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Receiver of Defendants Secure Investment Services, Inc.,
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. SECURE INVESTMENT SERVICES, INC., AMERICAN FINANCIAL SERVICES, INC., LYNDON GROUP, INC., DONALD F. NEUHAUS, and KIMBERLY A. SNOWDEN, Defendants.	Case No. 2:07-cv-01724 GEB CMK NOTICE OF RECEIVER'S MOTION TO COMPEL PAYMENT OF PREMIUM SHARE FROM JAMES L. KUFELDT [BOT-M] Date: May 18, 2009 Time: 9:00 a.m. Department: 10

TO: THE PARTIES AND ALL COUNSEL OF RECORD:

On May 18, 2009 at 9:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Garland E. Burrell, Jr., at the U.S. District Court for the Eastern District of California, 501 I Street, Sacramento, California, Michael J. Quilling, the Receiver appointed in these proceedings, ("Receiver"), will move this the Court to issue an order to compel James L. Kufeldt to pay his share of the premium on the BOT-M policy, and upon failure to pay his share of the

premium, that his ownership and beneficial interest in the policy be automatically forfeited and be replaced by an allowed claim on the receivership estate for $15,000.00 in his favor.

The motion will be based upon Receiver's Motion and Brief in Support, the papers on file in this matter and any testimony or argument received by the Court during the hearing on the motion. A proposed order is submitted contemporaneously with this motion.

Respectfully submitted,

BOUTIN GIBSON DI GIUSTO HODELL INC.

Dated: April 17, 2009.

By *_____ /s/ Maralee MacDonald _____*
Maralee MacDonald
Attorneys for Receiver of Defendants
Secure Investment Services, Inc.,
American Financial Services, Inc., and
Lyndon Group, Inc.

CERTIFICATE OF CERTIFIED MAIL SERVICE

I hereby certify that on the 17th day of April, 2009, a copy of this Notice was served on all interested parties through the Court's electronic filing system. In addition, a copy of this motion was served on by U.S. Certified Mail, Return Receipt Requested on the following investor named as owner of the BOT-M Policy at his last known address:

James L. Kufeldt
1413 Mangrove
Chico, CA 95926

_____ /s/ Michael J. Quilling _____
Michael J. Quilling

CERTIFICATE OF SERVICE

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Bazzle John Wilson
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Paradise, CA 95969

Ernest Jeremias
5022 17th Avenue, Apt. 1
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/s/ Maralee MacDonald
Maralee MacDonald

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. SECURE INVESTMENT SERVICES, INC., AMERICAN FINANCIAL SERVICES, INC., LYNDON GROUP, INC., DONALD F. NEUHAUS, and KIMBERLY A. SNOWDEN, Defendants.	Case No. 2:07-cv-01724 GEB CMK RECEIVER'S MOTION TO COMPEL PAYMENT OF PREMIUM SHARE FROM JAMES L. KUFELDT [BOT-M] Date: May 18, 2009 Time: 9:00 a.m. Department: 10

TO: THE HONORABLE GARLAND E. BURRELL, JR., UNITED STATES DISTRICT JUDGE:

Michael J. Quilling, the Receiver appointed in these proceedings ("Receiver"), files this Motion to Compel Payment of Premium Share and in support of such would show the following:

BACKGROUND FACTS

1. By Orders dated August 24, 2007 (Dkt. No. 27) and October 30, 2007 (Dkt. No. 80), the Receiver was appointed by this Court.

2. Continuously throughout 2008, the Receiver has been contacting the investors who hold small fractional ownership interests in the multiple owner policies, of which the BOT-M policy is one, for the purpose of trying to convince those investors to transfer their ownership interest to the Receiver. One of the partial owners of the policy is James L. Kufeldt ("Kufeldt") who, according to the books and records of the insurance company owns two a 0.47391% interest and a 0.94782% interest in the policy and is a beneficiary of the same percentages.

3. The Receiver is pleased to report to the Court that as of the filing of this motion, all of the investors have executed forms transferring their ownership interests in the BOT-M policy to the Receiver. However, despite repeated efforts, the Receiver has been unable to get Kufeldt to transfer his interests. Therefore, the Receiver can only assume James L. Kufeldt refuses to transfer his interests.

4. James L. Kufeldt's share of the premium on the BOT-M Policy since the time the Receiver was appointed is $631.25 and will be $383.87 per quarter in the future.

5. Accordingly, the Receiver seeks an order from this Court compelling James L. Kufeldt, to pay the Receiver $631.25 for his share of the premiums plus his percentage share of all additional premiums as they become due. Should Kufeldt fail to do so, the Receiver seeks an order forfeiting Kufeldt's ownership and beneficial interests in the BOT-M Policy to the receivership estate.

ARGUMENT AND AUTHORITIES

6. It is well-settled that District Courts have broad powers and wide discretion to determine appropriate relief for federal equity receiverships. *Securities & Exchange Comm'n v. Elliott*, 953 F.2d 1560, 1569-70 (11th Cir. 1992); *see also Securities & Exch. Comm'n v. Hardy*, 803 F.2d 1034, 1037 (9th Cir.1986). In applying equitable principles, courts in this district often use the theories of unjust enrichment and quasi-contract to achieve equity when one party has paid obligations benefiting another.

7. Unjust enrichment is not an independent cause of action, but a general principle supporting various equitable remedies. *Mauro v. General Motors Corp.*, 2008 WL 2775004, *6 (E.D. Cal. Jul. 15, 2008); *Walker v. USAA Cas. Ins. Co.*, 474 F.Supp.2d 1168, 1174 (E.D. Cal. 2007). The elements supporting unjust enrichment are (1) the receipt of a benefit and (2) the unjust retention of it at another's expense. *Weststyn Dairy 2 v. Eades Commodities Co.*, 280 F.Supp.2d 1044, 1057 (E.D. Cal. 2003). A "benefit" includes any advantage obtained by the recipient or expenses paid on his behalf. *Ghirardo v. Antonioli*, 924 P.2d 996, 1003, 14 Cal.4th 39, 51 (Cal. 1996); *see also Process Specialties, Inc. v. Sematech, Inc.*, 2001 WL 36105562, *20 (E.D. Cal. 2001).

8. Courts often redress unjust enrichment under the theory of quasi-contract or quantum meruit. Such relief does not require a contract and exists independent of the parties' privity, intent, or promises. *Fid. & Deposit Co. of Md. v. Harris*, 360 F.2d 402, 409 (9th Cir. 1966); *McBride v. Boughton*, 123 Cal. App. 4th 379, 388 n.6 (2004). Courts will imply an obligation to pay when one party, in equity and good conscience, should not be permitted to keep a benefit without paying for it. *U.S. v. Healy Tibbitts Const. Co.*, 607 F.Supp. 540, 542 (N.D. Cal. 1985) (citing DOBBS, REMEDIES 224 (West 1973); 66 Am.Jur.2d, §§ 2, 3). Equity will typically require payment as measured by the benefit received. *Davis v. Leal*, 43 F.Supp.2d 1102, 1112 (E.D. Cal. 1999).

9. To prevent unjust enrichment, courts have upheld the right of one party to pay an obligation for another and seek restitution for that amount. For example, in *Page v. Podol*, 4 Cal.App.2d 229 (1935), a separated couple held property together as joint tenants. When that property was sold, both parties became liable for the tax obligation. Plaintiff paid the entire tax obligation and filed a suit in equity to recover defendant's proportional share. The court noted that "[t]he soundness of this doctrine has been upheld by innumerable decisions of courts of the highest authority in many jurisdictions, and it is so obviously just and reasonable that it is matter of wonder that it should ever have been called in question." *Id.* The court reversed the decision

below and awarded plaintiff the right to recover a proportional share of the obligation owed by defendant.

10. Through this motion, the Receiver asks the Court to exercise its equitable powers in a similar manner and compel Kufeldt to pay his proportional share of premiums for the BOT-M policy. To date, the Receiver has paid 100% of those premiums since September 7, 2007, for a total of $44,400.00. While other joint owners of that policy have agreed to transfer their interest to the Receiver in exchange for the Receiver's payment of the premiums and a claim against the estate, Kufeldt has not. Accordingly, Kufeldt has unjustly benefited by maintaining his 0.47391% and 0.94782% ownership without paying a proportional share of the premiums. *See* CAL. CIV. CODE § 3521 ("No person can be permitted to enjoy the benefits of a transaction while rejecting the burdens of it.").

11. To avoid unjust enrichment, the Court should compel Kufeldt to pay (1) $631.25 to the Receiver for Kufeldt's 0.47391% and 0.94782% share of the premiums paid to date and (2) Kufeldt's proportional share of all future premiums on a quarterly basis as invoiced by the Receiver.[1] Should Kufeldt fail to pay these obligations in a timely manner, the Court should order his ownership interests in the BOT-M policy forfeited to the receivership estate. In the event of forfeit, the Receiver would replace Kufeldt's ownership interests in the BOT-M policy with an allowed claim against the receivership estate in the amount of $15,000.00 (the amount of the original investments).

12. As noted above, the Court has "broad powers and wide discretion to determine the appropriate relief in an equity receivership." *Elliott*, 953 F.2d at 1569-70. This includes the discretionary authority to deny Kufeldt's ordinary contract rights when they are "inimical to receivership purposes." *See U.S. v. Vanguard Inv. Co., Inc.*, 6 F.3d 222, 226 (4th Cir. 1993). That is exactly what the Receiver asks the Court to do here. Kufeldt currently has a contractual

[1] Kufeldt's share of the next premium payment will be $383.87. That amount, however, will increase in the future since premium obligations for the BOT-M policy are scheduled to increase annually. At this time, the Receiver does not know how much those future premium obligations will be and, therefore, would give Kufeldt advance notice by an invoice.

right to a 0.47391% and a 0.94782% of death benefits from the BOT-M policy even if the Receiver pays all of the premiums for that policy. This Court should impose upon Kufeldt an equitable obligation to pay his share of the premiums or else forfeit his ownership interests to the receivership estate in exchange for an allowed claim for $15,000.00. Doing so would both serve the interests of equity and keep the BOT-M policy in force for the benefit of all defrauded investors.

13. Given the fact that Kufeldt will not respond and would not be in position to protect the policy from lapsing if the Receiver requests permission from the court to abandon the policy and does not pay the premium, one can certainly argue that Kufeldt would be better off by a forfeiture and allowance of a claim. At least that way he would have something – a claim – if he or another person representing Kufeldt ever surfaces.

WHEREFORE, premises considered, the Receiver requests that upon final hearing and consideration of this matter, that the Court issue an order compelling James L. Kufeldt to pay $631.25 to the Receiver plus his share of all future premiums as they become due on pain of forfeiture of his ownership interests, and for such other and further relief, general or special, at law or in equity, to which the Receiver may show himself justly entitled.

Submitted this 17th day of April, 2009.

Respectfully submitted,

/s/ Michael J. Quilling

MICHAEL J. QUILLING (Tex. Bar No. 16432300)
BRENT J. RODINE (Tex. Bar No. 24048770)
QUILLING, SELANDER, CUMMISKEY
& LOWNDS, P.C.

Chris Gibson, SBN 073353
Maralee MacDonald, SBN 208699
BOUTIN GIBSON DI GIUSTO HODELL INC.
Attorneys for Receiver

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James L. Kufeldt
1413 Mangrove
Chico, CA 95926

/s/ Michael J. Quilling
Michael J. Quilling

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. SECURE INVESTMENT SERVICES, INC., AMERICAN FINANCIAL SERVICES, INC., LYNDON GROUP, INC., DONALD F. NEUHAUS, and KIMBERLY A. SNOWDEN, Defendants.	Case No. 2:07-cv-01724 GEB CMK APPENDIX OF AUTHORITIES IN SUPPORT OF RECEIVER'S MOTION TO COMPEL PAYMENT OF PREMIUM SHARE FROM JAMES L. KUFELDT [BOT-M] Date: May 18, 2009 Time: 9:00 a.m. Department: 10

Pursuant to Local Rule 5-133(i), the Receiver, by and through its counsel of record, respectfully submits the following copies of authority cited in and in support of its Motion to Compel Payment of Premium Share [BOT-M]:

1. Mauro v. General Motors Corp., 2008 WL 2775004, *6 (E.D. Cal. Jul. 15, 2008);

2. Process Specialties, Inc. v. Sematech, Inc., 2001 WL 36105562, *20 (E.D. Cal. 2001).

Respectfully submitted,

BOUTIN GIBSON DI GIUSTO HODELL INC.

Dated: April 17, 2009

By *_____ /s/ Maralee MacDonald _____*
Maralee MacDonald
Attorneys for Receiver of Defendants
Secure Investment Services, Inc.,
American Financial Services, Inc.,
and Lyndon Group, Inc.

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I hereby certify that on the 17th day of April, 2009, a copy of this Appendix was served on all interested parties through the Court's electronic filing system. In addition, a copy of this motion was served on by U.S. Certified Mail, Return Receipt Requested on the following investor named as owner of the BOT-M Policy at his last known address:

James L. Kufeldt
1413 Mangrove
Chico, CA 95926

_____ /s/ Michael J. Quilling _____
Michael J. Quilling

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5022 17th Avenue, Apt. 1
Brooklyn, NY 11204

/s/ Maralee MacDonald
Maralee MacDonald

United States District Court,E.D. California.
Damon MAURO and John Paikai, On Behalf Of Themselves And All Others Similarly Situated,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION, Defendant.
No. CIV. S-07-892 FCD GGH.

July 15, 2008.

Karen Marie Leser Grenon, Nathan Zipperian, PHV, Shepherd Finkelman Miller & Shah, LLP, San Diego, CA, Mark F. Anderson, Kemnitzer, Anderson, Barron & Ogilvie LLP, San Francisco, CA, for Plaintiffs.
A. Erin Dwyer, PHV, Figari and Davenport LLP, Dallas, TX, Patricia M. Coleman, Dykema Gossett LLP, Los Angeles, CA, Peter M. KellettPro Hac Vice, Timothy A. Daniels, PHV, Dykema Gossett PLLC, Detroit, MI, for Defendant.

