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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN JOSE DIVISION**

12 ZL TECHNOLOGIES, INC.,

13 Plaintiff,

14 v.

15 GARTNTER, INC. and CAROLYN DiCENZO,

16 Defendants.
17

Case No. 09-CV-02393-JF

**PLAINTIFF ZL TECHNOLOGIES,
INC.'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

Date: October 23, 2009

Time: 9:00 a.m.

Dept.: Courtroom 3, 5th Floor

Judge: Hon. Jeremy Fogel

Statement of Issues to be Decided (Civ. L. R. 7-4(a)(3))

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1. Are Defendants’ statements capable of being interpreted as statements of fact, making dismissal on First Amendment grounds inappropriate?

2. Even if construed as opinion, are Defendants’ statements capable of being construed as implying the existence of undisclosed facts, making dismissal on First Amendment grounds inappropriate?

3. Has Plaintiff alleged the type of “commercial injury” that confers standing under the Lanham Act’s false advertising provisions?

4. Has Plaintiff alleged injury and causation as required by California Business and Profession Code sections 17200 and 17500?

5. Are Plaintiff’s allegations that Defendants’ Magic Quadrant reports serve as advertisements for Defendants’ products sufficient to meet the liberal pleading requirements with respect to its false advertising claims?

6. Does California law limit negligent interference claims to third-party beneficiaries, or has Plaintiff met its pleading obligation with respect to alleging the existence of a duty owed by Defendants?

7. In the alternative, should Plaintiff be allowed to replead?

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1 **I. INTRODUCTION**

2 This is a commercial case about a dominant industry player’s baseless defamation of an
3 independent startup whose growth prospects have been crushed by the defendant’s unfair
4 business practices. Defendant Gartner, Inc. (“Gartner”), which advises businesses on
5 information technology decisions, exercises hegemonic control over the purchases made by a
6 wide swath of the international corporate and governmental market. The technology Gartner
7 says to buy is bought; what Gartner says not to buy languishes unsold, leaving its developers
8 scrambling for the leftover market share Gartner does not dictate. The problem arises when
9 Gartner exercises its market power recklessly, maliciously or—because of its tremendous
10 influence—negligently. When that occurs, as it has here, innovation and competition are stifled,
11 to the detriment of small companies who lack the resources to challenge Gartner, and to the
12 consuming public at large.

13 This case seeks redress for that problem, specifically, for Gartner’s wholly inaccurate
14 misstatements about the plaintiff’s products. Plaintiff ZL Technologies, Inc. (“ZL”) has been
15 virtually locked out of critical segments of the market because Gartner continuously publishes
16 “research” and disseminates “analysis” falsely maligning the company and the superior software
17 it produces. Gartner claims that it is entirely immune from liability for those false statements
18 because they are constitutionally protected “opinions.” The First Amendment provides no refuge
19 for false statements of fact, even if they are dressed up as opinion, especially when, as is the case
20 here, the speaker goes to great lengths to ensure that the statements are understood to be founded
21 on accurate objective fact. Gartner tells the public that its research is “objective, defensible and
22 credible”—it cannot now be allowed to escape the consequences of its misconduct by claiming
23 the exact opposite, that its statements cannot be taken as anything more than its subjective
24 opinion based on pure speculation and conjecture. The governing case law is clear: Gartner’s
25 motion must be denied because its statements were assertions of fact (and capable of being
26 construed that way by a jury), and even if they are construed as opinion, they are of the type of
27 opinion that implies the existence of undisclosed facts, and thus also subject to the types of
28 claims brought here.

1 Gartner's other contentions are equally meritless. ZL has sufficiently pled its claims, and
2 Gartner's motion must therefore be denied.

3 **II. BACKGROUND**

4 **A. ZL TECHNOLOGIES' HISTORY AND PRODUCTS**

5 ZL develops and sells enterprise software, including cutting-edge software that allows
6 large enterprises to store, index, search and extract electronic data, primarily email and files.
7 Complaint ¶ 20. Those capabilities are vital to modern businesses. Id. ¶¶ 24–26. As the volume
8 of email and computer files increases, and as corporations move more and more of their day-to-
9 day functions online, the ability to organize and recall information stored electronically becomes
10 increasing critical. Id. ZL's technology allows businesses to archive massive stores of electronic
11 information cheaply, while preserving their ability to tap into that data as needed without
12 disrupting operations. Id. In addition, ZL's products allow regulated companies to comply with
13 governmental compliance regimes and their discovery and document retention obligations in the
14 event of litigation. Id. ¶¶ 25, 27.

15 Founded in 1999, ZL's business model stands out among its peers. Forgoing the
16 significant backing from venture capitalists typical in the industry, ZL has instead remained
17 primarily self-funded. Complaint ¶ 21. As a result, ZL has focused on its steady product
18 development without sacrificing quality to the short-term needs of its funders. Id. ¶ 22. Based
19 on that client- and quality-focused history, ZL now offers the strongest product in the email
20 archiving market. Id. ¶ 23. ZL's superior product and service have won the company a
21 relatively small but satisfied core of customers that include some of the world's largest
22 enterprises, such as Union Bank of Switzerland, Komatsu, and Wachovia Bank. Id. ¶ 23.
23 Though its growth has been primarily self-funded, the company has nevertheless worked its way
24 to profitability, much earlier and more consistently than most of its peers. Id.

25 ZL's go-it-alone approach has not been without its drawbacks. Though ZL's products
26 outperform by a wide margin those offered by ZL competitors, the company's sales continue to
27 lag behind those for companies like Symantec Corporation ("Symantec"), which continues to sell
28 an email archiving system Symantec itself effectively admits through its own manuals that its

1 product is rooted in outdated technology with limited capabilities for key functions like
 2 searching and storage efficiency. Complaint ¶¶ 43, 47, 55. ZL’s hampered market status is not a
 3 result of any deficiencies in its archiving products, and the obstacles to its increased success go
 4 well beyond those of the typical start-up facing down established market brands. Instead, ZL is
 5 locked out of the heart of its target market of large enterprises due to a single factor—the false
 6 information published by Defendant Gartner, Inc.¹

7 **B. GARTNER’S CONTROL OVER THE INSTITUTIONAL TECHNOLOGY MARKET**

8 The large institutions that are the potential customers for ZL’s products rely heavily on
 9 outside advice when making their purchasing decisions. The market for providing that advice is
 10 dominated by Gartner, a behemoth with \$1.3 billion in annual revenues that sells research reports
 11 and consulting services to institutional technology consumers, and exercises make-or-break
 12 power over the technology providers whose products are aimed at such purchasers. Complaint
 13 ¶¶ 2, 15-19. The head of sales and marketing for one technology company said that Gartner
 14 “matters more than you want it to matter,” in an article that concluded that “[f]ailure to get a
 15 favorable mention in an analyst report could undermine years of product development.
 16 Acceptance, on the other hand, boosts a company’s exposure and is essential for buyers drawing
 17 up shortlists.” Complaint ¶ 38. In fact, large purchases of technology are often based
 18 exclusively on Gartner’s reports. *Id.* ¶ 36. For example, a Department of Veterans’ Affairs
 19 report recently found that \$16 million in purchases were made entirely on the basis of Gartner’s
 20 reports (a practice the Department’s Inspector General found improperly limited competition).

