No.

IN THE

Supreme Court of the United States

PONTILER S.A., A URUGUAY CORPORATION,
PETITIONER

v.

OPI PRODUCTS INC., A CALIFORNIA CORPORATION;
COTY INC., A NEW YORK CORPORATION

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

The court of appeals without a hearing and without granting leave to amend dismissed petitioner's complaint because it omits *one nonessential word* in describing respondents' breach of contract. Can this disposition be squared with the pleading norms of Fed. R. Civ. P. 8(a)(2), Rule15(a)(2)'s generous policy of amendment, due process and decisional law addressing this important question of federal policy and practice?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

The petitioner Pontiler S.A. is a privately owned family company which does not issue stock or have articles of incorporation. It has a principal place of business in Montevideo, Uruguay, and does business in the United States, specifically Los Angeles County, California. It has no parent corporations and there are no publicly held companies that own 10% or more of the company.

STATEMENT OF RELATED CASES

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The unpublished Order and Amended Memorandum Decision of the United States Court of Appeals for the Ninth Circuit in *Pontiler S.A. v. OPI Products, Inc. et al.*, C.A. No.19-55849, decided and filed September 10, 2020, and reported at 824 Fed. Appx. 523 (9th Cir. 2020), affirming the dismissal of petitioner's complaint without leave to amend by the United States District Court for the Central District of California and, at the same time, denying petitioner's timely filed petition for rehearing or for rehearing *en banc*, is set forth in the Appendix hereto (App. 1-7).

The unpublished original Memorandum Decision of the United States Court of Appeals for the Ninth Circuit in *Pontiler S.A. v. OPI Products, Inc. et al.*, C.A. No.19-55849, decided and filed July 31, 2020, and reported at 2020 WL 4386770 (9th Cir. 2020), affirming the dismissal of petitioner's complaint without leave to amend by the United States District Court for the Central District of California, is set forth in the Appendix hereto (App. 8-13).

The unpublished and unreported Order by the United States District Court for the Central District of California, in *Pontiler S.A. v. OPI Products, Inc. et al.*, Docket No. No. 2:18-cv-10772-R-SK, filed June 28, 2019, granting respondents' motion to dismiss all counts of petitioner's first amended complaint without leave to amend, is set forth in the Appendix hereto (App. 14-27).

The complete text of petitioner's first amended complaint dated April 30, 2019, filed in the federal district court for the Central District of California, in

Pontiler S.A. v. OPI Products, Inc. et al., Docket No. No. 2:18-cv-10772-R-SK, is set forth in the Appendix hereto (App. 27-40).

JURISDICTION

The Order and Amended Memorandum Decision of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of petitioner's complaint without leave to amend by the District Court and, at the same time, denying petitioner's timely filed petition for rehearing or for rehearing *en banc* was entered on September 10, 2020 (App. 1-7).

In addition, on March 19, 2020, in light of the ongoing public health emergency caused by COVID-19, this Court issued an Order extending the deadline for the filing any petition for writ of certiorari due on or after March 19, 2020, for 150 days from the date of the court of appeals' order denying a timely filed petition for rehearing.

This petition for writ of certiorari is filed within the time allowed by this Court's rules, 28 U.S.C. § 2101(c), and by this Court's Order of March 19, 2020.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. § 1332(a)(2):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

....

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State....

Cal. Bus. & Prof. Code § 17200:

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

Fed. R. Civ. P. 1:

[The federal rules of civil procedure] ...shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 8(a)(1) & (2):

(a) Claims for relief. A pleading that states a claim for relief must contain:
(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
(2) a short and plain statement of the claim showing that the pleader is entitled to relief....

Fed. R. Civ. P. 12(b)(6):

...[T]he following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted....

Fed. R. Civ. P. 15(a)(1) & (2):

(a) Amendments Before Trial.
(1) *Amending as a Matter of Course*. A party may amend its pleading once as a matter of course within:
(A) 21 days after serving it, or
(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
(2) *Other Amendments*. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Fed. R. App. P. 40(a)(2) & (4) : Petition for Panel Rehearing

(a) Time to File; Contents; Response; Action by the Court if Granted.
...

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.
Oral argument is not permitted.
....
(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following:
(A) make a final disposition of the case without reargument;
(B) restore the case to the calendar for reargument or resubmission; or
(C) issue any other appropriate order.

General Orders 4.6(d.) & 5.3(a.) of the Ninth Circuit Court of Appeals:

4.6 (d.). Recall of Mandate

A motion for recall of the mandate shall be forwarded to the panel. The author, or the presiding judge if the author is not a member of the Court, shall dispose of the motion in accordance with the panel's vote on the motion.
....
5.3(a.) Amendment of Disposition

> If a panel amends its disposition, the panel shall set forth in its amended disposition or separate order: (1) the ruling on the petition for rehearing or petition for rehearing en banc; (2) whether subsequent petitions for rehearing or rehearing en banc may be filed; and (3) the status of any pending petitions for rehearing or rehearing en banc not ruled on. The Clerk's Office shall contact the authoring judge if the amended disposition does not so specify. If a panel substantively amends its disposition, any off-panel judge may, within 7 days of the filing of the amended disposition, notify the panel and the other members of the Court that he or she is considering making an en banc call on the basis of the substantive amendment....

STATEMENT

On December 31, 2018, petitioner Pontiler S.A. ("petitioner" or "Pontiler") filed a complaint in federal district court for the Central District of California against respondents OPI Products, Inc. ("respondent" or "OPI"), Coty Inc. ("respondent" or "Coty") and other as yet unidentified agents, servants, employees or alter egos of respondents ("Does 1-25"). Asserting jurisdiction under 28 U.S.C. §§ 1332(a)(2), it alleged seven causes of action stemming from a so-called Exclusive Importer Agreement ("the Agreement") between it and OPI. Following respondents' motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted, petitioner without leave of court and pursuant to Fed. R. Civ. P. 15(a), timely filed its First Amended Complaint ("FAC") on April 30, 2019 (App. 15;27-40).

In its FAC, petitioner, a family-owned company based in Uruguay which distributes beauty products throughout South America, alleged that on October 1, 2001, it executed the Agreement with OPI in North Hollywood, California (App. 28;30). OPI manufactures and markets premium-priced beauty care products including nail polish under its OPI brand name (App. 30). In 2014, respondent Coty, a New York corporation, purchased OPI, a sale which included all of its assets and legal obligations (*Id.*).

Petitioner alleged that the Agreement, drafted by OPI and attached to the FAC as Exhibit "A," gave petitioner the *exclusive* right to import OPI products into the territory of Uruguay so that petitioner could capitalize on OPI's brand name and reach (*Id.*). Specifically, while the Agreement initially grants petitioner the "non-exclusive" right to warehouse and sell OPI products within Uruguay to "licensed cosmetologists, accredited beauty salons, nail technicians and beauty and barber schools", Paragraph 9(j) thereof further provides that petitioner had the right to sell OPI's products to these outlets "exclusively" and not to any other type of business without OPI's prior approval (App.16).

Moreover, the exclusive nature of petitioner's right under the Agreement to sell OPI products within Uruguay is further buttressed by Paragraph 10(f) of the Agreement which provides that

> *OPI will refrain from selling, distributing or consigning any of the "OPI Products"* covered by this agreement *to department, drug, food or variety stores in the Territory* [with "Territory"

> defined by the Agreement as Uruguay].

(App. 16;30) (emphasis supplied). Accordingly, as alleged and when read together, Paragraphs 9(j) and 10(f) of the Agreement gave petitioner the exclusive right to import and sell OPI products to licensed cosmetologists, accredited beauty salons, nail technicians and beauty and barber schools in Uruguay while, at the same time, OPI promised *not* to sell, distribute or consign its products to *other* outlets in Uruguay such as department, drug, food or variety stores (App. 16;30-31). In this way, petitioner was given the *exclusive* right under the Agreement to import and sell OPI's products in Uruguay.

The Agreement recognized that OPI did business with other distributors in other parts of the world; it was therefore understood that petitioner would not be the sole or exclusive distributor of OPI products worldwide, but only within the territory of Uruguay (App. 30). Petitioner alleged that in reliance on this exclusive right, it spent significant sums in order to secure inventory, develop marketing channels and exploit this opportunity to distribute and sell OPI products to beauty salons and other like outlets in Uruguay (App. 30-31).

Despite the Agreement giving it these exclusive rights, petitioner alleged in Paragraph 17 of the FAC:

> Unfortunately, OPI never intended to honor this deal. OPI began selling, distributing, and/or consigning OPI products and substantially similar products in Uruguay in direct violation of Paragraph 10(f) as well as other provisions of the

> Agreement. *Defendants sold and distributed OPI products to various business entities including but not limited to stores in the Airport and other stores in various cities in Uruguay*.

(App. 31) (emphasis supplied). Thus while petitioner was selling OPI products to beauty salons, licensed cosmetologists, etc., who would use OPI products and then also sell them to their customers at premium prices, OPI in plain violation of Paragraphs 9(j) and 10(f) of the Agreement was at the same time competing with and undercutting petitioner's business by placing its products in retail stores throughout Uruguay for direct sale to the public, often at lower prices (App. 31-32).

According to petitioner, OPI's violations took place during the term of the Agreement, a term which was automatically renewed at the end of each year unless either petitioner or OPI gave notice at least one month prior to its expiration on December 31st; and no cause was required for non-renewal (App. 16-17). On September 14, 2014, OPI gave notice to petitioner of the termination of the Agreement, effective December 31, 2014 (App. 16-17).

