

United States District Court
For the Northern District of California

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

SENSIBLE FOODS, LLC,)	Case No. 11-2819 SC
)	
Plaintiff,)	ORDER GRANTING IN PART AND
)	DENYING IN PART DEFENDANTS'
v.)	MOTION TO DISMISS
)	PLAINTIFF'S FIRST AMENDED
WORLD GOURMET, INC.; HAIN GOURMET,)	<u>COMPLAINT</u>
INC.; HAIN CELESTIAL GROUP, INC.;)	
WORLD GOURMET MARKETING, LLC; AND)	
SENSIBLE SNACKS, INC.,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Plaintiff Sensible Foods, LLC ("Plaintiff") brings this action against Defendants World Gourmet, Inc. ("World Gourmet"), Hain Gourmet, Inc. ("Hain Gourmet"), Hain Celestial Group, Inc., ("Hain Celestial"), World Gourmet Marketing, LLC ("WGM"), and Sensible Snacks, Inc. ("Sensible Snacks") (collectively, "Defendants"). ECF No. 28 ("FAC"). Now before the Court is Defendants' Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. ECF No. 30 ("Mot."). Defendants seeks to dismiss five of the FAC's twelve claims. Id. The Motion is fully briefed. ECF Nos. 36 ("Opp'n"), 37 ("Reply"). For the reasons set forth below, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion.

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1 **II. BACKGROUND**

2 As always when considering a Rule 12(b)(6) motion, the Court
3 takes all the well-pleaded facts of the operative complaint as
4 true. The Court has already summarized this case's history in a
5 previous Order partially granting Defendants' motion to dismiss
6 Plaintiff's original complaint. See ECF No. 26 ("Order"). In
7 brief, this case is about a trademark dispute between competitors
8 in the healthy snack food business. Plaintiff and Defendants both
9 use or have sought to use trademarks that prominently feature the
10 word "sensible." Some time ago, in apparent response to the
11 parties' ongoing trademark dispute, Defendant Hain Celestial
12 contemplated buying Plaintiff, but the sale never materialized. In
13 the course of sale negotiations, the parties signed a
14 Confidentiality Agreement. Plaintiff now alleges that during
15 proceedings before the Trademark Trial and Appeal Board ("TTAB"),
16 Defendants improperly disclosed certain confidential information in
17 violation of the Agreement. Plaintiff also alleges continuing
18 misuse of trade names and marks similar to Plaintiff's.

19 The procedural history of this case is as follows. Plaintiff
20 initially brought suit before this Court on sixteen claims. ECF
21 No. 1 ("Compl."). Defendants moved to dismiss all sixteen. ECF
22 No. 14. Plaintiff voluntarily withdrew four claims, which the
23 Court dismissed with prejudice.¹ The Court also dismissed six of
24 Plaintiff's claims without prejudice.² Finally, the Court left six

25 ¹ The Court dismissed with prejudice claims for: trademark
26 infringement under California law; cyberpiracy under both the
27 federal Lanham Act and California law; and unjust enrichment.
Order at 6.

28 ² The Court dismissed without prejudice claims for: breach of
contract; breach of implied contract; breach of implied covenant of

1 of Plaintiff's claims undisturbed.³

2 Plaintiff timely filed a First Amended Complaint.⁴ Plaintiff
3 now asserts claims for: (1) breach of implied contract, against
4 Hain Celestial; (2) breach of contract -- specifically, the
5 Confidentiality Agreement -- against Hain Celestial; (3) breach of
6 implied covenant of good faith and fair dealing, against Hain
7 Celestial; (4) contributory infringement; (5) unfair competition
8 under California Business and Professions Code section 17200 et
9 seq.; (6) deceptive trade practices under California Business and
10 Professions Code section 17500 et seq.; (7) false advertising under
11 California Business and Professions Code section 17500 et seq.; (8)
12 trademark infringement under the federal Lanham Act, 15 U.S.C. §
13 1051 et seq.⁵; (9) reverse confusion under the Lanham Act, § 1114
14 et seq.; (10) cancellation of federal trademark registration under
15 the Lanham Act, §§ 1064 and 1119; (11) false advertising,
16 misrepresentation, and unfair competition under the Lanham Act, §
17 1125(a) et seq.; and (12) common law trademark infringement.

