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

BECTON, DICKINSON AND  
COMPANY,

Plaintiff,

v.

CYTEK BIOSCIENCES INC., et al.,  
Defendants.

Case No. [18-cv-00933-MMC](#)

**ORDER GRANTING MOTION TO  
DISMISS; AFFORDING LEAVE TO  
AMEND**

Re: Dkt. No. 88

Before the Court is plaintiff/counterdefendant Becton, Dickinson and Company's ("BD") motion, filed October 29, 2018, to dismiss the First Cause of Action asserted against it in defendant/counterclaimant Cytek Biosciences, Inc.'s ("Cytek") Counterclaims. Cytek has filed opposition, to which BD has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.<sup>1</sup>

**BACKGROUND<sup>2</sup>**

Cytek is a company that "provide[s] . . . flow cytometry products and services in the United States."<sup>3</sup> (See Counterclaims ¶ 2.) BD is a company that, according to Cytek, "dominates more than half the United States market for flow cytometers" (see *id.* ¶ 2) and "commands 30-40% of the cytometry reagent market in the United States" (see *id.* ¶ 19).<sup>4</sup>

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<sup>1</sup> By order filed January 22, 2019, the Court took the motion under submission.

<sup>2</sup> The following facts are taken from the Counterclaims.

<sup>3</sup> "Flow cytometry is a powerful, laser-based technology used for identifying and quantifying cellular characteristics on a cell-by-cell basis that offers a variety of biomedical and therapeutic applications." (See *id.* ¶ 1.)

<sup>4</sup> "Reagents are essential consumable substances used in flow cytometers to identify and



1 under a cognizable legal theory.” See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696,  
2 699 (9th Cir. 1990). Rule 8(a)(2), however, “requires only ‘a short and plain statement of  
3 the claim showing that the pleader is entitled to relief.’” See Bell Atlantic Corp. v.  
4 Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, “a  
5 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual  
6 allegations.” See id. Nonetheless, “a plaintiff’s obligation to provide the grounds of his  
7 entitlement to relief requires more than labels and conclusions, and a formulaic recitation  
8 of the elements of a cause of action will not do.” See id. (internal quotation, citation, and  
9 alteration omitted).

10 In analyzing a motion to dismiss, a district court must accept as true all material  
11 allegations in the complaint, and construe them in the light most favorable to the  
12 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). “To  
13 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted  
14 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S.  
15 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations must be  
16 enough to raise a right to relief above the speculative level[.]” Twombly, 550 U.S. at 555.  
17 Courts “are not bound to accept as true a legal conclusion couched as a factual  
18 allegation.” See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

19 **DISCUSSION**

20 As noted above, BD seeks dismissal of Cytek’s First Cause of Action, which  
21 asserts a claim solely for injunctive relief under the UCL.<sup>5</sup>

22 The UCL prohibits “any unlawful, unfair or fraudulent business act or practice.”  
23 See Cal. Bus. & Prof. Code § 17200. The California Supreme Court has recognized that  
24 “[b]ecause [the UCL] is written in the disjunctive, it establishes three varieties of unfair  
25 competition – acts or practices which are unlawful, or unfair, or fraudulent.” See Cel-Tec  
26 Comm’ns, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180 (1999).

27 \_\_\_\_\_  
28 <sup>5</sup> In its Opposition, Cytek clarifies that it “is seeking injunctive relief under the UCL, not  
restitution.” (See Opp. at 22:18-19.)

1 Cytek asserts BD violated the “unfair” and “unlawful” prongs of the UCL.<sup>6</sup> BD  
2 contends the First Cause of Action is subject to dismissal because Cytek has not pled  
3 sufficient facts to state a claim under either of the above-referenced prongs and because  
4 Cytek has not adequately alleged it is entitled to injunctive relief under the UCL.

5 The Court addresses below each of BD’s proffered grounds for dismissal.

6 **A. Failure to Allege Sufficient Facts to State a Claim**

7 **1. The “Unfair” Prong**

8 Under the “unfair” prong of the UCL, “a practice may be deemed unfair even if not  
9 specifically proscribed by some other law.” See Cel-Tech, 20 Cal.4th at 180. A  
10 competitor’s conduct constitutes an “unfair” business practice when such “conduct . . .  
11 threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of  
12 those laws because its effects are comparable to or the same as a violation of the law, or  
13 otherwise significantly threatens or harms competition.” See id. at 187.