21 ZL’s experience reflects Gartner’s outsized power in the institutional technology market.
 22 Numerous customers simply refuse to consider ZL’s superior technology in the first instance
 23 because ZL is not on the top of Gartner’s preferred vendor lists. *Id.* ¶ 88. Because of negative
 24 statements in Gartner’s reports and Gartner’s low ranking of ZL’s email archiving software, ZL
 25 is often not even invited to respond to requests for proposals, or RFPs, issued by potential

26 ¹ ZL has also named as a defendant Carolyn DiCenzo, Gartner’s lead analyst for email
 27 archiving products. Because Gartner Group, Inc. and Ms. DiCenzo have filed a single motion to
 28 dismiss containing arguments generally applicable to both, they are referred to collectively here
 as “Gartner,” except where specifically distinguished.

1 customers. Complaint ¶ 39. Oracle, which resells some of ZL’s products, complains that many
2 prospects will not even look at ZL’s offerings because of Gartner’s reports, a phenomenon
3 Oracle has come to call being “Gartnered.” Id. at 36. Even more tellingly, other customers halt
4 the purchasing process mid-stream once they consult Gartner. Id. ¶ 89.

5 Gartner’s own marketing materials revel in its unique influence. Saying, “We can show
6 you how to buy, what to buy, and how to get the best return on your technology investment,”
7 Gartner brags that it is “not just bigger, more networked, or more influential than the
8 competition. We are in a league of our own.” Complaint ¶ 17. Gartner’s power is rooted in the
9 reciprocal self-interest between Gartner, its customers, and the companies whose products
10 Gartner rates—many of whom are also Gartner customers or who pay the company tens of
11 thousands of dollars to appear at Gartner’s trade conventions. The overwhelming power and
12 reach of Gartner even serves to suppress dissent in the IT market. For example, technology
13 startups facing ZL’s dilemma are usually funded by venture capital backers, whose interests in
14 remaining in Gartner’s good graces to protect their other investments prevent anyone from
15 challenging the Gartner-dominated system. Id. ¶ 94.

16 C. GARTNER’S PURPORTEDLY OBJECTIVE, DATA-DRIVEN REPORTS

17 Gartner’s public filings claim that the company provides “high-quality, independent and
18 objective research of the IT [information technology] industry.” Complaint ¶ 15. Gartner claims
19 that research is “objective, defensible and credible.” Id. ¶ 16. Gartner uses that written research
20 as a springboard to sell its consulting services. Id. ¶ 17. Its reports therefore operate as
21 advertisements for consulting with Gartner’s more than 1,200 research analysts, who Gartner
22 claims “answer 200,000 client questions every year.” Id.

23 Since 2002, Gartner has published annual “Magic Quadrant Reports” covering email
24 archiving. Complaint ¶ 28. Based on a set of defined criteria, the Magic Quadrant Report for
25 email archiving describes products Gartner says were “able to prove, through strong references,
26 their ability to address the needs of an organization looking to support thousands of users.” Id.
27 The Magic Quadrant Report places various products into one of four categories, “Leaders” (the
28

1 highest category), “Challengers,” “Visionaries,” and “Niche Players” (the lowest category). Id. ¶
 2 29. The products are arrayed in one of the four categories on a grid:

Ability to Execute →	Challengers	Leaders
	Niche Players	Visionaries
	Completeness of Vision →	

10 The “quadrant” is really no more than a graphical representation of two independent
 11 variables, “Ability to Execute,” which is set out along the y-axis, and “Completeness of Vision,”
 12 set out along the x-axis. Complaint ¶ 29. Gartner is explicit about the components that comprise
 13 each of the two variables. Id. ¶ 30. “Ability to Execute” is a weighted scoring of the following
 14 components:

- Quality of goods and services,
- Overall ability,
- Sales execution,
- Market responsiveness and track record,
- Marketing execution,
- Customer experience, and
- Operations.
-

20 Id. The y-axis of Gartner’s analysis, “Completeness of Vision,” is based on the following
 21 components:

- Market understanding,
- Market strategy,
- Sales strategy,
- Product strategy,
- Business model
- Industry strategy,
- Innovation, and
- Geographic strategy.

27 Id. Each of those components is in turn comprised of sub-components. Id. “Quality of Goods
 28 and Services” is, for example, broken out into such factors as “capabilities, quality, feature sets.”

1 The various components are assigned weights, designated as “heavy,” “standard,” or “low.” Id.
2 ¶ 70. Gartner, however, refuses to release or disclose the individual values for each criterion
3 underlying its assessment of any product.² Id.

4 Though Gartner looks at both “Ability to Execute” and “Completeness of Vision” when
5 assigning a product to one of the four quadrants, the two variables are independent and, because
6 they are presented on separate axes, the report makes clear the relative ranking of each product
7 with respect to each variable. Looking at the y-axis alone, Gartner’s statement about the relative
8 strength of ZL’s product versus each of its competitors with respect to “Ability to Execute” is
9 readily apparent. Thus, any reader of the Magic Quadrant Report immediately knows what
10 Gartner is saying about ZL’s “Ability to Execute,” and can understand that statement in light of
11 the various components Gartner explains go into it. The factual statement is clear and
12 unmistakable: with respect to the quality of goods and services, overall ability, sales execution,
13 market responsiveness and track record, market execution, customer experience and operations
14 taken as a whole, ZL and its products are inferior to its leading competitors.

15 Gartner repeatedly emphasizes that its reports are based on hard-and-fast data the
16 company compiles but does not release. Complaint ¶¶ 15-19. Without creating the impression
17 that its research is founded on a solid factual base, Gartner would be unable to sell its reports and
18 consulting time. Large institutions pay Gartner a significant premium, with fees totaling
19 hundreds of millions of dollars a year, for information Gartner tells them is founded in objective
20 data subjected to verification through real-world evaluation by end users. No customer would be
21 willing to pay for flimsy, off-the-cuff, subjective speculation, and Gartner tells its clients that the
22 company’s analyses are the exact opposite: “highly discerning research that is objective,
23 defensible and credible.” Id. ¶ 16. It is precisely because Gartner tells its customers that its
24 statements are founded in verifiable fact that they are afforded so much weight, and why
25 Gartner’s false statements about ZL have resulted in so much harm.

26 _____
27 ² In a policy undisclosed to its general audience, Gartner refuses to share with each vendor
28 its own component scores, effectively and furtively blotting out all transparency and
accountability in its evaluation process.

1 **D. GARTNER’S FALSE STATEMENTS ABOUT ZL’S PRODUCTS**

2 In every year since 2005, Gartner has relegated ZL to the bottom portion of the lowest
3 quarter of its Magic Quadrant Report. Complaint ¶ 32. Placement in that quartile renders ZL a
4 “Niche Player,” and identifies ZL’s performance as inferior in both the “Ability to Execute” and
5 “Completeness of Vision” areas. The Complaint specifies how Gartner’s reports are understood
6 by their readers: “Those MQ [Magic Quadrant Report] Placements were, and are, derogatory
7 *because they are understood by technology purchasers as a warning, by Gartner, that ZL and*
8 *the ZL Products are not good choices for enterprise email archive applications.” Id. ¶ 32*
9 (emphasis added).

