Novation Ventures, LLC v. J.G. Wentworth Co., LLC

United States District Court for the Central District of California

September 21, 2015, Decided; September 21, 2015, Filed

CV 15-00954 BRO (PJWx)

Reporter
2015 U.S. Dist. LEXIS 188001 *; 2015 WL 12765467

NOVATION VENTURES, LLC v. THE J.G. WENTWORTH COMPANY, LLC ET AL

Subsequent History: Affirmed by *Novation Ventures, LLC v. J.G. Wentworth Co., LLC, 2017 U.S. App. LEXIS 20570 (9th Cir. Cal., Oct. 19, 2017)*

Prior History: *Novation Ventures, LLC v. J.G. Wentworth Co., LLC, 156 F. Supp. 3d 1094, 2015 U.S. Dist. LEXIS 174944 (C.D. Cal., May 18, 2015)*

Core Terms

Defendants', consumers, bid, structured settlement, allegations, antitrust, advertisements, pricing, competitors, predatory, monopolization, purchasing, sellers, rights, fails, deceive, unfair, amended complaint, factoring, motion to dismiss, Internet, brands, merger, judicial notice, anti trust law, Lanham Act, genuinely, leave to amend, Sherman Act, trademark

Counsel: [*1] Attorneys for Plaintiffs: Not Present.

Attorneys for Defendants: Not Present.

Judges: BEVERLY REID O'CONNELL, United States District Judge.

Opinion by: BEVERLY REID O'CONNELL

Opinion

CIVIL MINUTES — GENERAL

Proceedings: (IN CHAMBERS)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT [27]

I. INTRODUCTION

Pending before the Court is Defendants' Motion to Dismiss Plaintiff's First Amended Complaint. (Dkt. No. 27.) After considering the papers filed in support of and in opposition to the instant motion, the Court deems this matter

appropriate for resolution without oral argument of counsel. *See* Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the following reasons, the Court **GRANTS** Defendants' Motion with leave to amend.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Novation Ventures, LLC is a Delaware limited liability company that is engaged in the business of factoring structured settlement payment rights by buying the right to receive scheduled future payments from settlement recipients who do not wish to or cannot wait years for their annuitized payments. (First Am. Compl. ("FAC") ¶ 6.) Defendant The J.G. Wentworth Company, LLC ("J.G. Wentworth" or "JGW") is also a Delaware limited liability company and is, along with **[*2]** its subsidiaries, "by far the largest participant in the factoring of structured settlements." (FAC ¶ 7.) In August 2011, J.G. Wentworth acquired its largest competitor in the market for the purchase of structured settlement payment rights, Defendant Peach Holdings, LLC ("Peachtree"). (FAC ¶¶ 9, 12.) Defendants J.G. Wentworth and/or Peachtree own and control the "Olive Branch Funding" brand. (FAC ¶ 10.)

Before the merger between J.G. Wentworth and Peachtree, J.G. Wentworth funded approximately 40-45% of the structured settlement factoring transactions completed in the United States annually. (FAC ¶ 11.) In an attempt to increase their relative market share, these companies would broadcast television ads and compete against each other "for on-screen 'shelf space' and position in pay-per-click Internet advertising." (*Id.*) Following the merger, Plaintiff alleges that J.G. Wentworth "advertises and presents itself to the public using (at least) three distinct brand names (JG Wentworth, Olive Branch Funding, and Peachtree)" without advising consumers that those brands are "all controlled and coordinated by the brands' common owner and manager: The JG Wentworth Company." (FAC ¶ 14.) Plaintiff **[*3]** claims that this merger, in addition to Defendants' allegedly deceptive conduct following the merger, constitutes violations of: (1) section 7 of the Clayton Act; (2) section 2 of the Sherman Act; (3) section 43(a) of the Lanham Act; and (4) section 17200 of the California Business & Professions Code ("UCL"). (FAC ¶ 15.)

