

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

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

PASSPORT HEALTH, INC., a Maryland)
corporation,)
)
Plaintiff,)
)
v.)
)
TRAVEL MED, INC., a California)
corporation and GINA FLAHARTY an)
individual and citizen of the State)
of California,)
)
Defendants.)

2:09-CV-01753-GEB-JFM

ORDER GRANTING AND DENYING IN
PART COUNTER-CLAIM DEFENDANT'S
MOTION TO DISMISS
COUNTER-CLAIMANTS' AMENDED
COUNTERCLAIM*

TRAVEL MED, INC., a California)
corporation and GINA FLAHARTY an)
individual and citizen of the State)
of California,)
)
Counter-Claimants,)
v.)
)
PASSPORT HEALTH, INC., a Maryland)
corporation,)
)
Counter-Claim)
Defendants.)

Plaintiff and Counter-Claim Defendant, Passport Health, Inc. ("Passport"), filed a motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss Defendants Travel Med, Inc. ("TMI") and Gina Flaharty's (collectively, the "Counter-Claimants") amended counterclaim. A previous order, filed on November 16, 2009, granted

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

1 Passport's motion to dismiss the Counter-Claimants' original
2 counterclaim. Counter-Claimants, however, filed an amended
3 counterclaim on November 26, 2009. Passport argues the claims alleged
4 in the amended counterclaim remain deficient and should be dismissed.
5 For the reasons stated below, Passport's motion to dismiss is GRANTED
6 AND DENIED IN PART.

7 I. DISCUSSION¹

8 A. Breach of the Franchise Agreement

9 Passport argues Counter-Claimants' first claim for breach of
10 the Franchise Agreement (the "Agreement") should be dismissed since
11 Counter-Claimants' allegations, even if true, do not constitute
12 breaches of the Agreement.² Counter-Claimants argue the amended
13 counterclaim specifies the sections of the Franchise Agreement that
14 Passport allegedly breached and Passport's conduct giving rise to
15 their claims of breach. (Opp'n 3:17-20.)

16 Under California law, "[a] cause of action for breach of
17 contract requires pleading of a contract, plaintiff's performance or
18 excuse for failure to perform, defendant's breach and damage to
19 plaintiff resulting therefrom." McKell v. Washington Mut., Inc., 142
20 Cal. App. 4th 1457, 1489 (2006) (citation omitted). Counter-Claimants
21 allege "TMI has performed all contractual obligations pursuant to the
22 Franchise Agreement except those obligations excused by [Passport's]
23 breach of the Franchise Agreement." (Amended Countercl. ¶ 51.)

24
25 ¹ The applicable legal standard and background can be found in the
26 court's previous order. See Passport Health, Inc. v. Travel Med, Inc.,
No. 2:09-cv-01753-GEB-JFM, 2009 WL 3824743 (E.D. Cal. Nov. 16, 2009).

27 ² As noted in the previous order, the Franchise Agreement is
28 attached to Passport's amended complaint and is incorporated into the
amended counterclaim by reference. (Amended Countercl. ¶ 3.)

1 Counter-Claimants further allege that Passport breached Sections 2(a),
2 7(b), 7(g), 7(j), 9(a) and 9(b) of the Agreement. (Id. ¶¶ 55, 60, 63,
3 66, 69, 72, 75, 78, 81, 85, 88, 91, 94.)

4 **1. Section 2(a)**

5 Section 2(a) of the Agreement states: "Subject to the terms
6 and provisions of this Agreement, [Passport] grant[s] [TMI] the right
7 (a) to use the System to operate the Franchised Business at and from
8 the Franchise Sites" The "System" refers to "[t]he
9 confidential, proprietary system relating to the operation of health
10 travel businesses[,] . . . developed and . . . owned by [Passport] . .
11 . . ."

12 Counter-Claimants allege Passport breached Section 2(a) of
13 the Agreement "by failing to provide 'the System' to TMI . . . [and]
14 by not providing any distinctive and unique training, marketing,
15 management methods, procedures and materials to TMI." (Amended
16 Countercl. ¶ 55.) This allegation, however, fails to allege a breach
17 of Section 2(a). Through Section 2(a), Passport only "grant[ed] [TMI]
18 the right . . . to use the System"; Section 2(a) imposes no obligation
19 on Passport to provide the System nor to provide any training,
20 marketing, or other materials to Counter-Claimants. Therefore, even
21 if Counter-Claimants' allegations are true, they have failed to allege
22 a breach of the Agreement.

