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

15 ZL TECHNOLOGIES, INC.,

16 Plaintiff,

17 vs.

18 GARTNER, INC., and
19 CAROLYN DiCENZO

20 Defendants.

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

**DEFENDANTS GARTNER, INC. AND
CAROLYN DICENZO'S REPLY IN
SUPPORT OF MOTION TO DISMISS**

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

Date: October 23, 2009

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Judge: Jeremy Fogel

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ARGUMENT

ZL's Complaint and Opposition to Defendant's Motion to Dismiss ("Opposition") frame this suit as a dispute over the quality of ZL's product and services, which, ZL alleges, Gartner has defamed through false statements. Try as it might, ZL cannot create a dispute where there is none. ZL alleges at great length in its Complaint (and recapitulates in its Opposition) that it has a strong product and satisfied customers. The Magic Quadrant reports do not say otherwise; the real point of contention here is not the quality of ZL's product, but instead the subjective analytical model Gartner used to assess ZL's market position and prospects. ZL does not contest Gartner's basic assessments of ZL—that it has a good product but needs to expand its sales and marketing—but ZL challenges its placement on the Magic Quadrant Report because Gartner uses a "misguided analytical model" that gives "undue weight to sales and marketing." Complaint ¶ 10. As the law makes clear, such analysis constitutes non-actionable opinion. None of ZL's arguments dispute this bedrock principle. Instead, ZL focuses on a straw-man defamatory statement (that ZL's product is "inferior") that never appeared in—and is contradicted by—the plain text of the Magic Quadrant reports. Because ZL cannot allege additional facts that will change the content or character of the statements in those reports, this Court should dismiss ZL's Complaint with prejudice—notwithstanding that this is ZL's first Complaint. Denial of leave to amend in this case is particularly important, given the violence the complaint does to rights protected by the First Amendment. As set forth below, ZL seeks to impose litigation costs and the threat of liability for (i) defamatory statements that were not made and (ii) plainly subjective opinions of industry experts. It is difficult to conceive of a complaint that is less worthy of amendment.

I. WHETHER A STATEMENT IS OPINION OR AN ASSERTION OF FACT MAY BE DECIDED ON A MOTION TO DISMISS

ZL contends, citing California law, that determination of whether the statements at issue are assertions of fact or non-actionable opinion must be left to a jury. Opposition at 13. Quite to the contrary, under California law, "it is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a provably false assertion of

1 actual fact.” *Kahn v. Bower*, 232 Cal. App. 3d 1599, 1608 (Cal. Ct. App. 1991). Only if that
2 question is answered in the affirmative does the matter go to the jury “to determine whether such
3 interpretation was in fact conveyed.” *Id.* Similarly—and more to the point—federal courts in the
4 Ninth Circuit determine as a matter of law whether a statement is susceptible to a defamatory
5 meaning, *see Knievel v. ESPN*, 393 F.3d 1068, 1073-74 (9th Cir. 2005), and such determinations
6 are regularly made upon a motion to dismiss. *See id.* at 1073-79 (affirming dismissal of state law
7 defamation claim); *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249 (W.D. Wash. 2007) (dismissing
8 claim where statements were found to be opinion as a matter of law); *see also Jefferson County*
9 *School Dist. No. R-1 v. Moody’s Investor’s Servs., Inc.*, 175 F.2d 848 (10th Cir. 1999) (affirming
10 dismissal where statement was found to be opinion as a matter of law). Thus, this Court need not
11 wait for summary judgment or trial to determine that the statements at issue constitute non-
12 actionable opinion.

13 **II. THE PLAINTIFF REMAINS UNABLE TO IDENTIFY AN ACTIONABLE FALSE**
14 **STATEMENT OF FACT**

15 ZL premises its argument that Gartner’s Magic Quadrant reports contain actionable
16 assertions of fact upon the entirely unfounded—and counterfactual—notion that the Magic
17 Quadrant reports “clearly stated” that ZL and its products were inferior. *See* Opposition at 15. As
18 the Magic Quadrant reports reflect, the statements at issue cannot be reasonably interpreted as
19 express or implied assertions of objective fact. *See Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir.
20 1995).

