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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOE HAND PROMOTIONS, INC., <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> MARC S. BRAGG, <i>et al.</i> , <p style="text-align: right;">Defendants.</p>
<p style="text-align: center;">AND RELATED COUNTERCLAIM AND THIRD PARTY COMPLAINT</p>

Case No. 13-cv-02725-BAS(KSC)

ORDER:

- (1) GRANTING DIRECTV'S MOTION TO DISMISS (ECF NO. 64);**
- (2) GRANTING DIRECTV'S MOTION FOR LEAVE TO FILE FIRST AMENDED COUNTERCLAIM (ECF NO. 84);**
- (3) DENYING AS MOOT COUNTERDEFENDANTS' MOTION TO DISMISS COUNTERCLAIMS (ECF NO. 68); AND**
- (4) DENYING COUNTERDEFENDANTS' MOTION TO FILE A SUPPLEMENTAL EXHIBIT (ECF NO. 95)**

Joe Hand Promotions, Inc. ("Joe Hand"), a commercial distributor and licensor of sporting events, commenced this action against Marc S. Bragg and Cynthia Motsch, both individually and doing business as Sally and Henry's Doghouse Bar

1 and Grill (collectively “Doghouse”) alleging Doghouse improperly broadcast the
2 “Ultimate Fighting Championship Program” (“the Program”) at the Bar and Grill on
3 November 17, 2012, without obtaining the proper licensing to do so from Joe Hand.
4 (ECF No. 1.) Doghouse filed counterclaims against Joe Hand. (ECF Nos. 25, 36.)

5 On June 25, 2014, Doghouse filed a Third Party Complaint against DirecTV,
6 LLC (“DirecTV”) alleging DirecTV’s misrepresentations caused it to broadcast the
7 Program without proper licensing. (ECF No. 26.) On July 28, 2014, Doghouse filed
8 an Amended Third Party Complaint against DirecTV. (ECF No. 37 (“ATPC”).)

9 Joe Hand and the Doghouse jointly dismissed the original complaint and
10 counterclaims, so that the only remaining complaint was the ATPC. (ECF Nos. 57,
11 58.) DirecTV thereafter filed counterclaims against Doghouse. (ECF No. 63.)

12 Presently before this Court are (1) DirecTV’s Motion to Dismiss the ATPC
13 (ECF No. 64); (2) Doghouse’s Motion to Dismiss DirecTV’s counterclaims (ECF
14 No. 68) to which no opposition has been filed; (3) DirecTV’s Motion for Leave to
15 File First Amended Counterclaims (ECF No. 84); and (4) Doghouse’s Motion to File
16 a Supplemental Exhibit (ECF No. 95).

17 For the following reasons, this Court **GRANTS** DirecTV’s Motion to Dismiss
18 (ECF No. 64); **GRANTS** DirecTV’s Motion to File First Amended Counterclaims
19 (ECF No. 84); **DENIES AS MOOT** Doghouse’s Motion to Dismiss the
20 Counterclaims (ECF No. 68); and **DENIES** Doghouse’s Motion to File a
21 Supplemental Exhibit (ECF No. 95).

22 **I. DIRECTV’S MOTION TO DISMISS THE ATPC**

23 DirecTV moves to dismiss the ATPC pursuant to Federal Rule of Civil
24 Procedure 12(b)(6) arguing: (1) the allegations of fraud and deceit lack sufficient
25 particularity; (2) Doghouse fails to allege any term of the contract that was breached;
26 (3) since there was no breach of contract, and no allegation of a special fiduciary
27 relationship, there can be no breach of the covenant of good faith and fair dealing;
28 (4) the UCC does not apply to contracts for goods as opposed to services; (5)

1 Doghouse fails to identify any false advertisements with particularity; and (6)
2 Doghouse fails to allege sufficient facts to support an unfair competition claim.

