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13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 ZL TECHNOLOGIES, INC.,

18 Plaintiff,

19 vs.

20 GARTNER, INC., and
21 CAROLYN DiCENZO

22 Defendants.

CASE NO. 5:09-cv-02393-RS

**DEFENDANTS GARTNER, INC. AND
CAROLYN DICENZO'S MOTION TO
DISMISS PLAINTIFF'S COMPLAINT**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[FED. R. CIV. P. 12(b)(6)]

Date: August 19, 2009

Time: 9:30 a.m.

Dept.: Courtroom 4, 5th Floor

Judge: Richard Seeborg

STATEMENT OF ISSUES (Civ. L. R. 7-4(a)(3))

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1. Are plaintiff's causes of action barred by the First Amendment where they allege subjective statements of opinion by a member of the media on a matter of public concern?

2. Can plaintiff adequately state its various causes of action where it fails to allege a false or misleading statement of fact by defendants, but instead alleges subjective statements of opinion by a member of the media?

3. Does plaintiff lack standing to assert claims under section 43(a) of the Lanham Act and sections 17200 and 17500 of the California Business and Professions Code where, *inter alia*, it does not compete with defendant and has not detrimentally relied on defendant's representations or actions?

4. Can plaintiff adequately state claims for false advertising based upon research reports that are not intended to influence the general public to buy defendant's products or services, but instead are sold to technology executives who purchase the reports for opinions on products *other* than the defendant's?

5. Can plaintiff adequately state a claim for negligent interference with prospective economic advantage where it fails to allege a "special relationship" giving rise to a duty of care?

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Preliminary Statement**

3 The Complaint in this action alleges seven causes of action, each of which depends upon
 4 allegation of a false or misleading statement of fact in order to survive a motion to dismiss. The
 5 Court can search plaintiff's Complaint high and low, but it will not find anywhere such a false or
 6 misleading statement of fact. Instead, the Court will find that the bulk of the Complaint is devoted
 7 to plaintiff's self-satisfied opinions about its own product, occupying a full twelve pages of the
 8 Complaint. Whether plaintiff's opinions about its product are correct, comprehensible or sincere
 9 has no legal significance; what matters is that the Complaint fails to state a claim because it
 10 attacks opinions expressed by Gartner, Inc. These opinions are constitutionally protected, in part
 11 to discourage lawsuits like this one, which are aimed at chilling the free expression of ideas and
 12 opinions. Not surprisingly, the statutory and common law of California recognize the same basic
 13 principle that expression of opinion cannot be actionable. These rules protecting free expression
 14 of opinion are vital to Gartner, Inc., whose business and reputation depend on the continued ability
 15 to offer its views openly and honestly without fear of retaliatory lawsuits which seek to use the
 16 judicial process to coerce changes in its opinions.

17 **Factual Background**

18 ***1. The Parties***

19 Plaintiff ZL Technologies ("ZL") is a California corporation that sells products that archive
 20 electronic data. Complaint ¶¶ 1, 20. Specifically, ZL's products are sold to "large enterprises to
 21 store, index, search, extract and purge electronic data, primarily in the form of email and files."
 22 *Id.* ¶ 20. Founded in 1999, ZL is primarily self-funded, and has not taken significant amounts of
 23 venture capital. *Id.* ¶¶ 20, 21. The target market for ZL's archiving products is large enterprises,
 24 not individual consumers. *Id.* ¶ 20.

25 Defendant Gartner Group, Inc. is a leading, worldwide information technology research
 26 and advisory company. *Id.* ¶ 2. Gartner, Inc. provides high-quality research and analysis of the
 27 information technology industry to paying corporate customers and their executives, such as
 28

1 “CIOs” and other technology leaders. *Id.* ¶ 15. One of the many services and products Gartner,
2 Inc. provides is the publication of its “Magic Quadrant” report. *Id.* ¶ 5. These reports are not
3 publicly available, but instead are purchased by sophisticated technology executives and investors.
4 *Id.* ¶¶ 15, 16.

5 Defendant Carolyn DiCenzo (herein collectively referred to along with Gartner, Inc. as
6 “Gartner”) is Gartner, Inc.’s lead analyst for the email active archiving market. *Id.* ¶ 3.

7 **2. ZL’s Allegations**

8 As ZL acknowledges in the Complaint, “[a]t the core of this action” are statements that
9 Gartner made “as an influential member of the media.” Complaint ¶ 10. These statements are
10 alleged to be “Defamatory Statements” (referred to herein as “Statements”). The Statements
11 forming the basis for each of ZL’s causes of action are identified at paragraphs 28 through 35 of
12 the Complaint. ZL divides the alleged statements into three categories: (1) the Magic Quadrant
13 placements, (2) “Cautions” in the Magic Quadrant reports, and (3) “Other” statements.

14 The “Magic Quadrant” Placements. The first and primary category of Statements alleged
15 by ZL is the “placement” by Gartner of ZL in Gartner’s annual Magic Quadrant reports on the
16 email active archiving market. Complaint ¶ 32.

17 A “Magic Quadrant” report is a “research report” sold by Gartner to its private enterprise
18 customers. *Id.* ¶¶ 5, 28. According to ZL, the Magic Quadrant assigns technology vendors such
19 as ZL to a particular placement on a four-part grid (from which the Magic Quadrant derives its
20 name). *Id.* ¶¶ 5, 29. ZL alleges that the locations of the various vendors on the grid purportedly
21 signify which products should be considered for purchase by Gartner’s customers. *Id.* ¶¶ 5, 36.
22 ZL’s primary grievance in this case apparently arises from the fact that Gartner places ZL in the
23 “Niche” quadrant on the lower left side of the grid, while Gartner places Symantec Corporation
24 (another email archiving company) in the “Leader” quadrant on the upper right side of the grid.
25 *Id.* ¶ 6.

