WRITTEN DECISION - NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re:	Bankruptcy No. 20-03779-LT11
INGENU INC.,	Adversary No. 20-90108-LT
Debtor.	
TRILLIANT NETWORKS (CANADA) INC.,	
Plaintiff,	
v.	MEMORANDUM DECISION[1]
INGENU INC. and ALVARO GAZZOLO.	
Defendants.	

Plaintiff, Cross-Defendant, and Creditor, Trilliant Networks (Canada) Inc., ("Trilliant") moves to dismiss one of the claims in the Third Amended Cross-Complaint ("TACC") filed by Defendant, Cross-Complainant, and Reorganized Debtor, Ingenu Inc., ("Ingenu") under Civil Rule 12(b)(6).[2] Specifically, Trilliant renews its argument that

[1] This opinion is intended only to resolve the dispute between these parties and is not intended for publication.

[2] Unless otherwise indicated: (1) all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§101-1532; (2) the Federal Rules of Bankruptcy Procedure, Rules 1001-9037; and (3) all civil rule references are to the Federal Rules of Civil Procedure, Rules 1-86.

Ingenu's fifth claim for recovery for alleged intentional interference with prospective economic relations fails to adequately allege all required elements of the claim.

The Court determines that the motion must be granted.

As to the alleged economic opportunity relating to LED Source, Ingenu fails to plead an independently wrongful act. Instead, it pleads numerous alleged breaches of contract and aggressive business practices and requests that the Court infer that Trilliant did so wrongfully. The Court can make inferences from the facts but cannot infer an inadequately pled element of the underlying claim.

As to the alleged economic opportunity related to Aquacheck and US AG, Ingenu fails to adequately plead that the alleged wrongful acts proximately caused economic harm. Ingenu pleads, or if allowed to amend is likely to plead, an independently wrongful act in addition to aggressive business practices and alleged breaches of contract, but it fails to identify a particular economic prospect that was not achieved as a result of these alleged activities. Instead, it asks the Court to infer that nonspecific economic opportunities existed and that the alleged wrongful act disrupted these unspecified relationships. As discussed more thoroughly below, the facts as pled do not plausibly support Ingenu's entitlement to relief on this theory.

Because the Court grants this motion, it also grants Trilliant's request that it strike the punitive damages claim which is related solely to this cause of action.

Finally, the Court concludes that it will grant the motion without leave to amend. Ingenu has had ample opportunity to plead this cause of action. To the extent it discovers facts in the future which make the cause of action viable, it may seek leave to amend. But at this time, it is important that the case proceed beyond the pleading phase.

Standards

Civil Rule 12(b)(6). Civil Rule 12(b)(6) applies to motions to dismiss complaints in adversary proceedings. Fed. R. Bankr. P. 7012(b). A motion to dismiss under Civil Rule 12(b)(6) challenges the sufficiency of the allegations set forth in the complaint. "A Rule 12(b)(6) dismissal may be based on either a 'lack of cognizable legal theory' or 'the

absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008) (citation omitted).

The Court's review is limited to the allegations of material facts set forth in the complaint, which must be read in the light most favorable to the non-moving party, and together with all reasonable inferences therefrom, must be taken to be true. *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

But, "[in] practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). Thus, the party seeking relief must provide grounds for entitlement to relief, which requires more than labels and conclusions; and the actions must be based on legally cognizable rights of action. *Twombly*, 550 U.S. at 555. And the court need not accept as true threadbare recitals of a cause of action's elements, supported by mere conclusory statements; and the plausibility of a claim is context-specific on review of which the court may draw on its experience and common sense. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The two-prong analysis, set out in *Iqbal*, requires the court to first identify the conclusory pleadings, which are not entitled to the assumption of truth; then, after discounting those pleadings, if there remain well-pleaded factual allegations, the court should assume their truth and then determine whether they plausibly give rise to an entitlement to relief. *See Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) ("for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.")

