

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

3
 4 LOGTALE, LTD.,

No. C 11-5452 CW

5 Plaintiff,

ORDER GRANTING IN
 PART AND DENYING
 IN PART MOTION TO
 DISMISS

6 v.

COUNTERCLAIMS;
 DENYING MOTION TO
 STRIKE; SETTING
 INITIAL CASE
 MANAGEMENT
 CONFERENCE

7 IKOR, INC., et al.,

8 Defendants.

9 _____
 10 AND RELATED COUNTERCLAIMS AND
 11 THIRD-PARTY CLAIMS
 12 _____/

12 Plaintiff and Counterdefendant Logtale, Ltd. moves to dismiss
 13 the counterclaims of Defendant and Counterclaimant IKOR, Inc.
 14 pursuant to Federal Rule of Civil Procedure 12(b)(6), and moves to
 15 strike portions of the counter-complaint pursuant to Rule 12(f).
 16 Defendants oppose the motion except as to dismissal of IKOR's
 17 unfair competition claim. The matter is fully briefed and the
 18 Court finds the matter suitable for decision without oral
 19 argument. Having considered the relevant legal authority and the
 20 papers filed by the parties, the Court grants the motion to
 21 dismiss and grants leave to amend, as more fully set forth below.

22 BACKGROUND

23 The following facts are admitted or alleged in the first
 24 amended answer and counterclaim (1AA) to the first amended
 25 complaint (1AC).

26 Defendant IKOR, Inc. is a South Dakota corporation in the
 27 business of developing bovine-derived oxygen therapeutics and
 28 related technologies and is the owner of three U.S. patents

1 related to tetrameric hemoglobin. 1AC ¶¶ 4, 15. Defendants
2 Canton and Tye are officers and directors of IKOR. 1AC ¶¶ 5-6.

3 On or about October 20, 2006, Logtale and IKOR entered into a
4 Series A Preferred Stock Purchase Agreement (SPA), pursuant to
5 which IKOR sold and issued 1,999,840 shares of its Series A
6 Convertible Stock to Logtale at a purchase price of \$2.5002 per
7 share. 1AC ¶ 17 and Ex. 1. As a result of this five million
8 dollar purchase, Logtale became the majority shareholder of
9 preferred stock in IKOR. 1AC ¶ 17.

10 On or about October 20, 2006, IKOR issued Amended and
11 Restated Articles of Incorporation, pursuant to which Logtale, as
12 the majority shareholder of preferred stock in IKOR, had the right
13 to elect, and did elect, Dr. Norman Wai to serve as a director on
14 the IKOR Board. 1AC ¶¶ 18-19 and Ex. 2. IKOR's first amended
15 third-party complaint names Dr. Wai as a third-party defendant,
16 but IKOR has not filed proof that he has been served.

17 Also on or about October 20, 2006, Logtale and Defendants
18 IKOR, Ross and Tye entered into an Investors' Rights Agreement.
19 1AC ¶ 20 and Ex. 3. One of the stated purposes of the Investors'
20 Rights Agreement was to induce Logtale to purchase Series A
21 Preferred Stock and invest funds in IKOR pursuant to the Purchase
22 Agreement, as well as to govern Logtale's rights as an investor in
23 IKOR. Id. Defendants allege that the negotiations leading to the
24 Investors' Rights Agreement were made between IKOR and New World
25 Mobile Holdings Ltd. (New World Mobile), a company incorporated in
26 the Cayman Islands and a subsidiary of New World Development
27 Company Limited (New World Development), a Hong Kong corporation.
28 1AA ¶ 20. Defendants allege that, at a relatively late stage in

1 the negotiations, New World Mobile requested that Logtale be
2 substituted for New World Mobile as the investor. Logtale was a
3 "shelf-corporation" registered in the British Virgin Islands with
4 no operational existence or significant capital at the time of
5 substitution. 1AA ¶ 20. The investors explained that
6 substitution by Logtale was necessary because the proposed
7 investment in IKOR would cause disclosure difficulties for New
8 World Mobile and New World Development. 1AA ¶ 20. IKOR names New
9 World Mobile as a third-party defendant but has not filed proof
10 that it has been served.