3 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
4 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
5 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court
6 must accept all factual allegations pleaded in the complaint as true and must construe
7 them and draw all reasonable inferences from them in favor of the nonmoving party.
8 *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). To avoid a
9 Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations,
10 rather, it must plead “enough facts to state a claim to relief that is plausible on its
11 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has “facial
12 plausibility when the plaintiff pleads factual content that allows the court to draw the
13 reasonable inference that the defendant is liable for the misconduct alleged.”
14 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).
15 “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s
16 liability, it stops short of the line between possibility and plausibility of ‘entitlement
17 to relief.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

18 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
19 relief’ requires more than labels and conclusions, and a formulaic recitation of the
20 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (quoting
21 *Papasan v. Allain*, 478 U.S. 265, 286 (1986). A court need not accept “legal
22 conclusions” as true. *Iqbal*, 556 U.S. at 678. Despite the deference the court must
23 pay to the plaintiff’s allegations, it is not proper for the court to assume that “the
24 [plaintiff] can prove facts that [he or she] has not alleged or that defendants have
25 violated the...laws in ways that have not been alleged.” *Associated Gen. Contractors
26 of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

27 Generally, courts may not consider material outside the complaint when ruling
28 on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d

1 1542, 1555 n.19 (9th Cir. 1990). However, documents specifically identified in the
2 complaint whose authenticity is not questioned by parties may also be considered.
3 *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superseded by statute on
4 other grounds). Moreover, the court may consider the full text of those documents
5 even when the complaint quotes only selected portions. *Id.* It may also consider
6 material properly subject to judicial notice without converting the motion into one
7 for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

8 As a general rule, a court freely grants leave to amend a complaint which has
9 been dismissed. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when
10 “the court determines that the allegation of other facts consistent with the challenged
11 pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well*
12 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

13 **A. Preliminary Considerations**

14 In its Opposition, Doghouse requests that the Court incorporate by reference
15 an Opposition filed in another case, involving different parties, before a different
16 Judge. (ECF No. 79 at p. 3.) Although this Court understands that there is a pending
17 Motion to Consolidate in that other case, requesting that the case be consolidated with
18 this one, that Motion has not been granted, the cases are not consolidated, and this
19 Court declines to allow Doghouse to incorporate by reference a pleading filed in a
20 different, as of yet, unrelated, case.

21 In addition, Doghouse filed a Motion to File a Supplemental Exhibit to its
22 Opposition. (ECF No. 95.) Doghouse requests that this Court take judicial notice of
23 a Final Judgment and Permanent Injunction issued by the San Diego Superior Court
24 against DirecTV on December 10, 2010. Since this Final Judgment is ultimately not
25 relevant to the decisions reached by the Court in this Order, the Motion to File a
26 Supplemental Exhibit is **DENIED**.

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1 **B. Count One: Fraud and Deceit**

2 DirecTV moves to dismiss Count One of the ATPC alleging Doghouse fails to
3 allege sufficient particularity to withstand a challenge under Rule 12(b)(6). In order
4 to establish a cause of action for fraud, Doghouse must allege: (1) a misrepresentation
5 (false representation, concealment, or nondisclosure); (2) DirecTV’s knowledge of
6 this falsity; (3) DirecTV’s intent to defraud; (4) Doghouse’s justifiable reliance; and
7 (5) resulting damage. *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 974
8 (1997).

9 Rule 9(b) of the Federal Rules of Civil Procedure holds fraud claims to a
10 heightened pleading standard and claimants must plead fraud with particularity. Fed.
11 R. Civ. P. 9(b). A plaintiff must state the “time, place and specific content of the
12 false representations as well as the identities of the parties to the misrepresentations”
13 with particularity. *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010)
14 (citation omitted). A plaintiff must also “set forth what is false or misleading about
15 a statement, and why it is false.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,
16 1106 (9th Cir. 2003) (citation omitted). In other words, the pleading must be
17 “specific enough to give defendants notice of the particular misconduct . . . so that
18 they can defend against the charge and not just deny they have done anything wrong.”
19 *Sanford*, 625 F.3d at 558 (citation omitted).

