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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

**CARE PLUS INSURANCE
MARKETING, a California
Corporation, and MIKE MASSAD, an
individual,**

Plaintiffs,

v.

**CONNECTICUT GENERAL LIFE
INSURANCE COMPANY aka CGLIC,
DOES 1 through 100 inclusive,**

Defendants.

1:10-CV-01836 AWI MJS

**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS THE SECOND AND
FOURTH CAUSES OF ACTION
AND DENYING DEFENDANT’S
MOTION TO DISMISS THE
THIRD CAUSE OF ACTION**

(Document #11)

BACKGROUND

On August 16, 2010, Plaintiffs Care Plus Insurance Marketing (“CPIM”) and Mike Massad, owner and operator of CPIM, filed a complaint for breach of contract, conversion, defamation and unfair competition in violation of California Business Code § 17200, *et seq.* The complaint arises from a contract dispute between Defendant Connecticut General Life Insurance Company (“CGLIC”) and Plaintiffs. On October 5, 2010, Defendant removed the action to this court because the parties are citizens of different states and more than \$75,000 is at issue.

On October 12, 2010, Defendant filed a motion to dismiss. Defendant contends that the second cause of action for conversion fails as a matter of law because conversion cannot be predicated on only a contractual right of payment and Plaintiffs have not specifically identified the money that was allegedly converted. Defendant argues that the third cause of action for defamation should be dismissed because the complaint fails to meet the stringent pleading

1 standard for defamation. Defendant contends that the fourth cause of action for unfair
2 competition fails to state a claim because an allegation of only a breach of contract is not a
3 violation of California's unfair competition law. Defendant asks the court to dismiss Plaintiffs'
4 second, third and fourth causes of action with prejudice.

5 Plaintiffs filed an opposition on October 27, 2010. Plaintiffs contend that the conversion
6 claim properly alleges that Defendant took control over property belonging to Plaintiffs.
7 Plaintiffs contend that the defamation claim sufficiently alleges that Defendant falsely stated that
8 Plaintiffs were not paid as a result of their incompetence, mismanagement and dishonesty.
9 Finally, Plaintiffs contend that they have stated a claim for unfair competition because the
10 complaint alleges that Defendant's intentional failure to perform in accordance with the contract
11 placed Plaintiffs at a competitive disadvantage with competitors. Plaintiffs request that any
12 dismissal be with leave to amend.

13 On November 11, 2010, Defendant filed a reply, repeating the same arguments as the
14 motion to dismiss.

15 **LEGAL STANDARD**

16 Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the
17 plaintiff's "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A
18 dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the
19 absence of sufficient facts alleged under a cognizable legal theory. Johnson v. Riverside
20 Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008); Navarro v. Block, 250 F.3d 729, 732 (9th
21 Cir. 2001). In reviewing a complaint under Rule 12(b)(6), all of the complaint's material
22 allegations of fact are taken as true, and the facts are construed in the light most favorable to the
23 non-moving party. Marceau v. Balckfeet Hous. Auth., 540 F.3d 916, 919 (9th Cir. 2008);
24 Vignolo v. Miller, 120 F.3d 1075, 1077 (9th Cir. 1999). The court must also assume that general
25 allegations embrace the necessary, specific facts to support the claim. Smith v. Pac. Prop. and
26 Dev. Corp., 358 F.3d 1097, 1106 (9th Cir. 2004). However, the court is not required "to accept
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1 as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
2 inferences.” In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1056-57 (9th Cir. 2008); Sprewell v.
3 Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Although they may provide the
4 framework of a complaint, legal conclusions are not accepted as true and “[t]hreadbare recitals of
5 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
6 Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009); see also Warren v. Fox Family Worldwide,
7 Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). As the Supreme Court has explained:

8 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
9 detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his
10 ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
11 recitation of the elements of a cause of action will not do. Factual allegations must
12 be enough to raise a right to relief above the speculative level, on the assumption
13 that all the allegations in the complaint are true (even if doubtful in fact).

14 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, “a complaint must contain
15 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
16 Iqbal, 129 S.Ct. at 1949.

17 The plausibility standard is not akin to a ‘probability requirement,’ but it asks
18 more than a sheer possibility that a defendant has acted unlawfully. Where a
19 complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it
20 stops short of the line between possibility and plausibility of ‘entitlement to
21 relief.’