23 **2. Section 7(b)**

24 Counter-Claimants also allege Passport violated various
25 provisions of Section 7(b) of the Agreement. Section 7(b) provides,
26 in pertinent part:

27 [Passport] shall furnish to [TMI] such guidance
28 and assistance as [Passport] believe[s]
appropriate, related to the following:

- 1 (i) advice and written materials concerning
- 2 methods, standards, and operating procedures
- 3 that [TMI] should be using in the operation
- 4 of [TMI's] Franchised Business as such are
- 5 developed by [Passport] from time to time,
- 6 including new developments and improvements
- 7 in product marketing and delivery of
- 8 services;
- 9 (ii) methods, standards, and operating procedures
- 10 for [TMI] to follow in purchasing and selling
- 11 approved goods and services, as such are
- 12 developed and modified by [Passport] from
- 13 time to time;
- 14 (iii) negotiation of supplier arrangements on
- 15 behalf of the Passport Health system and
- 16 franchisees conducting business thereunder,
- 17 including system-wide discounts where
- 18 available, and a list of approved suppliers
- 19 from whom [TMI] may purchase; . . .
- 20 (v) formulation and implementation of advertising
- 21 and promotional material and programs for
- 22 [TMI] and other franchisees to use in the
- 23 operation and promotion of the Franchised
- 24 Business in local advertising and promotion
- 25 (as more fully described in Section 14); . .
- 26 .
- 27 (vii) an initial training program for [TMI's] Nurse
- 28 Manager and Administrative Assistant (and
- other personnel) and other training programs
- (as described in Section 9); . . .
- (viii) on-site post-opening training at the first
- Franchise Site in accordance with the
- provisions of Section(b) . . .
- (xv) develop and publish a periodic newsletter for
- use and distribution to franchisees and to
- [TMI's] customers

Such guidance shall, in our discretion, be furnished in the form of [Passport's] Manual, bulletins, and other written materials; national, regional and other group meetings; and telephone consultations or consultations at our offices or at the Franchise Site In addition, if requested by [TMI] and deemed appropriate by [Passport], [Passport] will furnish additional guidance and assistance without charge . . . ; provided, however, [Passport] may require [TMI] to reimburse [Passport] for all out-of-pocket expenses reasonably incurred by [Passport] in connection with furnishing such additional guidance and assistance

Counter-Claimants allege Passport breached the above subsections of Section 7(b) by: "providing methods and procedures that were

1 inefficient, inaccurate and flawed,"; "providing flawed and defective
2 methods, standards and procedures"; "concealing the fact that
3 [Passport] was receiving 'kick-back' profits from some negotiated
4 group purchase agreements"; "not providing a usable website to TMI, by
5 failing to provide any usable advertising or promotional materials or
6 programs to TMI for use in local advertising and promotions"; "failing
7 to have a competent training program"; failing "to provide any
8 training to TMI after TMI opened its doors"; "failing to negotiate and
9 maintain corporate accounts in a method that would provide profitable
10 accounts for TMI"; and "by producing a newsletter that utterly failed
11 to accomplish the goal of producing a newsletter that could be
12 distributed to customers." (Amended Countercl. ¶¶ 60, 63, 66, 69, 75,
13 78, 81.)

14 Section 7(b), however, imposes no duties upon Passport.
15 Rather, it explicitly states that Passport "shall furnish such
16 guidance and assistance as [Passport] believes appropriate"
17 Therefore, even if Counter-Claimants' allegations are true, they fail
18 to allege a breach of any subsection of Section 7(b).

19 **3. Section 7(g)**

20 Section 7(g) of the Agreement states "[TMI] shall comply
21 with, and cause each of [its] employees to comply with all federal,
22 state and local laws, rules and regulations in connection with the
23 operation of the Franchised Business. In addition, [TMI] shall
24 maintain and cause each of [its] employees to maintain all required
25 medical and business records, professional licenses, permits and
26 certifications."

27 Counter-Claimants allege Passport breached this provision by
28 "asking TMI to repeatedly violate HIPAA." (Amended Countercl. ¶ 85.)