20 In the ATPC, Doghouse alleges that at the time DirecTV solicited Doghouse
21 to buy its service in 2012, it “represented that it was providing . . . Doghouse a
22 commercial license and that all the content it distributed to the DirecTV equipment it
23 installed . . . was properly licensed by DirecTV with the full knowledge and consent
24 of any content provider.” (ATPC at ¶¶ 7, 15.) Doghouse further alleges “DirecTV’s
25 representations made by it at the time it induced . . . Doghouse to subscribe to its
26 services,” included the representation “that all programs were properly licensed,” and
27 this “was knowingly and intentionally false.” (*Id.* at ¶ 34.) According to the ATPC,
28 “DirecTV’s representations . . . made by DirecTV during the continuation of the

1 subscription during verbal conversations with its telephonic sales agents and on its
2 website promoting various programs, . . . along with its purchase and license, were
3 intended to and did in fact lead . . . Doghouse to justifiably believe that the . . .
4 [Program] . . . [was] . . . lawfully licensed and authorized.” (*Id.* at ¶ 36.)

5 In its Opposition, Doghouse appears to concede that the representations in the
6 ATPC are insufficient. Doghouse provides insufficient specifics as to what
7 misrepresentations were made and by whom. Instead, Doghouse offers a Second
8 Amended Third Party Complaint and requests the Court allow it to amend its
9 allegations. Hence this Court **GRANTS** the Motion to Dismiss Count One. Since
10 the Court finds it possible Doghouse may be able to amend to allege sufficient
11 allegations of fraud, the Doghouse is given leave to amend. However, Doghouse is
12 cautioned that any allegation of fraud and deceit must include the specific content of
13 the allegedly false representations as well as the individual who made them.

14 **C. Count Six: Breach of Contract**

15 To state a breach of contract claim under California law, a plaintiff must allege:
16 (1) the existence of a contract; (2) the plaintiff’s performance or excuse for
17 nonperformance; (3) the defendant’s breach; and (4) the resulting damage to the
18 plaintiff. *CDF Firefighters v. Maldonado*, 158 Cal. App. 4th 1226, 1239 (2008). A
19 plaintiff must allege the substance of the relevant terms of the contract, set them out
20 verbatim in the complaint, or attach a copy of the contract to the complaint and
21 incorporated by reference. *N. Cnty. Commc’ns Corp. v. Verizon Global Networks,*
22 *Inc.*, 685 F. Supp. 2d 1112, 1122 (S.D. Cal. 2010) (citing *McKell v. Wash. Mut., Inc.*,
23 142 Cal. App. 4th 1457, 1489 (2006)). In addition, the complaint must “identify the
24 specific provision of the contract allegedly breached by the defendant.” *Donohue v.*
25 *Apple, Inc.*, 871 F. Supp. 2d 913, 930 (N.D. Cal. 2012) (citing *Progressive West Ins.*
26 *Co. v. Yolo Cnty. Super. Ct.*, 135 Cal. App. 4th 263, 281 (2005)). Moreover, a
27 plaintiff must allege how the defendant breached the relevant term(s) of the alleged
28 contract. *See Parrish v. Nat’l Football League Players Ass’n*, 534 F. Supp. 2d 1081,

1 1096 (N.D. Cal. 2007).

2 In the ATPC, Doghouse alleges DirecTV had a contract with Doghouse for the
3 provision of satellite television service and for the purchase of the Program. (ATPC
4 at ¶ 110.) Doghouse claims the contract required DirecTV to provide programming
5 paid for by Doghouse. (*Id.* at ¶ 111.) Without further specificity, Doghouse claims
6 DirecTV breached this contract.

7 In its Opposition to DirecTV’s Motion to Dismiss, Doghouse appears again to
8 admit that the allegations in the ATPC are insufficient to state a breach of contract
9 claim. It is unclear what provision of the contract DirecTV is alleged to have violated.
10 In fact, assuming everything in the ATPC is true, it appears DirecTV did provide
11 satellite television service and the programming paid for by Doghouse, including the
12 Program. Therefore, the Court **GRANTS** DirecTV’s Motion to Dismiss Count Six
13 with leave to amend. However, Doghouse is cautioned that any amended Complaint
14 must include the details as to what provision was allegedly violated and how.