Plaintiff defines the relevant product market in this action as "the purchasing of structured settlement payment receivables from individual consumer sellers." (FAC ¶ 16.) Within this market, Plaintiff alleges that "[t]here are only a handful of companies competing for the factoring of structured settlement payment rights in the United States. Post-acquisition of Peachtree, JG Wentworth is by far the largest, with a market share of about 75%. Novation has a market share believed to be no more than 7%." (FAC ¶ 19.) "The state and federal regulatory framework has shaped how the structured settlement purchasing market has developed, creating significant barriers to entering and conducting the business of buying structured settlement receivables from individual sellers." (FAC ¶ 18.) "As a consequence" of those regulations, "[t]here are only a handful of companies competing for the factoring of structured settlement payment rights in the United States." (FAC ¶¶ 18-19.)

An individual **[*4]** seeking to sell her structured settlement payment rights for "upfront" cash must secure one of the "handful" of national structured settlement purchasers. (FAC ¶ 29) If that seller wishes to "shop" for the best price (because pricing is negotiated, private, and neither standardized nor posted), she also must find a bona fide competing bidder. (*Id.*) Plaintiff alleges that the price a seller is able to negotiate for her settlement payments is most heavily influenced by whether or not she has "shopped" among competing purchasers. (FAC ¶ 21.) A seller typically turns to the Internet to search for such a purchaser, "using Google or some other 'search engine,'" for a buyer for their structured settlement payment rights or to find a better priced alternative to a bid the seller already received. (FAC ¶ 32; *see also* FAC ¶ 33.)

California Insurance Code sections 10134 through 10139.5 require both Plaintiff and Defendants (as well as other competing companies) to submit structured settlement factoring transactions to superior courts of the State of California for review and approval. (FAC ¶ 23.) The superior court judge reviewing a petition to approve a proposed transfer determines whether the proposed transaction is "fair" and in the selling consumer's **[*5]** "best interests." (FAC ¶ 24.)

Plaintiff claims that Defendants' "maintenance of three brands, each pretending to compete with the other, harms both consumers and genuine competitors such as Novation." (FAC ¶ 51.) Plaintiff alleges that Defendants coordinate their Google AdWords "pay-per-click" bidding and budgets, giving Defendants the ability to bid high

prices to "consistently grab two and often three of the top three search listing results on many of the keywords used by consumers searching for structured settlement buyers." (*Id.*) This behavior, according to Plaintiff, "crowds out competitors and/or drives up the cost of being in second or third position in any given search ranking, making it more difficult and expensive for Novation to be found by potential customers looking for genuinely competing offers." (*Id.*)

Plaintiff also claims that the fact that Defendants list themselves separately in Google's paid search results on the same keywords deceives consumers. (FAC ¶ 52.) According to Plaintiff, Defendants know that most sellers who have invested time obtaining bids from two companies will not solicit a third bid. (FAC ¶ 38.) Defendants promote a fleet of fake or "decoy" brands **[*6]** to decrease the likelihood that its prospective customers will find a genuinely competing bid. (*Id.*) This allows Defendants to bid lower prices for structured settlement payment rights than they would have to in a genuinely competitive market. (FAC ¶ 46-48.)

Plaintiff asserts that the "acquisition of Peachtree was the commencement of a conscious, intentional, and deliberate effort to achieve monopsony power in the structured settlement purchasing business." (FAC ¶ 62.) In other words, according to Plaintiff, "[t]he actual and likely continued effect of JG Wentworth's acquisition of Peachtree[] has substantially lessened and will continue to substantially lessen competition . . . to create a monopoly in interstate trade and commerce in the United States factoring of structured settlements." (FAC ¶ 70.) Plaintiff also alleges that J.G. Wentworth's acquisition of Peachtree, "[c]oupled with its post-acquisition conduct . . . violate[s] the attempt to monopolize and monopolization clauses of *Section 2* of the Sherman Act (*15 U.S.C. § 2*), *Section 43(a)* of the Lanham Act, and *Section 17200 of the California Business & Professions Code*." (FAC ¶ 15.)