1 ZL's complaint expressly alleges that the Magic Quadrant is "highly subjective." *Id.* ¶ 71.
2 According to ZL, "[t]here is no mathematical discipline which can compute to a definitive point
3 on the MQ map. . . . [T]he process must necessarily degrade into a subjective assessment . . ." *Id.*

4 ZL's characterization of the Magic Quadrant as subjective is consistent throughout the
5 Complaint. The complaint alleges that the Magic Quadrant grid contains two axes, "Ability to
6 Execute" and "Completeness of Vision." *Id.* ¶ 29. The "Ability to Execute" axis is based on
7 "quality of goods and services, overall viability, sales execution, market responsiveness and track
8 record, marketing execution, customer experience, and operations." *Id.* ¶ 30. The "Completeness
9 of Vision" axis is likewise based on intangibles, including "market understanding, market strategy,
10 sales strategy, product strategy, business model, industry strategy, innovation, and geographic
11 strategy." *Id.* ¶ 31. Each of the criteria for both axes of the Magic Quadrant have subcategories
12 that are similarly qualitative. For example, the "Ability to Execute" criterion for quality of goods
13 and services includes subcriteria such as "capabilities, quality, [and] feature sets." *Id.* ¶ 30.

14 As plaintiff alleges, none of Gartner's reports or statements involves a "single minute of
15 independent testing of the products" sold by the vendors. *Id.* ¶ 19. Rather, the Magic Quadrant
16 "states that it is focused on products that were 'able to prove, through strong references, their
17 ability to address the needs of'" customers. *Id.* ¶ 28. As ZL alleges, Gartner makes clear that its
18 Magic Quadrant rankings are driven not only by "good product" but also by "good sales and
19 marketing." *Id.* ¶ 9. The Complaint quotes the 2009 Magic Quadrant Report for the email active
20 archiving market, which states that "[i]t is important to remember that the Magic Quadrant does
21 not just rate product quality or capabilities. While the product is an important part of the rating,
22 the vendor's ability to capture customers and expand its presence in the market and to grow . . .
23 revenue is also important." *Id.* According to ZL, this disclosure by Gartner renders the Magic
24 Quadrant reports "market puffery", not "serious technology". *Id.* ¶ 10.

25 "Cautions" in the Magic Quadrant Reports. The "Cautions" category of Statements
26 comprises a single Statement from Gartner's 2008 Magic Quadrant report cited at paragraph 33 of
27 the Complaint: "ZL is primarily a product and engineering-focused company. To remain a viable
28

1 vendor in the market, the company must gain greater visibility and more aggressively expand its
2 sales channels.”

3 “Other Statements”. ZL provides only one example of a Statement in the “Other
4 Statements” category, alleged at paragraph 33 of the Complaint: “For instance, Ms. DiCenzo [a
5 Gartner analyst] told one ZL prospect that the ZL products and Symantec’s Enterprise Vault (EV)
6 ‘were the same.’”

7 **3. *The “Truth”, According to ZL***

8 Based upon twelve pages of the Complaint which appear to have been lifted from a
9 product brochure or white paper (*see* Complaint ¶¶ 40-67), ZL claims that Gartner’s Statements
10 are “literally false.” *Id.* ¶ 40. ZL alleges that its products are “far superior” to the products of
11 Symantec, and claims that it is actionable that Gartner placed Symantec in the purportedly more
12 desirable “Leader” quadrant of its Magic Quadrant reports. *Id.* ¶¶ 6, 7. In support of this claim,
13 ZL cites “overwhelming concerns about Symantec in the public domain, and ZL’s own protests
14 that ZL was the only product that could serve the large enterprise market.” *Id.* ¶ 87. ZL further
15 cites the recent sale of its products to a large, unidentified Silicon Valley company as proof that
16 Gartner’s placement of ZL on the Magic Quadrant must be “false.” *Id.* ¶ 40.

17 According to ZL, the root of the alleged deficiencies in Gartner’s Magic Quadrant analysis
18 lies in Gartner’s (disclosed) reliance on the “good sales and marketing” capabilities of email
19 archiving vendors. *Id.* ¶¶ 9, 10. While Gartner states that it focused on a company’s sales and
20 marketing because they are required to fund future development, *id.* ¶ 9, ZL claims that this
21 (disclosed) analytical framework creates a “misleading impression” because it resulted in ZL’s
22 placement in the Magic Quadrant “Niche” category. *Id.* ¶¶ 10, 32. ZL argues that Gartner was
23 “wrong” in its “assessment” of ZL because it gave undue weight to “sales and technology” and,
24 allegedly, is “consistently biased in favor of larger companies.” *Id.* ¶ 10.

Argument

I. LEGAL STANDARD

A complaint may be dismissed as a matter of law pursuant to Federal Rule of Civil Procedure 12(b)(6) for one of two reasons: “(1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim.” *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996); *see also Axis Imex, Inc. v. Sunset Bay Rattan, Inc.*, No. C 08-3931 RS, 2009 WL 55178, at *2 (N.D. Cal. Jan. 7, 2009) (same); Fed. R. Civ. P. 12(b)(6).

II. EACH OF THE CAUSES OF ACTION FAILS BECAUSE EACH IS BASED ON NONACTIONABLE OPINION

A. Each Cause of Action Requires a False or Misleading Statement of Fact, Not Opinion.

ZL enumerates seven distinct causes of action against Gartner. To survive a motion to dismiss they all require allegation of a common element: that Gartner has made a false or misleading statement of fact. Under state and federal constitutional law—as well as the statutory law and common law pertaining to each of ZL’s causes of action—statements of opinion are nonactionable and cannot be the basis for a valid legal claim.