22 . . .
23 Determining whether a complaint states a plausible claim for relief will . . . be a
24 context specific task that requires the reviewing court to draw on its judicial
25 experience and common sense. But where the well-pleaded facts do not permit
26 the court to infer more than the mere possibility of misconduct, the complaint has
27 alleged – but it has not shown – that the pleader is entitled to relief.

28 Id. at 1949-50. “In sum, for a complaint to survive a motion to dismiss, the non-conclusory
‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a
claim entitling the plaintiff to relief.” Moss v. United States Secret Serv., 572 F.3d 962, 969 (9th
Cir. 2009).

ALLEGED FACTS

The complaint alleges that Plaintiffs and Defendant entered into a written agreement on
April 8, 2010. Plaintiffs agreed to solicit applications for Defendant’s Medicare Plans and

1 additionally sell, market and promote the Medicare Plans. Defendant agreed to pay Plaintiffs a
2 set amount for each application it submitted. The written agreement stated that Defendant would
3 provide marketing materials to Plaintiffs and train Plaintiffs' agents regarding the requirements
4 of Medicare Laws and Regulations. The written agreement also provided that if Defendant were
5 to terminate the contract for cause, Defendant was required to provide written notice of the
6 alleged default and provide Plaintiffs with the opportunity to cure the alleged default.

7 The complaint alleges that on December 17, 2009, Defendant breached the contract by
8 immediately terminating the written agreement because of alleged defaults by Plaintiffs. The
9 complaint alleges Defendant failed to provide Plaintiffs with the opportunity to cure the alleged
10 defaults as required by the written agreement. The complaint alleges Defendant committed an
11 additional breach when it failed and refused to pay Plaintiffs for services already provided under
12 the written agreement.

13 The complaint alleges that on December 17, 2009, Defendant committed conversion
14 when it refused and failed to pay Plaintiffs for services already provided under the written
15 agreement. The complaint alleges Defendant also wrongfully converted money owed to
16 Plaintiffs by the United States for Medicaid benefits. The complaint alleges Defendant used the
17 money for its own purpose and benefit and to the detriment of Plaintiffs.

18 The complaint alleges that on December 17, 2009, Defendant, speaking through its agents
19 and representatives, including but not limited to Mr. Glenn Amnott, stated that Plaintiffs were
20 not being paid as a result Plaintiffs' incompetence, mismanagement and dishonesty.¹ The
21 complaint alleges the statement was false and is slanderous per se because it accused Plaintiffs of
22 dishonesty and professional incompetence. The complaint alleges that the words were
23 understood by those that heard them, and because of the statement, Plaintiffs have suffered
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25 ¹ The court notes that Plaintiffs' complaint alleges that the defamation occurred on December 17,
26 2010. The court will assume Plaintiff intended to allege that the defamation occurred on December 17, 2009 in
27 accordance with the rest of the complaint.

1 damages to their reputation.

2 The complaint alleges that Defendant failed to provide Plaintiffs with the educational and
3 promotional support required by the written agreement. Competitors with similar written
4 agreements with Defendant received the required educational and promotional support. The
5 complaint alleges Defendant's failure to act in accordance with the contract placed Plaintiffs at a
6 competitive disadvantage with competitors in violation of California Business & Profession
7 Code § 17200, *et seq.* The complaint alleges Defendant's actions were intentional because of
8 Defendant's dislike for Plaintiff Massad and meant to put Plaintiffs out of business.

9 DISCUSSION

10 A. Conversion

11 In the second cause of action for conversion, Plaintiffs allege that Defendant committed
12 conversion when it failed to pay Plaintiffs for services provided under the written agreement and
13 by taking control of money belonging to Plaintiffs paid by the United States for Medicaid
14 benefits. Plaintiffs allege Defendant used the Medicaid benefits money for its own purpose and
15 benefit, doing so against the interest of Plaintiff and without its permission. Defendant contends
16 Plaintiffs' claim for conversion fails because a contractual right of payment alone cannot give
17 rise to liability for conversion and because Plaintiffs have not identified a specific, identifiable
18 sum of money that was converted.

