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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 NICOLOSI DISTRIBUTING, INC.,

No. C 10-3256 SI

9 Plaintiff,

**ORDER RE: DEFENDANT'S MOTION
FOR JUDGMENT ON THE PLEADINGS**

10 v.

11 BMW OF NORTH AMERICA, LLC,

12 Defendant.
13 _____/

14 Defendant Bavarian Motor Works of North America, LLC ("BMW"), has filed a motion for
15 judgment on the pleadings. The motion is scheduled for hearing on February 11, 2011. Pursuant to
16 Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and
17 hereby VACATES the hearing. **The case management conference scheduled for February 11, 2011**
18 **at 3:00 pm remains on calendar.** Having considered the papers submitted, the Court rules as follows.

19
20 **BACKGROUND**

21 Plaintiff allegedly entered into an exclusive paint supply agreement with non-party German
22 Motors¹ on May 5, 2005. Compl. ¶ 3. The complaint alleges that defendant BMW was aware of the
23 exclusive paint supply agreement between plaintiff and German Motors. *Id.* Despite this knowledge,
24 _____

25 ¹ The complaint alleges that plaintiff entered a contract with "German Motors Collision Center,"
26 and attaches a Customer Agreement between plaintiff and "German Motors Corporation, also referred
27 of which refer to "German Motors Corporation dba BMW of San Francisco." The briefs sometimes
28 refer to German Motors as a "body shop" and sometimes as a "BMW dealership." Although not clear,
it appears that "German Motors Collision Center" is a department or adjunct of BMW of San Francisco;
neither its precise legal status nor its relationship to BMW of San Francisco is specified.

1 plaintiff alleges, BMW later required German Motors to contract to use a paint line produced by BMW
2 on any BMW cars. Compl. ¶ 4. Plaintiff alleges that the BMW paint contract resulted in over \$75,000
3 in damages including lost paint sales, non-paint sales that plaintiff would naturally have made as a
4 vendor to German Motors, “plus pre judgment interest in an amount according to proof, plus punitive
5 damages per Civil Code Section 3294 in an amount according to proof.” *Id.* ¶¶ 4-5, 7.

6 The complaint alleges four causes of action: (1) interference with contract; (2) interference with
7 prospective economic advantage; (3) anticompetitive activity in violation of the California Business and
8 Professions Code Section 17200; and (4) unlawful tying agreement in violation of the California
9 Business and Professions Code Section 16724.

10 11 LEGAL STANDARD

12 Under Federal Rule of Civil Procedure 12(c), “[a]fter the pleadings are closed but within such
13 time as to not delay the trial, any party may move for judgment on the pleadings.” The legal standard
14 for Rule 12(c) is virtually identical to the standard for a motion to dismiss under Rule 12(b)(6). *See*
15 *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989).

16 For a motion under either rule, the question presented is not whether the plaintiff will prevail in
17 the action, but whether the plaintiff is entitled to offer evidence in support of the claim. *See Scheuer*
18 *v. Rhodes*, 416 U.S. 232, 236 (1974). In answering this question, the Court must assume that the
19 plaintiff’s allegations are true and must draw all reasonable inferences in the plaintiff’s favor. *See Usher*
20 *v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). “As a general rule, a district court may not
21 consider any material beyond the pleadings in ruling on a 12(b)(96) motion.” *Lee v. City of Los*
22 *Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)(citation omitted). A district court may, however, consider
23 material that is “properly submitted as part of the complaint”; or, if the documents are not physically
24 attached to the complaint, they may be considered if the documents’ “authenticity is not contested and
25 the plaintiff’s complaint necessarily relies on them.” *Id.* (citations, internal quotation marks, and
26 ellipses omitted). A court may also take judicial notice of matters of public record. *Id.* at 689(citation
27 omitted); *see also* Fed. R. Evid. 201.

28 While Rule 12(c) of the Federal Rules of Civil Procedure does not expressly provide for partial

1 judgment on the pleadings, neither does it bar them; it is common to apply Rule 12(c) to individual
2 causes of action. See *Moran v. Peralta Community College Dist.*, 825 F. Supp. 891, 893 (N.D. Cal.
3 1993). “Courts have discretion to grant leave to amend in conjunction with 12(c) motions, and may
4 dismiss causes of action rather than grant judgment.” *Id.*

5 When a court finds the pleadings deficient, it must then decide whether to grant leave to amend.
6 In general, leave to amend is only denied if it is clear that amendment would be futile and "that the
7 deficiencies of the complaint could not be cured by amendment." *Broughton v. Cutter Laboratories*,
8 622 F.2d 458, 460 (9th Cir. 1980) (per curium).

