Timothy B. Yoo - State Bar No. 254332
tyoo@birdmarella.com
Patricia H. Jun - State Bar No. 277461
pjun@birdmarella.com
Andrew McTernan – State Bar No. 310545
amcternan@birdmarella.com
BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS, LINCENBERG & RHOW, P.C.
1875 Century Park East, 23rd Floor
Los Angeles, California 90067-2561
Telephone: (310) 201-2100
Facsimile: (310) 201-2110

Attorneys for Plaintiff and Counter-Defendant Galaxia Electronics Co., Ltd.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

GALAXIA ELECTRONICS CO., LTD.,

Plaintiff,

vs.

LUXMAX, U.S.A., a Nevada corporation; RWS MANAGEMENT, INC., a Nevada company; ROBERT SCARNECHIA, an individual; and FULL THROTTLE FILMS, INC., a California company,

Defendants.

LUXMAX, U.S.A., a Nevada corporation; RWS MANAGEMENT, INC., a Nevada company; and ROBERT SCARNECHIA. an individual,

Counter-Claimant,

vs.

GALAXIA ELECTRONICS CO., LTD., a Korean corporation, and DOES 1-50,

Counter-Defendants.

-And-

SUP YOON, an Individual,

Third Party Defendant.

CASE NO. 2:16-cv-05144-JAK-GJS

PLAINTIFF'S NOTICE OF MOTION AND MOTION TO DISMISS COUNTERCLAIMS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF TIMOTHY B. YOO

Filed Concurrently with Plaintiff's Request for Judicial Notice

Date: January 22, 2018
Time: 8:30 a.m.
Crtrm.: 10B

Assigned to Hon. John A. Kronstadt

TO THE COURT AND TO THE PARTIES HERETO AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 22, 2018 at 8:30 a.m. in Courtroom 10B of the above-captioned Court, located at 350 W. First Street, Los Angeles, CA 90012, Plaintiff Galaxia Electronics Co., Ltd., will, and hereby does, move to dismiss the Counterclaims of Defendants Luxmax U.S.A., RWS Management, Inc., and Robert Scarnechia (Dkt. No. 66) for failure to state a claim upon which relief may be granted pursuant to the Federal Rule of Civil Procedure Rule 12(b)(6). This motion is based upon this Notice of Motion, the attached Memorandum of Points and Authorities and Declaration of Timothy B. Yoo, the concurrently-filed Request for Judicial Notice, the entire record herein, and such further briefing and argument as the Court may hear.

This motion is made following a conference of counsel in compliance with Local Rule 7-3, that occurred on October 2, 2017, where the parties were not able to agree on a resolution of the matters raised in this motion. (Declaration of Timothy B Yoo, attached hereto, ¶ 2.)

DATED: October 10, 2017

Timothy B. Yoo
Patricia H. Jun
Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C.

By: /s/ Timothy B. Yoo
Timothy B. Yoo
Attorneys for Plaintiff and Counter-Defendant Galaxia Electronics Co., Ltd.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Each of the Luxmax Defendants'[1] Counterclaims lack factual and legal support, and they should therefore be dismissed with prejudice. For example, the main thrust of the Counterclaims is that Galaxia allegedly "interfered" with the Luxmax Defendants' business relationships with its customers. But the entirety of the "factual" allegations supporting the Luxmax Defendants' interference claims are as follows:

- "Galaxia intentionally interfered with economic relationships between Counterclaimants and several third parties, including current and prospective customers." (Counterclaims, ¶ 55.)
- "Galaxia negligently interfered with economic relationships between Counterclaimants and several third parties, including current and prospective customers." *Id.* ¶ 62.
- Galaxia "engag[ed] in interference with Counterclaimants' contractual relationships with customers and otherwise damag[ed] Counterclaimants' commercial interests and professional relationships[.]" *Id.* ¶ 51.
- "In attempting to steal clients from Counterclaimants, Galaxia intentionally engaged in misconduct designed to disrupt Counterclaimants' existing contractual relationships with its customers, including misconduct as recently as 2017." *Id.* ¶ 71.

These are precisely the type of "threadbare recitals" of claim elements, ungirded by any factual support, that cannot survive a motion to dismiss under *Twombly* and *Iqbal*. For instance, there is not a single non-conclusory allegation

[1] The Luxmax Defendants consist of the moving defendants, Luxmax, U.S.A.; RWS Management, Inc.; and Robert Scarnechia.

about what Galaxia actually did to interfere with any supposed economic or contractual relationships, which customers were involved, the nature of the Luxmax Defendants' relationship with those customers, and the resulting injury Defendants suffered (if any). Further, the Luxmax Defendants do not even plead the existence of any specific contracts with actual customers, much less the required elements of a predicate breach of those contracts by those customers. Accordingly, the Counterclaims do not come close to setting forth a plausible claim for relief, and they should be dismissed.