MEMORANDUM AND ORDER

FRANK C. DAMRELL, JR., District Judge.
*1 This matter is before the court on General Motors Corporation's ("defendant") motion to dismiss John Paikai's ("plaintiff") [FN1] first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[FN2] Defendant asserts that plaintiff's complaint fails to state a claim upon which relief can be granted because Florida law prohibits the requested relief. Defendant also argues the class claims fail as a matter of law because 1) the proposed class is not ascertainable and 2) the claims are unsuitable for class treatment because not all class members have valid claims. (Def.'s Mem. of P. & A., filed May 2, 2008 ("MTD") at 1-2.) Plaintiff opposes the motion or, in the alternative, seeks leave to amend his complaint.

FN1. Plaintiff Damon Mauro was dismissed by the parties pursuant to a stipulation filed April 28, 2008.

FN2. All further references to a "Rule" are to the Federal Rules of Civil Procedure.

For the reasons set forth below, defendant's motion to dismiss plaintiff's first amended complaint is GRANTED in part and DENIED in part. Plaintiff is granted leave to amend as set forth below.[FN3]

FN3. Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

BACKGROUND

Plaintiff's claims arise from the following alleged facts: The tires on 2004, 2005, and 2006 Pontiac GTOs are "prone to failure because the suspension system and alignment settings (and specifically the camber settings) are improperly designed, assembled, and/or installed, causing, inter alia, uneven and premature tire wear and failure, as well as causing the inside front tires to graze the struts during normal operation and use."(Pl.'s First Am. Compl., filed April 03, 2008 ("FAC") ¶ 2.) The subject GTOs were built by defendant, General Motors Corporation ("GM"), on the same platform as Australia's Holden Monaro ("Monaro"), which is manufactured by the GM subsidiary GM Holden Limited. (*Id.* ¶ 3.) The Monaros were equipped with 235 mm wide tires mounted on 17" wheels. (*Id.*) However, the vehicles at issue were equipped with 245 mm wide tires mounted on 17" wheels when sold as GTOs within the United States. (*Id.*)

On September 20, 2005, plaintiff purchased a new 2005 Pontiac GTO from Allen J. Pontiac ("Allen"), an authorized Pontiac GTO dealer in Seebring, Florida, through a written sales contract. (*Id.* ¶ 4.) Plaintiff's GTO came with standard 17" wheels and BF Goodrich tires. (*Id.* ¶ 7.) On April 20, 2006, plaintiff took his GTO to Yarbrough Tire ("Yarbrough") in Lake Placid, Florida in response to finding his tires significantly worn after 12,003 miles. (*Id.* ¶ 8.) Yarbrough determined that the tires needed replacement. (*Id.*) Plaintiff paid Yarbrough $1895.14 for four new wheels and tires. (*Id.*)

Plaintiff took his GTO to Allen in October 2007,

because he thought it was pulling to the left. (*Id.* ¶ 9.) Allen realigned the vehicle, explaining that the alignment, specifically the camber, was out of specification. (*Id.*) Later, on December 17, 2007, plaintiff returned to Yarbrough to purchase four new tires due to inner shoulder wear, despite having used the tires for only 20,369 miles and rotating them according to schedule. (*Id.* ¶ 10.)The tires cost $568.13. (*Id.*)

*2 Defendant provided plaintiff and each owner and lessee of the subject vehicles with a 3 year, 36,000 mile bumper-to-bumper factory warranty. (*Id.* ¶ 11.)

Plaintiff filed the instant action on November 15, 2007 on behalf of himself and all others similarly situated. Plaintiff asserted class action claims for: 1) violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. section 501.201 *et seq.*; 2) breach of warranty; and 3) unjust enrichment. Plaintiff filed a first amended complaint on April 3, 2008, modifying certain factual allegations but asserting the same causes of action against defendant. Defendant now moves to dismiss plaintiff's first amended complaint for failure to state a claim upon which relief can be granted.[FN4]

FN4. Pursuant to the parties' joint motion, this case was consolidated with *O'Connor v. General Motors Corp.*, Civ. S-07-892 FCD/GGH because of their common issues of fact. (Consolidated Case Order, filed May 19, 2008.)

STANDARD

On a motion to dismiss, the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). The court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n. 6, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. *See id.*

Nevertheless, it is inappropriate to assume that the plaintiff "can prove facts which it has not alleged or that the defendants have violated the ... laws in ways that have not been alleged." *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). Moreover, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir.1986).

Ultimately, the court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, ----, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). Only where a plaintiff has not "nudged [his or her] claims across the line from conceivable to plausible," is the complaint properly dismissed. *Id.*"[A] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Hudson v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)).

In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201. *See Mir v. Little Co. Of Mary Hospital*, 844 F.2d 646, 649 (9th Cir.1988); *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F.Supp.2d 1035, 1042 (C.D.Cal.1998).

ANALYSIS

Preliminarily, the court must decide what law applies in this case. In arguing their positions on the motion, the parties dispute whether Florida or California law is applicable. For example, defendant moves to dismiss, arguing all of plaintiff's claims fail under Florida law. Plaintiff responds that his claims are sustainable, at times citing California law but at other times relying on Florida law. Ultimately, this dispute exists because the complaint does not clearly establish what law applies to the individual claims. While the complaint is brought by a Florida resident and cites the FDUTPA, plaintiff does not allege facts establishing that Florida law applies via contract or otherwise. Therefore, before reaching the merits of the substantive causes of action, the court must consider the issue of the applicable law.

*3 This case was brought pursuant to federal diversity jurisdiction. (FAC ¶ 17.) When exercising diversity jurisdiction, a federal district court must apply federal procedural law and the substantive law of the forum state, which includes the choice-of-law rules of that state. *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir.2002) (citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)). Accordingly, to determine the sufficiency of the complaint, the court must apply the pleading requirements of the Federal Rules of Civil Procedure and California substantive law to each cause of action. If there is a choice-of-law question, the court must follow the law which California would apply in that circumstance.

In certain circumstances, California's choice-of-law rules require a court to apply the law of another jurisdiction. The first situation occurs when the parties have incorporated a choice-of-law clause in their express agreement. California courts will generally follow the law specified in the clause. *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 464, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (1992) (citing *Smith, Valentino & Smith, Inc., v. Superior Court*, 17 Cal.3d 491, 495-96, 131 Cal.Rptr. 374, 551 P.2d 1206 (1976)).[FN5]

FN5. There are circumstances where California law may trump a contractual choice-of-law provision. *Nedlloyd*, 3 Cal.4th at 465-66, 11 Cal.Rptr.2d 330, 834 P.2d 1148. However, since neither party has alleged that a choice-of-law clause governs this case, the court does not consider herein those exceptions.

The second situation occurs when no formal choice-of-law selection has been made, but a non-resident proponent has invoked the law of another jurisdiction. Once the foreign law has been invoked, California follows a three-step "governmental interest analysis" to address conflict-of-law claims. *Wash. Mut. Bank v. Superior Court*, 24 Cal.4th 906, 919, 103 Cal.Rptr.2d 320, 15 P.3d 1071 (2001). For the first step, the proponent must identify the applicable law of the proposed state and show that it materially differs from California law.*Id.* If differences exist, the second step is to "determine what interest, if any, each state has in having its own law applied to the case."*Id.* (citation omitted). If multiple states have an interest, the third step is to "select the law of the state whose interests would be 'more impaired' if its law were not applied."*Id.* (citation omitted).

Here, neither party has alleged that a choice-of-law clause exists in the subject contract. Nor has either party addressed California's "governmental interest analysis" to establish that a foreign state's law should be applied. Thus, having brought this action in this court under federal diversity jurisdiction, the court must apply, as the default, the substantive law of California to all claims.[FN6]

FN6. The court makes this finding for purposes of resolving the instant motion. However, plaintiff is granted leave to amend to allege facts supporting application of Florida law. Defendant may thereafter reassert its claim that Florida law precludes plaintiff's claims. Nonetheless, the court notes that its decision herein would likely remain the same under Florida law, as it is akin to California law in the respects related to this motion.

1. *Class Certification*

The court first considers defendant's challenges to the class action allegations. If the class allegations fail, diversity jurisdiction will be destroyed because plaintiff's individual claims do not meet the $75,000 threshold. (FAC ¶¶ 8, 10.) As a result, the court would not have subject matter jurisdiction over this action. 28 U.S.C. § 1332(a).

Plaintiff alleges the following class pursuant to Federal Rule of Civil Procedure 23:

*4 All current and former owners and lessees of model year 2004, 2005 and 2006 Pontiac GTOs purchased or leased in the State of Florida (the "Class").

(FAC ¶ 19.) "Excluded from the Class definition are officers and employees of GM, its subsidiaries and its dealers, anyone sustaining injuries as a result of the defect alleged herein, as well as any judge to whom the action is assigned."(*Id.*)

Rule 23(a) sets forth four prerequisites necessary to state a class action claim. Plaintiff must allege facts demonstrating: (1) "numerous" affected persons; (2) "common questions" of law and fact; (3) that the named representative's claim is "typical" of the class; and (4) that the class is "adequately" represented. *See Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir.1975).

Once the prerequisites enumerated in Rule 23(a) are satisfied, at least one of the requirements of Rule 23(b) must be met. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). A class action brought pursuant to Rule 23(b)(3), like plaintiff's action here, requires that (1) "questions of law or fact common to the members of the class predominate over any questions affecting individual members;" and (2) that the class action device is superior to other available methods for fair and efficient adjudication of the controversy. *Id.; see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.1996).

Plaintiff's complaint alleges facts establishing all of Rule 23's requirements. (FAC ¶¶ 19-25.) Yet, defendant contends that the class should be dismissed because it is: a) not sufficiently ascertainable, b) flawed since it includes members who could not individually bring suit, and c) is "inherently problematic." [FN7](MTD at 8-11.)

FN7. Notably, defendant did not challenge the virtually identical class claims in the consolidated *O'Connor* case. Rather, defendant answered that complaint. The only difference in the class definitions is the inclusion of 2006 GTO models in the present case.

a. Ascertainable Class

Defendant contends that the class is impossible to identify. (*Id.* at 9.) A class is sufficiently defined if it is "administratively feasible for the court to determine whether a particular individual is a member." *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D.Cal.1998); *see also Buford v. H & R Block*, 168 F.R.D. 340, 347 (S.D.Ga.1996) ("[T]he description of the class must be sufficiently definite to enable the court to determine if a particular individual is a member of the proposed class") (quoting *Pottinger v. Miami*, 720 F.Supp. 955, 957 (S.D.Fla.1989)). However, "not all class members need to be ascertained prior to class certification."*Heffelfinger v. Elec. Data Sys. Corp.*, No. 07-00101, 2008 U.S. Dist. LEXIS 5296, at *54 (9th Cir. Jan. 7, 2008); *see O'Connor*, 168 F.R.D. at 319. "It is sufficient if they are ascertainable 'at some point during the case.'"*Heffelfinger*, 2008 U.S. Dist. LEXIS 5296, at *54 (quoting *Fainbrun v. Sw. Credit Sys.*, 246 F.R.D. 128, 133 (E.D.N.Y.2007)).

Plaintiff's class definition specifically identifies the make, model, and years of specific owners and lessees, while excluding certain individuals. (FAC ¶ 19.) Plaintiff further alleges that defendant either maintains or has access to records that can identify each class member. (*Id.* ¶ 21.)While defendant contends that sales or transfers may make class identification impossible, the court disagrees. Sales records, public filings, and other means are potentially available to identify a finite number of class members. Taken in the light most favorable to the plaintiff, the class is sufficiently ascertainable from the pleaded facts, and thus, defendant's motion to dismiss on this issue is DENIED.

b. Flawed Class

*5 Defendant contends the class is fundamentally flawed since it includes members who cannot individually bring suit because they were not harmed. (MTD at 9.) This includes:

1. Persons who purchased a GTO and never had any problem with the tires;

2. Persons who first experienced any tire problems with their GTO after the expiration of the warranty;

3. Persons who never sought any warranty repair from GM for tire wear;

4. Persons who sought and received warranty repairs for tire wear;

5. Persons who purchased a GTO but no longer own or use the vehicle and who did not experience any problem with the tires prior to disposing of the vehicle.

(*Id.* at 10).

Defendant's argument only relates to the breach of express warranty claim, yet defendant contends that if this claim is insufficient, class certification for *all* claims is improper and *all* class claims should be dismissed.[FN8](*Id.*) The court disagrees. Defendant has not demonstrated that the class claims for unjust enrichment and unfair competition are prone to the same flaws. Indeed, those claims are not subject to the same contractual restrictions as the breach of express warranty claim and, therefore, would not exclude the same class members. As such, dismissal of all class claims because of one allegedly deficient claim is not appropriate. Defendant's motion to dismiss all class claims on the grounds of a flawed class relating to one claim is DENIED.

FN8. The cases defendant cited to support class dismissal are distinguishable from the present case. They either deal with instances where the plaintiff lacked standing to represent the class, or where no one had been injured. *See* (MTD at 9.) Here, the complaint alleges actual injuries to plaintiff and other class members. (FAC ¶¶ 7-13.)

However, defendant is correct that the class claim for breach of express warranty is insufficient. As set forth below, the substantive allegations are deficient and/or the class is too broad. *See* Discussion *infra* at Part IV. Accordingly, for the reasons set forth below, as to the specific class allegations for breach of express warranty, defendant's motion to dismiss is GRANTED.

c. Inherent Class Problems

Defendant contends that the class allegations for the breach of express warranty claim should be dismissed because individual issues will predominate over common issues of fact. (MTD at 11.) Defendant asserts that the difficulty of demonstrating that each class member has met the specific requirements of the warranty must be dealt with on an individual basis. (MTD at 11.) Since the court has already determined that the class claim for this cause of action is insufficient, it need not reach this alternative argument for dismissal of the claim. Notwithstanding, the court notes that this argument is more appropriately raised at the class certification stage. *In re Wal-Mart Stores, Inc.*, 505 F.Supp.2d 609, 615 (N.D.Cal.2007) (stating that courts have made it clear that "dismissal of class allegations at the pleading stage should be done rarely and that the better course is to deny such a motion because 'the shape and form of a class action evolves only through the process of discovery.'") (citations omitted).