14 Cytek alleges BD has engaged in conduct that “threatens an incipient violation” of  
15 section 3 of the Clayton Act, 15 U.S.C. § 14, as well as the Cartwright Act, specifically,  
16 California Business and Professions Code §§ 16720 and 16727. (See Counterclaims  
17 ¶ 46.) In particular, Cytek alleges, “a BD executive threatened that BD would no longer  
18 supply [a Cytek] customer with the critical reagents for its BD cytometers if the [customer]  
19 purchased an Aurora from Cytek” (see id. ¶ 18) and, in so doing, attempted to “[tie] . . .  
20 the sale of its reagents to its customers’ refusal to purchase competing Cytek machines”  
21 (see id. ¶ 45) (“tying arrangement theory”).<sup>7</sup>

22 BD contends Cytek has not adequately alleged BD has engaged in conduct that  
23 would result in a tying arrangement that is per se illegal under either the Clayton Act or  
24 the Cartwright Act.

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26 <sup>6</sup> In their respective memoranda filed in connection with the instant motion, neither party  
27 discusses the “fraudulent” prong.

28 <sup>7</sup> Although Cytek alleges “BD has made similar threats to other potential Cytek  
customers” (see id. ¶ 21), the allegation is entirely lacking in factual support.

1                    **a.        Section 3 of the Clayton Act**

2                    Pursuant to section 3 of the Clayton Act, it is “unlawful for any person engaged in  
3 commerce . . . to . . . make a sale or contract for sale of goods . . . on the condition,  
4 agreement, or understanding that the . . . purchaser thereof shall not use or deal in the  
5 goods . . . of a competitor . . . where the effect of such . . . contract for sale or condition,  
6 agreement, or understanding may be to substantially lessen competition.” See 15 U.S.C.  
7 § 14. “Although the literal terms of [section 3 of the Clayton Act] refer to exclusive  
8 dealing contracts, the Supreme Court has extended its application to tying  
9 arrangements.” Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1213-14 (9th Cir.  
10 1977).

11                    A tying arrangement is “defined as an agreement by a party to sell one product but  
12 only on the condition that the buyer also purchases a different (or tied) product, or at least  
13 agrees that he will not purchase that product from any other supplier.” See N. Pac. Ry.  
14 Co. v. United States, 356 U.S. 1, 5-6 (1958). “Three elements must be satisfied to  
15 establish that a tying arrangement is illegal per se: (1) a tie-in between two products or  
16 services sold in different markets, (2) market power in the tying product, and (3) the tying  
17 arrangement affects a not insubstantial volume of commerce.” Datagate Inc. v. Hewlett-  
18 Packard Co., 60 F.3d 1421, 1423-24 (9th Cir. 1995). The above-referenced test applies  
19 in determining whether a tying arrangement violates section 1 of the Sherman Act or  
20 section 3 of the Clayton Act. See Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1189 n.2  
21 (9th Cir. 1984) (applying same elements to analyze whether tying arrangement “violated  
22 . . . section 1 of the Sherman Act . . . and section 3 of the Clayton Act”); see also Mozart  
23 v. Mercedes-Benz of N. Am., 833 F.2d 1342, 1352 (9th Cir. 1987) (noting “the elements  
24 for establishing a Sherman Act § 1 claim and a Clayton Act § 3 claim” based on an illegal  
25 tying arrangement “are virtually the same”).

26                    Here, while BD acknowledges Cytek, to state a claim under the “unfair” prong of  
27 the UCL, need not allege that a purported tying arrangement has been consummated  
28 (see Reply at 3:20-4:6; see also id. at 5:19-6:2), BD contends Cytek has not adequately

1 alleged BD engaged in conduct that threatens an incipient violation of section 3 of the  
 2 Clayton Act. Specifically, BD argues that, even if the purported tying arrangement had  
 3 been consummated, Cytek “fails to plausibly allege BD’s market power in the purported  
 4 tying product market” (see Mot. at 12:27-28), and “fails to allege foreclosure of a not-  
 5 insubstantial dollar-volume of sales in the purported tied product market” (see Mot. at  
 6 15:13-14). As set forth below, the Court agrees.

