

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CREATIVE MOBILE TECHNOLOGIES,  
LLC,

Plaintiff/Counter-defendant,

v.

FLYWHEEL SOFTWARE, INC.,

Defendant/Counterclaimant.

Case No. 16-cv-02560-SI

**ORDER GRANTING  
PLAINTIFF/COUNTER-DEFENDANT'S  
MOTION TO DISMISS  
COUNTERCLAIMS**

Re: Dkt. No. 29

Plaintiff and counter-defendant Creative Mobile Technologies, LLC (“CMT”) has brought a motion to dismiss the counterclaims of defendant and counterclaimant Flywheel Software, Inc. (“Flywheel”). Dkt. No. 29. Pursuant to Civil Local Rule 7-1(b), the Court determines that this matter is appropriate for resolution without oral argument and VACATES the hearing set for October 14, 2016. For the reasons set forth below, the Court GRANTS plaintiff’s motion to dismiss the counterclaims, with leave to amend.

**BACKGROUND**

**I. Allegations Leading to Original Complaint**

According to plaintiff CMT’s complaint, between 2011 and 2013, the San Francisco Mass Transit Authority began requiring that San Francisco taxi fleets “install backseat credit card payment terminals and PIMs [passenger information monitors] accessible to the blind in all taxicabs.” Dkt. 1, Compl. ¶ 8. CMT alleges that those regulations required taxi fleet operators “to retain third party payment service providers (like CMT) to handle all aspects of electronic payment transactions and trip data collection and reporting.” *Id.* CMT designed and developed technology to comply with these regulations, “and then contracted with numerous taxi fleets

1 nationwide . . . to install the CMT Hardware in their taxicabs.” *Id.* ¶ 9. Under the contracts, CMT  
2 would purchase and install CMT Hardware at no upfront cost to the taxi fleet partners, for use by  
3 their taxicab drivers. *Id.* ¶ 9. In exchange, the taxi fleet partners agreed “to process all electronic  
4 passenger payments exclusively through CMT’s payment processor throughout the duration of the  
5 contract.” *Id.* CMT would collect a processing fee for those transactions “[i]n most cases.” *Id.*  
6 CMT alleges the contract terms range from five to ten years in duration and that all contacts are  
7 currently active. *Id.* ¶ 10.

8 Defendant Flywheel is a software company that developed a mobile “e-hailing” application  
9 for smartphones. *Id.* ¶¶ 14-15. Prospective passengers and taxi drivers download the application  
10 and then use it to connect with each other to arrange a pick-up. *Id.* ¶ 15. To set up an account  
11 through the application, prospective passengers enter their debit or credit card information. *Id.* At  
12 the end of the ride, Flywheel sends that information to a credit card processing service or merchant  
13 services provider for processing. *Id.* The complaint alleges that Flywheel charges taxi drivers a  
14 user fee and that Flywheel “was marketing its e-hail application directly to members of its San  
15 Francisco Taxi Fleet Partners, who could download and use the application on their personal  
16 smartphones while circumventing the appropriate, mandated use of CMT Hardware during rides.”  
17 *Id.* ¶ 16.

18 Upon discovery of Flywheel’s alleged interference, CMT alleges sending Flywheel a cease  
19 and desist letter dated around October 7, 2014. *Id.* ¶ 18. Following negotiations, the parties  
20 entered into a contract on December 4, 2014. *Id.* ¶ 19.<sup>1</sup>

21 On May 11, 2016, CMT brought suit against Flywheel, claiming: (1) breach of contract;  
22 (2) breach of the implied covenant of good faith and fair dealing; (3) inducing breach of contract;  
23 (4) intentional interference with contractual relations; and (5) violations of the California unfair  
24 competition law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*).

---

25  
26 <sup>1</sup> The December 4, 2014 CMT-Flywheel contract is the basis for CMT’s breach of contract  
27 and other claims. However, the two counterclaims at issue in this motion allege restraint of trade  
28 based on the underlying CMT-taxi fleet partner contracts. The details of the December 4, 2014  
CMT-Flywheel contract, which are currently under seal, are not relevant to the present motion to  
dismiss the counterclaims.