1. ***Expressions of Opinion Are Nonactionable Protected Speech Under the First Amendment.***

Expressions of opinion on matters of public concern are entitled to the protections of the First Amendment and Article I, Section 2 of the California Constitution. *See Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995); *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1041 (1986). Under the First Amendment, a protected “opinion” is one that does not assert or imply facts capable of being proven true or false. *See Partington*, 56 F.3d at 1153. As protected speech, expressions of such opinions on matters of public concern are nonactionable. *See id.* at 1156 (“[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.”) (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993);

1 *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254 (1986) (affirming dismissal of action
2 against newspaper based upon nonactionable, constitutionally protected expressions of opinion in
3 a published review of a television show); *see also Aviation Charter, Inc. v. Aviation Research*
4 *Group/US*, 416 F.3d 864, 871 (8th Cir. 2005) (air safety rating for charter services held
5 nonactionable due to First Amendment protections where the rating constituted a “subjective
6 interpretation of multiple objective data points leading to a subjective conclusion about aviation
7 safety”); *Jefferson County School Dist. No. R-1 v. Moody’s Investor’s Servs., Inc.*, 175 F.3d 848,
8 855-56 (10th Cir. 1999) (bond rating of “negative outlook” held nonactionable opinion under First
9 Amendment); *TMJ Implants, Inc. v. Aetna, Inc.*, 405 F. Supp. 2d 1242, 1251-52 (D. Colo. 2005)
10 (insurance company’s negative policy bulletin on medical device held nonactionable and protected
11 by the First Amendment because the company’s opinion depended in part “on factors not provably
12 true or false” and thus the resulting “opinion [was] not provably false”).

13 These First Amendment protections extend equally to media and non-media defendants,
14 *see Hofmann Co. v. E.I. Du Pont de Nemours & Co.*, 202 Cal. App. 3d 390, 403 (Cal. Ct. App.
15 1988), and explicitly have been held to apply to publications reviewing commercial products. *See*
16 *Lowe v. SEC*, 472 U.S. 181, 210 n.58 (1985) (“[W]e have squarely held that the expression of
17 opinion about a commercial product . . . is protected by the First Amendment”) (citing *Bose Corp.*
18 *v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984)). Further, the “broad protection” of
19 the First Amendment “is not diminished when the expression at issue is published and sold for
20 profit.” *In re County of Orange*, 245 B.R. 138, 143 (C.D. Cal. 1997) (citing *Time, Inc. v. Hill*, 385
21 U.S. 374, 397 (1967)). First Amendment protections are not limited to traditional causes of action
22 for falsehood such as defamation, but instead are “applicable to all claims, of whatever label,
23 whose gravamen is the alleged injurious falsehood of a statement.” *Blatty*, 42 Cal. 3d at 1044-45
24 (holding cause of action for intentional interference with prospective economic advantage barred
25 by the First Amendment).

26 2. ***ZL’s Causes of Action May Not Be Based on Statements of Opinion.***

1 As set forth below, each of ZL's claims requires an allegation of a false or misleading
2 statement of fact. Like the Constitution, the applicable statutes and common law make clear that
3 causes of action which solely attack opinions should be dismissed.

4 (a) A Defamation Claim May Not Be Based on Opinion.

5 ZL's first cause of action alleges that Gartner's Statements disparaged ZL's business
6 reputation, constituting defamation. Complaint ¶¶ 95-101. Statements of opinion cannot give rise
7 to a cause of action for defamation. *Jensen v. Hewlett-Packard Co.*, 14 Cal. App. 4th 958, 970
8 (Cal. Ct. App. 1993). A prima facie claim of defamation arises from a "false and unprivileged
9 publication . . . which exposes [a] person to hatred, contempt, ridicule, or obloquoy, . . . or which
10 has a tendency to injure him [or her] in his [or her] occupation." *Id.* at 969-70 (citing Cal. Civ.
11 Code §45). A defamation claim "must contain a false statement of fact." *Id.* at 970 (quoting
12 *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596, 600 (1976)). Mere opinion will not suffice;
13 a statement of opinion "cannot be false." *Id.* (quoting *Tschirky v. Superior Court*, 124 Cal. App.
14 3d 534, 539 (Cal. Ct. App. 1981)); *see also Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113,
15 1120 (C.D. Cal. 1998), *aff'd*, 210 F.3d 1036 (9th Cir. 2000) (dismissing defamation claim with
16 prejudice under Rule 12(b)(6) because statements at issue were opinion, not susceptible of being
17 proven true or false).

18 (b) A Trade Libel Claim May Not Be Based on Opinion.

19 ZL's second cause of action alleges that Gartner's Statements disparaged the quality of
20 ZL's products, constituting trade libel. Complaint ¶¶ 102-106. Like defamation, trade libel
21 requires a false statement, and cannot be based on opinion. *ComputerXpress, Inc. v. Jackson*, 93
22 Cal. App. 4th 993, 1010 (Cal. Ct. App. 2001). To make out a claim for trade libel, a plaintiff must
23 allege (1) a false statement (2) concerning the quality of services or product of a business (3)
24 which are intended to cause that business financial harm and (4) in fact cause pecuniary loss. *Id.*
25 "To constitute trade libel, a statement must be false." *Id.* "Since mere opinions cannot by
26 definition be false statements of fact, opinions will not support a cause of action for trade libel."
27 *Id.*

1 (c) A Lanham Act False Statements Claim May Not Be Based on
2 “Vague and Subjective” Statements.

3 ZL’s third and fourth causes of action allege false statements by Gartner concerning
4 Gartner’s own services and the products of Symantec, respectively, constituting violations of
5 section 43(a) of the Lanham Act. Complaint ¶¶ 107-117. These claims also require false or
6 misleading representation of fact, not vague and subjective opinions. *Coastal Abstract Serv., Inc.*
7 *v. First Am. Title Ins. Co.*, 173 F.3d 725, 730-31 (9th Cir. 1999). To make out a false
8 advertisement claim under section 43(a) of the Lanham Act, a plaintiff must allege “(1) “a false
9 statement of fact by the defendant in a commercial advertisement about its own or another’s
10 product; (2) the statement actually deceived or has the tendency to deceive a substantial segment
11 of its audience; (3) the deception is material . . . ; (4) the defendant caused its false statement to
12 enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the
13 false statement . . .” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir.
14 1997). No claim lies under section 43(a) absent a “false or misleading representation of fact.”
15 *Coastal Abstract Serv.*, 173 F.3d at 730. Statements that are “vague and subjective” are not
16 actionable; to be actionable, a statement must include a “specific and measurable claim, capable of
17 being proved false or of being reasonably interpreted as a statement of objective fact.” *Id.* at 731
18 (holding that defendant’s statement that plaintiff was “too small” to handle a large customer’s
19 business was not an actionable false or misleading statement of fact).

