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

HEARTLAND PAYMENT SYSTEMS, INC.,

Plaintiff,

v.

MERCURY PAYMENT SYSTEMS, LLC,

Defendant.

No. C 14-0437 CW

ORDER GRANTING
MOTION TO DISMISS
AND GRANTING LEAVE
TO AMEND

(Docket No. 15)

_____ /

Plaintiff Heartland Payment Systems (Heartland) asserts various unfair business practice claims against Defendant Mercury Payment Systems (Mercury). Mercury moves to dismiss the complaint. (Docket No. 15.) Heartland has filed an opposition. Mercury has filed a reply. Having considered the motion on the papers, the Court GRANTS the motion to dismiss and grants leave to amend.

BACKGROUND

The following facts are alleged in the complaint and taken as true for the purposes of this motion.

Heartland and Mercury are competing electronic payment processors who provide to businesses, known as merchants, point-of-sale (POS) systems. Compl. ¶¶ 7, 11. POS systems enable merchants to accept credit cards and debit cards. Id. ¶ 9. Through POS systems, banks (e.g., Wells Fargo) and credit card brands (e.g., Visa or Mastercard) are able to receive their fees, merchants are able to receive the proceeds from the sale, and

1 consumers have their accounts charged. Id. Both Heartland and
2 Mercury serve small and medium-sized merchants. Id. ¶ 10.

3 Both companies use, although not exclusively, an
4 "interchange-plus pricing model." Id. According to this model,
5 banks and credit card brands charge a fee, typically as a
6 percentage of the transaction plus a per-transaction fee. Id.
7 ¶ 16. POS systems providers then charge an additional fee (the
8 "plus" fee) to the merchants as the cost for being the
9 intermediary between the banks, credit card brands and the
10 merchants. Id. The interchange fee is that which is charged by
11 the banks and credit card brands, and is not controlled by the POS
12 systems providers. Id. The "plus" fee is controlled by the POS
13 system providers. Id. This fee is assessed "usually in some
14 combination of basis points and cents-per-transaction." Id.
15 Network and interchange fees can be reset as often as twice per
16 year. Id.

17 In recent years, Heartland has produced and promulgated a
18 document called the "Merchant Bill of Rights." Id. ¶ 17. The
19 document discusses the issue of "undisclosed fee markups" by
20 payment processors. In this document, Heartland informs merchants
21 that some processors, taking advantage of the bi-yearly
22 interchange fee adjustment, "seize the opportunity to inflate" the
23 interchange fees and "then deceptively blame the increase on the
24 card brands." Id. Heartland alleges that Mercury is a payment
25 processor that has engaged in this deception. Id.

26 Heartland alleges that Mercury deceives merchants by telling
27 them that it will pass the interchange fees "at cost" (i.e., as
28 charged by the banks and card brands, with no markup) and that its

1 fee is a "mark-up on a per transaction basis in addition to other
2 fees, such as monthly flat rate fees." Id. ¶ 18. Heartland
3 alleges that Mercury achieves this deception through its merchant
4 application, the representations of third-party POS dealers who
5 sell Mercury's product, its website, and "other advertising and
6 promotional materials distributed to merchants and potential
7 merchants." Id. ¶ 19. It also alleges that Mercury's "Operating
8 Guide," which is published on its website, contains deceptive
9 language that misrepresents how Mercury bills its merchants. Id.
10 ¶ 21.

11 Subsequent to its discovery of Mercury's alleged deception,
12 Heartland reviewed nearly 300 of Mercury's monthly billing
13 statements, including "a number of statements from merchants who
14 are located in the San Francisco Bay Area." Id. ¶ 22. Heartland
15 alleges that in seventy-five percent of those statements, Mercury
16 actually charged a fee that was higher than what it disclosed.
17 Id. ¶ 22. Heartland alleges that merchants are deceived because
18 they are "unaware of what the actual network fees are and cannot
19 easily determine based on Mercury's statements that those fees
20 have been inflated." Id. ¶ 25. Heartland alleges that Mercury
21 began this widespread practice of deception in or around June
22 2011. Id. Heartland alleges that it has lost business and
23 believes it will continue to lose business as a result of
24 Mercury's misrepresentations and deceitful conduct. Id.