Generally, a plaintiff's burden at the pleading stage is relatively light. Civil Rule 8(a)(2), made applicable to the Bankruptcy Code by Rule 7008, states that all that is needed is "a short and plain statement of the claim showing that the pleader is entitled to relief." But the complaint must include "sufficient allegations to put defendants fairly on notice of the claims against them." *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

Civil Rule 9

Certain claims, however, must be pled with greater specificity. Civil Rule 9, incorporated in adversary proceedings by Rule 7009, requires that a party state with particularity the circumstances constituting fraud or mistake (only malice, intent, knowledge, and other conditions of a person's mind may be alleged generally). "To comply with [Civil] Rule 9(b), allegations of fraud must be 'specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation omitted). Thus, "[a]verments of fraud must be accompanied by '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) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). "[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." *Id.* (quoting *Decker v. GlenFed, Inc. (In re GlenFed, Inc. Sec. Litig.)*, 42 F.3d 1451, 1548 (9th Cir. 1994)).

This heightened pleading standard has been applied to California Unfair Competition Law ("UCL") and Lanham Act claims which sound in fraud. *See Tortilla Factory, LLC v. Better Booch, LLC*, 2018 WL 4378700, at *7 (C.D. Cal. Sept. 13, 2018).

Intentional Interference With Prospective Economic Relations

The elements of the claim are not in dispute. Ingenu recognizes that in order to state a claim for intentional interference with prospective economic relations, it is required to allege:

> (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional 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.

Pardi v. Kaiser Permanente Hosp., Inc., 389 F.3d 840, 852 (9th Cir. 2004)(citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (Cal. 2003)).

Intentional Disruptive Acts

Ingenu acknowledges that the third element "requires an intentionally wrongful act by the defendant designed to disrupt a prospective business relationship." *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 823 F. App'x 516, 518 (9th Cir. 2020). It is not disputed that the "wrongful act" must be independent of the interference itself and that, in order to establish an "independently wrongful" act, a plaintiff must show a violation of "some constitutional, statutory, regulatory, common law, or other determinable legal standard." *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th at 1159. However, "[t]he tort of intentional interference with prospective economic advantage does not require a plaintiff to plead that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, to satisfy the intent requirement for this tort, it is sufficient to plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." *Id.* at 1153.

Analysis

In the Fifth Cause of Action in the TACC, Ingenu seeks recovery for alleged intentional interference with prospective economic relations and alleges wrongful acts that allegedly disrupted its economic relationships with three specific entities: LED Source, US AG, and Aquacheck. As in the prior motions to dismiss, Trilliant alleges that Ingenu insufficiently pleads this cause of action for several reasons including that Ingenu either fails to allege an independently wrongful act as required under California law or fails to allege proximate harm.

LED Source: As discussed above, a claim for intentional interference with prospective economic relations requires an allegation of actual disruption of the relationship and economic harm to the plaintiff proximately caused by the acts of the defendant. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th at 1165 ("Fourth, only plaintiffs

that can demonstrate actual disruption of their economic relationship will be able to state a claim for this tort. .... Fifth, a plaintiff must establish proximate causation.").

With respect to LED Source, the TACC contains allegations relating to Ingenu's revenue sharing agreement with LED Source related to a streetlighting project in Suriname. Ingenu alleges that Trilliant knew about the relationship and acted to disrupt it by wrongfully making a bid on the project "at the end of 2020" (and aggressively pursuing it). It asserts that LED Source should have won the bid – because only it had the required license. Thus, Ingenu asserts, the bid opportunity was pulled, it lost a revenue sharing opportunity, and Trilliant was the cause.

The Court previously granted a motion to dismiss an intentional interference with prospective economic relations claim on this theory finding that Ingenu had alleged no actual disruption of its relationship with LED Source or any economic harm with respect to LED Source. Ingenu has now pled such disruption and economic harm.

Ingenu alleges that by bidding on the project "Trilliant confused EBS, and the market generally, as to the rightful license of Ingenu's RPMA technology." As the Court understands Ingenu's allegations, this single project in Suriname was the only market with respect to Ingenu's joint-venture with LED Source; there was no "market generally" with respect to this specific project. Nevertheless, where the number of potential purchasers in the market are small, "even a single promotional presentation to an individual purchaser may be enough to trigger the protections of the [Lanham] Act." *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999) (citing *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379 (5th Cir.1996)). Trilliant acknowledged at oral argument that this market satisfies the statutory requirement.

