

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Castle Megastore Group, Inc.,

Plaintiff,

v.

Kylee Wilson et al,

Defendants.

No. CV-12-02101-PHX-DGC

ORDER

On October 3, 2012, Plaintiff Castle Megastore Group, Inc. (“CMG”) filed a complaint against Kylee Wilson, Michael Keith Flynn, and Alma Pilar Quintana and their spouses alleging breaches of contract, misappropriation of trade secrets, breaches of fiduciary duties, breaches of the implied covenant of good faith and fair dealing, violation of the Stored Communications Act, and conversion. Doc. 1. Wilson filed a motion to dismiss on November 6, 2012 (Doc. 17), and Quintana filed a motion raising virtually identical arguments on November 19, 2012 (Doc. 22). Plaintiff filed a consolidated response to the motions (Doc. 29) and both Defendants filed replies (Docs. 36-37). Defendant Flynn filed a notice of joinder in the motions to dismiss. Doc. 26. Plaintiff opposed joinder (Doc. 30) and Flynn filed a reply (Doc. 40).¹ All motions have been fully briefed and no party has requested oral argument. For the reasons that follow, the Court will grant Defendants’ motions to dismiss.

¹ Plaintiff’s response opposes joinder on the substance of the arguments in favor of the motions to dismiss. The Court will consider the briefing on the joinder issue as additional briefing on the motions to dismiss.

1 **I. Background.**

2 CMG is a retailer of novelty and adult-themed merchandise incorporated in
3 Arizona and with its principal place of business in Tempe, Arizona. Doc. 1 at 2.
4 Defendants are all Arizona residents and former employees of CMG and their spouses.
5 Doc. 1 at 2-3. As a condition of their employment, each Defendant signed confidentiality
6 agreements that included non-compete clauses. Doc. 1 at 4.

7 CMG alleges that Wilson posted an image of a computer screen displaying the
8 company’s computer system on Twitter on August 9, 2012. Doc. 1 ¶ 29. Over the next
9 week, CMG claims that Wilson prepared application materials to other companies that
10 contained “confidential information regarding CMG, including CMG’s facilities data, the
11 Company’s employees, its annual revenue, information regarding its systems and
12 business strategies, sales strategies, sales numbers and programs.” Doc. 1 ¶ 25. Wilson
13 was terminated on August 20, 2012.

14 CMG alleges that while still employed as the “Social Media Specialist,” Lynn
15 posted a video of a “confidential CMG Managers’ meeting” to a third party website
16 called Vimeo. Doc. 1 ¶ 35; Doc. 1-1 at 22. CMG claims that Flynn shared the link and
17 password to his account with Quintana on September 21, 2012, and with Wilson on
18 September 24, 2012. Doc. 1 ¶ 36. It also alleges that further email communications
19 between the three former employees disclosed other confidential information regarding
20 the company. Doc. 1 ¶ 37. Flynn was terminated on September 24, 2012 (Doc. 1 ¶ 38)
21 and Quintana resigned on July 3, 2012 (Doc. 1 ¶ 50).

22 **II. Legal Standard.**

23 When analyzing a complaint for failure to state a claim to relief under
24 Rule 12(b)(6), the well-pled factual allegations are taken as true and construed in the light
25 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
26 Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the
27 assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and they are insufficient
28 to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d

1 1103, 1108 (9th Cir. 2010). To avoid a Rule 12(b)(6) dismissal, the complaint must
2 plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp.*
3 *v. Twombly*, 550 U.S. 544, 570 (2007).

4 **III. Analysis.**

5 **A. Stored Communications Act.**

6 The Stored Communications Act (“SCA”), 18 U.S.C. § 2701, provides a cause of
7 action against anyone who:

8 (1) intentionally accesses without authorization a facility
9 through which an electronic communication service is
provided; or

10 (2) intentionally exceeds an authorization to access that
11 facility; and thereby obtains, alters, or prevents authorized
12 access to a wire or electronic communication while it is in
electronic storage in such system.

13 An electronic communication service is defined as “any service which provides to users
14 thereof the ability to send or receive wire or electronic communications.” 18 U.S.C.
15 § 2510(15).

16 CMG alleges that Flynn violated the SCA when he posted the video of the
17 manager’s meeting on an account he created on a third party website and when he gave
18 Wilson and Quintana access to the site. It alleges that Wilson and Quintana violated the
19 SCA when they accessed the link.

