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

ARTHUR J. GALLAGHER & CO.,

Plaintiff,

v.

CHRISTOPHER LANG,

Defendant.

No. C 14-0909 CW

ORDER GRANTING
MOTION TO DISMISS
(Docket No. 38)

_____ /

Plaintiff and Counterclaim-Defendant Arthur J. Gallagher & Co. brought this action against its former employee, Defendant and Counterclaimant Christopher Lang, for breach of contract and various business-related torts. This Court granted in part and denied in part Lang's motions to dismiss the complaint and the subsequently-filed amended complaint. Lang then answered the amended complaint and filed a counterclaim asserting six causes of action. Gallagher moves to dismiss four of Lang's counterclaims. Lang opposes the motion. After considering the parties' submissions, the Court grants Gallagher's motion, dismisses sua sponte the fifth cause of action and grants Lang leave to amend his counterclaim consistent with this Order.

BACKGROUND

Lang asserts the following facts in his counterclaim.

Gallagher is an insurance brokerage firm with its principal place of business in Illinois. In September 2008, Lang and Gallagher entered into an employment agreement whereby Lang agreed to be employed as an insurance broker in Gallagher's San Francisco

1 office. The employment agreement specified a term of employment
2 from September 10, 2008 through August 31, 2011. On or about
3 August 26, 2011, Lang confirmed with his supervisor, Douglas
4 Bowring, that the employment agreement would no longer be in place
5 after August 31, 2011, and that Lang's employment after that time
6 would continue on an "at-will" basis. In January 2014, Lang
7 informed Bowring that he was unhappy with Gallagher. Later that
8 month Gallagher proposed that Lang purchase his book of business
9 from Gallagher for 1.5 times its value, or about \$1,500,000.00.
10 On January 31, 2014, Lang tendered his resignation letter to James
11 McFarlane, Chairman of the Western Region. Lang inquired as to
12 how Gallagher would notify clients of Lang's departure; McFarlane
13 instructed Lang not to contact any of the clients. Beginning
14 January 31, 2014, Lang's clients began contacting him concerning
15 his resignation. Some of these clients said they heard of Lang's
16 resignation from Gallagher's employees. In a letter dated
17 February 13, 2014, Gallagher communicated to Lang that it
18 considered the employment agreement to be valid and in force.

19 On February 28, 2014, Gallagher filed a Complaint against
20 Lang. Lang filed a motion to dismiss, which this Court granted in
21 part and denied in part. Gallagher then filed an amended
22 complaint. Again Lang filed a motion to dismiss and again the
23 Court granted the motion in part and denied it in part. Gallagher
24 now proceeds on three claims of breach of contract.

25 Lang's counterclaim asserts six causes of action: intentional
26 interference with prospective economic advantage, negligent
27 interference with prospective economic advantage, a violation of
28 sections 17200 et seq. of the California Business and Professions

1 Code, two counts of restraint of trade and a request for
2 declaratory relief. Lang seeks monetary damages and declaratory
3 relief. To summarize briefly, Gallagher moves to dismiss Lang's
4 counterclaim on the basis that Gallagher's alleged actions are
5 protected by California's litigation privilege and that Lang does
6 not allege Gallagher engaged in sufficient conduct to support his
7 causes of action.¹ The Court addresses each argument in turn.

8 LEGAL STANDARD

9 A complaint must contain a "short and plain statement of the
10 claim showing that the pleader is entitled to relief." Fed. R.
11 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
12 state a claim, dismissal is appropriate only when the complaint
13 does not give the defendant fair notice of a legally cognizable
14 claim and the grounds on which it rests. Bell Atl. Corp. v.
15 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
16 complaint is sufficient to state a claim, the court will take all
17 material allegations as true and construe them in the light most
18 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
19 896, 898 (9th Cir. 1986). However, this principle is inapplicable
20 to legal conclusions; "threadbare recitals of the elements of a
21 cause of action, supported by mere conclusory statements," are not
22 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
23 (citing Twombly, 550 U.S. at 555). When granting a motion to
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25 ¹ Gallagher's motion also offers the argument that Lang's
26 counterclaim should be dismissed in its entirety as untimely. In
27 response Lang points out that Gallagher cites no authority in
28 support of this argument. In its reply brief, Gallagher
apparently abandons the argument, so the Court will not address it
further.