25 Heartland has identified thirty merchants who have cancelled
26 their POS contract with Heartland and entered into a POS contract
27 with Mercury. Id. As an example, Heartland alleges that, in
28 2008, it lost a bid to Mercury to supply payment processing

1 services to a California restaurant chain. Id. It now believes
2 that, based on a discussion with an operator of one of these
3 restaurants and an examination of a monthly statement, its bid was
4 deceptively undercut by Mercury. Id. ¶¶ 26-27. Heartland alleges
5 that, while the statement showed the bid-upon amount as the “plus”
6 fee, it also revealed that Mercury had “falsely inflated network
7 charges to impose an additional four cent fee per card
8 transaction.” Id. ¶ 28.

9 Heartland asserts five causes of action against Mercury:
10 (1) false advertising in violation of 15 U.S.C. § 1125(a)(1)(B)
11 (Lanham Act); (2) unfair competition in violation of California’s
12 Unfair Competition Law, Business and Professions Code section
13 17000 et seq. (UCL); (3) false advertising in violation of
14 California Business and Professions Code section 17500 et seq.
15 (FAL); (4) intentional interference with contractual relations;
16 and (5) intentional interference with prospective economic
17 advantage.

18 LEGAL STANDARD

19 A complaint must contain a “short and plain statement of the
20 claim showing that the pleader is entitled to relief.” Fed. R.
21 Civ. P. 8(a). The plaintiff must proffer “enough facts to state a
22 claim to relief that is plausible on its face.” Ashcroft v.
23 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.
24 Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible
25 “when the plaintiff pleads factual content that allows the court
26 to draw the reasonable inference that the defendant is liable for
27 the misconduct alleged.” Id.

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1 In considering whether the complaint is sufficient to state a
2 claim, the court will take all material allegations as true and
3 construe them in the light most favorable to the plaintiff.
4 Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061
5 (9th Cir. 2008). The court's review is limited to the face of the
6 complaint, materials incorporated into the complaint by reference,
7 and facts of which the court may take judicial notice. Id.
8 However, the court need not accept legal conclusions, including
9 "threadbare recitals of the elements of a cause of action,
10 supported by mere conclusory statements." Iqbal, 556 U.S. at 678
11 (citing Twombly, 550 U.S. at 555).

12 When granting a motion to dismiss, the court is generally
13 required to grant the plaintiff leave to amend, even if no request
14 to amend the pleading was made, unless amendment would be futile.
15 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
16 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
17 amendment would be futile, the court examines whether the
18 complaint could be amended to cure the defect requiring dismissal
19 "without contradicting any of the allegations of [the] original
20 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
21 Cir. 1990).

22 DISCUSSION

23 I. Mercury's Request for Judicial Notice (RFJN)

24 Although courts generally cannot consider documentary
25 evidence on a motion to dismiss, doing so is appropriate when the
26 pleadings refer to the documents, their authenticity is not in
27 question and there are no disputes over their relevance. Coto
28 Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010); see

1 also Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994),
2 overruled on other grounds by Galbraith v. County of Santa Clara,
3 307 F.3d 1119 (9th Cir. 2002) (holding that courts may properly
4 consider documents "whose contents are alleged in a complaint and
5 whose authenticity no party questions, but which are not
6 physically attached to the [plaintiff's] pleading"). This
7 includes "internet pages as it does . . . printed material."
8 Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

9 Mercury asks, and there is no record of Heartland opposing,
10 that the Court take judicial notice of various documents
11 associated with Mercury's contracts, applications, marketing and
12 advertising materials. Specifically, it requests that Court take
13 judicial notice of the following: (1) Mercury's Merchant
14 Application; (2) Mercury's "Operating Guide"; (3) Heartland's
15 "Merchant Bill of Rights" homepage; (4) the "Know Your Rights"
16 webpage; (5) and a PDF version of the "Merchants Bill of Rights."
17 Request for Judicial Notice (RFJN), Docket Nos. 18 and 35.