21 It is undisputed that an expression of pure opinion is protected by the First Amendment
22 and may not form the basis for a civil law suit. *See Partington*, 56 F.3d at 1153. A pure opinion
23 is one that does not imply facts capable of being proved true or false. *Id.* at 1153 n.10. To
24 determine whether a statement constitutes non-actionable opinion rather than an implied assertion
25 of objective fact, the Ninth Circuit applies a three-part analysis considering (1) whether the
26 general tenor of the entire work negates the impression that the defendant was asserting an
27 objective fact, (2) whether the specific content and context of the statements, including the use of
28

1 figurative or hyperbolic language, negate the impression of an assertion of fact, and (3) whether
2 the statement in question is susceptible of being proved true or false. *Id.* at 1153-60; *see also*
3 *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) (same). Applying each somewhat
4 overlapping element of this analysis to the Magic Quadrant reports demonstrates that Gartner’s
5 alleged statements are non-actionable opinion.

6 **A. The General Tenor of the Magic Quadrant Reports Negates the Impression of**
7 **an Assertion of Objective Facts.**

8 The reader of a Gartner Magic Quadrant report could not mistake it for a compendium of
9 objective fact or quantifiable test results. From the title page—which identifies the report as a
10 “*Magic Quadrant*” and notes the contents to be opinion¹—through to the end, it is evident from
11 both tenor and substance that the Magic Quadrant is not the test-driven “Consumer Reports”-style
12 product review the plaintiff suggests. As the plaintiff highlighted in its Complaint, the Magic
13 Quadrant reports “do not involve a single minute of independent testing of . . . products.”
14 Complaint ¶ 19. Instead, as made clear by three statements made at the outset of the report, the
15 Magic Quadrant is subjective in nature. First, the Magic Quadrant reflects Gartner’s “view” of the
16 extent to which products “were able to prove, through their references, the ability to address the
17 needs of an organization looking to support an [email archiving] environment with over 1,000
18 users.” Magic Quadrant Report for 2009 (D.N. 13-4) at 2-3. Second, the Magic Quadrant reflects
19 Gartner’s “view” of the product vendor’s “ability to capture customers and expand its presence in
20 the market.” *Id.* at 3. Third, Gartner bases these “views” upon interviews and surveys of
21 customers and vendors—not any testing. *Id.* In other words, the Magic Quadrant makes clear that
22

23 ¹ *See, e.g.*, Magic Quadrant Report for 2009 (D.N. 13-4) at 1 (disclaiming “all warranties
24 as to the accuracy, completeness, or adequacy” of the report’s information and noting that “[t]he
25 opinions expressed herein are subject to change without notice”). Plaintiff inexplicably claims
26 that Gartner’s Motion “relies heavily on the presence of alleged disclaimers.” Opposition at 12.
27 In fact, Gartner’s moving papers never mentioned them. That said, ZL is wrong to take on this
28 battle: the Ninth Circuit has made clear that disclaimers are important to avoid misinterpretation of
opinion as implied fact. *See Partington*, 56 F.3d at 1155 (noting that authors “must attempt to
avoid creating the impression that they are asserting objective facts rather than merely stating
subjective opinions”).

1 it offers a view of a product’s reception in the market and of the vendor’s capacity to grow—an
 2 evaluation of market position and prospects that is inherently subjective and unmistakably an
 3 expression of opinion. *See Compuware Corp. v. Moody’s Investors Servs., Inc.*, 499 F.3d 520,
 4 522-24, 529 (6th Cir. 2007) (credit rating agency’s negative rating of plaintiff based on pessimistic
 5 assessment of plaintiff’s future prospects held to be non-actionable “predictive opinion”).

6 Beyond the language of the report itself, one factor is critical to understanding the
 7 environment in which the statements in the report are received and understood—its readers. In
 8 evaluating whether First Amendment protections extend to an allegedly defamatory statement,
 9 courts interpret the statement “from the standpoint of the average reader, judging the statement not
 10 in isolation, but within the context in which it is made.” *Knievel*, 393 F.3d at 1074 (quoting *Norse*
 11 *v. Henry Holt & Co.*, 991 F.2d 563, 567 (9th Cir. 1993)). The Magic Quadrant reports are
 12 purchased and read by sophisticated executives and often used for evaluating corporate IT
 13 purchases. *See* Complaint ¶¶ 4, 15-18. It is apparent on the face of the Magic Quadrant reports
 14 that they offer neither analyses of individual product features or specifications nor benchmarked
 15 testing of features or overall product performance, and certainly none of the detailed product
 16 comparisons ZL’s complaint would suggest. Rather, as ZL’s complaint makes clear, senior
 17 executives at large enterprises look to Gartner’s Magic Quadrant reports for respected opinions
 18 regarding overall product offerings in making purchasing decisions—nothing more, nothing less.