Moreover, adding additional factual allegations to the Counterclaims would not cure their defects, since they each also lack proper legal bases. For instance, even if the allegations of the Counterclaims are taken as true, the Luxmax Defendants have not established that Galaxia's conduct was independently wrongful of the alleged interference, and thus, their intentional interference with prospective economic advantage claims must fail. Likewise, Galaxia, as the manufacturer of the goods that the Luxmax Defendants distributed in the U.S., is not a "stranger" to contracts involving the sale of those goods, and thus, as a matter of law cannot be held liable for intentionally interfering with them.

In the same way, the balance of the Luxmax Defendants' Counterclaims lack any factual allegations supporting liability, legal support in the case law, or both. For those reasons, and the reasons set forth more fully below, the Counterclaims should be dismissed in their entirety without leave to amend.

II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Galaxia is a Korean corporation that manufactures LED display products. (*See* Counterclaims, ¶¶ 1, 4.) In April 2010, Galaxia, Defendant Luxmax, U.S.A., and Defendant Full Throttle Films, Inc. ("VER") entered into an agreement for the distribution of Galaxia's products to VER in the U.S. (the "Exclusive Agreement"). *Id.* ¶¶ 13-14. In December 2010, Luxmax, U.S.A. and Galaxia entered into a follow-on agreement, whereby Luxmax agreed to distribute Galaxia's LED products

in North America. *Id.* ¶ 15. The Luxmax Defendants allege that over the course of several years, the Luxmax Defendants distributed Galaxia's products and forwarded payments to Galaxia as they were received from the end customers who had ordered Galaxia's products. *Id.* ¶ 16.

In March 2015, Defendant RWS signed an agreement regarding amounts owed to Galaxia for its products and that the Luxmax Defendants characterize as "purport[ing] to acknowledge certain amounts of accounts receivable from customers that Galaxia deemed to be past due." *Id.* ¶ 19. The Luxmax Defendants allege that they were told that the purpose of the agreement was to appease auditors, and would not be used "to change the custom and practice of the parties' business or otherwise harm Counterclaimants." *Id.* ¶ 20. The Luxmax Defendants also allege that they entered into other "similar documents" purporting to acknowledge amounts of accounts receivable from customers that Galaxia "deemed" to be past due. *Id.* ¶ 25.

The Luxmax Defendants assert that at some unspecified point in time, Galaxia "provid[ed] non-conforming goods that were not fit for their ordinary purpose, as well as goods that could not and did not pass without objection in the industry." *Id.* ¶ 44. The Luxmax Defendants further allege that Galaxia took unspecified actions which "disrupted" Defendants' economic relationships. *Id.* ¶ 58. In addition, Defendant Robert Scarnechia also alleges that in January 2016, in circumstances that are not detailed, he was recorded by a representative of Galaxia without his consent. *Id.* ¶¶ 76-80.

As a result of the Luxmax Defendants' failure to remit payment to Galaxia for millions of dollars' worth of its products, and further fraud in connection with those events, Galaxia filed its Complaint in this action on July 13, 2016, and its First Amended Complaint ("FAC") on August 23, 2016, for, *inter alia*, promissory fraud, breach of contract, conversion, and fraudulent misrepresentation. The Luxmax Defendants filed a Motion to Dismiss the FAC on September 19, 2016, which the

Court denied in part and granted in part. (*See* Order Re Defendants' Motion to Dismiss First Amended Complaint for Damages and Injunctive Relief (Dkt. No. 21).) Galaxia filed a Motion for Right to Attach Order, which the Court granted as to Defendants Luxmax, U.SA. and RWS Management, Inc. *Id*. Following these motions, the parties engaged in settlement discussions, stipulating to continue the Luxmax Defendants' time to respond to the FAC. (*See, e.g.*, Stipulation for Extension of Time to File Response as to Amended Complaint (Dkt. No. 50).)

On September 18, 2017, the Luxmax Defendants filed their Answer and the instant Counterclaims, which Galaxia now moves to dismiss.