18 Heartland explicitly refers to Mercury's Merchant
19 Application, Compl. ¶ 19; Mercury's "Operating Guide," id. ¶ 21;
20 and Heartland's "Merchant Bill of Rights" (both website and
21 document), id. ¶ 17. Furthermore, Heartland does not question the
22 authenticity of these documents nor their relevance. Accordingly,
23 the Court takes judicial notice of the aforementioned documents.

24 Heartland does not, however, explicitly refer to its own
25 "Know Your Rights" webpage. Mercury includes this webpage because
26 it is "a complete interactive version of Heartland's Merchant Bill
27 of Rights and a link to a standalone PDF version of the Merchant
28 Bill of Rights." RFJN, Docket No. 18 ¶ 3. Mercury has not

1 stated, however, how this webpage is relevant in the light of the
2 Merchant Bill of Rights document itself. Accordingly, the Court
3 declines to take judicial notice of the "Know Your Rights"
4 webpage.

5 II. Mercury's Motion to Dismiss

6 Mercury seeks to dismiss all claims against it.

7 A. Federal Rule of Civil Procedure 9(b)

8 As a threshold matter, Mercury argues that all of Heartland's
9 causes of action fail because they do not satisfy the heightened
10 pleading requirements of Rule 9(b).

11 "In all averments of fraud or mistake, the circumstances
12 constituting fraud or mistake shall be stated with particularity."
13 Fed. R. Civ. P. 9(b). "Therefore, in an action based on state
14 law, while a district court will rely on state law to ascertain
15 the elements of fraud that a party must plead, it will also follow
16 Rule 9(b) in requiring that the circumstances of the fraud be
17 pleaded with particularity." Marolda v. Symantec Corp., 672 F.
18 Supp. 2d 992, 996 (N.D. Cal. 2009); see also Kearns v. Ford Motor
19 Co., 567 F.3d 1120, 1125 (9th Cir. 2009). "[W]hen the claim is
20 'grounded in fraud,' the pleading of that claim as a whole is
21 subject to Rule 9(b)'s particularity requirement." Marolda, 672
22 F. Supp. 2d at 997 (citing Vess v. Ciba-Geigy Corp. USA, 317 F.3d
23 1097, 1104 (9th Cir. 2003)). A plaintiff must describe the
24 alleged fraud in specific enough terms "to give defendants notice
25 of the particular misconduct so that they can defend against the
26 charge." Kearns, 567 F.3d at 1124. Rule 9(b) requires the
27 plaintiff to allege "the who, what, when, where, and how" of the
28 alleged fraudulent conduct. Cooper v. Pickett, 137 F.3d 616, 627

1 (9th Cir. 1997). "The requirement of specificity in a fraud
2 action against a corporation requires the plaintiff to allege the
3 names of the persons who made the allegedly fraudulent
4 representations, their authority to speak, to whom they spoke,
5 what they said or wrote, and when it was said or written."
6 Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153,
7 157 (1991).

8 Heartland responds that (1) the Lanham Act cause of action
9 does not require scienter, hence, it is not "grounded in fraud";
10 (2) even if Rule 9(b) applies to the other claims, they are stated
11 with the required particularity; or, in the alternative, (3) Rule
12 9(b) should be applied less stringently because the factual
13 details underpinning the causes of action are uniquely known to
14 Mercury.

15 While Heartland may not use the word "fraud" in all of its
16 causes of action, it has alleged "a unified course of fraudulent
17 conduct and rel[ies] entirely on that course of conduct as the
18 basis of [its] claim[s]." See Kearns, 567 F.3d at 1125.
19 Throughout the complaint, Heartland alleges that Mercury has
20 engaged in "deceptive" and "false" conduct in how it bills and
21 charges merchants. See, e.g., Compl. ¶¶ 17, 25, 30-38. Heartland
22 also alleges that Mercury, "intentionally and willfully" or
23 fraudulently, violated false advertising and false
24 misrepresentation laws. See, e.g., id. ¶¶ 44, 49, 64. Heartland
25 also seeks punitive damages "sufficient to punish and make an
26 example" of Mercury. When a complaint as a whole is "'grounded in
27 fraud' or . . . 'sound[s] in fraud,' . . . the pleading . . . as a
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1 whole must satisfy the particularity requirement of Rule 9(b)."
2 Kearns, 567 F.3d at 1125.