7 **i. Market Power**

8 Market power refers to “the power, within the market for the tying product, to raise  
 9 prices or to require purchasers to accept burdensome terms that could not be exacted in  
 10 a completely competitive market.” See United States Steel Corp. v. Fortner Enters., 429  
 11 U.S. 610, 620 (1977) (“Fortner II”). In evaluating whether a seller possesses market  
 12 power, courts consider “whether the seller has some advantage not shared by his  
 13 competitors in the market for the tying product.” See id. “When the seller’s share of the  
 14 market is high, or when the seller offers a unique product that competitors are not able to  
 15 offer, the [Supreme Court] has held that the likelihood that market power exists and is  
 16 being used to restrain competition in a separate market is sufficient to make per se  
 17 condemnation appropriate.” Jefferson Parish Hosp. District No. 2 v. Hyde, 466 U.S. 2, 13  
 18 (1984) (internal citations omitted).

19 As to market share, Cytek alleges BD “commands 30-40% of the cytometry  
 20 reagent market in the United States.” (See Counterclaims ¶ 19.) Such allegation, does  
 21 not, however, support an inference that BD has market power in the tying product market.  
 22 See Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 611-12 (holding publishing  
 23 company did not have market power where its sales comprised 40% of total sales in tying  
 24 product market); see also Jefferson Parish Hosp., 466 U.S. at 26-27 (holding hospital did  
 25 not have market power where it served 30% of total patients in tying product market).

26 As to the uniqueness of the tying product, Cytek alleges “[t]he reagent BD  
 27 threatened to withhold was a proprietary BD-licensed formulation . . . for which there is no  
 28 market alternative” because BD holds a patent on it. (See Counterclaims ¶ 20; see also

1 id. ¶ 20 n.5 (noting BD has “filed suit for patent infringement” against “competitor [who  
2 has] marketed what BD referred to as ‘copycat products’”).) Contrary to Cytek’s  
3 argument, however, ownership of “a patent does not necessarily confer market power on  
4 the patentee,” see Illinois Tool Works Inc. v. Independent Ink. Inc., 547 U.S. 28, 45  
5 (2006), and Cytek does not allege any other facts to show “other competitors [in the tying  
6 product market] are in some way prevented from offering the distinctive product  
7 themselves,” see Fortner II, 420 U.S. at 621.

8 **ii. Substantial Volume of Commerce Affected**

9 When evaluating whether a tying arrangement affects a substantial volume of  
10 commerce, “the controlling consideration is simply whether a total amount of business,  
11 substantial enough in terms of dollar-volume so as not to be merely de minimis, is  
12 foreclosed to competitors by the tie[.]” See Fortner Enters., Inc. v. United States Steel  
13 Corp., 394 U.S. 495, 501 (1969) (“Fortner I”). “The ‘not insubstantial’ requirement can be  
14 satisfied by the foreclosure of a single purchaser, so long as the purchaser represents a  
15 ‘not insubstantial’ dollar-volume of sales.” Dategate, Inc. v. Hewlett-Packard Co., 60 F.3d  
16 1421, 1425 (9th Cir. 1995).

17 Here, Cytek’s Counterclaims lack sufficient facts to support a finding that the tying  
18 arrangement at issue, if consummated, would result in the foreclosure of sales by Cytek  
19 involving a “not insubstantial dollar-volume.” Indeed, Cytek does not plead any facts  
20 showing the customer to whom the tying arrangement was presented had any interest in  
21 purchasing a cytometer from Cytek, such that the arrangement was likely to result in the  
22 loss of a sale by Cytek. Moreover, Cytek alleges its cytometers “range in price from tens  
23 of thousands of dollars to more than [a] quarter of a million dollars per machine” (see  
24 Counterclaims ¶ 39); Cytek does not allege the price of the cytometer the above-  
25 referenced customer would have purchased, nor, given the ambiguity in the above-  
26 quoted description of the alleged lowest-priced cytometer, has Cytek shown such  
27 purchase necessarily would entail a not insubstantial sum. See, e.g., Fortner I, 394 U.S.  
28 at 502 (holding foreclosure of \$190,000 in sales was not “paltry or ‘insubstantial’”);

1 Moore, 550 F.2d at 1216 (noting “[t]he ‘not insubstantial’ test has been met by showing  
2 dollar volumes which total \$60,800, and estimated sales of \$86,376” (internal citations  
3 omitted)); Thompson v. Metro-Multi-List, 934 F.2d 1566, 1578 (11th Cir. 1991) (holding  
4 loss of membership dues “between \$30,000.00 – 70,000.00 . . . is clearly substantial”).

