to an entitlement of relief.”
11 *Id.* at 679. Plaintiffs must allege “plausible grounds to infer” that their claims rise “above
12 the speculative level.” *Twombly*, 550 U.S. at 555. “Determining whether a complaint states
13 a plausible claim for relief” is a “context-specific task that requires the reviewing court to
14 draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

15 **III. DISCUSSION**

16 **A. First Counterclaim for Breach of Written Contract**

17 The elements of a breach of contract claim are “(1) the existence of the contract, (2)
18 plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach; and (4) the
19 resulting damages to the plaintiff.” *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821
20 (2011). In its prior Order, the court concluded that E&E had adequately pled all of the
21 elements, except for “performance or excuse for nonperformance” of its contractual
22 duties. (Dkt. 39, at 6.)

23 In its First Amended Counterclaims, E&E elaborates that it “performed all
24 covenants required of it and paid those amounts due and owing under the Agreements,”
25 except to the extent that it was excused from doing so. (FAC ¶ 37.) Specifically, E&E sets
26 forth the following excuses for non-performance:

27 “(1) DirecTV’s overbilling of E&E’s accounts; (2) DirecTV’s refusal to accept
28 payment of the correct amounts actually due and owed to it; (3) DirecTV’s
consistent under-calculation of commissions due and owing to E&E for which

1 E&E was entitled to a credit on its accounts with DirecTV; (4) DirecTV's consistent
2 over-calculation of chargebacks due and owing to it from E&E; and (5) E&E's
3 inability to pay amounts owed on an inaccurate bill whilst in bankruptcy." (*Id.* ¶
37.)

4 The first, third, and fourth reasons are not excuses in themselves. Rather, they
5 relate to E&E's contention that DirecTV under-calculated the amounts owed to E&E.
6 Only the second and fifth reasons explain why E&E was excused from paying to DirecTV
7 any outstanding amounts that were not in dispute. In California, performance is excused
8 when it is "prevented or delayed by the act of the creditor, or by the operation of law."
9 Cal. Civ. Code § 1511.

10 First, E&E alleges that DirecTV refused to accept E&E's payments of the reduced
11 amounts that E&E claimed it owed. (*Id.* ¶ 37.) DirecTV argues that E&E must specifically
12 allege "with examples or otherwise, that DirecTV refused to accept payments from E&E"
13 (MTD at 7), and that "E&E does *not* allege that it made a payment that DirecTV rejected,"
14 (Reply at 4).

15 The court agrees that E&E's pleading contains some ambiguity as to whether
16 DirecTV in fact (1) refused to accept payment of the sums tendered by E&E or,
17 alternatively, (2) refused to accept that these sums represented the correct amounts of
18 outstanding debt owed by E&E. Therefore, the court grants E&E leave to amend its
19 pleadings to specifically allege that E&E offered to pay DirecTV the undisputed amounts
20 owed, but that E&E was prevented from doing so because DirecTV refused to accept
21 E&E's payments.

22 Second, E&E states that it was unable "to pay amounts owed on an inaccurate bill
23 whilst in bankruptcy." (FAC ¶ 37.) It is unclear what constitutes the precise source of
24 E&E's excuse. In other words, payment of the undisputed amounts owed to DirecTV is
25 not excused by virtue of the fact that the bills were inaccurate. Nor does E&E explain
26 why it might have been prevented from making payments "by operation of law." Cal.
27 Civ. Code § 1511. In California, "excuses must be pleaded specifically." *Durell v. Sharp*
28

1 *Healthcare*, 183 Cal. App. 4th 1350, 1367 (Ct. App. 2010) (citations omitted). Thus, the
2 court dismisses this claim with leave to amend.¹

3 **B. Second Counterclaim for Breach of Written Contract**

4 In the second counterclaim for breach of contract, E&E alleges that DirecTV
5 materially breached the terms of the Agreements by “fail[ing] to pay commissions due
6 and owing to E&E,” and by “applying incorrectly calculated and excessive chargebacks.”
7 (FAC ¶¶ 42, 43.) In its previous Order, the court directed E&E to replead this claim in
8 order to “specify which provisions of the Agreements were breached, over what period,
9 and with respect to which commissions.” (Dkt. 39, at 7.)