15 **D. Count Two: Breach of Good Faith and Fair Dealing**

16 In California, “[e]very contract imposes upon each party a duty of good faith
17 and fair dealing in its performance and its enforcement.” *Foley v. Interactive Data*
18 *Corp.*, 47 Cal. 3d 654, 684 (1988) (citing Rest. 2s Contracts §205). Thus, in order to
19 bring an action for breach of the implied covenant of good faith and faith dealing, the
20 complainant must first allege the existence of a contract. *Spencer v. DHI Mortgage*
21 *Co., Ltd.*, 642 F. Supp. 2d 1153, 1165 (E.D. Cal. 2009) (citing *Smith v. City and Cnty.*
22 *Of S.F.*, 225 Cal. App. 3d 38, 49 (1990)). Since this Court has determined Doghouse
23 has not sufficiently alleged the existence of a contract or that Doghouse failed to
24 receive the benefits of any contract, this cause of action must also be dismissed.
25 Hence, the Motion to Dismiss Count Two is **GRANTED** with leave to amend.

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1 **E. Count Three: Breach of Warranty of Fitness for Particular Purpose**

2 In Count Three, Doghouse alleges a breach of warranty under Article II of the
3 California Uniform Commercial Code (“UCC”). Doghouse alleges DirecTV
4 breached this warranty “by deceiving and inducing . . . Doghouse into believing the
5 Program that was purchased and paid for was had [sic] clear title and was transmitted
6 without infringing on the rights of any third parties.” (ATPC at ¶ 32.) Thus, DirecTV
7 breached the warranty of fitness for a particular purpose “when it sold, licensed, and
8 transmitted the Program to . . . Doghouse” (*Id.* at ¶ 80.)

9 The UCC only applies to contracts for sale of goods and not to contracts for
10 the sale of services. Cal. Com. Code § 2102. The UCC defines “goods” as “all things
11 (including specially manufactured goods) which are movable at the time of
12 identification to the contract for sale.” Cal. Com. Code § 2105; *see also Simulados*
13 *Software, Ltd. v. Photon Infotech Private, Ltd.*, 40 F. Supp. 3d 1191, 1199 (N.D. Cal.
14 2014). When something is a combination of goods and services, courts look to
15 “whether the thrust is the rendition of service with goods incidentally involved or
16 whether the transaction is a sale of goods with labor incidentally involved.” *TK*
17 *Power, Inc. v. Textron, Inc.*, 433 F. Supp. 2d 1058, 1061 (N.D. Cal. 2006).

18 This Court agrees with DirecTV (and Doghouse appears to concede) that the
19 transmission of cable television programming is a service rather than a good. The
20 leased equipment is only incidentally involved and merely makes it possible for
21 DirecTV to provide clients its television services. Hence, DirecTV’s Motion to
22 Dismiss Count Three is **GRANTED** without leave to amend.

23 **F. Count Four: Unfair Practices/Fraud in Advertising**

24 In Count Four, Doghouse alleges DirecTV violated California’s False
25 Advertising Law found in the California Business and Professions Code §§ 17500-
26 17509. This law prohibits the dissemination of statements that are “untrue or
27 misleading, and which [are] known, or which by the exercise of reasonable care
28 should be known, to be untrue or misleading.” Cal. Bus. & Prof. Code §17500.

1 Courts have interpreted this provision broadly to “embrace not only advertising
2 which is false, but also advertising which although true, is either actually misleading
3 or which has a capacity, likelihood or tendency to deceive or confuse the public.”
4 *Inter-Mark USA, Inc. v. Intuit, Inc.*, No. C-07-04178 JCS, 2008 WL 552482, at *9
5 (N.D. Cal. 2008) (quoting *Leoni v. State Bar*, 39 Cal. 3d 609, 626 (1985)).

6 Where a plaintiff alleges fraud as a basis for a violation of his false advertising
7 claim, he will be subject to the higher “particularity” pleading standard required
8 under Rule 9(b). *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection*
9 *HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1093 (S.D. Cal. 2010). Since
10 Doghouse alleges fraud as the basis for its false advertising claim, it is subject to this
11 higher pleading standard.

