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

PASSPORT HEALTH, INC., )  
 )  
Plaintiff, ) 2:09-cv-01753-GEB-JFM  
 )  
v. ) ORDER\*  
 )  
TRAVEL MED, INC. and GINA FLAHARTY, )  
 )  
Defendants. )  
\_\_\_\_\_ )

On September 28, 2009, Plaintiff and Counter-Claim Defendant Passport Health, Inc. ("Passport") filed a motion under Federal Rules of Civil Procedure 8(a)(2) and 12(b)(6) to dismiss Defendants Travel Med, Inc. ("Travel Med") and Gina Flaharty's (together, the "Counter-Claimants") counterclaim. (Docket No. 17.) For the reasons stated below, Passport's motion to dismiss is GRANTED.

I. Legal Standard

"Under Federal Rule of Civil Procedure 8(a)(2) ["Rule 8"], a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief." Ascroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quotations omitted). "[T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a

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\* This matter is deemed to be suitable for decision without oral argument. E.D. Cal. R. 78-230(h).

1 formulaic recitation of the elements of a cause of action will not do.  
2 Nor does a complaint suffice [under Rule 8] if it tenders naked  
3 assertions devoid of further factual enhancement." Id. (quotations  
4 and citations omitted).

5 To avoid dismissal under Federal Rule of Civil Procedure  
6 12(b)(6) ("Rule 12(b)(6)"), the Counter-Claimants must aver in their  
7 counterclaim "sufficient factual matter, accepted as true, to state a  
8 claim to relief that is plausible on its face." al-Kidd v. Ashcroft,  
9 580 F.3d 949, 956 (9th Cir. 2009) (quotations omitted). "A  
10 [counterclaim] has facial plausibility when the [counter-claimant]  
11 pleads factual content that allows the court to draw the reasonable  
12 inference that the [counterclaim defendant] is liable for the  
13 misconduct alleged." Iqbal, 129 S. Ct. at 1949. "Where a [counter-  
14 claimant] pleads facts that are merely consistent with a  
15 [counterclaim] defendant's liability, it stops short of the line  
16 between possibility and plausibility of entitlement to relief." Id.  
17 (quotations omitted).

## 18 II. Background

19 Passport is a Maryland corporation. (Countercl. ¶ 1  
20 (incorporating by reference ¶¶ 1-3 of the amended complaint).)  
21 Flaharty is the president of Travel Med, a California corporation.  
22 (Id.)

23 On or about July 27, 2007, the Counter-Claimants entered into a  
24 written agreement (the "Franchise Agreement") with Passport in which  
25 the Counter-Claimants agreed to operate a Passport franchise.  
26 (Countercl. ¶ 3.)

27 On June 25, 2009, Passport filed a complaint against the Counter-  
28 Claimants, alleging that they breached the Franchise Agreement and

1 violated the Lanham Act. On September 8, 2009, Travel Med and  
2 Flaharty filed a counterclaim against Passport, alleging claims of  
3 breach of the Franchise Agreement, breach of the implied covenant of  
4 good faith and fair dealing, breach of fiduciary duty, intentional  
5 interference with prospective business advantage, trade libel and a  
6 violation of California's Business & Professions Code § 17200 *et seq.*  
7 ("Section 17200"). (Docket No. 14.)

8 Passport's complaint includes a copy of the Franchise Agreement  
9 as an exhibit. This Franchise Agreement is incorporated into the  
10 counterclaim by reference. (Countercl. ¶ 3.) Therefore, the Franchise  
11 Agreement may be considered without converting this dismissal motion  
12 into a motion for summary judgment. See *Venture Associates Corp. v.*  
13 *Zenith Data Systems Corp.*, 987 F.2d 429, 431 (9th Cir. 1993) (stating  
14 that "[d]ocuments . . . attache[d] to a motion to dismiss are  
15 considered part of the pleadings if they are referred to in the  
16 plaintiff's complaint and are central to her claim."); *Rose v. Chase*  
17 *Manhattan Bank USA*, 396 F.Supp.2d 1116, 1119 (C.D. Cal. 2005) ("When a  
18 party submits an indisputably authentic copy of a document, and the  
19 document is referred to in the complaint, the Court does not have to  
20 convert the motion into a summary judgment motion.")