As petitioner alleged, OPI's breaches of the Agreement constituted a continuing violation which "continued up to and including the date OPI wrongfully terminated the Agreement...[on] December 31, 2014," with the last act of this breach of contract taking place on that day (App. 31). Petitioner alleged that at a date to be determined by its proof, respondents began their serial breaches of the Agreement by establishing relationships with other distributors in Uruguay; by

terminating the Agreement with petitioner in bad faith on December 31, 2014; and by selling OPI products to petitioner's customers (*Id.*). Based on these continuing violations, petitioner claimed a right to all monies received by respondents from the sale or distribution of OPI products in Uruguay "from the date the breach began...up to, and including December 31, 2014" (*Id.*).

Upon these allegations, petitioner asserted seven separate claims: (1) for breach of contract in violating Paragraph 10(f) of the Agreement and by terminating the Agreement in bad faith and without cause on December 31, 2014; (2) for breach of the Agreement's implied covenant of good faith and fair dealing when they competed with petitioner in distributing OPI products in Uruguay thereby squeezing petitioner out of its own distribution territory; (3) for promissory fraud by misrepresenting their intention to honor petitioner's exclusive right to sell and distribute OPI products in Uruguay in order "to effectively 'tie up' [petitioner] while OPI pursued other distribution channels"; (4) for violating California's Unfair Competition Law (Cal. Bus. and Prof. Code §§ 17200 *et seq.*) when it unfairly squeezed petitioner out of its own distribution territory in Uruguay; (5) for intentionally interfering with petitioner's economic relationships with its own customers; (6) for declaratory relief setting forth the rights and obligations of the parties; and (7) for an injunction permanently enjoining respondents from taking any further action in derogation of petitioner's rights (App. 31;32-39). Petitioner sought rescission of the Agreement, an award of compensatory and punitive damages, and a jury trial (App. 39-40).

On May 6, 2019, respondents moved to dismiss petitioner's complaint under Rule 12(b)(6) and on June 28, 2019 the district court, Klausner, J., granted the motion (14-26). He ruled that respondents' termination of the Agreement was sanctioned by the renewal and limitation of liability clauses contained in the contract and was therefore not actionable (App. 16-18). As for the breach of contract claim itself, the district judge determined that petitioner's lawsuit filed on December 31, 2018, alleging serial breaches of contract up to and including December 31, 2014, was barred by California's four-year Statute of Limitations (App. 18). He also ruled that petitioner could not escape the limitations bar by resort to either the "continuing violations" doctrine or the theory of continuous accrual (App. 18-19). Because these defects could not be cured, the breach of contract claim was dismissed without leave to amend (App. 19).

Since under California law petitioner's claim for breach of the implied covenant of good faith and fair dealing must be premised on breach of contract, a claim which had already been dismissed, the motion judge dismissed this claim as well without leave to amend (App. 20). As for promissory fraud, the district court dismissed it without leave to amend finding that the FAC did not allege specific facts creating an inference of fraud and that, in any event, it was barred by California's three-year statute of limitations (App. 21-22). Nor did the FAC allege any predicate acts of unfair competition to support a claim under California's Unfair Competition Law, especially when there was no breach of contract, no breach of the implied covenant of good faith and fair dealing, no fraud, and no actionable anti-competitive conduct (App. 22-23). This claim too was

dismissed without leave to amend (App. 23).

Finally, Judge Klausner ruled that petitioner's claim that OPI interfered with its prospective economic advantage when OPI squeezed it out of its own distribution territory by underselling OPI products directly to the public through store outlets must be dismissed without leave to amend (App. 23-25). As he read the FAC, petitioner failed to plead adequately that OPI intentionally attempted to disrupt petitioner's relationships with third parties, that there was an actual disruption of any business relationships, or that OPI's conduct was a causative factor, all elements of the claim (App. 23-24). Because petitioner's other claims for declaratory and injunctive relief hinged on the vitality of these other dismissed claims, they were also dismissed without leave to amend (App. 24-26).

Petitioner appealed arguing that its claims for breach of contract and breach of the implied covenant of good faith and fair dealing were wrongly dismissed as time-barred and that his other claims while insufficiently pled should not have been dismissed without providing the opportunity to amend the FAC (App. 9). On July 31, 2020, the court of appeals without oral argument and in an unpublished memorandum opinion unanimously affirmed the dismissal of the FAC without leave to amend (App. 8-13). Without addressing whether petitioner's contract claims were time-barred, it ruled that the FAC failed to state a claim for breach of contract and that any amendment of the FAC would be futile (App. 9). As the Panel read the Agreement, petitioner had only the *non-exclusive* right to warehouse and sell OPI products in Uruguay and while respondents

> agreed to "refrain from selling, distributing or consigning any of the 'OPI Products' covered by [the] agreement to *department, drug, food or variety stores*[,]" Defendants never agreed not to sell to other distributors. Accordingly, [petitioner's] claim that Defendants breached the contract by selling OPI products to other distributors is foreclosed by the contract's plain language. [Petitioner's] breach of contract claim therefore fails as a matter of law.

(App. 10) (emphasis in original). And "[b]ecause the covenant of good faith and fair dealing cannot impose duties on [respondents] beyond those contained in the contract, [petitioner's] claim fails as a matter of law" (App. 11).

Nor did the Panel think that petitioner deserved the opportunity to amend its FAC alleging promissory fraud, unfair competition or interference with prospective economic advantage (App. 11-12). As it observed, petitioner had failed to provide any legal or factual basis for these claims to survive their dismissal (App. 11). Since all of its claims fail as a matter of law, petitioner was not entitled to declaratory or injunctive relief (App. 12).

Petitioner petitioned for panel rehearing and for rehearing *en banc*. It argued consistent with Fed. R. App. P. 40(a)(2) that the Panel had fundamentally misapprehended the nature of its claims for breach of contract and for breach of the implied covenant of good faith and fair dealing. While acknowledging that respondents had promised to "refrain from selling, distributing or consigning any of [its] Products...to

department, drug, food or variety stores in the Territory" (App. 10), the Panel then ignored petitioner's allegations in Paragraphs 17 and 26 of the FAC *that respondents had done exactly that*, i.e, they "sold and distributed OPI products to various business entities including but not limited to stores in the Airport and other stores in various cities in Uruguay" (App. 31).

Petitioner argued that these allegations when read with all inferences in its favor upon this Rule 12(b)(6) motion, should have been deemed sufficient to withstand dismissal or, at the very least, to justify giving it the opportunity to amend the FAC for breach of contract and for the breach of the implied covenant of good faith and fair dealing.

On September 10, 2020, the Panel issued an amended memorandum decision which again affirmed the district court's dismissal of the FAC (App. 1-7). The three amendments changed the decision so that it now read (with the amendments in italics):

> Plaintiff further argues Defendants breached the contract by selling OPI products to other distributors *and to various stores* in Uruguay.
> ....
> Defendants never agreed not to sell to other distributors *or to other types of stores* [i.e., besides department, drug, food or variety stores, as recited in the Agreement].
> ....
> *Moreover, Plaintiff's operative complaint contains no allegations that Defendants sold to one of the four types of stores enumerated in the contract, i.e., "department, drug, food or variety*

> *stores*." Plaintiff's breach of contract claim therefore fails as a matter of law.

(App. 2;4) (emphasis in italics). With these amendments, the Panel denied petitioner's petition for panel rehearing or for rehearing *en banc* (App. 2).

Petitioner timely moved to withdraw the mandate and for leave to file another petition for panel rehearing or for rehearing *en banc*. On September 25, 2020, one day later, the Panel denied the motion.

REASONS FOR GRANTING THE PETITION

The Panel's Dismissal Of Petitioner's Complaint Without A Hearing And Without Granting Leave To Amend Because It Omits *One Nonessential Word* In Describing Respondents' Breach Of Contract Contravenes Rule 8(a)(2)'s Pleading Norms, Rule 15(a)(2)'s Liberal Policy Of Amendment, Due Process And Decisional Law Addressing This Important Question Of Federal Policy And Practice.

The Panel has taken this Court's heightened pleading requirements of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) to unsupportable levels of capriciousness, inappropriately making the pleading standard of Fed. R. Civ. P. 8(a) more of "a game, like golf, with arbitrary rules to test the skill of the players." *Exxon Shipping v. Baker*, 554 U.S. 471, 487 n.6 (2008) (Souter, J., quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993)) .Even though the Agreement attached to the

FAC identified the four kind of stores in Uruguay to which respondents could not sell, distribute or consign OPI products, the Panel ruled that petitioner's failure to use that precise adjectival description of "stores" in Paragraph 17 of its FAC, i.e., *because of the absence of just one nonessential adjective*, now doomed its claim for breach of contract and for breach of the implied covenant of good faith and fair dealing (App. 4).

This arbitrary, irrational reading of petitioner's timely filed FAC is at odds not only with Rule 8(a)(2)'s pleading requirement that there be "a short and plain statement of the claim showing that the pleader is entitled to relief," but also with the decisions of this Court interpreting that Rule's pleading norms. Furthermore, the dismissal of petitioner's FAC with prejudice for this technical nonessential omission having nothing to do with the plausibility of its claims without giving it the opportunity to amend under the provisions of Fed. R. Civ. P. 15(a)(2) violates Rule 1's admonition that the Rules of Civil Procedure "shall be construed and administered to secure the *just*, speedy, and inexpensive determination of every action and proceeding." (emphasis supplied).

The Panel has thus decided an important question of federal law which should be settled by this Court: whether the heightened pleading norms of I*qbal-Twombly* can justify this hypertechnical reading of the FAC and whether its reading should overcome Rule 15(a)(2)'s right to amend the complaint in the wake of a dismissal under Rule 12(b)(6), a dismissal *founded on the absence of just one nonessential word in the FAC*. This important federal question has also been decided in a way that conflicts with the relevant

decisions of this Court. Certiorari should be granted to decide whether *Iqbal-Twombly's* pleading norms can support the Panel's attenuated, arbitrary reading of the FAC and whether Rule 15(a)(2)'s longstanding liberal policy of amending pleadings when justice so requires should serve as an effective counterbalance to the more strict pleading standard signaled by those decisions.