11 IKOR alleges that, on or about October 20, 2006, it entered
12 into an Option and License and Manufacturing Agreement (License
13 Agreement) with Logtale. 1AA, First Counterclaim ¶ 1 and Ex. A.
14 The License Agreement granted Logtale a limited exclusive right to
15 manufacture, sell and distribute certain IKOR biopharmaceuticals
16 in designated territories, essentially Asia, Australia, and New
17 Zealand. Id. IKOR alleges that, although a more complete
18 agreement was initially contemplated, it was never executed, and
19 IKOR and Logtale have been operating under the terms of the
20 License Agreement since 2006. Id. The drugs licensed to Logtale
21 under the alleged License Agreement are known as Oxygen
22 Therapeutics and related hemoglobin-based biopharmaceuticals.
23 1AA, First Counterclaim ¶ 4.

24 IKOR alleges that Logtale created a Hong Kong corporation,
25 New A-IKOR, whose name was later changed to New A Innovation Ltd.
26 1AA, First Counterclaim ¶ 3. New A Innovation allegedly
27 manufactures and sells the licensed biopharmaceutical products
28 under the license granted to Logtale by IKOR. Id. New A

1 Innovation is named by IKOR as a third-party defendant but IKOR
2 has not filed proof that it has been served.

3 IKOR cancelled the Logtale licenses in 2010, after having
4 given notice that Logtale was in default for uncured breaches of
5 the License Agreement, including, but not limited to, the
6 marketing and manufacturing of IKOR's Oxygen Therapeutics and
7 related pharmaceuticals. 1AA, First Counterclaim ¶ 10.

8 IKOR alleges that Logtale, as well as New A Innovation, New
9 World Mobile and New World Development acting through Logtale,
10 have breached the License Agreement by, among other things,
11 withholding royalties, failing to comply with auditing and
12 inspection requirements, and misusing IKOR's proprietary
13 information. 1AA, First Counterclaim ¶ 14.

14 Logtale filed this action on November 9, 2011, and filed an
15 amended complaint on February 13, 2012. The operative complaint
16 seeks injunctive relief and alleges claims against Defendants for
17 breach of contract, breach of fiduciary duties and breach of the
18 implied covenant of good faith and fair dealing.

19 Defendants filed an answer and counterclaim to the 1AC and
20 third-party complaint on March 23, 2012, then filed the 1AA on May
21 21, 2012. In its most recent pleading, IKOR alleges the following
22 counterclaims against Logtale: (1) breach of the License
23 Agreement, including failure to supply financial and manufacturing
24 information required by the agreement; (2) theft of intellectual
25 property under California's Uniform Trade Secrets Act; (3) unfair
26 competition by copying IKOR's drugs without paying royalties; and
27 (4) interference with prospective business opportunity by
28 thwarting IKOR's efforts to obtain additional financing, in order

1 to drive IKOR into bankruptcy and acquire rights in IKOR's
2 technology as a preferred shareholder in IKOR's liquidation.

3 Logtale moves to dismiss IKOR's counterclaims and to strike
4 certain allegations. IKOR concedes that the third counterclaim
5 for unfair competition fails to state a claim for relief, but
6 otherwise opposes Logtale's motion to dismiss and motion to
7 strike.

8 LEGAL STANDARD

9 I. Motion to Dismiss

10 A complaint must contain a "short and plain statement of the
11 claim showing that the pleader is entitled to relief." Fed. R.
12 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
13 state a claim, dismissal is appropriate only when the complaint
14 does not give the defendant fair notice of a legally cognizable
15 claim and the grounds on which it rests. Bell Atl. Corp. v.
16 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
17 complaint is sufficient to state a claim, the court will take all
18 material allegations as true and construe them in the light most
19 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
20 896, 898 (9th Cir. 1986). However, this principle is inapplicable
21 to legal conclusions; "threadbare recitals of the elements of a
22 cause of action, supported by mere conclusory statements," are not
23 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
24 (citing Twombly, 550 U.S. at 555).

25 When granting a motion to dismiss, the court is generally
26 required to grant the plaintiff leave to amend, even if no request
27 to amend the pleading was made, unless amendment would be futile.
28 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911

1 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
2 amendment would be futile, the court examines whether the
3 complaint could be amended to cure the defect requiring dismissal
4 "without contradicting any of the allegations of [the] original
5 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
6 Cir. 1990).