### 21 III. Discussion

#### 22 A. Breach of the Franchise Agreement

23 Counter-Claimants' first claim alleges breach of the Franchise  
24 Agreement. (Countercl. ¶¶ 7-11.) Passport argues Counter-Claimants  
25 have failed to state a claim for breach of the Franchise Agreement  
26 since "the Franchise Agreement places no affirmative obligations on  
27 Passport . . . to 'supervise' Travel Med as it operates its business."  
28 (Mot. to Dismiss 4:1-2.) Counter-Claimants respond that "[p]ursuant

1 to Section 7 of the Franchise Agreement, Passport . . . was obligated  
2 to provide supervision and support to [Counter-Claimants] in their  
3 operation of the [Passport] franchise.” (Opp’n. 6:3-4.)

4 In the counterclaim, Counter-Claimants allege that under Section  
5 7 of the Franchise Agreement, Passport “was obligated to provide  
6 supervision and support to [Counter]-Claimants in their operation of  
7 the [Passport] franchise” and “[Passport] breached the Franchise  
8 Agreement by, among other things, failing to provide supervision and  
9 support. . . .” (Countercl. ¶¶ 4, 10.) Counter-Claimants further  
10 plead that “[a]lmost immediately after executing the Franchise  
11 Agreement, [the Counter-Claimants] notice[d] several flaws in  
12 [Passport’s] franchise system . . . . [In the] few months after the  
13 Franchise Agreement was executed, Counter-Claimants identified and  
14 presented several flaws in the franchise business model to [Passport].  
15 [Passport] either responded that Counter-Claimants would ‘get used to’  
16 the flaws, or learn to ‘deal’ with the errors in the [Passport] plan.  
17 At no time did [Passport] correct or address the identified flaws and  
18 problems even though [Passport] was obligated to do so pursuant to the  
19 Franchise Agreement.” (Id. ¶ 5.)

20 Counter-Claimants, however, have not cited to a specific  
21 provision or language in the Franchise Agreement that supports their  
22 allegation. Section 7 of the Franchise Agreement is over two pages  
23 long and includes fourteen subsections, yet none require Passport to  
24 provide “supervision and support” to Counter-Claimants or impose an  
25 obligation on Passport to “correct or address” flaws in the franchise  
26 system identified by Counter-Claimants. Therefore, “[e]ven if the  
27 [Counter-Claimants’] allegations are true, they are not breaches of  
28 any provision in the [Franchise Agreement].” Gibson v. Office of the

1 Attorney Gen., 561 F.3d 920, 929 (9th Cir. 2009). Accordingly,  
2 Counter-Claimants' first claim for breach of the Franchise Agreement  
3 does not state sufficient factual matter to withstand Passport's  
4 motion and is dismissed.

5 B. Breach of the Implied Covenant of Good Faith and Fair Dealing

6 Passport argues Counter-Claimants' second claim for breach of the  
7 implied covenant of good faith and fair dealing should also be  
8 dismissed since Counter-Claimants do not allege that Passport lacked  
9 subjective good faith or that Passport took acts to frustrate the  
10 common purpose of the Franchise Agreement. (Mot. to Dismiss 4-5;  
11 Reply 3.) Counter-Claimants rejoin they have alleged sufficient  
12 "facts to show that [Passport] has acted in a way to frustrate Travel  
13 Med's rights and to deny Travel Med the benefits of the Franchise  
14 Agreement." (Opp'n. 8-9.)