1 dismiss, the court is generally required to grant the plaintiff
2 leave to amend, even if no request to amend the pleading was made,
3 unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v.
4 N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir.
5 1990).

6 DISCUSSION

7 A. Interference with Prospective Economic Advantage (First
8 and Second Causes of Action)

9 Gallagher moves to dismiss Lang's first two causes of action,
10 negligent and intentional interference with prospective economic
11 advantage, for two reasons: first that the causes of action are
12 barred by California's litigation privilege and second that Lang
13 fails to state a claim because he does not allege an independent
14 wrong. The Court agrees with Gallagher and will, accordingly,
15 grant its motion.

16 Gallagher first moves to dismiss these causes of action
17 because they are barred by California's litigation privilege.
18 Under California Civil Code section 47(b), communications made in
19 or related to judicial proceedings cannot give rise to tort
20 liability. The purpose of the so-called litigation privilege is
21 "to afford litigants . . . the utmost freedom of access to the
22 courts without fear of being harassed subsequently by derivative
23 tort actions." Silberg v. Anderson, 50 Cal. 3d 205, 213 (1990).
24 The privilege is quite broad. It covers "any publication required
25 or permitted by law in the course of a judicial proceeding to
26 achieve the objects of the litigation, even though the publication
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1 is made outside the courtroom and no function of the court or its
2 officers is involved." Id. Courts have applied the litigation
3 privilege to all tort claims, with the exception of malicious
4 prosecution. Edwards v. Centex, 53 Cal. App. 4th 15, 29 (1997).

5 The threshold issue in determining whether the litigation
6 privilege applies is whether the defendant's conduct was
7 communicative, in which case the privilege bars suit, or non-
8 communicative, in which case it does not. Kimmel v. Goland, 51
9 Cal. 3d 202, 211 (1990). The relevant judicial inquiry is whether
10 the alleged injury resulted from an act that was "communicative in
11 its essential nature." Rusheen v. Cohen, 37 Cal. 4th 1048, 1058
12 (2006).

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14 In response to Gallagher's motion, Lang argues that his
15 counterclaims are founded in Gallagher's conduct: interfering with
16 Lang's business relationships and attempting to intimidate the
17 clients into ceasing those relationships. Gallagher replies that
18 the essence of Lang's claims is that Gallagher allegedly said
19 something during its contacts with the clients, and that the
20 conduct Lang alleges is really communication. As currently plead,
21 Lang's counterclaims do not allege non-communicative conduct that
22 falls outside of the litigation privilege.
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24 First, Lang's counterclaims assert that Gallagher "contacted"
25 his clients "for the purpose of intimidating" them to terminate
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1 their relationships with Lang.² Lang cites no cases to support
2 his position that talking to those who may be affected by
3 litigation is non-communicative; indeed, in all of the cases he
4 cites the courts are careful to distinguish communication from
5 conduct going beyond communication. See Kimmel v. Goland, 51 Cal.
6 3d 202, 205 (1990) (illegal recording of telephone conversations
7 is non-communicative); Kupiec v. American Intl. Adjustment Co.,
8 235 Cal. App. 3d 1326, 1333 (1991) (concealment, misrepresentation
9 and abuse of the discovery process are communicative where,
10 "[s]ignificantly, there is no allegation of physical destruction
11 of evidence"); LiMandri v. Judkins, 52 Cal. App. 4th 326, 345
12 (1997) (preparation and execution of documents is non-
13 communicative). Lang's counterclaim does not allege any conduct
14 other than "contact[ing]" the clients and, on the legal authority
15 cited, the Court cannot conclude that this conduct is non-
16 communicative so as to escape the litigation privilege. Further,
17 as "[a]ny doubt about whether the privilege applies is resolved in
18 favor of applying it," Kashian v. Harriman, 98 Cal. App. 4th 892,
19 913 (2002), the Court grants Gallagher's motion to dismiss.