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20 good faith and fair dealing; contributory trademark infringement;
21 and false advertising under both California law and the federal
Lanham Act. Order at 19-20.

22 ³ The Court left undisturbed claims for: unfair competition and
23 deceptive trade practices under California law; trademark
24 infringement, reverse confusion, and cancellation of trademark
registration under the Lanham Act; and common law trademark
infringement. Order at 20.

25 ⁴ Plaintiff attached the Confidentiality Agreement to the First
26 Amended Complaint. ECF No. 28 Ex. CA ("CA"). The Court therefore
27 may properly consider the contents of the Confidentiality Agreement
while deciding this motion. Hal Roach Studios, Inc. v. Richard
Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

28 ⁵ Further references to the Lanham Act are to section numbers
within Title 15 of the United States Code.

1 Of these twelve claims, Defendants challenge five: claim 1
2 (breach of implied contract by Hain Celestial); claim 2 (breach of
3 the Confidentiality Agreement by Hain Celestial); claim 3 (breach
4 of implied covenant of good faith and fair dealing by Hain
5 Celestial); claim 7 (false advertising under California law); and
6 claim 11 (false advertising, misrepresentation, and unfair
7 competition under the Lanham Act).

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9 **III. LEGAL STANDARD**

10 A motion to dismiss under Federal Rule of Civil Procedure
11 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
12 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
13 on the lack of a cognizable legal theory or the absence of
14 sufficient facts alleged under a cognizable legal theory."
15 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
16 1988). "When there are well-pleaded factual allegations, a court
17 should assume their veracity and then determine whether they
18 plausibly give rise to an entitlement to relief." Ashcroft v.
19 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a
20 court must accept as true all of the allegations contained in a
21 complaint is inapplicable to legal conclusions. Threadbare
22 recitals of the elements of a cause of action, supported by mere
23 conclusory statements, do not suffice." Id. (citing Bell Atl.
24 Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made
25 in a complaint must be both "sufficiently detailed to give fair
26 notice to the opposing party of the nature of the claim so that the
27 party may effectively defend against it" and "sufficiently
28 plausible" such that "it is not unfair to require the opposing

1 party to be subjected to the expense of discovery." Starr v. Baca,
2 633 F.3d 1191, 1204 (9th Cir. 2011). When a complaint fails to
3 plead sufficient facts, leave to amend should be given freely, but
4 "a district court may dismiss without leave where a plaintiff's
5 proposed amendments would fail to cure the pleading deficiencies
6 and amendment would be futile." Cervantes v. Countrywide Home
7 Loans, Inc., 656 F.3d 1034, 1041 (9th Cir. 2011).

8
9 **IV. DISCUSSION**

10 **A. Breach of Implied Contract by Hain Celestial (Claim 1)**

11 To state a claim for breach of contract, a plaintiff must
12 allege (1) that a contract existed between plaintiff and defendant,
13 (2) that plaintiff has substantially performed or been excused from
14 performance, (3) that defendant breached, and (4) that plaintiff
15 suffered resultant damages. See, e.g., Harris v. Rudin, Richman &
16 Appel, 74 Cal. App. 4th 299, 307 (Cal. Ct. App. 1999) (citing
17 Otworth v. S. Pac. Transp. Co., 166 Cal. App. 3d 452, 459 (Cal. Ct.
18 App. 1985)). "A cause of action for breach of implied contract has
19 the same elements as does a cause of action for breach of contract,
20 except that the promise is not expressed in words but is implied
21 from the promisor's conduct." Yari v. Producers Guild of Am.,
22 Inc., 161 Cal. App. 4th 172, 182 (Cal. Ct. App. 2008).

