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

AMARETTO RANCH BREEDABLES,
LLC,

Plaintiff,

v.

OZIMALS, INC., et al.,

Defendants.

No. CV 10-5696 CRB

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

This case began as a copyright dispute between business competitors who sell virtual animals in an online simulated world known as Second Life. In November 2012, the Court disposed of the parties' copyright claims and counterclaims. Order (dkt. 146). Presently before the Court is Defendant Ozimals, Inc.'s ("Ozimals") Motion for Summary Judgment on Plaintiff Amaretto Ranch Breedables's ("Amaretto") four remaining state law claims: (1) defamation; (2) trade libel; (3) intentional interference with prospective business advantage; and (4) unfair competition in violation of California Business and Professions Code section 17200, et seq. (the "UCL"). Mot. (dkt. 162).

I. BACKGROUND

The following facts are not in dispute. Second Life is an online virtual world created by Linden Research. Stibbards Decl. (Ex. A to dkt. 124-1) ¶¶ 6-9. Users are represented in the virtual world by an avatar and participate in activities such as socializing with other users, traveling the virtual world, and engaging in commerce using Second Life currency,

1 known as the Linden dollar. Id. Users receive Linden dollars by paying Linden Research
2 real money. Id.

3 Third-party software developers, using a programming language unique to Second
4 Life, can create and market their own 3-D objects to operate in Second Life’s virtual world.
5 Id. ¶¶ 10-13. The parties here are two companies that developed competing “breedable
6 animals” for purchase and use in Second Life; Ozimals developed a virtual bunny, and
7 Amaretto developed a virtual horse. Sargent Decl. (dkt. 129-1) ¶ 2. The “breedable” label
8 reflects that the virtual animals were programmed to function in certain ways like real
9 animals. Jadzewski Decl. (Ex. B to dkt. 124-1) ¶ 11. For example, the “breedable animals”
10 reproduced and passed on genetic traits. Id.

11 Ozimals’ bunny appeared first, Sargent Decl. ¶ 6, and after some informal
12 communications between representatives of Ozimals and Amaretto in the ensuing months
13 about the possibility that Amaretto’s horse infringed Ozimals’ copyright, id., Amaretto
14 released its virtual horse, id. ¶ 9. Ozimals sent Amaretto a cease-and-desist letter (“Letter”)
15 in November 2010, see Second Am. Compl. (Ex. 1 to dkt. 92), and a few weeks later
16 Ozimals received a registration certificate from the U.S. Copyright Office for its “Ozimals
17 Animal Scripts” computer program (the “’661 Copyright”), Kearns Decl. (Ex. I to dkt. 124-
18 1).

19 The following month, Ozimals sent a Digital Millennium Copyright Act (DMCA)
20 takedown notice to Linden Research, asserting that Amaretto’s horse infringed Ozimals’
21 copyright, and requesting that Linden Research remove Amaretto’s horse from Second Life.
22 See Second Am. Compl. Ex. 3. Amaretto responded with a counter-DMCA notice to Linden
23 Research, id. Ex. 4, and filed the instant action in this Court, where it secured a temporary
24 restraining order and preliminary injunction preventing Linden Research from removing its
25 virtual horses, see dkts. 29, 49.

26 On December 16, 2010, after Amaretto filed the instant action, Ozimals posted on its
27 blog an entry titled “Regarding the Lawsuit Against Ozimals by Amaretto,” discussing the
28 dispute to “address [the reader’s] questions and explain the reasons behind the steps

1 [Ozimals] have taken.” Blog Entry (Ex. J to dkt. 166). The claims now at bar arise from
2 what was said in that Blog Entry.

3 The Blog Entry, signed by “Your Ozimals Team,” claimed that Amaretto “release[d] a
4 product that infringed on the intellectual property of Ozimals” and that “what Amaretto did is
5 not fair competition.” Id. Additionally, the Blog Entry stated that “the current state of the
6 Amaretto horse product was a near complete clone of the Ozimals concept,” that Ozimals did
7 not want Amaretto’s “unlawful decisions” to “affect the breedable community in such a
8 negative way,” and that Ozimals hoped the present action established “a safer environment
9 for great ideas to flourish in Second Life.” Id. Beneath the Blog Entry were three reader
10 comments offering their support for Ozimals and their right to protect their intellectual
11 property. See id.