7 II. Motion to Strike

8 Pursuant to Federal Rule of Civil Procedure 12(f), the court
9 may strike from a pleading "any redundant, immaterial, impertinent
10 or scandalous matter." The purpose of a Rule 12(f) motion is to
11 avoid spending time and money litigating spurious issues.
12 Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993),
13 rev'd on other grounds, 510 U.S. 517 (1994). Matter is immaterial
14 if it has no essential or important relationship to the claim for
15 relief plead. Id. Matter is impertinent if it does not pertain
16 and is not necessary to the issues in question in the case. Id.
17 "Superfluous historical allegations are a proper subject of a
18 motion to strike." Id. Motions to strike are disfavored because
19 they are often used as delaying tactics and because of the limited
20 importance of pleadings in federal practice. Bureerong v. Uvawas,
21 922 F. Supp. 1450, 1478 (C.D. Cal. 1996). They should not be
22 granted unless it is clear that the matter to be stricken could
23 have no possible bearing on the subject matter of the litigation.
24 Colaprico v. Sun Microsystems, Inc., 758 F. Supp. 1335, 1339 (N.D.
25 Cal. 1991).

DISCUSSION

I. Breach of Contract

The first counterclaim for breach of contract alleges that on or about October 20, 2006, "IKOR and Logtale entered into a[n] Option and Licensing and Manufacturing Agreement," and that "[a]lthough a more complete agreement was initially contemplated, it was never executed, and thus both IKOR and Logtale have been operating under the terms of the Licensing Agreement since 2006." 1AA, First Counterclaim ¶ 1. Logtale contends that IKOR fails to allege the existence of a valid License Agreement in support of its breach of contract claim. As currently plead, the allegations are not sufficient to state a claim for breach of contract, but IKOR is granted leave to amend the allegations.

Courts apply general principles of contract interpretation when interpreting the terms and scope of a licensing agreement. Miller v. Glenn Miller Productions, Inc., 454 F.3d 975, 989 (9th Cir. 2006) (citing Mendler v. Winterland Production, Ltd., 207 F.3d 1119, 1121 (9th Cir. 2000)). "The fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time of contracting." Id. (quoting United States Cellular Invest. Co. of Los Angeles v. GTE Mobilnet, Inc., 281 F.3d 929, 934 (9th Cir. 2002)).

The Option Agreement entered by IKOR (referred to as the Company) and Logtale (referred to as the Grantee) on October 20, 2006, states as follows:

1. GRANT OF OPTION.

1.1 In consideration of the sum of HK\$1.00 now paid by the Grantee to the Company (receipt of which the Company hereby acknowledges), the Company

1 hereby irrevocably and unconditionally grants to
2 the Grantee the option (the "Option") to require
3 the Company to enter into a license and
4 manufacturing agreement (the "License and
5 Manufacturing Agreement") with the Grantee or any
6 company as the Grantee may direct, on the principal
7 terms set out in the Schedule hereto.

8
9 1.2 The Option may be exercised by the Grantee
10 at any time during the period commencing from the
11 date of this Agreement to the first anniversary
12 hereof by serving an option notice in the form
13 attached hereto as Exhibit A (the "Option Notice")
14 on the Company upon which the Option shall be
15 deemed exercised.

16
17 1.3 Immediately after the service of the
18 Option Notice, the Company and the Grantee shall
19 negotiate diligently and in good faith, and use
20 their best efforts to enter into the License and
21 Manufacturing Agreement on the principal terms and
22 conditions set out in the Schedule attached hereto
23 within thirty (30) days after such service.

24 1AA, Ex. A (Docket No. 26-1) at 1.

25 Logtale contends that on the face of the Option Agreement,
26 the parties expressed their intent that the attached License
27 Agreement was a contingent, draft document, and further contends
28 that IKOR has not alleged that the parties ever signed or entered
into a written License Agreement. IKOR responds that the parties
treated the License Agreement as binding on them and intended the
writing to reflect their agreement.