23 ² Lang also asserts that Gallagher "filed legal action
24 against Lang to induce the Clients, and/or other potential
25 employers or businesses, to terminate their relationships. . . ."
26 As Gallagher argues, and as Lang essentially concedes in his
27 response, the litigation privilege certainly bars a cause of
28 action based on the filing of a lawsuit. Action Apartment Assoc.,
Inc. v. Santa Monica, 41 Cal. 4th 1232, 1249 (2007) ("the filing
of a legal action . . . by its very nature is a communicative
act.").

1 Gallagher also moves to dismiss these causes of action on the
2 ground that Lang fails to state a claim for relief. To state a
3 claim for intentional interference with prospective economic
4 advantage, a plaintiff must allege "'(1) an economic relationship
5 between the plaintiff and some third party, with the probability
6 of future economic benefit to the plaintiff; (2) the defendant's
7 knowledge of the relationship; (3) intentional acts on the part of
8 the defendant designed to disrupt the relationship; (4) actual
9 disruption of the relationship; and (5) economic harm to the
10 plaintiff proximately caused by the acts of the defendant.'" Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153
11 (2003) (citations omitted). The elements to state a claim for
12 negligent interference with prospective economic advantage are the
13 same, except instead of alleging intentional acts, the plaintiff
14 must allege that the defendant knew or should have known that the
15 relationship would be disrupted if it failed to act with
16 reasonable care; and that the defendant failed to act with
17 reasonable care. Theme Promotions, Inc. v. News Am. Mktg., 546
18 F.3d 991, 1004 (9th Cir. 2008). In addition, for either tort, a
19 plaintiff must allege that the defendant's conduct was "wrongful
20 by some legal measure other than the fact of the interference
21 itself." Korea Supply, 29 Cal. 4th at 1153. "An act is
22 independently wrongful if it is unlawful, that is, if it is
23 proscribed by some constitutional, statutory, regulatory, common
24 law, or other determinable legal standard." Id. at 1159.

1 In the paragraphs describing his first two causes of action,
2 Lang alleges that Gallagher knew of the economic relationships
3 between the clients and Lang; that Lang had a prospective economic
4 advantage because of these relationships; that Gallagher contacted
5 the clients and filed a lawsuit with the intent to disrupt the
6 prospective economic advantage; that the relationships were
7 disrupted; and that Lang was harmed by this disruption. These
8 allegations satisfy some of the main elements articulated above.
9 However, as Gallagher argues, the conduct Lang describes in the
10 first two causes of action—contacting clients and filing a
11 lawsuit—are not independently wrongful acts and Lang does not cite
12 any legal authority upon which the Court could conclude otherwise.
13 Instead, in response to Gallagher's argument, Lang cites
14 subsequent paragraphs of his counterclaim, which allege causes of
15 action predicated upon completely different conduct, namely the
16 parties' execution of the employment agreement. Because of the
17 counterclaim's disjointed and incongruous nature, it is difficult
18 to tell exactly what conduct forms the bases of Lang's causes of
19 action and thus the claims as currently written do not give
20 Gallagher fair notice of the grounds on which the causes of action
21 rest. Twombly, 550 U.S. at 555. As such, the Court must dismiss
22 Lang's first and second causes of action for this reason as well.
23 The Court grants Lang leave to amend but only if he can plead a
24 counterclaim based on conduct that is not barred by the litigation
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1 privilege and that satisfies the independent wrong requirement of
2 these causes of action.