2. *Unjust Enrichment*

Defendant asserts that "there is no claim of unjust enrichment under Florida law when a valid contract governs the transaction."(MTD at 2, 7.) However, the court considers defendant's contention under California law, having determined it to be the applicable law for this case.

*6 Defendant's argument is untenable. Under California law, plaintiff may alternatively plead breach of contract and unjust enrichment claims.[FN9]*See, e.g.*, *Huskinson & Brown v. Wolf*, 32 Cal.4th 453, 9 Cal.Rptr.3d 693, 84 P.3d 379 (2004) (plaintiff law firm maintained cause of action for breach of contract, unjust enrichment, and quantum meruit); *Snowney v. Harrah's Entm't, Inc.*, 35 Cal.4th 1054, 29 Cal.Rptr.3d 33, 112 P.3d 28 (2005) (plaintiff hotel guest maintained unfair competition, breach of contract, unjust enrichment, and false advertising class claims). Thus, while ultimately plaintiff may not recover damages under both theories, that a valid contract may exist between the parties is no bar to *pleading*, in the alternative, a claim of unjust enrichment.

FN9. This is consistent with Federal Rule of Civil Procedure 8(d), which allows alternate and inconsistent claims in pleadings.

Finally, the court notes for clarification that there is no cause of action in California for "unjust enrichment." *Melchior v. New Line Prods., Inc.*, 106 Cal.App.4th 779, 793, 131 Cal.Rptr.2d 347 (2003). Rather, it is "a general principle, underlying various legal doctrines and remedies."*Id.* (citation omitted). "It is synonymous with restitution." *Id.* (citation omitted). Nevertheless, mislabeling a cause of action is not fatal to the complaint, so long as the necessary facts of that claim are properly pled. *See, e.g.*, *Mazur v. Ebay Inc.*, 2008 U.S. Dist. LEXIS 16561 at *42, 2008 WL 618988 (N.D.Cal. Mar. 4, 2008) ("[P]utting

substance over form, this court holds that plaintiff may validly seek restitution damages independent of how it is labeled."); Dorr v. Yahoo! Inc., 2007 U.S. Dist. LEXIS 59126, 2007 WL 2215445 (N.D.Cal. July 30, 2007) (denying a motion to dismiss a mislabeled unjust enrichment claim). Therefore, the court considers plaintiff's complaint in general to determine if an appropriate cause of action can be ascertained from the alleged facts which would give rise to a restitutionary remedy.

Quasi-contract, implied warranty of merchantability, and various torts are all examples of claims supported by a cursory review of the complaint's factual allegations. *See* (FAC ¶¶ 2-12); 1 Witkin, *Summary of Cal. Law* (10th ed. 2005) Contracts, §§ 1015, 1016, at 1104-1105 (stating that unjust enrichment is a basis for obtaining restitution based on quasi-contract). As such, the court finds that plaintiff has sufficiently pled a cause of action which would support damages based on a theory of unjust enrichment. Accordingly, defendant's motion to dismiss this claim is DENIED.

3. *FDUTPA Violations*

Defendant moves to dismiss the FDUTPA claim because of insufficient facts alleging "deception." (MTD at 7-8.) As the court finds that California law applies, it considers this claim under the California Business and Professions Code section 17200 *et seq.*, commonly known as the Unfair Competition Law ("UCL"), which is California's equivalent to FDUTPA. The UCL states that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."Cal. Bus. & Prof.Code § 17200 (Deering 2008).

*7 Under the "fraud prong" of the UCL, actual deception is not necessary. Buller v. Sutter Health, 160 Cal.App.4th 981, 987, 74 Cal.Rptr.3d 47 (2008) ("A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage."). Plaintiff only needs to show "that members of the public are likely deceived."*Id.* Moreover, even California courts, under their stricter pleading requirements, hesitate to dismiss UCL claims on demurrer. Williams v. Gerber Prods. Co., 523 F.3d 934, 939 (9th Cir.2008) ("Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires 'consideration and weighing of evidence from both sides' and which usually cannot be made on demurrer.") (quoting McKell v. Washington Mutual, Inc., 142 Cal.App.4th 1457, 1472, 49 Cal.Rptr.3d 227 (2006)). Nevertheless, the seemingly minimal standard for pleading a UCL violation does have a lower limit. *See* Berryman v. Merit Prop. Mgmt., Inc., 152 Cal.App.4th 1544, 1557, 62 Cal.Rptr.3d 177 (2007) ("Absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL."); Bardin v. DaimlerChrysler Corp., 136 Cal.App.4th 1255, 1275, 39 Cal.Rptr.3d 634 (2006) (finding that to be deceived about an alleged automobile defect, "members of the public must have had an expectation or an assumption" about the materials used in manufacturing the vehicle).

As stated previously, the federal pleading standards do not require that all facts be plead; facts may be reasonably inferred from other facts properly alleged in the complaint. *See* Discussion *supra* pp. 4-5.However, in support of this claim, plaintiff simply alleges that GM's conduct was "likely to mislead consumers." (FAC ¶ 29.) No additional facts are alleged in the complaint to substantiate this assertion. Thus, it is difficult to infer from the complaint how or why class members were likely to be misled or under what knowledge and obligation GM was operating. Plaintiff's allegation is more a recitation of a legal requirement than a statement of fact, which is insufficient to allege a viable claim. (FAC ¶ 29.) Because the court must not assume plaintiff can prove facts or causes of action he has not alleged, the unfair competition claim is insufficient. Associated, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). Accordingly, defendant's motion to dismiss this claim is GRANTED.

4. *Breach of Express Warranty*

Finally, defendant moves to dismiss the breach of express warranty claim, asserting that plaintiff and class members have not alleged they met the warranty requirements that would have placed an obligation to repair on GM. (MTD at 5-6.) Specifically, defendant contends the complaint fails to allege that plaintiff and each class member 1) presented their automobile to a GM dealership for repair; 2) were refused service; and 3) the dealership

was given reasonable time to perform the repairs. (*Id.*) Defendant asserts these conditions are required by the terms of the warranty. (MTD Part A, Exhibit A.)

*8 Traditional contract law applies to the breach of express warranty claim.[FN10] *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal.App.4th 824, 830, 51 Cal.Rptr.3d 118 (2006) ("The law governing express warranties is clear. A warranty is a contractual promise.") To properly plead the elements of a breach of express warranty claim in California, "one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury." *Williams v. Beechnut Nutrition Corp.*, 185 Cal.App.3d 135, 142, 229 Cal.Rptr. 605 (1986). While the more liberal federal pleading rules do not require such specific allegations, the facts alleged must at least demonstrate that plaintiff can prove a "plausible" cause of action for breach of express warranty. *Twombly*, 127 S.Ct. at 1974; *Associated*, 459 U.S. at 526.

FN10. Neither party has pled that any California statute governs, or relates to, the breach of express warranty cause of action.

Here, the complaint alleges that plaintiff took his GTO to a "Pontiac dealership because he thought it was pulling to the left."(FAC ¶ 9.) He alleges that he needed replacement tires within two months of the realignment.(*Id.* ¶ 10.)He also alleges the mileage of his vehicle was less than 36,000 miles and he request the repairs within three years of purchase. *See*(*Id.* ¶¶ 9-10.)The warranty states that, "[t]o obtain warranty repairs, take the vehicle to a Pontiac dealer facility within the warranty period and request the needed repairs. A reasonable time must be allowed for the dealer to perform necessary repairs."(MTD at 3.) Drawing all reasonable inferences from these facts, plaintiff has adequately alleged that he met the warranty requirements, and that defendant failed to meet its duty of repair.

Defendant argues, nonetheless, that these allegations suggest plaintiff is trying to recover under a warranty guaranteeing the performance or quality of the suspension, tires, and alignment. (Def.'s Reply to Opp'n, filed May 30, 2008 ("Reply") at 2.) Defendant contends no such performance was provided.(*Id.*)

The court disagrees with defendant's interpretation of the complaint. Plaintiff alleges tire and alignment problems due to the "improperly designed, assembled, and/or installed suspension system and alignment settings."(FAC ¶¶ 7, 12.) The allegations relate to defendant's failure to *repair* and *replace* items under the warranty, not its failure to ensure overall performance and quality of the vehicle. (*Id.*) Alleging that the defects were covered under the warranty, plaintiff cites the warranty which provides, "any vehicle defect related to materials or workmanship" will be covered. (*Id.*) The word "any" is broad enough to include the alleged defects. Whether or not they are actually included is to be determined at a later stage. For pleading purposes, however, it is sufficient that plaintiff alleged the subject defects are covered under the warranty provided by GM. Therefore, plaintiff's individual claim for breach of express warranty is sufficiently pled in the complaint.

*9 Defendant also contends that a class claim for breach of express warranty is inappropriate because not all class members have satisfied the necessary conditions that would enable them to bring individual claims. (MTD at 5.) It is a prerequisite to the duty of repair under an express warranty that a defect manifest itself. *Daugherty*, 144 Cal.App.4th at 831, 51 Cal.Rptr.3d 118 (rejecting recovery under an express warranty when automobile owners did not experience problems within the warranty limits). Courts that have held otherwise have "apparently confused concepts of express and implied warranty."[FN11] *Id.* (citations omitted).

FN11. The cases plaintiff cites to show that defects do not need to be discovered or manifested to recover damages are distinguishable. They are based on breach of *implied* warranties.

Here, the complaint's sole allegation that ties all class members to the breach of express warranty claim is the following: "plaintiffs have performed each and every duty required of them under the terms of the warranties, except as may have been excused or prevented ...." (FAC ¶ 39.) With no other facts relating to any actions by or towards the class members, the allegation is, once again, more akin to a statement of a legal requirement than a factual allegation. Also, plaintiff contradicts the allegation,

in his opposition, by indicating that many class members have *not* experienced issues from the defect or presented their vehicles to an authorized dealer for repair. (Opp'n at 16.) Moreover, it appears implausible that all class members are still within the 3 year, 36,000 mile constraints of the warranty. Presumably, some 2005 models were sold as early as 2004, in which case the 3 year warranty could have expired in 2007. It is also likely that some class members have exceeded the 36,000 mile limit. Those class members would not have actionable breach of express warranty claims. *See* Daugherty, 144 Cal.App.4th at 831, 51 Cal.Rptr.3d 118. The complaint's present class allegations as to this claim are therefore deficient, and defendant's motion to dismiss this cause of action is GRANTED.

5. *Leave to Amend*

Plaintiff requested leave to amend his first amended complaint in the event the court found any of the causes of action deficient. (Opp'n at 20.) Federal Rule of Civil Procedure 15(a) states that "[t]he court should freely give leave when justice so requires."In his opposition, plaintiff sets forth additional facts which support the class claims. For example, plaintiff states that GM knew about the defects prior to selling the subject vehicles, concealed the defects from the public, received numerous complaints and has refused to correct the defects. (*Id.* at 2, 51 Cal.Rptr.3d 118.) Plaintiff also alleges that consumers have been denied warranty coverage and/or have been charged for repairs relating to the warranty. (*Id.* at 5, 51 Cal.Rptr.3d 118.) Finally, plaintiff asserts that defendant's conduct has been uniformly directed to other class members. (*Id.* at 6, 51 Cal.Rptr.3d 118.) These additional facts, among others, may bolster and sufficiently correct the deficiencies identified herein. Accordingly, the court grants leave to amend the first amended complaint.

CONCLUSION

***10** Based on the foregoing analysis, the court makes the following orders:

1. Defendant's motion to dismiss is:

(A) DENIED in part and GRANTED in part as to the sufficiency of the class allegations;

(B) GRANTED as to the FDUTPA claim, construed as a UCL claim under California law;

(C) DENIED as to the unjust enrichment claim;

(D) GRANTED as to the breach of express warranty claim with respect to the class allegations, but DENIED as to plaintiff's individual claim.

2. Plaintiff's motion to amend his first amended complaint is GRANTED.

IT IS SO ORDERED

E.D.Cal.,2008.
Mauro v. General Motors Corp.
Slip Copy, 2008 WL 2775004 (E.D.Cal.)

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HOnly the Westlaw citation is currently available.
United States District Court,E.D. California.
PROCESS SPECIALTIES, INC., a California corporation, Plaintiff,
v.
SEMATECH, INC., a Delaware corporation, Defendant.
No. CIV. S-00-414 FCD PAN.

Nov. 8, 2001.

Named Expert: ALAN J. COX

MEMORANDUM AND ORDER[FN1]

|Missing TextŒ evidentiary ruling which the court entertains after it has heard all dispositive pretrial motions. Moreover, the motion is not appropriate in conjunction with the pending motion for summary judgment. Accordingly, the motion is summarily DENIED WITHOUT PREJUDICE, without further discussion.

Amended and Redacted

FRANK C. DAMRELL, JR., District Judge.
*1 This matter is before the court on the following motions: (1) plaintiff Process Specialties, Inc.'s ("PSI") motion to modify the pretrial scheduling order to allow it to designate an additional expert witness; (2) defendant Sematech, Inc.'s ("Sematech") motion to exclude the testimony of PSI's expert Alan Sematech's |missing textŒ alternative motion for summary adjudication regarding monetary relief under California's unfair competition law.

The court heard oral argument on June 15, 2001. By this order, the court now renders its decision.

FACTUAL BACKGROUND[FN3]

PSI is a privately held company that manufactures commercial semiconductor products, including "test wafers," at its plant in Tracy, California. Test wafers are partially processed silicon discs which are utilized to develop and test equipment, or "tools," used to manufacture microchips (sometimes called "semiconductor devices" or computer "chips"). Morris Decl. in Opp'n to Def.'s MSJ, filed June 1, 2001 ("Morris Decl."), ¶ 1-2.[FN4]

Sematech, a nonprofit, tax-exempt Delaware corporation headquartered in Austin, Texas, is a consortium of the largest microchip manufacturers in the United States.[FN5]Sematech was created in 1987, as a cooperative effort among semiconductor manufacturing firms and the United States government, to regain United States superiority in microchip manufacturing from the Japanese. *See*15 U.S.C. § 4601.[FN6]At the time, it appeared that Japanese companies had an unfair advantage over United States companies because Japanese companies worked collusively with each other in research and development, under the direction of their government, in a manner which would violate United States antitrust laws. Sematech was formed in response to this perceived threat. Morris Decl., ¶ 6.