If there is a manifest intention that the agreement is not
binding until reduced to a formal writing that is executed by both
parties, there is no binding contract until this occurs. Rennick
v. OPTION Care, Inc., 77 F.3d 309, 316 (9th Cir. 1996). On the
other hand, "[w]hen parties intend that an agreement be binding,
the fact that a more formal agreement must be prepared and
executed does not alter the validity of the agreement." Blix St.
Records, Inc. v. Cassidy, 191 Cal. App. 4th 39, 48 (2010).

1 "Whether a writing constitutes a final agreement or merely an
2 agreement to make an agreement depends primarily upon the
3 intention of the parties. In the absence of ambiguity this must
4 be determined by a construction of the instrument taken as a
5 whole.'" Beck v. American Health Group Intl., Inc., 211 Cal. App.
6 3d 1555, 1562 (1989) (quoting Smissaert v. Chiodo, 163 Cal. App.
7 2d 827, 830 (1958)).

8 In support of its contention that the parties' agreement to
9 negotiate and execute a license agreement is not a binding
10 contract, Logtale cites Beck, where the court held that a letter
11 drafting "the outline of our future agreement" was "merely an
12 'agreement to agree' which cannot be made the basis of a cause of
13 action." 211 Cal. App. 3d at 1562-63. There, the court
14 considered the writing to determine the parties' intention, and
15 held that the language of the letter indicated an intent to
16 forward the letter outlining the terms of the proposed agreement
17 to corporate counsel "for the drafting of a contract," and to
18 discuss the draft further. Beck, 211 Cal. App. 3d at 1563. The
19 court in Beck found that the letter contemplated further
20 negotiations and that no binding agreement would result until a
21 formal contract was drafted by an attorney. Id. Although Logtale
22 and IKOR outlined the proposed "terms and conditions" of their
23 contemplated agreement in greater detail than did the parties in
24 Beck, they nevertheless failed to memorialize their final
25 agreement in writing. 1AA, Ex. A. The Option Agreement, on its
26 face, evidences the parties' intent to enter into a written
27 license agreement only after engaging in further negotiations.

28

1 The Schedule attached to the Option Agreement is entitled
2 "Term Sheet - License and Manufacturing Agreement," and sets out
3 the principal terms and conditions of the License Agreement. 1AA,
4 Ex. A at 6. The Option Agreement provides that the option to
5 enter into a license and manufacturing agreement "may be
6 exercised" by Logtale by serving notice in the form attached to
7 the Option Agreement, after which the parties would "use their
8 best efforts to enter into the License and Manufacturing Agreement
9 on the principal terms and conditions set out in the Schedule."
10 Id. at 1. As currently plead, the first counterclaim does not
11 allege that Logtale exercised the option or otherwise consented to
12 the terms of the written licensing agreement. The allegation that
13 the parties "have been operating under the terms of the Licensing
14 Agreement since 2006" is insufficient to show the existence of a
15 valid license agreement. However, additional factual allegations
16 may demonstrate that the parties' actions evidence an agreement.
17 "'Words are frequently but an imperfect medium to convey thought
18 and intention. When the parties to a contract perform under it
19 and demonstrate by their conduct that they knew what they were
20 talking about the courts should enforce that intent.'" 1 Witkin,
21 Summary of Cal. Law (10th ed. 2005) Contracts § 749, p. 838.

22 IKOR seeks leave to amend its counterclaim, contending that
23 the parties' correspondence demonstrates that they acted as if
24 there was a licensing agreement between them. They refer to a
25 letter from Dr. Wai on behalf of Logtale dated August 21, 2009,
26 which acknowledges the validity of the terms of the License
27 Agreement set forth in the schedule to the Option Agreement. Opp.
28

1 at 14. Because amendment may not be futile, the breach of
2 contract claim is dismissed with leave to amend.

3 II. Theft of Intellectual Property

4 Logtale seeks dismissal of the second counterclaim for theft
5 of intellectual property. That counterclaim alleges that Logtale
6 entered into the License Agreement to obtain rights to IKOR's
7 trade secrets, has failed to pay royalties or otherwise comply
8 with the License Agreement, and has misappropriated IKOR's
9 technology and trade secrets with the intent to market IKOR's
10 biopharmaceuticals in markets that IKOR owns, namely the United
11 States and the European Union. 1AA, Second Counterclaim ¶¶ 17,
12 21. IKOR alleges, "At this point, it looks like theft." Id.