3 B. Violation of California Business and Professions Code
4 Sections 17200 et seq. (Third Cause of Action)

5 Lang's third cause of action proceeds under California's
6 Unfair Competition Law, which prohibits "any unlawful, unfair or
7 fraudulent business act or practice." Cal. Bus. & Prof. Code
8 § 17200. Lang alleges that Gallagher violated the Unfair
9 Competition Law by requiring Lang to execute the employment
10 agreement in this case, which he alleges contains unreasonable,
11 overbroad and unenforceable covenants not to compete and not to
12 solicit the business of Gallagher's clients. Gallagher moves to
13 dismiss Lang's third cause of action for two reasons: first that
14 the cause of action is barred by California's litigation privilege
15 and second that Lang fails to state a claim because he does not
16 allege conduct that is independently unlawful, unfair or
17 fraudulent.³ For the reasons that follow, the Court grants
18 Gallagher's motion.

19 First, in response to Gallagher's assertion of the litigation
20 privilege, Lang argues that his cause of action asserts liability
21 predicated on non-communicative acts of requiring Lang to execute
22 the employment agreement and on Gallagher's vacillation on whether

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24 ³ In response to Gallagher's second argument, Lang asserts
25 that his allegation of a violation of California Business and
26 Professions Code section 16600 serves as a basis for his Unfair
27 Competition Law claim. In its reply briefing, Gallagher does not
28 rebut this argument, and instead pursues only its litigation
privilege argument. Accordingly, the Court considers this
privilege argument.

1 or not the employment agreement applied beyond August 31, 2011.
2 However, as Gallagher persuasively argues in its reply, the
3 injurious action Gallagher committed, if any, is not the mere
4 requirement that Lang execute the employment agreement, but rather
5 the filing of the lawsuit seeking to enforce the agreement.
6 Lang's alleged injury makes this clear: the injury Lang
7 articulates is loss of income, loss of business and loss of
8 goodwill, all injuries Lang would suffer if the allegedly anti-
9 competitive provisions of the agreement were enforced, but which
10 Lang did not suffer due to merely signing the agreement.

11 The California Court of Appeal illustrated this reasoning in
12 Navellier v. Sletten, 106 Cal. App. 4th 763 (2003). There, the
13 defendant served as an independent trustee of a mutual fund
14 established and advised by the plaintiffs. 106 Cal. App. 4th at
15 767. There was some shuffling of advisors, during the course of
16 which the defendant signed a release discharging all claims
17 against the plaintiffs other than contribution and indemnity. Id.
18 The plaintiffs then filed suit against the defendant in federal
19 court and the defendant filed counterclaims. Id. Subsequent to
20 the entry of a federal judgment, the plaintiffs filed suit in
21 state court, alleging that the defendant committed fraud by
22 misrepresenting his intention to be bound by the release he
23 executed and further asserting that he breached the release when
24 he pursued his federal counterclaims. Id. at 768. The defendant
25 interposed an anti-SLAPP⁴ motion, predicated in relevant part on

26 _____
27 ⁴ Anti-SLAPP refers to California's anti-Strategic Lawsuit
28 Against Public Participation statute. See Cal. Code Civ. Proc. §
425.16.

1 the litigation privilege, and arguing that the plaintiffs could
2 not maintain a suit in tort against him for the counterclaims he
3 filed as part of the federal action. Id. at 768, 769-70. In
4 assessing the applicability of the litigation privilege to these
5 facts, the Court of Appeal drew a distinction between a claim
6 arising from the defendant's act of signing the release and a
7 claim arising from the defendant's subsequent filing of the
8 counterclaims. Id. at 771-72. The court explained:

9 While it is true that the alleged fraud occurred before
10 the counterclaims were filed, it is also true that
11 damages from the fraud were caused by the counterclaims'
12 assertion. Thus, as the [California Supreme Court]
13 majority observed [on prior appeal], "[defendant] is
14 being sued because of the affirmative counterclaims he
15 filed in federal court. In fact, but for the federal
16 lawsuit and [defendant's] alleged actions taken in
17 connection with that litigation, plaintiffs' present
18 claims would have no basis." Since the fraud claim is
19 predicated, at least in part, on privileged
20 counterclaims and, as has been noted, the privilege bars
21 all tort causes of action other than malicious
22 prosecution, plaintiffs cannot prevail on the fraud
23 claim and the motion to strike should have been granted
24 as to that cause of action.