3 Accordingly, the Court finds that Heartland must plead each
4 cause of action with the particularity required by Rule 9(b). The
5 Court now turns to each cause of action.

6 B. First Cause of Action: False Advertising in Violation of
7 15 U.S.C. § 1125(a)(1)(B) (Lanham Act)

8 The elements of a Lanham Act . . . false advertising claim
9 are: (1) a false statement of fact by the defendant in a
10 commercial advertisement about its own or another's product;
11 (2) the statement actually deceived or has the tendency to
12 deceive a substantial segment of its audience; (3) the
13 deception is material, in that it is likely to influence the
14 purchasing decision; (4) the defendant caused its false
15 statement to enter interstate commerce; and (5) the plaintiff
16 has been or is likely to be injured as a result of the false
17 statement, either by direct diversion of sales from itself to
18 defendant or by a lessening of the goodwill associated with
19 its products.

20 Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th
21 Cir. 1997) (citing 15 U.S.C. § 1125(a)(1)(B)).

22 In its first cause of action, Heartland alleges that Mercury
23 "has made and will continue to make, in commercial advertising or
24 promotion throughout the United States including in California,
25 false and/or misleading statements of fact that misrepresent the
26 nature, characteristics and/or qualities of Defendant's and
27 Plaintiff's services" in violation of the Lanham Act. Compl.
28 ¶ 41.

29 The first element of a Lanham Act false advertisement cause
30 of action requires a plaintiff to allege "a false statement of
31 fact by the defendant in a commercial advertisement about its own
32 or another's product." Southland Sod Farms, 108 F.3d at 1139.
33 Thus, Heartland needs to allege both that Mercury made a false
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1 statement and that the statement was made in a commercial
2 advertisement.

3 "To constitute 'commercial advertising or promotion' under
4 the Lanham Act, a statement must be: (1) commercial speech, (2) by
5 a defendant who is a commercial competitor of the plaintiff,
6 (3) for the purpose of inducing customers to buy defendant's goods
7 or services, and (4) disseminated sufficiently to the relevant
8 purchasing public to constitute 'advertising' or 'promotion'
9 within the industry." Bernard v. Donat, 2012 WL 525533, at *2
10 (N.D. Cal.) (citing Coastal Abstract Serv., Inc. v. First Am.
11 Title Ins. Co., 173 F.3d 725, 735 (9th Cir. 1999)).

12 Heartland alleges that because neither it nor Mercury engages
13 in "traditional" advertising, "individual representations made to
14 individual merchants" constitute "commercial advertising or
15 promotion." Docket No. 25 at 14. It alleges that Mercury's false
16 advertising takes two forms: (1) oral statements to merchants; and
17 (2) written documents, including monthly billing statements, the
18 Merchant Application, and the Operating Guide. Mercury counters
19 that (1) monthly statements are not advertisement, because they
20 "memorialize transactions that have already occurred;" (2) the
21 Merchant Application is a contract, and not promotional; and
22 (3) the Operating Guide, despite being on its website, is a mere
23 "technical manual." Docket No. 15 at 12.

24 1. Rule 9(b)

25 Heartland argues that the Lanham Act cause of action should
26 not be subject to the heightened pleading standards of Rule 9(b)
27 because "district courts are split on whether Rule 9(b) applies."
28 Pl.'s Opp'n Def.'s Mot. Dismiss, Docket No. 25 at 4. This

1 argument is unavailing; the heightened pleading is required for
2 every cause of action in the complaint because the entire
3 complaint sounds in fraud. While each individual cause of action,
4 taken alone, may not be generally subject to Rule 9(b), they are
5 within a complaint that "sounds in fraud."

6 The purpose of Rule 9(b) is "to give defendants notice of the
7 particular misconduct so that they can defend against the charge."
8 Kearns, 567 F.3d at 1124. Heartland argues that "less
9 particularity is required under Rule 9(b) when, as in this case,
10 such detailed facts are uniquely known to the defendant." Docket
11 No. 25 at 8.