12 The Blog Entry linked to an online chat (“Chat”) between Candace Sargent
13 (“Sargent”), co-owner of Ozimals, and an “Amaretto Dev Team Member,” and linked to the
14 Letter that Ozimals’ attorney previously sent to Amaretto. Id. In the Chat, Sargent stated
15 that Ozimals had a copyright in its bunnies and “in the way our game is set up.” Chat (Ex. K
16 to dkt. 166). Sargent went on to say that Amaretto’s horse had the same copyrighted “core
17 concepts” as Ozimals’ bunny. Id. In the Letter, Ozimals’ attorney asserted that Amaretto’s
18 virtual horse infringed upon Ozimals’ “intellectual property rights,” namely a copyright in its
19 breedable virtual bunny in violation of the United States Copyright Act. Letter (Ex. A to dkt.
20 166). Specifically, Ozimals’ attorney claimed that Amaretto had “virtually cloned all aspects
21 of the Ozimals Works, with the only material difference being that its animal is cloaked as a
22 horse,” and that Amaretto is “not engaged in fair competition.” Id. Ozimals’ counsel
23 identified specific examples of the alleged infringement, such as identical genetic traits (eye
24 color); identical settings (roaming range); and identical expression of functionality (capacity
25 to breed at age seven). Id.

26 Before this Court, Amaretto alleged that Ozimals’ DMCA notice was copyright
27 misuse under 17 U.S.C. § 512(f) and sought a declaration that its horses did not infringe. See
28 Compl. (dkt. 1); Appl. for TRO (dkt. 3). Ozimals counterclaimed for copyright infringement.

1 See Answer (dkt. 106). This Court granted Amaretto’s Motion for Summary Judgment on
2 Ozimals’ copyright infringement counterclaim because Ozimals lacked standing to sue on the
3 copyright at issue. See Order at 6. Additionally, this Court denied in part Amaretto’s
4 Motion for Summary Judgment as to the declaratory judgment and copyright misuse claims,
5 and dismissed those claims for lack of subject matter jurisdiction. See id. at 7-8.

6 Ozimals now moves for summary judgment on Amaretto’s four remaining claims, all
7 stemming from Ozimals’ Blog Entry: (1) defamation; (2) trade libel; (3) intentional
8 interference with prospective business advantage; and (4) unfair competition in violation of
9 the UCL. See Mot.¹

10 **II. LEGAL STANDARD**

11 Summary judgment is proper when “the movant shows that there is no genuine
12 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
13 Fed. R. Civ. P. 56(a). A dispute is “genuine” only if there is a sufficient evidentiary basis on
14 which a reasonable fact finder could find for the nonmoving party, and a fact is “material”
15 only if it could affect the outcome of the suit under governing law. See Anderson v. Liberty
16 Lobby, Inc., 477 U.S. 242, 248-49 (1986). A principal purpose of the summary judgment
17 procedure “is to isolate and dispose of factually unsupported claims.” Celotex Corp. v.
18 Catrett, 477 U.S. 317, 323-24 (1986). “Where the record taken as a whole could not lead a
19 rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’”
20 Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

21 “[The] standard [for granting summary judgment] mirrors the standard for a directed
22 verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct
23 a verdict if, under the governing law, there can be but one reasonable conclusion as to the
24 verdict.” Anderson, 477 U.S. at 250. When a party fails to make a showing sufficient to
25 establish the existence of an element essential to that party’s case, and on which that party

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28 ¹ In their reply brief, Ozimals objected to and moved to strike portions of a declaration attached to Amaretto’s opposition brief. Reply (dkt. 169) at 2-4. The objections are DENIED as moot.

1 will bear the burden of proof at trial, the moving party is entitled to judgment as a matter of
2 law. See Celotex, 477 U.S. at 322-23.