1 Section 7(g), however, only places a duty upon TMI. Therefore, even
2 if Counter-Claimants' allegation is true, Counter-Claimants have not
3 alleged a breach of Section 7(g).

4 **4. Section 7(j)**

5 Section 7(j) of the Agreement provides, in relevant part:
6 "[Passport] reserve[s] the right to require [TMI] to use the Software
7 [Passport] develop[s], or ha[s] developed for [Passport], for use in
8 the Franchised Business." Counter-Claimants allege Passport breached
9 Section 7(j) "by providing a flawed software program to TMI" that was
10 unuseable. (Amended Countercl. ¶ 88.) Counter-Claimants'
11 allegations, however, do not constitute a breach of the Agreement
12 since Section 7(j) does not require that Passport provide TMI with a
13 "useable software program"; rather, Section 7(j) simply states that
14 Passport "reserve[s] the right to require" TMI to use certain
15 software. Therefore, even if Counter-Claimants' allegations are true,
16 they do not constitute a breach of Section 7(j).

17 **5. Section 9(a)**

18 Section 9(a) of the Agreement, entitled "Training Program,"
19 provides, in relevant part:

20 Following the execution hereof and prior to the
21 opening of the Franchised Business, [Passport]
22 shall provide through [Passport's] Training Program
23 basic training in the organization and operation of
24 the Franchised Business to [TMI's] Nurse Manager.
[TMI's] Nurse Manger shall attend and complete the
Training Program to [Passport's] satisfaction
before opening the Franchised Business to the
public.

25 The term "Training Program" is defined in the Agreement as "[t]he basic
26 training program offered by [Passport] pursuant to which [TMI's] Nurse
27 Manager and Administrative Assistant . . . are initially trained to
28 operate the Franchised Business. The Training Program will include

1 instruction on such topics, and be conducted at such location or
2 locations, as [Passport] may from time to time designate.”

3 Counter-Claimants allege Passport breached Section 9(a) “by
4 failing to provide training to TMI prior to the opening of the Franchise
5 Business.” (Amended Countercl. ¶ 43.) However, Counter-Claimants also
6 allege “[r]ather than providing actual training to TMI, [Passport] . .
7 . had TMI meet with pharmaceutical sales representatives not affiliated
8 with [Passport] to discuss the different brands of vaccines available.”
9 (Id.)

10 Counter-Claimants allegations do not state a breach of
11 Section 9(a). Section 9(a) only requires Passport to provide TMI’s
12 Nurse Manager with training through Passport’s Training Program, prior
13 to the opening of the franchise. The content of the Training Program,
14 however, is left to Passport’s discretion. Counter-Claimants
15 allegations are contradictory and suggest that TMI did receive some
16 training but that TMI found such training unsatisfactory. Since the
17 Agreement allows Passport to dictate the training provided, Counter-
18 Claimants’ allegations, even if true, do not state a breach of Section
19 9(a).

20 **6. Section 9(b)**

21 Lastly, Counter-Claimants allege Passport breached section
22 9(b) of the Agreement. Section 9(b) provides, in pertinent part:
23 “[TMI’s] Nurse Manager must attend the post-opening training to be
24 provided at [TMI’s] first Franchise Site within six (6) weeks after
25 [TMI’s] first Franchise Site opens for business.” Counter-Claimants
26 allege Passport breached Section 9(b) “by failing to provide post-
27 opening training to TMI.” (Amended Countercl. ¶ 94.) Section 9(b),
28 however, does not require Passport to provide TMI “post-opening

1 training"; the Agreement does not state who is to provide such
2 training. Counter-Claimants' allegations, even if true, do not state
3 a breach of Section 9(b) of the Agreement.

4 Therefore, Counter-Claimants' have not stated a claim for
5 breach of the Agreement, and this claim is dismissed.

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

7 Passport also argues Counter-Claimants' second claim for
8 breach of the implied covenant of good faith and fair dealing should
9 be dismissed since Passport has complied with the terms of the
10 Agreement. Specifically, Passport argues it has "complied with the
11 express terms of the Franchise Agreement, and . . . [t]hus, Passport .
12 . . has also complied with the implied covenant of good faith and fair
13 dealing, and [TMI's] cause of action for breach of the implied
14 covenant should be dismissed." (Mot. to Dismiss 4:6-10.) Counter-
15 Claimants respond that they have alleged facts demonstrating Passport
16 "acted in a way that frustrated the purpose of the Franchise
17 Agreement." (Opp'n 4:27.)