Plaintiff filed its Original Complaint in this action on February 10, 2015, alleging violations of *section 7* of the Clayton Act and *section 2* of the Sherman Act. (Dkt. No. 1.) Defendants **[*7]** filed a motion to dismiss on April 6, 2015, (Dkt. No. 17), which this Court granted on May 18, 2015, (Dkt. No. 23). Plaintiff timely filed its First Amended Complaint ("FAC") on June 8, 2015, alleging violations of: (1) *section 7* of the Clayton Act; (2) *section 2* of the Sherman Act; (3) *section 43(a)* of the Lanham Act; and (4) *California Business & Professions Code section 17200*. (Dkt. No. 24.) After jointly stipulating to extend Defendants' time to answer the FAC, (Dkt. Nos. 25, 26), Defendants filed the instant motion to dismiss on July 13, 2015, (Dkt. No. 27). Plaintiff opposed Defendants' Motion on August 13, 2015. (Dkt. No. 31.) Defendants timely replied on August 24, 2015. (Dkt. No. 32.)

III. LEGAL STANDARD

Under *Rule 8(a)*, a complaint must contain a "short and plain statement of the claim showing that the [plaintiff] is entitled to relief." *Fed. R. Civ. P. 8(a)*. If a complaint fails to do this, the defendant may move to dismiss it under *Rule 12(b)(6)*. *Fed. R. Civ. P. 12(b)(6)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct **[*8]** alleged." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. Thus, there must be "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678*. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility'" that the plaintiff is entitled to relief. *Id.*

Where a district court grants a motion to dismiss, it should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)* ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment."). Leave to amend, however, "is properly denied . . . if amendment would be futile." *Carrico v. City & Cty. of S.F., 656 F.3d 1002, 1008 (9th Cir. 2011)*.

IV. REQUEST FOR JUDICIAL NOTICE

When considering a motion to dismiss, a court typically does not look beyond the complaint in order to avoid converting a motion to dismiss into a motion for summary judgment. *See* Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991). Notwithstanding this precept, a court may properly take judicial notice of (1) material which is included as part of the complaint or relied upon by the complaint, **[*9]** and (2) matters in the public record. *See* Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006); Lee v. City of L.A., 250 F.3d 668, 688-89 (9th Cir. 2001).

A court may also take judicial notice pursuant to Federal Rule of Evidence 201(b). Under the rule, a judicially noticed fact must be one that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." *See* Fed. R. Evid. 201(c)(2); In re Icenhower, 755 F.3d 1130, 1142 (9th Cir. 2014).

Although Plaintiff does not object to Defendants' Request for Judicial Notice, the Court **DENIES** Defendants' Request. The results of a Google search are continually changing and thus cannot "be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see, e.g.,* Elec. Arts, Inc. v. Textron Inc., No. C 12-00118 WHA, 2012 U.S. Dist. LEXIS 103914, 2012 WL 3042668, at *3 (N.D. Cal. July 25, 2012) ("Taking judicial notice of the entire game and all of its permutations would be like taking notice of a dynamic Internet site such as Google."); Dorner v. Commercial Trade Bureau of Cal., No. CIV-F-08-0083 AWI SMS , 2008 U.S. Dist. LEXIS 70425, 2008 WL 1704137, at *4 (E.D. Cal. Apr. 10, 2008) ("Results from a Google search do not meet the standard required as they **[*10]** are not 'capable of accurate and ready determination by resort to sources whose accuracy cannot be [sic] reasonably be questioned.' Fed. R. Evid. 201(b). Google is continually updating its search system, and results for an identical search can vary from day to day.").