3 **III. DISCUSSION**

4 **A. Amaretto’s Defamation Claim**

5 The statements made in Ozimals’ Blog Entry do not constitute actionable defamation
6 because the statements are constitutionally protected opinions. Therefore, Ozimals is entitled
7 to judgment as a matter of law on Amaretto’s defamation claim.²

8 “Defamation requires a publication that is false, defamatory, unprivileged, and has a
9 tendency to injure or cause special damage.” Hawran v. Hixson, 209 Cal. App. 4th 256, 277
10 (Cal. Ct. App. 2012). Pure opinions – “those that do not imply facts capable of being proved
11 true or false” – are protected by the First Amendment. Partington v. Bugliosi, 56 F.3d 1147,
12 1153, n.10 (9th Cir. 1995). Assertions of fact and statements that “may imply a false
13 assertion of fact, however, are not protected.” Id. Whether a statement is an assertion of fact
14 or opinion is a question of law for the court to decide. Dworkin v. Hustler Magazine, Inc.,
15 867 F.2d 1188, 1193 (9th Cir. 1989).

16 To determine whether a statement implies an assertion of fact, the Ninth Circuit
17 applies a three-factor test. See Art of Living Found. v. Does, No. 10-CV-05022-LHK, 2011
18 U.S. Dist. LEXIS 63507, at *13-15 (N.D. Cal. June 15, 2011) (citing Underwager v. Channel
19 9 Australia, 69 F.3d 361, 366 (9th Cir. 1995)). First, a court reviews the statement in its
20 “broad context,” which includes the general tenor of the entire work, the subject of the
21 statement, the setting, and the format of the work. Id. Second, the court considers the
22 “specific context” and content of the statement, analyzing the extent of figurative or
23 hyperbolic language used and the reasonable expectations of the audience in that particular

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26 ² Ozimals argues that certain communications, specifically the DMCA Notices, the Blog Entry,
27 the Chat, and the Letter, are not actionable per the litigation privilege. See Mot. at 4-9. As this Court
28 already held, the DMCA Notices and Letter are protected by the litigation privilege and are non-
actionable in and of themselves. See Mot. to Dismiss Order (dkt. 104); Amaretto Ranch Breedables,
LLC v. Ozimals, Inc., 790 F. Supp. 2d 1024, 1030 (N.D. Cal 2011). The Court need not rule on whether
the Blog Entry or Chat are protected by the litigation privilege; the issue is moot because Ozimals would
still prevail even if the communications were deemed actionable.

1 situation. Id. Finally, the court looks to whether the statement itself is sufficiently factual to
2 be susceptible of being proved true or false. Id.

3 Amaretto’s defamation claim rests on eleven statements made by Ozimals: (1) that
4 Amaretto’s (earlier) horse product was a “near complete clone of the Ozimals concept of a
5 breedable”; (2) that “Ozimals works are protected by copyright”; (3) that Amaretto’s (earlier)
6 horse product was “nearly identical to the Ozimals work and would be infringing on the
7 copyrights that Ozimals held if Amaretto released it”; (4) that Amaretto released a product
8 that was “even more similar than what had been presented”; (5) that Amaretto must develop
9 their own “concept so that any problems could be avoided”; (6) that Amaretto released a
10 product “that infringed on the intellectual property rights of Ozimals”; (7) that Ozimals
11 contacted an intellectual property attorney to gather information on the “scope of the
12 infringement”; (8) that Ozimals did not want Amaretto’s “unlawful decisions” to “affect the
13 breedable community in such a negative way”; (9) that Ozimals was the first to develop
14 breedable animals in Second Life (“Since Ozimals began development, there have been
15 many other breedable pets introduced”); (10) that “what Amaretto did is not fair competition
16 and if Ozimals did not stand up for copyright protections, we would be doing a disservice not
17 just to our company but every company in Second Life that develops a unique concept and
18 brings it into our virtual world”; and (11) that “[w]e are fortunate to be able to invest into
19 protecting our intellectual property and part of what we hope to do with this action is to help
20 establish a safer environment for great ideas to flourish in Second Life.” See Second Am.
21 Compl. ¶¶ 25-41.