20 Defendants argue that CMG has failed adequately to allege that they accessed an
21 “electronic communication service” within the meaning of the statute. Doc. 22 at 4-5.
22 CMG emphasizes that the statute covers “any service which provides to users the ability
23 to send or receive wire or electronic communications,” and points to case law holding
24 that third party websites can be electronic communication services under the SCA. *See*
25 *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 880 (9th Cir. 2002) (finding employee’s
26 personal website was an electronic communication service); *Pure Power Boot Camp, v.*
27 *Warrior Fitness Boot*, 587 F. Supp. 2d 548, 556 (S.D.N.Y. 2008) (holding that private
28 employer email accounts are electronic communication services). CMG argues that the

1 third party website in this case, Vimeo, was an electronic communication service and that
2 Defendants “were aware of the confidential content of the video before accessing it and
3 that Flynn did not have the authority to authorize them to access the website to view the
4 video.” Doc. 29 at 8.

5 While Vimeo might be an electronic communication service, CMG provides no
6 support for its assertion that Flynn did not have authority to authorize others to view his
7 Vimeo account. Flynn created the account and provided his password to Wilson and
8 Quintana. CMG alleges that he was not authorized to have or to share the video, but they
9 do not allege that he obtained the video by accessing an electronic communication
10 service that was controlled by CMG.² Without additional facts, CMG has not alleged that
11 Defendants gained *unauthorized* access to an electronic communication service. Sending
12 or using a link and password to access a personal account created on a third party website
13 does not appear to violate the SCA.

14 CMG also alleges that Flynn changed the password of the Facebook account he
15 created for CMG after the date he was terminated (Doc. 1 ¶ 42), and that changing the
16 password is a separate ground for finding that Flynn violated the SCA (Doc. 30 at 7-8).
17 But CMG has not alleged any facts about the company’s use of the Facebook page from
18 which the Court could conclude that the page was an electronic communication service
19 under the SCA. The Court may not “assume any facts necessary to the [plaintiffs’] claim
20 that they have not alleged.” *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club,*
21 *Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005). The threadbare statement that Flynn changed
22 the Facebook password (a statement that is not even repeated under the SCA claim
23 heading later in the complaint) does not state a claim under the SCA.

24 **B. State Law Claims.**

25 Jurisdiction in this case is based on the federal question presented by the SCA
26 claim, with supplemental jurisdiction over the state law claims. Doc. 1 ¶ 11; 28 U.S.C

27
28 ² In CMG’s response in opposition to Flynn’s notice of joinder, CMG claims that
Flynn gained access to the video through CMG’s IT systems. Doc. 30 at 6-7. This
allegation, however, is not set out in the complaint. *See* Doc. 1 ¶¶ 35-49.

1 §§ 1331 & 1367. A district court may decline to exercise supplemental jurisdiction if
2 “the district court has dismissed all claims over which it has original jurisdiction.” 28
3 U.S.C. § 1367(c)(3). The Supreme Court has instructed that ““if the federal claims are
4 dismissed before trial . . . the state claims should be dismissed as well.” *Carnegie-*
5 *Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988) (quoting *United Mine Workers of*
6 *America v. Gibbs*, 383 U.S. 715, 726 (1966)). While not a hard-and-fast rule, that
7 statement has come to mean that “in the usual case in which all federal-law claims are
8 eliminated before trial, the balance of factors . . . will point toward declining to exercise
9 jurisdiction over the remaining state-law claims.” *Id.*

10 All of the remaining claims against Defendants are based on Arizona law. Having
11 dismissed the SCA claim, the basis for this Court’s federal question jurisdiction no longer
12 exists. The Court declines to exercise supplemental jurisdiction over the state law claims
13 that would more appropriately be litigated in state court.

14 **IT IS ORDERED:**

15 1. Defendants’ motions to dismiss (Docs. 17, 22) are **granted**. The complaint
16 (Doc. 1) is dismissed without prejudice.

17 2. Consistent with the Court’s discussion with the parties at the recent Rule 16
18 conference, Plaintiff is granted leave to file an amended complaint on or before
19 **March 15, 2013**, following which the parties shall have **30 days** to attempt to resolve this
20 case.

21 3. A further scheduling conference will be held on **April 17, 2013, at**
22 **4:00 p.m.** If the case has not been resolved by that date, the Court will set a litigation
23 schedule for completion of the case.

24 Dated this 25th day of February, 2013.

25
26
27 

28

David G. Campbell
United States District Judge