15 In their counterclaim, Counter-Claimants plead Passport "breached  
16 the implied covenant of good faith and fair dealing by, among other  
17 things, refusing and failing to respond to [the] Counter-Claimant's  
18 specific concerns related to the [Passport] franchise business and by  
19 interfering with [the] Counter-Claimants relationships with suppliers  
20 and customers." (Countercl. ¶ 14.)

21 Under California law, in "every contract there is an implied  
22 covenant that neither party shall do anything which will have the  
23 effect of destroying or injuring the right of the other party to  
24 receive the fruits of the contract." Locke v. Warner Bros., Inc., 57  
25 Cal.App.4th 354, 363 (1997) (quotations omitted). "[T]he covenant is  
26 implied as a *supplement* to the express contractual covenants, to  
27 protect a contracting party from engaging in conduct which (while not  
28 technically transgressing the express covenants) frustrates the other

1 party's rights to the benefits of the contract." Racine v. Laramie,  
2 Ltd. v. Department of Parks & Recreation, 11 Cal.App.4th 1026, 1031-32  
3 (1992). However, "the implied covenant of good faith and fair dealing  
4 cannot impose substantive duties or limits on the contracting parties  
5 beyond those incorporated in the specific terms of their agreement."  
6 Spiegler v. Home Depot U.S.A., Inc., 552 F.Supp.2d 1036, 1054 (C.D.  
7 Cal. 2008). Finding "[i]mplied covenants [is] justified only when  
8 they are not inconsistent with some express term of the contract, and  
9 in the absence of such implied terms, the contract could not be  
10 effectively performed." Id.

11 The Franchise Agreement clearly outlines the "standards,  
12 policies, and procedures" Counter-Claimants were to follow in  
13 operating a franchise and the "guidance and assistance" Passport would  
14 provide at its discretion. (Compl., Ex. A.) Under the Franchise  
15 Agreement, Passport was under no obligation to "respond to Counter-  
16 Claimant's specific concerns" related to the Passport franchise model.  
17 Reading such a requirement into the Franchise Agreement is not  
18 necessary for the contract to be effectively performed as written and  
19 would be inconsistent with the express terms of the parties'  
20 agreement. Moreover, Counter-Claimants' bare assertion that Passport  
21 "interfer[ed] with Counter-Claimants' relationships with suppliers and  
22 customers," is a "naked assertion[] devoid of further factual  
23 enhancement" sufficient to state a claim for breach of the implied  
24 covenant of good faith and fair dealing. Iqbal, 129 S. Ct. at 1949.  
25 Accordingly, Counter-Claimants' second cause of action for breach of  
26 the implied covenant of good faith and fair dealing fails to state a  
27 claim and is dismissed.

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1 C. Breach of Fiduciary Duty

2 Passport further argues Counter-Claimants' third cause of action  
3 for breach of fiduciary duty should be dismissed since Counter-  
4 Claimants have not pled that there was a fiduciary relationship and no  
5 fiduciary relationship existed between the parties. (Mot. to Dismiss  
6 5-6; Reply 3-4.) Counter-Claimants rejoin a "special relationship  
7 existed between [Passport] and Travel Med such that [Passport] owed a  
8 fiduciary duty to Travel Med."

9 The Counter-Claimants' plead Passport owed them a duty of loyalty  
10 and a duty of care and breached these duties by, "providing Counter-  
11 Claimants with inaccurate software[,] . . . refusing to correct  
12 errors identified by Counter-Claimants" and by "failing to disclose  
13 hidden mark ups and profits in [Passport's] group purchase  
14 organization." (Countercl. ¶¶ 17-19.)