The enabling legislation passed by Congress in 1987 authorized the provision of substantial government funds to Sematech. *See*15 U.S.C. § 4602. In 1988, Sematech entered into a Memorandum of Understanding ("MOU") with the United States government regarding the government's involvement with Sematech. *Id.;* Falstad Aff. in Supp. of Def.'s MSJ, filed under seal May 17, 2001 ("Falstad Aff."), Ex. 4. The MOU states that the federal subsidies shall be used to "[c]onduct research on advanced semiconductor manufacturing techniques."Falstad Aff., Ex. 4 at 2. The MOU further specifies that Sematech shall have "a charter agreed to by all representatives of the semiconductor industry that are participating members of Sematech ...." *Id.* at 3. The MOU also requires Sematech to submit to an annual independent audit to ensure that it has complied with its charter every year that it received federal subsidies. *Id.*

Sematech's corporate charter provides that it was formed "exclusively" for "scientific and educational purposes," and that its principal purpose is "research and development." *Id.* at Ex. 3. The charter specifically prohibits Sematech from engaging in the "commercial sales of semiconductor products." *Id.*

*2 From 1988 through 1996, Sematech received $848 million in funds from the United States government, which equals approximately half of its expenses during that period. The members of Sematech provided the other half of Sematech's funding. Sematech also received approximately $40 million from the state of Texas during this time frame, in the form of a 20-year lease for its facility at a nominal rent of $2 per year, payable to the University of Texas ("UT"). The lease also prohibits Sematech from engaging in commercial sales of "any" product. Brown Decl. in Opp'n to Def.'s MSJ, filed June 1, 2001 subject to protective order ("Brown Decl. re: MSJ"), Ex. 39.[FN7]Lastly, Sematech has received millions of dollars in loaned or donated equipment from tool manufacturers. Brown Decl. re: MSJ, Exs. 10-14; Barfield Aff. in Supp. of Def.'s MSJ, filed under seal May 17, 2001 ("Barfield Aff."), ¶ 3.

Since 1997, Sematech has not received any funding from the federal government. PSI alleges that, beginning in 1994, Sematech executives began "plotting" ways in which Sematech could replace the federal subsidies scheduled to be lost in 1997. *See* Opp'n to MSJ at 5. One such idea was to manufacture and sell commercial test wafers [FN8] in competition with existing suppliers. *Id.* PSI alleges that from 1994 (the year Sematech entered the commercial test wafer market) to 1997 (the year Sematech's federal funding terminated), Sematech executives disguised the sales, in order to avoid loss of Sematech's federal funding, favorable lease, and tax-exempt status. *Id.*

For instance, PSI alleges Sematech's sales brochure provided to test wafer customers stated that "Due to legal restrictions, Sematech may only provide wafer processing services that are not available from any other source."Morris Decl., Ex. 1. In addition, Sematech's standard test wafer customer contract includes a provision whereby the customer represents that the semiconductor products being provided by Sematech are not available from any other supplier. Brown Decl. re: MSJ, Ex. 153.

In early 1995, PSI learned that Sematech had begun selling commercial test wafers, and that at least in one instance, was charging substantially below PSI's price for the same product. Morris Decl., ¶ s 7-8, 16 and Ex 3. PSI president Edward Morris telephoned Sematech's Operations Manager, Chris Sallee, to complain about Sematech's entry into the commercial test wafer market.*Id.* at ¶ 9; Brown Decl. re: MSJ, Ex. 1010. A series of letters between counsel for Sematech and counsel for PSI followed. Morris Decl., Exs. 2-6, 8. In that correspondence, Sematech told PSI that it had no intention of providing "wafer processing services that other private sector suppliers are capable of providing."*Id.* at Ex. 2.[FN9]

In an attempt to resolve the dispute, Sematech and PSI arranged a meeting for September 27, 1995. *Id.* at ¶ 14.At the meeting, Morris alleges that Sematech representatives denied they were selling test wafers at all. *Id.* at ¶ 15.This denial was made despite Morris' reliance on the sales brochure given to Sematech's clients (referenced above). Nothing was resolved at the meeting.

*3 PSI alleges, however, that it left the meeting feeling "appeased" due to Sematech's representations that it did not intend to compete with private suppliers of the same products. In 1997, PSI discovered that Sematech had not been true to its word, and it was selling, and had been since 1994, commercial test wafers of the same type that PSI and its competitors could and were producing. *Id.* at ¶ s 16-17.

The Test Wafer Market

The test wafer market is but a fractional part of the semiconductor industry.*Id.* at ¶ 4. Next to Sematech, PSI is the largest supplier of test wafers in the United States. Cox Report_attached as Ex. 4 to the Swanson Aff. in Supp. of Def.'s MSJ, filed under seal May 17, 2001 ("Swanson Aff."). According to PSI, there are only approximately seven companies in the United States that sell test wafers, including PSI and Sematech. Morris Decl., ¶ 23. According to Sematech, there are at least 15 other companies that sell test wafers in the United States, including IBM and Seaway. Teece Report at 14-15 attached as Ex. 1 to Teece Decl. in Supp. of Def.'s MSJ, filed under seal May 17, 2001. Tool manufacturers are Sematech's and PSI's primary customers for test wafers. Barfield Aff., ¶ 4. Test wafers are also produced, and purchased, by foreign companies. Mewes Dep. at 87 attached as Ex. 7 to Swanson Aff .; Cox Report, Ex. 4 to Swanson Aff., at Table 3. However, PSI states that less than .8% of its sales are to foreign buyers. Morris Decl., ¶ 23.

As microchips become more and more technically sophisticated, the tools used to make them become more complex and sophisticated as well. Similarly, as the tools become more complex, the test wafers used by the tool manufacturers must also become more complex. Thus, to succeed in the test wafer market, a company must purchase, on an ongoing basis, ever more technically sophisticated and complex tools in order to manufacture the test wafers needed by tool manufacturers. These tools are extremely expensive. Morris Decl., ¶ 18.

Additionally, to increase power, transistors printed on microchips have become smaller and smaller, and are now measured in tenths of microns. From 1995 to 2001, the "geometries" of the patterns printed on integrated circuits has gone from .5 microns, to .35 microns, to .25 microns, to .18 microns. Each of these reductions in the geometries of the transistors required a new generation of manufacturing tools to imprint and engrave the patterns on the chips. In turn, each generation of manufacturing tools required a new generation of test wafers to calibrate them. *See id.*

The Instant Litigation

PSI filed this action in state court in January 2000, alleging causes of action for unfair competition pursuant to California Business and Professions Code section 17200 *et seq.* and unjust enrichment. Sematech removed the action to this court shortly thereafter. On October 24, 2000, PSI filed its Amended Complaint, alleging causes of action for (1) attempted monopolization pursuant to Section 2 of the Sherman Act, (2) unfair competition pursuant to Section 17200, and (3) unjust enrichment.

*4 PSI contends that, given its privileged position in the market, Sematech unfairly competes with PSI, and other test wafer manufacturers, by selling commercial test wafers. PSI argues that Sematech's sale of commercial test wafers violates its corporate charter, the terms of its federal subsidies, and its lease with UT. PSI further argues that these sales violate federal tax laws, because Sematech, a tax-exempt, nonprofit corporation, has not reported the revenue from these commercial sales, or paid income tax thereon. PSI contends that no private, tax-paying test wafer manufacturer can compete with Sematech because of Sematech's access to free tools, obviously low overhead, and tax-exempt status. These advantages, PSI asserts, allow Sematech to price its test wafers substantially below those of its competitors. Additionally, Sematach's presence in the test wafer market has prevented other private competitors from acquiring the latest generation of tools. *See* Opp'n to MSJ at 8-9.

As an example of Sematech's affect on the test wafer market, PSI points to its current situation. At this time, Sematech is the *only* manufacturer with tools to produce sub-.25 micron 8 inch test wafers. Those tools were donated to Sematech years ago, and are operated in Sematech's virtually rent-free facility in Austin, Texas. Brown Decl. re: MSJ, Exs. 10-14.

PSI desires to sell sub-.25 mocron 8 inch wafers, but it must first purchase the necessary tools, which cost in excess of $10 million. Morris Decl., ¶ 20. This amount is greater than PSI's gross annual revenue. *Id.* Thus, PSI would have to "bet the company" in order to purchase the tools, and risk not being able to sell enough test wafers to recoup the cost of the tools. *Id.*

That risk is very real, PSI contends. If PSI does purchase the tools, Sematech's extremely low overhead allows it to cut its price for sub-.25 micron 8 inch wafers to a level below PSI's cost, thereby effectively driving PSI out of business. PSI points to Sematech's pricing of .35 micron test wafers in 1995. At that time, Sematech was charging half of what PSI needed to charge for the same wafer, in order for PSI to turn a profit. *Id.* at ¶ s 8, 21, & Ex. 1. Thus, PSI has not purchased the tools necessary to manufacture sub-.25 micron 8 inch wafers. *Id.* at ¶ 21.As a result, PSI contends, Sematech has a monopoly on that product, because no private competitor can take the risk of competing.*Id.*

Sematech does not deny that it has entered the commercial test wafer market, but argues that its presence in the market is lawful and fair. Sematech contends that its charter and the MOU do not prohibit it from engaging in the commercial sale of test wafers because the prohibition against the sale of "commercial semiconductor products" does not encompass test wafers. Falstad Aff., Ex. 3. Moreover, Sematech argues that its sales of test wafers do not violate its lease with UT; the lease only prohibits the establishment of a "retail" center, and UT is aware,

and does not object, to Sematech's sales of test wafers. *See* Def.'s P. & A. in Supp. of MSJ, filed under seal May 17, 2001 ("Def.'s MSJ"), at 5. Sematech asserts the "fees" collected from the sales of test wafers are necessary to offset some of the costs of running Sematech's research facility, the Advanced Tool Research and Development Facility ("ATDF"). Barfield Decl., ¶ 4. Finally, Sematech argues that its entry into the test wafer market has not harmed PSI; since 1995, PSI's revenues have doubled, its profit margin has increased from 40% to 60%, and it has bought new tools and built new production facilities. Morris Dep. at 520, 816, 855, 964, and 1201 attached as Ex. 3 to the Swanson Aff.

STANDARDS

Modification of Pretrial Scheduling Order

*5 A pretrial scheduling order "shall not be modified except upon a showing of good cause."Fed.R.Civ.P. 16(b). The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992). The "good cause" standard set forth in Rule 16 primarily focuses upon the diligence of the party requesting the amendment."Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification."*Id.*

Summary Judgment/Summary Adjudication

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c). One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). If the moving party does not bear the burden of proof at trial, he or she may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325. Once the moving party meets the requirements of Rule 56 by showing there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Genuine factual issues must exist that "can be resolved only by a finder of fact, because they may reasonably be resolved in favor of either party." *Id.* at 250.In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir.1987) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The evidence presented by the parties must be admissible.Fed.R.Civ.P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49, 57 (2d Cir.1985); *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir.1979).

Rule 56 also allows a court to grant summary adjudication on part of a claim or defense. *See*Fed.R.Civ.P. 56(a) ("A party seeking to recover upon a claim [may move] for a summary judgment in the party's favor upon all or any part thereof."); *see also Allstate Ins. Co. v. Madan*, 889 F.Supp. 374, 378-79 (C.D.Cal.1995). The standard applied to a motion for summary adjudication is the same as that described above for a motion for summary judgment.Fed.R.Civ.P. 56(a), (c); *Mora v. Chem-Tronics, Inc.*, 16 F.Supp.2d 1192, 1200 (S.D.Cal.1998).

ANALYSIS

I. PSI'S MOTION TO MODIFY THE PRETRIAL SCHEDULING ORDER TO DESIGNATE AN ADDITIONAL EXPERT

*6 PSI moves for leave to amend the pretrial

scheduling order dated December 8, 2000, to designate an additional expert, Carmen R. Eggleston, to testify regarding non-profit, tax-exempt corporations. It is Eggleston's expert opinion that since approximately 1996, Sematech has not qualified for tax exemption as defined in 26 U.S.C. § 501(c)(6), despite the fact that it has filed tax returns as a non-profit, tax-exempt Delaware corporation every year since 1988. Alternatively, Eggleston posits that even if Sematech had qualified for tax exemption during this time period, its commercial test wafer business constituted an "unrelated trade or business activity" which generated income that should have been reported by Sematech and subjected to federal income taxation.

PSI avers that this testimony is relevant to all three of its claims. Furthermore, PSI contends that the need for designating an expert to testify regarding Sematech's abuse of its tax exempt status could not have been anticipated on March 2, 2001, the expert designation deadline. It was not until the end of March 2001, after the deposition of Sematech comptroller Jack Ball and the belated production of Sematech's tax returns by its accountant, PricewaterhouseCoopers ("PwC"), that PSI could have (and did) discover the need for such an expert.

Sematech opposes the motion, arguing that PSI should have known of the need to designate a tax exemption expert long ago, and that PSI has not been diligent in this matter. The court is not persuaded by Sematech's arguments.[FN10]

While the general subject of Sematech's tax exempt status has been an issue in this case from its inception, the more specific issue of whether Sematech might be violating federal tax laws in claiming its exemption is a new one. According to PSI's counsel, Sematech reneged on its promise to produce its tax returns in late 2000. Brown Decl. in Supp. of Mot. to Mod. PSO, filed June 8, 2001 ("Brown Decl. re: PSO"), ¶ s 1-5. PSI only obtained the relevant tax returns, spanning the years 1995-1999, on February 18, 2001, when PwC finally produced them. Spaletta Decl. in Supp. of Mot. to Mod. PSO, filed June 8, 2001, ¶ 6. As discovery was drawing to a close around this time, PwC's belated production occurred in the midst of a flurry of document productions, discovery responses and depositions. *Id.* at ¶ 7.