V. DISCUSSION

A. Plaintiff Fails to Plead Antitrust Injury

Defendants once again argue that the Court should dismiss Plaintiff's antitrust claims because Plaintiff fails to plead a cognizable antitrust injury. (Mot. at 3-8.) And Plaintiff continues to make the same arguments as before, that: (1) Plaintiff has suffered injury as a result of reduction in the vigor of the competitive process; (2) consumers have been harmed as a result of suppressed competition, reduced choice, and being deprived of the benefit of true competition; and (3) Plaintiff has been substantially foreclosed from competing in the structured settlements market. (Opp'n at 5-10; *see* Dkt. No. 23 at 6 ("In its opposition, Plaintiff identifies three types of harm that it is [sic] has suffered that it contends are cognizable antitrust injuries: '(1) reduction in the vigor of the competitive process; (2) consumer harm in the form of reduced competition and choice; and (3) competitor **[*11]** foreclosure from the market.'" (quoting Dkt. No. 19 at 9)).) In dismissing Plaintiff's original Complaint in this matter, this Court held that Plaintiff "failed to identify any injury that it has suffered that is of the type that the antitrust laws were designed to prevent." (Dkt. No. 23 at 9.)

The Supreme Court has explained that "[t]he essence of the antitrust laws is to ensure fair price competition in an open market." Reiter v. Sonotone Corp., 442 U.S. 330, 342, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). The Court agrees with Plaintiff that a price increase "resulting from a dampening of competitive market forces" is one type of antitrust injury. Blue Shield of Va. v. McCready, 457 U.S. 465, 482, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982) (quoting Reiter, 442 U.S. at 342). (*See* Opp'n at 6.) Although the "threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury," the Supreme Court has clarified that

predatory pricing is a practice capable of inflicting antitrust injury. Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104, 116-17, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986); *see also* Amarel v. Connell, 102 F.3d 1494, 1508 (9th Cir. 1996) ("Losses a competitor suffers as a result of predatory pricing is a form of antitrust injury because 'predatory pricing has the requisite anticompetitive effect' against competitors." (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))). "When prices are not predatory, any losses flowing from them cannot be said to stem from an *anticompetitive* aspect of the defendant's conduct." **[*12]** Atl. Richfield, 495 U.S. at 340-41.

Even if the Court assumes Plaintiff does not benefit from the market concentration brought about by the allegedly illegal merger, (*see* Opp'n at 6-7), it does not automatically follow that Plaintiff sufficiently pleaded an adequate antitrust injury. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) ("The antitrust laws, however, were enacted for 'the protection of competition not competitors.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))). Plaintiff argues that Defendants participated in an unlawful merger, and that the merger "substantially worsened" Plaintiff's position in the market because "[t]he commonly-owned-and- controlled single commercial enterprise has created and maintained the false illusion of competition, making it substantially harder for [Plaintiff], other competitors, and individual sellers to engage in a fair and genuinely competitive environment." (Opp'n at 6; *see also* FAC ¶ 48.)

But Plaintiff does not allege facts to support a claim of predatory pricing. Plaintiff makes a single reference to "predatory bidding" in its First Amended Complaint, (*see* FAC ¶ 67), but it is unclear if the conclusory use of "predatory" refers to Defendants' bids on structured settlement payment rights, or Defendants' bids for the "paid search" ad slots, (*see* FAC ¶ 40). **[*13]** Plaintiff asserts that Defendants' conduct, though in "rare case[s]," provides Plaintiff with the "chance to bid in a very competitive situation" which costs Plaintiff "many millions of dollars every year." (FAC ¶ 48.) Plaintiff does not claim, however, that Defendants bid artificially low prices for *structured settlement payment rights* "for the purpose of eliminating competitors in the short run and reducing competition in the long run." Cargill, 479 U.S. at 117 (defining "predatory pricing"). Rather, Plaintiff alleges that Defendants "bid[] for online ad space in a way that effectively exclude[d] competitors like [Plaintiff] from offering consumers an alternative." (FAC ¶ 43; *see also* Opp'n at 18 n.8 ("What is described as predatory bidding and bid rigging is the fraud and duplicity being perpetrated on consumers who are led to believe that the single entity responsible for [Defendants'] bids are independent of each other and truly competitive.").)