III. LEGAL STANDARD

A. Rule 12(b)(6) Motion To Dismiss.

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that establish the elements of a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Although a court may accept well-pleaded factual allegations as true, a court should not accept legal conclusions couched as factual allegations or "[t]hreadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

And while the Court generally does not consider materials beyond the pleadings when ruling on a Rule 12(b)(6) motion, under Federal Rule of Evidence 201, the Court may take judicial notice of "matters of public record," such as prior court proceedings. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001). The Court may also consider "documents attached to the complaint [and] documents incorporated by reference in the complaint . . . without converting the motion to

dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

B. Rule 9(b) Heightened Pleading Standard For Allegations Of Fraud.

Fraud-based claims must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). A party alleging fraud "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). The allegations must be "specific enough to give defendants notice . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Accordingly, the allegations must contain "the who, what, when, where, and how" of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Allegations of fraud must also contain an account of the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

IV. ARGUMENT

A. The Fraud-Based Claims Fail For Lack Of Particularity.

To plead fraud sufficiently, a claimant must allege with specificity: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud or to induce reliance; (4) justifiable reliance; and (5) resulting damage. *See, e.g., Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086. 1093 (C.D. Cal. 1999). Rule 9(b) requires that all fraud allegations be made "with particularity." Fed. R. Civ. P. 9(b); *see also Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-23 (9th Cir. 2000) (fraud must be pled "with a high degree of meticulousness"); Schwarzer, et al., *California Practice Guide: Federal Civil Procedure Before Trial* ¶ 8:155. The specificity requirement has been summarized by various courts as requiring the plaintiff to allege "the who, what, when, and where" of the fraud. *See, e.g., Schwarzer, supra*, at ¶ 8:156 (citing cases). "Allegations that are vague or conclusory do not satisfy Rule 9(b)." *Id*. at ¶ 8:159 (citing cases); *see also*

Transphase Sys., Inc. v. Southern Calif. Edison Co., 839 F. Supp. 711, 718 (C.D. Cal. 1993). Such allegations must be disregarded and the complaint then re-evaluated to determine whether it states a claim without them. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003).

Here, the fraud allegations are so few and conclusory that Galaxia can only guess what the Luxmax Defendants' fraud theory is. The only non-conclusory allegations set forth the following: 1) on or around March 25, 2015, nearly a year and a half before Galaxia filed its complaint, Galaxia requested that the Luxmax Defendants sign an agreement acknowledging outstanding debts (the "Accounts Receivable Payment Agreement" (hereinafter "Payment Agreement")); 2) Galaxia explained that the purpose of the Payment Agreement was to appease a Korean auditor concerning past due debt and not for any other purpose; and 3) the Luxmax Defendants admit to having signed that written Payment Agreement affirming their past due debt to Galaxia. (Counterclaims, ¶¶ 18-21.) The remaining allegations are conclusory recitals of the elements of fraud. *Id.* ¶¶ 22-29. These allegations are inadequate to support a plausible theory of fraud and to satisfy the heightened pleading standards of Rule 9(b). *See, e.g.*, *Glen Holly*, 100 F. Supp. 2d at 1093 ("[a] pleading that simply avers the technical elements of fraud does not have sufficient informational content to satisfy Rule 9(b)'s requirements") (citations omitted)).

For instance, the Luxmax Defendants have not properly pled falsity or injury. Galaxia surmises, by filling in multiple missing steps, that the Luxmax Defendants' fraud claim must be that the Payment Agreement was not actually meant to be used for Korean auditing but for some other, unspecified, purpose. But the Luxmax Defendants provide no facts from which it can be inferred, much less determined, that Galaxia's representations regarding the purpose of the Payment Agreement were false. "To allege fraud with particularity, a plaintiff must set forth *more* than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false." *In re GlenFed,*

Inc. Securities Litigation, 42 F.3d 1541, 1548 (9th Cir.1994) (*en banc*), *superseded by statute on other grounds*. Nor can Galaxia decipher the injury the Luxmax Defendants are claiming resulted from the alleged misrepresentations. For instance, there can be no plausible, legally cognizable injury to Defendants flowing from the signed acknowledgments that simply confirmed debts owed to Galaxia unless the statements contained in them were false, *i.e.*, the Defendants committed fraud in their execution. These defects alone are fatal to the fraud claim under Rule 9(b).

Further, when multiple individuals are involved in an alleged fraud, a claimant must, at a minimum, "identif[y] the role of [each] in the alleged fraudulent scheme. *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (citations omitted). In other words, "Rule 9(b) does not allow a complaint to merely lump multiple [individuals] together but require[s] plaintiffs to differentiate their allegations . . . and inform each [individual] separately of the allegations surrounding his alleged participation in the fraud." *Id.* at 764-65 (internal quotation marks and citations omitted). Here, the Counterclaims merely allege broadly that Galaxia, "by and through their employees and agents, including Seungil Choi, Brian Kim, Eun-pyo Chang, and Jay Hong" made representations to RWS in "February and March of 2015" via "correspondence, telephone and during an in-person meeting in Korea." (Counterclaims, ¶¶ 20-21.) And while corporations such as Galaxia can only act through their agents, the Counterclaims do not identify who specifically said what to whom, precisely when, and why it was false. Instead, the allegations aver vaguely and generally that up to four individuals made various representations during a two-month period through three separate mediums (correspondence, telephone, and in person). As such, these general allegations fall well short of the particularity required under Rule 9(b).