The Panel first ruled that petitioner's FAC was rightly dismissed because its allegations that respondents had breached the Agreement when it sold OPI products to other *distributors* in Uruguay were foreclosed by the contract's plain language which, according to the Panel, allowed it do so (App. 10). In the course of making this ruling, the Panel ignored other plain language in the Agreement by which respondents promised petitioner to "refrain from selling, distributing or consigning any of [its] Products...to department, drug, food or variety stores in the Territory;" and it overlooked the claim by petitioner in Paragraphs 17 and 26 of the FAC *that respondents had done exactly that*, i.e, they "sold and distributed OPI products to various business entities including but not limited to stores in the Airport and other stores in various cities in Uruguay" (App. 31).

When confronted with this misapprehension on its part, the Panel instead of accepting as true all the factual allegations of petitioner's FAC for purposes of this motion and giving petitioner the benefit of all hypotheses consistent with its plausible claim for relief under Paragraphs 17 and 26, then ruled that because petitioner had alleged only that respondents in violation of the Agreement had sold OPI products to "stores in the Airport and other stores in various cities in

Uruguay" but *not* to one of the four specific types of stores enumerated in the contract, its claim for breach of contract failed as a matter of law (App. 4). This capricious ruling dismissing the breach of contract claim without leave to amend is even more arbitrary because it is tantamount to an admission by the Panel that petitioner's claim would have been sufficient *if just one word, a nonessential adjective, were added to the FAC*.

This reasoning and result by the Panel first undercuts Rule 8(a)(2)'s pleading standard and the decisions of this Court interpreting the pleading norms it represents. In *Iqbal* and *Twombly*, the Court revised the standards of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) for dismissing a complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. To survive such a motion now, the complaint's *factual*—not legal---allegations are taken as true; and if the complaint so read contains sufficient factual matter to state a claim for relief that is plausible on its face, allowing the court to draw the reasonable inference that the defendant may be liable for the misconduct alleged, dismissal is not warranted. *Iqbal*, 556 U.S. at 678-680. *Twombly*, 550 U.S. at 570.

The complaint's factual allegations must be enough to raise the right to relief above the speculative level, assuming that all the allegations of the complaint are true, even if doubtful in fact. *Twombly*, 550 U.S. at 555. This standard "calls for enough fact to raise a reasonable inference that discovery will reveal evidence of" the defendant's unlawful conduct, or enough factual heft to show that the pleader is entitled to relief. *Id.* at 556. This evaluation will "be a context-

specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

In *Twombly*, Justice Souter made the crucial point that once a claim has been adequately stated, i.e., once the claim is plausible and not just conceivable, it may be supported by showing any set of facts consistent with the allegations in the complaint. 550 U.S. at 563. Thus when a plaintiff like petitioner sets forth an adequate claim for breach of contract, with the contract itself attached to its complaint, it "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint." *Id.* quoting *Sanjuan v. Amer. Bd. of Psychiatry Neurology*, 40 F.3d 247, 251 (7th Cir. 1994) and citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994); *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249-250 (1989); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

The Panel gave petitioner *no* benefit of imagination at all even though its factual allegations were more than mere hypotheses consistent with its FAC but instead consisted of solid facts adding up to respondents' liability under the Agreement for competing with and undercutting petitioner's exclusive rights by placing its products in retail stores throughout Uruguay for direct sale to the public, often at lower prices. The Panel's view that petitioner never possessed the exclusive right under the Agreement to distribute and sell OPI products in Uruguay because respondents never agreed not to sell their products to other distributors relies on an incomplete reading of the

Agreement. Paragraph 9(j) provides that petitioner had the right to distribute and sell OPI's products to outlets like salons and barber shops "exclusively" and not to any other type of business without OPI's prior approval (App.16).

Petitioner's exclusive right to distribute and sell OPI products in Uruguay is buttressed by Paragraph 10(f) of the Agreement which provides that

> OPI will refrain from *selling*, *distributing* or consigning any of the "OPI Products" covered by this agreement to department, drug, food or variety stores in the Territory.

(App. 16;30) (emphasis supplied). Thus Paragraphs 9(j) and 10(f) of the Agreement together gave petitioner the exclusive right to import, distribute and sell OPI products to licensed cosmetologists, accredited beauty salons, nail technicians and beauty and barber schools in Uruguay while, at the same time, OPI promised *not* to sell, distribute or consign its products to *other* outlets in Uruguay like department, drug, food or variety stores (App. 16;30-31). In this way, contrary to the Panel's reading, petitioner was given the *exclusive* right under the Agreement to import, distribute and sell OPI's products in Uruguay.

Just as important, petitioner unmistakably alleged in Paragraphs 17 and 26 of the FAC that contrary to their obligations under Paragraph 10(f) of the Agreement, respondents "sold and distributed OPI products to various business entities including but not limited to *stores* in the Airport and other *stores* in various cities in Uruguay" (App. 31) (emphasis

supplied). That these "stores" were not precisely identified as "department, drug, food or variety stores" is not fatal to the breach of contract claim because, as Justice Souter's analysis in *Iqbal* makes clear, the word "stores" in the FAC is one of a number of "hypotheses [which] are consistent with the complaint" and its attached Agreement. This allegation should have—but did *not*—receive the benefit of the Panel's imagination demanded by the *Iqbal-Twombly* analysis. The Panel's hypertechnical, unforgiving reading of the FAC to reject petitioner's well pleaded claim for relief *for the want of one word* is fundamentally at odds with Rule 8(a)(2)'s pleading standard as this Court has refined it.

Second, if the Panel were going to adopt this tripwire standard of pleading, it should have allowed petitioner leave to amend the FAC to add the one word which would have cured this perceived flaw. That it did not do so improperly elevates the heightened pleading requirements of *Iqbal* and *Twombly* over the liberal amendment policy of Rule 15(a)(2), undercutting petitioner's ability to cure a clearly formal imperfection in the complaint which did not go to the substantive allegation that respondents breached the agreement.

As Justice Kennedy concluded in his opinion for the majority in *Iqbal* which found the complaint wanting, the plaintiff there should have the right to "seek leave to amend his deficient complaint" under Rule 15 (a)(2) either in the court of appeals or the district court. *Id.* at 687. This result is in keeping with the salutary values of the Federal Rules of Civil Procedure which guide their construction, i.e., "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

As the Court observed in *Foman v. Davis*, 371 U.S. 178, 182 (1962), the "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the Federal Rules." *Id.* It further stated:

> 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 opposing party by virtue of allowance of the amendment, etc.----the leave should, as the rule requires, be "freely given."

Id. The message of *Foman* is clear: Give leave to amend or give good reason not to.

This was the first examination of the FAC incident to a motion to dismiss and if the Panel because of perceived futility refused to permit petitioner to amend, it was wrong to do so. The FAC was not time-barred having been brought within the limitations period; it stated good claims for relief for breach of contract and for breach of the covenant of good faith and fair dealing based upon the Agreement attached to the FAC; and to the extent that any of its claims were not well pled, petitioner should have been allowed to plead additional facts. For example, petitioner stood ready to plead all the names of the beauty salons which had either cancelled or reduced their purchases of OPI products based on the availability of the same products OPI was marketing at lower prices.

The Panel's refusal to provide petitioner this opportunity, even after being confronted with its mistaken reading of the FAC by petitioner's petition for rehearing or for rehearing *en banc*, undercuts *Foman's* continued vitality and its message that leave to amend be generously given or that valid reasons for denying amendment be provided. Especially after the heightened pleading requirements of *Iqbal* and *Twombly*, the liberal opportunity to amend a complaint when justice requires under Rule 15(a)(2) is a vital stopgap to the dismissal of otherwise valid complaints and a fair counterbalance to these decisions so that legitimate claims for relief survive the pleading stage of litigation. See P.W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553, 598 (2010) (study shows *a three-fold* increase in dismissals with leave to amend after *Iqbal*).

The Court should take this opportunity to reassert the enduring fairness of *Foman* so that before a complaint is dismissed with prejudice for failure to state a claim under *Iqbal-Twombly*, thereby foreclosing petitioner from an opportunity to state his claim consistent with Rule 8(a)(2) even before a responsive pleading has been filed, the pleader be given an opportunity to amend its complaint to respond to the identified deficiency.

The Due Process Deprivation.

The Panel's capricious ruling dismissing the breach of contract claim without leave to amend is tantamount to an admission by the Panel that petitioner's claim would have been sufficient *if just one word,* a nonessential adjective such as "department,"

"drug," "food" or "variety," were added to the FAC. That the Panel upon rehearing dismissed the FAC because of this lone, technical omission bespeaks unfairness or prejudgment at odds with impartial decisionmaking or an impartial tribunal.

In addition, § 5.3(a)(2) of the General Orders of the Ninth Circuit Court of Appeals provides *inter alia* that "[i]f a panel amends its disposition, the panel *shall* set forth in its amended disposition or separate order ...whether subsequent petitions for rehearing or rehearing *en banc* may be filed..." (emphasis supplied). Contrary to this General Order, the Panel failed to set forth in its amended memorandum any notice whether petitioner could file any subsequent petition for rehearing or for rehearing *en banc* thereby impliedly denying him this opportunity.

Petitioner was thereby deprived of any meaningful way to adduce before the Panel argument of law or fact demonstrating that because the absence *of just one word* in its FAC prevented its breach of contract claims from proceeding against respondents, amendment of the FAC under Rule 15(a)(2) should have been allowed as a matter of justice and fair play so that this formal imperfection in its pleading could be cured. That petitioner was never given this opportunity by the Panel upon rehearing bespeaks a lack of due process.