12 Accordingly, to properly plead its false advertising claim, Doghouse must
13 identify specific advertisements, when and where they were shown, and why they
14 were untrue or misleading. *Id.*; *see also Williams v. Gerber Prods. Co.*, 552 F.3d
15 934, 938 (9th Cir. 2008) (“[T]he primary evidence in a false advertising case is the
16 advertising itself.”) (quotation omitted); *VP Racing Fuels, Inc. v. Gen. Petroleum*
17 *Corp.*, 673 F. Supp. 2d 1073, 1088 (E.D. Cal. 2009) (“The underlying element of a
18 false advertising claim is some type of advertising statement.”) In *In re Sony Grand*
19 *Wega*, for example, the Court granted defendant’s motion to dismiss the false
20 advertising claim because plaintiffs failed to identify specific advertisements, when
21 and where they were shown, or why they were untrue or misleading. *In re Sony*
22 *Grand Wega*, 758 F. Supp. 2d at 1093-94.

23 In this case, Doghouse alleges DirecTV sent Doghouse “advertisements that
24 [DirecTV] was the authorized distributor and source for the Program” and “paper
25 advertisements and advertisements over the Internet that solicited the sale of the
26 Program but did not disclose that DirecTV’s sale of the Program required as a
27 condition of the sale, a separate price or fee to be paid over to [Joe Hand].” (ATPC
28 at ¶¶ 87, 88.) Doghouse fails to identify any specific advertisement, let alone when

1 and where it was shown. Doghouse’s allegations of false advertising are insufficient
2 even under the notice pleading standard of Rule 8(a) and certainly lack the
3 particularity required under Rule 9(b).

4 Therefore, DirecTV’s Motion to Dismiss Count Four is **GRANTED**. Again,
5 since Doghouse may be able to cure this deficiency, this Court gives Doghouse leave
6 to amend. Any amended cause of action must include specifics as to what
7 advertisement was received, when and where, and specifically what in the
8 advertisements is alleged to be misleading or false.

9 **G. Count Five: Unfair Competition**

10 In Count Five, Doghouse alleges unfair competition in violation of California’s
11 Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.* This law
12 prohibits business acts or practices that are “unlawful,” “unfair,” or “fraudulent.” *Id.*
13 §17200. Each of these three prongs constitutes a separate and independent cause of
14 action. *See Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th
15 163, 180 (1999).

16 Doghouse alleges DirecTV deceived the public by “knowingly licens[ing] and
17 sell[ing] the Program to commercial customers improperly . . . designated as
18 ‘residential.’” (ATPC at ¶ 98.) Doghouse claims that by misrepresenting the owner
19 and licensor of the Program, DirecTV was able to sell the Program at significantly
20 reduced rates to small business owners and other members of the public, who were
21 then deceived into purchasing DirecTV. (*Id.* at ¶¶ 100-102.) Finally, Doghouse
22 alleges DirecTV “created a strict pricing model for the licensing of the Program
23 which not only confuses the general public as a result of the concealed terms and
24 license rights, but also inhibits competition in the marketplace as the Program is
25 unique and not otherwise available to the general public.” (*Id.* at ¶ 103.) Doghouse
26 claims this constitutes unfair competition because the purpose of the “dividing of the
27 license fees into two discrete categories of ‘residential’ and ‘commercial’ is to
28 restrain competition.” (*Id.* at ¶ 104.)

1 This Court will analyze these allegations under each of the three prongs of the
2 unfair competition law.

3 1. Unlawful prong

4 The UCL’s “unlawful” prong is essentially an incorporation-by-reference
5 provision. *See Cel-Tech*, 20 Cal. 4th at 180 (“By proscribing ‘any unlawful’ business
6 practice, section 17200 borrows violations of other laws and treats them as unlawful
7 practices that the [UCL] makes independently actionable.” (citations and some
8 internal quotation marks omitted)). “Violation of almost any federal, state, or local
9 law may serve as the basis for a UCL claim.” *Plascencia v. Lending 1st Mortg.*, 583
10 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008) (citing *Saunders v. Super. Ct.*, 27 Cal. App.
11 4th 832, 838-39 (1994)). “When a statutory claim fails, a derivative UCL claim also
12 fails.” *Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176, 1185 (2012).