10 In its FAC, E&E specifies that, beginning around February 2014, DirecTV failed to
11 pay the following commissions: “(1) prepaid programming commissions and bonuses
12 pursuant to Paragraphs 6.1 and attached Schedule 6.1 of the Commercial Agreement, (2)
13 continuing service commissions pursuant to Paragraph 6.2 and attached Schedule 6.2 of
14 the Commercial Agreement; and (3) commissions pursuant to Section 2.2 and attached
15 Exhibit B or the SMATV Agreement.” (FAC ¶¶ 41, 42.)

16 The court concludes that these amended allegations satisfy E&E’s imperative to
17 put DirecTV on notice of the commissions that E&E claims were unpaid. Accordingly,
18 E&E need not, as DirecTV contends, additionally specify “a single actual commission for
19 any sale that DirecTV did not pay.” (MTD at 7.) Nor must E&E provide additional
20 granularity as to the kinds of “prepaid programming commissions and bonuses pursuant
21 to . . . Schedule 6.1 of the Commercial Agreement,” (FAC ¶ 41), in order to state a claim
22 for relief.

23 Yet E&E repeats the deficient allegations of excuse articulated in its first cause of
24 action. (FAC ¶ 45.) As the court concluded above, if E&E is to successfully plead excuse,

25
26 ¹ DirecTV also contends that, because it was “authorized to terminate the Agreements
27 with immediate effect due to E&E’s bankruptcy,” then this provides an independent
28 ground for dismissal of the breach of contract claim. (Reply at 4.) Not so. Although the
Agreements provided DirecTV the authority to terminate them upon bankruptcy, there is
no evidence that DirecTV actually exercised its authority to do so.

1 it must plead facts establishing excuse with specificity. Therefore, the court dismisses the
2 claim on this basis with leave to amend.

3 **C. Third Counterclaim for Tortious Interference with Contractual Relations**

4 To plead a claim for tortious interference with contractual relations, E&E must
5 allege: “(1) a valid contract between plaintiff and a third party, (2) defendant’s
6 knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach
7 or disruption of the contractual relationship; (4) actual breach or disruption of the
8 contractual relationship; and (5) resulting damage.” *Pac. Gas & Electric Co. v. Bear Stearns*
9 *& Co.*, 50 Cal.3d 1118, 1126 (1990).

10 In its Amended Counterclaims, E&E specifies that DirecTV interfered with E&E’s
11 contracts with a number of VA facilities. (FAC ¶ 49.) Specifically, E&E alleges that
12 DirecTV intended to disrupt the performance of those contracts by “wrongfully
13 represent[ing] that E&E was terminated prior to the actual termination date, and
14 otherwise wrongfully solicit[ing] those customers away from E&E prior to the
15 termination of the SMATV Agreement.” (FAC ¶ 51.)

16 DirecTV contends that E&E “never alleges that DirecTV’s conduct actually caused
17 a breach, disruption, or early termination of its VA contracts.” (MTD at 9.) The court
18 disagrees. E&E alleges that DirecTV’s conduct “caused those E&E customers to terminate
19 their agreements with E&E” and “depriv[ed] E&E of access to DirecTV dealer services
20 that would allow E&E to carry out its obligations under various contracts with its
21 government entity customers.” (FAC ¶¶ 54, 55.) Therefore, E&E has adequately pled a
22 breach or disruption of these contracts.

23 In addition to the VA contracts, E&E references a former contract with TSA. TSA
24 allegedly terminated its contract with E&E because DirecTV informed TSA that it could
25 upgrade to high-definition satellite services “without further service commitments or
26 additional expenses,” whereas E&E had previously informed TSA that it needed to
27 commit to a new two-year agreement. (FAC ¶ 17.) TSA subsequently contracted with
28 another company that was not a DirecTV dealer. (FAC ¶ 18.)

1 E&E alleges that this behavior was intended to “circumvent E&E” and disrupt its
2 contractual relationship with TSA, and that it eventually “led to TSA terminating E&E’s
3 agreements with it in or around June 2016.” (FAC ¶ 18.) It is not implausible that
4 incidents of confusion or miscommunication as to the terms of service may have
5 prompted TSA to seek out the services of another satellite television vendor and
6 terminate its relationship with E&E. Reviewing the revised allegations, the court
7 concludes that E&E has adequately pled the elements for tortious interference with the
8 TSA contract. Therefore, the court denies DirecTV’s motion to dismiss E&E’s
9 counterclaim for tortious inference with contractual relations.