Moreover, PSI did not have the opportunity to depose Sematech comptroller Jack Ball, who had overseen the preparation of the 1995-1999 tax returns, until March 28, 2001. Brown Decl. re: PSO, ¶ 8. PSI retained Eggleston, and brought the instant motion to designate Eggleston less than two months later. On this record, the court finds that PSI has been diligent in discovering the need to retain Eggleston, and in bringing the issue to the court's attention as soon as practicable. *See* *Mammoth Recreations*, 975 F.2d at 609.

The court further finds that Sematech has failed to demonstrate how it would be prejudiced by the granting of PSI's motion. Sematech will be permitted to designate a rebuttal expert. In addition, it bears noting that this case was filed only 18 months ago. Discovery has proceeded at a remarkably fast pace, given the magnitude and complexity of this case. Even assuming the granting of PSI's motion to designate Eggleston causes a minor delay in scheduling the trial in this matter, Sematech offers no reason why such delay would prejudice it in any way.

*7 Accordingly, PSI's motion to modify the pretrial scheduling order to designate Carmen R. Eggleston as an expert witness is GRANTED.

II. SEMATECH'S MOTION FOR SUMMARY JUDGMENT

Sematech moves for summary judgment on all three of PSI's causes of action. PSI opposes the motion, arguing that triable issues of material fact exist as to all of its claims. The parties' arguments will be addressed seriatim.

A. Attempted Monopolization Under the Sherman Act § 2

In order to prevail on its attempted monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, PSI must demonstrate (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.1995).

1. Specific Intent to Monopolize

Sematech argues that PSI has no evidence of Sematech's specific intent to control prices or destroy competition. Rather, Sematech contends that the undisputed evidence shows that it has merely "competed vigorously" in the test wafer market, and that such competition is not evidence of its specific intent to destroy competition. *See* Def.'s MSJ at 10:9-11.

PSI, however, offers evidence that in 1998, Sematech's ATDF Director wrote a memo to Sematech's CEO, proposing that Sematech have its member companies agree to use their influence with the tool companies to "consolidate all manufacture of test wafers for equipment suppliers and other external customers at SEMATECH."Brown Decl. re: MSJ, Ex. 415. It is up to the trier of fact to determine whether this evidence satisfies PSI's burden of proof on the element of specific intent to exclude competition. Sematech's assertion that this evidence is not relevant, because PSI cannot prove that the plan was actually implemented or endorsed by Sematech and the memo was written in 1998 (four years after Sematech entered the test wafer market), is without merit. Regardless of whether the plan was executed and when it was devised, the memo is evidence of Sematech's intent, and it is for a jury to decide the weight of such evidence.

Moreover, specific intent may be proved by inference from conduct. *See* Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 926 (9th Cir.1980). PSI has offered evidence indicating that in 1995, Sematech priced its .35 micron test wafers at less than half the price charged by its biggest competitor, PSI, a private company with much higher operating costs. Morris Decl., ¶ 16. From this conduct, a jury might infer that Sematech intended to drive the competition out of business. Additionally, PSI offers substantial evidence concerning Sematech's decision to enter the test wafer market. Brown Decl. re: MSJ, Exs. 36, 47, 59, 153-54, 193-94, 197, 237-39, 666. Said evidence suggests that Sematech was aware of the limitations on its conduct, including those limitations imposed by its charter, the MOU, and its tax-exempt status; yet, it decided nonetheless to enter the commercial test wafer market in direct competition with companies such as PSI. A jury may find this evidence probative on the issue of Sematech's intent to exclude its competition, since Sematech entered the market despite apparent legal restrictions prohibiting its entry into the market.

*8 Sematech's motion for summary judgment on this basis is denied.

2. Predatory or Anti-competitive Conduct

Sematech argues that PSI has no evidence of predatory or anti-competitive conduct. In Sematech's view, PSI objects to Sematech's mere presence in the market, which, Sematech contends, is not actionable under Section 2 of the Sherman Act.

PSI argues that Sematech violated multiple laws in entering the commercial test wafer business, and that these violations of law constitute "predatory or anti-competitive" conduct. In other words, PSI argues that the conduct element of a Section 2 claim may be established by proof that Sematech violated some law extrinsic to the antitrust laws, which its competitors were obliged to follow. *See* Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1347-48 (9th Cir.1986), *superceded by rule on other grounds,* 103 F.3d 868 (9th Cir.1996) (Section 2 liability established based on defendants' violation of the Interstate Commerce Commission's tariff regulations); *see also* Western Concrete Structures Co. v. Mitsui & Co. (U.S.A.), Inc., 760 F.2d 1013, 1018 (9th Cir.1985) (holding that importing steel at prices less than permitted by U.S. import regulations constituted "predatory conduct" for purposes of Section 2).[FN11]

The court agrees with PSI. As recognized by the ABA section on antitrust law,

[W]here conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find that conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws. Thus, false advertising, product disparagement, the filing of baseless legal proceedings, and the violation of regulatory requirements have all been held to satisfy the second element of a monopoliztion claim.

ABA Section of Antitrust Law, Antitrust Law

Developments (4th Ed.1997) at 248; *see, e.g.,* Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427 (9th Cir.1993) (defendant committed "anticompetitive" acts when it prepared a false and misleading market survey, delayed transmittal of plaintiff's financing application, and interfered with plaintiff's ability to enter a contract with a third party); Hunt-Wesson Foods, 627 F.2d at 926 (recognizing that certain acts, including false and misleading advertising, when performed by an entity with "market power" could harm competition sufficient to state a claim under Section 2); Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 928-30 (4th Cir.1990) (considering whether plaintiff submitted sufficient evidence of defendant's "anti-competitive" conduct, including, among other things, discriminatory and deceptive pricing, misuse of confidential financial and customer information, misrepresentation, and hiring of plaintiff's employees).

Here, PSI alleges that Sematech violated the following: (1) its Certificate of Incorporation; (2) the MOU; (3) its lease with UT; (4) federal tax laws; and (5) and the National Cooperative Research and Production Act of 1993 ("NCRPA"). The court addresses, in detail, each of these alleged illegal acts under its discussion of PSI's unfair competition claim.[FN12] It will be sufficient here to address PSI's evidence concerning violation of the federal tax laws, as it provides a clear basis for denying Sematech's motion. Moreover, to survive summary judgment PSI is only required to raise a triable issue of fact relating to at least one of the above.

*9 PSI proffers evidence that Sematech operates its test wafer business in contravention of federal tax laws. *See* Eggleston Report and evidence cited therein.[FN13] Thus, PSI argues, by competing against taxpaying private companies in the test wafer market while themselves circumventing the tax laws, a reasonable jury could conclude that Sematech engaged in predatory or anticompetitive conduct. By exploiting its tax-exempt status, and other benefits, including its federal and state subsidies and free equipment, Sematech is able to price its products "in an irrational way without regard to costs (because it has none)." *See* Pl.'s Supp. Brief in Opp'n to Def.'s MSJ, filed July 5, 2001, at 4:7-8. The court agrees that PSI's evidence, if believed by a trier of fact, could satisfy this element of proof. *See* Western Concrete, 760 F.2d at 1018 (recognizing that conduct is actionable under Section 2 where it "is not true competition ... [i]ts purpose is to create a monopoly by means other than fair competition") (internal quotations and citation omitted)); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) ("If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory") (internal quotations and citation omitted)). Sematech's motion for summary judgment on this basis is denied.

3. Dangerous Probability of Obtaining Monopoly Power

Sematech argues that PSI also has no evidence in support of this element. Whether there is a dangerous probability of achieving monopoly power requires an inquiry into the relevant product and geographic market, and the defendant's economic power in that market. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 & 459 (1993); *see also* Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir.1997) ("To demonstrate monopoly power by circumstantial evidence, 'a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and [that] existing competitors lack the capacity to increase their output in the short run.'") (quoting Rebel Oil, 51 F.3d at 1434)).

(a) The Relevant Market

"Defining the relevant market is a factual inquiry ordinarily reserved for the jury." Oltz v. St. Peter's Comty. Hosp., 861 F.2d 1440, 1446 (9th Cir.1988) (citation omitted). The geographic market includes the "area of effective competition ... where buyers can turn for alternate sources of supply." *Id.* (internal quotations and citations omitted).

It is undisputed that the product market is the commercial test wafer industry. PSI claims that the relevant geographic market is the United States. Sematech argues that the relevant market is worldwide. While it is true that some foreign manufacturers make test wafers, and that some United States manufacturers sell test wafers abroad, PSI presents compelling evidence that the relevant geographic market should be confined to the United

States. Such evidence includes the following:

*10 (1) The percentage of foreign transactions in test wafer sales is extremely low. Cox Report, Ex. 4 to Swanson Aff., at 17-18 (concluding that U.S. customers of test wafers bought wafers from foreign suppliers in only *de minimis* amounts).

(2) From 1995 to 2000, PSI's foreign sales of test wafers amounted to only .8% of its total sales. Morris Decl., ¶ 23.

(3) From 1995 to 1999, Sematech's foreign sales of test wafers represented only 1.5% of its total sales. Brown Decl. re: MSJ, Ex. 22.

(4) Two of the world's largest suppliers of semiconductor equipment,-and-purchase test wafers exclusively from U.S.-based test wafer suppliers. Brown Decl. re: MSJ, Ex. H (Barnhart Dep. at 16:18-23; 17:8-17), Ex. I (Patrick Dep. at 17:12-24; 22:5-8)

(5) PSI and Noel, another test wafer manufacturer, consider their major competitors to be only a handful of U.S. companies. Brown Decl. re: MSJ, Ex. J (Pearce Dep. at 53:3-54:11); Morris Decl ., ¶ 23.

The Ninth Circuit stated in *Rebel Oil* that a "market" is "the group of sellers or producers who have the actual or potential ability to deprive each other of significant levels of business." 51 F.3d at 1434 (internal quotations and citation omitted). Because the sales of test wafers to and by foreign manufacturers is so small, a jury could find that the relevant market excludes such companies. Thus, PSI's evidence raises a triable issue of fact as to the definition of the relevant geographic market.[FN14]

(b) Market Power

Assuming the trier of fact is persuaded by PSI's evidence and determines that the relevant geographic market is the United States, PSI's offers evidence that Sematech's current market share in the United States is 42%. *See* Cox Report, Ex. 4 to Swanson Aff. In certain circumstances, a market share of this magnitude can be sufficient to demonstrate a dangerous probability of obtaining monopoly power. *Rebel Oil*, 51 F.3d at 1438 ("ARCO's market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supra-competitive pricing.")

Sematech argues that here no such entry or expansion barriers exist.

(c) Barriers to Entry

Entry barriers are "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants" or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns."[FN15] *Los Angeles Land Co.*, 6 F.3d at 1427-28. In evaluating entry barriers, courts focus on their ability to constrain not "those already in the market, but ... those who would enter but are prevented from doing so." *United States v. Syufy Enters.*, 903 F.2d 659, 672 n. 21 (9th Cir.1990).

Here, Sematech contends that there are no significant barriers to entry into the test wafer market because (1) there are no government licensing requirements; (2) four companies, IBM, Noel, TTI Silicon, and IMT, have entered the market since Sematech began selling test wafers and have remained viable; and (3) there are numerous "potential entrants," including all semiconductor manufacturers since they already have the tools and expertise to make test wafers, Sematech's members for the same reasons, and foreign suppliers who are already making test wafers.

*11 It is undisputed that there are no government licensing requirements in the test wafer industry. However, PSI has offered evidence to demonstrate that other entry barriers exist. First, regarding the entry of other companies into the test wafer market, PSI offers the following evidence:

(1)-makes R & D wafers at cutting edge geometries and does not participate in the commercial test wafer market. Also, tool suppliers do not buy test wafers in significant quantities from-because they are too expensive (-'s average test wafer costs $3,700 compared to the industry's average price of $150). Brown Decl. re: MSJ, Ex. I (Patrick Dep. at 34:15-35:6, 38:6-17), Ex. H (Barnhart Dep. at 50:14-20), Ex. A (Henderson Dep. at 131:24-132:1); Cox Report, Ex. 4 to Swanson Aff.

(2) Noel is not a new entrant into the test wafer market; a company called SiFab was founded by Leon Pearce and had been in the test wafer business since 1985; SiFab went bankrupt and Mr. Pearce reincarnated the company as Noel in 1996. Brown Decl. re: MSJ, Ex. J (Pearce Dep. at 39:24-41:12).

(3) TTI Silicon is not a new manufacturer of test wafers; it is a broker that distributes test wafers and is thus not a supplier but a customer of test wafers. Morris Decl., ¶ 23.

(4) IMT, while admittedly a new entrant, has had erratic sales making its long-term viability highly questionable. Cox Report, Ex. 4 to Swanson Aff., at 28.

Based on the above, PSI has demonstrated a triable issue of fact regarding barriers to entry into the test wafer market. Moreover, "the fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power." Rebel Oil, 51 F.3d at 1440. Here, PSI submits evidence that IMT's sales in 2000 were $1 million in comparison to Semtach's sales of $15 million. *See* Cox Report, Ex. 4 to Swanson Aff., at 28. A jury could reasonably conclude that IMT would not have sufficient capacity to seriously challenge Sematech.

Second, PSI offers evidence to show that there are significant capital costs to enter the test wafer market. Such capitol costs are a well-recognized barrier to entry. Rebel Oil, 51 F.3d at 1439. PSI's President Edward Morris declares that the cost of entry, including buying the necessary equipment, constructing a facility, hiring personnel, and recruiting customers, is approximately $25-30 million. Morris Decl., ¶ 24. The high cost of entry is most clearly demonstrated when one compares it to the size of the entire test wafer market in 2000 which was $35.5 million. Even entry on a modest scale requires millions of dollars. The founder of Noel estimated that to enter the wafer business buying all used equipment and offering only the simplest and most common test wafers would cost $5 million. Brown Decl. re: MSJ, Ex. J (Pearce Dep. 115:22-120:20)

***12** Finally, Sematech's evidence concerning "potential entrants" into the test wafer market is not relevant to the determination of entry barriers. While the existence of potential entrants bears on market definition, the concept of entry barriers refers to *conditions* that are likely to inhibit other firms from entering the market on a substantial scale in response to an increase in the incumbent's prices. *See* ABA Section of Antitrust Law, Antitrust Law Developments (4th ed.1997). Thus, entry barriers are the structural barriers and other aspects of the market that make entry difficult or easy depending on whether they exist. *See* Rebel Oil, 51 F.3d at 1439. PSI has raised a triable issue of fact regarding the capital costs involved in entering the test wafer market, and thus, it is for a jury to decide whether such evidence is a *sufficient* barrier to entry.