1 **II. Allegations of Defendant’s Counterclaim**

2 Flywheel answered on June 20, 2016, and brought two counterclaims for unlawful restraint  
3 of trade and unfair competition. Dkt. No. 16, Answer & Counterclaim. In its counterclaim,  
4 Flywheel alleges that its mobile application provides taxi drivers with “a needed and valuable  
5 response to increased competition from mobile rider services such as Uber and Lyft.”  
6 Counterclaim ¶ 4. Flywheel’s application is used when a customer hails a cab through the  
7 platform. *Id.* ¶ 5. “Flywheel then processes the customer’s order and arranges for a taxi to fulfill  
8 the customer’s order.” *Id.* “Payment for a Flywheel arranged ride is collected through Flywheel’s  
9 platform.” *Id.* Flywheel further pleads that it “has invested significant resources developing its  
10 platform and mobile application, advertising the Flywheel service to taxi customers, and  
11 developing a network of drivers who will efficiently fulfill orders received by Flywheel.” *Id.*

12 Flywheel counterclaims for unlawful restraint of trade, arguing that CMT, by entering into  
13 written agreements with third party taxi fleet partners, is relying on unfair and unlawful business  
14 practices that effectively prevent mobile taxi hailing solutions. *Id.* ¶¶ 7, 9. Flywheel also claims  
15 unfair competition, alleging that:

16 CMT has engaged and continues to engage in unlawful and unfair business  
17 practices, including (a) entering into the Restraining Agreements with Subject Taxi  
18 Companies that unlawfully and unfairly restrain competition, (b) coercing the  
19 Subject Taxi Companies to refuse to deal with Flywheel based on the Restraining  
20 Agreements, and (c) coercing Flywheel not to lawfully compete with it.

21 *Id.* ¶ 16. Flywheel claims that this conduct “seeks to unfairly and unlawfully restrain competition”  
22 and that “[t]he gravity of the harm to Flywheel and members of the public greatly outweighs the  
23 utility of the conduct to CMT.” *Id.* ¶ 17.

24 CMT now moves to dismiss both counterclaims under FRCP 12(b)(6). Dkt. No. 29.

25 **LEGAL STANDARD**

26 To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to  
27 state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
28 (2007). This “facial plausibility” standard requires the plaintiff to allege facts that add up to  
“more than a sheer possibility that a Defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S.

1 662, 678 (2009). While courts do not require “heightened fact pleading of specifics,” a plaintiff  
2 must allege facts sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550  
3 U.S. at 555, 570. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the  
4 elements of a cause of action will not do.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at  
5 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual  
6 enhancement.” *Id.* (quoting *Twombly*, 550 U.S. at 557). “While legal conclusions can provide  
7 the framework of a complaint, they must be supported by factual allegations.” *Id.* at 679.

8 In reviewing a Rule 12(b)(6) motion to dismiss a counterclaim, a district court must accept  
9 as true all facts alleged in the counterclaim, and draw all reasonable inferences in favor of the  
10 claimant. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009). However, a district court is  
11 not required to accept as true “allegations that are merely conclusory, unwarranted deductions of  
12 fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.  
13 2008).

14 If the Court dismisses a complaint, it must decide whether to grant leave to amend. The  
15 Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no  
16 request to amend the pleading was made, unless it determines that the pleading could not possibly  
17 be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)  
18 (citations and internal quotation marks omitted).