18 "It is well-established that a breach of the implied
19 covenant of good faith is a breach of the contract, and that breach of
20 a specific provision of the contract is not a necessary prerequisite
21 to a claim for breach of the implied covenant of good faith and fair
22 dealing." Schwartz v. State Farm Fire & Cas. Co., 88 Cal. App. 4th
23 1329, 1339 (2001) (citations omitted). Passport, therefore, has not
24 shown that Counter-Claimants' claim should be dismissed. The portion
25 of Passport's motion seeking to dismiss Counter-Claimants' breach of
26 the implied covenant of good faith and fair dealing claim is denied.

27 //

28 //

1 **C. Trade Libel**

2 Passport further seeks dismissal of the Counter-Claimants'
3 trade libel claim, arguing "they have failed to adequately plead
4 multiple essential elements of their claim." (Mot. to Dismiss 4:12-
5 13.) Specifically, Passport argues Counter-Claimants have not
6 adequately alleged that Passport published a false statement or that
7 Passport acted with actual malice. Counter-Claimants do not oppose
8 dismissal of their trade libel claim.

9 In this claim, Counter-Claimants allege that "[i]n or about
10 June 2009 and July 2009, [Passport] published untrue facts regarding
11 TMI and Flaharty"; and "[w]hen [Passport] published these untrue
12 facts, [Passport] knew they were false, or published them with
13 reckless disregard for the truth of the facts." (Amended Countercl.
14 ¶¶ 105-106.) Counter-Claimants further allege "[a]mong the untrue
15 statements published by [Passport], [were] '[TMI] cannot perform
16 nation-wide services' and '[TMI] is using [Passport's] materials' and
17 '[TMI] is in trouble.'" (Id. ¶ 108.) Further, Counter-Claimants
18 allege "[Passport also] told TMI and Flaharty's customers and
19 suppliers that TMI and Flaharty were operating in violation of the law
20 and would be shut down" and "[Passport] . . . told each [Passport]
21 franchisee to not communicate with TMI and Flaharty and if they did,
22 they would be subpoenaed as witnesses in the instant action." (Id.)
23 Counter-Claimants plead these statements caused them to "suffer[]
24 damages in the form of lost profits from customers who were scared off
25 by [Passport's] untrue remarks and in the form of increased costs in
26 dealing with suppliers who believed [Passport's] untrue comments about
27 TMI's and Flaharty's ability to conduct business in the future in an
28 amount unknown at this time" (Id. ¶ 109.)

1 "Trade libel is the publication of matter disparaging the
2 quality of another's property, which the publisher should recognize is
3 likely to cause pecuniary loss to the owner. The tort encompasses all
4 false statements concerning the quality of services or product of a
5 business which are intended to cause that business financial harm and
6 in fact do so." ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th
7 993, 1010 (2001) (quotations and citations omitted). "Since mere
8 opinions cannot by definition be false statements of fact, opinions
9 will not support a cause of action for trade libel." Id. at 1010-11.
10 To allege a "cause of action for trade libel [a Plaintiff is required
11 to allege]: (1) publication, (2) which induces others not to deal with
12 plaintiff, and (3) special damages." Aetna Cas. & Sur. Co., Inc. v.
13 Centennial Ins. Co., 838 F.2d 346, 351 (9th Cir. 1998) (applying
14 California law). The third element "requires pleading and proof of
15 special damages in the form of pecuniary loss." Leonardini v. Shell
16 Oil. Co., 216 Cal. App. 3d 547, 572 (1989). The pleader "may not rely
17 on a general decline in business arising from the falsehood, and must
18 instead identify particular customers and transactions of which [they]
19 were deprived as a result of the [trade] libel." Mann v. Quality Old
20 Time Serv., Inc., 120 Cal. App. 4th 90, 109 (2004). "This means, in
21 the usual case, that the plaintiff must identify the particular
22 purchasers who have refrained from dealing with him, and specify the
23 transactions of which he claims to have been deprived." Erlich v.
24 Etner, 224 Cal. App. 2d 69, 73-74 (1964) (quotations and citation
25 omitted).