19 "A conversion occurs where the defendant wrongfully exercises dominion over the
20 property of another." Bank of New York v. Fremont Gen. Corp., 523 F.3d 902, 914 (9th Cir.
21 2008) (citations omitted). "The elements of a conversion are the plaintiff's ownership or right to
22 possession of the property at the time of the conversion; the defendant's conversion by a
23 wrongful act or disposition of property rights; and damages." Plummer v. Day/Eisenberg, LLP,
24 184 Cal. App. 4th 38, 45 (2010) (internal quotation marks and citation omitted).

25 Plaintiffs fail to state a claim for conversion based on Defendant's failure to pay Plaintiffs
26 under the written agreement. A contractual right of payment, without more, cannot establish a
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1 conversion claim. Farmers Ins. Exch. v. Zerín, 53 Cal. App. 4th 445, 452 (1997). For example,
2 in Imperial Valley Land Co. v. Globe Grain & Milling Co., 187 Cal. 352, 353 (1921), tenant
3 entered into a rental agreement with landlord to raise crops, agreeing to pay landlord one-fourth
4 of the crop for rent. After tenant sold the entire crop, landlord filed a claim against tenant for
5 conversion. Id. The Supreme Court of California concluded that plaintiff failed to state a claim
6 for conversion because the rental agreement did not establish landlord's title or lien upon the
7 crop, but only established the measure of damages for breach of contract. Id. at 354-355.

8 In this case, Plaintiffs only allege that Defendant refused and failed to pay Plaintiff for
9 services provided under the written agreement. Plaintiffs have failed to allege that the written
10 agreement with Defendant establishes ownership or the right to possess the money it is owed
11 under the written agreement that would give rise to a conversion claim. Therefore, Plaintiffs
12 have failed to state a claim for conversion based on Defendant's failure to pay Plaintiffs under
13 the written agreement.

14 Plaintiffs also fail to state a claim for conversion based on Defendant taking control of
15 money belonging to Plaintiffs. Plaintiffs have failed to allege that they had ownership or the
16 right to possess the Medicaid benefits at the time of conversion. Furthermore, a "generalized
17 claim for money [is] not actionable as conversion." Vu v. California Commerce Club, Inc., 58
18 Cal. App. 4th 229, 235 (1997). A conversion claim involving money requires there be a
19 "specific, identifiable sum involved" and the amount of money be "readily ascertainable." PCO,
20 Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal. App. 4th 384,
21 395-96 (2007). Plaintiffs have failed to allege the amount of money involved or any specifics
22 regarding the money converted other than the fact the money was Medicaid benefits.

23 Accordingly, Defendant's motion to dismiss Plaintiffs' second cause of action for
24 conversion is granted without prejudice.

25 B. Defamation

26 In the third cause of action for defamation, Plaintiffs allege Defendant falsely stated that
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1 Plaintiffs were not being paid as a result their incompetence, mismanagement and dishonesty.
2 Plaintiffs allege the statement was understood by those that heard it and that the statement
3 constitutes slander per se because it accused Plaintiffs of dishonesty and professional
4 incompetence. Defendant contends Plaintiffs’ defamation claim fails because the allegations are
5 conclusory and do not allege what specifically was said and to whom and therefore does not meet
6 the stringent pleading standard for defamation.

7 Slander is a form of defamation. Cal. Civ. Code § 44. California Civil Code § 46(3)
8 provides:

9 Slander is a false and unprivileged publication, orally uttered . . . which:
10

11 3. Tends directly to injure him in respect to his office, profession, trade or business, either
12 by imputing to him general disqualification in those respects which the office or other
13 occupation peculiarly requires, or by imputing something with reference to his office,
14 profession, trade, or business that has a natural tendency to lessen its profits[.]

15 A slander claim under section 46(3) is slander per se and requires no proof of actual damages.
16 Mann v. Quality Old Time Serv., Inc., 120 Cal. App. 4th 90, 107 (2004). Most cases involving
17 section 46(3) “involve statements that reflect on the integrity and competence of the plaintiff, the
18 clearest being allegations of unethical activity or incompetence.” Regalia v. Nethercutt
19 Collection, 172 Cal. App. 4th 361, 369 (2009) (citation omitted). The “disparagement must be
20 more than general defamation of the victim’s character, it must go to a characteristic particularly
21 relevant to the victim’s occupation.” Id. (citation omitted.) “[I]t is not sufficient that the words
22 be merely injurious to one whatever his pursuit, but they must prejudice him in the special
23 profession or business in which he is actually engaged.” Correia v. Santos, 191 Cal. App. 2d
24 844, 853 (1961) (internal quotation marks omitted).