19  
20 **DISCUSSION**

21 **I. Unlawful Restraint of Trade**

22 Flywheel brings its first counterclaim based on “unlawful restraint of trade.” Counterclaim  
23 ¶¶ 8-14. Flywheel does not state in its counterclaim or answer under what relevant law it bases  
24 this counterclaim. *See id.* In their briefs, both parties seem to take the position that the claim is  
25 brought under California’s Cartwright Act, which codifies California’s common law on unlawful  
26 restraints of trade. *See Cal. Bus. & Prof. Code §§ 16700 et seq.*; Dkt. No. 29, Mot. at 5-6; Dkt.  
27 No. 32, Oppo. at 1. But because Flywheel has not stated this expressly, the Court does not know  
28 whether there is also a claim under the federal Sherman Act. In its opposition, Flywheel cites to

1 the Sherman Act, but it is unclear whether Flywheel does so because it intends to bring its  
2 counterclaim under the Sherman Act or if it does so because courts look to Sherman Act case law  
3 in interpreting Cartwright Act claims. *See* Oppo. at 4; *Big Bear Lodging Ass'n v. Snow Summit,*  
4 *Inc.*, 182 F.3d 1096, 1101 n.2 (9th Cir. 1999) (“California's Cartwright Act, Cal. Bus. & Prof.  
5 Code §§ 16700-16770, is patterned after the Sherman Act. California courts look to federal case  
6 law interpreting the Sherman Act for guidance in interpreting the Cartwright Act.”). At minimum,  
7 the Court finds that CMT should be notified of the basis for Flywheel’s first counterclaim, and  
8 there is reason to dismiss the counterclaim on those grounds alone.

9 Turning to the sufficiency of Flywheel’s allegations, the Court further finds that  
10 Flywheel’s first counterclaim should be dismissed for failure to allege that CMT “has market  
11 power within a ‘relevant market.’”<sup>2</sup> *See Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038,  
12 1044 (9th Cir. 2008). To do so, Flywheel “must allege both that a ‘relevant market’ exists and that  
13 [CMT] has power within that market.” *See id.* Although the elements of the antitrust claim need  
14 not be pled with specificity, an antitrust claim will not survive a Rule 12(b)(6) motion to dismiss if  
15 “it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect” or  
16 if “the complaint’s ‘relevant market’ definition is facially unsustainable.” *Id.* at 1045.

17 At minimum, “[a]ntitrust law requires allegation of both a product market and a geographic  
18 market.” *Id.* at 1045 n.4. Flywheel has done neither. Flywheel asserts, without citation, that “the  
19 existence of a specific relevant market is not required to state a Cartwright Act violation.” Oppo.  
20 at 5. Flywheel then argues that it should at least be permitted “to amend its complaint to state the  
21 implicit allegation of a relevant market – namely, e-hailing mobile applications in the San  
22 Francisco, taxicab, or ride-hailing market.” *Id.* Flywheel thus confusingly mixes product and  
23 geographic markets in its brief, and then goes on to state that it “may expand its claim to include”  
24

25  
26 <sup>2</sup> The Court notes that CMT argues, and Flywheel does not contest, that exclusive-dealing  
27 relationships are not per se unlawful restraints of trade. Mot. at 7 (citing *Allied Orthopedic*  
28 *Appliances, Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 996 (9th Cir. 2010)); Oppo. at 5  
(citing *Corwin v. Los Angeles Newspaper Service Bureau Inc.*, 4 Cal. 3d 842, 853 (1971)). Thus,  
both parties focus their arguments on whether the alleged restraint of trade is unreasonable.

1 other geographic markets in New York, Boston, Chicago, Philadelphia, and Houston. *See id.* at 6  
2 n.2.