23 The Court previously dismissed Plaintiff's breach of implied
24 contract claim because Plaintiff failed to allege which defendant
25 was a party to the implied contract, what the terms of the contract
26 were, or how it had been breached. See Order at 13-14. Plaintiff
27 has substantially revised this claim. Plaintiff now alleges that
28 the other party to the implied contract was Hain Celestial. FAC ¶

1 191. Plaintiff alleges that the implied contract imposed two
2 obligations on Hain Celestial: first, to stop using the marks
3 "sensible snack" and "sensible snacks" (together, "the Sensible
4 Snack(s) mark"), and, second, to "enter purchase discussions for
5 the Plaintiff" Id. Plaintiff further alleges that Hain
6 Celestial continued to use the Sensible Snack(s) mark,
7 notwithstanding the implied contract. Id. ¶ 195.

8 Defendants move to dismiss on three grounds. First, they
9 claim that the Confidentiality Agreement precludes Plaintiff from
10 asserting a claim for breach of implied contract because it
11 contained a merger clause that "expressly superseded all prior
12 agreements 'with respect to the subject matter thereof.'" Mot. at
13 6 (quoting FAC Ex. 1 ("CA") at 3). Second, Defendants read the
14 First Amended Complaint to admit that Hain Celestial entered into
15 the allegedly promised purchase discussions, and therefore to
16 negate Plaintiff's claim for breach of a promise to do so. Id. at
17 7. Third, they contend that the First Amended Complaint
18 inadequately alleges the existence of consideration to support Hain
19 Celestial's purported promise to stop using the Sensible Snack(s)
20 mark. See id. at 7-10.

21 Plaintiff responds that Hain Celestial's alleged promise to
22 discontinue use of the Sensible Snack(s) mark lies outside the
23 scope of the Confidentiality Agreement's merger clause. Opp'n at
24 8. It urges the Court to interpret any ambiguity in the merger
25 clause against Hain Celestial because, according to Plaintiff's
26 brief, Hain Celestial's attorney drafted the Confidentiality
27 Agreement. Id. at 9. Lastly, Plaintiff argues that its promise to
28 stay the TTAB proceedings, alleged in the First Amended Complaint

1 at paragraph 191, served as consideration for Hain Celestial's
2 promises. Id. at 10-12.

3 The Court declines to dismiss this claim. Taking the
4 allegations of the First Amended Complaint as true, Plaintiff has
5 alleged that it exchanged an agreement to stay the TTAB proceedings
6 for two promises from Hain Celestial: a promise to discontinue use
7 of the Sensible Snack(s) mark and a promise to discuss purchasing
8 Plaintiff. As Defendants note, the First Amended Complaint
9 effectively admits that Hain Celestial held the allegedly promised
10 purchase discussions with Plaintiff. But holding the purchase
11 discussions would not, by itself, give Plaintiff the benefit of its
12 alleged bargain. Plaintiff would also have to receive the benefit
13 of Hain Celestial's alleged promise to stop using the Sensible
14 Snack(s) mark. Plaintiff alleges that it did not, FAC ¶ 195, and
15 the Court must take this allegation as true.

16 Defendants' argument that the Confidentiality Agreement's
17 merger clause precludes Plaintiff's breach of implied contract
18 claim is unavailing. Neither the First Amended Complaint nor the
19 Confidentiality Agreement specify what "subject matter," or
20 matters, the parties had in mind when they wrote the phrase "with
21 respect to the subject matter thereof" in the Confidentiality
22 Agreement's merger clause. Answering that question would require
23 the Court to make factual findings based on evidence extrinsic to
24 the Confidentiality Agreement as well as to the pleadings. The
25 Court may not go so far in the context of a Rule 12(b)(6) motion.

26 Defendants contend that the First Amended Complaint
27 contradicts Plaintiff's argument that the Confidentiality Agreement
28 related to a different "subject matter" than the alleged implied

1 contract. Reply at 3. The Court sees no such contradiction. The
2 pleading describes with reasonable clarity a straightforward
3 exchange of promises: Plaintiff's promise to stay the TTAB
4 proceedings for Hain Celestial's promises to discuss purchasing
5 Plaintiff and to stop using the Sensible Snack(s) mark. The
6 Confidentiality Agreement simply does not address Hain Celestial's
7 second alleged promise. That is not inconsistent with Plaintiff's
8 argument that the Confidentiality Agreement and the alleged implied
9 contract concern two different subject matters. Hain Celestial
10 allegedly made two promises, but it does not necessarily follow
11 that both promises must have been part of the subject matter of the
12 Confidentiality Agreement: The alleged implied contract could
13 pertain to both promises while the Confidentiality Agreement
14 pertained to only one. The Court cannot determine otherwise from
15 the express terms of the Confidentiality Agreement and the
16 pleadings.