10 In particular, Gartner’s poor evaluations of ZL on the “Ability to Execute” axis are
11 understood by customers to indicate the inferiority of ZL’s product, service and customer
12 satisfaction. Those evaluations, taken together with Gartner’s strident assertions that such
13 evaluations are based on rigorously compiled data, are intended to and actually do communicate
14 objective statements of fact. As the Complaint explicitly states, “The relative MQ placement of
15 ZL versus Symantec gives a clear message that ZL’s offerings are significantly inferior to
16 Symantec.” Complaint ¶ 68. Coupled with Gartner’s voluminous claims about the rigor of its
17 analytic process, Gartner’s evaluations also imply the existence of additional, undisclosed facts
18 allegedly underlying those conclusions.

19 Gartner’s statements are, however, false. Gartner’s reports both express and imply that
20 ZL’s products are inferior, yet by any objective measure ZL’s email archiving software vastly
21 outperforms that from competitors rated highly by Gartner. Complaint ¶¶ 40-67. ZL’s products
22 search archives more accurately, quickly and completely than its competitors’ offerings. *Id.* ¶¶
23 44-54. In contrast, the leading competitor product from Symantec is built around the Alta Vista
24 search engine, software that reached its designated end-of-life four years ago, and which results
25 in cumbersome and slow operations. *Id.* ¶ 63. ZL’s technology allows its users to maintain
26 archives at a lower cost, while at the same time increasing performance using fewer computing
27 resources. *Id.* ¶¶ 55-61. ZL’s products operate on up-to-date architecture, allowing more rapid
28 ingestion and export of data and the use of end-user journal search, a capability that allows all

1 the benefits of a storage-reduction system without the attendant costs of deploying one. Id. ¶¶
2 62, 66. ZL’s products also work across multiple platforms, like Linux, Windows, Solaris and
3 databases like Oracle, DB2 and MS SQL. Id. ¶ 65. ZL’s service is also superior, with tailored
4 support and a time-to-problem-resolution that is the fastest in the industry. Id. ¶ 67.

5 The insidious danger of Gartner’s claims is that while they purport to be objective,
6 neutral and accurate, they are in fact subjective, biased and wrong. Complaint ¶¶ 69–70.
7 Gartner works hard to create the appearance that its reports contain rigorous analysis based on an
8 evaluation of comprehensive facts, and its customers take them that way. The value proposition
9 Gartner pitches to its clients holds out the Magic Quadrant Report and other analyses as
10 “objective” and “defensible”—the latter a highly important attribute for IT managers who must
11 justify their purchasing expenditures to senior company management, shareholders or investors.
12 Gartner tells its clients to trust the company’s conclusions because its legions of analysts are
13 allegedly sorting through the data and arriving at supposedly verifiable conclusions. By setting
14 forth a supposedly rigorous methodology, with a defined set of objective criteria, and then
15 arriving at a negative conclusion, Gartner’s reports create the inescapable implication that the
16 speaker is privy to additional negative information about ZL and its products. IT managers are
17 left with an impossible choice: select ZL’s products, which they may know to be superior, and
18 risk the unknown dangers implied by Gartner’s reports, or take the safe route and select
19 Gartner’s designated top picks.

20 The Complaint specifies two other categories of defamatory statements by Gartner. The
21 Magic Quadrant Reports contain other statements specifically aimed at ZL and labeled
22 “Cautions.” Complaint ¶ 33. The 2008 Caution said ZL remained “primarily a product and
23 engineering-focused company,” and explicitly called into question ZL’s ability to remain a
24 “viable vendor in the market.”³ Id. The Complaint also specifies disparaging statements made
25 by Defendant Carolyn DiCenzo, Gartner’s lead analyst for email archiving products, and other
26

27 ³ Gartner made these statements notwithstanding the company’s early and repeated
28 profitability performance as cited in data sent to Ms. DiCenzo, and despite the fact that ZL was
already in its tenth year of operations with happy customers, which she readily acknowledged.

1 Gartner representatives, including Ms. DiCenzo’s statement to a potential ZL customer that ZL’s
 2 product was “the same” as the inferior Symantec offering. That and other false statements of
 3 fact by Gartner and its representatives continue to harm ZL and its business prospects.

4 **III. GARTNER’S MOTION TO DISMISS SHOULD BE DENIED**

5 **A. LEGAL STANDARD**

6 A motion to dismiss a claim for legal insufficiency is viewed with disfavor in the federal
 7 courts and is granted only in extraordinary cases. U.S. v. City of Redwood City, 640 F.2d 963,
 8 966 (9th Cir. 1981); De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978). In acting on a
 9 motion to dismiss, the plaintiff’s allegations must be assumed to be true and the complaint must
 10 be construed in the light most favorable to the plaintiff. City of Redwood City, 640 F.2d at 966.
 11 It must also be assumed “that all general allegations embrace whatever specific facts might be
 12 necessary to support them.” Pelozza v. Capistrano Unified School Dist., 37 F.3d 517, 521 (9th
 13 Cir. 1994). Plaintiff has more than met its burden of alleging with the requisite legal sufficiency
 14 each of its claims, and they therefore must not be dismissed.

15 **B. THE FIRST AMENDMENT DOES NOT INSULATE GARTNER’S DEFAMATORY 16 STATEMENTS FROM ANY AND ALL LEGAL SCRUTINY**

17 Gartner argues that it cannot be held liable on any theory for any of its statements
 18 because they are “opinions,” and that the First Amendment erects a *per se* barrier to liability
 19 based on any expressions of opinion. That argument is overly simplistic, legally erroneous and
 20 factually inapposite. Qualifying an assertion as “opinion” is not the constitutional equivalent of
 21 crossing one’s fingers, and the United States Supreme Court has squarely rejected the
 22 proposition that the First Amendment creates “a wholesale defamation exemption for anything
 23 that might be labeled ‘opinion.’” Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990). As
 24 one of the cases cited by Gartner relies on puts it, a defendant “should not be shielded from
 25 liability by raising the word ‘opinion’ as a shibboleth.” Jefferson County School Dist. No. R-1 v.
 26 Moody’s Investor’s Svcs., Inc., 175 F.3d 848, 856 (10th Cir. 1999).

27 The First Amendment provides no defense to liability here for two reasons. First,
 28 Gartner’s statements were not opinion, but statements of fact alleging the poor quality of ZL’s
 products and services. Simply because the statements included evaluative components does not

1 mean they were not understood in exactly the way Gartner intended them to be understood: as
2 “objective, defensible and credible” expressions of fact. Second, a defendant may be held liable
3 for statements of opinion that imply the existence of undisclosed facts. Gartner expressly stated
4 that its statements had a factual basis, and intended that they be understood as being derived
5 from a fact-based analysis, and can therefore be held liable even if the statements themselves are
6 couched as opinion. For both reasons, the First Amendment does not entitle Gartner to the
7 dismissal requested here.