19 Plaintiff makes much of the language on Gartner’s website characterizing its research as
 20 “objective, defensible, and credible.” *See, e.g.*, Opposition at 10. As the Complaint reflects, the
 21 Magic Quadrant reports do not use that language—it is found only on Gartner’s website,
 22 describing Gartner’s research services as a whole.² Even were the website language applicable to

23 ² The full quotation from Gartner’s website, as set forth in the Complaint, reads:

24 “Technology investors need exactly what Gartner Provides: highly discerning research
 25 that is objective, defensible, and credible to do your job better. Investor clients have full
 26 access to the combined strength of Gartner Core Research, the most comprehensive
 27 analysis of technology anywhere, and Gartner Dataquest, the technology world’s
 28 definitive forecasting database. Use Gartner to support buy/sell recommendations,
 perform due diligence, evaluate risks and opportunity, and generate ideas.”

Complaint ¶ 16.

1 the Magic Quadrant reports under the *Partington* analysis, there is no basis to suggest that the
2 sophisticated readers of the Magic Quadrant reports would interpret such language to suggest that
3 the rankings conveyed factual material rather than opinion. To say that Gartner’s research is
4 “objective” is merely to say that it is independent and unprejudiced. See Webster’s Third Int’l
5 Dictionary 1556 (3d ed. 2002) (“objective”, when used in phrases such as “an *objective* analysis”,
6 means “without distortion by personal feelings or prejudices”). Furthermore, “defensible”,
7 meaning “capable of being defended”, *id.* at 591, accurately implies that Gartner is offering an
8 opinion that can be supported and defended on the basis of its stated source material (interviews
9 and surveys of customers and vendors in the market). It certainly does not indicate that the Magic
10 Quadrant report is conveying objective facts; to the contrary, statements of objective fact need not
11 merely be “*capable of being defended*”—they are unimpeachable. Finally, the Magic Quadrant
12 reports are undeniably “credible.” Indeed, the level of credibility achieved by the Magic Quadrant
13 reports is a central element of plaintiff’s grievance against Gartner. See Opposition at 3-4. Thus,
14 even if the target audience for the Magic Quadrant reports (sophisticated executives) reads the
15 marketing materials on Gartner’s website to refer to the Magic Quadrant reports, the
16 characterization of Gartner’s research as “defensible”, as well as independent and credible, should
17 further alert them to the fact that the Magic Quadrant reports contain opinions, not assertions of
18 objective fact.

19 **B. The Specific Context and Content of Gartner’s Statements Similarly Negate**
20 **the Impression of an Assertion of Objective Fact.**

21 At the heart of plaintiff’s Opposition lies the incorrect assertion that Gartner’s reports
22 express and imply that ZL’s products are inferior. See Opposition at 7; *see also id.* at 10-11, 15
23 (“Gartner’s reports clearly stated that ZL and its products were inferior to the alternatives.”). No
24 such statement can be found in the reports. To the contrary, as ZL acknowledged in its Complaint,
25 Gartner has credited ZL with “great product performance as well as good prices and consistent
26 support.” Complaint ¶ 74. The reports themselves laud ZL for its product and customer
27 satisfaction. See 2009 Magic Quadrant Report (D.N. 13-4) at 17 (noting that ZL’s “partitioned
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1 search supports fast access to data in very large archive repositories” and that ZL “has large
2 deployments with customers that are happy with product features, scalability and efficient use of
3 infrastructure resources.”); 2008 Magic Quadrant Report (D.N. 13-3) at 8 (“References spoke of
4 the solution’s ease of deployment, strong performance, and comprehensive supervision and
5 discovery modules.”); *id.* at 14 (“The addition of case management and integrated file archiving to
6 its discovery solution provides a strong offering.”).

7 Indeed, ZL does not find fault with any express statement in the Magic Quadrant reports.
8 Gartner and ZL agree that ZL has a strong product, and ZL has not contested (nor has it suggested
9 is defamatory) Gartner’s assessment that ZL needs “to aggressively expand its sales channels to
10 capture more customers.” 2009 Magic Quadrant Report (D.N. 13-4) at 17; *see also* 2008 Magic
11 Quadrant Report (D.N. 13-3) at 14 (same). It is the conclusion that Gartner draws from those
12 assessments, as represented by ZL’s placement in the Magic Quadrant, with which ZL disagrees
13 and of which it now complains. ZL’s vehemence is unavailing; divergent interpretations of
14 uncontroversial propositions do not afford the basis for a lawsuit. As the Ninth Circuit stated in
15 *Partington*, when an author “fairly describes the general events involved and offers his personal
16 perspective about some of its ambiguities and disputed facts, his statements should generally be
17 protected by the First Amendment. Otherwise, there would be no room for expressions of opinion
18 by commentators, experts in a field, . . . or others whose perspectives might be of interest to the
19 public.” *Partington*, 56 F.3d at 1154.