That said, the claim must still be based on an independent wrongful act: as noted above in order to establish an "independently wrongful" act, a plaintiff must show a violation of "some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th at 1159. Ingenu alleges violations of the Lanham Act and California Unfair Competition Law ("UCL").

Ingenu's alleged wrongful act is the submission of the bid. According to Ingenu, by bidding Trilliant represented that it could provide the street lighting services when it could not because it lacked a required license. Because Ingenu must allege a separate wrongful act, the Court assumed that Ingenu was asserting that Trilliant intentionally made the misrepresentation knowing it to be false – a claim sounding in fraud. This was the focus of the Court's tentative ruling. The Court expressed in its tentative ruling that if Ingenu could plead, consistent with Rule 11, that, at the time Trilliant bid on the streetlight and metering project, Trilliant knew that the bid constituted a false representation of a contractual right to use the RPMA technology and knew that it could not provide those services under the terms of its contract with Ingenu (the "VAR") because they were "outside the Field of Use," the Court likely would grant leave to amend to add that discrete allegation. It was clear from oral argument that Trilliant had the same understanding: Trilliant argued that Ingenu had not met the pleading requirements of Rule 9 for a claim sounding in fraud. See Dkt. No. 91.

At the hearing, counsel for Ingenu clarified that Ingenu was not alleging a claim of actual fraud:

> ONE OF THE COURT'S QUESTIONS TO INGENU IN THE TENTATIVE RULING WAS HOW DID WE -- OR CAN WE PROVE CONSISTENT WITH RULE 11 THAT INGENU KNEW THAT ITS SUBMISSION WAS WRONGFUL. AND SO A -- A -- I GUESS AN HONEST ANSWER TO THE COURT IS I CAN'T PLEAD THAT THEY KNEW BECAUSE SUBJECTIVELY I DON'T KNOW WHAT THEY KNEW, BUT I CAN PLEAD AND I BELIEVE WE HAVE PLED THAT THEY SHOULD HAVE KNOWN THAT IT WAS IMPROPER UNDER THE VAR AGREEMENT.

Dkt. No. 91 at 33:13-21.

Counsel went on to explain that the reason Trilliant should have known the EBS project was beyond the scope of Trilliant's rights under the VAR was because Ingenu had so informed Trilliant:

> WE PLED THAT ON JULY 23RD, WE SENT A TERMINATION LETTER WHICH SET FORTH THE BREACHES WHICH INCLUDED, "TRILLIANT, YOU ARE SELLING OUR PRODUCTS TO STREET LIGHTING APPLICATIONS WHICH IS IMPROPER." AND THAT WAS IN JULY.

Dkt. No. 91 at 34:5-10.[3]

But even if the CEO of Ingenu told the CEO at Trilliant, that he, the Ingenu CEO, thought selling street lighting was outside the Field of Use and was a breach of the VAR, Ingenu has provided no authority, and the Court is aware of none, for the proposition that representing a position on the meaning of a contract, even where the party is uncertain as to the term, is actionable either as a fraud claim, a Lanham Act violation, or a UCL claim. Ingenu has also provided no authority for the proposition that Trilliant was required to accept the opinions of Ingenu's representatives as to the scope of its rights under the VAR. And Trilliant, to this day, disputes Ingenu's interpretation.

Eventually, the Court will interpret the license agreement. And it may determine that Trilliant lacked an ability to perform on its bid. But Ingenu provides no authority supporting that a non-fraudulent or negligent breach of contract supports an intentional interference with prospective economic advantage claim.

Since Ingenu does not allege that Trilliant made an intentional misrepresentation, the Court finds that Trilliant's implicit representation, that under the VAR that it was authorized to perform the EBS project, a position which no court has ruled is incorrect, amounts to a non-actionable statement of opinion which is "not generally actionable under the Lanham Act." *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731–32 (9th Cir. 1999) (citations omitted).