8 **1. Gartner’s Defamatory Statements Were Factual**

9 In the first instance, Gartner’s opinion defense fails because its statements concerning
10 ZL’s products were assertions of fact, not opinion. The Ninth Circuit has established a three-part
11 test for determining whether a statement is an assertion of fact or opinion. The standard first
12 examines whether the defendant used figurative or hyperbolic language that negates the
13 impression that the defendant was asserting an objective fact; second, whether the general tenor
14 of the entire work negates that impression; and third, whether the statement at issue is capable of
15 being proved true or false. Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990).
16 Under that rubric, Gartner’s defamatory statements are clearly assertions of fact.

17 Apart from the name, the Magic Quadrant Reports are wholly devoid of figurative or
18 hyperbolic language. As detailed above, Gartner goes to great length to ensure that the reports
19 and its research generally are taken as sober, technical evaluations. Their value in the
20 marketplace would be nullified if they were not perceived as “objective, defensible and
21 credible,” Gartner’s own words to describe its analyses. Complaint ¶ 16. Nothing in the general
22 tenor of the reports or any of their details suggests that they are meant to be taken as a spoof,
23 satire or in a humorous light—and Gartner does not now suggest that is how they were meant.
24 The first two prongs of the Ninth Circuit standard clearly support the conclusion that Gartner’s
25 statements should be construed as factual.

26 Gartner’s statements are also susceptible to being proved true or false. As detailed above,
27 Gartner’s statements express a factual statement about ZL’s products: both that “ZL and the ZL
28 Products are not good choices for enterprise email archive applications,” and that “ZL’s offerings

1 are significantly inferior to Symantec,” its chief competitor. Complaint ¶¶ 32, 68. That factual
2 meaning is buttressed not only by Gartner’s emphasis on the objective reliability of its research,
3 but on the specific detail it offers about the Magic Quadrant ratings themselves. For example,
4 any reader of a Magic Quadrant Report is clearly told how ZL stacks up against other providers
5 with respect to its “Ability to Execute,” and if it has any question about how to interpret that
6 phrase, is given a detailed explanation that the statement is based on a weighted evaluation of
7 specific characteristics relating to the quality of ZL’s goods and services, overall ability,
8 marketing execution and other explicitly stated factors. *Id.* ¶¶ 29–30. Gartner’s ultimate
9 conclusions can therefore be unpacked, with factual detail readily apparent based on the stated
10 model.

11 Gartner now attempts to back away from its guarantees of the reports’ objectivity and
12 defensibility, saying now that its statements are “inherently vague” and that the “Magic Quadrant
13 format itself rebuts any suggestion that it is a statement of fact.” Defendants’ Memorandum of
14 Points and Authorities in Support of Motion to Dismiss Plaintiff’s Complaint (“MPA”) at p. 12.
15 That line of argument amounts to nothing more than a rhetorical shell game, and the Court
16 should not ignore the company’s prior authoritative claims to the contrary. If a defendant were
17 allowed to escape liability at the pleading stage by recharacterizing its defamatory statements as
18 nothing more flim-flam guesswork, no defamation claim would ever survive. That is clearly not
19 the case, and should not be the rule here.⁴

20 Gartner is also incorrect that the inclusion of what it now describes as “qualitative”
21 components renders the entire Magic Quadrant Reports nonactionable opinion. Many statements
22 of fact include subjective components but are nevertheless considered factual for defamation
23 purposes. For example, the statement that a surgeon is “incompetent” necessarily includes at
24 least some qualitative evaluation, but is nevertheless a statement of fact that may give rise to a

25 _____
26 ⁴ Gartner plays games with the Complaint’s characterizations of Gartner’s research as
27 “subjective” and lacking in objective factual basis. MPA at p. 11. Those statements do not refer
28 to the nature of Gartner’s defamatory statements, but to the absence of a genuine factual basis for
making them. It is no defense and wholly illogical to say that because a statement is false it is
non-factual and therefore non-actionable.

1 claim for defamation. Gill v. Hughes, 227 Cal. App. 3d 1299, 1309 (1991) (“The statement that
2 plaintiff ‘is an incompetent surgeon and needs more training’ ... is susceptible of being proved
3 true or false.”). Gartner’s evaluations are analogous. Inclusion of some qualitative evaluation in
4 the Magic Quadrant Reports does not alter the inherently factual nature of its conclusions.

5 Gartner relies on the “Completeness of Vision” axis as its primary illustration of the
6 qualitative nature of its reports. Gartner’s selected quotation describing the criteria used to
7 measure that variable show that even if qualitative, the findings are measurable, and thus
8 susceptible to proof as true or false. Gartner’s report says that the variable is based on a vendor’s
9 ability to “*demonstrate* innovation in meeting customer needs,” and that its “vision” is “*weighed*
10 *against* its past ability to execute against previously stated plans.” MPA at p. 12, quoting 2007
11 Magic Quadrant Report at p. 6 (emphasis added). Statements purportedly generated by reference
12 to demonstrable fact or by weighing whether certain events have transpired can be proved true or
13 false based on their own stated criteria. In short, a qualitative analysis is not necessarily non-
14 factual opinion.

15 Gartner also relies heavily on the presence of alleged disclaimers in the Magic Quadrant
16 Reports that purportedly qualify all statements made in those reports as opinion. Such
17 disclaimers do not mandate dismissal, or any defamatory screed could escape liability by the
18 inclusion of a cursory footnote. In Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.,
19 ___ F. Supp. 2d ___, 2009 WL 2828018 (S.D.N.Y. Sept. 2, 2009), bond rating agencies Moody’s
20 and Standard and Poor’s asserted the same opinion defense alleged here, claiming that “their
21 ratings are nonactionable opinions.” Id. at *9. The court rejected that claim on multiple bases,
22 among them that disclaimers “are unavailing and insufficient to protect the Rating Agencies
23 from liability for promulgating misleading ratings.” Id.

24 Even if the disclaimers have some significance, their ultimate meaning cannot be
25 determined at the pleading stage because under Ninth Circuit law, courts must look to the
26 “totality of the circumstances” to determine whether a statement of opinion implies a factual
27 assertion. See Underwager v. Channel 9 Australia, 69 F.3d 361, 366 (9th Cir. 1995) (“To
28 determine whether a statement implies a factual assertion, we examine the totality of the

1 circumstances in which it was made.”). Whether Gartner’s reports taken as a whole show that
2 the statements at issue were mere opinion cannot be determined by looking to a few short
3 passages selected by Gartner, and the evidence necessary to make that determination is not
4 before the Court at this pleading stage.

5 At most, Gartner’s arguments show that there is a factual question as to whether its
6 statements are expressions of fact or opinion. In such circumstances, it must be left to the jury to
7 resolve the matter. “[W]here the alleged defamatory remarks could be determined either as fact
8 or opinion, and the court cannot say as a matter of law that the statements were not understood as
9 fact, there is a triable issue of fact for the jury.” Bindrim v. Mitchell, 92 Cal. App. 3d 61, 77-78
10 (1979). California courts even issue a standard jury instruction for use when statements might be
11 construed as fact or opinion. Cal. Civ. Jury Instructions 1707. Gartner’s contention that its
12 statements are opinion is not so clearly true that it can be resolved as a matter of law based on the
13 pleadings alone, and for that reason, its motion to dismiss cannot be granted.