25 As a preliminary matter, Defendant contends that a particularized pleading standard
26 applies to defamation claims. Defendant cites to Jones v. Thyssenkrupp Elevator Corp., No.
27 C-05-3539 EMC, 2006 WL 680553, at *6 (N.D. Cal. March 14, 2006), which stated that the
28 “standard for pleading defamation is more stringent than that applicable to most other substantive

1 claims because of the historically disfavored nature of this type of action.” However, the
2 heightened pleading standard of Federal Rule of Civil Procedure 9(b) only applies to “allegations
3 of fraud or mistake” and not defamation. Therefore, Federal Rule of Civil Procedure 8(a)(2)
4 applies to Plaintiffs’ defamation claim, which states a complaint must contain a “short and plain
5 statement of the claim showing that the pleader is entitled to relief.” Rule 8(a)(2) requires only
6 that Plaintiffs allege facts sufficient to state a “plausible claim for relief.” Iqbal, 129 S. Ct. at
7 1950.

8 Defendant contends that Plaintiffs’ allegations are insufficient to state a claim for
9 defamation because they do not specify the content of what was allegedly said. “Under
10 California law, although a plaintiff need not plead the allegedly defamatory statement verbatim,
11 the allegedly defamatory statement must be specifically identified, and the plaintiff must plead
12 the substance of the statement.” Jacobson v. Schwarzenegger, 357 F. Supp. 2d 1198, 1216 (C.D.
13 Cal. 2004); see also Okun v. Superior Court, 29 Cal. 3d 442, 458 (1981).

14 For example, in Goodrick v. Hertz Equipment Rental Corp., No. A126741, 2010 WL
15 4113812, at *1 (Cal. Ct. App. October 20, 2010), plaintiff filed a claim against defendant for
16 defamation, alleging defendant falsely stated to customers that plaintiff was fired from his branch
17 manager position “in connection with missing equipment” from the store. The court held that the
18 statement impugned plaintiff’s business reputation and constituted slander per se under section
19 46(3). Id. at *10. The court emphasized that the statement tended to directly injure plaintiff with
20 respect to his profession because it conveyed a lack of competence to perform his duties as
21 branch manager. Id.

22 Plaintiffs state a plausible slander per se claim under section 46(3). Plaintiffs have
23 alleged that Defendant made an oral, false publication, to a third party when Defendant falsely
24 stated that Plaintiffs were not paid as a result of Plaintiffs’ incompetence, mismanagement and
25 dishonesty. Similar to Goodrick, Defendant’s alleged statement impugns Plaintiffs’ business
26 reputation because it directly reflects on Plaintiffs’ integrity and lack of competence to perform
27

1 its duties in the insurance marketing business.

2 Accordingly, Defendant's motion to dismiss Plaintiffs' third cause of action for
3 defamation is denied.

4 C. Unfair Competition

5 In Plaintiffs' fourth cause of action for unfair competition, Plaintiffs allege Defendant
6 intentionally failed to provide the educational and promotional support required by their written
7 agreement. Plaintiffs allege that competitors entered into similar contracts with Defendant and
8 were provided the required educational and promotion support. Plaintiffs allege that Defendant's
9 actions placed them at a competitive disadvantage with competitors and were meant to put
10 Plaintiffs out of business. Defendant contends Plaintiffs' unfair competition claim fails because
11 a breach of contract alone is insufficient to give rise to liability under section 17200.

12 The purpose of California's unfair competition law ("UCL") "is to protect both
13 consumers and competitors by promoting fair competition in commercial markets for goods and
14 services." Kasky v. Nike, Inc., 27 Cal. 4th 939, 949 (2002). The UCL prohibits "any unlawful,
15 unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "Because [the
16 UCL] is written in the disjunctive, it establishes three varieties of unfair competition-acts or
17 practices which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as
18 unfair or deceptive even if not unlawful and vice versa." Cel-Tech Commc'ns, Inc. v. Los
19 Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999) (internal quotation marks and citations
20 omitted).