10 **D. Fourth Counterclaim for Tortious Interference with Prospective Economic**
11 **Advantage**

12 Under California law, a claim for tortious interference with prospective economic
13 advantage consists of the following elements: “(1) an economic relationship between the
14 plaintiff and some third party, with the probability of future economic benefit to the
15 plaintiff; (2) the defendant’s knowledge of the relationship; (3) intentional acts on the part
16 of the defendant designed to disrupt the relationship; (4) actual disruption of the
17 relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the
18 defendant.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003).

19 The only third party that E&E specifies in its tortious inference claim is TSA. After
20 the termination of its original TSA contract, E&E asked TSA around June 14, 2017
21 whether it could regain its contract with TSA. (FAC ¶¶ 19, 61, 63.) Between June 14 and
22 June 21, TSA contacted DirecTV and was informed that E&E was no longer a DirecTV
23 dealer. (FAC ¶ 20.) Consequently, TSA declined E&E’s request. (*Id.*) Soon thereafter, on
24 June 27, 2017, DirecTV mailed E&E a letter terminating the Agreements. (McCree Dec.,
25 Ex. D; FAC ¶ 16.) E&E states that it “was denied a contract with TSA due to DirecTV’s
26 misrepresentation of E&E’s status as a DirecTV dealer,” and that the TSA contract was
27 instead awarded to DirecTV around July 12, 2017. (FAC ¶ 63.)
28

1 The court agrees that E&E could have conceivably been awarded the TSA contract
2 but for DirecTV's representation that E&E was no longer a DirecTV dealer. Yet, as the
3 court concluded earlier, "with respect to a prospective contract with TSA, the court
4 cannot reasonably infer on the basis of the facts alleged that E&E would have benefitted
5 from accepting a third-party contract that it would have been unable to perform several
6 days or weeks later, upon the termination of E&E's role as a DirecTV dealer." (Dkt. 39, at
7 10-11.) In other words, E&E's allegations must show "economic harm to the plaintiff
8 proximately caused by" DirecTV's representation. *Korea Supply Co.*, 29 Cal. 4th at 1153.

9 Before termination, the Agreements prevented E&E from selling or soliciting "any
10 other multi[-]channel video service which competes with the DirecTV Service. . . ."
11 (McCree Decl, Ex. A (Commercial Agreement) § 1.4.) After termination, the Agreements
12 continued to prevent E&E from, "on behalf of any provider of audio/video multichannel
13 video/entertainment programming services or equipment or on its own behalf,
14 solicit[ing] any Commercial Subscriber who was procured by [E&E] and is a Commercial
15 Subscriber as of such termination date." (*Id.* § 13.2.) Moreover, upon termination, the
16 Agreements prohibited E&E from engaging in "all activities related to . . . the promotion,
17 marketing and advertising of the National Commercial Offers and DirecTV Service" and
18 "the sales of DirecTV programming packages." (*Id.*) Therefore, by operation of these
19 contractual provisions, E&E would have been prevented from, as it contends, providing
20 TSA with "alternative satellite television service" from a DirecTV competitor both before
21 or after termination.² (FAC ¶ 64.) In view of this critical limitation, the court finds that
22 E&E cannot adequately set forth a basis for "probability of future economic benefit"
23 arising from the prospective TSA contract. *Korea Supply Co.*, 29 Cal. 4th at 1153. The court
24 therefore dismisses this claim with prejudice.

25 **E. Fifth Counterclaim for Violation of California Unfair Competition Law**
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28 ² E&E has not challenged the validity of these contractual provisions.

1 California's Unfair Competition Law ("UCL") prohibits unfair, unlawful, or
2 fraudulent business practices. Each of these three prongs may give rise to actionable
3 conduct under the UCL. *See* Cal. Bus. & Prof. Code § 17200.

4 In its FAC, E&E alleges that DirecTV violated the UCL by "[1] unfairly and
5 wrongfully misrepresent[ing] E&E's status as a DirecTV dealer to TSA; [2] unfairly and
6 wrongfully misrepresent[ing] to VA and other facilities that E&E had been terminated
7 prior to the effective date of termination; and [3] unfairly and wrongfully
8 misrepresent[ing] the terms at which DirecTV would upgrade TSA facilities to high
9 definition programing." (FAC ¶ 72.) As the court noted in its previous Order, E&E does
10 not pursue specific claims of fraudulent conduct, but instead appears to rest its UCL
11 claim on unlawful and unfair conduct.³ (FAC ¶ 71.)