14 **2. Gartner’s Implied Statements of Fact are Actionable**

15 Second, even if Gartner’s statements are construed as opinion, the First Amendment
16 provides no defense here because a defendant may be held liable for statements of opinion that
17 *imply* the existence of additional, undisclosed facts. By design, Gartner’s statements imply the
18 assertion of additional facts that may serve as the basis for ZL’s claims even if the statements
19 themselves are construed as opinion. As Milkovich reasoned, exempting opinion from liability
20 would “ignore the fact that expressions of ‘opinion’ may often imply an assertion of objective
21 fact.” Milkovich, 497 U.S. at 18. The Court further explained:

22 If a speaker says, “In my opinion John Jones is a liar,” he implies a
23 knowledge of facts which lead to the conclusion that Jones told an
24 untruth. Even if the speaker states the facts upon which he bases
25 his opinion, if those facts are either incorrect or incomplete, or if
26 his assessment of them is erroneous, the statement may still imply
27 a false assertion of fact. Simply couching such statements in terms
28 of opinion does not dispel these implications; and the statement,
“In my opinion Jones is a liar,” can cause as much damage to
reputation as the statement, “Jones is a liar.” As Judge Friendly
aptly stated: “[It] would be destructive of the law of libel if a writer
could escape liability for accusations of [defamatory conduct]
simply by using, explicitly or implicitly, the words ‘I think.’ ” It is
worthy of note that at common law, even the privilege of fair
comment did not extend to “a false statement of fact, whether it

1 was expressly stated or implied from an expression of opinion.”
 2 Restatement (Second) of Torts, § 566, Comment a (1977).

3 Id. at 18–19 (citations omitted).

4 Milkovich eviscerates Defendants’ contention that opinion is *per se* nonactionable.
 5 (MPA at p. 5, “As protected speech, expressions of such opinions on matters of public concern
 6 are nonactionable.”) To the contrary, because Milkovich holds there is no separate “opinion”
 7 privilege under the First Amendment, “the threshold question in defamation suits is not whether
 8 a statement ‘might be labeled “opinion,”’ but rather whether a reasonable factfinder could
 9 conclude that the statement ‘impl[ies] an assertion of objective fact.’” Unelko Corp. v. Rooney,
 10 912 F.2d 1049, 1053 (9th Cir. 1990) (quoting Milkovich, 497 U.S. at 18). The Ninth Circuit’s
 11 alternative hypothetical also illustrates the post-Milkovich standard:

12 The statement, “I think Jones is an alcoholic,” for example, is an
 13 expression of opinion based on implied facts because the statement
 14 “gives rise to the inference that there are undisclosed facts that
 15 justify the forming of the opinion[.]” Readers of this statement will
 16 reasonably understand the author to be implying he knows facts
 17 supporting his view-*e.g.*, that Jones stops at a bar every night after
 18 work and has three martinis. If the speaker has no such factual
 19 basis for his assertion, the statement is actionable, even though
 20 phrased in terms of the author’s personal belief.”

21 Standing Committee on Discipline v. Yagman, 55 F.3d 1430, 1439 (9th Cir. 1995) (citations
 22 omitted); see also Weller v. American Broadcasting Cos, 232 Cal. App. 3d 991, 999–1001
 23 (1991).⁵

24 In Unelko, the Ninth Circuit held that humorous television commentator Andy Rooney’s
 25 statement of opinion that a particular product “didn’t work” was nevertheless actionable because
 26 it implied that the product—a windshield treatment called “Rain-X”—did not fulfill the functions
 27 it purported to perform:

28 Rooney’s statement thus implied that his visibility was not
 improved, that Rain-X’s shield was not invisible, that rain did not

⁵ The rule is also found in common law. “[A]n expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently.... [I]f the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.” Restatement 2d of Torts, §566, comment c.

1 disperse on contact, that Rain-X did not repel bugs and other
2 projectiles, that cleaning was not a snap, and that Rain-X did not
3 increase Rooney's all-around visibility, safety and driving comfort.
4 *Although these are somewhat subjective determinations, they are
5 based on factual observations to a sufficient extent to imply an
6 assertion of fact.* Whether Rain-X repels rain, facilitates window
7 cleaning, and increases visibility are all capable of being proved
8 true or false.

9 Unelko, 912 F.2d at 1055 (emphasis added). Thus, the case makes clear that it is not the opinion
10 itself that must be capable of being proved true or false, but the *statements implied by the opinion*
11 that must be factual in nature.

12 The analogous situation is found here. Gartner's reports clearly stated that ZL and its
13 products were inferior to the alternatives, and though it described the factual methodology by
14 which Gartner arrived at that conclusion, the facts and data underlying Gartner's analysis were
15 not disclosed. Complaint ¶¶ 15-19. Moreover, as detailed above, Gartner went to great lengths
16 to tout the supposed factual, objective and "defensible" basis for its conclusions, deliberately
17 creating the impression that the company was privy to other undisclosed facts underlying its
18 statements. Statements by experts or those whose word carries authority are more likely to be
19 construed as implying fact. See Slaughter v. Friedman, 32 Cal. 3d 149, 154 (1982) ("Although
20 accusations of 'excessive' fees or 'unnecessary' work when made by laymen might indeed
21 constitute mere opinion, similar accusations by professional dental plan administrators carry a
22 ring of authenticity and reasonably might be understood as being based on fact."). Thus, even if
23 Gartner's ratings themselves are opinion, the factual statements implied by those opinions may
24 still serve as the basis for liability.

25 Here, the factual context is provided by Gartner itself, which sets out the various
26 weighted criteria it purports to use when assembling its Magic Quadrants. Again, the presence
27 of some qualitative factors in the analysis does not negate the implication of factual statements.
28 In Gill, discussed above, the court found not only that the statement that a surgeon was
"incompetent" to be factual in itself, but also that it was subject to a defamation claim because it
"implies a knowledge of facts which lead to this conclusion." Gill, 227 Cal. App. 3d at 1309.
Similarly, in Murray v. United Food and Commercial Workers Intern. Union, 289 F.3d 297 (4th
Cir. 2002), the Fourth Circuit reversed the district court's dismissal of a defamation claim based

1 on a union’s statement that its former employee was “not a good organizer,” holding that “it is at
 2 least arguably an opinion that might be construed as implying [plaintiff’s] failure to fulfill the
 3 duties of his position of a union organizer.” *Id.* at 306. See also, 2 Callmann on Unfair Comp.,
 4 Tr. & Mono. § 11:5 (4th ed.) (“Statements of opinion to the effect that a competitor’s goods are
 5 poor, or that a creative work is a plagiarism, have been held to imply a state of facts.”).

6 Gartner’s reports implied a factual basis for the conclusion that ZL and its products were
 7 inferior to other email archiving products.⁶ The truth of that implied factual basis is testable, and
 8 therefore may be the basis for liability here. For that reason as well, Gartner’s First Amendment
 9 defense fails to immunize it from ZL’s claims, and its motion must be denied.