20 Moreover, the “statement” embodied in the Magic Quadrant placement cannot fairly be
21 read to assert any specific, objective facts, let alone the defamatory ones ZL reads into it. Gartner
22 weighs multiple subjective criteria in determining a vendor’s location: seven separate criteria,
23 from “Product/Service” to “Marketing Execution”, determine placement on the *Ability to Execute*
24 axis, and eight more criteria, including assessments of “Sales Strategy” and “Innovation”, go into
25 placement on the *Completeness of Vision* axis. *See* 2009 Magic Quadrant Report (D.N. 13-4) at
26 18-19 (describing criteria). It is impossible for a Magic Quadrant report reader to determine
27 which, if any, of these criteria were determinative of a given placement on either axis, let alone
28

1 what underlying factors influenced Gartner’s weighing of the individual criteria. In other words, a
2 positive placement on the *Ability to Execute* axis could as easily be due to good marketing
3 practices as it could to the quality of the vendor’s product and service or the other five, relevant
4 criteria.

5 Likewise, the placement in a particular “quadrant” may be due to a host of factors. As the
6 2009 Magic Quadrant report describes the “Niche Players” quadrant:

7 Niche players are narrowly focused on an application, market or product mix, or
8 they offer broad capabilities without the relative success of competitors in other
9 quadrants. Niche players may focus on a segment of the market and do it well, or
10 they may simply have modest horizons and lower overall capabilities compared
11 with competitors. Others are simply too new to the market or have fallen behind
12 and, although worth watching, they have not yet developed complete functionality
13 or the ability to execute. The niche quadrant is the most interesting this year, as
14 there are both emerging vendors in this quadrant that truly address market niches
15 and also vendors that should be leaders, but are still struggling to get the right mix
16 of product and go-to market activities.

17 *Id.* at 8. Absent from this description is the stigma ZL reads into the “Niche Player” designation—
18 a “Niche Player” may be one that focuses on a segment of the market and “do[es] it well” or one
19 that has more broad capabilities but has not yet achieved the success of its competitors. Contrary
20 to ZL’s protestations, a vendor’s placement on the Magic Quadrant chart simply cannot be read to
21 assert any specific, objective facts about the vendor.

22 **C. Gartner’s Statements Are Not Susceptible to Being Proved True or False.**

23 Lastly, subjective ratings and evaluations like those at issue here are simply not susceptible
24 to being proved true or false. Indeed, how would ZL endeavor to “prove false” its placement on
25 the Magic Quadrant chart? It might quarrel with the weight granted particular criteria—e.g., that
26 product quality should be more heavily rated and success in sales and marketing deemphasized—
27 but there is simply no factual statement manifest in the chart to disprove. ZL could hardly contend
28 that Gartner’s chart is factually incorrect because ZL appears X inches below and Y inches to the
left of a particular competitor; ZL’s location on the chart is not a “fact” about ZL, but merely an
artifact of Gartner’s opinion. As numerous courts have held, such ratings and reviews are not
susceptible of being proved true or false and are thus protected from suit under the First
Amendment.

1 For example, in *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249 (W.D. Wash. 2007), the court
 2 dismissed with prejudice a suit by an attorney against a website that evaluated lawyers. In
 3 *Browne*, the ratings were more “objective” than in this case: they used a numerical rating system.
 4 The nature of the analysis underlying defendant’s rating, however, was similar to that at issue
 5 here:

6 The underlying data is weighted based on Avvo’s subjective opinions regarding
 7 the relative importance of various attributes, such as experience, disciplinary
 8 proceedings, client evaluations, and self-promotion. How an attribute is scored
 9 and how it is weighed in comparison with other attributes is not disclosed, but a
 reasonable person would understand that two people looking at the same
 underlying data could come up with vastly different ratings depending on their
 subjective views of what is relevant and what is important.