12 With respect to alleged oral statements made by Mercury to
13 merchants, Heartland fails to allege its Lanham Act cause of
14 action with the particularity required under Rule 9(b). As stated
15 above, when a complaint sounding in fraud is against a corporate
16 party "the plaintiff [must] allege the names of the persons who
17 made the allegedly fraudulent representations, their authority to
18 speak, to whom they spoke, what they said or wrote, and when it
19 was said or written." Tarmann, 2 Cal. App. 4th at 157. Heartland
20 alleges that it has the name of at least one merchant it believes
21 was a victim of Mercury's deception. Yet it fails to disclose the
22 name of that merchant, or any other merchant who it claims was
23 deceived. It also fails to allege any facts to support that it
24 was a Mercury employee or representative who made false statements
25 to current or potential merchants.

26 Accordingly, to the extent this cause of action relies on
27 alleged oral statements from Mercury employees to merchants, the
28 Court dismisses it for failure to comply with Rule 9(b) by failing

1 to identify the details of the oral representations. Heartland is
2 granted leave to amend to remedy this deficiency if it can do so
3 truthfully and without contradicting the allegations in its prior
4 pleadings.

5 However, it is true that Heartland cannot know the
6 particularities of exactly which Mercury employee drafted the
7 alleged advertisements. Accordingly, to the extent that this
8 cause of action relies on written documents of which the Court has
9 taken judicial notice, the Court declines to dismiss it for
10 failure to identify who made statements and when. Nonetheless it
11 fails to state the alleged false statements with sufficient
12 particularity.

13 2. "Commercial advertising and promotion"

14 Mercury argues that even if Heartland's Lanham Act cause of
15 action did not fail due to Rule 9(b), it fails because Heartland
16 has not adequately alleged that its statements or documents
17 (1) are commercial advertising or promotion; or (2) contain false
18 statements of fact.

19 "The core notion of commercial speech is 'speech which does
20 no more than propose a commercial transaction.'" Rice v. Fox
21 Broad. Co., 330 F.3d 1170, 1181 (9th Cir. 2003). As discussed
22 above, Heartland does not state any facts to support that Mercury
23 employees made oral statements to merchants that could be
24 considered commercial speech. Thus, Heartland fails to allege
25 that Mercury employees engaged in commercial speech, and hence it
26 fails to state a claim under the Lanham Act with regard to oral
27 statements. Accordingly, to the extent this cause of action
28 relies on alleged oral statements from Mercury employees to

1 merchants, the Court dismisses it for this reason also. Heartland
2 is granted leave to amend to remedy this deficiency if it can do
3 so truthfully and without contradicting the allegations in its
4 prior pleadings.

5 On the other hand, the monthly statements could induce
6 merchants to continue using Mercury's services, and hence could be
7 considered commercial speech designed to propose a continued
8 business relationship. Likewise, the Operating Guide posted on
9 Mercury's website could be seen to propose a commercial
10 transaction by providing information to a potential merchant who
11 may be considering using Mercury's services. Likewise, the
12 Merchant Application could be viewed as proposing a commercial
13 transaction, not as a contract, as Mercury purports, but rather as
14 an offer to enter into a contract. See, e.g., RFJN, Ex. 1 ("If
15 this Merchant Application is accepted for card services. . .").
16 As such, the Application's "Card Services Terms & Conditions"
17 section arguably constitutes commercial speech. Accordingly, to
18 the extent that the cause of action relies on Mercury's written
19 documents, the Court declines to dismiss it for failure adequately
20 to allege commercial speech.

21 3. "False statement of fact"

22 Even if the oral statements and written documents are
23 commercial speech, and satisfy the other requirements for
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1 commercial advertising or promotion,¹ Mercury argues that neither
2 the oral statements nor the written documents contain any false
3 statements of fact.