20 (d) A California False Advertising Claim May Not Be Based on
21 Opinion.

22 ZL’s fifth cause of action alleges that Gartner’s Magic Quadrant reports constitute false or
23 misleading advertising in violation of 17500 *et seq.* of the California Business and Professions
24 Code. Complaint ¶¶ 118-120. California’s false advertising law prohibits “unfair, deceptive,
25 untrue, or misleading advertising.” Cal. Bus. & Prof. Code § 17500. To make out a claim of false
26 advertising, a plaintiff must allege a “false statement of fact” or “misdescription of specific or
27 absolute characteristics of a product.” *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 973
28

1 (N.D. Cal. 2008). “Generalized, vague, and unspecified assertions . . . are not actionable.” *Id.*
2 (granting motion to dismiss false advertising claim under section 17500 because the alleged
3 characterization of products as exhibiting “higher performance,” longer battery life,” “richer
4 multimedia experience,” and “faster access to data” were all nonactionable); *see also Bernardo v.*
5 *Planned Parenthood Fed’n of Am.*, 115 Cal. App. 4th 322, 349-50, 356 (Cal. Ct. App. 2004)
6 (finding insufficient likelihood of success for injunctive relief on false advertising and unfair
7 competition claims based on statements of “opinion” on a subject of genuine scientific dispute,
8 rather than “false, misleading or deceptive representations of fact”).

9 (e) ZL’s California Unfair Competition Claim May Not Be Based on
10 Opinion.

11 ZL’s sixth cause of action alleges that Gartner’s Statements and “false Expertise Claims”
12 constitute unfair competition in violation of sections 17200 *et seq.* of the California Business and
13 Professions Code. Complaint ¶¶ 121-124. ZL’s unfair competition claim, as pleaded, requires a
14 false or misleading statement of fact, not opinion. *Bernardo*, 115 Cal. App. 4th at 349-50, 356.
15 “Unfair competition” under section 17200 “means conduct that threatens an incipient violation of
16 an antitrust law, or violates the policy or spirit of one of those laws because its effects are
17 comparable to or the same as a violation of the law, or otherwise significantly threatens or harms
18 competition.” *Arizona Cartridge Remanufacturers Ass’n, Inc. v. Lexmark Int’l, Inc.*, 421 F.3d
19 981, 986 (9th Cir. 2005) (quoting *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20
20 Cal.4th 163, 187 (1999)). A violation of the false advertising law, section 17500 of the California
21 Business and Professions Code, may also give rise to a violation of the unfair competition
22 provision. *Id.* ZL does not allege an incipient violation of an antitrust law or similar threat to
23 competition. The only alleged bases for ZL’s claim are the false statements, and thus the
24 requirements are the same here as under 17500: ZL must allege “false statement of fact” or
25 “misdescription of specific or absolute characteristics of a product.” *Oestreicher*, 544 F. Supp. 2d
26 at 973. “Opinion” will not suffice. *Bernardo*, 115 Cal. App. 4th at 349-50, 356.

(f) ZL's Negligent Interference with Prospective Economic Advantage
May Not Be Based on Opinion.

ZL's seventh and final cause of action alleges that Gartner negligently interfered with ZL's relations with prospective customers, thereby causing ZL damage. Complaint ¶¶ 125-128. Like all of ZL's other claims, this last claim, as pleaded, requires a false or misleading statement of fact. To make out a claim for negligent interference with prospective economic advantage under California law, a plaintiff must allege (1) an economic relationship between the plaintiff and a third party; (2) the defendant knew of the existence of the relationship; (3) the defendant was negligent; and (4) the defendant's negligence caused damage to the plaintiff in that the relationship was actually interfered with or disrupted and the plaintiff lost in whole or part the economic advantages reasonably expected from the relationship. *N. Am. Chem. Co. v. Superior Court*, 59 Cal. App. 4th 764, 786 (Cal. Ct. App. 1997). The sole alleged act of negligence upon which ZL premises this cause of action is Gartner's publication of the Statements "knowing that they were false, or recklessly disregarding the falsity of those statements." Complaint ¶ 127. ZL's negligent interference claim thus requires an allegation that the Statements published by Gartner were "false." *Cf. Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1075-76 (C.D. Cal. 2002) (holding that, where negligence claim was based on allegedly false statements, negligence claim was coextensive with plaintiff's defamation claim and, accordingly, failed with the defamation claim).

B. The Complaint Alleges Nonactionable Opinions, Not False Statements of Fact.

1. ***The Magic Quadrant Reports and Other "Statements" Are Clearly Opinion.***

As set forth above, opinions are protected by the state and federal constitutions and cannot form the basis of a claim under any of ZL's causes of action. Thus, to survive a motion to dismiss, ZL must set forth allegations that Gartner's placement of ZL in its Magic Quadrant report constituted a false or misleading statement. The actual substance of the Complaint alleges the

1 opposite: the false or misleading statements at issue here, ZL alleges, are subjective, unmeasurable
 2 and, says ZL, based on market puffery. Specifically, ZL’s Complaint alleges that:

- 3 • The Magic Quadrant is “highly subjective.” Complaint ¶ 71.
- 4 • “There is no mathematical discipline or process disclosed which can compute to a
 5 definitive point on the [Magic Quadrant] map.” *Id.*
- 6 • In the absence of a mathematical discipline for determining Magic Quadrant
 7 placement, “the process must necessarily degrade into a subjective assessment.” *Id.*
- 8 • The Magic Quadrant reports “do not involve a single minute of independent testing
 9 of the products that Gartner purports to evaluate.” *Id.* ¶ 19.
- 10 • The Magic Quadrant reports promote “market puffery” over “serious technology.”
Id. ¶ 10.