10 3. The Cases Gartner Relies On Do Not Support Its Argument

11 Gartner first relies on Partington v. Bugliosi, 56 F.3d 1147, 1156 (9th Cir. 1995),
 12 suggesting through a truncated quotation from the opinion that the case establishes a *per se* rule
 13 against liability for any expression of opinion. MPA at p. 5. The case establishes no such rule.
 14 Instead, the Ninth Circuit there held that “[a] statement of fact is *not* shielded from liability by
 15 being prefaced with the words ‘in my opinion.’” Partington, 56 F.3d at 1156 (emphasis added.)
 16 While a statement is not actionable “if it is *plain* that the speaker is expressing a subjective view,
 17 an interpretation, a theory, conjecture, or surmise,” the court expressly contrasted that with the
 18 situation where the speaker is “claiming to be in possession of objectively verifiable facts.” *Id.*
 19 (emphasis added.) The case also illustrates the breadth of evidence needed to “analyze a
 20 statement in its broad context to determine whether it implies the assertion of an objective fact.”
 21 *Id.* at 1153. The attorney plaintiff in Partington accused the author of a book of implying that the
 22 plaintiff had represented a client poorly in a prominent murder trial. *Id.* at 1149–51. To
 23 determine whether the allegedly defamatory statements were opinion or fact, the court looked
 24 broadly to the entirety of the book and the facts about the underlying trial itself. *Id.* at 1153–54.

25
 26 _____
 27 ⁶ The question of whether the defendant’s statement implies defamatory facts is a question
 28 for the jury, so long as there is a reasonable basis for the implication. “If the statements are
 susceptible of both an innocent and libelous meaning, it is for the jury to understand how they
 were in fact understood.” Weller, 232 Cal. App. 3d at 1002 n. 8.

1 Evidence necessary to make that determination is not before this Court, and it is thus impossible
2 from the pleadings alone to make any analogous determination.

3 Gartner also relies on Jefferson County School Dist. No. R-1 v. Moody's Investor's
4 Svcs., Inc., 175 F.3d 848, 855–56 (10th Cir. 1999), in which the court found that the plaintiff
5 failed to identify the false statements that reasonably implied from defendant Moody's phrases
6 "negative outlook" and "ongoing financial pressures." Those shortcomings are not found here,
7 where ZL has identified the specific factual implications a reasonable reader would draw from
8 Gartner's statements. Complaint at ¶¶ 32, 68. Notably, the Jefferson County court did not hold
9 that Moody's statements were incapable of implying an actionable fact, just that the plaintiff had
10 failed to allege them: "We emphasize that the phrases 'negative outlook' [and] 'ongoing
11 financial pressures' are not necessarily too indefinite to imply a false statement of fact. If
12 coupled with specific factual assertions, such statements might not be immunized from
13 defamation claims by the First Amendment." Jefferson County, 175 F.3d at 856. In contrast, ZL
14 has alleged both the implied factual statements inherent in Gartner's reports, and the specific
15 factual basis for drawing those implications. The Jefferson County court also highlighted the
16 significance of a defendant's claims to objectivity in establishing the basis for liability:
17 "Moody's refers to 'the proven objectivity of [its] opinions, which are issued in accordance with
18 Moody's responsibility to investors and subscribers.' If such an opinion were shown to have
19 materially false components, the issuer should not be shielded from liability by raising the word
20 'opinion' as a shibboleth." Id. (citations omitted). ZL has identified the false components of
21 Gartner's conclusions by reference to Gartner's own description of its methodology. Jefferson
22 County thus illustrates why Gartner's motion should be denied.

23 Defendants also rely on outdated pre-Milkovich cases. As Unelko expressly held, the
24 pre-existing case law from this circuit establishing the *prima facie* rule that "an opinion is simply
25 not actionable defamation" were overruled by Milkovich. Unelko, 912 F.2d at 1052–55 (quoting
26 Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983)); see also Partington, 56 F.3d at 1152
27 (Milkovich did away with prior cases drawing "a sharp, formalistic line between fact and
28 opinion, [and] holding that anything cast in the form of an opinion was absolutely protected by

1 the First Amendment and could not serve as the basis for a defamation claim.”). Cases like
2 Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254 (1986), therefore, are of little weight in
3 guiding the Court’s ruling here.

4 TMJ Implants, Inc. v. Aetna, Inc., 405 F. Supp. 2d 1242, 1251–52 (D. Colo. 2005),
5 involved starkly different scenario explanations by an insurance company defendant for why it
6 took certain coverage positions with respect to plaintiff’s medical devices. The court explicitly
7 found that the statement “appear[ed] within the context of Aetna’s explanation for its various
8 coverage details,” and even the plaintiff conceded that their “primary purpose” was “to explain
9 Aetna’s approval or denial of coverage for various temporomandibular therapies.” Id. at 1250.
10 The court concluded that the coverage calls may have been based in part on a review of medical
11 evidence, but because the ultimate decision was a judgment call left to the company, its
12 statements *explaining* those subjective decisions were pure expressions of opinion. The same
13 cannot be said here, where Gartner’s statements were not explanations of its own prior actions,
14 but rather critical assessments of ZL’s products that Gartner repeatedly promised were founded
15 on objective facts.

16 Aviation Charter, Inc. v. Research Group/US, 416 F.3d 864 (8th Cir. 2005), is similarly
17 inapposite. The decision there arose in the summary judgment context, where the court had
18 before it evidence concerning the basis for the reviews in question. Id. at 868. Here, the Court
19 has no evidence before it, and must assume the truth of the pleaded facts, notwithstanding
20 Gartner’s lawyer’s arguments that the company did not mean what it said. Second, based on the
21 proffered evidence, the court in Aviation Charter was able to determine that the statements at
22 issue were wholly “subjective interpretation” leading to “a subjective conclusion” based on the
23 “independent judgments” of the defendant’s analysts, even if the analysis reviewed certain
24 objective data as part of the process. Id. at 870. In contrast, the statements at issue here were
25 intended to be understood as statements of objective fact. Finally, Aviation Charter does not
26 address the undisclosed facts doctrine. Here, even if Gartner’s statements were to be interpreted
27 as opinion, its statements may still serve as the basis for liability because they implied a factual
28 statement capable of being proved true or false.

1 For those reasons, the cases cited by Gartner in support of its First Amendment defense
2 do not support dismissal here.

3 4. All of ZL's Claims Survive Gartner's First Amendment Defense

4 Gartner's brief goes to some length to explain that ZL's claims for defamation, trade
5 libel, false statements under the Lanham Act, false advertising, and unfair competition all require
6 a false statement of fact, and that a statement of opinion is insufficient. To the extent that
7 opinion may form a defense to those claims, it is on the same basis and subject to the same
8 exceptions discussed above. Kahn v. Bower, 232 Cal. App. 3d 1599 (1991), explicitly rejected
9 the argument that state law provided a second, possibly stronger line of defense for statements of
10 opinion: "Respondents suggest that a categorical exemption for opinion exists independently
11 under California law. We find no support for this proposition in the cited defamation cases." Id.
12 at 1607 n. 2.