4 Heartland alleges that, both in the oral statements and
5 written documents, "Mercury represents to . . . merchants that
6 Mercury will pass interchange fees through at cost, and will
7 charge an additional, disclosed, mark-up on a per transaction
8 basis (in addition to other fees, such as monthly flat rate fees).
9 In fact, however, . . . Mercury is significantly inflating the
10 interchange fees over cost." Compl. ¶ 18. Heartland alleges that
11 Mercury "misrepresents" its pricing, but it has not stated facts
12 sufficient to support the inference that 1) Mercury discloses its
13 pricing in the way Heartland alleges, or that 2) Mercury has
14 actually charged something other than what it discloses. It fails
15 to allege any facts -- such as specific language or terms in the
16 monthly statements, Operating Guide or Merchant Application -- to
17 support the inference that the documents do not contain truthful
18 "detailed terms and conditions . . . that make clear disclosures
19 about Mercury's pricing and fees." Def.'s Reply Supp. Mot.
20 Dismiss, Docket No. 33 at 4. Heartland claims to have copies of
21 specific applications, but alleges that it did not have them at
22 the time the complaint was filed. Be that as it may, without some
23 specific allegation as to what statements in the documents are
24

25 ¹ The other elements require a defendant who is a commercial
26 competitor of the plaintiff, commercial speech made for the
27 purpose of inducing customers to buy defendant's goods or
28 services, and disseminated sufficiently to the relevant purchasing
public to constitute "advertising" or "promotion" within the
industry. These elements are not in dispute.

1 false and why, Heartland fails to state a claim under Rule 9(b)
2 and the Lanham Act.

3 Accordingly, to the extent it is based on the written
4 documents, this cause of action is dismissed for failure to state
5 a claim on this ground. To the extent it is based on the oral
6 statements, this cause of action is dismissed for this reason as
7 well, in addition to the reasons discussed above. Heartland is
8 granted leave to amend to remedy the deficiencies noted above if
9 it can do so truthfully and without contradicting the allegations
10 in its prior pleadings.

11 C. Second Cause of Action: Unfair Competition in Violation of
12 California Business and Professions Code section 17200 et
seq. (UCL)

13 The UCL prohibits "any unlawful, unfair or fraudulent
14 business act." Cal. Bus. & Prof. Code § 17200 et seq. Because
15 section 17200 is written in the disjunctive, it establishes three
16 types of unfair competition. Davis v. Ford Motor Credit Co., 179
17 Cal. App. 4th 581, 593 (2009). Therefore, a practice may be
18 prohibited as unfair or deceptive even if it is not unlawful and
19 vice versa. Podolsky v. First Healthcare Corp., 50 Cal. App. 4th
20 632, 647 (1996). Heartland alleges claims under all three prongs.

21 1. Rule 9(b)

22 Heartland relies on the same set of facts to support its UCL
23 claims as it does for its Lanham Act claims. Accordingly, the
24 Court dismisses Heartland's UCL causes of action for failure to
25 comply with Rule 9(b). Heartland is granted leave to amend to
26 remedy this deficiency if it can do so truthfully and without
27 contradicting the allegations in its prior pleadings.
28

1 In addition to moving for dismissal based on Rule 9(b),
2 Mercury moves to dismiss Heartland's UCL causes of action for
3 failure to state a claim.

4 2. Failure to state a claim: Unlawful business
5 practices

6 An unlawful business practice includes anything that can be
7 called a business practice and that is forbidden by law. Ticconi
8 v. Blue Shield of Cal. Life & Health Ins., 160 Cal. App. 4th 528,
9 539 (2008). Any federal, state or local law can serve as a
10 predicate for an unlawful business practice action. Smith v.
11 State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th 700, 718 (2001).
12 Thus, the UCL incorporates violations of other laws and treats
13 them as unlawful practices independently actionable under the UCL.
14 Id.; Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048
15 (9th Cir. 2000); Cel-Tech Communs., Inc. v. L.A. Cellular Tel.
16 Co., 20 Cal. 4th 163, 180 (1999).

17 Heartland alleges that Mercury's false statements, as found
18 in its written materials, are unlawful because they violate the
19 Lanham Act and California's False Advertising Law (FAL). As
20 discussed elsewhere in this order, Heartland fails to state a
21 claim under Rule 9(b), the Lanham Act and the FAL because it does
22 not state facts sufficient to support the allegation that Mercury
23 has made false statements, either in its oral statements or
24 written documents.