5 **b. The Cartwright Act**

6 “A tying arrangement may be condemned under either or both [Cal. Bus. & Prof.  
7 Code] section 16720 and section 16727.” Morrison v. Viacom Inc., 66 Cal. App. 4th 534,  
8 541 (1998). To establish a “per se tying arrangement violative of section 16720,” the  
9 following elements must be met:

- 10 (1) a tying agreement, arrangement or condition whereby the sale of the  
11 tying product was linked to the sale of the tied product or service; (2) the  
12 party had sufficient economic power in the tying market to coerce the  
13 purchase of the tied product; (3) a substantial amount of sale was affected  
14 in the tied product; and (4) the complaining party sustained pecuniary loss  
15 as a consequence of the unlawful act.

16 See id. at 541-42. “Under section 16727, a per se violation is established if either  
17 element (2) or (3) is established along with elements (1) and (4).” See id. at 542  
18 (emphasis in original); see also Nicolosi Distrib., Inc. v. BMW of N. Am., 2011 WL  
19 1483424, at \*2 (N.D. Cal. Apr. 19, 2011).

20 BD contends Cytek fails to adequately allege BD’s conduct threatens an incipient  
21 violation of the Cartwright Act “for the same reasons it fails to state a federal tying claim.”  
22 (See Mot. at 16:15-16; see also Reply at 9:15-16). The Court agrees.

23 As discussed above, Cytek’s Counterclaims lack sufficient facts to support a  
24 finding that BD has market power in the reagent market in the United States, that the  
25 tying arrangement at issue would affect a substantial volume of commerce in the  
26 cytometer market, or that Cytek would suffer a pecuniary loss as a consequence of BD’s  
27 conduct.

28 **c. Conclusion as to “Unfair” Prong**

To the extent the First Cause of Action is premised on Cytek’s tying arrangement  
theory, such claim is subject to dismissal.



1                                   **2.       The “Unlawful” Prong**

2                   Under the “unlawful” prong, the UCL “borrows violations of other laws and treats  
3 them as unlawful practices that the unfair competition law makes independently  
4 actionable.” See Cel-Tech, 20 Cal. 4th at 180 (internal quotation and citation omitted).

5                   Cytek alleges BD engaged in unlawful conduct when: (1) “BD falsely told a  
6 representative of a large, public research university and potential Cytek customer that  
7 Cytek ‘stole’ the technology in the Aurora flow cytometer from BD” (see Counterclaims  
8 ¶ 34) (“false statement theory”);<sup>8</sup> and (2) BD “require[d] its employees . . . to enter into  
9 employee agreements that are illegal under California Business & Professions Code  
10 § 16600” (see id. ¶ 51) (“employee agreement theory”).

11                  While BD does not challenge the sufficiency of the factual allegations underlying  
12 Cytek’s claim based on its employee agreement theory,<sup>9</sup> BD contends Cytek’s  
13 Counterclaims lack sufficient facts to state a claim based on its false statement theory.

14                  First, BD contends Cytek’s allegations underlying its false statement theory are  
15 insufficient to state a claim under the “unlawful” prong of the UCL because Cytek “fail[s]  
16 to identify the legal basis for this claim.” (See Reply at 10:12-13.) The Court agrees.

17                  As BD correctly points out, the allegations in Cytek’s Counterclaims do not identify  
18 the statute BD purportedly violated when it made the statement at issue. For this reason  
19 alone, Cytek has failed to state a claim under the “unlawful” prong of the UCL, as “a  
20 violation of another law is a predicate for stating a cause of action under the UCL’s  
21 unlawful prong.” See Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554  
22 (2007); see also E & E Co. v. Kam Hing Enters., 2008 WL 1924905, at \*1 (N.D. Cal. Apr.