In fact, the allegations as pled in the Counterclaim, are *facially inconsistent* with fraud, which requires that the allegedly fraudulent representations were false at the time they were made. *See, e.g., Glen Holly*, 100 F. Supp. 2d at 1093. The

unwritten accusation seems to be that Galaxia actually intended to use the Payment Agreement not for Korean auditing but in order to support a lawsuit filed nearly one and a half years later. Anything short of that implausible set of facts would fail to establish fraud; simply changing one's mind about a promise, for instance, does not rise to the level of misrepresentation, fraudulent or negligent. *See, e.g.*, *Building Permit Consultants. Inc. v. Mazur*, 122 Cal. App. 4th 1400, 1414 (2004). Furthermore, a misrepresentation "must ordinarily be an affirmation of past or existing facts . . . predictions as to future events [] are not actionable by fraud. *Glen Holly*, 100 F. Supp. 2d at 1093. The allegations in the Counterclaim are, therefore, irreconcilable with the elements of fraud and amendment would be futile.

Given the Luxmax Defendants' inability to articulate fraud or cognizable injury despite more than a year of litigation leading up to the filing of this counterclaim, this cause of action should be dismissed with prejudice pursuant to Rules 12(b)(6) and 9(b).

B. The Negligent Misrepresentation Claim Fails Because Galaxia Owed No Duty It Could Have Breached.

To state a claim for negligent misrepresentation, a plaintiff must allege facts showing that the defendant owed a special duty to the plaintiff and breached that duty. *See, e.g.*, *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1177 (S.D. Cal. 2010); *Eddy v. Sharp*, 199 Cal. App. 3d 858, 864 (Cal. Ct. App. 1988). The Luxmax Defendants fail to allege the existence of any special duty owed to them by Galaxia, much less one that was breached, which is by itself fatal to their claim.

Further, negligent misrepresentation, like fraud, must be pled with specificity. *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) ("It is well established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements."); *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004). The defects in the Luxmax Defendants' fraudulent misrepresentation claim are equally applicable here.

For instance, the counterclaim fails to adequately allege any of the elements of a misrepresentation, fraudulent or negligent, because its allegations do not establish that there was a misrepresentation, or any injuries arising therefrom.

Hence, the claim for negligent misrepresentation must be dismissed.

C. The Covenant Of Good Faith And Fair Dealing Claim Is Legally Insufficient Because Defendants Cannot Identify An Express Contractual Term That Was Frustrated.

Likewise, the Luxmax Defendants' counterclaim for a breach of the covenant of good faith and fair dealing is legally insufficient and should be dismissed. "In California, the factual elements necessary to establish a breach of the covenant of good faith and fair dealing are: (1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct." *Ahmadi v. United Cont'l Holdings, Inc.*, No. 1:14-CV-00264-LJO, 2014 WL 2565924, at *6 (E.D. Cal. June 6, 2014) (quoting *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010)). "Importantly, to state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must identify the specific contractual provision that was frustrated." *Plastino v. Wells Fargo Bank*, 873 F. Supp. 2d 1179, 1191 (N.D. Cal. 2012) (internal quotation and citation omitted). "The implied covenant operates to protect the express covenants or promises of a contract [and] ***cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of the parties' agreement***." *Id*. (internal quotation and citation omitted) (emphasis added).

This counterclaim should be dismissed because Defendants, yet again, merely recite the elements of the claim, and allege no corresponding *facts* supporting a plausible cause of action. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555);

(*see* Counterclaims, ¶¶ 36-40); *see also Asmussen v. PNC Bank, N.A.*, No. 5:14-CV-01948-SVW-KK, 2014 WL 12591628, at *3 (C.D. Cal. Oct. 22, 2014) (granting motion to dismiss as to breach of covenant of good faith and fair dealing where such claims were not supported by any facts) (emphasis added). There is, again, no basic factual predicate to this claim explaining what particular actions, over the course of numerous years of dealings between the parties, supposedly gave rise to this supposed breach.

But even had the Luxmax Defendants properly stated facts supporting such allegations, which they did not, their counterclaim is still fatally flawed because it does not identify the specific contractual provisions agreed to by the parties that were allegedly frustrated by Galaxia. *Plastino v. Wells Fargo Bank*, 873 F. Supp. 2d at 1191. More importantly, the few alleged violations that are identified by Defendants *were for duties that were not a part of the contract identified as giving rise to those claims*.