13 ¶ 17. IKOR contends that Logtale continued to use IKOR's
14 technology even after IKOR cancelled the alleged License
15 Agreement, and that if Logtale prevails on its argument that there
16 was never a licensing agreement, then Logtale's use of IKOR's
17 technology was theft from the very beginning. IKOR further
18 alleges that Logtale has plotted with the Chinese government and
19 the Chinese military to acquire IKOR's trade secrets and patents
20 for commercial and military use and competition with IKOR. 1AA,
21 Second Counterclaim ¶ 22.

22 IKOR seeks relief under the Uniform Trade Secrets Act (UTSA),
23 as adopted in California, Cal. Civ. Code § 3426 et seq. The UTSA
24 defines a trade secret as

25 information, including a formula, pattern,
26 compilation, program, device, method, technique, or
process, that:

27 (1) Derives independent economic value, actual
28 or potential, from not being generally known to the

1 public or to other persons who can obtain economic
value from its disclosure or use; and

2 (2) Is the subject of efforts that are
3 reasonable under the circumstances to maintain its
secrecy.

4 Cal. Civ. Code § 3426.1(d). "Actual or threatened
5 misappropriation may be enjoined" under this statute. Cal. Civ.
6 Code § 3426.2(a).

7 In Bayer Corp. v. Roche Molecular Sys., Inc., the court
8 recognized,

9 A corporation misappropriates a trade secret when
10 (1) it discloses or uses the trade secret of
another without express or implied consent, and
11 (2) at the time of the disclosure or use, it knew
or had reason to know that its knowledge of the
12 trade secret was derived from a person who owed a
duty to the entity seeking relief to maintain the
13 trade secret's secrecy or limit its use. Cal. Civ.
Code § 3426.1(b)(2)(B)(iii). The Court may order
14 affirmative acts to protect a trade secret in
appropriate circumstances. Cal. Civ. Code
15 § 3426.2(c).

16 Bayer Corp. v. Roche Molecular Sys., Inc., 72 F. Supp. 2d 1111,
1117 (N.D. Cal. 1999).

17 Logtale contends that IKOR has failed to identify with
18 reasonable particularity how its intangible proprietary
19 information is a property interest capable of being converted or
20 stolen. To identify the trade secrets at issue, IKOR refer to its
21 patent rights, defined in the alleged License Agreement as "[a]ll
22 patents and patent applications of any kind anywhere in the world
23 owned or controlled by IKOR during the term of the Agreement," and
24 IKOR Know-How, defined as "[a]ny proprietary information, trade
25 secrets, techniques, materials and data owned or controlled by
26 IKOR." Opp. at 15; 1AA, Ex. A at 7. IKOR also refers to an
27 application by third-party defendant New A Innovation for approval
28

1 to market an IKOR drug in Europe after IKOR terminated the License
2 Agreement with Logtale, but does not sufficiently identify the
3 drug or IKOR's ownership interest in it.

4 A claimant seeking relief for misappropriation of trade
5 secrets "must identify the trade secrets and carry the burden of
6 showing that they exist." MAI Sys. Corp. v. Peak Computer, Inc.,
7 991 F.2d 511, 522 (9th Cir. 1993). "The plaintiff 'should
8 describe the subject matter of the trade secret with sufficient
9 particularity to separate it from matters of general knowledge in
10 the trade or of special knowledge of those persons . . . skilled
11 in the trade.'" Imax Corp. v. Cinema Technologies, Inc., 152 F.3d
12 1161, 1164-65 (9th Cir. 1998) (quoting Universal Analytics v.
13 MacNeal-Schwendler Corp., 707 F. Supp. 1170, 1177 (C.D. Cal.
14 1989), aff'd, 914 F.2d 1256 (9th Cir. 1990)). As currently plead,
15 the allegations supporting the second counterclaim fail to
16 identify the alleged trade secrets with sufficient particularity.