10 *Id.* at 1252. As the court noted, the defendant’s entire rating system was an “abstraction”, relying
 11 on an idiosyncratic assignment of numerical values to non-numerical criteria such as an attorney’s
 12 “disciplinary history, references, awards, etc.” *Id.* The court held that, while “[o]ne may disagree
 13 with defendants’ evaluation of the underlying objective facts, . . . the rating itself cannot be proved
 14 true or false.” *Id.* The court also concluded that the “fuzzy descriptive phrases like ‘superb,’
 15 ‘good,’ and ‘strong caution’” used by the website to explicate different ratings were subjective and
 16 not sufficient factual to be proved or disproved. *Id.* In so holding, the court observed that
 17 “[r]atings and reviews are, by their very nature, subjective and debatable” and that “[c]omparisons
 18 and comparative ratings are often based as much on the biases of the reviewer as on the merits of
 19 the reviewed.” *Id.* at 1252 n.1.

20 Similar conclusions were reached in two other cases involving ratings or reviews based
 21 upon subjective analysis of multiple factors. In *Aviation Charter, Inc. v. Aviation Research*
 22 *Group/US*, 416 F.3d 864 (8th Cir. 2005), the court affirmed summary judgment³ in favor of a

23 _____
 24 ³ ZL attempts to distinguish *Aviation Charter* on the basis that “the decision there arose in
 25 the summary judgment context, where the court had before it evidence concerning the basis for the
 26 reviews in question.” Opposition at 18. As discussed in Section I, *supra*, courts may—and
 27 regularly do—determine whether a statement constitutes non-actionable opinion on a motion to
 28 dismiss. *See, e.g., Browne*, 525 F. Supp. 2d at 1251-54. Further, the procedural posture is a
 distinction without a difference, since the Court here is not deprived of information on the basis of
 Gartner’s opinions: ZL fully describes in its allegations the criteria on which Gartner’s Magic
 Quadrant reports are based. Complaint ¶¶ 28-31.

1 company sued for defamation over its publication of a negative safety rating of an air charter
2 service provider. Though the defendant's analysis was based in large part on public data, as well
3 as on-site safety audits, the defendant "chose which underlying data to prioritize, performed a
4 subjective review of those data, and defined 'safety' relative to its own methodology." *Id.* at 871.
5 The court held that the resulting review was not "sufficiently factual to be susceptible of being
6 proved true or false" because it was a "subjective interpretation of multiple objective data points
7 leading to a subjective conclusion about aviation safety." *Id.* Likewise, in *TMJ Implants, Inc. v.*
8 *Aetna, Inc.*, 405 F. Supp. 2d 1242 (D. Colo. 2005), the court granted a 12(b)(6) motion to dismiss
9 a suit brought against an insurer based upon statements about plaintiff's medical device published
10 in a policy bulletin distributed to defendant's insureds, to health care providers, and to the public.
11 The court found that the defendant's conclusion about the device rested in part on factually
12 verifiable factors such as the "regulatory status of the technology" as well as factors not provably
13 true or false, such as "views of physicians practicing in relevant clinical areas", and therefore the
14 resulting conclusion was "not provably false and [was] thus protected." *Id.* at 151-52.

15 Courts will also find a statement not provably true or false where it is too vague to imply
16 any factual assertion. In *Jefferson County School District No. R-1 v. Moody's Investor's Services,*
17 *Inc.*, 175 F.3d 848 (10th Cir. 1999), the court affirmed Rule 12(b)(6) dismissal of a suit against the
18 defendant for an article which, among other things, characterized the plaintiff bond issuer as "not
19 creditworthy." *Id.* at 855. The court held that this conclusion was too vague to be provably false,
20 reasoning:

21 Like the statement of a product's value, a statement regarding the
22 creditworthiness of a bond issuer could well depend on a myriad of factors, many
23 of them not provably true or false. [Citation omitted] . . . The difference in the
24 evaluators' assessments of the bonds could result from differing views about the
relative weight to be assigned to those factors or from other philosophical or
theoretical disagreements rather than from one evaluator's reliance on inaccurate
information.