For all of the above reasons, PSI has submitted sufficient evidence to create a triable issue of fact regarding entry barriers, but this does not end the inquiry because PSI must also show that barriers to expansion exist.

(d) Barriers to Expansion

The ability of an alleged monopolist to control output and prices "depends largely on the ability of existing firms to quickly increase their own output in response to a contraction by the defendant." Rebel Oil, 51 F.3d at 1441. Competitors may not be able to increase output if there are barriers to expansion.

Sematech argues that there are no barriers to expansion in the test wafer market because the evidence shows that Sematech's competitors have expanded since Sematech entered the market and will continue to be able to do so. Sematech relies on the following: (1) the sales of half of the test wafer manufacturers in the market grew over the last year; (2) PSI has excess capacity; (3) PSI's revenues have increased two-fold since Sematech's entry into the market; (4) PSI's profit margins have increased from 40% to 60% since Sematech entered the market; (5) PSI has constructed two new facilities since Sematech's entry into the market and is planning a fourth facility; and (6) IBM is in the test wafer market and varies its production and sales of test wafers as it sees fit. *See* Def.'s MSJ at 18-19.

PSI does not dispute the facts regarding increased profits, but rather, it argues that the above facts do not describe the true market realities in which barriers to entry exist. Because of Sematech's presence in the market, PSI asserts that existing test wafer manufacturers are inhibited from expanding, or rather modernizing, their facilities in the face of Sematech's ability to price its wafers without regard to its competitors. As an example, PSI sets forth the testimony of Gerald Henderson, Chairman of Tactical Fabs. Currently, Sematech offers 12 inch test wafers at .25 micron geometries. Tatical Fabs does not own the equipment to produce this size wafer, and it would have to buy the equipment to compete with Sematech. However, Mr. Henderson was not willing to buy the equipment because Sematech is selling 12 inch .25 micron wafers for $70. The cost to Tactical Fabs for the new equipment would be $10 million, requiring it to price the wafers at $300-400 per wafer. Accordingly, Tactical Fabs intends to continue to offer its current lithography products so long as it remains profitable but it expects the market to last only "another couple [of] years." Brown Decl. re: MSJ, Ex. A (Henderson Dep. 18:12-19:1, 148:21-149:5, 152:17-25, 155:22-156:5, 160:9-15). PSI asserts that it is in a similar situation. PSI can produce test wafers with geometries no smaller than .35 microns. When it became apparent that the market would be shifting to test wafers with smaller geometries, PSI intended to buy the necessary, new equipment, but declined to do so because of Sematech's position in the market. As a result, PSI cannot compete for the sub-.35 micron business which is increasing in demand. Morris Decl., ¶ 20-22; Hammond Report attached as Ex. 13 to Swanson Aff.

*13 The above evidence raises a triable issue of fact regarding barriers to expansion. A jury could find that barriers to expansion exist because Sematech can price the latest technology without regard to the constraints faced by its competitors, including the costs to buy new equipment, to build or rent facilities, and to pay taxes on their revenues. PSI's evidence shows that this is *not* a circumstance where Sematech's competitors can "quickly respond to [Sematech's] attempt to raise prices above competitive levels," and thus, PSI has demonstrated barriers to expansion. Rebel Oil, 51 F.3d at 1441.

4. Antitrust Injury

Sematech argues that PSI has suffered no injury as a result of Sematech's marketplace actions, and thus, cannot prove this element of its claim. To demonstrate antitrust injury, "a plaintiff must prove that his loss flows from an anti-competitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages from acts that do not hurt competition." Rebel Oil, 51 F.3d at 1433.

PSI submits evidence that its losses stem from Sematech's entry into the commercial test wafer industry in violation of multiple laws (*see supra* Section H.A.2.), and its continued sales. *See* Cox Report, Ex. 4 to Swanson Aff.; Wagner Report attached as Ex. 15 to Swanson Aff. These are the very acts which PSI complains of in its attempted monopolization claim. Thus, summary judgment on this element is unwarranted.

5. Statute of Limitations

Sematech argues that PSI's attempted monopolization claim is barred by the applicable four-year statute of limitations. PSI disagrees, on the basis that Sematech's continued sales of test wafers triggers the continuing violations doctrine, effectively renewing PSI's claim until such time as the wrongs cease.

The continuing violations doctrine allows the bringing of an action beyond the four-year limitation period provided by antitrust law. The Ninth Circuit has declared that "[a] continuing violation is one in which the plaintiff s interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured." Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir.1987). In cases of continuing violations, the limitations period begins at the "last overt act" by the defendant, which must be (1) a new and independent act that is not merely a reaffirmation of a previous decision that (2) inflicts "new and accumulating" injury on the plaintiff. Id. at 238.

Sematech contends that their continued sales of test wafers merely reaffirms their original decision to enter the market, rendering such acts insufficient to resurrect a cause of action under the continuing violations doctrine. The court disagrees. Each new sale is, in fact, a new and independent act that potentially inflicts new and accumulating injury on PSI. *See, e.g.,* Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997).

*14 Where a violation is final in its impact, such as a permanent boycott of plaintiff's business, or when an actionable wrong is inherently permanent at initiation without further acts, then suit must be brought within the limitations period. *See, e.g.,* *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.1979) (quoting *Poster Exchange, Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 126-27 (5th Cir.1975)). Such is not the case at bar. Each sale is a new and discrete act, purportedly effectuated in order to drive the competition out of business. *See* *Klehr*, 521 U.S. at 188 (continuing sales is trigger to restart the statute of limitations in the context of RICO); *see also* *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1444 (9th Cir.1996).

Because the continuing violations doctrine applies to the acts underlying Sematech's alleged attempt to monopolize the commercial test wafer market, the statute of limitations does not bar PSI's Section 2 claim.

B. Unfair Competition Under California Business and Professions Code Section 17200

The law prohibits "unfair competition" which is defined as "any unlawful, unfair or fraudulent business act or practice ...." Cal. Bus. & Prof.Code § 17200 (hereinafter "UCL"). The Legislature intended this "sweeping language" to include " 'anything that can properly be called a business practice and that at the same time is forbidden by law.' " *Stop Youth Addition, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 560 (1998) (quoting *Bank of the West v. Sup.Ct.*, 2 Cal.4th 1254, 1266 (1992)). Because Section 17200 is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices that are unlawful, or unfair, or fraudulent. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). "When determining whether a practice is 'unlawful,' section 17200 'borrows' violations of other laws, and makes them independently actionable under the UCL." *Aicco, Inc. v. Ins. Co. of North Am.*, 2001 WL 767884 (July 10, 2001) (citing *Cel-Tech*, 20 Cal.4th at 180). "Virtually any law-federal, state or local-can serve as a predicate" for a UCL claim, "unless the defendant is privileged, immunized by another statute, or the predicate statute expressly bars its enforcement" under the UCL. *Stevens v. Sup.Ct.*, 75 Cal.App. 4th 594, 602 (1999).

1. "Unlawful" Business Practices[FN16]

Sematech argues preliminarily that PSI may not state a UCL claim where, as here, PSI had no private right of action for Sematech's alleged violation of the underlying statutes. Sematech's argument misstates the law. "[I]t is irrelevant whether a private right of action is implied under the predicate statute where the action is brought under the [UCL], for conduct violating the underlying law." *Stevens*, 75 Cal.App. 4th at 604 (citing *Stop Youth Addiction*, 17 Cal.4th at 562).

*15 As previously mentioned, PSI asserts that Sematech violated the following: (1) its Certificate of Incorporation; (2) the MOU (which in turn resulted in a violation of the False Claims Act-31 U.S.C. § 3729 *et seq.*); (3) its lease with UT; (4) federal tax laws; and (5) the NCRPA.[FN17]

(a) Certificate of Incorporation

Sematech is a Delaware corporation. Under Delaware law, an act of a corporation in excess of its powers while not invalid, may be challenged in a proceeding by a shareholder against a present or former officer or director or in a proceeding by the Attorney General to enjoin the unauthorized business.Del.Code Ann., Tit. 8, § 124 (2001). Thus, a violation of a Delaware corporation's certificate of incorporation (charter) could constitute an "unlawful" act.

Here, PSI argues that Sematech violated its charter in two ways: (1) it engaged in the commercial sale of test wafers in contravention of its charter's mandate that it exclusively perform "scientific and educational" activities; and (2) it violated its charter's further prohibition against "commercial sales of semiconductor products." Falstad Aff., Ex. 3. Sematech contends that it did not violate either provision.

As a preliminary issue, Sematech argues that PSI's claim fails because it cannot rely on an out-of-state law as a predicate for a UCL claim. However, Sematech has not cited any authority, nor is the court aware of any, prohibiting PSI from doing so. Instead, California law on the UCL emphasizes the broad

nature of a UCL claim. *See* Cel-Tech, 20 Cal.4th at 181; *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App. 4th 499, 531-32 (1997) (the "unlawful" practices prohibited by the UCL are "any practices forbidden by law, be it civil or criminal, federal, state or municipal, statutory, regulatory, or court-made") (quoting *Saunders v. Sup.Ct.*, 27 Cal.App. 4th 832, 838-39 (1994)). Accordingly, the court finds that PSI may bring its UCL claim based on a violation of Delaware law.[FN18]

PSI has submitted sufficient evidence to demonstrate a triable issue of fact that Sematech violated its charter. First, PSI submits evidence that once Sematech realized its federal funding would end, it studied the commercial test wafer market, and despite knowing that it would be directly competing with private companies such as PSI, it nonetheless entered the market. Brown Decl. re: MSJ, Exs. 36, 412; Barfield Aff., ¶ 4. Sematech established a marketing department for the sale of test wafers, and its sales went from $565,000 to about $14.8 million in 2000. Brown Decl. re: MSJ, Ex. F (Mayo Dep. 34:11-35:1), Ex. 22. Sematech also researched the prices its competitors charged, and then targeted its competition in the test wafer market by lowering its prices on those products for which it had existing competition, and lowering prices where it did not. *See, e.g.*, Brown Decl. re: MSJ, Exs. 80, 268-69. Such evidence raises a genuine issue of material fact as to whether Sematech was exclusively engaging in "scientific and educational" activities.

***16** Second, PSI submits evidence to refute Sematech's argument that its sales of test wafers do not violate its charter's prohibition against the sale of "commercial semiconductor products" because test wafers are not "semiconductor products." For example, in a 1994 letter from Sematech's Operations Manager, Chris Sallee, to the owner of Tactical Fabs, Mr. Sallee wrote,

[U]nder Sematech's operating documents, we are legally prohibited from commercially selling semiconductor products solely for revenue. This precludes us from selling wafers or wafer processing services to Tactical Fabs/Telemark for resale.

Said evidence is sufficient to create a triable issue of fact since the jury could believe that Sematech knew the sale of test wafers constituted the commercial sale of a "semiconductor product." [FN19]

(b) MOU

PSI contends that Sematech violated the terms of the MOU, which in turn resulted in violation of the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"). Specifically, PSI asserts that Sematech violated the MOU by failing to describe its test wafer sales in its 1994 and 1995 annual operating plans submitted to the Department of Defense, and in failing to disclose the revenues it received from its sales of test wafers in its required, audited financial statements. Brown Decl. re: MSJ, Ex. D (Daverse Dep.), Exs. 10-14. Under the FCA, any person who knowingly uses a false record or statement to obtain a claim for payment by the Government is liable for up to treble damages and civil penalties. *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476-77 (9th Cir.1996). PSI contends that had Sematech disclosed its sales of test wafers, which violated its charter and the enabling legislation's purpose of "research and development," the federal government would not have continued Sematech's funding.

Sematech disputes that it filed a "false" claim with the government, but argues that even if it did, PSI cannot maintain its UCL claim based on violation of the FCA because the FCA bars actions by private parties based on information that was publicly disclosed. *See*31 U.S.C. § 3730(e)(4)(A).[FN20] Sematech is correct. PSI has not shown that Sematech's manufacture of test wafers was *not* publicly disclosed or that PSI was the "original source" of any information upon which the alleged FCA violation is based. In fact, PSI admits in its opposition that the Department of Defense was specifically informed of Sematech's sales of test wafers in its 1996 and 1997 annual operating plans. *See* Opp'n to MSJ at 32. Such disclosure meets the requirements of Section 3730(e) (4)(A).*A-1 Ambulance Serv., Inc. v. State of CA*, 202 F.3d 1238, 1243 (9th Cir.2000), *cert. denied*, 529 U.S. 1099 (2000). Additionally, the court notes that Sematech's sales of test wafers was certainly known in the industry generally, in light of Sematech's aggressive marketing and increasing sales, and thus, was likely disclosed through the "news media" as contemplated by Section 3730(e)(4)(A).

***17** Therefore, violation of the FCA is not a proper

basis for PSI's claim under the UCL. However, this finding is not fatal to PSI's claim since the court finds that PSI has shown other "unlawful" conduct which may properly serve as predicate offenses. Also, as will be discussed below, Sematech's violation of the MOU, in conjunction with other conduct, can be a basis for finding that Sematech engaged in "unfair" conduct violative of the UCL.

(c) Lease with UT

Sematech argues that its lease with UT does not prohibit the commercial sales of test wafers, and even if it did, UT has stated that it does not believe that Sematech's sales are in contravention of the lease. Swanson Aff., Ex. 2 (Wilson Dep. 35:11-21; 47:23-48:24). Sematech's lease with UT provides,

Lessee may use the Leased Premises for the purpose of conducting research and development in the areas of semiconductor, micro electronics, [and] computer technology .... Lessee may use the Leased Premises to conduct miscellaneous retail and/or sales operations necessary to support Lessee's employees, ... including, but not limited to vending and cafeteria operations and employee ticket sales; ... No other retail or sales operations of any kind shall be carried on by Lessee ... unless prior written approval for such operations is obtained from Lessor ...