17 Under California law, when information "is generally known in
18 the trade and already used by good faith competitors, it is not a
19 protectable trade secret and injunction should not issue." Am.
20 Paper & Packaging Prods., Inc. v. Kirgan, 183 Cal. App. 3d 1318,
21 1326 (1986). Thus, Defendants may not assert trade secret
22 protection for patented IKOR technology. See Henry Hope X-Ray
23 Prods., Inc. v. Marron Carrel, Inc., 674 F.2d 1336, 1342 (9th Cir.
24 1982) ("Matters disclosed in a patent publication destroy any
25 trade secret contained therein.") (applying Pennsylvania trade
26 secret law). Logtale argues that Defendants initially alleged a
27 counterclaim for patent infringement but abandoned that claim in
28 the amended answer and counterclaim, and may not revive the trade

1 secret claim as one for patent infringement. IKOR fails to
2 address this argument or demonstrate that amendment would not be
3 futile as to its published patents. The counterclaim for theft of
4 IKOR patent rights is therefore dismissed without leave to amend.
5 Because amendment may not be futile with respect to protectable
6 trade secrets that are not in the public domain, the counterclaim
7 is dismissed with leave to amend to allege that.

8 III. Interference with Prospective Business Opportunity

9 IKOR's fourth counterclaim for relief alleges interference
10 with prospective business opportunity. Under California law, the
11 elements of a tort claim for intentional interference with
12 prospective economic advantage are (1) an economic relationship
13 between the plaintiff and some third party, with the probability
14 of future economic benefit to the plaintiff; (2) the defendant's
15 knowledge of the relationship; (3) intentional acts on the part of
16 the defendant designed to disrupt the relationship; (4) actual
17 disruption of the relationship; and (5) economic harm to the
18 plaintiff proximately caused by the acts of the defendant. Korea
19 Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153
20 (2003). To meet the third element, intentional acts, a plaintiff
21 must plead intentional acts by the defendant that are wrongful
22 apart from the interference itself, and are designed to disrupt
23 the relationship. Id. at 1154. This requires a showing that the
24 defendant "engaged in conduct that was wrongful by some legal
25 measure other than the fact of interference itself" such as
26 "conduct that is recognized as anticompetitive under established
27 state and federal positive law." Della Penna v. Toyota Motor
28 Sales, U.S.A., Inc., 11 Cal. 4th 376, 393 (1995).

1 The fourth counterclaim alleges that IKOR secured a contract
2 with the United States Army and with Northwestern University to
3 conduct research in the area of wound healing, and that Logtale
4 tried to interfere and obstruct IKOR's business. 1AA, Fourth
5 Counterclaim ¶ 39. Logtale contends that the counterclaim for
6 intentional interference with prospective economic advantage fails
7 to allege that Logtale did anything to interfere with the Army
8 contract. IKOR responds that Logtale and the third-party
9 defendants have obtained equipment subject to export controls by
10 misrepresenting to the United States Department of Commerce that
11 they have rights to distribute IKOR's biopharmaceuticals and have
12 thereby jeopardized IKOR's reputation as a defense contractor.
13 Because IKOR fails to allege actual disruption of a contractual
14 relationship or economic harm that is proximately caused by
15 Logtale, the claim for intentional interference with prospective
16 business opportunity with the Army and Northwestern University is
17 dismissed. Leave to amend is granted only to cure the deficient
18 elements of the claim; IKOR may not amend the counterclaim to
19 assert new grounds for relief.

20 IKOR also contends that Logtale has withheld information
21 necessary for IKOR to meet the Food and Drug Administration's
22 strict requirements for reporting findings from clinical tests or
23 studies, and has precluded IKOR from making new drug applications
24 in the United States and in Europe. 1AA, Fourth Counterclaim
25 ¶¶ 40, 43; Opp. at 17. These allegations fail to claim the
26 existence of an economic relationship between IKOR and a third
27 party, intentional acts by Logtale designed to disrupt that
28 relationship, actual disruption of the relationship, or economic

1 harm proximately caused by the intentional acts. In response to
2 the motion to dismiss, IKOR fails to address any of the specific
3 elements of a claim for intentional interference of prospective
4 business advantage. Because amendment appears to be futile, this
5 claim is dismissed with prejudice as to the allegations of
6 interference with IKOR's new drug applications in the United
7 States and in Europe.