25 3. Failure to state a claim: Unfair business practices

26 "When a plaintiff who claims to have suffered injury from a
27 direct competitor's 'unfair' act or practice invokes section
28 17200, the word 'unfair' in that section means conduct that

1 threatens an incipient violation of an antitrust law, or violates
2 the policy or spirit of one of those laws because its effects are
3 comparable to or the same as a violation of the law, or otherwise
4 significantly threatens or harms competition." Cel-Tech Commc'ns,
5 Inc., 20 Cal. 4th at 187.

6 Heartland alleges that Mercury's actions threaten a violation
7 of antitrust law, "including but not limited to Section 5 of the
8 Federal Trade Commission Act, violate the policy or spirit of such
9 law, and/or otherwise significantly threaten or harm competition."
10 Compl. ¶ 48. Heartland fails to state facts to support the
11 allegation that Mercury's conduct violates or threatens to violate
12 § 5 of the Federal Trade Commission Act, or any anti-trust law.

13 Accordingly, Heartland's cause of action for unfair business
14 practices is dismissed for failure to state a claim, and for lack
15 of particularity under Rule 9(b).

16 4. Failure to state a claim: Fraudulent business
17 practices

18 "A fraudulent business practice is one in which members of
19 the public are likely to be deceived." Morgan v. AT&T Wireless
20 Servs., Inc., 177 Cal. App. 4th 1235, 1254 (2009). As discussed
21 above, Heartland's cause of action for fraudulent business
22 practices relies on the same allegations as its other causes of
23 action, and is dismissed under Rule 9(b).

24 D. Third Cause of Action: False Advertising in Violation of
25 California Business and Professions Code section 17500 et
seq. (FAL)

26 California's False Advertising Law makes it unlawful for any
27 person to induce the public to enter into any obligation
28 based on a statement that is untrue or misleading, and which
is known, or which by the exercise of reasonable care should
be known, to be untrue or misleading. Whether an
advertisement is misleading must be judged by the effect it

1 would have on a reasonable consumer. . . . A reasonable
2 consumer is the ordinary consumer acting reasonably under the
3 circumstances. To prevail under this standard, [Plaintiff]
4 must show that members of the public are likely to be
5 deceived by the advertisement.

6 Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1162 (9th Cir. 2012)
7 (citations omitted).

8 1. Rule 9(b)

9 Again, Heartland relies on the same set of facts to support
10 its FAL claim as it does for its other claims. Accordingly, as
11 discussed above, the Court dismisses this cause of action for
12 failure to comply with Rule 9(b).

13 2. Failure to state a claim

14 Even if Heartland's FAL cause of action did not fail due to
15 Rule 9(b), Mercury argues that Heartland fails to state a FAL
16 claim. Mercury argues that the FAL requires that the "alleged
17 false advertising 'be made or disseminated before the public in
18 California or emanate from California.'" Docket No. 15 at 20.
19 Hence, Mercury argues that the "Complaint does not allege that any
20 of Mercury's advertising emanates from California." Id.

21 Mercury's argument is unpersuasive. The complaint alleges
22 that Mercury's written representations, with regard to its
23 pricing, are disseminated to all California merchants with whom it
24 contracts.

25 The Court declines to dismiss Heartland's FAL cause of action
26 based on this argument. However, as discussed above, it is
27 dismissed for failure to comport with the requirements of Rule
28 9(b).

1 E. Fourth Cause of Action: Intentional Interference with
2 Contractual Relations (IICR)

3 Heartland alleges that Mercury, with knowledge of Heartland's
4 contractual relationships, "engaged in intentional actions to
5 interfere with them by inducing merchants to terminate their
6 contracts with Heartland and instead engage the services of
7 Defendant." Compl. ¶ 59.

8 1. Rule 9(b)

9 Heartland fails to allege this cause of action with the
10 particularity required by Rule 9(b). It does not allege any
11 particular contractual relationship, nor the "who, what, when,
12 where, and how" the interference occurred. Accordingly, the Court
13 GRANTS Mercury's motion to dismiss this cause of action for
14 failure to comply with Rule 9(b). Heartland is granted leave to
15 amend to remedy this deficiency if it can do so truthfully and
16 without contradicting the allegations in its prior pleadings.