23 \_\_\_\_\_  
24 <sup>8</sup> Although Cytek alleges it “has learned of repeated instances of BD and its sales  
25 representatives making false statements of fact about Cytek’s products and practices”  
26 (see id. ¶ 33), the allegation is lacking in any factual support beyond the above-  
27 referenced instance.

28 <sup>9</sup> Although Cytek characterizes the “holdover clauses” (see id. ¶ 54) as “illegal” and,  
consequently, unlawful, Cytek also alleges BD’s use of such contractual provision is  
“unfair” (see id. ¶ 51). In any event, BD does not challenge the sufficiency of the  
underlying factual allegations under either theory.

1 29, 2008) (holding “plaintiff’s allegations [were] insufficient to satisfy the ‘unlawful’ prong,  
2 for the reason that allegations of illegality must be accompanied by reference to a  
3 particular statute”); Gonzalez v. Trust, 2015 WL 12081028, at \*2 (S.D. Cal. Sep. 28,  
4 2015) (dismissing claim under “unlawful” prong; noting, “while [p]laintiffs may have  
5 alleged facts to support a statutory violation, [p]laintiffs have not identified any such  
6 statute in their allegations directed at [defendant]”).

7 Next, BD argues that, even assuming Cytek’s Counterclaims had identified  
8 California Civil Code § 43 as the basis for its false statement theory, see Cal. Civ. Code  
9 § 43 (providing persons “the right of protection . . . from defamation”), Cytek has not pled  
10 sufficient facts to state a claim for defamation. As set forth below, the Court again  
11 agrees.

12 “Defamation is the intentional publication of a statement of fact that is false,  
13 unprivileged, and has a natural tendency to injure or that causes special damage.”  
14 Grenier v. Taylor, 234 Cal. App. 4th 471, 486 (2015). In order to plead a claim for  
15 defamation, “the defamatory statement must be specifically identified, and the plaintiff  
16 must plead the substance of the statement.” See Pruitt v. Genentech, Inc., 2017 WL  
17 3641783, at \*4 (E.D. Cal. Aug. 24, 2017); see also MacKinnon v. Logitech, Inc., 2016 WL  
18 541068, at \*5 (N.D. Cal. Feb. 11, 2016) (noting “defamatory statement must be  
19 specifically identified” and “plaintiff must plead the substance of the statement” (internal  
20 quotation and citation omitted)). Specifically, to withstand dismissal, “the complaint must  
21 reference the speakers of the defamatory communications, the recipients, the timing, or  
22 the context in which they were made, sufficient to provide [the defendant] with notice of  
23 the issues to prepare a defense.” See Pruitt, 2017 WL 3641783 at \*4 (alteration in  
24 original) (internal quotation and citation omitted); see also MacKinnon, 2016 WL 541068  
25 at \*5 (noting plaintiff, to plead defamation claim, must “specifically identify who made the  
26 statements, when they were made, and to whom they were made” (internal quotation and  
27 citation omitted)); Cook v. UPS Cartage Service, Inc., 2018 WL 3630043, at \*2 (E.D. Cal.  
28 July 31, 2018) (dismissing defamation claim where plaintiff failed to allege identity of

1 speakers and recipients of defamatory statements, as well as time or context in which  
2 statements were made).

3 Here, although Cytek alleges “BD falsely told a representative of a large, public  
4 research university and potential Cytek customer that Cytek ‘stole’ the technology in the  
5 Aurora flow cytometer from BD” (see Counterclaims ¶ 34), the allegation “lacks the  
6 requisite specificity” to state a claim for defamation. See Pruitt, 2017 WL 3641783 at \*4.  
7 In particular, Cytek does not adequately allege the identity of the speaker or the recipient,  
8 when such statement was made, and the context in which the statement was made.<sup>10</sup>

9 Accordingly, to the extent the First Cause of Action is based on Cytek’s false  
10 statement theory, such claim is subject to dismissal.

11 **B. Failure to Allege Entitlement to Injunctive Relief**

12 As noted above, Cytek’s First Cause of Action asserts a claim solely for injunctive  
13 relief. (See Counterclaims ¶ 57.) BD contends Cytek has not adequately alleged  
14 entitlement to such relief because Cytek “alleges no basis for a remedy to stop any non-  
15 speculative future harm.” (See Reply at 15:23-24.) The Court agrees.