13 Similarly, courts have treated the distinction between opinion and non-opinion, and
14 actionable opinion from exempt opinion under the post-Milkovich line of cases, as subject to the
15 same standard set out in the defamation case law. For example, this Court stated, "Only false
16 statements of fact are subject to defamation or trade libel liability; statements of opinion are
17 protected by the First Amendment unless they 'imply a false assertion of fact.'" Vondran v.
18 McLinn, 1995 WL 415153, at *4 (N.D. Cal. July 5, 1995). With respect to Lanham Act false
19 statement claims, another court said: "To prevail on either a Lanham Act or a state law
20 defamation claim, Plaintiffs must show that the articles' challenged statements 'expressly or
21 impliedly assert [facts] that [are] susceptible to being proved false.'" National Services Group,
22 Inc. v. Painting and Decorating Contractors of America, Inc., 2006 WL 2035465, at *6 (C.D.
23 Cal. July 18, 2006) (citing Coastal Abstract Service, Inc. v. First American Title Ins. Co., 173
24 F.3d 725, 730 (9th Cir. 1999)). Thus, because Gartner's statements were not opinion, or at least
25 were the type of opinion implying undisclosed facts that are actionable under the First
26 Amendment, ZL has met its obligation to plead an allegation of fact with respect to all of its
27 claims.

28

1 **C. GARTNER’S OTHER ARGUMENTS ARE MERITLESS**

2 **1. ZL Has Standing To Bring Its Lanham Act Claims**

3 Gartner incorrectly argues that ZL’s third and fourth claims must be dismissed because
4 ZL and Gartner are not competitors. Gartner overstates the requirements for standing to bring a
5 false advertising claim under the Lanham Act.

6 Gartner claims that a plaintiff can meet the “competitive injury” requirement for a
7 Lanham Act false advertising claim only if the defendant is its competitor, relying on Ninth
8 Circuit cases it says uphold the so-called “categorical approach” to standing. More recent cases
9 from other circuits have held that approach to be unduly restrictive, and instead look to a multi-
10 factor test to determine whether the type of injury claimed by the plaintiff is sufficient to confer
11 standing. In Phoenix of Broward, Inc. v. McDonald’s Corp., 489 F.3d 1156 (11th Cir. 2007), for
12 example, the Eleventh Circuit adopted a more reasonable prudential standing approach, looking
13 not to whether the defendant was a competitor but instead to five factors:

- 14 (1) The nature of the plaintiff’s alleged injury: Is the injury of a
15 type that Congress sought to redress in providing a private remedy
16 for violations of the [Lanham Act]?
17 (2) The directness or indirectness of the asserted injury.
18 (3) The proximity or remoteness of the party to the alleged
injurious conduct.
19 (4) The speculativeness of the damages claim.
20 (5) The risk of duplicative damages or complexity in apportioning
damages.

21 Id. at 1163–64 (adopting the approach set out in Conte Bros. Automotive, Inc. v. Quaker State-
22 Slick 50, Inc., 165 F.3d 221, 233 (3d Cir. 1998)). ZL would clearly qualify to be entitled to
23 maintain Lanham Act false advertising claims under the prudential approach. It suffered direct
24 and calculable damages as an immediate result of Gartner’s false statements, which skewed the
25 open market in which ZL competes with Gartner’s favored providers. Complaint ¶¶ 88–90.

26 The cases from this circuit on which Gartner relies indicate that the “categorical
27 approach” is not applied universally even here. In National Services Group, 2006 WL 2035465
28 at *3, for example, the court held that a nonprofit trade group defendant created a “competitive
injury” even though it was not in direct competition with the plaintiff. Additionally, in Coastal
Abstract Service, 173 F.3d at 734, the court held that a corporate officer, who was obviously not

1 in direct competition with plaintiff, could be personally liable for false statements. Because ZL
 2 has suffered the type of competitive injury the Lanham Act was intended to remedy, it should be
 3 allowed to maintain its false advertising claim here.

4 **2. ZL Has Standing To Bring California Business and Profession 5 Code Claims**

6 Gartner argues that ZL lacks standing to bring its claims under California Business and
 7 Professions Code sections 17200 (the Unfair Competition Law or “UCL”) and 17500 (California
 8 False Advertising”) because (1) ZL has not lost money or property, and (2) it has not suffered
 9 injury in fact “as a result” of Gartner’s actions. Both contentions are incorrect.

10 *a) ZL has suffered the requisite monetary harm*

11 Gartner erroneously argues that only plaintiffs who have paid money *directly* to the
 12 defendant and seek return of that money have standing to bring a UCL or false claim. That
 13 interpretation has been squarely rejected. California statute provides that “[t]he court may make
 14 such orders or judgments, . . . as may be necessary to restore to any person in interest any money
 15 or property” acquired by means of a forbidden practice. Cal. Bus. & Prof. Code §§ 17203,
 16 17535. The Court’s discretion is very broad as to the remedy it awards. Colgan v. Leatherman
 17 Tool Group, Inc., 135 Cal. App. 4th 663, 695 (2006). Restitutionary awards “are not concerned
 18 with restoring the violator to the status quo ante. The focus instead is on the victim.” People v.
 19 Beaumont Inv., Ltd., 111 Cal. App. 4th 102, 134 (2003). An award is restitutionary where the
 20 order returns money to people “from whom it was taken or who had an ownership interest in it.”
 21 Shersher v. Superior Court, 154 Cal. App. 4th 1491, 1497 (2007).

22 Gartner’s erroneous contentions are rooted in a fundamental misapprehension of Korea
 23 Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1149-50 (2003), the case cited by
 24 Gartner and on which the other cases it relies on are based. The narrow reading of Korea Supply
 25 urged by Gartner has been squarely rejected. In Shersher, 154 Cal. App. 4th 1491, the court
 26 confronted the defendant’s argument that it could not be held liable because it did not directly
 27 receive the challenged service charges at issue in that case. Id. at 1497-1500. It held, “Nothing
 28 in Korea Supply conditions the recovery of restitution on the plaintiff having made direct
 payments to a defendant who is alleged to have engaged in false advertising or unlawful

1 practices under the UCL.” *Id.* at 1494. The same conclusion was reached in Troyk v. Farmers
 2 Group, Inc., 171 Cal. App. 4th 1305 (2009), in which the court affirmed an award of restitution
 3 from Farmers to a class of insureds who paid service charges to a third party as a result of
 4 Farmers’ unlawful business practices. *Id.* at 1338-41.

5 Here, ZL has both been damaged directly by lost sales as a result of Gartner’s
 6 misconduct, but has also been forced to expend money on sales efforts that were thwarted by
 7 Gartner’s false statements. That type of harm is not only compensable as restitution, even if
 8 those losses are not as large as its damages for other claims, they are sufficient to confer standing
 9 and entitle ZL to the injunctive relief it also seeks here.

10 *b) ZL has met the standing requirement by pleading causation*

11 California Business and Professions Code sections 17204 and 17535 require that private
 12 litigants bringing a claim under sections 17200 or 17500 have “suffered injury in fact and has
 13 lost money or property as a result of the unfair competition.” As Gartner’s own brief states, the
 14 “as a result” language (the product of California’s Proposition 64) “imports a *reliance or*
 15 *causation* element” into section 17200 and 17500. Medina v. Safe-Guard Prods., 164 Cal. App.
 16 4th 105, 115 (2008). Gartner focuses entirely on the reliance prong of that requirement, but
 17 ignores completely the causation prong. Proposition 64 standing may be satisfied by showing
 18 reliance *or* causation. ZL has met its burden by pleading causation. Its fifth claim, for violation
 19 of section 17500, directly avers that Gartner’s false advertisements “have caused direct harm to
 20 ZL.” Complaint ¶ 120. Its sixth claim, for violation of section 17200, states that “ZL has
 21 suffered irreparable harm, has suffered injury in fact and has lost money or property as a result of
 22 Gartner’s unfair acts and business practices.” *Id.* at ¶ 122. Both allegations are sufficient to
 23 meet ZL’s standing requirement at the pleading stage.