The Court's decision is consistent with the decisions of other courts. In *Global Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, the court dismissed with prejudice a false advertising claim based on the defendant's alleged statements that the plaintiff did not have

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[3] At the hearing Counsel also alleged that the Suriname streetlight project was discussed at the 2004 Exam, but admitted that that had not been pled in the TACC.

the right to sell tickets to end-users under the contract at issue in the case. 960 F. Supp. 701, 706–07 (S.D.N.Y. 1997). As then District Court Judge, Justice Sonia Sotomayor, explained, these statements were not actionable under the Lanham Act because without "a clear and unambiguous determination of the contractual rights and liabilities of the parties," the defendant's statements "at worst" "simply expressed an opinion – not a false statement – about the legal effect of its contracts." *Id.* As in *Global*, no court has made a determination as to the scope of the VAR or whether the sale of street lighting contemplated in the LED Source project was within the Field of Use – the issue is one aspect of this adversary proceeding. And Ingenu admits that it cannot allege that Trilliant knew its position was inconsistent with the contract.

Similarly, in *Dial A Car, Inc. v. Transportation & Barwood,* a luxury car service company sued two taxicab companies, alleging that they were violating the Lanham Act "by misrepresenting to Dial A Car's actual and potential corporate account customers that their taxicabs can legally provide within [D.C.] the same [luxury car] service as Dial A Car." 82 F.3d 484, 486 (D.C. Cir. 1996). Dial A Car claimed that, by using regular taxicabs to provide luxury car service in D.C., the two taxicab companies were violating an administrative order issued by the D.C. Taxicab Commission. The D.C. Circuit noted that the Commission had not addressed, in an adjudication or formal ruling, whether the luxury car service provided by the taxicab companies violated the administrative order in question and "there [wa]s no dispute that such a question [wa]s within the jurisdiction of the D.C. Taxicab Commission." *Id.* at 488. The D.C. Circuit concluded that the issue was a matter of statutory construction for the Commission and held that the Lanham Act does not provide a cause of action for Dial A Car to enforce its preferred interpretation of the administrative order. The Panel stated that "at a minimum, there must be a clear and unambiguous statement from the Taxicab Commission regarding [the taxicab companies'] status before a Lanham Act claim can be entertained." *Id.* at 489 (emphasis in original).

In the case at hand, Trilliant's inferential statements regarding the scope of its rights under the VAR, which have yet to be determined by this Court or any other, are not actionable Lanham Act violations.

Similarly, the Ninth Circuit has held that representations regarding licensing status do not concern "the nature, characteristics, and qualities" of goods under the Lanham Act. *See Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008). In Sybersound, the court held that the defendant karaoke record producer's alleged misrepresentations regarding its and the plaintiff's licensing rights could not state a false advertising claim because "the nature, characteristics, and qualities . . . under the Lanham Act are more properly construed to mean characteristics of the good itself"—not the provider's licensee status. *Id.* Therefore, Ingenu's allegations regarding Trilliant's alleged licensing or authorship representations cannot state a claim under the Lanham Act as a matter of law.

Ingenu also argues that Trilliant's bid violated the VAR and thus, constitutes an unfair business practice under the UCL. However, a breach of contract claim can only support a UCL claim if it also constitutes unlawful, or unfair, or fraudulent conduct. *Sybersound*, 517 F.3d at 1152. The only case Ingenu cites is premised on such illegal activity. *See Turo Inc. v. City of Los Angeles*, 2020 WL 3422262, at *2 (C.D. Cal. June 19, 2020), rev'd on other grounds, 2021 WL 914083 (9th Cir. Mar. 10, 2021). There, the City of Los Angeles alleged that Turo, Inc., a peer-to-peer car-sharing platform, violated the law by operating without a license, lease, or permit and without entering an agreement with and paying the required fees to the City's Department of Airports. *Id.* Turo's refusal to comply with these laws supported a UCL claim. *Id.* at *14. Here, Ingenu has not identified any laws that Trilliant violated by bidding on the EBS Tender – only that the bid allegedly exceeded Trilliant's license. Alone, these breach of contract allegations cannot support a UCL claim. *See Honey Baked Ham, Inc v. Honey Baked Ham Co. LLC*, 2020 WL 5498077, at *4 (C.D. Cal. Aug. 17, 2020).