Brown Decl. re: MSJ, Ex. 39 at 14-15. From the plain language of the lease, the court cannot find as a matter of law that Sematech's sale of test wafers did not violate the terms of the lease. Additionally, even if the court found to the contrary, PSI submits evidence to refute Sematech's contention that UT acquiesced in Sematech's sales of test wafers; this evidence includes: (1) UT was not told until 1998 that Sematech sold test wafers, and at that time Sematech stated that it was providing wafer processing "services" to members and suppliers on a cost recovery basis for the overall benefit of the industry (Brown Decl. re: MSJ, Ex. E (Wilson Dep. 133:6-25), Ex. 43); (2) UT only learned that Sematech had competitors for its test wafer business a few months prior to the deposition of its representative, James Wilson [FN21](*Id.* at Ex. E (Wilson Dep. 138:4-9)); (3) UT first learned that Sematech was selling test wafers to non-members on the day of Mr. Wilson's deposition (*Id.* at 40:12-41:19; 151:15-152:24)); and (4) at the time of Mr. Wilson's deposition (April 5, 2001) UT believed that Sematech's "wafer processing services" were an "incidental activity" from which Sematech did not profit (*Id.* at 152:25-154:13)). Such evidence raises a triable issue of fact.

Based on the above, PSI's claim under the UCL may alternatively proceed on the basis of a violation of the UT lease.

(d) Federal Tax Laws

For the same reasons as stated in Section II.A.2. *supra,* PSI has raised a triable issue of fact that Sematech violated federal tax laws when it failed to report and pay taxes on the income it received from its commercial test wafer sales. *See* United States v. American Bar Endowment, 477 U.S. 105, 114 (1986) (the "purpose of the unrelated business income tax was to prevent tax-exempt organizations from competing unfairly with businesses whose earnings were taxed). Said violation of federal tax laws can serve as a predicate offense under the UCL. Stevens, 75 Cal.App. 4th at 602; Ballard v. Equifax, 27 F.Supp.2d 1201 (E.D.Cal.1998) (holding that violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, could serve as predicate for UCL claim).

(e) Conclusion as to Unlawful Business Practices

***18** In sum, the court denies Sematech's motion for summary judgment as to PSI's claim under the UCL because PSI has raised a triable issue of fact regarding whether Sematech entered the commercial test wafer business in violation of its Certificate of Incorporation (and thus, in violation of Delaware law), its lease with UT, and federal tax laws.

2. "Unfair" Business Practices

Although not required in light of the above findings, the court will also now consider below the parties' arguments concerning the "unfair" and "fraudulent" prongs of the UCL. In *Cel-Tech,* the California Supreme Court articulated a two-part test for determining whether a practice is actionable under the "unfair" prong of the UCL. First, the court must determine whether the legislature provided a "safe harbor" for the defendant's conduct. If the answer is

yes, the conduct is not actionable under the UCL; if the answer is no, the court must determine whether the defendant's conduct is "unfair." The court defined unfair conduct as conduct that (a) "threatens an incipient violation of an antitrust law," or (b) "violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law," or (c) "otherwise significantly threatens or harms competition." Cel-Tech, 20 Cal.4th at 187.

Neither party contends that a legislative safe harbor exists for Sematech's test wafer business; thus, the court must determine whether Sematech's participation in the test wafer business is "unfair." First, for the reasons described in Section II.A. *supra,* plaintiff has raised a triable issue of fact that defendant's conduct violates Section 2 of the Sherman Act. Accordingly, PSI has raised sufficient evidence to show that Sematech's conduct "threatens an incipient violation of an antitrust law."*Id.* Sematech's reliance on *Carter v. Variflex,* 101 F.Supp.2d 1261 (C.D.Cal.2000) is misplaced. There, the plaintiff was unable to show a violation of the Sherman Act or California's antitrust law, the Cartwright Act, and thus, the court held that plaintiff had not met the first prong of the *Cel-Tech* test. The *Carter* court also found that the plaintiff failed to present sufficient evidence that competition had been harmed by the defendant's conduct, and accordingly, the plaintiff could not establish either the second or third prong of *Cel-Tech's* test. In contrast, here PSI has raised sufficient evidence to withstand Sematech's motion for summary judgment on its Sherman Act claim, and such evidence is also sufficient to withstand Sematech's motion as to PSI's UCL claim.

This case is analogous to the facts of *Cel-Tech.* The defendant in *Cel-Tech* had been granted wholesale duopoly status in the cellular service business by the federal government. The California Supreme Court upheld the lower court's finding that the defendant used its legally privileged status in violation of the UCL by making fair and honest competition in the cellular *equipment* business impossible. 20 Cal.4th at 187-191. Like Sematech, the defendant in *Cel-Tech,* was using a federally conferred privilege for one activity (cellular service) to enable its unfair competition in another unrelated activity (cellular equipment sales). Similarly, Sematech has used its federally conferred privilege (semiconductor research and development) to enable its unfair competition in an unrelated activity (the commercial sale of test wafers)

*19 The court notes that PSI is also able to meet the second and third prongs of the *Cel-Tech* test. Thus, even without the court's finding regarding PSI's Sherman Act claim, PSI would still be able to assert its UCL claim. PSI submits evidence that (1) because Sematech has virtually no costs in producing test wafers, it is able to irrationally price its products without regard to its competitors; (2) Sematech's conduct has prevented its competitors from participating in the market because they cannot justify the expense necessary to invest in the most technologically advanced equipment; (3) Sematech's conduct has injured its competition; both PSI and Tactical Fabs have lost sales and have been prevented from buying new equipment; and finally, (4) Sematech knew when it entered the test wafer market that it may be violating various legal restrictions on its conduct, yet it decided to enter the market nonetheless, taking full advantage of its privileged status as a non-profit R & D consortium to engage in the commercial sale of test wafers. Brown Decl. re: MSJ, Ex. L (Barfield Dep. 91:2-93:18, 100:25-102:16, 109:16-111:21, 115:4-24), Exs. 153-54, 177, 181-82, 193, 197, 202-04, 666; Morris Decl., ¶ 20; Cox Report, Ex. 4 to Swanson Aff. This evidence raises a triable issue of fact as to whether Sematech has violated the "policy or spirit" of the antitrust laws or otherwise threatened or harmed competition.

3. "Fraudulent" Business Practices

PSI raises for the first time in its supplemental brief submitted to the court on July 5, 2001 [FN22] that Sematech's conduct also violates the "fraudulent" prong of the UCL. Specifically, PSI argued that Sematech has committed "fraud" on the public because the taxpayers who funded Sematech, in the amount of $850 million dollars, thought they were paying for "research and development," not commercial sales for Sematech's profit. The court does not consider this argument because it was raised for the first time in PSI's supplemental brief; a brief which Sematech did not have an opportunity to respond. Additionally, consideration of the argument is not necessary since the court finds alternative bases for the denial of Sematech's motion for summary

judgment as to the UCL claim.

4. Statute of Limitations

Finally, Sematech argues that PSI's UCL claim is barred by the applicable four-year statute of limitations. *See* Cal. Bus. Prof.Code § 17208. Again, Sematech's contention fails. PSI contends that the continuing violations doctrine applies to its UCL claim, and the court agrees.

As a preliminary matter, the court finds that the continuing violations doctrine has been applied to unfair competition claims in California, as suggested by PSI. *See* *Suh v. Yang*, 987 F.Supp. 783, 796 (N.D.Cal.1997) (citation omitted).[FN23]

Secondarily, Sematech's attempt to persuade this court to characterize its presence in the marketplace as a single alleged wrong, distinct from the subsequent acts of selling test wafers, is unavailing. The act of "entering the marketplace" *is* the act of selling a product or service in the market. Indeed, presence in the marketplace without sales would render this action moot, because PSI could not have suffered any injury from the mere presence of Sematech in the marketplace.

***20** For the reasons discussed more fully above, this court concludes that Sematech's continuing sales of commercial test wafers also constitutes a continuing violation under the UCL. Accordingly, PSI's UCL claim is not barred by the statute of limitations.

C. Unjust Enrichment

Although courts often use the terms "unjust enrichment" and "quantum meruit" synonymously, the distinction between them is legally significant. Quantum meruit (contract implied-in-fact) is an equitable remedy under which a plaintiff who has rendered services or materials benefitting the defendant may recover the reasonable value thereof. *In re De Laurentiis Entertainment Group, Inc.*, 963 F.2d 1269 (9th Cir.1992). Unjust enrichment (contract implied-in-law), on the other hand, describes recovery for the value of a benefit retained when, on the grounds of fairness and justice, the law compels a legal and moral obligation to pay. *See* *Philpott v. Superior Court*, 1 Cal.2d 512, 521 (1934); *see also* Restatement (First), Restitution, § 1 (1936).

PSI's claim is for unjust enrichment. To establish a claim for unjust enrichment, PSI must show that Sematech (1) received a benefit and (2) unjustly retained that benefit at the expense of another. *Lectrodryer v. Seoulbank*, 77 Cal.App. 4th 723, 726 (2000). Benefit means any type of advantage. *First Nationwide Sav. v. Perry*, 11 Cal.App. 4th 1657, 1662 (1992). The doctrine of unjust enrichment is applicable, however, only when the property sought to be returned, in equity and good conscience, belongs to the plaintiff. *Western Pac. R. Corp. v. Western Pac. R. Co.*, 206 F.2d 495, 500 n. 7 (9th Cir.1953).

Sematech argues that privity between the parties is required to establish an action for unjust enrichment, i.e., that PSI conferred a benefit on Sematech which it seeks to have returned. The court disagrees; there is no such requirement under California law. Sematech's argument is improperly premised on cases discussing quantum meruit. As discussed *supra*, quantum meruit is legally distinct from unjust enrichment, and while quantum meruit does require privity, unjust enrichment does not. *See, e.g.*, *Maglica v. Maglica*, 66 Cal.App. 4th 442, 449 (1998) (holding that the plaintiff must have bestowed the benefit on the defendant as a prerequisite to recovery in quantum meruit action); *but see* *Fidelity & Deposit Co. of Maryland v. Harris*, 360 F.2d 402 (9th Cir.1966) (holding that liability under contract implied-in-law is not contractual, but is imposed even in the absence of privity to prevent unjust enrichment); *see also* Restatement (First), Restitution, §§ 133, 136 (1936) (discussing restitution of benefits acquired from third parties at another's expense). Here, Sematech has received a benefit, in the form of substantial revenues, from its commercial sales of test wafers. Cox Report, Ex. 4 to Swanson Aff.

Sematech also contends that PSI must establish that Sematech had knowledge of the benefit conferred in order to be obligated to make restitution. *See* Def.'s MSJ at 38. Sematech's argument is misplaced as knowledge is only relevant in instances of mistaken conferral of a benefit. *See* *First Nationwide*, 11 Cal.App. 4th at 1662 (transferee without knowledge of mistake may retain benefit if he has detrimentally changed position thereon). Here, PSI is seeking restitution based on allegedly tortious conduct *not*

mistaken conferral of benefits; thus, Sematech's knowledge is of no relevance to this inquiry.

*21 Lastly, Sematech argues that PSI cannot show that Sematech has benefitted at PSI's expense thus warranting summary judgment on this claim. PSI opposes on the basis that Sematech has engaged in illegal conduct directly depriving PSI of its share of the test wafer market. In fact, PSI has offered evidence that Sematech has captured a substantial share of the test wafer market since entering the market in 1995. *See* Cox Report, Ex. 4 to Swanson Aff.; Wagner Report, Ex 15 to Swanson Aff. This evidence when viewed in the light most favorable to PSI raises an issue of material fact as to whether Sematech has unjustly retained a benefit which in equity and good conscience belongs to PSI. Accordingly, Sematech's motion for summary judgement on this claim is denied.

III. SEMATECH'S MOTION FOR SUMMARY ADJUDICATION REGARDING MONETARY RELIEF UNDER THE UCL.

Sematech argues that, in the event the court declines to grant summary judgment on PSI's UCL claim, the court should grant summary adjudication in its favor regarding PSI's demand for monetary relief under the UCL. Because the court denies Sematech's motion with respect to PSI's UCL claim, it now turns to Sematech's alternative motion for summary adjudication.

Specifically, Sematech seeks an adjudication that PSI may not be awarded restitution under California Business and Professions Code section 17203 because PSI has no property right in Sematech's sales of test wafers. Sematech further argues that PSI may not employ the doctrine of disgorgement of profits under Section 17203. PSI disagrees, arguing that disgorgement of profits made from unfair conduct has been recognized as a form of restitutionary relief under California law. Moreover, PSI asserts that Section 17203 is extremely broad, permitting the court to use its equitable powers to do what is necessary to prevent the use of unfair business practices and to make PSI whole.

PSI is correct. As recently held by the California court of appeal in *Korea Supply Co. v. Lockheed Martin Corp.*, 2001 WL 808347, *4-5 (July 18, 2001), a plaintiff may seek under the UCL disgorgement of profits unjustly earned by the defendant.[FN24] In *Korea Supply*, the defendant made the exact argument Sematech makes here-that plaintiff was limited under the UCL to an award of "restitution" which required that plaintiff have an ownership interest in the monies it sought from the defendant; because plaintiff did not have such a property interest, it was not entitled to proceed with its UCL claim. *Id.* at *4.

Plaintiff, in *Korea Supply*, was a Korean corporation doing business as a manufacturer's representative in the sale of military equipment to the Korean government. In 1995 and 1996, plaintiff's client, MacDonald Dettwiller ("MacDonald"), and Loral Corporation ("Loral") (the predecessor of defendant Lockheed Martin Corporation ("Lockheed")) submitted competing bids to sell military equipment to the Republic of Korea. Loral's bid was accepted even though MacDonald's bid was lower and its equipment superior. If MacDonald's bid was accepted, plaintiff would have earned a $30 million dollar commission. Plaintiff brought an action against Lockheed for interference with prospective economic advantage and unfair competition under the UCL based on violation of the Foreign Corrupt Practices Act (15 U.S.C. § 78dd-2). *Id.* at *1.