The right of every litigant to adequate notice and the opportunity to respond in a meaningful way to challenges to its pleadings or proof is deeply embedded in the Federal Rules' concept of fair play and substantial justice. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14 (1978); *Arnett v.*

Kennedy, 416 U.S. 134, 142-146 (1974); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950). This reflects the fundamental principle of judicial administration that every person is entitled to notice and the availability of making some kind of response or being given some kind of a hearing before adverse judicial action is taken against him. See generally *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694,707 (1988).

These embedded notions in the Federal Rules of notice and a fair opportunity to respond and be heard before judicial action is taken are founded on the principle that a litigant's cause of action and its right to have its claims fairly heard and decided in federal court is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). The Panel's attenuated effort to manufacture new reasons to deny petitioner relief even after its own misapprehension of petitioner's claims was made apparent was itself a cause for concern. But that it did so without affording petitioner either leave to amend or the further opportunity to contest that decision in some manner denied petitioner the process due it under both the constitution and the Federal Rules.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate and reverse that judgment and remand the matter to the United States District Court for the Central District of California with

instructions to reinstate all of petitioner's claims contained in its FAC except for its promissory fraud claim or provide petitioner with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals, Ninth Circuit.

PONTILER S.A., a Uruguay corporation, Plaintiff-Appellant,
v.
OPI PRODUCTS INC., a California corporation; Coty Inc., a New York Corporation, Defendants-Appellees.

No. 19-55849

Submitted July 10, 2020* Pasadena, CaliforniaFILED September 10, 2020

Appeal from the United States District Court for the Central District of California, R. Gary Klausner, District Judge, Presiding, D.C. No. 2:18-cv-10772-R-SK

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Before: BALDOCK,** BERZON, and COLLINS, Circuit Judges.

ORDER

The memorandum disposition filed on July 31, 2020 is amended as follows:

1. On page 3, line 14, the phrase "and to various stores" is added after "other distributors"

2. On page 4, line 1, the phrase "or to other types of stores" is added after "other distributors"

3. On page 4, line 3, the following sentence is added after "plain language": "Moreover, Plaintiff's operative complaint contains no allegations that Defendants sold to one of the four types of stores enumerated in the contract", *i.e.*, "department, drug, food or variety stores."

With these amendments, the panel has unanimously voted to deny appellant's petition for rehearing. Judge Berzon and Judge Collins have voted to deny the petition for rehearing en banc. Judge Baldock recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

AMENDED MEMORANDUM***

Plaintiff argues the district court erred in dismissing its claims for breach of contract and breach of

the implied covenant of good faith and fair dealing. Plaintiff concedes its promissory fraud, unfair competition, and intentional interference with prospective economic advantage claims were insufficiently pled but contends the district court erred in denying leave to amend. Finally, Plaintiff argues the district court erred in dismissing its claims as time-barred. We review a district court's order dismissing a complaint for failure to state a claim de novo. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013). We need not reach the issue of whether Plaintiff's claims are timely because Plaintiff fails to state a claim upon which relief can be granted and any amendment would be futile. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

1. To state a claim for breach of contract under California law, a plaintiff must allege: (1) the existence of a valid contract; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's breach; and (4) damage resulting from the breach.[1] *Oasis West Realty, LLC. v. Goldman*, 51 Cal.4th 811, 124 Cal.Rptr.3d 256, 250 P.3d 1115, 1121 (2011). While we construe the pleadings in favor of the plaintiff, if "the allegations of a pleading are inconsistent with the terms of a written contract attached as an exhibit, the terms of the latter, fairly construed, must prevail over the averments differing therefrom." *Ott v. Home Sav. & Loan Ass'n*, 265 F.2d 643, 646 n.1 (9th Cir. 1958).

In this case, Plaintiff alleges Defendants breached the contract by terminating it without cause. But the contract, which was attached to the complaint, plainly states it can be terminated by "notice given by either party to the other party addressed in writing of its intention not to renew [the] agreement at least one calendar month prior to the expiration of the ... period."

It is undisputed Defendants provided written notice of their intent not to renew the contract on September 4, 2014—more than three months prior to the expiration of the relevant period. Thus, the agreement expressly provided for Defendants' method of termination, and Plaintiff's claim that Defendants needed good cause to terminate the contract is without merit.

2. Plaintiff further argues Defendants breached the contract by selling OPI products to other distributors and to various stores in Uruguay. This argument is similarly without merit. The agreement states, "OPI hereby grants to [Plaintiff], and [Plaintiff] hereby accepts, *the non-exclusive right* to warehouse and sell 'OPI Products'...." (emphasis added). This language makes clear that the contract was intended to be non-exclusive. Moreover, while Defendants agreed to "refrain from selling, distributing or consigning any of the 'OPI Products' covered by [the] agreement to *department, drug, food or variety stores*[,]" Defendants never agreed not to sell to other distributors or to other types of stores. (emphasis added). Accordingly, Plaintiff's claim that Defendants breached the contract by selling OPI products to other distributors is foreclosed by the contract's plain language. Moreover, Plaintiff's operative complaint contains no allegations that Defendants sold to one of the four types of stores enumerated in the contract, *i.e.*, "department, drug, food or variety stores." Plaintiff's breach of contract claim therefore fails as a matter of law.

3. Nor did the district court err in dismissing Plaintiff's claim for breach of the covenant of good faith and fair dealing. Again, we review the district court's order de novo. *Faulkner*, 706 F.3d at 1019. Under California law, the covenant of good faith and fair dealing

"cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317, 100 Cal.Rptr.2d 352, 8 P.3d 1089, 1110 (2000).

Here, Plaintiff bases its breach of the implied covenant of good faith and fair dealing claim on the fact that Defendants (1) terminated the contract without cause and (2) sold OPI products to other distributors in Uruguay. But as we have explained, this conduct was permitted under the plain language of the contract. Because the covenant of good faith and fair dealing cannot impose duties on Defendants beyond those contained in the contract, Plaintiff's claim fails as a matter of law.

4. Finally, the district court did not err in denying Plaintiff leave to amend its promissory fraud, unfair competition, and interference with prospective economic advantage claims. We review the district court's denial of leave to amend for an abuse of discretion. *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004). Dismissal without leave to amend is appropriate when it is clear the complaint could not be saved by amendment. *Somers v. Apple, Inc.*, 729 F.3d 953, 960 (9th Cir. 2013).

In this case, Defendants' initial motion to dismiss alerted Plaintiff to the legal defects in its original complaint. While Plaintiff filed an amended complaint in response to that motion, Plaintiff did not substantively revise its claims to address the deficiencies identified. Even when confronted with a second motion to dismiss, Plaintiff did not propose an amendment which would save its claims. And in its briefing to this Court, Plaintiff still fails to provide any legal or factual basis by which its promissory fraud, unfair competition, or interference

with prospective economic advantage claims could survive dismissal. Because Plaintiff fails to proffer a legally adequate basis for its claims—and from our review there is none—we conclude the district court did not abuse its discretion in denying leave to amend.

5. Plaintiff's only remaining claims are for declaratory and injunctive relief. Because all of Plaintiff's claims fail as a matter of law, Plaintiff is not entitled to any relief—declaratory, injunctive, or otherwise. For the reasons provided below, Plaintiff's arguments to the contrary are without merit.

With respect to declaratory relief, Plaintiff asks us to declare "the parties' rights, duties and obligations" under the contract. But a complaint for declaratory relief must show "the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument...." *Wellenkamp v. Bank of Am.*, 21 Cal.3d 943, 148 Cal.Rptr. 379, 582 P.2d 970, 972 (1978). Here, the contract between Plaintiff and Defendants terminated in 2014. Thus, the parties have no ongoing rights, duties, or obligations under the agreement. And insofar as Plaintiff asks us to declare Defendants breached the contract, we have already held they did not. Accordingly, Plaintiff is not entitled to declaratory relief.

Plaintiff is similarly not entitled to the permanent injunction it requests. A permanent injunction is an equitable remedy that may issue if, among other things, a plaintiff's lawsuit "turns out to be meritorious." *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999). In this case, Plaintiff's claims are wholly without merit. Therefore, Plaintiff is not entitled to injunctive relief.

For the reasons provided herein, the judgment of the district court is AFFIRMED.

Footnotes

*The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

**The Honorable Bobby R. Baldock, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

***This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1The contract between Plaintiff and Defendants contains a choice of law provision which provides the agreement "has been made and shall be performed with reference to the laws of the State of California...."

2Plaintiff's pending motion to supplement the record [DE 25] is GRANTED.

2020 WL 4386770
Only the Westlaw citation is currently available.

United States Court of Appeals, Ninth Circuit.

PONTILER S.A., a Uruguay corporation, Plaintiff-Appellant,
v.
OPI PRODUCTS INC., a California corporation; Coty Inc., a New York Corporation, Defendants-Appellees.

No. 19-55849

Submitted July 10, 2020[*] Pasadena, CaliforniaFILED July 31, 2020

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, R. Gary Klausner, District Judge, Presiding, D.C. No. 2:18-cv-10772-R-SK

Before: BALDOCK,[**] BERZON, and COLLINS, Circuit Judges.