22 **1. Broad Context**

23 The first factor the Court considers is the broad context of Ozimals’ statements,
24 paying particular attention to setting, subject matter, format, and tenor. Underwager, 69
25 F.3d at 366. Ozimals made the statements at issue on its own blog to “explain the reasons
26 behind the steps [Ozimals] has taken.” Blog Entry. In this context, readers are less likely to
27 view statements as assertions of fact. See Underwager, 69 F.3d at 366-67 (audience would
28 likely view comments made in context of heated debate as “spirited critique” and “would

1 expect emphatic language on both sides”); Info. Control v. Genesis One Computer Corp.,
2 611 F.2d 781, 784 (9th Cir. 1980) (in context of legal dispute, “the audience may anticipate
3 efforts by the parties to persuade others to their position by use of epithets, fiery rhetoric or
4 hyperbole, [and thus] language which generally might be considered as statements of fact
5 may well assume the character of statements of opinion”); Art of Living Found., 2011 U.S.
6 Dist LEXIS 63507, at *19 (statements made on a personal blog are less likely to be viewed
7 as statements of fact); Nicosia v. De Rooy, 72 F. Supp. 2d 1093, 1101 (N.D. Cal. 1999)
8 (statements made on personal website, through Internet discussion groups, and as part of
9 heated debate are less likely to be viewed as statements of fact).

10 Amaretto argues that because Ozimals’ Blog Entry does not contain “heated debate,”
11 it is unlike the previously cited cases, and the statements made there should be interpreted as
12 assertions of fact. See Opp’n (dkt. 166) at 12-13. That is incorrect. The Blog Entry was a
13 potential forum for “heated debate.” See Obsidian Fin. Group v. Cox, No. CV-11-57-HZ,
14 2011 U.S. Dist. LEXIS 73413, at *16 (D. Or. July 7, 2011) (holding that a blog is a forum
15 for “heated debate,” given the fact that there are reader postings, even if the postings suggest
16 that the debate has been one-sided). And, as Ozimals points out, it would be odd to hold
17 that a blog is not actionable if an opposing party engages in “heated debate,” but is
18 actionable if an opposing party does not. See Reply at 7. The result would be that a party,
19 by choosing not to comment on an opposing party’s blog, could create a defamation cause of
20 action. Even absent “heated debate,” a reader of Ozimals’ Blog Entry would realize that
21 Ozimals wrote it from its own perspective to paint itself in a better light, and would not
22 understand it to be “statements of fact rather than the predictable opinion of . . . one side
23 about the other’s motives.” See Info. Control, 611 F.2d at 784.

24 2. Specific Context

25 The Court next considers the “content of the allegedly defamatory statements, which
26 includes the extent of figurative and hyperbolic language and the reasonable expectations of
27 the readers.” Nicosia, 72 F. Supp. 2d at 1102. Many of Ozimals’ statements, when
28 considered in isolation, appear to assert facts. These include “Ozimals works are protected

1 by copyright,” Amaretto “infringed on the intellectual property of Ozimals,” and “the
2 Amaretto horse product was a near complete clone of the Ozimals concept of a breedable.”
3 Blog Entry.

4 In context, however, those statements fail to amount to such assertions or imply
5 defamatory facts. The statements in Ozimals’ Blog Entry expressed Ozimals’ opinions and
6 purported to apply Ozimals’ understanding of copyright law as applied to the facts. See
7 Franklin v. Dynamic Details, Inc., 116 Cal. App. 4th 375, 378 (Cal. Ct. App. 2004)
8 (statements in e-mails that recited facts for purpose of applying copyright and contract law
9 to them merely expressed opinions). Likewise, by linking to the Chat and Letter, Ozimals
10 gave its blog readers additional context to decide whether to accept or reject Ozimals’
11 opinions based on their own independent evaluations. See id. (statements in e-mails were
12 opinions because readers were provided facts upon which the opinions were based).