12 As to the unfair prong of the UCL, the court finds that E&E's allegations do not
13 suffice to establish a violation. When the alleged harms arise from "a direct competitor's
14 unfair act or practice," then unfair conduct must also "threaten[] an incipient violation of
15 an antitrust law, or violate[] the policy or spirit of one of those laws because its effects are
16 comparable to or the same as a violation of the law, or otherwise significantly threaten[]
17 or harm[] competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th
18 163, 187 (1999). In others words, the harms alleged must be "significant" and have
19 impacts on "competition," not merely on a competitor. *See id.* at 186.

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22 ³ Even so, DirecTV's alleged misstatement of the terms of a high-definition upgrade was
23 directed at E&E. (FAC ¶ 72.) As this statement was made only to "the direct competitor
24 or other non-consumer party to a contract," it does not constitute deception of the public
25 under the UCL's fraudulent prong. *See Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178
26 F. Supp. 2d 1099, 1121 (C.D. Cal. 2001). As to any fraudulent representations made by
27 DirecTV to customers that E&E had been terminated as a DirecTV dealer, E&E still has
28 not plead the details of these incidents with specificity. *Kearns v. Ford Motor Co.*, 567 F.3d
1120, 1125 (9th Cir. 2009). That includes identifying "the who, what, when, where, and
how" of the alleged fraud. *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d
1047, 1055 (9th Cir. 2011).

1 The court finds that the relationship between E&E and DirecTV is akin to those of
2 “direct competitors.” The gravamen of the FAC concerns DirecTV alleged attempts to
3 compete with E&E for the same customers. *See, e.g.*, FAC ¶ 25 (alleging that DirecTV
4 “began soliciting E&E’s government entity customers”); *id.* ¶ 63 (alleging that DirecTV
5 was awarded a customer contract that E&E would otherwise would have been awarded);
6 *id.* ¶ 71 (alleging that DirecTV “divert[ed] the customers”). Under the *Cel-Tech* standard,
7 E&E’s allegations do not rise to the level of “an incipient violation of an antitrust law.”
8 *Cel-Tech Commc’ns, Inc.*, 20 Cal. 4th at 187. The specific harms alleged in the FAC chiefly
9 impact E&E as DirecTV’s competitor rather than “significantly threaten[ing] or harm[ing]
10 competition.” *Id.* In view of the fact that E&E’s termination as a DirecTV dealer was
11 imminent at the time of the alleged misrepresentations, E&E cannot demonstrate that the
12 “effects [were] comparable to or the same as a violation” of the antitrust laws. *Id.*
13 Accordingly, E&E’s claim of unfair competition under the UCL fails.

14 Finally, the court observes that tortious interference with contractual relations
15 may form the basis for a UCL claim under the unlawful conduct prong. *CRST Van*
16 *Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1107 (9th Cir. 2007). This claim
17 therefore rises or falls with E&E’s tortious interference claim. As the court earlier
18 determined that E&E has pled a claim for tortious interference, then so too has it pled a
19 claim under the UCL’s unlawful prong.

20 **F. Seventh Counterclaim for Accounting**

21 A claim for accounting is derivative of the other claims. *See Union Bank v. Superior*
22 *Court*, 31 Cal. App. 4th 573, 593 (Ct. App. 1995). E&E’s accounting claim appears to rely
23 in substantial part upon the viability of the second counterclaim for breach of contract,
24 which alleges that DirecTV failed to pay E&E commissions due under the Agreements.
25 Because the court has dismissed this cause of action, it also dismisses E&E’s seventh
26 counterclaim for accounting.

27 **IV. CONCLUSION**

1 For the foregoing reasons, the court GRANTS in part and DENIES in part
2 Plaintiff's Motion to Dismiss Defendant's First Amended Counterclaims.

3 As to Counterclaims One and Two, Defendant shall file amended counterclaims
4 within twenty one (21) days after the date of this Order, or by Monday, February 26,
5 2018. Failure to file amended counterclaims by this date shall result in the striking of
6 Defendant's counterclaims.

7 **IT IS SO ORDERED.**

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9 Dated: February 5, 2018



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12 DEAN D. PREGERSON
13 UNITED STATES DISTRICT JUDGE
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