For instance, the Luxmax Defendants assert that their breach of implied covenant claims arise from the "Exclusive Agreement" between the parties, as well as unspecified "sales transactions." (Counterclaims, ¶¶ 37-38.) At the same time, the basis of their violation of covenant of good faith claim arises from allegations that Galaxia did not reimburse Counterclaimants for certain expenses, such as marketing and related costs. *Id.* ¶ 39. The problem is that these allegations are both unfounded and contradicted by the only specific agreement cited by the Luxmax Defendants in support of their cause of action, the Exclusive Agreement. (*See* First Amended Complaint Exhibits (Dkt. No. 16-1 at Exhibit A); Request for Judicial Notice, Exhibit A.[2]) The Exclusive Agreement contains no requirement that

[2] As explained in the concurrently filed Request for Judicial Notice, the Exclusive Agreement is both attached to Galaxia's FAC and incorporated by reference again in the Counterclaims. A court may consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically

Galaxia bear such costs with respect to the Luxmax Defendants, and the Luxmax Defendants cannot now foist such phantom obligations on Galaxia above and beyond the stated duties within the Exclusive Agreement. *Plastino*, 873 F. Supp. 2d at 1191 (N.D. Cal. 2012). This claim must therefore be dismissed with prejudice.

D. The Breach of Warranty Claim Fails.

The Luxmax Defendants' counterclaims for breach of warranty should also be dismissed for a failure to state a claim. The warranty of merchantability is breached only if "the product [does] not possess even the most basic degree of fitness for ordinary use." *Sims v. Kia Motors Am., Inc.*, No. SACV 13-1791 AG, 2014 WL 12558251, at *3 (C.D. Cal. Oct. 8, 2014). Furthermore, the defect must exist at the time of sale and delivery. *See, e.g.*, Cal. Com. Code § 2725 ("A breach of warranty occurs when tender of delivery is made. . . ."). "[T]he product is either merchantable or not (and a breach of the implied warranty occurs or not) only at the time of delivery." *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297, 1304-05 (2009).

Here, the Luxmax Defendants again fail to allege even the most basic facts to support a plausible claim for breach of warranty. (*See* Counterclaims, ¶¶ 41-47.) The parties have dealt with one another for a number of years, exchanging millions of dollars of products, yet Defendants nowhere explain what goods, or shipments of goods, out of all of those exchanged by the parties, were allegedly non-conforming, or in what way they were not fit for their ordinary purpose. More importantly, the Counterclaims do not specify when such non-conformities allegedly arose, whether at the time of sale and delivery, or at some later time. *Mexia*, 174 Cal. App. 4th at 1304-05 (2009). Again, the Luxmax Defendants have simply cut and pasted the elements of a breach of warranty claim without any underlying facts to support

---

attached to [a] pleading" and "treat such documents as part of the complaint." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (citations omitted).

those elements, which is insufficient to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Thus, the breach of warranty counterclaim should be dismissed.

E. The Counterclaim For Unfair Business Practices In Violation of California Business & Professions Code Section 17200 *et seq*. Fails To State A Claim.

To state a claim under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code Sections 17200 *et seq*., the pleading must establish that the defendant engaged in a business practice that was fraudulent, unfair, or unlawful. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). Each prong constitutes a *separate* theory of liability with distinct elements. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009) The Counterclaim does not (and cannot) state a claim under any of the prongs.

As a threshold matter, a plaintiff alleging a UCL violation "must state with reasonable particularity the facts supporting the statutory elements of the violation." Here, the Luxmax Defendants string together a few conclusory allegations, which are largely not elaborated elsewhere, in order to plead the UCL claim. The allegations are haphazardly listed, with no distinction as to which are pled under the fraudulent, unfair, or unlawful prongs of the UCL, making it impossible for Galaxia to determine which standard applies to each allegation. *See, e.g., Khoury v. Maly's of California*, 14 Cal. App. 4th 612, 619 (1993) (finding that demurrer is appropriate when a UCL claim fails to identify which section of the statutory scheme was violated). The cursory manner in which the Luxmax Defendants plead violations of the UCL do not pass muster under *Twombly*. Moreover, where fraud is alleged, Rule 9(b)'s heightened pleading standards apply to UCL claims. *Kearns*, 567 F.3d at 1125. And for at least the following reasons, the Luxmax Defendants have likewise failed to state a claim under any of the separate UCL prongs.