13 Amaretto argues that since Ozimals’ Blog Entry did not mention Amaretto’s
14 viewpoints and failed to link to Amaretto’s Complaint or Response, it should be viewed as
15 an actionable, one-sided, false attack. See Opp’n at 13-14. However, Amaretto provides no
16 case law to support its theory that a blog must present both sides of an argument to protect it
17 from a defamation cause of action. As the court noted in Art of Living Foundation,
18 accusations of criminal activity, like other statements, are not actionable if the underlying
19 facts are disclosed. See 2011 U.S. Dist. LEXIS 63507, at *20.

20 Here, Ozimals linked to the Chat and Letter. See Partington, 56 F.3d at 1156 (“The
21 courts of appeals that have considered defamation claims . . . have consistently held that
22 when a speaker outlines the factual basis for his conclusion, his statement is protected by the
23 First Amendment.”); Moldea v. N.Y. Times Co., 22 F.3d 310, 317 (D.C. Cir. 1994)
24 (“[B]ecause the readers understand that such supported opinions represent the writer's
25 interpretation of the facts presented, and because the reader is free to draw his or her own
26 conclusions based upon those facts, this type of statement is not actionable in defamation.”)
27 (quoting Moldea v. N.Y. Times Co. (“Moldea I”), 15 F.3d 1137, 1144-45 (D.C. Cir. 1994));
28 Art of Living Found., 2011 U.S. Dist. LEXIS 63507, at *21.

1 **3. Statements Susceptible of Being Proved True or False**

2 Lastly, the Court determines whether the statements at issue are provable as true or
3 false. Underwager, 69 F.3d at 366. In conducting its inquiry, the Court is guided by the
4 maxim that “where the question of truth or falsity is a close one, a court should err on the
5 side of nonactionability.” Partington, 56 F.3d at 1159.

6 Amaretto maintains that Ozimals’ statements are necessarily false because “Ozimals
7 is not, nor has it ever been, the ‘owner’ of the copyright in the bunnies (to the extent there is
8 one) - and Defendants knew it before they posted the Article.” Opp’n at 14. Additionally,
9 Amaretto contends that Ozimals’ statements were reckless because Amaretto “pointed out to
10 [Ozimals] all of the reasons why the traits of the Ozimals’ bunnies were not copyrightable in
11 its Response to the Cease & Desist Letter – prior to [Ozimals] posting the Article.” Id. at
12 16. Amaretto claims that, because the statements are provable as true or false, they should
13 be construed as fact rather than opinion.

14 Amaretto offers no evidence that Ozimals knew that it did not “own” a copyright.
15 Whether Ozimals “owned” the copyright is a murky legal issue that has divided federal
16 circuits, with the Ninth Circuit’s position being an outlier, and so whether Amaretto owned
17 the copyright depended on jurisdiction. Moreover, Ozimals’ rights in the Ninth Circuit as a
18 non-exclusive licensee could be characterized as a form of ownership.

19 In sum, Ozimals’ statements reflecting its belief that the Amaretto horse “infringed
20 on the intellectual property rights of Ozimals” might be provable as true or false after a
21 lengthy jurisdiction-sensitive lawsuit, but looking at all three Underwager factors, the Court
22 concludes that Ozimals’ statements were merely expressions of opinion, not assertions of
23 objective fact. Thus, Ozimals’ statements were not defamatory.

24 Accordingly, this Court GRANTS Ozimals’ summary judgment motion on
25 Amaretto’s defamation claim.

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1 **B. Amaretto’s Trade Libel Claim**

2 Ozimals’ summary judgment motion on Amaretto’s trade libel claim is GRANTED
3 because (1) statements of opinion rather than fact are not actionable as libel, and (2)
4 Amaretto cannot produce evidence of special damages.