17 Accordingly, the Court DENIES Defendants' motion to dismiss
18 claim 1.⁶

19 **B. Breach of Confidentiality Agreement by Hain Celestial**
20 **(Claim 2)**

21 Plaintiff intends to assert this claim against Hain Celestial
22 for violation of the Confidentiality Agreement. FAC ¶¶ 200-21. In
23 its briefing, however, Plaintiff admits that the First Amended
24 Complaint contains an "inadvertent drafting mistake" and seeks
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26 _____
27 ⁶ Because the Court has not relied on the rule of construction
28 construing ambiguous documents against their drafters, see Opp'n at
9, the Court does not reach Defendant's argument that application
of the rule here would be improper, Reply at 4.

1 leave to amend. Opp'n at 13-14. Therefore, the only question for
2 this claim is whether to dismiss it with prejudice.

3 The Court rules that dismissal with prejudice is warranted
4 because the amendments proposed by Plaintiff would be futile. See
5 Cervantes, 656 F.3d at 1041. Plaintiff has used its Opposition
6 brief to indicate what it intended to write in the First Amended
7 Complaint. Id. at 13. The First Amended Complaint currently
8 alleges that Hain Celestial revealed Plaintiff's confidential
9 information -- which Plaintiff identifies as its "profitability" --
10 in a document filed as part of the TTAB proceedings, the TTAB
11 Answer. Id. at 13. Plaintiff would amend the pleading to indicate
12 a different document filed in that same proceeding, the TTAB
13 Response. Id. at 13. Both documents are part of the public record
14 and the Court takes judicial notice of them for the purpose of
15 determining whether the proposed amendment would be futile. See
16 ECF Nos. 32 Ex. 1 ("TTAB Answer"), 39 Ex. 1 ("TTAB Response"). As
17 Defendants point out, neither document says anything about
18 Plaintiff's profitability. Therefore, Plaintiff's current pleading
19 does not adequately plead a breach, and neither would Plaintiff's
20 proposed amendment. Considering that Plaintiff's restatement of
21 its claim in the Opposition brief amounted to Plaintiff's third
22 bite at the apple, that the Court's previous Order already gave
23 Plaintiff guidance concerning this claim, and that the Court has
24 already put Plaintiff on warning that failure to attend to
25 important details would not be tolerated, see Order at 1 n.1, the
26 Court sees no reason to give Plaintiff a fourth bite.

27 The Court GRANTS Defendants' motion to dismiss claim 2 and
28 DISMISSES that claim WITH PREJUDICE.

1 C. Breach of Implied Covenant of Good Faith and Fair Dealing
2 by Hain Celestial (Claim 3)

3 The implied covenant of good faith and fair dealing is
4 "implied by law in every contract." Guz, 24 Cal. 4th at 350. The
5 Court previously dismissed Plaintiff's implied covenant claim
6 because Plaintiff failed to identify on which contract it based the
7 claim. Plaintiff has amended this claim and now alleges the
8 existence of three contracts with Hain Celestial. FAC § 225.
9 Plaintiff identifies these as: (1) "an implied agreement that [Hain
10 Celestial] would discontinue the use of the phrase, 'sensible
11 snack(s),' to eliminate the resulting public confusion and
12 Plaintiff would agree to stay the TTAB Proceedings;" (2) the
13 written Confidentiality Agreement; and (3) "an oral agreement to
14 facilitate the purchase of Plaintiff by [Hain Celestial]"
15 Id. Plaintiff claims, in essence, that Hain Celestial breached the
16 implied covenants arising from these promises by allegedly
17 continuing to use the Sensible Snack(s) mark, revealing Plaintiff's
18 confidential information, and refusing to buy Plaintiff.