Plaintiff does not explain, however, how bidding artificially high prices to purchase advertisements constitutes predatory pricing in the relevant market here. (*See* FAC ¶ 16 (defining the "relevant product market" as the "purchasing of structured settlement payment receivables **[*14]** from individual consumer sellers").) Advertisements are a cost of doing business in the market of purchasing structured settlement payment rights. The Supreme Court, however, has "rejected . . . the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws." Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) (citing Atl. Richfield, 495 U.S. at 340); *see* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 314, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007) (holding that the test applied to claims of predatory pricing in *Brooke Group* applies to claims of predatory bidding). Plaintiff does not allege that Defendants' "bidding on the buy side . . . caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs." Id. at 325. More specifically in this case, Plaintiff fails to plausibly allege that Defendants' ability "to bid more than its competitors for more of the limited 'paid search' ad slots," (FAC ¶ 40), caused Plaintiff's cost of purchasing structured settlement payment receivables to exceed Plaintiff's revenues from such a purchase.

The Court notes that Plaintiff's own allegations also indicate that "[t]he state and federal regulatory framework has shaped how the structured settlement purchasing market has developed, creating **[*15]** significant barriers to entering and conducting the business of buying structured settlement receivables from individual sellers." (FAC ¶ 18.) "As a consequence" of those regulations, "[t]here are only a handful of companies competing for the factoring of structured settlement payment rights in the United States." (FAC ¶¶ 18-19.) Based on these allegations, the Court questions whether it is Defendants' conduct, or the stringent regulatory scheme that injures Plaintiff. *See* In re Canadian Imp. Antitrust Litig., 470 F.3d 785, 791 (8th Cir. 2006) (holding that "the alleged conduct of the

defendants did not cause an injury of the type that the antitrust laws were designed to remedy" because the absence of competition was "caused by the federal statutory and regulatory scheme adopted by the United States government, not by conduct of the defendants"); *RSA Media, Inc. v. AK Media Grp., Inc., 260 F.3d 10, 15 (1st Cir. 2001)* (finding that plaintiff lacked antitrust standing here it "was not excluded from the market for outdoor billboards because of [defendant's] threats," but rather "because of the Massachusetts regulatory scheme that prevents new billboards from being built"); *City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 265 (3d Cir. 1998)* (City suffered no antitrust injury and had no antitrust standing because "any injury suffered by the City did not flow from the defendants' conduct, but, rather, **[*16]** from the realities of the regulated environment in which all three were actors").

As an alternative means of alleging antitrust injury, Plaintiff once again attempts to rely on harm to consumers, but with a slightly different theory than Plaintiff presented in connection with its original Complaint. Plaintiff argues that "the pricing power enjoyed (and profits reaped) by JGW in the purchases it negotiates free from the discipline of genuine competition is not a benefit shared by Novation or other companies. Novation must 'bid up' and compete on price to win deals away from JGW and the array of JGW alter egos." (Opp'n at 8 (citing FAC ¶¶ 21-22).) Plaintiff's own argument highlights the implausibility of Plaintiff's claim that there is antitrust injury because of harm to consumers. If Plaintiff "must 'bid up' and compete on price to win deals away from" Defendants, (FAC ¶ 22), then the price that sellers of structured settlement payment rights will receive will also go up. This chain of events, described in Plaintiff's First Amended Complaint, would not hurt consumers. To the extent that Plaintiff argues that Defendants' conduct harms consumers because it deceives or tricks consumers, **[*17]** that argument fails for the same reasons discussed below. (*See* discussion *infra* Sections V.B—C.)

Plaintiffs also allege that *California Insurance Code sections 10134 through 10139.5* require Plaintiff and Defendants (as well as other competing companies) to submit structured settlement factoring transactions to superior courts of the State of California for review and approval. (FAC ¶ 23.) The superior court judge reviewing a petition to approve a proposed transfer determines whether the proposed transaction is "fair" and in the selling consumer's "best interests." (FAC ¶ 24.) These allegations further support the implausibility of Plaintiff's allegations that Defendant's conduct harms individual consumers.