24 **3. Gartner’s Magic Quadrant Reports Constitute Advertising**

25 Gartner’s contention that the Magic Quadrant Reports do not qualify as “advertising”
 26 under the Lanham Act and section 17500 is equally unavailing.

27 Under the California standard, the question of whether representations constitute “false
 28 advertising,” is guided by looking to the speaker, the intended audience, and the content of the

1 message. Kasky v. Nike, 27 Cal. 4th 939, 960 (2002). The court there noted that the typical
 2 speaker is likely to be someone engaged in commerce, or “acting on behalf of a person so
 3 engaged,” while the intended audience is likely to be a potential buyer or customer of the
 4 speaker’s product. Id. Whether the speaker has an economic motivation in making the statement
 5 is also a relevant factor. Id. at 961. The content of the message—whether it contains factual
 6 representations about business operations, products or services—is also relevant. Id. at 961–62.
 7 In Kasky, statements regarding the company’s overseas practices and working conditions were
 8 held “commercial.” Id. Here, all three factors weigh in favor of finding that Gartner’s
 9 misrepresentations qualify as advertising. Gartner uses the Magic Quadrant Reports to leverage
 10 sales of its consulting services, a large part of its \$1.3 billion annual business, approaching
 11 almost half its research revenues. Complaint ¶ 17. They are, therefore, statements by someone
 12 engaged in commerce to a potential buyer or customer of the speaker’s product. Gartner’s hope
 13 to win consulting business is its commercial motivation for issuing its Magic Quadrant Reports.
 14 Finally, the content of the message is indubitably commercial—indeed, the entire focus of the
 15 reports. The statements therefore qualify as advertising under the California standard.

16 The federal Lanham Act standard looks to four factors: whether the representations are

17 (1) commercial speech; (2) by a defendant who is in commercial
 18 competition with plaintiff; (3) for the purpose of influencing
 19 consumers to buy defendant's goods or services. While the
 20 representations need not be made in a “classic advertising
 21 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 Coastal Abstract Service, 173 F.3d at 735. Gartner claims that ZL cannot meet the second prong,
 23 but that prong is merely a restatement of the standing requirement discussed and rejected above.
 24 Gartner also claims that ZL cannot meet the first prong because Gartner’s statements cannot be
 25 deemed “commercial speech” because it does not “propose a commercial transaction.” Va. State
 26 Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976). That is
 27 untrue. The fundamental purpose of the Magic Quadrant Reports is to get customers to sign on
 28 for additional services with Gartner. For that reason, the reports also meet the third prong of the
 standard, the requirement that they be “made for the purpose of influencing consumers to buy

1 defendant's goods or services." Gartner's statements therefore meet the Lanham Act standard
2 for advertisement as well.

3 In any event, these are not threshold questions appropriate for adjudication on the
4 pleadings. To the extent there is any question about Gartner's purpose in making the
5 representations at issue, any such question must be resolved by reference to evidence not yet
6 before the Court. Gartner is not therefore entitled to dismissal at this pleading stage.

7 **4. Gartner Overstates the "Special Relationship" Requirement for**
8 **Negligent Interference**

9 Finally, Gartner wrongly argues that ZL has not met the pleading requirements of
10 negligent interference because it has not alleged the existence of a "special relationship" giving
11 rise to a heightened duty of care. While most cases of negligent interference involve a third-
12 party beneficiary, such a particular relationship has not explicitly been held to be a prerequisite
13 to establishing a "special relationship." Indeed, in *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799
14 (1979), the court specifically stated that the duty may arise by statute, contract, "the general
15 character of the activity in which the defendant engaged, the relationship between the parties *or*
16 *even the interdependent nature of human society.*" *Id.* at 803 (emphasis added). It listed the
17 traditional six factors in deciding whether a duty exists: "(1) the extent to which the transaction
18 was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree
19 of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the
20 defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's
21 conduct and (6) the policy of preventing future harm." *Id.* at 804. Here, Gartner specifically
22 targeted ZL, and as the Complaint describes, was perfectly aware of the continuing harm done to
23 the company by its misconduct. Complaint ¶¶ 74–77, 86. Public policy weighs heavily in favor
24 of requiring Gartner from refraining from the affirmative acts that prevent ZL from
25 consummating its business relationships. The factual basis for a negligent interference claim has
26 been properly pled, and ZL's claim cannot be dismissed.

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1 **D. IN THE ALTERNATIVE, PLAINTIFF SHOULD BE ALLOWED TO REPLEAD**

2 A plaintiff may amend its complaint “once as a matter of course...before being served
3 with a responsive pleading.” F.R.C.P. 15(a)(1). A motion to dismiss is not a “responsive
4 pleading” within the meaning of Rule 15. Doe v. U.S., 58 F.3d 494, 496-97 (9th Cir. 1995).
5 Thus, “[n]either the filing nor granting [of a motion to dismiss] terminates the right to amend.”
6 Id. at 497. ZL should therefore be granted leave to amend as a matter of right.

7 Further, under Federal Rule of Civil Procedure 15(a)(2), the “court should freely give
8 leave when justice so requires.” The Ninth Circuit has “stressed Rule 15’s policy of favoring
9 amendments, and [it has] applied this policy with liberality.” Ascon Properties, Inc. v. Mobil Oil
10 Co., 866 F.2d 1149, 1160 (9th Cir. 1989) (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
11 186 (9th Cir. 1987)). This policy is particularly forceful when, as here, the court has not
12 previously granted leave to amend. None of the five factors that courts consider in determining
13 whether to grant leave to amend weigh against granting such leave here: “(1) bad faith; (2) undue
14 delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether plaintiff
15 has previously amended his complaint.” Ascon Properties, 866 F.2d at 1160. Gartner asserts
16 only that amendment would be futile. Amendment is futile only if “the allegation of other facts
17 consistent with the challenged pleading could not possibly cure the deficiency.” Schreiber, 806
18 F.2d at 1401. Defendant has not demonstrated that is the case here, and ZL should be given
19 leave to replead should the Court deem dismissal appropriate.⁷

20 **IV. CONCLUSION**

21 For the reasons stated above, Gartner’s motion must be denied in its entirety.

22 _____
23 ⁷ ZL’s continuing investigation has also revealed additional facts that bolster its
24 contentions and provide additional bases for liability. For example, it has discovered that a
25 former board member of Gartner was also, until very recently, a board member of Symantec, and
26 also happens to be a co-founder of a significant Gartner shareholder, which, Gartner describes in
27 a recent SEC filing, “may be able to exercise significant influence over matters” of significant
28 importance at Gartner. In addition, ZL has deepened its understanding of the commercial
relationships between Gartner and the companies it rates, some of whom pay Gartner hundreds
of thousands of dollars per year for Gartner services, promotions, and participation in Gartner
trade shows. Both facts are strong indications that Gartner’s positions are not neutral, but
influenced by its privity with companies willing and able to pay-to-play.

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By /s/
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ZL TECHNOLOGIES, INC.

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