11 This conclusion that the Magic Quadrant is opinion is buttressed by the text of the Magic
 12 Quadrant reports themselves.¹ As the 2008 Magic Quadrant report prominently announces,
 13 “[p]lacement on the Magic Quadrant each year is based on Gartner’s *view* of the vendor’s
 14 performance.” 2008 Magic Quadrant Report for E-Mail Active Archiving at 3 (emphasis added).
 15 The report further explains:

16 Shaping that view are more than 1,000 conversations over this past year with
 17 Gartner customers, . . . survey responses and updates from the vendors . . . , and
 18 over 70 conversations with vendor-supplied references We learn from these
 19 conversations not only why a client is choosing or has chosen a specific vendor,
 20 but why it did not choose other vendors that were on its shortlist. We also learn
 about experiences running the product in production environments and how
 effective the vendors are in responding to client issues. . . . Prior to publication,
 each vendor has the opportunity to look at its placement on the Magic Quadrant
 and the strengths and challenges listed, and respond to any factual errors.

24 ¹ As stated in the Request for Judicial Notice accompanying this motion, judicial notice of
 25 the Magic Quadrant reports is appropriate even though they were not physically attached to the
 26 Complaint. Under the Ninth Circuit’s “incorporation by reference” doctrine, the Court may
 27 consider documents such as the Magic Quadrant reports that are “referenced extensively in the
 28 complaint and . . . accepted by all parties as authentic.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (citing *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999)).

1 *Id.* It is plain from the face of the report that it does not purport to be anything other than a
2 statement of “Gartner’s view,” a view which is itself derived from the opinions of those in the
3 industry.

4 Moreover, the Magic Quadrant reports make clear that the criteria for placement are not
5 measurable quantities or hard facts. For example, one of the axes of the Magic Quadrant tracks
6 the vendors’ “Completeness of Vision”, an inherently vague, qualitative judgment that cannot be
7 characterized as a false or misleading “statement of fact.” Indeed, the Report confirms that the
8 criteria used to measure “Completeness of Vision” are undeniably qualitative:

9 A vendor’s completeness of vision is evaluated based on its ability to
10 convincingly articulate its future product direction and demonstrate innovation in
11 meeting customer needs, enabling the vendor to more effectively compete in the
12 market. The credibility of a vendor’s vision is weighed against its past ability to
13 execute against previously stated plans. Market understanding should be the
14 guiding factor in new product development to ensure that the product engineered
15 meets customer needs. Managing the complexity of storage environments
16 requires innovative approaches that will distinguish leaders and delight customers.

17 2007 Magic Quadrant Report for Email Active Archiving at 6. The fact that these criteria are
18 themselves qualitative and not provably true or false further dictates that the resulting placement
19 on the Magic Quadrant cannot be a factual statement. *See Jefferson County*, 175 F.3d at 855-56
20 (bond rating of “negative outlook” nonactionable opinion because, “[I]ike the statement of a
21 product’s value, a statement regarding creditworthiness of a bond issuer could well depend on a
22 myriad of factors, many of them not provably true or false”); *TMJ Implants*, 405 F. Supp. 2d at
23 1252 (resulting opinion from multi-factor evaluation of a medical device not actionable because it
24 was based, “at least in part, on factors not provably true or false”).

25 It is evident from the very format of the Magic Quadrant that the depicted information
26 cannot be a provable “statement of fact.” Absent from the two axes defining the outer limits of the
27 grid—“Ability to Execute” and “Completeness of Vision”—is any indication of a measurable unit
28 or interval, not even any tick marks to suggest a regular, measurable interval. *See 2009 Magic*
Quadrant Report for Email Active Archiving at 3. Thus, the Magic Quadrant format itself rebuts
any suggestion that it is a statement of fact.

1 ZL acknowledges that Gartner recognized ZL's products for "great product performance as
2 well as good prices and consistent support," and factored those achievements into the Magic
3 Quadrant analysis. Complaint ¶ 74. ZL nonetheless alleges that the reports are "false" because
4 they give greater weight to vendors' marketing and sales capabilities than ZL thinks is appropriate.
5 ZL repeatedly accuses Gartner of giving "undue weight to sales and marketing" thereby biasing
6 the results "in favor of large companies—that generally have lavish sales and marketing budgets."
7 *Id.* ¶ 10; *see also id.* ¶¶ 9, 91 (same). This is plaintiff's chief complaint; as ZL itself states, "[a]t
8 the core of this action" lies "an economic model championed by Defendants that elevates market
9 puffery over serious technology." *Id.* ¶ 10; *See also id.* ¶¶ 70-74 (critiquing Gartner's Magic
10 Quadrant model in detail).

11 ZL's claim of bias in favor of "large companies" is belied by the Magic Quadrant reports
12 themselves. Appearing in the same "Niche" category as ZL are a number of very large companies
13 including IBM, Hewlett Packard, and EMC. *See* 2009 Magic Quadrant Report for Email Active
14 Archiving at 3; 2008 Magic Quadrant Report for Email Active Archiving at 3. ZL's protest boils
15 down to a dispute over methodology, not a legally cognizable claim (even if Gartner had not
16 plainly disclosed the criteria on which it relies). *See* Complaint ¶ 9. The Magic Quadrant reports
17 state Gartner's opinion that a "good product" is not enough to elevate a company to "Leader"
18 status; sales and marketing are critical factors and Gartner gives them great weight. *See id.* The
19 sophisticated technology executives who purchase Gartner's reports—indeed, only large
20 enterprises need the sort of archiving products discussed in the Magic Quadrant reports at issue
21 here—are free to agree or disagree with Gartner's criteria and opinions, for they are just that:
22 opinions.

23 The remaining Statements of which ZL complains are similarly non-factual. ZL cites two
24 other allegedly defamatory Statements in addition to the placement of ZL in the Magic Quadrant:

- 25 • "ZL is primarily a product and engineering-focused company. To remain a viable
26 vendor in the market, the company must gain greater visibility and more
27 aggressively expand its sales channels." *Id.* ¶ 33.

- “The ZL Products and Symantec’s Enterprise Vault (EV) ‘were the same.’” *Id.* ¶ 34.

Both statements clearly express Gartner’s opinions regarding ZL, and could not be taken to suggest “specific and measurable claim[s], capable of being proved false or of being reasonably interpreted as a statement of objective fact.”² *Coastal Abstract Serv.*, 173 F.3d at 730. Indeed, the first statement is clearly an opinion or prediction—that ZL needs to expand its marketing efforts to succeed—and the second is so general as to resist characterization as a specific, measurable fact.