MEMORANDUM[***]

Plaintiff argues the district court erred in dismissing its claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Plaintiff concedes its promissory fraud, unfair competition, and intentional interference with prospective economic advantage claims were insufficiently pled but contends the district court erred in denying leave to amend. Finally, Plaintiff argues the district court erred in dismissing its claims as time-barred. We review a district court's order dismissing a complaint for failure to state a claim de novo. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013). We need not reach the issue of whether Plaintiff's claims are timely because Plaintiff fails to state a claim upon which relief can be granted and any amendment would be futile. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

1. To state a claim for breach of contract under California law, a plaintiff must allege: (1) the existence of a valid contract; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's breach; and (4) damage resulting from the breach.[1] *Oasis West Realty, LLC. v. Goldman*, 51 Cal.4th 811, 124 Cal.Rptr.3d 256, 250 P.3d 1115, 1121 (2011). While we construe the pleadings in favor of the plaintiff, if "the allegations of a pleading are inconsistent with the terms of a written contract attached as an exhibit, the terms of the latter, fairly construed, must prevail over the averments differing therefrom." *Ott v. Home Sav. & Loan Ass'n*, 265 F.2d 643, 646 n.1 (9th Cir. 1958).

In this case, Plaintiff alleges Defendants breached the contract by terminating it without cause. But the contract, which was attached to the complaint, plainly states it can be terminated by "notice given by either party to the other party addressed in writing of its

intention not to renew [the] agreement at least one calendar month prior to the expiration of the ... period." It is undisputed Defendants provided written notice of their intent not to renew the contract on September 4, 2014—more than three months prior to the expiration of the relevant period. Thus, the agreement expressly provided for Defendants' method of termination, and Plaintiff's claim that Defendants needed good cause to terminate the contract is without merit.

2. Plaintiff further argues Defendants breached the contract by selling OPI products to other distributors in Uruguay. This argument is similarly without merit. The agreement states, "OPI hereby grants to [Plaintiff], and [Plaintiff] hereby accepts, *the non-exclusive right* to warehouse and sell 'OPI Products' ...." (emphasis added). This language makes clear that the contract was intended to be non-exclusive. Moreover, while Defendants agreed to "refrain from selling, distributing or consigning any of the 'OPI Products' covered by [the] agreement to *department, drug, food or variety stores*[,]" Defendants never agreed not to sell to other distributors. (emphasis added). Accordingly, Plaintiff's claim that Defendants breached the contract by selling OPI products to other distributors is foreclosed by the contract's plain language. Plaintiff's breach of contract claim therefore fails as a matter of law.

3. Nor did the district court err in dismissing Plaintiff's claim for breach of the covenant of good faith and fair dealing. Again, we review the district court's order de novo. *Faulkner*, 706 F.3d at 1019. Under California law, the covenant of good faith and fair dealing "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz v. Bechtel Nat'l*,

Inc., 24 Cal.4th 317, 100 Cal.Rptr.2d 352, 8 P.3d 1089, 1110 (2000).

Here, Plaintiff bases its breach of the implied covenant of good faith and fair dealing claim on the fact that Defendants (1) terminated the contract without cause and (2) sold OPI products to other distributors in Uruguay. But as we have explained, this conduct was permitted under the plain language of the contract. Because the covenant of good faith and fair dealing cannot impose duties on Defendants beyond those contained in the contract, Plaintiff's claim fails as a matter of law.

4. Finally, the district court did not err in denying Plaintiff leave to amend its promissory fraud, unfair competition, and interference with prospective economic advantage claims. We review the district court's denial of leave to amend for an abuse of discretion. *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004). Dismissal without leave to amend is appropriate when it is clear the complaint could not be saved by amendment. *Somers v. Apple, Inc.*, 729 F.3d 953, 960 (9th Cir. 2013).

In this case, Defendants' initial motion to dismiss alerted Plaintiff to the legal defects in its original complaint. While Plaintiff filed an amended complaint in response to that motion, Plaintiff did not substantively revise its claims to address the deficiencies identified. Even when confronted with a second motion to dismiss, Plaintiff did not propose an amendment which would save its claims. And in its briefing to this Court, Plaintiff still fails to provide any legal or factual basis by which its promissory fraud, unfair competition, or interference with prospective economic advantage claims could survive dismissal. Because Plaintiff fails to proffer a legally adequate basis for its claims—and from our

review there is none—we conclude the district court did not abuse its discretion in denying leave to amend.

5. Plaintiff's only remaining claims are for declaratory and injunctive relief. Because all of Plaintiff's claims fail as a matter of law, Plaintiff is not entitled to any relief—declaratory, injunctive, or otherwise. For the reasons provided below, Plaintiff's arguments to the contrary are without merit.

With respect to declaratory relief, Plaintiff asks us to declare "the parties' rights, duties and obligations" under the contract. But a complaint for declaratory relief must show "the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument ...." *Wellenkamp v. Bank of Am.*, 21 Cal.3d 943, 148 Cal.Rptr. 379, 582 P.2d 970, 972 (1978). Here, the contract between Plaintiff and Defendants terminated in 2014. Thus, the parties have no ongoing rights, duties, or obligations under the agreement. And insofar as Plaintiff asks us to declare Defendants breached the contract, we have already held they did not. Accordingly, Plaintiff is not entitled to declaratory relief.

Plaintiff is similarly not entitled to the permanent injunction it requests. A permanent injunction is an equitable remedy that may issue if, among other things, a plaintiff's lawsuit "turns out to be meritorious." *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999). In this case, Plaintiff's claims are wholly without merit. Therefore, Plaintiff is not entitled to injunctive relief.

For the reasons provided herein, the judgment of the district court is AFFIRMED.[2]

Footnotes

*The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

**The Honorable Bobby R. Baldock, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

***This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1The contract between Plaintiff and Defendants contains a choice of law provision which provides the agreement "has been made and shall be performed with reference to the laws of the State of California ...."

2Plaintiff's pending motion to supplement the record [DE 25] is GRANTED.

Filed 06/28/19
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 2:18-cv-10772-R-SK

PONTILER S.A., a Uruguay corporation,
Plaintiff,
v.
OPI PRODUCTS INC., a California corporation; et al.
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court is Defendants OPI Products Inc. ("OPI") and COTY Inc.'s ("Coty")(collectively, "Defendants") Motion to Dismiss, filed on May 6, 2019. (Dkt. No. 19). Having been thoroughly briefed by the parties, this Court took the matter under submission on May 29, 2019.

This case arises from an alleged breach of the distribution agreement between Plaintiff Pontiler S.A. ("Plaintiff") and OPI. Plaintiff is a distributor of beauty products throughout South America, including Uruguay. Plaintiff's First Amended Complaint ("FAC") alleges that "[i]n or about October 1, 2001, Plaintiff entered into an Exclusive Importer Agreement ("Agreement") with OPI" to capitalize on OPI's brand name and reach. In 2014, Coty purchased OPI, including all assets and legal obligations of OPI.

The Agreement provides for automatic renewal in one-year terms unless either side provided one month's notice of non-renewal. The parties renewed the

Agreement 12 times, until Defendants chose not to renew and terminated the Agreement on December 31, 2014 after giving the required notice. Plaintiff alleges Defendants wrongfully terminated the Agreement in bad faith to further other business relationships in Uruguay and began selling to Plaintiff's former customers in December 2018.1

On April 30, 2019, Plaintiff filed the operative FAC, bringing seven claims for: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) promissory fraud, (4) intentional interference with prospective economic advantage, (5) unfair competition under

California Business and Professions Code § 17200, (6) declaratory relief, and (7) permanent injunction. On May 6, 2019, Defendants filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6).

Dismissal under Rule 12(b)(6) is proper when a complaint exhibits either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988). Under the heightened pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face," so that the defendant receives "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555, 570. The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Breach of Contract

To state a claim for breach of contract under California law, a plaintiff must allege: (1) the existence of a valid contract; (2) the plaintiff's performance or excuse for failure to perform; (3)the defendant's breach; and (4) damage resulting from the breach. *McKell v. Washington Mut.,Inc.*, 142 Cal. App. 4th 1457, 1489 (2006). Here, Plaintiff's claim for breach of the Agreement fails due to the Agreement's renewal terms, limitation of liability notice, and the applicable statute of limitations.

First, the Agreement states that OPI granted Plaintiff the "non-exclusive" right to warehouse and sell OPI products within Uruguay to "licensed cosmetologists, accredited beauty salons, nail technicians and beauty and barber schools." (Dkt. No. 17-1, ¶ 1). Paragraph 9(j) states that Plaintiff could sell or deliver products through these channels "exclusively" and not to any other type of business unless Plaintiff received prior approval from OPI. (Dkt. No. 17-1, ¶9(j)). Defendants assert that these terms are straightforward and preclude Plaintiff's arguments for total exclusivity within Uruguay. However, Plaintiff alleges that the Agreement granted Plaintiff the right to exclusively market OPI products in Uruguay. Specifically, Paragraph 10(f) states that Defendants must refrain from distributing OPI products to any "department, drug, food, or variety store" in Uruguay. (Dkt. No. 17-1, ¶ 10(f)).

The Agreement's renewal clause plainly states that the contract was to be automatically renewed yearly, unless either party gave notice at least one month prior to an expiration period.(*See* Dkt. No. 17-1, ¶ 2(b)). On September 4, 2014, Defendants gave Plaintiff more than the required one month's notice of termination, and the termination became effective on

December 31, 2014. Plaintiff argues that Paragraph 17 contains specific grounds for termination, which implies that Defendants could not terminate the Agreement except under the circumstances enumerated there. (*See* Dkt. No. 17-1, ¶ 17). However, Paragraph 2(b) clearly permits nonrenewal upon one month's notice to the other party and does not require a showing of cause for non-renewal. Plaintiff's interpretation is inconsistent with that term and would essentially require that the parties maintain their contractual relationship in perpetuity unless one of the grounds for termination under Paragraph 17 were to arise. That interpretation is clearly at odds with the intent of the parties as expressed by the plain language of the Agreement.