The Court finds that Ingenu has not alleged facts to support a claim for intentional interference with prospective economic relations based on Trilliant's submission of the bid on the project in Suriname.

The only other allegation with respect to LED Source is that Trilliant pressured and bullied LED Source and informed other potential business entities of Ingenu's financial situation. Ingenu has provided no authority for the proposition that pressuring or bullying other executives or informing LED Source about Trilliant's cease and desist letter to Ingenu, is a violation of the Lanham Act or the UCL or otherwise satisfies a claim for intentional interference with prospective economic relations. Furthermore, these actions would appear to be direct efforts to interfere with Ingenu's business relations as opposed to independent wrongful acts. Finally, as admitted by Ingenu at the hearing, there was no resulting injury; the allegedly bullied and pressured business partner did not terminate relations with Ingenu. Here, the alleged economic harm to Ingenu arose when the officials in Suriname pulled the project. But there was no allegation that they were bullied or pressured by Trilliant.

Ingenu argues that the Court must infer qualifying – but unpled – wrongful conduct from these aggressive but not wrongful actions. But the requirement of inference does not go so far.

US AG:

The Court earlier dismissed the claim with respect to US AG finding that Ingenu had not properly pled the who, what, when, where, and how of the alleged fraud. In the TACC, Ingenu now alleges the who (Doug Wolfe informed Chris Pillow), the what (that the sale of product to Liquid Fibre was permissible under the VAR Agreement [which Ingenu alleges was not true]), the when (in the first quarter of 2020), and the how (in oral communications). Trilliant argues, however, that Ingenu has not pled the "where." As the Court understands Trilliant's position, it denies that Mr. Wolfe ever made the statements, so it can so plead without allegations of the "where." But the where (i.e. in a meeting, in an email, on a call, etc.) continues to be important because the "when" is not highly specific. In any event, the Court would allow amendment for Ingenu to say – in a phone call, etc.

The TACC also remedies another problem in the SACC; Ingenu now alleges that Doug Wolfe knew his statements were untrue. In effect, it alleges acts of fraud.

Trilliant cites to *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.,* 173 F.3d 725 (9th Cir. 1999) and *Glob. Disc. Travel Servs., LLC v. Trans World Airlines, Inc.,* 960 F. Supp. 701, 706-07 (S.D.N.Y. 1997) for the proposition that statements about one's rights under a contract are "nonactionable opinions." The distinction here is that Ingenu expressly alleges that Mr. Wolfe knew the representations to be false at the time he made them. The allegation is that he represented that Trilliant was able to provide services knowing that it could not. This was not, at least as alleged, merely a statement of opinion.

Trilliant also cites to *Sybersound Records, Inc. v. UAV Corp.,* 517 F.3d at 1144, for the proposition that representations regarding licensing status do not concern "the nature, characteristics, and qualities" of goods under the Lanham Act. Even if Trilliant's misrepresentations do not amount to a Lanham Act violation, they could, as alleged, amount to fraud (a fraudulent business practice), which could be an independent wrongful act as required for a claim of intentional interference. California Unfair Competition Law also has a place in the analysis.

But even if these problems are cured, another problem exists. The TACC now alleges a causal connection between the allegedly wrongful acts of Trilliant and alleged harm to Ingenu's prospective economic relationship with US AG. The problem for Ingenu is that it does not allege that US AG terminated or even limited its relationship with Ingenu. To the contrary, it alleges that together with US AG it projected increased income even after the alleged actions of Trilliant. Further, it identified no business relationship among the targets or prospects that was included in the projections that was interfered with as a result of the alleged fraudulent misrepresentations to US AG.