3           Additionally, Flywheel has failed to allege that CMT has power within the relevant market.  
4 *See* Counterclaim ¶¶ 8-14. Because Flywheel is silent on this, the Court cannot know whether the  
5 alleged market power is cognizable. If, however, the source of the market power is alleged to be  
6 the “Restraining Agreements” (i.e., contracts) that CMT entered into with taxi companies, these  
7 cannot constitute a market power for antitrust claims. The Ninth Circuit has held that “contractual  
8 obligations [are] not a cognizable source of market *power*.” *Newcal*, 513 F.3d at 1047. Nor does  
9 a “contractually-created monopoly” serve as market power for Sherman Act purposes. *Id.* at 1050.  
10 For instance, in *Forsyth v. Humana, Inc.*, consumers of health insurance policies willingly entered  
11 into contracts explicitly granting defendant Humana the power to insure them only through certain  
12 hospitals. 114 F.3d 1467, 1476 (9th Cir. 1997). The Ninth Circuit concluded that the plaintiffs’  
13 antitrust claim failed because they “claimed a submarket whose boundaries depended entirely on a  
14 written contract.” *See id.*; *Newcal*, 513 F.3d at 1047. In contrast, in *Newcal* the relevant market  
15 was a “wholly derivative aftermarket for replacement equipment” for photocopiers that resulted  
16 from an initial contractual relationship. 513 F.3d at 1050. Because that was “not a case in which  
17 the alleged market power flows from contractual exclusivity[,]” the court permitted the claim to  
18 survive a motion to dismiss. *Id.* Thus, if Flywheel means to allege that CMT has market power  
19 stemming from CMT’s exclusivity contracts with taxi fleets, which the taxi fleets willingly  
20 entered into, Flywheel will not have alleged that CMT has market power for purposes of an  
21 antitrust claim.

22           Accordingly, the Court GRANTS CMT’s motion to dismiss Flywheel’s first counterclaim.  
23 Because the counterclaim could potentially be cured with the addition of the information outlined  
24 above, the Court gives Flywheel leave to amend.

25  
26 **II. Unfair Competition**

27           Flywheel’s brings its second counterclaim for “unfair competition.” Counterclaim ¶¶ 15-  
28 19. Although Flywheel does not specify the source of law, both parties assume in their briefs that

1 the claim is based on California’s unfair competition law (“UCL”), which prohibits “any unlawful,  
2 unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. Flywheel’s claim  
3 is based on the (1) “unlawful” and (2) “unfair” prongs. Oppo. at 7. The “unlawful” prong of the  
4 UCL “borrows violations of other laws and treats them as unlawful practices that the unfair  
5 competition law makes independently actionable.” *Cel-Tech Commc’ns, Inc. v. Los Angeles*  
6 *Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). However, under the “unfair” prong, “a practice  
7 may be deemed unfair even if not specifically proscribed by some other law.” *Id.* The word  
8 “unfair” in the UCL “means conduct that threatens an incipient violation of an antitrust law, or  
9 violates the policy or spirit of one of those laws because its effects are comparable to or the same  
10 as a violation of the law, or otherwise significantly threatens or harms competition.” *Id.* at 186.  
11 Additionally, one suing for relief under the UCL must allege that he “suffered injury in fact and  
12 ha[ve] lost money or property as a result of the unfair competition.” Cal. Bus. Prof. Code  
13 § 17204; *Kwikset Corp. v. Super. Court*, 51 Cal. 4th 310, 318 (2011).

14  
15 **A. Unlawful Prong**

16 Here, both parties agree that Flywheel’s counterclaim under the “unlawful” prong depends  
17 on proving there to be a violation of another law, specifically the antitrust law alleged in  
18 Flywheel’s first counterclaim. Mot. at 11; Oppo. at 7; *see also Cel-Tech*, 20 Cal. 4th at 180. As  
19 such, Flywheel must sufficiently plead facts with respect to a Cartwright or Sherman Act antitrust  
20 violation in order to meet the unlawful prong of a UCL violation. Because Flywheel has not pled  
21 sufficient facts to survive a motion to dismiss with respect to its first counterclaim, it has not pled  
22 sufficient facts to meet the unlawful prong of its second counterclaim.