Nor does Plaintiff adequately plead that it was substantially foreclosed from the market by Defendants' bidding for Google AdWords. Arguing that the screens of mobile devices afford space for only two or three sponsored listings does not save Plaintiff's claim. (Opp'n at 9-10.) Plaintiff's allegations still do "not suggest that Plaintiff could not bid for and be awarded" those advertising spots. (Dkt. No. 23 at 8.) Plaintiff merely alleges that Defendants' bidding "crowd[s] out the competition, and/or push[es] the competition down the page, making it less **[*18]** likely for a genuine competitor to be found." (FAC ¶ 43.) This does not plausibly foreclose Plaintiff from competing in the market. A seller can simply scroll down past the advertisements with a flick of his or her finger.

Accordingly, Plaintiff once again fails to allege antitrust injury, and lacks standing to bring its antitrust claims. *Brunswick, 429 U.S. at 489*; ; *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010)*. Plaintiff's antitrust claims must therefore be **DISMISSED** for this reason alone.

B. Plaintiff Fails to State a Claim Under *Section 2* of the Sherman Act

Plaintiff's antitrust claims also fail because they do not adequately allege unlawful monopolization under *section 2* of the Sherman Act. As discussed in this Court's previous order, (Dkt. No. 23 at 9-10), to state a claim for unlawful monopolization under *section 2* of the Sherman Act, Plaintiff must allege that: "(1) the defendant possesses monopoly power in the relevant market; (2) the defendant has willfully acquired or maintained that power; and (3) the defendant's conduct has caused antitrust injury." *Cost Mgmt. Servs., Inc. v. Wash. Natural Gas Co., 99 F.3d 937, 949 (9th Cir. 1996)*. And to support a claim for attempted monopolization, Plaintiff must adequately plead: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; **[*19]** (3) dangerous probability of success; and (4) causal antitrust injury." *Id. at 949-50*.

Defendants argue that Plaintiff once again fails to allege: (1) anticompetitive conduct, and (2) specific intent, necessary to make an attempted monopolization claim. (Mot. at 8-14; Reply at 5-8.)

Plaintiff's *Section 2* claim continues to rely on allegations of false or misleading advertising. (FAC ¶¶ 1, 39, 40, 50, 51, 56, 58, 60.) As the Court has already explained, in order for false advertising to constitute exclusionary conduct, it must "overcome a presumption that the effect on competition . . . was *de minimis*." *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997)*. (*See* Dkt. No. 23 at 10-11.) Plaintiff once again fails to "respond to Defendants' arguments that (1) bidding on Google AdWords to obtain two of the top search positions is not anticompetitive, and (2) there is nothing anticompetitive about a company maintaining separate brands." (Dkt. No. 23 at 11.) Additionally, as discussed in connection with Plaintiff's Lanham Act claims, Plaintiff has not stated a plausible claim that Defendants' Internet advertisements, labeled as "Ads," were "clearly false," or "clearly likely to induce reasonable reliance." *Am. Prof'l, 108 F.3d at 1152*. (*See* discussion *infra* Section V.C.) Plaintiff once again **[*20]** fails to allege anticompetitive conduct, requiring dismissal of Plaintiff's monopolization and attempted monopolization claims.

The Court notes that although it previously found that Plaintiff "failed to allege *facts* supporting Plaintiff's conclusory allegation[s]" of Defendants' scheme, (Dkt. No. 23 at 11), Plaintiff's allegations would likely support a finding of specific intent to monopolize. (*See, e.g.*, FAC ¶¶ 43 (alleging that Defendants have an "ongoing scheme" to bid for "online ad space in a way that effectively excludes competitors like Novation from offering consumers an alternative" by bidding "on multiple positions simultaneously and, using the fruits of that scheme, [to] pay whatever it takes so that its multiple brand offerings crowd out the competition"), 45, 62.) But Plaintiff's attempted monopolization claim still fails where it does not properly allege anticompetitive conduct. *See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* (stating that an attempted monopolization claim requires predatory or anticompetitive conduct).

C. Plaintiff Fails to State a False Advertising Claim Under the Lanham Act

Defendants argue that Plaintiff's false advertising claims are subject to *Twombly* as well as *Federal Rule of Civil Procedure 9(b)*. (Mot. at 15-16.) Plaintiff responds that **[*21]** the Ninth Circuit has not yet decided the issue. (Opp'n at 20.) The Court declines to address whether the heightened pleading standard applies to Plaintiff's false advertising claims where Plaintiff's allegations fail to meet *Twombly's* plausibility standard.