16 Under California law, courts may award injunctive relief “as may be necessary to  
17 prevent the use or employment . . . of any practice which constitutes unfair competition.”  
18 See Cal. Bus. & Prof. Code § 17203. Injunctive relief under § 17203, however, “cannot  
19 be used . . . to enjoin an event which has already transpired; a showing of threatened  
20 future harm or continuing violation is required.” See People v. Toomey, 157 Cal. App. 3d  
21 1, 20 (1984). “Injunctive relief has no application to wrongs which have been completed,  
22 absent a showing that past violations will probably recur.” Id. (internal citation omitted).  
23 Where a plaintiff’s UCL claim lacks facts showing he or she is entitled to the relief sought  
24 under the UCL, such claim is subject to dismissal. See Ice Cream Distribs. of Evansville,

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<sup>10</sup> To the extent BD argues the alleged statement is privileged under California’s litigation privilege, California’s common interest privilege, and the Noer-Pennington doctrine, such argument is premature, given the absence of sufficient facts regarding the circumstances under which the statement was made.

1 LLC v. Dreyer’s Grand Ice Cream, Inc., 487 Fed. App’x 362, 363 (9th Cir. 2012) (affirming  
2 dismissal of UCL claim where plaintiff sought injunction and restitution but did not plead  
3 facts demonstrating entitlement to either form of relief).

4 Here, Cytek’s tying arrangement and false statement theories are premised on  
5 statements purportedly made by BD representatives at some point in time between the  
6 Aurora’s release in 2017 and the filing of the Counterclaims in 2018 (see Counterclaims  
7 ¶¶ 18, 34) and, consequently, are based on events “which [have] already transpired.”  
8 See Toomey, 157 Cal. App. 3d at 20. Cytek’s Counterclaims lack, however, sufficient  
9 facts to support a finding that such conduct “will probably recur” in the future. See id.

10 Next, with respect to Cytek’s employee agreement theory, Cytek alleges it may be  
11 subject to future harm because “BD has asserted claims against Cytek . . . for inducing  
12 breach of [the] illegal holdover clauses,” and, although such claims “have been  
13 dismissed,” BD’s “discovery requests . . . make clear that BD intends to pursue this claim  
14 in the future following additional discovery.” (See Counterclaims ¶ 54.) In particular,  
15 Cytek alleges, BD has “request[ed] production by Cytek . . . of ‘[a]ll documents  
16 concerning patents, patent applications, or invention disclosure statements relating to  
17 Flow Cytometry Systems or Spectral Flow Cytometry Systems that were drafted,  
18 submitted, or filed by [Cytek or on Cytek’s behalf] . . .’ from January 1, 2012 to present.”  
19 (See id. ¶ 31 (alterations in original).)

20 Cytek’s allegations do not support a finding that BD will reassert against Cytek a  
21 claim for inducement of breach of contract premised on the “holdover provision.” The  
22 Court dismissed BD’s inducement of breach of contract claim on the ground such claim  
23 was preempted by the California Uniform Trade Secrets Act (see Doc. No. 65 (Order  
24 Granting Cytek’s Motion to Dismiss) at 10-11), and Cytek has not pleaded any facts  
25 showing how the above-referenced discovery, or any other discovery, will provide BD  
26 with information sufficient to avoid that legal bar or to allow BD to reassert the “holdover  
27 provision” as the basis of any other claim.

28 Accordingly, to the extent the First Cause of Action is premised on Cytek’s


1 employee agreement theory, such claim is subject to dismissal, and, to the extent the  
2 First Cause of Action is premised on the tying arrangement and false statement theories,  
3 such claim is subject to dismissal on this additional ground as well.

4 **CONCLUSION**

5 For the reasons set forth above, BD's motion to dismiss is hereby GRANTED and  
6 Cytek's First Cause of Action is hereby DISMISSED with leave to amend. Cytek's  
7 Amended Counterclaims, if any, shall be filed no later than March 7, 2019.

8 **IT IS SO ORDERED.**

9  
10 Dated: February 14, 2019

  
11 MAXINE M. CHESNEY  
12 United States District Judge