23  
24 **B. Unfair Prong**

25 Under the “unfair” prong, CMT argues that conduct that is not found to be “unfair” under  
26 the Cartwright Act cannot be found to be “unfair” under the UCL. *See* Mot. at 11 (citing *Chavez*  
27 *v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001)). CMT further cites language from *Cel-*  
28 *Tech* suggesting that a claimant cannot “plead around” antitrust law by using the UCL’s “unfair”

1 prong. *See* Dkt. No. 33, Reply at 7 (citing *Cel-Tech*, 20 Cal. 4th at 182-83). Flywheel, on the  
 2 other hand, argues that the UCL “allows a court maximum discretion to address improper business  
 3 practices” because the court may find the “unfair” prong satisfied where conduct “violates the  
 4 policy or spirit” of antitrust law. *See* Oppo. at 7 (citing *Cel-Tech*, 20 Cal. 4th at 187). According  
 5 to Flywheel, CMT’s “Restraining Agreements violate the policy and spirit of antitrust laws  
 6 because they significantly threaten or harm competition.” *Id.* Specifically, Flywheel points to  
 7 CMT’s Restraining Agreements that disrupt the business of taxi and e-hailing application  
 8 companies against competition from Uber and Lyft. *See id.*

9 The Court finds that Flywheel’s reading of *Cel-Tech* is the more accurate one. In *Cel-*  
 10 *Tech*, the California Supreme Court held that “courts may not use the unfair competition law to  
 11 condemn actions the Legislature permits.” *See* 20 Cal. 4th at 184. “Conversely, the Legislature’s  
 12 mere failure to prohibit an activity does not prevent a court from finding it unfair.” *Id.* Thus,  
 13 Flywheel is not barred from recovery under the UCL just because it does not currently meet the  
 14 standards for a claim under the Cartwright Act. *Chavez*, on which CMT relies, is inapplicable  
 15 here because that case was brought by a consumer and involved a finding that the alleged unfair  
 16 conduct was permissible under the law. *See* 93 Cal. App. 4th at 375. *Cel-Tech* governs in cases  
 17 such as this one, “involv[ing] an action by a competitor alleging anticompetitive practices.” *See*  
 18 *Cel-Tech*, 20 Cal. 4th at 186-87 n.12. Thus, Flywheel’s UCL claim may stand if the challenged  
 19 conduct “threatens an incipient violation of an antitrust law, or violates the policy or spirit of one  
 20 of those laws because its effects are comparable to or the same as a violation of the law, or  
 21 otherwise significantly threatens or harms competition.” *See id.* at 187.

22 Nevertheless, despite Flywheel’s correct statement of the law, the allegations stated in its  
 23 counterclaim are not enough to meet the Rule 12(b)(6) pleading standard. *See Twombly*, 550 U.S.  
 24 at 555, 570. In contending that CMT’s conduct threatened or harmed competition, Flywheel’s  
 25 counterclaim draws broad conclusions, such as, “CMT’s conduct is unfair and unlawful because it  
 26 seeks to unfairly and unlawfully restrain competition.” *See* Counterclaim ¶ 17. Without further  
 27 specificity, Flywheel’s conclusory allegations cannot be taken as true. *See Dayton Time Lock*  
 28 *Serv., Inc. v. Silent Watchman Corp.*, 52 Cal. App. 3d 1, 6-7 (1975); *In re Gilead*, 536 F.3d at



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

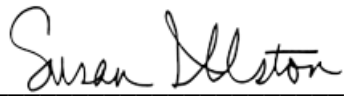
1055. Nor does Flywheel allege that it “lost money or property as a result of the unfair competition.” *See* Cal. Bus. Prof. Code § 17204. Flywheel alleges that CMT “is now attempting to develop its own competitive mobile taxi hailing application,” but CMT apparently has not done so yet. *See* Counterclaim ¶ 7. The counterclaim does not plausibly allege that CMT’s challenged conduct has cost Flywheel money or property. Accordingly, the Court GRANTS CMT’s motion to dismiss the second counterclaim, with leave to amend.

**CONCLUSION**

For the foregoing reasons and for good cause shown, the Court hereby GRANTS CMT’s motion to dismiss Flywheel’s first and second counterclaims, with leave to amend. Flywheel must file any amended pleading **no later than October 19, 2016**.

**IT IS SO ORDERED.**

Dated: October 5, 2016

  
\_\_\_\_\_  
SUSAN ILLSTON  
United States District Judge