26 Counter-Claimants' allegations that they have suffered "lost
27 profits from customers who were scared off" and "increased costs in
28 dealing with suppliers who believed [Passport's] untrue comments"

1 describe a general decline in business that is insufficient to plead
2 special damages. See Continental D.I.A. Diamond Products, Inc. v.
3 Dong Young Diamond Indus. Co., Ltd, No. C. 08-02136 SI, 2009 WL
4 330948, at *6 (N.D. Cal. Feb. 10, 2009) (dismissing trade libel claim,
5 in part, for failure to allege "pecuniary value of lost business").
6 Therefore, Counter-Claimants' trade libel claim is dismissed.

7 **D. Intentional Interference with Prospective Business Advantage**

8 Passport also seeks dismissal of Counter-Claimants'
9 intentional interference with prospective business advantage claim.
10 Passport contends Counter-Claimants have not pled that the alleged
11 interference was wrongful.

12 Counter-Claimants allege that "[i]n June and July 2009,
13 there was an existing economic relationship between TMI and Flaharty .
14 . . . and . . . other potential customers including CSL Biotherapies";
15 "[Passport] knew of the relationship between Counter-Claimants and the
16 specific potential customers"; "[Passport] committed intentional acts
17 designed to interfere with the relationship between TMI and Flaharty
18 and their potential customers," including telling "potential customers
19 . . . that TMI and Flaharty were 'incapable of performing nationwide
20 services' . . ., that TMI and Flaharty would not be in business long
21 and that it would be trouble for those potential customers to do
22 business with TMI and Flaharty"; "[t]he relationship between TMI and
23 Flaharty and their potential customers was actually interrupted"; and
24 as "a direct and proximate cause of [Passport's] interference, TMI and
25 Flaharty have suffered damages because at least two customers decided
26 not to do business with TMI and Flaharty as a result of the false
27 statements made by [Passport]." (Amended Countercl. ¶¶ 111-115.)

28 The elements of a claim for intentional interference with

1 prospective business advantage under California law are: "(1) an
2 economic relationship exists between the plaintiff and some third
3 party, with the probability of future economic benefit to the
4 plaintiff; (2) the defendant's knowledge of the relationship; (3)
5 intentional acts on the part of the defendant designed to disrupt the
6 relationship; (4) actual disruption of the relationship; and (5)
7 economic harm to the plaintiff proximately caused by the acts of the
8 defendant." Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th
9 1134, 1153 (2003). "The tort of interference with prospective
10 business advantage applies to interference with existing
11 noncontractual relations which hold the promise of future economic
12 advantage. In other words, it protects the expectation that the
13 relationship will eventually yield the desired benefit, not
14 necessarily the more speculative expectation that a potentially
15 beneficial relationship will eventually arise." Google Inc. v. Am.
16 Blind & Wallpaper Factory, Inc., No. C 03-05340 JF, 2005 WL 832398, at
17 *8 (N.D. Cal. Mar. 30, 2005) (quoting Westside Ctr. Assocs. v. Safeway
18 Stores 23, Inc., 42 Cal. App. 4th 507 (1996)).

19 Counter-Claimants' intentional interference with prospective
20 business advantage claim is deficient since Counter-Claimants have not
21 sufficiently alleged that an economic relationship existed between
22 themselves and a third-party with the promise of future economic
23 advantage. Counter-Claimants' alleged relationship with "potential
24 customers" is insufficient to satisfy the first element of this claim.
25 See Google, 2005 WL 832398, at *8 (dismissing intentional interference
26 with prospective business advantage claim because relationship with
27 "repeat customers" was too speculative and did not "rise to the level
28 of the requisite promise of future economic advantage") (quotations

1 omitted); see also Westside Ctr. Assocs., 42 Cal. App. 4th 507
2 (holding that alleged relationship with prospective buyer was
3 insufficient because probability of future economic benefit was too
4 speculative). "Allegations that amount to a mere hope for an economic
5 relationship and a desire for future benefit are inadequate to satisfy
6 the pleading requirements of the first element of the tort." Google,
7 2005 WL 832398, at *8 (quoting Blank v. Kirwan, 39 Cal. 3d 311, 331
8 (1985) (holding, in part, that alleged relationship with potential
9 club patrons was insufficient to state an intentional interference
10 with prospective business advantage claim)). Therefore, Counter-
11 Claimants' intentional interference with prospective business
12 advantage claim is dismissed.