Thus, all of the allegedly “Defamatory” Statements by Gartner are manifestly *not* statements of fact but of opinion. As such, they (1) are protected by the state and federal constitutions and (2) fail to adequately allege a critical element of ZL’s causes of actions. Whether the Court finds ZL’s claims precluded by the First Amendment and Article I, Section 2 of the California Constitution or deficient for failure to allege a key element, the result is the same: the Complaint must be dismissed.

2. ***Gartner’s “Expertise Claims” Are Likewise Opinion.***

In addition to the six causes of action based on Gartner’s Statements about ZL and Symantec, ZL’s third cause of action is grounded on the allegation that Gartner has made false or misleading statements about its own expertise. *See* Complaint ¶¶ 18, 107-112. Specifically, ZL cites Gartner’s claims that “(a) its research is ‘high quality, independent and objective research’, (b) it is a ‘thought-leader’ in information technology, [and] (c) it can ‘show how to get the best return on your technology investment.’” *Id.* ¶ 18. These statements are clearly subjective claims and are not actionable under section 43(a) of the Lanham Act. *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999) (holding that implication or statement that defendant was large enough to handle a client’s business is not an actionable false or misleading statement of fact). “[V]ague or highly subjective” statements by a business about its own services or products, such as an advertiser’s statement that “lamps were ‘far brighter than any lamp ever before offered for home movies,’” cannot form the basis for a Lanham Act claim. *Cook, Perkiss*

² Nor could either of these Statements reasonably be construed as negative, let alone defamatory.

1 & *Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 245-46 (9th Cir. 1990) (upholding
 2 dismissal of Lanham Act false advertising claim based on nonactionable statement that defendants
 3 were “the low cost commercial collection experts”) (citations omitted). There are no specific,
 4 measurable claims in the statements cited by ZL, and thus they cannot state a cause of action.
 5 Further, because they do not state or imply provably false facts—like the other Statements—they
 6 are protected and nonactionable under the First Amendment and Article I, Section 2 of the
 7 California Constitution.

8 **III. ZL’S CLAIMS PRESENT OTHER UNCURABLE DEFECTS**

9 **A. ZL Lacks Standing to Assert Its False Advertising and Unfair Competition** 10 **Claims.**

11 **1. ZL Lacks Standing to Assert Its Lanham Act Claims.**

12 Even were ZL able to allege sufficient facts to make out the Lanham Act claims asserted in
 13 ZL’s third and fourth causes of action, those claims must be dismissed for lack of standing. “[F]or
 14 standing pursuant to the ‘false advertising’³ prong of § 43(a) of the Lanham Act, 15 U.S.C. §
 15 1125(a)(1)(B), a plaintiff must show: (1) a commercial injury based upon a misrepresentation
 16 about a product; and (2) that the injury is ‘competitive,’ or harmful to the plaintiff’s ability to
 17 compete with the defendant.” *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*,
 18 407 F.3d 1027, 1037 (9th Cir. 2005). ZL fails to state any facts which would establish the second
 19 element of this test. ZL does not allege that it is a competitor of Gartner, that Gartner is itself
 20 taking any business from ZL, nor even that Gartner and ZL share a similar market.⁴ As a non-
 21 competitor, ZL lacks standing to bring a claim under section 43(a), and thus those claims should
 22 be dismissed. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992) (“[S]imple claims

23 ³ The Ninth Circuit has held that there are two distinct causes of action under § 43(a) of
 24 the Lanham Act: (1) actions for “false association” based upon deceptive use of a trademark, and
 25 (2) actions for “false advertising.” *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club,*
 26 *Inc.*, 407 F.3d 1027, 1037 (9th Cir. 2005). ZL’s third and fourth causes of action evidently fall
 within the latter category, as ZL does not allege any deceptive use of its trademarks to create false
 associations.

27 ⁴ As strongly as these arguments apply to Gartner, Inc., they carry even more force with
 28 respect to Carolyn DiCenzo, who clearly cannot be characterized as a “competitor” of ZL.

1 of false representations in advertising are actionable under section 43(a) when brought by
 2 competitors of the wrongdoer...”); *Halicki v. United Artists Commc’ns, Inc.*, 812 F.2d 1213, 1214
 3 (9th Cir. 1987) (“To be actionable [under the Lanham Act], conduct must not only be unfair but
 4 must in some discernible way be competitive...[plaintiff] failed to show injury by a competitor.”);
 5 *Nat’l Servs. Group, Inc. v. Painting & Decorating Contractors of Am., Inc.*, No. SACV06-
 6 563CJC(ANX), 2006 WL 2035465, at *4 (C.D. Ca. July 18, 2006) (indicating that the key to
 7 standing under the Lanham Act is “whether the statement in issue tended to divert business from
 8 the plaintiff to the defendant.”); *see also Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*,
 9 173 F.3d 725, 734 (9th Cir. 1999) (characterizing an injury as “competitive” under the Lanham
 10 Act when an individual officer of First American “sought by his statements to divert business from
 11 Coastal to First American.”).

12 2. ***ZL Lacks Standing to Assert Its California Business & Professions***
 13 ***Code Claims.***

14 ZL’s claims under California Business and Professions Code sections 17200 and 17500
 15 (the fifth and sixth causes of action) likewise fail for lack of standing. Standing to assert a claim
 16 under either provision requires a showing that the plaintiff “has suffered injury in fact and has lost
 17 money or property as a result of such unfair competition.” Cal. Bus. & Prof. Code §§ 17204,
 18 17535. ZL lacks standing here for at least two distinct reasons. First, ZL has not “lost money or
 19 property” as that term has been interpreted by the courts. Second, ZL has failed to show that any
 20 “injury in fact” or “lost or money or property” occurred “*as a result*” of Gartner’s actions, which,
 21 under a recent California Supreme Court decision, requires that ZL allege actual reliance on
 22 Gartner’s statements or actions.