21 An action based on an "unlawful" business act occurs when there is a violation of almost
22 any federal, state or local law. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39 (1994).
23 An "unfair" business act under the UCL is "conduct that threatens an incipient violation of anti-
24 trust law, or violates the policy or spirit of one of those laws because its effects are comparable to
25 or the same as a violation of the law, or otherwise significantly threatens or harms competition."
26 Cel-Tech Commc'ns, 20 Cal. 4th at 187. A "fraudulent" business act under the UCL occurs

1 when “members of the public are likely to be deceived.” Kasky, 27 Cal. 4th at 951. A breach of
2 contract may violate the UCL if the breach “also constitutes conduct that is unlawful, unfair, or
3 fraudulent.” Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1152 (9th Cir. 2008)
4 (citation omitted).

5 It is unclear from Plaintiffs’ complaint whether they are filing a UCL claim based on an
6 unlawful, unfair or fraudulent business act. However, Plaintiffs fail to state a claim under all
7 three varieties. Plaintiffs fail to state a claim for an unlawful business act because they have not
8 alleged that Defendant’s breach of contract violates any other law. Plaintiffs fail to state a claim
9 for an unfair business act because they have not alleged that Defendant’s breach of contract
10 violates an anti-trust law, violates the policy or spirit of one of those anti-trust laws, or otherwise
11 significantly threatens or harms competition. The court notes that Plaintiffs allege that
12 Defendant’s breach of contract harmed *Plaintiffs* by placing them at a competitive disadvantage
13 with other competitors. However, “[i]njury to a competitor is not equivalent to injury to
14 competition; only the latter is the proper focus of antitrust laws.” Cel-Tech, 20 Cal. 4th at 186.
15 Finally, Plaintiffs fail to state a claim for a fraudulent business act because they have not alleged
16 that because of Defendant’s breach of contract members of the public are likely to be deceived.

17 In addition, Defendant is correct that Plaintiffs fail to allege an available remedy under
18 the UCL. Plaintiffs seek damages against Defendant for its alleged violation of the UCL.
19 However, a “UCL action is equitable in nature; damages cannot be recovered.” Korea Supply
20 Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144 (2003). Under the UCL, “[p]revailing
21 plaintiffs are generally limited to injunctive relief and restitution.” Cel-Tech, 20 Cal. 4th at 179.
22 Therefore, the court instructs Plaintiffs that any amendment to its fourth cause of action must
23 include an available remedy under the UCL.

24 Accordingly, Defendant’s motion to dismiss Plaintiffs’ fourth cause of action for unfair
25 competition is granted without prejudice.

26 D. Leave To Amend Plaintiffs’ Second And Fourth Causes of Action
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1 Plaintiffs request that any dismissal from the court be with leave to amend. "If a
2 complaint is dismissed for failure to state a claim, leave to amend should be granted unless the
3 court determines that the allegation of other facts consistent with the challenged pleading could
4 not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806
5 F.2d 1393, 1401 (9th Cir.1986). Although the court will allow Plaintiffs to file an amended
6 complaint to cure the deficiencies of its second and fourth causes of action for conversion and
7 unfair competition, Plaintiffs are advised that any amended complaint that includes these claims
8 must be based upon a well-founded belief that a cognizable or arguable legal theory exists that
9 would support such a theory. See Fed. R. Civ. P. 11 (allowing sanctions to be awarded when
10 litigant asserts frivolous legal theory); Les Shockley Racing Inc. v. Nat'l Hot Rod Ass'n, 884
11 F.2d 504, 510 (9th Cir. 1989) (defining legal argument as frivolous if "at time of filing, a
12 competent attorney after a reasonable investigation could not have determined that a
13 well-founded basis in fact and in law or a good faith argument for extension of law supported the
14 filing").

15 **ORDER**

16 Accordingly, the court ORDERS that:

- 17 1. Defendant's motion to dismiss Plaintiffs' second cause of action for conversion is
18 GRANTED without prejudice and with leave to amend;
- 19 2. Defendant's motion to dismiss Plaintiffs' third cause of action for defamation is
20 DENIED.
- 21 3. Defendant's motion to dismiss Plaintiffs' fourth cause of action for unfair
22 competition is GRANTED without prejudice and with leave to amend;
- 23 4. Plaintiffs have thirty days to file an amended complaint.

24 IT IS SO ORDERED.

25 Dated: December 20, 2010

26 
CHIEF UNITED STATES DISTRICT JUDGE