15 Under California law, a "fiduciary relationship is created where  
16 a person reposes trust and confidence in another and the person in  
17 whom such confidence is reposed obtains control over the other  
18 person's affairs." Recorded Picture Co. v. Nelson Entertainment,  
19 Inc., 53 Cal.App.4th 350, 370 (1997) (quotations omitted). However,  
20 under California law, a "fiduciary relationship is not created by a  
21 franchisor-franchisee relationship." Strawflower Electronics, Inc. v.  
22 RadioShack Corp., 2005 WL 2290314, at \*4 n.2 (N.D. Cal. Sept. 20,  
23 2005); see also Boat & Motor Mart v. Sea Ray Boats, Inc., 825 F.2d  
24 1285, 1292 (9th Cir. 1987) (holding that under California law, "[t]he  
25 relation between a franchisor and a franchisee is not that of a  
26 fiduciary to a beneficiary."); In re Sizzler Restaurants  
27 International, Inc., 225 B.R. 466, 473 n.3 (Bankr. C.D. Cal.

1 1998) (stating "as a matter of California law, a franchisor does not  
2 owe a franchisee any fiduciary duties.").

3 Since no fiduciary relationship existed between Passport and the  
4 Counter-Claimants by virtue of the Franchise Agreement, the Counter-  
5 Claimants may not state a claim for breach of fiduciary duty as a  
6 matter of law. Therefore, Counter-Claimants' third claim for breach  
7 of fiduciary duty is not actionable under California law and is  
8 dismissed with prejudice.

9 D. Intentional Interference with Prospective Business Advantage

10 Passport also seeks dismissal of Counter-Claimants' fourth cause  
11 of action for intentional interference with prospective business  
12 advantage, arguing the claim lacks sufficient factual allegations to  
13 state a viable claim. (Mot. to Dismiss 6-7, Reply 5.)

14 Under this claim, Counter-Claimants plead "there was an existing  
15 economic relationship between Counter-Claimants and potential  
16 customers"; "[Passport] knew of the relationship between [the]  
17 Counter-Claimants and the specific potential customers"; "[Passport]  
18 committed intentional acts designed to interfere with the relationship  
19 between Counter-Claimants and their potential customers" by telling  
20 the potential customers that "Counter-Claimants were 'incapable of  
21 performing nationwide services' for them"; "[t]he relationship between  
22 Counter-Claimants and their potential customers was actually  
23 interrupted"; and "[a]s a direct and proximate cause of [Passport's]  
24 interference, [the] Counter-Claimants have suffered damages in an  
25 amount unknown at this time, but subject to proof at trial."

26 (Countercl. ¶¶ 22-26.)

27 Under California law, the elements of a claim for intentional  
28 interference with prospective business advantage are: "(1) an economic



1 relationship exists between the plaintiff and some third party, with  
2 the probability of future economic benefit to the plaintiff; (2) the  
3 defendant's knowledge of the relationship; (3) intentional acts on the  
4 part of the defendant designed to disrupt the relationship; (4) actual  
5 disruption of the relationship; and (5) economic harm to the plaintiff  
6 proximately caused by the acts of the defendant." Korea Supply Co. v.  
7 Lockheed Martin Corp., 29 Cal.4th 1134, 1153 (2003). To satisfy the  
8 third element, "a plaintiff must plead . . . that the defendant's acts  
9 are wrongful apart from the interference itself." Id. at 1154.

10 Counter-Claimants' claim for intentional interference with  
11 prospective business advantage does not satisfy the requirements of  
12 Rule 8 since it merely restates the elements of the cause of action.  
13 "[A] formulaic recitation of the elements of a cause of action will  
14 not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

15 Counter-Claimants have also failed to state a claim under Rule  
16 12(b)(6) since they have not sufficiently pled that an economic  
17 relationship existed between themselves and a "third-party" with the  
18 probability of future economic benefit. "Allegations that amount to a  
19 mere hope for an economic relationship and a desire for future benefit  
20 are inadequate to satisfy the pleading requirements of the first  
21 element of the tort." Google Inc. v. American Blind & Wallpaper  
22 Factory, Inc., 2005 WL 832398, at \*8 (N.D. Cal. Mar. 30,  
23 2005) (dismissing claim for intentional interference with prospective  
24 business advantage because relationship with "repeat customers" was  
25 too speculative and did not "rise to the level of the requisite  
26 promise of future economic advantage") (quotations omitted). Counter-  
27 Claimants mere assertion that an economic relationship exists with  
28 "potential customers" is insufficient to state a claim. See id; see