9
10 **DISCUSSION**

11 **I. Interference with contract and with prospective economic advantage (Claims 1 and 2)**

12 Under California law, to state a claim for intentional interference with a contract, a plaintiff must
13 allege: “(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this
14 contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual
15 relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.”
16 *Quelimane Co. v. Stewart Title Guaranty Co.*, 960 P.2d 513, 530 (Cal. 1998). Intent to interfere with
17 the contract does not need to be the primary purpose of the defendant's acts; rather, intent may be shown
18 if the defendant knows that the interference is certain or substantially certain to occur as a result of his
19 action. *Id.* at 531.

20 The elements for tortious interference with prospective economic advantage are similar to those
21 of tortious interference with a contract claim. Generally, a plaintiff must plead: “(1) an economic
22 relationship between the plaintiff and a third party, with the probability of future economic benefit to
23 the plaintiff; (2) the defendant's knowledge of the relationship; (3) an intentional act by the defendant,
24 designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to
25 the plaintiff proximately caused by the defendant's wrongful act, including an intentional act by the
26 defendant that is designed to disrupt the relationship between the plaintiff and a third party.” *Edwards*
27 *v. Arthur Andersen LLP*, 189 P.3d 285, 290 (Cal. 2008) (citation omitted). Moreover, “while
28 intentionally interfering with an existing contract is ‘a wrong in and of itself,’ intentionally interfering

1 with a plaintiff's prospective economic advantage is not. To establish a claim for interference with
2 prospective economic advantage, therefore, a plaintiff must plead that the defendant engaged in an
3 independently wrongful act." *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 953 (Cal. 2003)
4 (citation omitted).

5 Here, plaintiff has alleged the requisite elements of each claim. Defendant BMW argues that
6 plaintiff will not be able to prove its interference claims, pointing to a clause in the BMW/German
7 Motors paint contract which represents and warrants that entering and performing the contract would
8 not cause German Motors to breach any existing contracts. Defendant argues that such a warranty
9 clause in another case, *Dollar Tree*, was sufficient to show that defendant lacked the requisite
10 knowledge that the contract would interfere with other contracts. *Dollar Tree v. Toyama Partners, LLC*,
11 2010 WL 1688583, *3 (N.D. Cal. April 26, 2010). However, *Dollar Tree* involved a substantially
12 different set of transactions (refinancing and renovation of a shopping center) and the complaint
13 contained no clear statement of facts from which a competing inference could be drawn. Here, plaintiff
14 specifically alleges that German Motors management informed BMW "that it had a multi year contract
15 to purchase paint from only [plaintiff] and no one else." Compl. ¶ 8. Whether that can be proved at
16 trial, and what evidence may be adduced concerning the various sets of negotiations, cannot be
17 determined at this early stage. Further, plaintiff alleges interference with its expected economic
18 opportunities to sell collateral, non-paint supplies by virtue of the contractual interference. Accordingly,
19 the Court DENIES defendant's motion for judgment on the pleadings as to plaintiff's first two causes
20 of action.

21
22 **II. Unlawful tying agreement in violation of the California Business and Professions Code**
23 **Section 16727 (Claim 4)**

24 An unlawful tying agreement generally occurs where the sale of one good is conditioned on the
25 sale of a different good. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 461
26 (1992) (citation omitted). To state a claim for an unlawful tying agreement under section 16727, the
27 plaintiff must first allege both that: "a tying agreement, arrangement or condition existed whereby the
28 sale of the tying product was linked to the sale of the tied product. . .;" and "the complaining party

1 sustained pecuniary loss as a consequence of the unlawful act.” *Morrison v. Viacom, Inc.*, 66 Cal. App.
2 4th 534, 541-542 (1998) (citations omitted). After establishing the first two elements, the plaintiff must
3 additionally allege that either, “the party had sufficient economic power in the tying market to coerce
4 the purchase of the tied product;” or “a substantial amount of sale was affected in the tied product . . .
5 .” *Id.*