At the hearing Ingenu clarified that the relationship at issue "IS BETWEEN INGENU AND US AG." Dkt. No. 91 at 44:23-24. But there is no allegation that this relationship was impacted directly. Mr. Wolfe's alleged representations were made to Mr. Pillow of US AG in the first quarter of 2020. Again, despite the representations,

US AG and Ingenu continued with their business relations and created revenue projections for their "Opportunities Pipeline" in April and December of 2020, well after Mr. Wolfe's alleged false statements. At the hearing Ingenu admitted that the relationship between Ingenu and US AG continued despite Mr. Wolfe's representations. True, Ingenu also complains that Trilliant sent letters to Ingenu's partners informing them of Ingenu's financial problems. However, Ingenu does not allege that US AG ended or changed its business relationship with Ingenu as a result. And the Court questions whether a truthful account that Ingenu is in financial trouble is a bad act as required for an intentional interference with prospective economic advantage.

At the hearing Ingenu argued that Mr. Wolfe's statements must have hurt business between US AG and Ingenu on the one hand, and unidentified consumers on the other hand, because it just makes sense. The Court finds that the allegation of general lack of business does not satisfy a claim for intentional interference with prospective economic relations. Ingenu argues that it hopes to discover missed business opportunities through discovery. At the hearing, counsel explained that Ingenu knew of thirteen potential contracting parties that they hoped to do business with; the Court can assume that that these potential revenue sources have not become actual customers. But in order to state a claim, Ingenu must allege that it lost a specific business opportunity.

Ingenu does not allege that the wrongful conduct – the statements to US AG – caused US AG to lose specific contracts. As explained in *Korea Supply Co. v. Lockheed Martin Corp.*, the pleading requirements are specific:

> First, a plaintiff that wishes to state a cause of action for this tort must allege the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff. This tort therefore "protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will arise." (*Westside Center Associates v. Safeway Stores 23, Inc.*, supra, 42 Cal.App.4th at p. 524.) Here, KSC had an agency relationship with MacDonald

> Dettwiler under which KSC's commission was fixed at 15 percent of the contract price. As alleged in the complaint, if MacDonald Dettwiler had been awarded the contract, KSC's commission would have exceeded $30 million. This business relationship and corresponding expectancy is sufficient to meet this first element. Only plaintiffs that can demonstrate an economic relationship with a probable future economic benefit will be able to state a cause of action for this tort.
>
> Second, a defendant must have knowledge of the plaintiff's economic relationship. KSC alleges that "Loral acted with full knowledge of the commission relationship between plaintiff and MacDonald Dettwiler." Again, this element serves to restrict the class of plaintiffs that can state a claim for this tort.
>
> Third, the defendant must have engaged in intentionally wrongful acts designed to disrupt the plaintiff's relationship.

29 Cal. 4th at 1164.

Unlike the plaintiff in *Korea Supply*, Ingenu has identified no relationship other than with US AG. Rather, this is a case such as *Sybersound Recs., Inc. v. UAV Corp.*, in which the claim was dismissed for failure to plead specific lost business: "Sybersound does not allege, for example, that it lost a contract nor that a negotiation with a Customer failed." 517 F.3d at 1151.

Ingenu does not allege that the wrongful conduct it alleges – statements to US AG – caused US AG to lose specific contracts. It never alleges that any lost opportunity was the direct result of what Trilliant told US AG. It again argues that the Court must infer proximate cause. Again, inference does not go this far. Ingenu and US AG identified thirteen sales prospects for 2021. Ingenu filed the TACC five months into the year. It cannot say that it failed to achieve its sales goals because it had seven months then – and four months now – to achieve them. This conclusory allegation – that Trilliant disrupted these relationships and caused economic harm is not entitled to the assumption of truth. It is not plausible that Trilliant's early 2020 statements to US AG caused unnamed entities to cease doing business with US AG/Ingenu and caused Ingenu to lose income sharing in

2020-2021, especially as the business prospects were identified after the alleged statements to US AG. Ingenu does not allege that US AG self-sabotaged as a result of Trilliant's efforts, wrongful or otherwise. Ingenu does not allege that Trilliant knew of the sales targets in its forecast and approached them directly. And Ingenu cannot allege economic harm based on early 2020 conversations between US AG and Trilliant where it made 2021 projections jointly with US AG in late 2020 and while 2021 has not even concluded.