5 Trade libel is the intentional disparagement of the quality of property that results in
6 pecuniary damage to the plaintiff. See Nichols v. Great Am. Ins. Cos., 169 Cal. App. 3d
7 766, 773 (Cal. Ct. App. 1985). The cause of action for trade libel requires: (1) a publication,
8 (2) which induces others not to deal with plaintiff, and (3) special damages. Erlich v. Etner,
9 224 Cal. App. 2d 69, 73 (Cal. Ct. App. 1964). To be actionable, the defamatory statement
10 must be a false statement of fact; statements of opinion alone will not support a cause of
11 action for trade libel. See ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1010-11
12 (Cal. Ct. App. 2001). To establish trade libel, the plaintiff must plead and prove, first, that
13 the defamatory statement at issue was one “disparaging the quality of [the plaintiff’s]
14 property” that the defendant “should recognize is likely to cause pecuniary loss.” Id. at
15 1010. The plaintiff must also prove that the statement played “a material and substantial
16 part in inducing others not to deal with [the plaintiff].” Erlich, 224 Cal. App. 2d at 73.
17 General statements of harm do not sufficiently identify special damages. See Luxpro Corp.
18 v. Apple Inc., No. C 10-03058 JSW, 2011 U.S. Dist. LEXIS 35008, at *42 (N.D. Cal. Mar.
19 24, 2011).

20 Amaretto’s claim for trade libel fails for the same reason that its defamation claim did
21 - the statements at issue are constitutionally protected opinions.

22 Additionally, Amaretto fails to sufficiently identify special damages.

23 [It] is not enough to show a general decline in . . . business resulting from the
24 falsehood, even where no other cause for it is apparent, and that it is only the
25 loss of specific sales that can be recovered. This means, in the usual case, that
26 the plaintiff must identify the particular purchasers who have refrained from
27 dealing with him, and specify the transactions of which he claims to have been
28 deprived.

29 Erlich, 224 Cal. App. 2d at 73-74; see also Luxpro Corp., 2011 U.S. Dist. LEXIS 35008, at
30 *42 (Although a plaintiff does not need to plead a specific dollar amount, the plaintiff should
31 allege an “established business, the amount of sales for a substantial period preceding the

1 publication, the amount of sales subsequent to the publication, [and] facts showing that such
2 loss in sales were the natural and probable result of such publication.”).

3 Here, Amaretto contends that its sales dipped and that it was forced to give away free
4 “food” to alleviate customer concerns about its horses’ viability. Opp’n at 20. Amaretto’s
5 Lost Profits Report contains expert testimony stating that it incurred lost profits as a result of
6 Ozimals’ alleged misconduct. See Lost Profits Report at 5. That Report, however, does not
7 identify “particular purchasers” or “specify the transactions” lost because of Ozimals’ Blog
8 Entry.

9 In its Second Amended Complaint, Amaretto alleges that Ms. Smith, an Amaretto
10 customer, “specifically stopped buying Amaretto’s products since the conduct of the
11 Defendants caused her to question Amaretto....” Second Am. Compl. at 15. However,
12 Amaretto does not support this allegation with any evidence in the record. For the foregoing
13 reasons, this Court GRANTS Ozimals’ summary judgment motion on Amaretto’s trade libel
14 claim.

15 **C. Amaretto’s Intentional Interference with Prospective Business Advantage**
16 **Claim**

17 Ozimals’ summary judgment motion on Amaretto’s intentional interference with
18 prospective business advantage claim is GRANTED because Amaretto cannot produce
19 evidence that Ozimals knew of any specific economic relationship between Amaretto and a
20 third party.

21 To state a claim for intentional interference with prospective economic advantage, a
22 plaintiff must prove the following:

- 23 (1) an economic relationship between the plaintiff and some third party, with the
24 probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge
25 of the relationship; (3) intentional acts on the part of the defendant designed to disrupt
26 the relationship; (4) actual disruption of the relationship; and (5) economic harm to the
27 plaintiff proximately caused by the acts of the defendant. The 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.

28 Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153 (Cal. 2003).