13 **E. Unfair Business Practices**

14 Passport lastly argues Counter-Claimants' unfair business
15 practices ("UCL") claim should be dismissed since Flaharty has not
16 established that she has suffered an injury in fact; Counter-Claimants
17 improperly seek damages; and Counter-Claimants have not alleged any
18 wrongful or unfair business practices.

19 Counter-Claimants allege Passport's "acts constitute unfair
20 business practices such that the public would likely be deceived . . .
21 ." (Amended Countercl. ¶ 117.) Counter-Claimants factual allegations
22 concerning Passport's conduct include:

23 Passport's . . . selling [of Passport] franchises
24 while advertising that [Passport] shall provide
25 guidance and assistance as described in Section 7
26 of the Franchise Agreement to its new franchisees,
27 all the while knowing that [Passport] would not
28 meet those obligations. Also, [Passport] knows
that its representation that it will perform
Sections 2, 7 and 9 of the Franchise Agreement, all
the while knowing that it would not perform those
obligations to any current or new franchisee is
likely to mislead the public. Further,

1 [Passport's] act of publishing untrue statements of
2 TMI's ability to perform national contract
3 constitutes an unfair business practice because the
4 general public is likely to be deceived by
5 [Passport's] untrue statements. Also, [Passport's]
6 forgery of documents related to TMI's relationship
7 with a supplier is likely to deceive the public
8 because [Passport] presented the forged document as
9 a truthful, accurate and lawful document.

10 (Id. ¶ 118.) Counter-Claimants allege they "have suffered damages in
11 the form of royalty payments that TMI and Flaharty would not have paid
12 if [Passport] had not acted in such a fraudulent and unlawful way."

13 (Id. ¶ 119.)

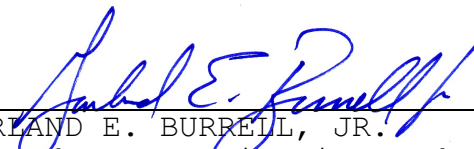
14 Counter-Claimants' allegation that "they have suffered
15 damages in the form of royalty payments" satisfies the injury-in-fact
16 requirement since Counter-Claimants allege they have "expended money
17 due to defendant's acts of unfair competition." Hall v. Time Inc.,
18 158 Cal App. 4th 847, 854 (2008). Although Passport argues that only
19 TMI made royalty payments, the allegations in the amended counterclaim
20 are presumed to be true. Further, while Passport argues damages are
21 not an available remedy for an unfair competition claim, Counter-
22 Claimants' amended counterclaim only alleges that "TMI and Flaharty
23 are entitled to injunctive relief." (Amended Countercl. ¶ 119.)
24 Lastly, Passport argues that Counter-Claimants' "allegations . . . of
25 wrongful conduct are based on the same actions that underlie [the]
26 claim for breach of contract" and therefore Counter-Claimants "have
27 not established that [Passport] behaved wrongfully or engaged in any
28 unfair business practice." This argument, however, overlooks Counter-
Claimants' allegations that do not constitute alleged breaches of the
Agreement, including Counter-Claimants' allegations that Passport
published "untrue statements" and forged documents. Therefore,

1 Passport has not shown Counter-Claimants' UCL claim should be
2 dismissed and this portion of their motion is denied.

3 **IV. CONCLUSION**

4 For the stated reasons, Passport's dismissal motion is
5 GRANTED AND DENIED IN PART. While Counter-Claimants request that they
6 be granted leave to amend any dismissed claim, they have not explained
7 how further amendment would be productive. The amended counterclaim
8 contains many of the same deficiencies that were identified in the
9 court's previous order dismissing the original counter-claim.
10 Therefore, it appears that further amendment would be futile. See
11 Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir.
12 2009) (stating that "where the plaintiff has previously been granted
13 leave to amend and has subsequently failed to add the requisite
14 particularity to its claims, the district court's discretion to deny
15 leave to amend is particularly broad.") Accordingly, the dismissed
16 claims are dismissed without leave to amend.

17 Dated: May 11, 2010

18
19 
20 _____
GARLAND E. BURRELL, JR.
United States District Judge