In the TACC, Ingenu also complains that Trilliant bought up Piconodes with the intent of keeping Ingenu and US AG from being able to provide them to customers. However, as with the allegations of misrepresentations, Ingenu has identified no business that was interfered with. The purchase of and sale of Piconodes to Liquid Fibre and the alleged attempt to corner the market in the Piconodes is not tied to any specific allegation of disruption of an economic relationship between Ingenu and a potential business partner.

At the hearing Ingenu argued that Trilliant's behavior caused general confusion in the market. That could amount to a Lanham Act violation (which is Ingenu's Third Cause of Action). In order to state a claim for intentional interference with prospective economic relations, however, Ingenu must allege a that specific business relationship was injured. The Court finds that with respect to US AG, Ingenu has failed to do so.

Aquacheck: With respect to Aquacheck, at the hearing the discussion overlapped and paralleled the claim with respect to US AG. Ingenu has alleged the who (false information from Doug Wolfe at Trilliant to Brad Rathje), the what (that Trilliant was authorized to support RPMA devices outside the Field of Use), the when (the first quarter of 2020), the how (oral communications), and possibly the where (the TACC can be read to state that the misrepresentation was made "at Aquacheck USA," or simply to Brad Rathje, who works "at Aquacheck USA.")

Also, Ingenu now alleges that Mr. Wolfe knew this allegation was false. Ingenu has also now alleged that the alleged wrongful acts were the proximate cause of identified harm.

However, the intentional interference with prospective economic relations claim with respect to Aquacheck US AG suffers the same problems as with respect to US AG: Ingenu

has failed to allege any specific business relationship that was injured due to Trilliant's alleged actions. The Court finds that Ingenu has failed to state a claim for intentional interference with prospective economic relations with respect to Aquacheck.

For the reasons set forth above, the Court grants Trilliant's motion to dismiss Ingenu's Fifth Cause of Action for intentional interference with prospective economic relations.

Dismissal with Prejudice

The TACC is Ingenu's fourth attempt to state a claim for intentional interference with prospective economic relations. Ingenu argues that if the claim is dismissed, it should be without prejudice for it to file yet another amended complaint. Rule 15 requires leave of the Court to amend. The Rule provides that leave should be freely given, but only "when justice so requires." Ingenu argues that "[a]t this stage of the case, it would not be a just result to deprive Ingenu of the right to seek damages for Trilliant's tortious and extra-contractual conduct." Dkt. No. 82. First, as set forth above with respect to LED Source, Ingenu has admitted that it cannot state a claim for tortious fraud, and that was its only hook. As to US AG and Aquasource, Ingenu has failed to allege any proximate damages. Furthermore, Ingenu still has other claims. The only deprivation flowing from a dismissal of this claim is the ability to seek punitive damages, which appears to be the reason Ingenu has so doggedly attempted to protect this claim.

The best known, and most frequently cited, precedent examining the relevant considerations for a trial court's decision to grant or deny leave to amend a complaint is the Supreme Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962). In *Foman*, the Court considered, among other issues, whether a district court abused its discretion by denying leave to amend a complaint without providing any reasons for its decision. The Court instructed that:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the appealing

party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Id. at 182. In this case we have "repeated failure to cure deficiencies by amendments previously allowed." As noted, Ingenu has amended this claim three times with the benefit of input from the Court. The Court does not find that justice requires that it get another try.

Furthermore, at the hearing Ingenu identified no amendments that could cure these deficiencies.

Punitive Damages Claim

Ingenu does not dispute that its request for punitive damages is based solely on the claim for intentional interference with prospective economic relations. Accordingly, the request for punitive damages will also be dismissed from the TACC.

As a result, its claim for punitive damages also fails.

DATED: August 19, 2021

LAURA S. TAYLOR, JUDGE
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

Trilliant Networks (Canada) Inc. v. Ingenu Inc. & Alvaro Gazzolo, Adv. No. 20-90108-LT
(In re Ingenu Inc., Bk. No. 20-03779-LT11)

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified employee in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed via first class mail to the party at their respective address listed below:

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Said envelopes containing such document was deposited by me in the City of San Diego, in said District on August 19, 2021.

Regina A. Fabre, Judicial Assistant