The "fraudulent" prong of a UCL claim is distinct from common law fraud in

that a fraudulent business practice must involve deception against members of the public. *Morgan v. AT&T Wireless Services, Inc.*, 177 Cal. App. 4th 1235, 1255 (Cal. Ct. App. 2009) (citations omitted); *see also Capella Photonics, Inc. v. Cisco Systems, Inc.*, 77 F. Supp.3d 850, 866 (N.D. Cal. 2014) (holding that "sophisticated corporations" are not members of the "general public" for the purposes of the UCL). As discussed above, the Luxmax Defendants do not explain what its accusation of fraudulent business practices is based on, but as the Luxmax Defendants are not members of the general public, the UCL fraud claim must be dismissed with prejudice. *See, e.g., Capella Photonics, Inc. v. Cisco Systems, Inc.*, 77 F. Supp.3d 850, 866 (N.D. Cal. 2014).

The "unfair" prong generally requires that the alleged conduct (1) violates an established public policy or (2) is immoral, oppressive, "or substantially injurious" to consumers, and is unjustified when balanced against "the gravity of the harm to the alleged victim[s]." *Herskowitz v. Apple Inc.*, 940 F. Supp. 2d 1131, 1145-46 (N.D. Cal. 2013) (collecting California authority; internal quotation marks omitted). Defendants have made no allegations that even relate to the elements of unfair conduct under the UCL.

The "unlawful" prong incorporates other laws and treats violations of those laws as independently actionable. *See, e.g., Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000). Here, Defendants have not described the allegedly unlawful conduct or the predicate laws Galaxia allegedly violated with the requisite particularity. Defendants allege generally that Galaxia violated the UCL by misappropriating proprietary information, forcing Defendants to pay for repairs to non-conforming products, manipulating records to inflate its revenue, engaging in Defendants' contractual relationships with customers, and failing to address technical issues in a timely manner in order to damage Defendants' reputation. Each of these allegations is presented in a perfunctory manner, with no explanation of the facts that would allow Galaxia to answer the claim.

For example, the Luxmax Defendants claim misappropriation of proprietary information, but do not include any allegations that would allow Galaxia to identify what information was allegedly misappropriated. Other, equally serious accusations are leveled with absolutely no support, such as the claim that Galaxia manipulated accounting records to artificially inflate its revenue.

For all of these reasons, the UCL claim must be dismissed.

F. The Counterclaims for Intentional and Negligent Interference with Prospective Economic Relationships Are Factually and Legally Insufficient.

The Luxmax Defendants' counterclaims for intentional and negligent interference with prospective economic relationships should be dismissed because Defendants (i) do not adequately allege facts that establish the elements of those claims, (ii) do not allege independent wrongful conduct required for intentional and negligent interference claims, and (iii) do not allege a duty owed to Defendants as required for a negligent interference with a prospective economic relationship claim.

First, the Luxmax Defendants do not come close to alleging facts that establish either interference claim. To state a claim for intentional interference with prospective economic advantage, a plaintiff must plausibly allege: (1) an existing economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional wrongful acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003). Similarly, the tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that: (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the

relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." *North American Chemical Co. v. Superior Court*, 59 Cal.App.4th 764, 786 (1997).

For both of these causes of action, the Luxmax Defendants allege only that they had "economic relationships" with several third parties, and that Galaxia "disrupted these relationships." (Counterclaims ¶¶ 55, 58, 62, 66.) In a separate cause of action for violations of California's Unfair Competition Law, Defendants also assert that Galaxia "engag[ed] in interference" with their economic relationships. *Id.* at ¶ 51(D).

But other than these bare, conclusory allegations, the Luxmax Defendants *in no way describe* what supposed "interference" occurred, or what Galaxia supposedly did to cause such interference. This is literally the "formulaic recitation of the elements of a cause of action" that cannot survive a motion to dismiss, as articulated under *Twombly* and *Iqbal*. *See, e.g., Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Almost no explanation is given as to what interference was undertaken, what relationships were interfered with, or what damages Defendants allegedly suffered. Rather, Defendants rely only on "[t]hreadbare recitals of a cause of action's elements, supported by mere conclusory statements," without coming close to alleging the most basic facts to establish the plausibility of their claims. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). For this reason alone, these two counterclaims should be dismissed.

Second, these interference claims further fail because Defendants do not allege wrongful conduct independent of the alleged interference. As a general

matter, an entity is free to divert business to itself as long as it uses fair and reasonable means. Thus, a plaintiff must present facts indicating the defendant's interference is somehow wrongful, *i.e.* "based on facts that take the defendant's actions out of the realm of legitimate business transactions." *Tri-Growth Ctr. City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg*, 216 Cal. App. 3d 1139, 1153–54 (1989), *reh'g denied and opinion modified* (Jan. 18, 1990). In other words, allegations of wrongful conduct, separate from the mere fact of interference, is required for both intentional and negligent interference with prospective economic relationship claims. *See Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995) (plaintiff must plead that "the defendant's interference was wrongful 'by some legal measure ***other than the fact of interference itself***.'") (emphasis added); *Nat'l Med. Transp. Network v. Deloitte & Touche*, 62 Cal. App. 4th 412, 440 (1998) (finding that negligent interference requires the element of "independent wrongfulness" and failure to inform jury of the requirement was prejudicial). An act is independently wrongful, for example, "if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co.*, 29 Cal. 4th at 1159.