19 None of these provide a proper basis for a breach of implied
20 covenant claim. To the extent that Plaintiff bases this claim on
21 violations of the implied covenant arising from the first and
22 second agreements, it must fail because these allegations merely
23 reallege contractual breaches as breaches of the implied covenant.
24 Such claims are superfluous and properly dismissed. Guz, 24 Cal.
25 4th at 352-53. To the extent that Plaintiff bases this claim on
26 Hain Celestial's alleged refusal to buy Plaintiff, the claim must
27 fail for two reasons. First, the implied covenant cannot "impose
28 substantive duties or limits on the contracting parties beyond

1 those incorporated in the specific terms of their agreement." Id.
2 at 349-50. Plaintiff alleges the existence of an agreement to
3 enter into purchase discussions, not an agreement to buy Plaintiff.
4 And, as discussed in Section IV.A supra, the First Amended
5 Complaint indicates that Hain Celestial did in fact enter into the
6 contemplated purchase discussion. Plaintiff cannot base a claim
7 for breach of the implied covenant on allegations that Plaintiff
8 actually received the benefit of its bargain.

9 The only way this agreement could support a breach of implied
10 covenant claim is if it was an agreement for Hain Celestial to
11 later agree to buy Plaintiff -- that is, an "agreement to agree,"
12 as distinct from an agreement to negotiate. See Copeland v. Baskin
13 Robbins U.S.A., 96 Cal. App. 4th 1251, 1257-58 n.10 (Cal. Ct. App.
14 2002) (explaining distinction). Plaintiff essentially alleges the
15 existence of an agreement to negotiate, an agreement which, taking
16 the allegations of the First Amended Complaint as true, Hain
17 Celestial substantially performed. Plaintiff also, however, hints
18 that its agreement with Hain Celestial amounted to an agreement to
19 later agree to purchase Plaintiff. See FAC ¶ 236 (alleging, inter
20 alia, that Hain Celestial "reneged on its promise to pay a fair
21 price"). To the extent that this is an agreement to agree, it is
22 invalid as a matter of law. Copeland, 96 Cal. App. 4th at 1257-58
23 n.10. To the extent it is merely an agreement to enter purchase
24 discussions, Plaintiff received the benefit of that bargain.
25 Either way, the implied covenant claim fails as a matter of law.

26 Accordingly, the Court GRANTS Defendants' motion to dismiss
27 claim 3 and DISMISSES that claim WITH PREJUDICE.

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1 D. False Advertising Under California Law (Claim 7) and
2 False Advertising, Misrepresentation, and Unfair
3 Competition under the Lanham Act (Claim 11)

4 As in its previous Order, the Court addresses Plaintiff's
5 state and federal false advertising claims together. Previously,
6 the Court dismissed Plaintiff's false advertising claims because
7 they identified no false statements of fact. Order at 15-16.
8 Plaintiff has extensively revised these claims. FAC ¶¶ 267-301
9 (state law claim), ¶¶ 328-37 (Lanham Act claim, incorporating
10 allegations in state law claim). Plaintiff now alleges that
11 Defendants have made false statements by: (1) using the word
12 "veggie" in the name of its Veggie Straws, Veggie Chips, and Veggie
13 Crisps products when in fact those products are "primarily potato
14 product[s]," see id. ¶¶ 268, 282; (2) using the word "apple" in the
15 name of its Apple Straws product when in fact that product is a
16 "primarily potato product," see id. ¶¶ 268, 283; (3) making various
17 health-related claims -- for example, that Defendants' products are
18 "the next generation in unique and better-for-you snacks" -- that
19 mislead the public into thinking Defendants' products are healthy,
20 see id. ¶¶ 278, 291; and (4) on Defendants' logo, positioning the
21 trademark "Sensible Portions" partially in front of a heart-shaped
22 design, in a manner that misleads the public into thinking
23 Defendants' products are healthy, see Opp'n at 17 (citing FAC ¶
24 101).