13 In the ATPC, Doghouse fails to allege that DirecTV violated any law.
14 Therefore, the claim under the unlawful prong must fail.

15 2. Unfair prong

16 Under the UCL, for suits brought by consumers, courts have applied either the
17 balancing test set forth in *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.
18 App. 4th 861 (1999), the test set forth in *Cel-Tech*, or the three-pronged test set forth
19 in the FTC Act. *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1169-70 (9th Cir.
20 2012). However, the Ninth Circuit has declined to apply the FTC standard to
21 consumer actions “in the absence of a clear holding from the California Supreme
22 Court” that it should be applied. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718,
23 736 (9th Cir. 2007).

24 Under the balancing test, “unfair” conduct occurs when that practice “offends
25 an established public policy or when the practice is immoral, unethical, oppressive,
26 unscrupulous or substantially injurious to consumers.” *Davis*, 691 F.3d at 1169
27 (citing *S. Bay Chevrolet*, 72 Cal. App. 4th at 886-87). “Under this approach, courts
28 must examine the practice’s impact on its alleged victim, balanced against the

1 reasons, justifications and motives of the alleged wrongdoer. In short, this balancing
2 test must weigh the utility of the defendant’s conduct against the gravity of the harm
3 to the alleged victim.” *Id.* (internal citations and quotations omitted). Under the *Cel-*
4 *Tech* test, which was expressly limited in *Cel-Tech* to actions by competitors, but has
5 been applied by courts to consumer actions, an “unfair” practice means “conduct that
6 threatens an incipient violation of an antitrust law, or violates the policy or spirit of
7 one of those laws because its effects are comparable to or the same as a violation of
8 the law, or otherwise significantly threatens or harms competition.” *Id.* at 1169-70
9 (citing *Cel-Tech.*, 20 Cal. 4th at 187 & n. 12).

10 Although Doghouse alleges DirecTV’s conduct “inhibit[ed] competition,” it
11 does not identify the established public policy being offended, or make clear how
12 DirecTV’s conduct is immoral, unethical, unscrupulous or substantially injurious to
13 consumers. Doghouse also fails to allege any acts that threaten an incipient violation
14 of an antitrust law or violate the spirit of the antitrust laws. Therefore, any claim
15 under this prong must also fail.

16 3. Fraudulent prong

17 To state a claim under the UCL’s “fraudulent” prong, Doghouse must plead
18 that DirecTV’s allegedly fraudulent business practice is one in which “members of
19 the public are likely to be deceived.” *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144,
20 1167 (2000). “Unless the challenged conduct targets a particular disadvantaged or
21 vulnerable group, it is judged by the effect it would have on a reasonable consumer.”
22 *Puentes v. Wells Fargo Home Mortg., Inc.*, 160 Cal. App. 4th 638, 645 (2008)
23 (internal quotations and citation omitted). Reduced to the elements, a plaintiff must
24 allege with specificity that a defendant’s alleged misrepresentations: “(1) were relied
25 upon by the named plaintiffs; (2) were material; (3) influenced the named plaintiffs’
26 decision to purchase the product [or enter into an agreement]; and (4) were likely to
27 deceive members of the public.” *Yastrab v. Apple, Inc.*, No. 5:14-cv-01974-EJD,
28 2015 WL 1307163, at *19 (N.D. Cal. Mar. 23, 2015) (quotations omitted).

1 As discussed above, Doghouse fails to allege with sufficient particularity what
2 alleged misrepresentations were made and by whom they were made. However, it
3 appears Doghouse may be able to allege more specific misrepresentations, therefore,
4 Doghouse is given leave to amend.