*22 In reversing the trial court's grant of Lockheed's demurrer to the UCL claim, the court held that plaintiff had adequately alleged a UCL claim in praying for the disgorgement of profits unjustly earned by Lockheed.

Section 17203 authorizes the court to fashion remedies to prevent, deter, and compensate for unfair business practices. In addition to injunctions, it authorizes orders that are necessary to prevent practices that constitute unfair competition and to make 'orders or judgments ... as may be necessary to restore' to persons in interest any money or property acquired by unfair competition.

Id. at *4 (citing *Cortez*, 23 Cal.4th at 176).[FN25] The court rejected Lockheed's argument that the above language limited plaintiff to injunctions and/or "restitution" orders which required a defendant to return money belonging to the plaintiff (i.e ., orders requiring the return of money taken from a person who had an ownership interest in it). *Id.* at *4-

5.Relying on the California Supreme Court's decision in *Kraus v. Trinity Mgmt. Servs.*, 23 Cal.4th 116, 127 (2000), the court concluded that plaintiff may seek an order requiring Lockheed to surrender all profits earned as a result of its unfair business practices Such an order was permitted "regardless of whether those profits represent money taken directly from [a person] who [was the] victi[m] of the unfair practice."*Id.* at *5 (citing *Kraus*, 23 Cal.4th at 127).

The Supreme Court made clear in *Kraus* that *in addition* to restoring property or money to a person holding an ownership interest in it,

Section 17203*also* grants the court the power to make orders necessary to prevent the use of unfair business practices. Such orders may encompass broader restitutionary relief, including disgorgement of all money so obtained even when it may not be possible to restore all of that money to direct victims of the practice

Kraus, 23 Cal.4th at 129 (emphasis added). Moreover, the court in *Kraus* recognized that orders for disgorgement may have "deterrent force beyond that of injunctions coupled with restitutionary orders" and in certain cases may be " 'necessary to prevent the use or employment ... of any practice which constitutes unfair competition.' " *Id.* at 137 (citing Cal. Bus. & Prof.Code § 17203).

Accordingly, based on *Korea Supply*, this court denies Sematech's motion for summary adjudication regarding PSI's claim for monetary relief under the UCL.[FN26] PSI is entitled to seek disgorgement of Sematech's profits earned as a result of the alleged unfair business practices.[FN27]

CONCLUSION

1. Sematech's motion to exclude the testimony of PSI's expert Alan J. Cox is summarily DENIED WITHOUT PREJUDICE.

2. PSI's motion to modify the pretrial scheduling order to designate Carmen R. Eggleston as an expert witness is GRANTED.

a. Sematech shall have to and including July 30, 2001 to designate a rebuttal expert.

*23 b. Any report of said rebuttal expert is due on or before September 28, 2001.

c. Depositions may be taken of Eggleston and Sematech's rebuttal expert any time after the disclosure to PSI of Sematech's expert's report but no later than October 29, 2001.

d. The court will hold a mid-litigation conference on November 16, 2001 at 10:00 a.m. The parties are directed to file a joint status report by November 6, 2001.

e. The previous final pre-trial conference and jury trial dates of August 17 and November 13, 2001, respectively, are vacated.

3. Sematech's motion for summary judgment is DENIED.

4. Sematech's motion for summary adjudication regarding monetary relief under California's unfair competition law is DENIED.

IT IS SO ORDERED.

FN1. Pursuant to the court's order, dated November 8, 2001, unsealing this memorandum and order, the court hereby re-issues this order, originally filed under seal on August 16, 2001, in redacted form. The redactions are indicated herein by dash marks, and appear at pages 22:21 and 25:2-4.

FN3. The facts recited herein are taken from the parties' briefs and evidence submitted in conjunction with the pending motions. Where disputed, PSI's version of the facts are taken as true. The court overrules Sematech's objection to PSI's "Statement of Undisputed Facts in Opposition to Sematech's Motion for Summary Judgment, or in the Alternative, Summary Adjudication," filed June 8, 2001. While PSI labeled the document a "Statement of *Undisputed* Facts," it is actually a statement of "disputed" facts which is properly filed in opposition to a motion for summary

judgment. E.D. Cal. L.R. 56-260(b).

FN4. The court overrules Sematech's objection, filed June 8, 2001, to the Morris Declaration. Said declaration does not purport to offer "expert testimony," either technical, economic, legal, or otherwise. Rather, it offers the lay opinion testimony of Mr. Morris based on his experience in the test wafer market; said testimony is properly considered. Alternatively, there are facts stated in the declaration which support that Mr. Morris may be qualified to testify as to some expert opinions. Additionally, the court does not rely on any portions of Mr. Morris' declaration which are argumentative or without foundation.

FN5. The present members of Sematech are: IBM, Intel, Motorola, Hewlett Packard, Advanced Microdevices, Texas Instruments, Phillips, TSMC, ST Microelectronics, Infinion Technology, Hynix, Conextent, and Agere Systems. *See* Pl.'s Opp'n to Def.'s MSJ, filed June 1, 2001 subject to protective order ("Opp'n to MSJ"), at 3 n. 4.

FN6.15 U.S.C. § 4601 reads in relevant part:

(a) Findings

The Congress finds that it is in the national economic and security interests of the United States for the Department of Defense to provide financial assistance to the industry consortium known as Sematech for research and development activities in the field of semiconductor manufacturing technology.

(b) Purposes

The purposes of this subchapter are-

(1) to encourage the semiconductor industry in the United States-

(A) to conduct research on advanced semiconductor manufacturing techniques; and

(B) to develop techniques to use manufacturing expertise for the manufacture of a variety of semiconductor products; and

(2) in order to achieve the purpose set out in paragraph (1), to provide a grant program for the financial support of semiconductor research activities conducted by Sematech.

15 U.S.C. § 4601(a) & (b).

FN7. The court overrules Sematech's objection, filed June 8, 2001, to the Brown Declaration. Said declaration properly authenticates the attached exhibits, the majority of which were authenticated at deposition.

FN8. PSI's claims do not involve the production of "new" semiconductor products by Sematech, i.e., so called "cutting edge" test wafers. Rather, its claims only involve test wafers which PSI and other private competitors could have made with commercially available equipment which they owned or which they could and would have acquired but for Sematech's participation in the market.

FN9. Responding to a similar complaint by another test wafer company, Tactical Fabs, Inc., Sematach's Chris Sallee wrote, "[U]nder SEMATECH's operating documents, we are legally prohibited from commercially selling semiconductor products solely for revenue."Brown Decl. re: MSJ, Ex. 666.

FN10. For the sake of brevity, the court omits from this discussion the extensive bickering contained in the parties' briefs as to who said what, and when.

FN11. *Cost Mgmt. Serv., Inc. v. Washington Natural Gas Co.*, 99 F .3d 937, 953 (9th Cir.1996), relied on by Sematech, does not hold to the contrary. While the court in *Cost*

Mqmt. reached a different result from the courts in *Farley* and *Western Concrete,* it did not prohibit a finding of "predatory" conduct based on a violation of law extrinsic to the antitrust laws. Rather, the court did not follow the holdings in *Farley* and *Western Concrete* because in *Cost Mqmt.*, the plaintiff was not itself subject to the governing tariff. As will be explained *infra,* here, PSI asserts violations of law which are applicable to both PSI and Sematech, and thus, the distinction drawn in *Cost Mqmt.* is not applicable. Moreover, the court notes the limited applicability of all three cases. The rationale for the decisions in *Farley, Western Concrete,* and *Cost Mqmt.* was based on the courts' findings that the facts in those cases presented claims closely analogous to traditional predatory pricing claims. Here, predatory pricing is not at issue. Therefore, the cases are not factually on point; however, the court relies on them in so far as they stand for the general proposition that a Section 2 violation may be shown by evidence of violation of laws extrinsic to the antitrust laws.

FN12. Such claim requires that the court address whether the asserted predicate offenses are "forbidden by law." *Stop Youth Addition, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 560 (1998).

FN13. It is Ms. Eggleston's expert opinion that (1) Sematech lost its tax-exempt status in 1996 when its mission changed from assisting the industry to assisting its member corporations; (2) Sematech's test wafer business constituted an "unrelated trade or business activity" which generated income which should have been (but was not) reported by Sematech and subjected to taxation; and (3) Sematech has failed to disclose on IRS Form 990 the existence of its commercial test wafer business.

FN14. Sematech's expert, David Teece, disputes many of the findings made by PSI's expert, Alan Cox, set forth above. On a motion for summary judgment, the court cannot weigh the evidence presented by the parties. Here, the conflicting expert reports demonstrate that triable issues of fact remain for a jury. *See Avery Dennison Corp. v. Acco Brands, Inc.*, 2000 WL 986995, *12 (C.D.Cal.2000) ("In light of the [c]onflicting evidence and expert opinions, this Court may not weigh the evidence as presented by the parties. The inferences to be drawn from the parties' evidence could weigh in favor of either party.")

FN15. In *Rebel Oil,* the court stated that the "main sources of entry barriers are: (1) legal license requirements; (2 control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capitol costs on new entrants; and ... (5) economies of scale." 51 F.3d at 1439.

FN16. The court rejects Sematech's "judicial abstention" argument as inapposite. The cases cited by Sematech each involve a highly-regulated industry (i.e., the insurance industry) and/or plaintiff had an alternative remedy that was either available or mandatory. *See* Def.'s MSJ at 32-34. In this case, the test wafer industry is not regulated whatsoever, and PSI has no other forum to redress its damages; accordingly, this court will decide the matter.

FN17. PSI conceded in its opposition that it does not have a UCL claim based on the NCRPA since the Act does not prohibit any conduct by Sematech. *See* Opp'n to MSJ at 37:20-22. The NCRPA simply confers certain benefits on research and production ventures that satisfy its terms, including a relaxed antitrust standard and single (not treble) damages if their activities are challenged under the antitrust laws.

FN18. *Norwest Mortgage, Inc. v. Sup.Ct.*, 72 Cal.App. 4th 214 (1999), relied on by Sematech, does not require a contrary holding. There, the question presented was whether a UCL action could be granted nationwide class certification when some of the actions complained of were performed

out of state and effected out of state plaintiffs with no nexus to California. The court held that with respect to these claims only, the lack of any nexus to California made it inappropriate to apply the UCL. The court did not decide whether an out-of-state law could serve as a predicate for a UCL claim because no out-of-state laws were involved.

FN19. Moreover, since this lawsuit was filed, Sematech amended its Certificate of Incorporation to state that the term "semiconductor products" means only finished chips. Falstad Aff., Ex. 3. While Sematech contends that the amendment was only a "clarification" of its charter, the trier of fact could treat the amendment as an admission that Sematech's sales of test wafers before the amendment were in violation of its charter.

FN20.Section 3730(e)(4)(A) provides, "No court shall have jurisdiction over an action ... based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."

FN21. Mr. James Wilson was designated by UT as the person most knowledgeable about the lease between UT and Sematech and about Sematech's disclosures to UT about its test wafer business.

FN22. After the hearing on Sematech's motions, the court permitted the parties to simultaneously file supplemental briefs to further address the issues raised at the hearing. The "fraud" prong of the UCL was not discussed at the hearing.

FN23. Sematech cites the *Stutz* case, which addresses whether the "discovery rule" applies to unfair competition claims. *Stutz Motor Car of Am., Inc., v. Reebok Int'l, Ltd.*, 909 F.Supp. 1353, 1363-64 (9th Cir.1995).*Stutz* does not rule upon whether the "continuing violations" doctrine applies to unfair competition claims. Moreover, although the Ninth Circuit has not directly decided this question, recent Ninth Circuit decisions have generously applied this equitable doctrine in many other contexts. In fact, at least one California district court has directly applied the continuing violations doctrine to an unfair competition claim. *See Suh*, 987 F.Supp. at 796;*see also Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1107 (9th Cir.1998) (court applied the continuing violations doctrine to a Title VII claim); *see also Gutowsky v. County of Placer*, 108 F.3d 256, 259 (9th Cir.1997) (court applied the continuing violations doctrine to a § 1983 action).

FN24.*Korea Supply* is the first California case to squarely address the issue presented by this motion. The cases cited by both parties, though instructive of the issue generally, do not directly address the question presented here. *See, e.g., Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 176 (2000) (the court expressly stated that it did not consider whether an award of back wages would be proper under a "disgorgement of benefit theory").

FN25.Section 17203 states in relevant part,

> The court may make such orders ... as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, ...*or* as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Cal. Bus. & Prof.Code § 17203 (emphasis added).

FN26. In its reply, Sematech argues that should the court decide that PSI may proceed under the UCL pursuant to a

"disgorgement of benefits" theory, it nonetheless seeks an order that PSI is not entitled to "retitution" under the UCL. *See* Def.'s Reply on Mot. for Sum. Adjud., filed under seal June 8, 2001, at 8:4-11. The court declines to make such a bright-line order. The relevant cases discuss "disgorgement of profits" as a form of "retitutionary" relief. *See, e.g.,* *ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. of Am.*, 14 Cal.4th 1247, 1268 (1997) ("on its face, section 17203 authorized injunctive relief to prevent unfair competition and/or restitution (i.e., disgorgement) of money or property wrongfully obtained"). Although this may not be technically true in some instances, the California Supreme Court recognized in *Kraus* that "an order that a defendant disgorge money obtained through an unfair practice may include a restitutionary element, but is not so limited."23 Cal.4th 127. Thus, some disgorgement orders may also classify as "restitution" orders, and it is not necessary to make a distinction between the two theories of recovery when plaintiff is entitled to either type of relief under the UCL. Moreover, it is worth noting that PSI has expressly stated that it is not seeking "restitution" as that term is defined by Sematech but rather seeks relief under the UCL under a "disgorgement of benefits" theory. *See* Pl.'s Opp'n to Mot. for Sum. Adjud., filed June 1, 2001 subject to protective order ("Opp'n re: Sum. Adjud."), at 6:4-6.

FN27. PSI only seeks to disgorge "that portion of Sematech's illicit profits that are proportionate to PSI's share of the test wafer market," had Sematech not engaged in unfair competition. *See* Opp'n re: Sum. Adjud. at 8:16-19.

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