25 *Id.* at 855. Because the creditworthiness conclusion was "so vague", the court held that
26 defendant's article would have been actionable only had the plaintiff pointed to a more specific
27 implied or express assertion of fact. *Id.* ZL purports to distinguish *Jefferson* on this ground,
28

1 asserting that, unlike the plaintiff in that case, here ZL has identified two specific implied
2 assertions of fact: (1) that the Magic Quadrant reports “are understood by technology purchasers
3 as a warning, by Gartner, that ZL and the ZL Products are not good choices for enterprise email
4 archive applications” and (2) “[t]he relative placement of ZL versus Symantec gives a clear
5 message that ZL’s offerings are significantly inferior to Symantec’s.”⁴ Complaint at ¶¶ 32, 68;
6 Opposition at 17. As discussed above, these allegedly implied statements of “fact” run counter to
7 the actual text of the Magic Quadrant reports describing ZL’s product. However, even could such
8 statements reasonably be inferred from the reports, they would fall prey to the same vagueness that
9 renders the Magic Quadrant placement itself non-actionable: the statement that a product is “not a
10 good choice” or is “inferior”, like the statement that a bond issuer is “not creditworthy”, depends
11 upon too many factors—the overwhelming majority of which would be subjective evaluation—to
12 imply any provably false assertions of fact. *See Compuware Corp.*, 499 F.3d at 529 (noting that,
13 even if fact-based inferences could be drawn from predictive rating that was “dependent on a
14 subjective and discretionary weighing of complex factors”, “such inferences could not be proven
15 false because of the inherently subjective nature of the . . . ratings calculation”).

16 The logical implication of ZL’s arguments is that any published, evaluative statement that
17 relies on multiple factors should be held “provably false” if a different weighing of those factors
18 might produce a divergent result. This is neither sensible nor a correct statement of the law.
19 Were this the case, not only ZL but each of the companies rated in the Magic Quadrant might
20 assert claims against Gartner seeking a different weighing of the underlying criteria to improve its
21 position; Gartner (and others like it) would be subject to a never-ending string of lawsuits that
22 would chill its freedom to offer opinions on the relative prospects of technology companies. The
23 fact that “reasonable minds can and do differ” as to the appropriate conclusions to be drawn from
24 a given set of circumstances is not evidence that the conclusion is provably false, but instead that a

25 ⁴ The defamatory implication ZL reads into its Magic Quadrant placement will not even
26 be actionable unless ZL can prove that “*the defendant endorsed the implication.*” *Partington*, 56
27 F. 3d at 1152 n.9 (citations omitted) (emphasis in original). Here, the text of the Magic Quadrant
28 reports, which praises ZL’s products, firmly establishes that Gartner does *not* endorse the
implication that ZL has an inferior product.

1 clear sign that the conclusion constitutes constitutionally protected opinion. *See Partington*, 56 F.
2 3d at 1158-59.

3 **III. ZL'S OTHER ARGUMENTS FAIL**

4 **A. Out-of-Circuit Standards Cannot Change the Fact that ZL's Lanham Act**
5 **Claims Fail Under Ninth Circuit Precedent Limiting Standing to Competitors.**

6 According to ZL, Gartner's Memorandum of Points and Authorities in Support of its
7 Motion to Dismiss ("Opening Memorandum") "incorrectly argues" that ZL's Lanham Act claims
8 should be dismissed, because a "more reasonable" standard applied by the Third and Eleventh
9 Circuits would not limit standing for Lanham Act section 43(a) claims to competitors. Opposition
10 at 20. In doing so, ZL effectively concedes that the "less reasonable" precedent of the Ninth
11 Circuit only permits section 43(a) false advertising claims to be brought by competitors who have
12 suffered competitive injury, i.e. an injury "harmful to the plaintiff's ability to compete with the
13 defendant." *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027,
14 1037 (9th Cir. 2005) (affirming dismissal of section 43(a) claim where plaintiffs were not
15 competitors of defendant). ZL is unable to cite any Ninth Circuit cases to the contrary on facts
16 analogous to those here. In the *Coastal Abstract Service, Inc. v. First American Title Insurance*
17 *Company*, 173 F.3d 725 (9th Cir. 1999) case ZL cites, the Ninth Circuit held that a corporate
18 official who made statements about his corporation's competitor and thereby "sought to divert
19 business" from the competitor to his employer could be held individually liable, alongside his
20 employer, for a Lanham Act violation. *Id.* at 734. It did not hold, as plaintiff implies, that a
21 plaintiff has standing to pursue section 43(a) claims against a party not involved in competition
22 with the plaintiff. *Id.* Likewise, in *National Services Group, Inc. v. Painting & Decorating*
23 *Contractors of America, Inc.*, No. SACV06-563CJC(ANX), 2006 WL 2035465 (C.D. Cal. July
24 18, 2006), where the defendant trade group's members were in "direct competition" with plaintiffs
25 and the trade group published statements that "diverted business" from plaintiffs to defendant's
26 members, the court held that the trade group could not escape liability for causing competitive
27 injury. *Id.* at *3-4. Here, there are no allegations that Gartner or any associated entities compete
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1 with ZL or that ZL sustained any injury to its ability to compete with Gartner, and thus ZL's
2 Lanham Act claims fail.