17 2. Failure to State a Claim

18 Even if this cause of action did not fail under Rule 9(b),
19 Mercury argues that Heartland fails to allege any "specific,
20 intentional breaches of contract." Docket No. 15 at 22.

21 "Under California law, the elements for the tort of
22 intentional interference with contractual relations are (1) a
23 valid contract between plaintiff and a third party;
24 (2) defendant's knowledge of this contract; (3) defendant's
25 intentional acts designed to induce a breach or disruption of the
26 contractual relationship; (4) actual breach or disruption of the
27 contractual relationship; and (5) resulting damage." United Nat.
28 Maint., Inc. v. San Diego Convention Ctr., Inc., 766 F.3d 1002,

1 1006 (9th Cir. 2014) (citing Pac. Gas & Elec. Co. v. Bear Stearns
2 & Co., 50 Cal. 3d 1118 (1990)).

3 While Heartland asserts that it has “identified nearly thirty
4 merchants who have left Heartland for Mercury within the last six
5 months prior to filing the Complaint,” it admits it does not know
6 “why every merchant who leaves Heartland has chosen to do so,” and
7 cannot know without discovery. Docket No. 25 at 24. Be that as
8 it may, Heartland does not allege that any of its contracts with
9 any former merchant have actually been breached, much less
10 breached because of interference by Mercury.

11 Accordingly, the Court GRANTS Mercury’s motion to dismiss
12 Heartland’s IICR cause of action. Heartland is granted leave to
13 amend to remedy the deficiencies noted above if it can do so
14 truthfully and without contradicting the allegations in its prior
15 pleadings.

16 F. Fifth Cause of Action: Intentional Interference with
17 Prospective Economic Advantage (IIPEA)

18 Heartland alleges that it has “developed . . . prospective
19 opportunities which are likely to benefit [it] in the future,” but
20 that Mercury, “with knowledge of these . . . future economic
21 opportunities, engaged in wrongful and intentional actions to
22 interfere with them by inducing . . . prospective merchants to
23 sever their . . . prospective business relationships with
24 Heartland and instead engage the services of” Mercury. Compl.
25 ¶¶ 63-64.

26 1. Rule 9(b)

27 Heartland fails to allege this cause of action with the
28 particularity required by Rule 9(b). It does not allege any

1 particular prospective economic relationship, nor the "who, what,
2 when, where, and how" the interference occurred. Accordingly, the
3 Court GRANTS Mercury's motion to dismiss this cause of action for
4 failure to comply with Rule 9(b). Heartland is granted leave to
5 amend to remedy this deficiency if it can do so truthfully and
6 without contradicting the allegations in its prior pleadings.

7 2. Failure to state a claim

8 "[A] plaintiff seeking to recover for alleged interference
9 with prospective economic relations has the burden of pleading and
10 proving that the defendant's interference was wrongful by some
11 measure beyond the fact of the interference itself." Della Penna
12 v. Toyota Motor Sales, USA, Inc., 11 Cal. 4th 376, 392-93 (1995).

13 Heartland alleges that Mercury's false advertising is the
14 "wrong beyond measure of the interference itself." As discussed
15 above, Heartland's FAL allegations are dismissed, and this cause
16 of action too is dismissed for failure to state a claim, as well
17 as for failure to comport with the pleading requirement of Rule
18 9(b).

19 CONCLUSION

20 For the foregoing reasons, the Court GRANTS Mercury's motion
21 to dismiss (Docket No. 15), and the Court GRANTS Heartland leave
22 to amend. Within fourteen days of the date of this order,
23 Heartland may file an amended complaint to remedy the deficiencies
24 identified above. It may not add further claims or allegations
25 not authorized by this order. If Heartland does not have facts to
26 support some of these claims despite due diligence, but later
27 discovers them, it may timely move for leave to amend further in
28 the future.

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If Heartland files an amended complaint, Mercury shall respond to it within fourteen days after it is filed. If Mercury files a motion to dismiss, Heartland shall respond to the motion within fourteen days after it is filed. Mercury's reply, if necessary, shall be due seven days thereafter. Any motion to dismiss will be decided on the papers.

IT IS SO ORDERED.

Dated: November 7, 2014


CLAUDIA WILKEN
United States District Judge