1 also Roth v. Rhodes, 25 Cal.App.4th 530, 546 (1994) (affirming judgment  
2 on the pleadings on intentional interference with prospective business  
3 advantage claim when plaintiff's claim was predicated on alleged  
4 interference with relationship with "future patients"). Counter-  
5 Claimants have also failed to plead that Passport's alleged  
6 interference was otherwise wrongful, as required by the third-element  
7 of the tort. Accordingly, Counter-Claimants' fourth claim for  
8 intentional interference with prospective business advantage fails to  
9 state a claim and is dismissed.

10 E. Trade Libel

11 Passport also seeks dismissal of Counter-Claimants' fifth cause  
12 of action in which trade libel is alleged, arguing that the Counter-  
13 Claimants' "conclusory allegations [in that claim] are not entitled to  
14 a presumption of truth and cannot state a claim" since Counter-  
15 Claimants have failed to sufficiently plead that they have suffered  
16 economic damages as a result of the alleged statements of trade libel.  
17 (Mot. to Dismiss 7; Reply 5-6.)

18 Counter-Claimants allege in this claim that "[i]n or about June  
19 2009 and July 2009, [Passport] published untrue facts regarding  
20 [Travel Med]" and that "[w]hen [Passport] published these untrue  
21 facts, [Passport] knew they were false, or published them with  
22 reckless disregard for the truth of the facts." (Countercl. ¶¶ 27-  
23 28.) "Among the un[true] facts published by [Passport] are 'Travel  
24 Med Inc. cannot perform nation wide services,' and 'Travel Med Inc. is  
25 using [Passport's] materials' and 'Travel Med Inc. is in trouble.'"  
26 (Id. ¶ 31.)

27 "Trade libel is the publication of matter disparaging the quality  
28 of another's property, which the publisher should recognize is likely

1 to cause pecuniary loss to the owner. The tort encompasses all false  
2 statements concerning the quality of services or product of a business  
3 which are intended to cause that business financial harm and in fact  
4 do so. To constitute trade libel, a statement must be false.”  
5 ComputerXpress, Inc. v. Jackson, 93 Cal.App.4th 993, 1010  
6 (2001) (quotations and citations omitted). “Since mere opinions cannot  
7 by definition be false statements of fact, opinions will not support a  
8 cause of action for trade libel.” Id. at 1010-11.

9 Stating a “cause of action for trade libel thus requires: (1)  
10 publication, (2) which induces others not to deal with plaintiff, and  
11 (3) special damages.” Aetna Cas. and Sur. Co., Inc. v. Centennial  
12 Ins. Co., 838 F.2d 346, 351 (9th Cir. 1998). To satisfy the third-  
13 element, the pleader must “allege special damages specifically, by  
14 identifying customers or transactions lost as a result of [the]  
15 disparagement . . . . The plaintiff in a trade libel case thus may  
16 not rely on a general decline in business arising from the falsehood,  
17 and must instead identify particular customers and transactions of  
18 which it was deprived as a result of the [alleged trade] libel.”  
19 Eagle Broadband, Inc. v. Mould, 2007 WL 4358515 (Cal. Ct. App. Dec.  
20 14, 2007) (quotations and citations omitted).

21 Counter-Claimants have not demonstrated that the statements  
22 giving rise to their trade libel claim are false or not mere  
23 statements of opinion. Moreover, Counter-Claimants’ bare allegation  
24 that they “have suffered damages in an amount unknown at this time” is  
25 insufficient to satisfy the pleading requirements for the element of  
26 special damages in a trade libel claim. Therefore, Counter-Claimants  
27 trade libel claim fails to state a claim and is dismissed.