1 Amaretto argues that Ozimals was “well aware that Amaretto had economic
2 relationships with Second Life customers” and that Ozimals intentionally disrupted
3 Amaretto’s business during the holiday season by publishing defamatory statements and
4 committing trade libel. Opp’n at 21-22. But, in order to state a claim for intentional
5 interference with prospective business advantage, it is essential that the plaintiff allege facts
6 showing that the defendant interfered with the plaintiff’s relationship with a particular
7 individual. See, e.g., Westside Ctr. Assocs. v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507,
8 527 (Cal. Ct. App. 1996) (Defendant must be aware that actions would frustrate expectations
9 of specific, even if unnamed, third party); Damabeh v. 7-Eleven, Inc., No. 5:12-CV-1739-
10 LHK, 2013 U.S. Dist. LEXIS 66565, at *29 (N.D. Cal. May 8, 2013).

11 Here, Amaretto specifies Ms. Woods and Ms. Smith as two customers who were
12 induced by Ozimals’ Blog Entry not to purchase Amaretto’s products. See Second Am.
13 Compl. ¶¶ 90-93. However, Amaretto does not provide a declaration from either Ms. Woods
14 or Ms. Smith attesting to that fact. Moreover, Amaretto provides no evidence that Ozimals
15 knew of these specific relationships or that Ozimals aimed to disrupt them.

16 In addition, Amaretto has failed to establish that Ozimals’ alleged conduct was
17 “wrongful apart from the interference itself.” Korea Supply Co., 29 Cal. 4th at 1154.
18 Amaretto relied on the theory that the statements amounted to defamation and trade libel,
19 which this Court has rejected. Amaretto also indirectly suggests that the timing of Ozimals’
20 blog statements, i.e., that they were made during the holiday shopping season, somehow
21 satisfies that requirement, but it cites no authority for the proposition that a lawful opinion
22 casting a competitor in a negative light during a busy shopping season is independently
23 wrongful.

24 Accordingly, this Court GRANTS Ozimals’ summary judgment motion on Amaretto’s
25 intentional interference with prospective business advantage claim.

26 **D. Amaretto’s Section 17200 Unfair Competition Claim**

27 Amaretto also seeks injunctive relief under the UCL. See Opp’n at 21-22. This cause
28 of action arises out of Ozimals’ alleged defamation of Amaretto in its Blog Entry. Because

1 the Blog Entry did not constitute defamation and was neither actionably “unfair” nor
2 fraudulent, Amaretto’s UCL claim also fails as a matter of law, and Ozimals’ summary
3 judgment motion on Amaretto’s UCL claim is GRANTED.

4 Section 17200 prohibits “any unlawful, unfair or fraudulent business act or practice
5 and unfair, deceptive, untrue or misleading advertising” Cal. Bus. & Prof. Code
6 § 17200. Because section 17200 is written in the disjunctive, “a business act or practice need
7 only meet one of the three criteria—unlawful, unfair, or fraudulent—to be considered unfair
8 competition under the UCL.” Daro v. Superior Court, 151 Cal. App. 4th 1079, 1093 (Cal. Ct.
9 App. 2007). Amaretto asserts that Ozimals’ conduct violated all three prongs of the UCL.
10 See Mot. at 16-18.

11 “Under its ‘unlawful’ prong, the UCL borrows violations of other laws . . . and makes
12 those unlawful practices actionable under the UCL.” Berryman v. Merit Prop. Mgmt., 152
13 Cal. App. 4th 1544, 1554 (Cal. Ct. App. 2007) (internal quotation marks and citation omitted;
14 alteration in original). “Thus, a violation of another law is a predicate for stating a cause of
15 action under the UCL’s unlawful prong.” Id.; see Smith v. State Farm Mut. Auto. Ins. Co.,
16 93 Cal. App. 4th 700, 717-18 (Cal. Ct. App. 2001) (unlawful prong forbids “anything that
17 can be properly called a business practice and that at the same time is forbidden by law”).
18 Here, Amaretto admits that its “‘unlawful’ unfair competition claim is derived from its
19 defamation and trade libel claims.” Opp’n at 22-23. Since those claims do not survive,
20 neither does the “unlawful” competition claim. See Hawran, 209 Cal. App. 4th at 277.