Here, Defendants allege only generic "disruption" of their prospective economic relationships, without any plausible allegations establishing independent wrongful conduct. They do not allege, for example, that Galaxia did anything unlawful or illegitimate when Defendants' relationships were supposedly "disrupted." Again, Defendants say nothing other than repeating the elements of the claim. Thus, both claims should be dismissed, for failure to allege plausible facts establishing independently wrongful conduct, separate and apart from the fact of the interference itself.

Third, "[t]he tort of negligent interference with economic relationship arises only when the defendant owes the plaintiff a duty of care." *Limandri v. Judkins*, 52 Cal. App. 4th 326, 348 (1997) (internal citation omitted). Much in the same way

that Defendants failed to allege any requisite duty between the parties, and thus failed to establish their counterclaim for negligent misrepresentation, Defendants have alleged no duty owed by Galaxia to Defendants. No such duty is alleged in connection with Defendants' negligent interference claim. (*See* Counterclaims ¶¶, 61-67.) Thus, for this and the other reasons stated above, the Sixth and Seventh Counterclaims should be dismissed.

G. The Counterclaim For Intentional Interference With Contractual Relations Fails Because Galaxia Was Not A Stranger To The Alleged Relations.

To state a claim for intentional interference with contractual relations in California, a plaintiff must allege facts sufficient to establish (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of this contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990).

The Luxmax Defendants' counterclaim for intentional interference fails again because Defendants do nothing more than parrot the elements of an intentional interference with contract claim devoid of any factual support. (*See* Counterclaims, ¶¶ 68-74 (alleging existence of contracts and Galaxia's "intentional engage[ment] in misconduct designed to disrupt Counterclaimants' existing contractual relationships with its customers").) Again, Defendants do not provide *any* basic factual assertions to support a plausible inference that such interference occurred. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). For instance, there are no allegations directed at which customers were affected, the nature of the Luxmax's contractual relationship with those customers, and what, precisely, Galaxia supposedly did to interfere with those relationships. Thus, as with its other interference claims, this counterclaim should be dismissed.

Even setting aside Defendants' threadbare factual allegations, the claim further fails as a matter of law, because Galaxia—as the manufacturer of the LED items distributed by the Luxmax Defendants to their customers—is not a "stranger" to the contractual relationships it is alleged to have disrupted. As numerous courts have recognized, the "tort duty not to interfere with the contract falls only on strangers—interlopers who have no legitimate interest in the scope or course of the contract's performance." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514 (1994). A closely related background principle under California law is that "an entity with a direct interest or involvement in that relationship is not usually liable for harm caused by pursuit of its interests." *See Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825, 832 (9th Cir. 2001) (citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376 (1995)).

Courts in California generally find that a defendant has a "direct interest" in a business relationship, and is thus not liable for the tort of intentional interference with contract, where the underlying contract cannot exist without the defendant's participation or cooperation or when the defendant stands to benefit from the contract's performance. *See, e.g., Marin Tug & Barge, Inc.*, 271 F.3d at 834; *PM Group, Inc. v. Stewart*, 154 Cal.App.4th 55, 65 (2007) (observing that a contracting party is "incapable of interfering with the performance of his or her own contract"). Courts have also held that a defendant's direct "economic interest" in the performance of the contract supports a finding that it is not a stranger to the contract. *See, e.g., Marin Tug & Barge, Inc.*, 271 F.3d at 834 (concluding that Shell was not "easily characterized as a stranger" to the relationship between Marin Tug and buyers of Shell oil, where "Shell and Marin Tug had a mutual economic interest in delivering the oil safely and cleanly").

Most relevant here, California courts have held that manufacturers are considered to have a direct economic interest in the distribution of their own goods, and thus, are not "strangers" concerning contractual relationships associated with

those goods. *See Citizens of Humanity, LLC v. LAB sarl*, No. CV12-10627-MMM(JEMX), 2013 WL 12129393, at *17 (C.D. Cal. Apr. 22, 2013) (finding car manufacturer was not a stranger and not liable for interference with contractual relationship between prospective dealer and existing dealer).