5 **III. DIRECTV'S MOTION TO AMEND COUNTERCLAIMS**

6 DirecTV moves to amend its counterclaims. (ECF No. 84.) As it points out,
7 this case is procedurally in its infancy. No answer has been filed. No scheduling
8 order has been issued. No discovery has been conducted. Rule 15(a)(2) of the
9 Federal Rules of Civil Procedure directs that “a party may amend its pleading only
10 with the opposing party’s written consent or the court’s leave. The court should
11 freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). “[T]his policy
12 is to be applied with extreme liberality.” *Morongo Band of Mission Indians v. Rose*,
13 893 F.2d 1074, 1079 (9th Cir. 1990). Although the decision whether to allow
14 amendment is in the court’s discretion, “[i]n exercising its discretion, a court must
15 be guided by the underlying purpose of Rule 15—to facilitate decision on the merits
16 rather than on the pleadings or technicalities.” *DCD Programs, Ltd. v. Leighton*, 833
17 F.2d 183, 186 (9th Cir. 1987) (internal quotations omitted). Denial of a request to
18 amend is only proper when it “would be clearly frivolous, unduly prejudicial, cause
19 undue delay or a finding of bad faith is made.” *United Union of Roofers,*
20 *Waterproofers and Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1402
21 (9th Cir. 1990); *see also Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708,
22 712-13 (9th Cir. 2001) (no prejudice where amended pleading would not delay
23 proceedings and not require additional discovery).

24 There is no evidence the amendment is clearly frivolous or made in bad faith.
25 Furthermore, there is no evidence of undue delay. The original counterclaim was
26 filed October 21, 2014 (ECF No. 63) and ten days later, upon the joint motion of the
27 parties, the matter was stayed (ECF No. 67, 70-74). The stay was lifted on July 6,
28 2015 (ECF No. 78), and DirecTV attempted to file its Amended Counterclaim on

1 August 17, 2015 (ECF No. 82). The Amended Counterclaim was rejected on August
2 24 because DirecTV had failed to request permission from the Court pursuant to Rule
3 15, so five days later, on August 29, 2015, DirecTV filed this motion seeking leave
4 from the Court to file the Amended Counterclaim. The Court finds DirecTV has not
5 delayed filing the Amended Counterclaim.

6 Doghouse’s primary opposition appears to be based on an argument that the
7 amendment would be unduly prejudicial because it is duplicative of a pleading filed
8 in another action, involving other parties, in front of a different judge. Although this
9 Court understands a motion to consolidate that action with this one is pending in that
10 other court, currently two separate actions exist. The fact that DirecTV amended in
11 that other action does nothing to amend the counterclaims in this case. Therefore,
12 this Court rejects Doghouse’s argument that it would be unduly prejudiced because
13 the amended counterclaim is “identical and redundant” to a pleading filed in another
14 case. Doghouse fails to show that filing the Amended Counterclaim would be unduly
15 prejudicial at this early stage of the proceedings. In fact, omitting one cause of action
16 could save Doghouse time and energy.

17 Accordingly, DirecTV’s Motion for Leave to File a First Amended
18 Counterclaim (ECF No. 84) is **GRANTED**. Consequently, Doghouse’s Motion to
19 Dismiss the original counterclaim (ECF No. 68) is **DENIED AS MOOT**.

20 **IV. CONCLUSION**

21 DirecTV’s Motion to Dismiss the ATPC (ECF No. 64) is **GRANTED**.
22 Doghouse is given leave to amend all counts except for Count Three which is
23 dismissed with prejudice. Any Second Amended Third Party Complaint must be
24 filed no later than **March 21, 2016**.

25 DirecTV’s Motion to file amended counterclaims (ECF No. 84) is
26 **GRANTED**. The amended counterclaims must be filed no later than **March 21,**
27 **2016**.


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1 Neither party may add any new causes of action. Furthermore, both parties are
2 cautioned that they must comply with Civil Local Rule 15.1 when filing any amended
3 pleading, including Local Rule 15.1(c) requiring that “[a]ny amended pleading . . .
4 must be accompanied by a version of that pleading that shows—through redlining,
5 underlining, strikeouts, or other similarly effective typographic methods—how that
6 pleading differs from the previously dismissed pleading.” Civ. L.R. 15.1(c).

7 Lastly, Doghouse’s Motion to Dismiss the Counterclaims (ECF No. 68) is
8 **DENIED AS MOOT**, and Doghouse’s Motion to File a Supplemental Exhibit (ECF
9 No. 95) is **DENIED**.

10 **IT IS SO ORDERED.**

11
12 **DATED: February 29, 2016**


Hon. Cynthia Bashant
United States District Judge