21 The California Supreme Court has yet to establish a definitive test that may be used to
22 determine whether a particular business act or practice is “unfair” for the purposes of the
23 UCL. Drum v. San Fernando Valley Bar Ass’n, 182 Cal. App. 4th 247 (Cal. Ct. App. 2010)
24 (citing Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187 n. 12
25 (Cal. 1999)). As a result, three tests have developed among state and federal courts. See
26 Davis v. Ford Motor Credit Co., 179 Cal. App. 4th 581, 593-97 (Cal. Ct. App. 2009)
27 (detailing the split in authority in handling consumer UCL cases).

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1 One test, which has garnered the most attention from the Ninth Circuit, limits unfair
2 conduct to that which “offends an established public policy” and is “tethered to specific
3 constitutional, statutory, or regulatory provisions.” Davis, 179 Cal. App. 4th at 595; Lozano
4 v. AT&T Wireless Servs., 504 F.3d 718, 736 (9th Cir. 2007) (holding that unfairness must be
5 tied to a “legislatively declared” policy).

6 The second test contemplates whether the alleged business practice is “immoral,
7 unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the
8 court to weigh the utility of the defendant’s conduct against the gravity of the harm to the
9 alleged victim.” Davis, 179 Cal. App. 4th at 594-95.

10 The third test, which borrows the definition of “unfair” from the Federal Trade
11 Commission Act, requires that “(1) the consumer injury must be substantial; (2) the injury
12 must not be outweighed by any countervailing benefits to consumers or competition; and (3)
13 it must be an injury that consumers themselves could not reasonably have avoided.” Id. at
14 597.

15 Here, Amaretto’s “unfair” competition claim relates to Ozimals’ Blog Entry that
16 Amaretto argues “prevented Plaintiff from competing during the all important holiday
17 shopping season” and forced it to give away free virtual “food” to its customers. See Second
18 Am. Compl. ¶ 59. Amaretto does not argue that Ozimals’ alleged conduct was an antitrust
19 violation, nor does it identify any “established public policy” or “specific constitutional,
20 statutory, or regulatory provisions” that its actions violated in spirit. Davis, 179 Cal. App.
21 4th at 595. And it cites no authority suggesting that a non-defamatory opinion casting a
22 competitor in a negative light during the holiday shopping season amounts to “immoral,
23 unethical, oppressive, unscrupulous or substantially injurious” conduct. Id. at 594-95.
24 Concluding otherwise would call into question the legality of countless familiar advertising
25 campaigns.

26 Section 17200 claims that are grounded in fraud must show that members of the
27 public are likely to be deceived. See In re Ins. Installment Fee Cases, 211 Cal. App. 4th
28 1395, 1417 (Cal. Ct. App. 2012). A viable claim does not exist when there “is nothing

1 misleading or deceptive about” the disputed practice. Id. Here, Amaretto points to Ozimals’
2 Blog Entry and Ozimals’ alleged defamatory statements as fraudulent. See Opp’n at 24.
3 Amaretto states that Ozimals’ Blog Entry “likely deceived the public,” and Amaretto cites
4 three reader’s comments to the Blog Entry as proof that the public was deceived. See id.
5 Those comments stated, in relevant part, that “you [Ozimals] have every right to protect your
6 intellectual property” and “[i]t is sad that some people can’t come up with their own creative
7 ideas.” Id. As stated earlier, the Blog Entry itself contained mere statements of opinion that
8 the public was likely to view as such, and so the statements were not likely to deceive. Thus,
9 this Court GRANTS Ozimals’ summary judgment motion on Amaretto’s section 17200
10 unfair competition claim.

11 **IV. CONCLUSION**

12 For the foregoing reasons, this Court GRANTS Ozimals’ Motion for Summary
13 Judgment on Amaretto’s defamation, trade libel, intentional interference with prospective
14 business advantage, and UCL claims.

15 **IT IS SO ORDERED.**

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17 Dated: July 9, 2013



18 CHARLES R. BREYER
19 UNITED STATES DISTRICT JUDGE
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