A false advertising claim under the Lanham Act requires:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by lessening of the goodwill associated with its products.

Wells Fargo & Co. v. ABD Ins. & Fin. Servs., 758 F.3d 1069, 1071 (9th Cir. 2014) (quoting *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997)*). Plaintiff's Lanham Act cause of action fails on two separate grounds.

First, nothing in Plaintiff's allegations assert that *Defendants* made a false statement of fact, either explicitly or implicitly. Plaintiff alleges that Defendants made statements of "literal falsehood" by **[*22]** paying Google to display certain advertisements in response to a consumer's question as typed into the Internet search engine. (FAC ¶¶ 80-81.) Although the Lanham Act does not require an explicit statement of fact, *Apple Inc. v. Amazon.com Inc., 915 F. Supp. 2d 1084, 1090 (N.D. Cal. 2013)*, it is unclear to the Court how an advertisement, expressly labeled as an "Ad," that appears after an individual consumer inputs search terms and clicks to "search," is false statement that can be attributed to Defendants. (*See* FAC, Exs. A—C.) More importantly, Defendants alleged failure to disclose common ownership is not a false statement. "A simple failure to disclose is not a violation of the Lanham Act

because the absence of any statement is neither 'false' nor a 'representation.'" *Expedia, Inc. v. Priceline.com Inc., No. C09-0712RSL, 2009 U.S. Dist. LEXIS 109477, 2009 WL 4110851, at *3 (W.D. Wash. Nov. 23, 2009)*. Plaintiff does not assert that the contents of Defendants' advertisements are explicitly or impliedly false; Plaintiff therefore makes no plausible claim that Defendants made any false statement of fact.

Moreover, Plaintiff fails to plausibly allege that Defendants' advertisements actually deceived or had the tendency to deceive a substantial segment of its audience. "Where a statement is not literally false and is only misleading in **[*23]** context, . . . proof that the advertising actually conveyed the implied message and thereby deceived a significant portion of the recipients becomes critical." *William H. Morris Co. v. Grp. W, Inc., 66 F. 3d 255, 258 (9th Cir. 1995)*. Plaintiff claims that Defendants' "pay-per-click" bidding for Google AdWords leads consumers "to believe they are shopping among competitive alternatives, but really are not." (FAC ¶ 51.) The Ninth Circuit has recognized that internet consumers "fully expect to find some sites that aren't what they imagine based on a glance at the domain name or search engine summary. . . . [C]onsumers don't form any firm expectations . . . until they've seen the landing page—if then. This is sensible agnosticism, not consumer confusion." *Toyota Motor Sales v. Tabari, 610 F.3d 1171, 1179 (9th Cir. 2010)*. And as discussed, the fact that the advertisements that appear as results to the consumer's search terms are labeled as an "Ad," (*see* FAC, Exs. A—C), makes Plaintiff's claim of deception even less plausible. *Infostream Grp. Inc. v. Avid Life Media Inc., No. CV 12-09315 DDP (AJWx), 2013 U.S. Dist. LEXIS 161940, 2013 WL 6018030, at *5 (C.D. Cal. Nov. 12, 2013)* (explaining that "clear labeling of an advertisement might eliminate any possibility of consumer confusion" and holding that plaintiff could not plausibly claim that defendant's "mere use of keywords caused any consumer confusion").