23 (a) Lost Money or Property

24 To meet the “lost money or property” requirement for standing under sections 17204 and
 25 17535 of the Business and Professions Code, ZL must allege losses for which it could obtain
 26 restitution from Gartner for money or property obtained by Gartner from ZL. *See Walker v. USAA*
 27 *Casualty Ins. Co.*, 474 F. Supp. 2d 1168, 1172 (E.D. Ca. 2007) (“[T]he question of what
 28

1 constituted ‘lost money or property’ for purposes of the UCL” should “be interpreted in
2 accordance with the construction already given to the ‘lost money or property’ required to seek
3 restitution under section 17203.”); *Buckland v. Threshold Enters., Ltd.*, 66 Cal. Rptr. 3d 543, 557
4 (Cal. Ct. App. 2007) (“Because remedies for individuals under the UCL are restricted to injunctive
5 relief and restitution, the import of the requirement is to limit standing to individuals who suffer
6 losses of money or property that are eligible for restitution.”). To sufficiently allege a loss of
7 money or property, “a plaintiff must have either prior possession or a vested legal interest in the
8 money or property lost.” *Walker*, 474 F. Supp. 2d at 1172 (citing *Korea Supply Co. v. Lockheed-*
9 *Martin Corp.*, 29 Cal. 4th 1134, 1149-50 (2003)). ZL does not allege that Gartner is now in
10 possession of any money or property in which ZL had any ownership interest. Further, ZL fails to
11 allege any concrete money or property it has lost beyond a mere hope for potential profits from
12 third party customers. The California Supreme Court has explicitly held that “contingent
13 expectancy of payment from a third party” does not constitute lost money or property under
14 sections 17200 or 17500 of the Business and Professions Code, as such an expectation is too
15 attenuated. *Korea Supply*, 29 Cal. 4th at 1150. ZL thus fails to allege “lost money or property” as
16 required to assert standing under sections 17204 and 17535.

17 (b) Reliance

18 To satisfy the requirement under Business and Professions Code section 17204 and 17535
19 that plaintiff’s injury occur “as a result of” defendant’s unfair actions, ZL must “plead and prove
20 *actual reliance*. “ *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009) (emphasis added); *see also*
21 *Medina v. Safe-Guard Prods.*, 164 Cal. App. 4th 105, 115 (Cal. Ct. App. 2008) (“[T]he ‘as a
22 result’ language imports a *reliance or causation* element into Business and Professions Code
23 section 17204.”) “Reliance is proved by showing that the defendant’s misrepresentation or
24 nondisclosure was ‘an immediate cause’ of the plaintiff’s injury-producing conduct.” *In re*
25 *Tobacco II Cases*, 46 Cal. 4th at 326. Here, ZL fails to allege any statements made by Gartner
26 upon which it relied or any conduct ZL engaged in while relying on those statements. All claims
27 of reliance in the Complaint are predicated solely upon third-party reliance rather than reliance by
28

1 ZL itself. ZL even explicitly alleges as part of its claims that Gartner “misled the public.”
 2 Complaint ¶ 120. This fails to meet the requirement of a showing of actual reliance required under
 3 17204 and 17535. *See Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005)
 4 (“Because plaintiffs fail to allege they actually relied on false or misleading advertisements, they
 5 fail to adequately allege causation as required by Proposition 64. Thus, . . . Plaintiffs lack
 6 standing to bring their [unfair competition] and [false advertising] claims.”).

7 **B. ZL’s Lanham Act and California False Advertising Claims Fail Because the**
 8 **Magic Quadrant Reports Do Not Constitute “Advertising”.**

9 Three of the claims asserted by ZL can only be alleged regarding advertisements: the two
 10 claims under the Lanham Act, which proscribes misrepresentation of another’s goods or services
 11 in “commercial advertising or promotion,” and the claim asserted under Business and Professions
 12 Code section 17500 for “false advertising.” Nowhere, however, does ZL allege that Gartner’s
 13 reports in fact constitute advertising. Indeed, under Ninth Circuit precedent, it is clear that the
 14 Magic Quadrant reports **could not** be construed as “advertising”, and thus these claims must fail.

15 The Ninth Circuit has adopted a four part test for determining whether representations
 16 constitute “commercial advertising or promotion:”

17 In order for representations to constitute “commercial advertising or promotion” .
 18 . . . , they must be: (1) commercial speech; (2) by a defendant who is in commercial
 19 competition with the plaintiff; (3) for the purpose of influencing consumers to buy
 20 defendant’s goods or services. While the representations need not be made in a
 21 “classic advertising campaign,” but may consist instead of more informal types of
 “promotion,” the representations (4) must be disseminated sufficiently to the
 relevant purchasing public to constitute “advertising” or “promotion” within that
 industry.

22
 23 *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F. 3d 725, 735 (9th Cir. 1999) (quoting
 24 *Gordon & Breach Sci. Publishers v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1535-36 (S.D.N.Y.
 25 1994)). Gartner’s Statements cannot meet the first three prongs of this test.

26 ZL utterly fails to allege—nor could it—that Gartner is “in commercial competition” with
 27 ZL, and thus it cannot meet the second prong of the *Coastal Abstract* analysis. “Competitors are
 28 ‘persons endeavoring to do the same thing and each offering to perform the act, furnish the

1 merchandise, or render the service better or cheaper than his rival.’’ *Fuller Bros. v. Int’l Mktg.,*
2 *Inc.*, 870 F. Supp. 299, 303 (D. Or. 1994) (quoting Black’s Law Dictionary 257 (5th ed. 1979)).
3 Here, Gartner and ZL are not engaged in providing the same goods or services, nor are they
4 “endeavoring to do the same thing.” Gartner provides research and analysis to the information
5 technology industry, whereas ZL sells software products that archive emails and files. *See*
6 Complaint ¶¶ 15, 20. There is thus no basis upon which it could be alleged that the two companies
7 are commercial competitors.