Moreover, the Agreement's "limitation of liability notice" at Paragraph 18(b) clearly states the parties' acknowledgment that neither would be liable to the other for "any loss, damages, cost or expenses" incurred as a result of termination, "whether such termination is with or without cause." (*See* Dkt. No. 17-1 ¶ 18(b)). The FAC ambiguously alleges that Defendants failed to provide proper notice of termination; however, no supporting facts or details are alleged, and Plaintiff appears to be relying on the fact that Defendants chose not to renew the Agreement without cause. Defendants contend that the limitation of liability clause shields them from liability for any allegedly deficient notice; Plaintiff did not address this argument in its Opposition.

Limitation of liability notices have long been held valid in California. *Markborough California, Inc. v. Superior Court*, 227 Cal. App. 3d 705, 714 (1991) (citations omitted). They are enforceable unless unconscionable. *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118, 1126 (2012). Plaintiff has not alleged that the limitation of liability notice was

unconscionable. The Agreement's renewal and limitation of liability clauses demonstrate that Defendants' termination of the Agreement was valid and that Defendants are not liable for any damages incurred by Plaintiff due to the valid termination.

Even if Defendants' termination was invalid, however, Plaintiff's claim for breach of contract is barred by the statute of limitations. The statute of limitations for breach of a written contract is four years. *See Parrish v. Nat'l Football League Players Ass'n*, 534 F. Supp. 2d 1081, 1088 (N.D. Cal. 2007); Cal. Civ. Proc. Code § 337. Plaintiff did not file his initial Complaint until December 31, 2018, exactly four years after the Agreement was terminated on December 31, 2014. And as discussed above, that termination was not a breach under the plain language of the Agreement.

Plaintiff contends that, despite the four-year statute of limitations, Defendants are liable for breaches occurring "up to, and including December 31, 2014" under the continuing violations doctrine. The continuing violation doctrine is applicable when injuries are a "series of small harms . . . any one of which may not be actionable on its own." *Aryeh v. Canon Bus. Sols. Inc.*, 55 Cal. 4th 1185, 1198. Where it applies, the doctrine "renders an entire course of conduct actionable." 55 Cal. 4th at 1199. However, the California Supreme Court held in *Aryeh* that the continuing violation doctrine does not apply to a series of "discrete, independently actionable alleged wrongs." 55 Cal. 4th at 1198; *see also Alta Devices, Inc. v. LG Elecs., Inc.*, 343 F. Supp. 3d 868, 886 (N.D. Cal. 2018) (rejecting plaintiff's "continuous breach" theory where discrete, independently actionable breaches could be identified). Here, Plaintiff has not alleged harms that were only actionable in the

aggregate. Thus, the continuing violation doctrine does not apply.

Another exception to the statute of limitations is the theory of continuous accrual. The continuous accrual doctrine applies when separate, recurring invasions of the same right each trigger their own statute of limitations, allowing recovery within an applicable period. 55 Cal. 4th at 1192, 1198. It generally applies when there is a "continuing or recurring obligation." *Id.* At 1199. The recovery is limited to the injuries within the limitations period "preceding the suit." *Id.*

Here, Plaintiff alleges that Defendants breached their continuing duty to refrain from selling OPI products. Applying this doctrine would allow Plaintiff to recover for harms that occurred within the four years preceding the Complaint filed on December 31, 2018; the continuous accrual doctrine does not allow Plaintiff to circumvent the statute of limitations for conduct occurring prior to December 31, 2018. 55 Cal. 4th at 1199. And the only breach alleged to have occur on or after December 31, 2014 is Defendants' termination of the Agreement, which, as discussed above, was valid. There could be no breach after December 31, 2014 because no contractual relationship existed between the parties; therefore, Plaintiff cannot establish that Defendants owed any "recurring obligation" after that date.

Thus, Plaintiff has failed to state a claim for breach of contract. Because these defects cannot be cured, Plaintiff's breach of contract claim is dismissed without leave to amend.

Breach of the Implied Covenant and Good Faith and Fair Dealing

In California, a "cause of action for breach of the implied covenant of good faith and fair dealing is premised on the breach of a specific contractual obligation." *Innovative Bus. P'Ships, Inc. v. Inland Cntys. Reg'l Center, Inc.*, 194 Cal. App. 4th 623, 631 (2011) (citing *Racine & Laramie, Ltd. v. Department of Parks & Recreation*, 11 Cal. App. 4th 1026, 1031-32 (1992)). If there is no breach of an underlying contract, then there is no breach of the covenant of good faith and fair dealing. *Reinhardt v. Gemini Motor Transp.*, 869 F. Supp. 2d 1158, 1171 (2012). Here, Plaintiff cannot state a claim for breach of the covenant of good faith and fair dealing because, as discussed above, the FAC lacks a valid underlying breach of contract claim. Thus, Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is dismissed without leave to amend.

Promissory Fraud

Promissory fraud is when a party enters into an agreement without intending to be bound by its terms. *Hsu v. OZ Optics Ltd.*, 211 F.R.D. 615, 620 (N.D. Cal. 2002). Federal Rule of Civil Procedure 9(b) requires that a plaintiff plead allegations of fraud "with particularity." Fed. R. Civ. P. 9(b); *Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001). The Ninth Circuit identifies two requirements: (1) a plaintiff's allegations must identify the "time, place, and content" of any alleged misrepresentation so that the defendant can identify the statement, and (2) a plaintiff must plead facts from which the trier of fact may plausibly infer fraudulent intent. *Id.*

Plaintiff alleges that Defendants made "materially misleading and outright false"

misrepresentations to induce Plaintiff to sign the Agreement. Plaintiff also emphasizes that Defendants almost immediately started negotiating with other stores and thus "never intended" to honor the Agreement.

Plaintiff's promissory fraud claim fails for two reasons. First, Plaintiff has not alleged specific facts creating an inference of fraudulent intent. Plaintiff focuses largely on the timing of Defendants' alleged negotiations with others while the Agreement was in effect and otherwise relies on the same allegations as for its breach of contract claim. However, the timing of when Defendants began negotiations does not by itself imply that OPI intended to induce Plaintiff to execute the Agreement based on OPI's allegedly misleading statements and "never intended" to honor the Agreement.

Second, the statute of limitations bars Plaintiff's promissory fraud claim. California Code of Civil Procedure Section 338(d) states that there is a three-year limitations period for fraud. The cause of action accrues when the aggrieved party discovers the facts constituting the alleged fraud. Cal. Civ. Proc. Code § 338(d). Here, Plaintiff does not dispute that the Agreement was signed in 2001 and terminated in December 2014. Plaintiff alleges the fraud began "at the time Defendant made these representations" to induce Plaintiff to sign the Agreement and "immediately from inception." Plaintiff further alleges that "the last act in Defendants [sic] fraud took place in December 2018 when [OPI] began selling directly to Plaintiff's former customers." Plaintiff presumably meant to refer to December 2014, which is when OPI chose to terminate the Agreement. No agreement was formed in 2018 and, thus, Plaintiff could not have been induced to enter into

any such agreement. In any case, the FAC contains no specific allegations of misrepresentations made at any time within the limitations period. Thus, Plaintiff's promissory fraud claim is dismissed without leave to amend.

California Unfair Competition Law Claim

Under the California unfair competition law ("UCL"), a plaintiff may recover civil damages for unfair competition, defined as "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Plaintiff alleges Defendants engaged in an unfair and/or fraudulent business practice when Defendants sold the same or substantially similar products to stores in Uruguay.

"A UCL claim must be dismissed if the plaintiff has not stated a claim for the predicate acts upon which he bases the claim." *Pellerin v. Honeywell Int'l, Inc.*, 877 F. Supp. 2d 983, 992 (S.D. Cal. 2012); *see also Hicks v. PGA Tour, Inc.*, 165 F. Supp. 3d 898, 911 (N.D. Cal. 2016) ("[W]here the same conduct alleged to be unfair under the UCL is also alleged to be a violation of another law, the UCL claim rises or falls with the other claims.") (internal citation omitted). Here, Plaintiff cannot state a claim under the UCL because Plaintiff does not allege facts supporting any predicate acts of unfair competition.

Plaintiff's UCL claim derives from prior allegations such as those made in support of its breach of contract claim. A breach of contract claim may only form the basis of a UCL claim if that breach itself is "unlawful, unfair, or fraudulent." *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1146 (quoting *Puentes v. Wells Fargo Home Mortg., Inc.*, 160 Cal. App. 4th 638, 645 (2008)). As discussed above, the FAC fails to state a claim for breach of contract, breach of the implied

covenant of good faith and fair dealing, or fraud. The UCL cannot be used to rewrite contracts or to determine whether the terms of the contract are fair. *See, e.g.*, *Spiegler v. Home Depot U.S.A., Inc.*, 552 F. Supp. 2d 1036, 1046 (C.D. Cal. 2008), *aff'd sub nom*, *Spiegler v. Home Depot USA, Inc.*, 349 F. App'x 174 (9th Cir. 2009). Moreover, Plaintiff has not alleged any violation of antitrust law or any other anti-competitive scheme. *See, e.g.*, *Khoury v. Maly's of California, Inc.*, 14 Cal. App. 4th 612, 618-19 (1993).

Thus, Plaintiff's UCL claim lacks a predicate act or other basis from which the Court could plausibly infer any actionable unfair or anti-competitive conduct. Accordingly, Plaintiff's UCL claim is dismissed without leave to amend.

Interference with Prospective Economic Advantage

Under California law, a claim for intentional interference with prospective economic advantage requires: (1) an economic relationship between plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to plaintiff proximately caused by defendant's acts. *Westside Center Associates v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 521-22 (1996). The defendant must have engaged in conduct that is "wrongful" according to some legal measure other than simple interference. *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 389 (1995). "Wrongful" means unlawful or proscribed by some "constitutional, statutory, regulatory, common law, or other determinable legal

standard." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (2003).