3 **B. ZL Lacks Standing to Bring California Business and Professions Code Claims.**

4 Standing to bring suit under sections 17204 and 17535 of the California Business and
5 Professions Code requires that the plaintiff allege losses for which it could obtain restitution from
6 defendant. *See* Opening Memorandum at 16-17. ZL tries to skirt this requirement, arguing that a
7 plaintiff may obtain restitution from a defendant even where the defendant did not *directly* receive
8 the money or property taken from plaintiff by the defendant's unfair competition. Opposition at
9 21-22. ZL is correct that the defendant need not have taken money or property *directly* from the
10 plaintiff for the plaintiff to be entitled to restitution; however, the defendant still must have
11 received some benefit at plaintiff's expense. As the chief case cited by ZL concludes, California's
12 Unfair Competition Law requires "that the plaintiff must once have had an ownership interest in
13 the money or property acquired by the defendant through unlawful means." *Shersher v. Superior*
14 *Court*, 154 Cal. App. 4th 1491, 1500 (Cal. Ct. App. 2007). In each of the cases ZL cites, the
15 defendants' acts of unfair competition caused the plaintiffs to make payments which benefited the
16 defendants, thus entitling the plaintiffs to restitution. In *Shersher*, defendant Microsoft's alleged
17 misrepresentations about the qualities of its products caused plaintiffs to purchase Microsoft
18 products from third party dealers, which indirectly accrued to the benefit of Microsoft. *Id.* at
19 1499-1500. In *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305 (Cal. Ct. App. 2009), the
20 court upheld an award of restitution for payments defendant insurance companies had required its
21 plaintiff insureds to make to a third party billing contractor that was a wholly owned subsidiary of
22 one defendant and acting as the other defendant's billing agent. *Id.* at 1340-41. Here, ZL can
23 point to no analogous loss of money or property that has benefited Gartner and which would
24 entitle ZL to restitution. It thus lacks standing to bring its claims under the California Business
25 and Professions Code. *See* Cal. Bus. & Prof. Code §§ 17204, 17535.

26 ZL's further argument that it may satisfy the Business and Profession Code's requirement
27 that the claimed injury occur "as a result of" the defendant's unfair actions without alleging actual
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1 reliance ignores the California Supreme Court’s recent holding in *In re Tobacco II Cases*, 46 Cal.
2 4th 298 (2009). There, the Supreme Court held that, because “reliance is the causal mechanism of
3 fraud,” the Code’s “as a result of” language “imposes an actual reliance requirement on plaintiffs
4 prosecuting a private enforcement action under the UCL’s fraud prong.” *Id.* at 326. Because ZL’s
5 UCL and false advertising claims sound in fraud and ZL has not alleged reliance, ZL’s claims fail.

6 **C. Gartner’s Magic Quadrant Reports Are Not Advertising.**

7 The most notable portion of ZL’s arguments that the Magic Quadrant reports constitute
8 advertising is what ZL fails to say. ZL concedes that a key factor in determining whether a
9 message constitutes advertising is the commercial content of the message, i.e. whether it contains
10 factual representations about the business operations, products, or services of the defendant.
11 Opposition at 23; *see also Kasky v. Nike*, 27 Cal. 4th 939, 961 (2002) (in false advertising context,
12 message has commercial content where “the speech consists of representations of fact about the
13 business operations, products, or services of the speaker”). However, ZL does not—and cannot—
14 argue that the Magic Quadrant reports contain a *single* representation about Gartner’s other
15 products or services. They do not, other than a short list of “recommended reading” (which is not
16 even identified as authored by Gartner) towards the end of each report. This is fatal to ZL’s state
17 law claim under *Kasky*, and it strongly weighs against a conclusion under the federal standard that
18 Gartner’s reports constitute “commercial speech” for the purpose of influencing consumers to buy
19 defendant’s goods or services. How, indeed, could a publication sell goods and services that it
20 does not even describe? For this reason as well as those set forth in Gartner’s Opening
21 Memorandum, the Magic Quadrant reports cannot constitute advertising for purposes of the state
22 and federal false advertising laws.