8 IKOR also alleges that Logtale has obstructed its attempts to
9 obtain additional financing for research to complete the testing
10 necessary for new drug applications. 1AA, Fourth Counterclaim
11 ¶ 39; Opp. at 18. As currently plead, the counterclaim fails to
12 identify a particular economic relationship between IKOR and some
13 third party, which would probably provide future economic benefit
14 to IKOR. See Westside Center Associates v. Safeway Stores 23,
15 Inc., 42 Cal. App. 4th 507, 522 (1996) ("The law precludes
16 recovery for overly speculative expectancies by initially
17 requiring proof the business relationship contained 'the
18 probability of future economic benefit to the plaintiff.'").
19 IKOR suggests that Logtale and the third-party defendants have
20 been attempting to "drive IKOR into bankruptcy or damage the
21 company," but fails to plead intentional or unlawful acts designed
22 to disrupt an economic relationship with some third party. See
23 LiMandri v. Judkins, 52 Cal. App. 4th 326, 340 (1997) ("`a
24 plaintiff seeking to recover for an alleged interference with
25 prospective contractual or economic relations must plead and prove
26 as part of its case-in-chief that the defendant not only knowingly
27 interfered with the plaintiff's expectancy, but engaged in conduct
28 that was wrongful by some legal measure other than the fact of

1 interference itself.” (quoting Della Penna v. Toyota Motor
2 Sales, U.S.A., Inc., 11 Cal. 4th 376, 393 (1995)) (emphasis in
3 original). The allegations also fail to demonstrate actual
4 disruption of the relationship, or economic harm proximately
5 caused by the intentional acts. Because amendment may not be
6 futile, the claim is dismissed with leave to amend to cure these
7 defects with respect to the alleged interference with IKOR’s
8 prospective financing.

9 IV. Counterclaim for Injunctive Relief

10 Logtale further seeks dismissal of IKOR’s counterclaim for
11 injunctive relief. IKOR has not alleged an independent
12 counterclaim for injunctive relief.¹ Instead, it simply seeks
13 equitable relief on its other counterclaims. Because those
14 counterclaims are dismissed with leave to amend, Logtale’s motion
15 to dismiss the prayer for injunctive relief is granted with leave
16 to re-allege it if any of the counterclaims are successfully
17 amended.

18 V. Motion to Strike

19 Logtale moves to strike allegations that it contends are
20 immaterial to the dispute. IKOR seeks leave to amend the
21 allegations to demonstrate their relevance to the counterclaims,
22 with the exception of the allegations related to the abandoned
23 counterclaim for unfair competition, 1AA at 30:24-27. Because
24 that counterclaim is dismissed, the motion to strike the
25 allegation at page 30, paragraph 34, is denied as moot. Because
26

27 ¹ IKOR alleges a third-party claim for injunctive relief,
28 but the third-party complaint is not presently before the Court.

1 IKOR is granted leave to amend the counterclaims within the
2 limited scope discussed above, Logtale's motion to strike is
3 denied.

4 CONCLUSION

5 For the foregoing reasons, Logtale's Motion to Dismiss the
6 Counterclaims is GRANTED, WITH LEAVE TO AMEND as to the first,
7 second and fourth counterclaims for relief. (Docket No. 27.) The
8 motion to dismiss the third counterclaim for unfair competition is
9 unopposed and granted with prejudice. Logtale's motion to dismiss
10 the counterclaim for injunctive relief is GRANTED with leave to
11 amend and its motion to strike is DENIED.

12 IKOR may file an amended counter-complaint within twenty-one
13 days of the date of this order. Logtale must answer or otherwise
14 respond to the amended counter-complaint twenty-one days
15 thereafter. IKOR must also file proof of timely service of its
16 third-party complaint upon third-party defendants Dr. Wai, New
17 World Mobile, and A Innovation pursuant to Federal Rule of Civil
18 Procedure 4(1) within three days of this Order.

19 The initial case management conference will be held on
20 January 16, 2013. The parties must file a revised joint case
21 management statement by January 9, 2013.

22 IT IS SO ORDERED.

23
24 Dated: 12/5/2012

25 
26 CLAUDIA WILKEN
27 United States District Judge
28