Here, Plaintiff alleges that Defendants' alleged underselling to Plaintiff's competitors "squeezed out" Plaintiff and damaged Plaintiff's reputation. However, Plaintiff cannot state a claim for interference with economic advantage because it has not adequately plead factors (3), (4), and (5).

First, Plaintiff has not alleged that Defendants "intentionally" attempted to disrupt any business relationship between Plaintiff and a third party. The "intentional" element is satisfied if a defendant knew the harmful interference was "certain or substantially certain to occur" due to its actions. *Id.* at 1152. Here, the FAC does not address whether Defendants acts were "certain or substantially certain" to cause harm. Second, Plaintiff has not provided any facts indicating an actual disruption of any business relationship. Plaintiff only alleges that it was squeezed out of its own territory and that its reputation was damaged; however, the FAC does not specify which of Plaintiff's purported business relationships were interfered with. Here, Plaintiff's lack of identifiable business partners renders its financial expectations "at most a hope for an economic relationship and a desire for future benefit." *Roy Allan Slurry Seal, Inc. v. A. Asphalt S., Inc.*, 2 Cal. 5th 505, 516 (2017). Third, because Plaintiff has failed to allege facts suggesting interference with any identifiable business relationship, the FAC also fails to allege facts supporting the element of causation.

Finally, this claim is barred by the statute of limitations because it was not brought within the two- or four-year timeframe required by California law, depending on whether or not the alleged obligation was founded on a written instrument. *See* Cal. Civ. Proc.

Code § 339(1) (twoyear statute of limitations for obligations not founded on an instrument in writing); Cal. Civ. Proc. Code § 337 (four-year statute of limitations for obligations founded on an instrument in writing); *Reddy v. MedQuist, Inc.*, 2013 WL 3828348, at *5 (N.D. Cal. July 19, 2013). Thus, Plaintiff's claim for interference with prospective economic advantage is dismissed without leave to amend.

Declaratory Relief

To state a claim for declaratory relief, Plaintiff's complaint must set forth "facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument . . . and request that the rights and duties of the parties be adjudged by the court." *Ludgate Ins. Co., Ltd. v. Lockheed Martin Corp.*, 82 Cal. App. 4th 592, 606 (2000) (quoting *Wellenkamp v. Bank of Am.*, 21 Cal. 3d 943, 947 (1978)); Cal. Civ. Proc. Code § 1060.

Because Plaintiff's claims are barred by the statute of limitations and other defects, Plaintiff's request for declaratory relief must be denied. *See Maguire v. Hibernia S. & L. Soc.*, 23 Cal. 2d 719, 733-34 (1944). Thus, Plaintiff's request for declaratory relief is dismissed without leave to amend.

Injunctive Relief

To obtain a permanent injunction, Plaintiff must show four factors: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity

is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013).

Because Plaintiff's claims fail as discussed above, Plaintiff's request for permanent injunctive relief must also fail. As held in *Nodari v. Wells Fargo Bank, N.A.*, 2012 WL 13012697, at *5 (C.D. Cal. Jan. 4, 2012), a cause of action "must exist before injunctive relief may be granted." Thus, Plaintiff's request for permanent injunction is dismissed without leave to amend.

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is GRANTED. (Dkt.

Dated: June 28, 2019.

_____

HON. R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

Footnotes

1 It is unclear whether Plaintiff intended to allege that this conduct began in December 2018 or in December 2014, when the Agreement was terminated. However, no contractual relationship existed between the parties in December 2018.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO. 2:18-cv-10772-R-SK

PONTILER S.A., a Uruguay corporation,
Plaintiff,
v.
OPI PRODUCTS INC., a California corporation; Coty Inc., a New York Corporation, and DOES 1-25,
Defendants.

Assigned to Hon. Manuel L. Real

FIRST AMENDED COMPLAINT FOR:

1. BREACH OF CONTRACT;
2. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING;
3. PROMISSORY FRAUD;
4. INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE;
5. UNFAIR BUSINESS PRACTICES
6. DEMAND FOR ACCOUNTING AND
7. PERMANENT INJUNCTION

(DEMAND FOR JURY TRIAL)

Come now plaintiff Pontilar S.A., by their attorneys to allege as follows:

JURISDICTION

1. This Court has jurisdiction over the claims and parties named in this Complaint pursuant to 28 U.S.C. Secs. 1332, 1367(a) and 1441(a).

VENUE

2. Venue is appropriate as the contract at issue was executed and Defendant OPI products Inc. principal place of business was 13034 Saticoy Street, North Hollywood CA 91605.

THE PARTIES

3. At all times hearing mentioned, Plaintiff, PONTILER S.A. (hereinafter "Pontiler") has been and now is a company, which is both headquartered, and maintains its principal place of business, in Montevideo, Uruguay. It has, and continues to conduct business in Los Angeles County, California.

4. Defendant OPI Products Inc, ("OPI") is believed to be a California corporation. Its principal place of business is Los Angeles, California, where it has offices and conducts a significant portion of its business.

5. Defendant COTY, Inc. ("Coty") is believed to be a New York Corporation. It conducts a significant portion of its business in Los Angeles, California.

6. The true names and capacities of Defendants named in this action as DOES 1 through 25, inclusive, are unknown to Plaintiff's, who therefore sue them by such fictitious names. Plaintiffs will amend this Complaint set forth their true names and capacities when and as they are ascertained.

7. Plaintiffs are informed and believe, and based thereon allege, that said Defendants and DOES 1 through 25, inclusive, are each in some manner

responsible for the wrongs alleged here in, and that at all times referenced each was the agent, servant and/or employee of the other Defendants, who obtain financial benefit from those Defendants' acts and omissions, and each was acting within the course and scope of said agency and employment.

8. Plaintiffs are informed and believe, and based thereon allege, that at all relevant times here in, Defendants and DOES 1 through 25, inclusive, did aid, abet, participate in, contribute to and/or from the acts and behavior allege herein and the damage is caused there by, and by their action and/or inaction ratified and encouraged such acts and behavior.

9. Plaintiffs further allege that Defendants and DOES 1 through 25, inclusive, had a non- delegable duty to prevent or cure such acts and the behavior described herein, which duty Defendants and DOES 1 through 25, inclusive, failed and/or refused to perform.

10. Upon information and belief, there is such unity of interest and ownership between Defendants and DOES 1 through 25 that the separate personalities of each no longer exist.

11. Upon information and belief, if the acts alleged herein are treated as the acts of one particular Defendant, an inequitable result will follow in that the defendant entities will receive an unjust benefit from misleading consumers of defendant services, including plaintiff, that they are one entity while at the same limiting liability to a judgement- proof subsidiary entity, precluding Plaintiffs from adequately pursuing their claims.

12. Given the allegations of herein, Plaintiffs allege on information and belief that Defendants and DOES 3 through 25 are the alter egos of each other, being liable

on this basis for the wrongs committed by each other Defendant.

CHARGING ALLEGATIONS

13. Pontiler S.A. ("Pontiler") is a distributor of beauty products throughout South America, including Uruguay, and other regions. In or about October one, 2001 it entered into an Exclusive Importer Agreement ("Agreement") with OPI. That Agreement is attached hereto as Exhibit "A."

14. OPI manufactures and markets what it claims to be professionally inspired, premium-priced luxury beauty care products under the OPI brand name. It claims to have grown to become a global leader in the professional beauty care industry. In 2014, Plaintiff is informed and believes and on that basis alleges that Defendant Coty purchased OPI including but not limited to all assets and legal obligations of OPI.

15. In order to capitalize on OPI's brand name and reach, Pontiler executed in or around October of 2001 an Exclusive Importer Agreement. That Agreement provided Pontiler with, among other things, the exclusive right to import OPI products in the territory of Uruguay. The exclusivity provision is set forth in Paragraph 10(f) of the Agreement which states that Defendants would not "sell, distribute or consign" any OPI products in the country of Uruguay which, is defined in the Agreement as the "Territory".

16. However, the Agreement did reflect that OPI did business with many other distributors in various other regions in the world and therefore Pontiler was not the sole i.e." exclusive" distributor of OPI products worldwide. Pontiler is the exclusive distributor in Uruguay. In reliance on this right, Pontiler expanded significant sums to secure inventory, develop marketing

channels and exploit the benefits of its exclusive distribution in reliance on the Agreement.

17. Unfortunately, OPI never intended to honor this deal. OPI began selling, distributing and/or consigning OPI products and substantially similar products in Uruguay in direct violation of paragraph 10(f) as well as other provisions of the Agreement. Defendants sold and distributed OPI products to various business entities including but not limited to stores in the Airport and other stores in various cities in Uruguay.

18. Said breach of the Agreement constitutes a continuing violation which continued up through and including the date OPI wrongfully terminated the Agreement which was December 31st, 2014. In other words, Defendants continually breached the Agreement and the last acts of said breach occurred on December 31st, 2014. Based on the continuing violation doctrine, Plaintiff is entitled to all monies received by Defendant from the sale and/or distribution of OPI products in Uruguay from the date the breach began, which will be determined according to proof, up to, and including December 31st, 2014. After finding and establishing business relationships with other distributors in the subject territory, Defendants terminated this Agreement in bad faith in order to further those relationships. In fact, Defendants begin selling to Plaintiff's former customers. Plaintiff is informed and believes that Defendants begin selling to former salons/customers of Pontiler in December 2018.

19. Pontiler gave up significant other relationships and economic advantages, attending other business endeavors in order to pursue the benefits of the Agreement at issue, all to its detriment.

20. Defendants also made various misrepresentations to Pontiler in order to induce it to enter the Agreement,

thereby forgoing other possible business opportunities and to effectively "tie up" Pontiler while OPI pursued other distribution channels. In fact, it is alleged OPI never intended to honor the Agreement at issue and thus committed promissory fraud.