23 **D. ZL Fails to Cite Any California Decisions Finding a “Special Relationship”**
24 **Sufficient to Make Out a Negligent Interference Claim on Analogous Facts.**

25 As Gartner explained in its Opening Memorandum, California law requires allegation of a
26 “special relationship” to adequately plead a claim for negligent interference with prospective
27 economic advantage. *See J’Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979). ZL concedes that
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1 the decided cases predominantly involve a third-party beneficiary to a contract or closely
2 analogous circumstances, but it nonetheless argues that such a relationship has not been
3 specifically held to be a prerequisite for a negligent interference claim. However, ZL is unable to
4 cite a single California state court opinion in which a “special relationship” has been found on
5 facts not involving a third-party beneficiary relationship or its equivalent. In fact, as Gartner
6 explained in its Opening Memorandum, in the one case with facts analogous to those here—albeit
7 stronger—a California court refused to recognize a special relationship. *See Worldvision Enters.,*
8 *Inc. v. Am. Broadcasting Cos.*, 142 Cal. App. 3d 589 (Cal. Ct. App. 1983). The Court should not
9 accept plaintiff’s invitation to extend California law where California courts have been unwilling
10 to venture.

11 **IV. ZL SHOULD NOT BE GRANTED LEAVE TO AMEND**

12 ZL argues that it should be granted leave to amend as a matter of right because no
13 responsive pleading has yet been filed. However, “if a complaint is dismissed for failure to state a
14 claim upon which relief can be granted, leave to amend may be denied, even if prior to a
15 responsive pleading, if amendment of the complaint would be futile.” *Albrecht v. Lund*, 845 F.2d
16 193, 195 (9th Cir. 1988) (citing *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393,
17 1401 (9th Cir. 1986)). Dismissal without leave to amend is thus proper where the “allegation of
18 other facts consistent with the challenged pleading could not possibly cure the deficiency.” *Id.*
19 (quoting *Schreiber Distrib. Co.*, 806 F.2d at 1401).

20 The type of allegations with which ZL has indicated it would amend its Complaint do not
21 change the core facts of its claims. ZL states that Gartner has had some board members in
22 common with Symantec—a situation so commonplace in the corporate world as to be
23 unremarkable—and that Gartner has other, unrelated transactions with many of the companies it
24 evaluates in its Magic Quadrant reports. Setting aside whether these sorts of prosaic facts could
25 afford a Rule 11 basis for alleging bias,⁵ amendment would be futile because such allegations do

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27 ⁵ Allegations of improper influence or bias would run counter to the allegations in the
28 current Complaint, which specifically attributes the alleged error in ZL’s Magic Quadrant
placement to “misguided analytical models” that are “biased in favor of larger companies”, not

1 not change the content or nature of the statements over which ZL has brought suit. ZL cannot
 2 avoid the statements in the Magic Quadrant report that—contrary to ZL’s arguments in its
 3 Opposition—acknowledge the strength of ZL’s products, nor may it plead facts that contradict its
 4 original allegations that ZL’s placement on the Magic Quadrant is the result of a “misguided
 5 analytical model” that gives “undue weight to sales and marketing.” Simply put, the Court has
 6 before it the Magic Quadrant reports at issue here, and, should the Court determine the disputed
 7 statements therein to be non-actionable opinion, ZL cannot plead facts that will transform those
 8 published statements of opinion into assertions of fact. *See Partington v. Bugliosi*, 56 F.3d 1147,
 9 1162 (9th Cir. 1995) (affirming dismissal of defamation and false light claims without leave to
 10 amend where statements at issue were held to be protected by the First Amendment and thus
 11 amendment would be futile); *see also Albrecht*, 845 F.2d at 195-96 (affirming dismissal of fraud
 12 claims without leave to amend where additional allegations could not change the fact that
 13 defendant’s statements “concerned his own beliefs” and thus “could not be a misrepresentation”).

CONCLUSION

14
 15 For the reasons discussed above and in Gartner’s August 6, 2009 Motion to Dismiss, this
 16 Court should dismiss plaintiffs Complaint with prejudice.

17
 18 DATED: October 9, 2009

QUINN EMANUEL URQUHART OLIVER &
 HEDGES, LLP

By _____ /s/

Robert P. Feldman
 Attorneys for Defendants
 GARTNER, INC. and CAROLYN DiCENZO

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 26 because Gartner is improperly influenced, but because Gartner’s model gives “undue weight to
 27 sales and marketing.” Complaint ¶ 10. Merely because ZL has belatedly realized that this
 28 formulation does not state a claim does not mean that the Court should grant it leave to add other,
 libelous allegations of undue influence—which will not, in any case, cure the suit’s deficiencies.