6 Defendant argues that plaintiff has not alleged that the paint sales were tied to any other sale
7 and thus fails to allege an unlawful tying agreement. The Court agrees. Plaintiff does allege that BMW
8 “forced” German Motors to contract to use BMW paints. However, the complaint does not allege what
9 the source of coercion is and if it relates to a tying agreement. The complaint is not clear as to how two
10 products are tied. Plaintiff alleges that the tied goods are the BMW cars that need painting and the
11 BMW paints. However, the contract between BMW and German Motors refers to “repair and refinish
12 work” rather than to the painting of new cars. *See* Compl. Ex. A. Thus, it does not appear that the paint
13 sales are tied to the purchase of cars needing painting, but rather that the paint sales relate to the painting
14 of already purchased cars belonging to clients of German Motors. Accordingly, the Court DISMISSES
15 plaintiff’s claim for an unlawful tying agreement. Because it is unclear whether or not plaintiff can state
16 a claim for an unlawful tying agreement, the Court grants plaintiff leave to amend.

17
18 **III. Anticompetitive activity in violation of the California Business and Professions Code**
19 **Section 17200 (Claim 3)**

20 To state a claim under the Unfair Competition Law (“UCL”), plaintiff must prove that
21 defendant's conduct was unlawful, unfair, or fraudulent. Cal. Bus. Prof. Code § 17200; *Cel-Tech*
22 *Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999). Section 17200
23 is to be read disjunctively. *Id.* This means that a cause of action need only meet one of the descriptors:
24 unlawful or unfair or fraudulent. *Id.*

25 Pursuant to the UCL, which defines unfair competition, the “unlawful” practices prohibited are
26 any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory,
27 or court-made. It is not necessary that the predicate law provide for private civil enforcement. *Id.* The
28 UCL borrows violations of other laws and treats them as unlawful practices independently actionable.

1 *Id.* “Unfair” refers to “conduct that threatens an incipient violation of an antitrust law, or violates the
2 policy or spirit of one of those laws because its effects are comparable to or the same as a violation of
3 the law, or otherwise significantly threatens or harms competition.” *Stevenson Real Estate Services, Inc.*
4 *v. CB Richard Ellis Real Estate Services, Inc.*, 138 Cal. App. 4th 1215, 1225 (2006). “Fraudulent,” as
5 used in the statute, only requires a showing that members of the public are likely to be deceived.
6 *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1044 (9th Cir. 2010).

7 Plaintiff argues that the allegation of BMW’s unlawful tying agreement also suffices to allege
8 a violation of the UCL. However, as discussed above, plaintiff has not stated a claim for an unlawful
9 tying agreement. Plaintiff also alleges that defendant “forced” German Motors to buy BMW paint. This
10 alone may be the type of anticompetitive behavior the Unfair Competition Law is intended to prohibit.
11 However, plaintiff’s allegations are too conclusory to be clear as to whether defendant’s activity is in
12 fact unfair. The contract between BMW and German Motors attached to the complaint as Exhibit B
13 provides that if German Motors does not use the BMW paints that they cannot use BMW paint
14 advertising materials. It is not clear whether plaintiff alleges this as the coercion/unfair business
15 activity, or, if it did, whether this alone could rise to the level of coercion or unfair business activity.

16 However, the Ninth Circuit has recognized that tortious behavior such as intentional interference
17 with a contract qualifies as the type of activity proscribed by the UCL. *CRST Van Expedited, Inc. v.*
18 *Werner Enters.*, 479 F.3d 1099, 1107 (9th Cir. 2007). Plaintiff has sufficiently alleged that defendant
19 interfered with plaintiff’s contract and prospective economic advantage with German Motors.
20 Accordingly, the Court DENIES defendant’s motion for judgment on the pleadings as to plaintiff’s
21 claim of unfair competition.

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CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES defendant's motion for judgement on the pleadings as to plaintiff's claims for intentional interference with a contract, interference with prospective economic advantage, and unfair competition, and DISMISSES, with leave to amend, plaintiff's claim for an unlawful tying agreement. If plaintiff wishes to submit an amended complaint, it should do so by **February 25, 2011**. (Doc. 28).

IT IS SO ORDERED.

Dated: February 7, 2011



SUSAN ILLSTON
United States District Judge