21. Defendants also intentionally interfered with Pontiler's prospective economic advantage in relations to the latter's efforts to utilize and exploit its distribution Channel throughout the territory in the agreement so as to enjoy the benefits, not only the agreement, but also the relationships then existing for distribution of OPI products.

22. Pontiler had relationships with multiple outlets and retailers for OPI products, of which OPI was aware, but subverting the Agreement at issue, caused Pontiler to lose these deals.

FIRST CAUSE OF ACTION
Breach Of Contract
(Against All Defendants)

23. Plaintiff repeat and re- allege each and every allegation contained in paragraphs 1 through 22, inclusive, as though set forth in full herein.

24. In order to capitalize on OPI's brand name and reach, Pontiler executed in or around October 2001 an Agreement that provided Pontiler with, among other things, the exclusive right to import OPI products in the territory of Uruguay as reflected in paragraph 10(f) of said Agreement.

25. Pontiler has performed all terms and conditions required of it under the terms of the Agreement.

26. Defendants breached the Agreement by (1) selling/distributing OPI or substantially similar products in Uruguay in violation of paragraph 10(f) and

by (2), terminating disagreement on December 31st, 2014. There was, in fact, no proper notice given in this case. Further no cause existed for terminating the Agreement a specified in paragraph 17 of the Agreement.what is more, OPI is believed to have simply found other distributors in the subject territory, and thus terminated this Agreement in bad faith in order to further those relationships.

27. As a direct and proximate result of OPI's conduct as alleged herein, Pontiler is entitled to damages in an amount to be proven at trial but in no event less than 10 million dollars ($10,000,000).

SECOND CAUSE OF ACTION
Breach Of The Implied Covenant Of Good Faith And Fair Dealing
(Against All Defendants)

28. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 27, inclusive, as though set forth in full herein.

29. As a result of the contractual relationship, which existed between Pontiler and OPI, the expressed and implied promises made in connection with that relationships, and the acts, conduct, and communications resulting in these implied promises, defendants promised to act in good faith toward and deal fairly with Pontiler, which requires, among other things, that:

(a) Each party in the relationship must act with good faith toward the other concerning matters related to the agreement.

(b) Each party in the relationship must act with fairness toward the other concerning all matters related to the agreement;

(c) Neither party would take any action to unfairly prevent the other from obtaining the benefits of the relationship;

(d) Defendants would comply with its own representations, rules, policies, and procedures in dealing with Plaintiff;

(e) Defendants would not terminate the agreement without a fair and honest cause, regulated by good faith on defendants' part;

29. OPI's breach of the covenant of good faith and fair dealing was a substantial factor in causing damage and injury to Pontiler. As a direct and proximate result of defendants' unlawful conduct alleged in this Complaint, including but not limited to (1) wrongfully competing with Pontiler by distributing OPI products and substantially similar products to other business entities in Uruguay and (2) wrongfully terminating the Agreement without cause in order to further those relationships, and (3) selling directly to Plaintiff's former customers after terminating the Agreement, OPI lost its relationships with multiple outlets and retailers for OPI product, of which OPI was aware. Pontiler lost these business relationships, and the expected revenue therefrom as a result of Defendants subverting the Agreement at issue.

30. Pontiler is informed and believes and alleges on that basis that Defendants engaged in the foregoing wrongful conduct willfully, fraudulently, oppressively, and maliciously, with the intent to injure Pontiler. As a result, Plaintiff Is entitled to exemplary and punitive damages in an amount sufficient to punish the defendant and to deter them as well as others from such conduct in the future.

THIRD CAUSE OF ACTION

(Promissory Fraud)
(Against All Defendants)

31. Pontiler repeat and re-alleges each and every allegation contained in paragraphs 1 through 30, inclusive, as though set forth in full herein.

32. In order to induce Pontiler to enter into the Agreement addressed herein, OPI made various materially misleading and outright false statements of fact both orally and in written form. Those misrepresentations have been described above and include but are not limited to immediately distributing OPI or substantially similar products to other business entities in Uruguay and then terminating the Agreement without cause in violation of paragraphs 10(f) and 17 then selling OPI products to Plaintiff's previous customers.

Defendants misrepresented their intentions to Plaintiff who was told that Defendants would not engage in any of the conduct described above in exchange for Plaintiff developing a market for OPI products in Uruguay. The last act in Defendants fraud occurred in December 2018 when Defendants begin selling directly to Plaintiff's former customers.

33. At the time Defendant made these representations, it knew them to be false.

34. Pontiler was ignorant of the falsity of Defendant's representations as the time they were made. Its reliance on Defendant's misrepresentations was justified in that it had no reason to believe Defendant would so flagrantly misrepresent the facts, which largely induced Plaintiff to contract with Defendant.

35. As a direct and proximate result of Defendant's conduct as alleged herein, Plaintiff has suffered and will suffer substantial damages in a sum, which is as yet

unknown but which exceeds the jurisdiction of this Court.

36. Plaintiff is informed and believes and alleges on that basis that as a further direct and proximate result of Defendant's conduct as alleged herein, Defendant has unlawfully and wrongfully derived income and profits, and have been unjustly enriched thereby. Thus, Pontiler is entitled to restitution of all income, profits, or other benefits resulting from their conduct as alleged here in in an amount to be proven at trial.

37. Plaintiff is informed and believes and alleges on that basis that Defendants engaged in the foregoing wrongful conduct willfully, fraudulently, oppressively, and maliciously, with the intent to injure Pontiler. As a result, Plaintiff is entitled to exemplary and punitive damages in an amount sufficient to punish Defendant and to deter it as well as others from such conduct in the future.

FOURTH CAUSE OF ACTION
[Unfair Competition Under Cal. Bus. And Prof. Code Sec. 17200 Et Seq.]

38. Pontiler repeats and re-alleges each and every allegation contained in paragraphs 1 through 37, inclusive, as though set forth in full herein.

39. As described above, OPI's act and conduct in violation of Cal. Bus. and Prof. Code Section 17200, et seq. has caused and will continue to cause Plaintiff great and irreparable injury. The harm sustained as a result of Defendant's wrongful acts cannot be adequately compensated or measured in damages.

40. By effectively causing Pontiler to commit to it's exclusive distribution deal with it, while OPI continue to cultivate other distribution avenues in an essentially

unhampered marketplace, with the result Pontiler was squeezed out of its own territory, we believe OPI has committed an unfair business practice and has unfairly competed within the meaning of the law. OPI has also damaged Pontiler business reputation, which will take years to repair as many shots, salons and other businesses had come to rely on Pontiler just apply OPI products at a reasonable price and formed their annual revenue projections based on those figures.

41. Pontiler has no adequate remedy at law and will suffer immediate and irreparable harm, lost, damaged and injury unless Defendant is restrained and enjoined from continuing to engage in such wrongful conduct.

42. By reason of the foregoing, Plaintiff is entitled to an injunction to restrain Defendant from engaging in such further unlawful conduct and is likewise entitled to an attachment of all funds advanced to them. Plaintiff is also entitled to restitution from Defendant to compensate it for injuries sustained as a result of Defendant's unlawful acts.

FIFTH CAUSE OF ACTION
[Intentional Interference With Prospective Economic Advantage]
(Against All Defendants)

43. Pontiler repeats and re-alleges each and every allegation contained in paragraphs 1 through 42 inclusive, as those set forth in full herein.

44. Under California law, a claim for interference with existing economic advantage may be stated where there is shown to be: "(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 destruction of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Westside Center Associates v. Safeway Stores* 23, Inc. 42 Cal.App.4th 507, 521-522 (1996). All of these elements are shown in this case.

45. Here, by effectively causing Pontiler to commit to its exclusive distribution deal with it, OPI continued to cultivate other distribution avenues in an essentially unhampered marketplace, with the result Pontiler was squeezed out of its own territory, we believe OPI has committed an unfair business practice and has unfairly competed within the meaning of the law. OPI has also damaged Pontiler business reputation, which will take years to repair as many shops, salons and other businesses had come to rely on Pontiler to supply OPI products at a reasonable price and formed their annual revenue projections based on those figures. As it stands, many have had to buy from competitors, including the new distributors for which Pontiler was so callously discarded.

SIXTH CAUSE OF ACTION
[Declaratory Relief]
(Against All Defendants)

46. Plaintiff incorporate paragraphs 1 through 45 herein by reference, as though fully set forth herein.

47. Plaintiff seek a declaration of the parties' rights, duties and obligations under the various agreements reference herein,

48. An actual controversy exist as to these matters such that a Judicial Declaration of the parties' respective rights is required.

SEVENTH CAUSE OF ACTION
[Permanent Injunction]
(Against All Defendants)

49. Plaintiffs incorporate paragraphs 1 through 48 herein by reference, as though fully set forth herein.
50. Through their actions above-described, Defendants have, and continue to cause irreparable harm to Plaintiffs and should be permanently enjoined from taking any action in the territories, and they be permanently enjoying from all further actions as described herein.
51. Plaintiffs have no other plain, speedy or adequate remedy, and the injunctive relief prayed for below is necessary and appropriate at this time to prevent irreparable loss to Plaintiffs' interests.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

1. For consequential damages according to proof but in no event less than 10 million dollars ($10,000,000);
2. For an injunction prohibiting Defendants from distributing in the territories;
3. For punitive damages according to proof;
4. For rescission of the agreement identify here in and a return of any and all monies provided to Defendants under those agreements;
5. For cost of suit;
6. For any and all further relief as this Court may deem appropriate.

Dated: April 30, 2019

LAW OFFICES OF JAMES K. AUTREY

James K. Autrey
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demand a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

Dated: April 30, 2019

LAW OFFICES OF JAMES K. AUTREY

James K. Autrey
Attorneys for Plaintiff