25 Id. (internal citations omitted). This analysis applies neatly to
26 the instant case. The allegedly anticompetitive action may have
27 occurred at the time of the execution of the employment agreement,
28 but any injury Lang can claim originates in Gallagher's litigation
to enforce those provisions of of the agreement. Gallagher's
filing of its lawsuit is a communicative act falling squarely
within the litigation privilege and, thus, Gallagher is entitled
to protection of the litigation privilege and dismissal of this
cause of action. The Court grants Lang leave to amend but only if
he can plead an anticompetitive action not barred by litigation
privilege that is independently unlawful, unfair, or fraudulent.

1 C. Restraint of Trade - Terminated Employment Agreement
2 (Fourth Cause of Action)

3 Lang's fourth cause of action alleges that Gallagher
4 represented that the employment agreement was not in force, that
5 Lang relied on that representation and that Gallagher then filed
6 suit to enforce the employment agreement. Lang asserts that these
7 actions restrained Lang from practicing his profession. Gallagher
8 seeks dismissal of this cause of action as barred by the
9 litigation privilege because the basis of the cause of action is
10 Gallagher's lawsuit to enforce the employment agreement. The
11 Court can only agree, based on the same logic as explained in
12 section B, above. Accordingly, Gallagher is entitled to dismissal
13 of this cause of action. The Court grants Lang leave to amend but
14 only if he can plead an act restraining his trade that is not
15 barred by the litigation privilege.

16 D. Restraint of Trade - Contract Provisions (Fifth Cause of
17 Action)

18 Lang's fifth cause of action alleges that the employment
19 agreement contains provisions that restrained trade and prevented
20 Lang from engaging in his lawful profession. Although Gallagher's
21 motion to dismiss does not seek dismissal of this cause of action,
22 the Court finds it prudent to dismiss it sua sponte. The fifth
23 cause of action displays a frailty similar to the third and fourth
24 causes of action: the alleged injury occurred or is occurring due
25 to Gallagher's enforcement of the employment agreement in
26 litigation, not due to the mere execution of the agreement, and
27 thus the litigation privilege shields Gallagher from liability.
28 On this point, the Court finds that Lang is not entitled to relief

1 on his cause of action as plead, and the Court may, therefore,
2 dismiss the claim under Federal Rule of Civil Procedure 12(b)(6).
3 Omar v. Sea Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987).
4 Accordingly, the Court dismisses Lang's fifth cause of action.
5 Lang is granted leave to amend, but only if he can plead a cause
6 of action consistent with this Order.

7 The Court thus dismisses causes of action one through five of
8 Lang's counterclaim. The Court also grants Lang leave to file an
9 amended counterclaim within fourteen days of the date of this
10 Order. Though Lang's sixth cause of action survives after this
11 Order granting Gallagher's motion to dismiss, the Court reminds
12 Lang of this District's Civil Local Rule 10-1, Amended Pleadings,
13 which mandates that amended pleadings stand alone and may not
14 incorporate any part of a prior pleading by reference.

15 CONCLUSION

16 For the reasons set forth above, Gallagher's motion to
17 dismiss (Docket No. 38) is GRANTED. Causes of action one through
18 five of Lang's counterclaim are dismissed. The Court grants Lang
19 leave to amend, and grants Lang fourteen days from the date of
20 this Order to file an amended counterclaim, consistent with this
21 Order. A case management conference will be held in this case at
22 2:00 PM on Wednesday, February 25, 2015. The parties shall submit
23 a joint case management statement by February 18, 2015.

24 IT IS SO ORDERED.

25 Dated: December 3, 2014

26 
27 CLAUDIA WILKEN
28 United States District Judge