8 Likewise, ZL fails to allege any facts that would meet the related first and third prongs of
9 the *Coastal Abstract* analysis, “commercial speech” made “for the purpose of influencing
10 consumers to buy defendant’s goods or services.” The U.S. Supreme Court has described the
11 “core notion of commercial speech” as “speech which does no more than propose a commercial
12 transaction.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748,
13 762 (1976). The California Supreme Court has further stated that “commercial speech must
14 consist of factual representations about the business operations, products, or services of the
15 speaker...made for the purpose of promoting sales of, or other commercial transactions in, the
16 speaker’s products or services.” *Kasky v. Nike Inc.*, 27 Cal. 4th 939, 962 (Cal. 2002).

17 The Magic Quadrant reports neither propose a commercial transaction nor make factual
18 representations about Gartner’s products or services for the purpose of selling such services. The
19 Magic Quadrant reports are products that are purchased by technology executives for the views
20 contained therein regarding specific technology markets, *see* Complaint ¶¶ 5, 15; purchasers do
21 not buy the reports for information on Gartner’s own products or services. Except for the
22 “Expertise Claims,” which (as discussed above) are not factual assertions, none of the Statements
23 are representations about Gartner’s operations, products, or services. Moreover, Gartner’s
24 Statements about ZL and Symantec clearly were not made for the purpose of promoting sales of
25 Gartner’s products or services, as they were made about an entity other than Gartner itself.

1 Because ZL cannot satisfy the first three prongs of the *Coastal Abstract* test for
2 “commercial advertising or promotion,” ZL’s Lanham Act and California false advertising claims
3 must fail.

4 **C. ZL’s Negligent Interference Claim Fails Because ZL Does Not Allege a**
5 **“Special Relationship” Creating a Duty of Care.**

6 ZL has not alleged a “special relationship” between Gartner and ZL as required for its
7 claim for negligent interference with prospective economic advantage. The California Supreme
8 Court has held that, absent a contractual duty between the parties, a plaintiff may make out a claim
9 for negligent interference with prospective economic advantage only upon a showing of a “special
10 relationship” giving rise to a duty of care between the plaintiff and defendant. *See J’Aire Corp. v.*
11 *Gregory*, 24 Cal. 3d 799, 804 (1979). Though courts will apply a multi-factor test to determine
12 the existence of a “special relationship,” *see id.*, cases in which such a relationship has been found
13 involve dealings that are contractual in nature or in fact. For example, in *J’Aire Corp.*, the Court
14 found a “special relationship” where plaintiff was essentially the third-party beneficiary of a
15 contract; the defendant was a general contractor who had contracted with the County of Sonoma to
16 improve restaurant premises located at the Sonoma County Airport, and the plaintiff (who sued for
17 damages based on a delay in the work) operated a restaurant in the premises leased from the
18 County. *J’Aire Corp.*, 24 Cal. 3d at 802-08. In *North American Chemical Co. v. Superior Court*,
19 59 Cal. App. 4th 764 (Cal. Ct. App. 1997), where plaintiff chemical company sued its packaging
20 and shipping contractor to recover sums paid in settlement from a customer’s claim regarding a
21 contaminated product, the court found a special relationship based upon an actual contractual
22 relationship. *Id.* at 781-85. *See also Chameleon Eng’g Corp. v. Air Dynamics, Inc.*, 101 Cal. App.
23 3d 418, 422-23 (Cal. Ct. App. 1980) (special relationship found between plaintiff general
24 contractor and defendant parts supplier who was under contract to supply parts to sub-contractor
25 for plaintiff).

26 ZL has not alleged any duty of care or special relationship of the sort found to support a
27 cause of action for negligent interference with prospective economic advantage. The facts alleged
28

1 by ZL similar to those in *Worldvision Enterprises, Inc. v. American Broadcasting Companies*, 142
 2 Cal. App. 3d 589 (Cal. Ct. App. 1983), where the court found no special relationship giving rise to
 3 a duty of care. There, an officer of ABC criticized the level of violence in a television show for
 4 which the plaintiff held residual syndication rights, and the plaintiff brought an action for
 5 negligent interference with prospective economic advantage. *Id.* at 592. Despite the fact that the
 6 case for a special relationship was stronger than that here—the television show criticized by
 7 defendant’s officer was currently showing on ABC—the court declined to find one, noting that
 8 public policy favored defendant’s right to comment on matters of public interest, and that the
 9 criticism in question was delivered in a speech to ABC’s network affiliates, who had an interest in
 10 knowing defendant’s broadcasting philosophy. *Id.* at 596-98. Here, Gartner has no contractual or
 11 commercial relationship with ZL; similar to *Worldvision*, Gartner is merely expressing its views to
 12 a group of paying customers that have a particularized interest in hearing those views. ZL has not
 13 alleged—and could not—a “special relationship” supporting its claim.⁵

14 **IV. ZL’S COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE BECAUSE**
 15 **LEAVE TO AMEND WOULD BE FUTILE**

16 Where it is clear that no relief can be granted under any set of facts, dismissal without
 17 leave to amend is appropriate. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911
 18 F.2d 242, 247 (9th Cir. 1990); *see also Chem v. N.Y. Life Ins. Co.*, 168 F.3d 498, 498 (9th Cir.
 19 1999) (affirming dismissal without leave to amend because amendment would be futile); *In re All*
 20 *Terrain Vehicle Litig.*, 771 F.Supp.1057, 1062 (C.D. Cal. 1991) (denying leave to amend because
 21 further attempts to amend would be futile). There is no set of facts that ZL could plead which
 22 would render Gartner’s Magic Quadrant reports actionable, because, among other defects, ZL
 23 cannot sufficiently allege a false or misleading statement of fact. In order to vindicate the
 24 protections of the state and federal constitutions and guard the free expression of ideas against

25 ⁵ Additionally, ZL’s claim fails because it has not met the “independently wrongful”
 26 requirement for a negligent interference claim set forth in *Della Penna v. Toyota Motor Sales,*
 27 *USA, Inc.*, 11 Cal. 4th 376, 393 (1995). As discussed above, the alleged interference could not, as
 28 a matter of law, be independently wrongful because Gartner’s views are absolutely protected
 speech under the First Amendment and Article I, Section 2 of the California Constitution.