1. Plaintiff's Trademark [*24] Infringement Claim

Plaintiff's First Amended Complaint alleges that Defendants' use of Defendants' own trademarks "has in fact 'caused confusion,' 'mistake,' and has 'deceived' thousands of persons (in California and throughout the United States) 'as to the affiliation, connection, or association' of JG Wentworth with 'Olive Branch Funding' and 'Peachtree Financial.'" (FAC ¶ 78.) This allegation does not state a claim for trademark infringement. *See 15 U.S.C. § 1114(1)(a)* (stating that a claim of federal trademark infringement may be brought against any person who, without consent of the holder of the registered trademark, "use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with such use is likely to cause confusion, or to cause mistake, or to deceive . . ."); *see also Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1178 (9th Cir. 1988)*. But Plaintiff's Opposition appears to make a different claim; namely, that Defendants infringed on Novation's trademarks in Defendants' use of keyword meta tags. (Opp'n at 23.) Even though Plaintiff makes no such allegations in its First Amended Complaint, the Court still finds **[*25]** that Plaintiff fails to state a claim on this basis.

Plaintiff "does not allege that defendant's advertisements and links incorporate plaintiff's marks in any way discernable to internet users and potential customers." *J.G. Wentworth, S.S.C. Ltd. P'ship v. Settlement Funding LLC, No. 06-0597, 2007 U.S. Dist. LEXIS 288, 2007 WL 30115, at *7 (E.D. Pa. Jan. 4, 2007)* (granting defendant's motion to dismiss because "no reasonable factfinder could find a likelihood of confusion" where court assumed "that defendant did in fact use plaintiff's marks through Google's AdWords program or in the keyword meta tags for its website"). No reasonable factfinder could find a likelihood of confusion here. If a consumer conducts an Internet search for the term "Novation" and Defendants' advertisements appear in the search results—again, labeled with the word "Ad"—it would not confuse consumers. *See 2007 U.S. Dist. LEXIS 288 [WL], at *8* (explaining that "initial interest confusion must create in consumers confusion as to the source of the goods or services or a misunderstanding as to an association between the mark holder and the mark user"). Accordingly, the Court **DISMISSES** Plaintiff's cause of action under the Lanham Act.

D. Plaintiff Fails to State a Claim Under California's Unfair Competition Law

The UCL defines "unfair competition" as "any unlawful, unfair or fraudulent business **[*26]** act or practice." Cal. Bus. & Prof. Code § 17200. Plaintiff may therefore base its claim on "acts or practices which are unlawful, or unfair, or fraudulent." Shvarts v. Budget Grp., Inc., 81 Cal. App. 4th 1153, 1157, 97 Cal. Rptr. 2d 722 (Cal. Ct. App. 2000) (quoting Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647, 58 Cal. Rptr. 2d 89 (Cal. Ct. App. 1996)). Plaintiff argues that "if this Court determines that Novation sufficiently pled *any* of its claims—or that its conduct is 'unfair' because it threatens competition or fraudulent because members of the public are likely to be deceived—it should also find that Novation's UCL claim is adequately pled." (Opp'n at 25.) The Court has already determined that Plaintiff has not sufficiently pleaded any of its claims, and has already found that Defendants' conduct, as alleged by Plaintiff, was not false or likely to deceive.[1] (*See* discussion *supra* Sections V.A—C.) Therefore Plaintiff's allegations fail to state a claim under the "unlawful" or "fraudulent" prongs of the UCL.

In Cel-Tech Commc'ns, Inc. v. L.A. Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999), the California Supreme Court defined the meaning of an "unfair" act under the UCL as it applies in the antitrust context:

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes section 17200, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of **[*27]** those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Id. at 187. Because this Court finds that Plaintiff's allegations do not violate the antitrust laws, Plaintiff also fails to state a claim under the UCL's "unfairness" prong. Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (Cal. Ct. App. 2001) ("If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' towards consumers."). Plaintiff's UCL claim therefore must be **DISMISSED**.

Despite the fact that the Court has already given Plaintiff a chance to re-plead its causes of action, the Court **GRANTS** Plaintiff leave to amend because it finds that amendment would not be futile in this case.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's First Amended Complaint with leave to amend. Plaintiff must file any amended complaint no later than **4:00 p.m. on Tuesday, October 13, 2015**.

IT IS SO ORDERED.

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[1] Moreover, allegations of fraudulent conduct made under section 17200 must be pleaded with particularity and comply with Federal Rule of Civil Procedure 9(b). Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003).