Likewise, Galaxia is the manufacturer of the LED items distributed by the Luxmax Defendants to their customers. Defendants' own counterclaims acknowledge that Defendants acted as Galaxia's North American distributor of Galaxia's products. (*See* Counterclaims, ¶1 (describing Defendants "networking" and "marketing" to create the "market for Galaxia LED display products"); ¶ 14 (acknowledging Galaxia as manufacturer of LED products and Defendants' distribution of Galaxia's goods).)

As in the above cases, the distribution by Luxmax of Galaxia's products, clearly necessitated Galaxia's continued participation and cooperation in providing those goods. Also, as in the above cases, Galaxia's retained, and still retains, a direct economic interest in the distribution of those goods to customers in the United States. Put simply, Galaxia's role as manufacturer, its direct participation in the Luxmax Defendants' distribution of its goods, and its direct economic interest in providing those goods, all demonstrate that Galaxia was not a "stranger" to the distribution of its own products.

Thus, the Luxmax Defendants have no viable counterclaims against Galaxia for any alleged interaction with third-party recipients of Galaxia's products, and this counterclaim should also be dismissed.

H. The Counterclaim For Violation Of California Penal Code Section 632 Fails For Lack Of Facts Establishing "Confidential Communications."

California Penal Code § 632 prohibits the recording of certain communications without consent. CAL. PENAL CODE § 632(a). For a violation of section 632, the subject communications must be "confidential" and a party to the

communications must have an "objectively reasonable expectation that the conversation is not being overheard or recorded." *Flanagan v. Flanagan*, 27 Cal. 4th 766, 776-77 (2002). Furthermore, the definition of "confidential communications" under section 632 expressly "excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public." CAL. PENAL CODE § 632(a).

The Luxmax Defendants' claim for violation of section 632 does not provide enough detail to establish whether the parties had a reasonable expectation of confidentiality and whether the allegedly recorded conversation was made in a public or private location. In fact, the claim is devoid of *any* allegations regarding the content of the communications and whether the parties had an expectation of confidentiality, objectively reasonable or otherwise. Courts routinely dismiss section 632 claims that plead confidentiality without providing any facts that would allow the parties and the court to determine whether the requirement of "confidential" communications is met. *See, e.g.*, *Faulkner v. ADT Sec. Servs, Inc.*, 706 F.3d 1017, 1019-20 (9th Cir. 2013) ("[t]o prevail against the Rule 12(b)(6) motion, then, [Plaintiff] would have to allege facts that would lead to the plausible inference that his was a confidential communication"); *Montegna v. Yodle, Inc.*, 2012 WL 3069969, at *3 (S.D. Cal. 2012) (dismissing a section 632 claim for failure to allege any facts regarding the circumstances surrounding the communications and their content or nature).

In *Faulkner*, the Ninth Circuit found that an allegation that the subject conversation was confidential because it was carried on in circumstances as may reasonably indicate that a party would desire it to be confined thereto was "no more than a threadbare recital of the language of Section 632" and a "bald legal conclusion [] not entitled to be accepted as true and thus[insufficient] to prevail over a motion to dismiss." *Faulkner*, 706 F.3d at 1020. The Luxmax Defendants fail to include even such a threadbare allegation about the circumstances of the

communications in their inadequate pleading, choosing instead to simply name the communications as "confidential" without more.

Hence, the Luxmax Defendants have not pled an actionable claim under Section 632, and the claim must be dismissed.

V. CONCLUSION

For the foregoing reasons, the Court should dismiss the Luxmax Defendants' counterclaims in their entirety.

DATED: October 10, 2017

Timothy B. Yoo
Patricia H. Jun
Andrew McTernan
Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C.

By: /s/ Timothy B. Yoo
Timothy B. Yoo
Attorneys for Plaintiff and Counter-Defendant Galaxia Electronics Co., Ltd.

DECLARATION OF TIMOTHY B. YOO

I, Timothy B. Yoo, declare as follows:

1. I am an active member of the Bar of the State of California and a Principal with Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, A Professional Corporation, attorneys of record for Plaintiff and Counter-Defendant Galaxia Electronics Co., Ltd. in this action. I make this declaration in support of Plaintiff and Counter-Defendant Galaxia Electronics Co., Ltd.'s Motion to Dismiss Counterclaims. Except for those matters stated on information and belief, I make this declaration based upon personal knowledge and, if called upon to do so, I could and would so testify.

2. On October 2, 2017, counsel for Galaxia and counsel for the Luxmax Defendants met and conferred in compliance with Local Rule 7-3 regarding Galaxia's Motion to Dismiss Counterclaims, but were not able to agree on a resolution of the matters raised in this motion.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I executed this declaration on October 10, 2017, at Los Angeles, California.

/s/ Timothy B. Yoo
Timothy B. Yoo