28 ///

1 F. Unfair Business Practices Under Section 17200

2 Passport also seeks dismissal of Counter-Claimants' Section 17200  
3 claim, arguing that it "fails because [Counter-Claimants] do not have  
4 standing to assert the claim." Passport contends a Section 17200  
5 claim "may only be asserted by a person who has suffered [an] *injury*  
6 *in fact* and has actually lost money or property as a result of [the  
7 alleged acts constituting] unfair competition." (Mot. to Dismiss 8:7-  
8 10) (emphasis in original). Counter-Claimants rejoin the amount of  
9 damages suffered is currently unknown and is to be revealed through  
10 discovery. (Opp'n. 11.)

11 Under this claim, Counter-Claimants plead Passport's acts  
12 "constitute unfair business practices" in violation of Section 17200.  
13 (Countercl. ¶¶ 34, 33-36.) Specifically, Counter-Claimants allege  
14 "[Passport's] actions of selling . . . franchises while advertising  
15 that [Passport] will provide supervision and support to its new  
16 franchisees, all the while knowing that its Passageware software  
17 contained severe and dangerous inaccuracies and flaws constitutes acts  
18 that would likely deceive the general public. Further, [Passport's]  
19 act of publishing untrue statements of Travel Med Inc's ability to  
20 perform national contracts constitutes an unfair business practice  
21 because the general public is likely to be deceived by [Passport's]  
22 untrue statements. Also, [Passport's] forgery of documents related to  
23 Counter-Claimants relationship with a supplier is likely to deceive  
24 the public because [Passport] presented the forged document as a  
25 truthful, accurate and lawful document." (Id. ¶ 35.)

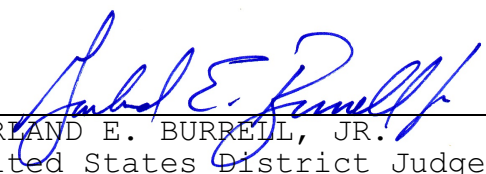
26 "[A] plaintiff suffers an injury in fact for purposes of standing  
27 under [Section 17200] when he or she has: (1) expended money due to  
28 the defendant's acts of unfair competition; (2) lost money or

1 property; or (3) been denied money to which he or she has a cognizable  
2 claim." Hall v. Time Inc., 158 Cal.App.4th 847, 854 (2008) (quotations  
3 and citations omitted). Counter-claimants' assertion that they "have  
4 suffered damages in an amount unknown at this time" as a result of  
5 Passport's alleged unfair business practices, does not fall into any  
6 of the definitions outlined in Hall. Counter-Claimants, therefore,  
7 have not pled facts demonstrating they have suffered an injury in fact  
8 from Passport's alleged unfair business practices. Accordingly,  
9 Counter-Claimants have not alleged "enough facts to state a claim to  
10 relief that . . . is plausible on its face." Chavez v. Blue Sky  
11 Natural Beverage Co., 2009 WL 1956225, at \*3 (9th Cir. June 23,  
12 2009) (holding that complaint, which alleged plaintiff had personally  
13 lost the purchase price of beverages he purchased, was sufficient to  
14 state an injury in fact) (quotations omitted). Since Counter-  
15 Claimants' sixth cause of action fails to state sufficient facts to  
16 withstand Passport's dismissal motion, this claim is dismissed.

17 IV. Conclusion

18 For the reasons stated above, Passport's motion to dismiss  
19 Counter-Claimants' counterclaim is GRANTED and the counterclaim is  
20 dismissed. However, Counter-Claimants are granted ten (10) days from  
21 the date on which this order is filed within which to file an amended  
22 counterclaim curing any deficiencies in a claim addressed above that  
23 is not dismissed with prejudice.

24 Dated: November 13, 2009

25  
26   
27 GARLAND E. BURRELL, JR.  
28 United States District Judge