25 While a court deciding a Rule 12(b)(6) motion must take a
26 complaint's well-pleaded factual allegations as true, it also must
27 determine, relying on its "judicial experience and common sense,"
28 whether those allegations amount to a "plausible" claim. Iqbal,

1 129 S. Ct. at 1950. Here, Plaintiff has not met Iqbal's
2 plausibility requirement. It is simply implausible -- indeed, it
3 strains the boundaries of the English language -- to say that
4 products made primarily from potatoes are not made of "veggies."
5 Similarly, Plaintiff complains of the word "apple" in the name of
6 the Apple Straws product, all the while alleging that the product
7 contains pureed apples. FAC ¶ 271. In both cases, Plaintiff
8 cannot credibly claim that the words "veggie" and "apple," when
9 used to describe products containing veggies and apples, are
10 "literal falsit[ies]." Id. ¶¶ 282, 283.

11 Plaintiff's claim that Defendants have made actionably false
12 health claims fares no better. A district court may determine as a
13 matter of law whether an advertising statement is mere puffery or a
14 factual, and hence actionable, statement. Coastal Abstract Serv.,
15 Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir.
16 1999). Actionable statements are "capable of being proved false or
17 of being reasonably interpreted as a statement of objective fact."⁷
18 Id. Here, each statement identified by Plaintiff is puffery. See
19 Opp'n at 14-15 (collecting statements). To take two representative
20 examples, the statement that Defendants' products contain the
21 "right" ingredients, FAC § 277, is not capable of being proved
22 false. Likewise, no consumer could reasonably take Defendants'
23 claim that its products are "guilt free," id. ¶ 278, as a statement
24 of objective fact.

25 _____
26 ⁷ A corollary of this rule is that Plaintiff's statements on these
27 points -- for example, its statement that "[t]he relevant
28 purchasing public thinks that [Defendants'] Products are healthy,"
FAC ¶ 291 -- are not factual allegations but rather conclusions of
law which are not entitled to the presumption of truth. Cf. Iqbal,
129 S. Ct. at 1950.

1 Plaintiff's last argument, that the Sensible Portions logo
2 itself forms the basis of a false advertising claim because it
3 includes a heart symbol, lacks merit. A heart symbol is not a
4 statement "capable of being proved false or of being reasonably
5 interpreted as a statement of objective fact." Coastal Abstract
6 Serv., 173 F.3d at 731. Plaintiff devotes considerable time to a
7 discussion of various parts of Food and Drug Administration
8 regulations promulgated in Title 21 of the Code of Federal
9 Regulations. Opp'n at 14-18. This discussion is marginally
10 relevant at best because Defendants do not rely on the FDA
11 regulations and Plaintiff has not brought a claim under them.

12 Plaintiff has adequately pled facts that allow the Court to
13 ascertain the viability of Plaintiff's false advertising claims,
14 and these claims fail as a matter of law. Accordingly, the Court
15 GRANTS Defendants' motion to dismiss claims 7 and 11 and DISMISSES
16 those claims WITH PREJUDICE.

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18 **V. CONCLUSION**

19 For the foregoing reasons, the Court GRANTS IN PART AND DENIES
20 IN PART the motion by Defendants World Gourmet, Inc., Hain Gourmet,
21 Inc., Hain Celestial Group, Inc., World Gourmet Marketing, LLC, and
22 Sensible Snacks, Inc. to dismiss Plaintiff Sensible Foods, LLC's
23 First Amended Complaint, and rules as follows:

- 24 • Plaintiff's second claim (breach of contract), third claim
25 (breach of implied covenant of good faith and fair dealing),
26 seventh claim (false advertising under California Business and
27 Professions Code section 17500), and eleventh claim (false
28 advertising, misrepresentation, and unfair competition under

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the Lanham Act, 15 U.S.C. § 1125(a) et seq.) are DISMISSED WITH PREJUDICE.

- Plaintiff's first claim (breach of implied contract) remains undisturbed, as do the other claims asserted in Plaintiff's First Amended Complaint.

The parties are hereby ordered to appear before this Court for a case management conference on Friday, March 16, 2012, at 10:00 a.m. in Courtroom One, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California. The parties are to file one Joint Case Management Conference Statement seven days prior to the conference.

IT IS SO ORDERED.

Dated: February 21, 2012


UNITED STATES DISTRICT JUDGE