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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN CALIFORNIA INSTITUTE OF LAW, a California corporation,

Plaintiffs,

vs.

TCS EDUCATION SYSTEM, an Illinois corporation; DAVID J. FIGULI, *an* individual; GLOBAL EQUITIES, LTD. d/b/a HIGHER EDUCATION GROUP, a Colorado limited liability company,

Defendants.

CASE NO. CV10-8026 PSG

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT TCS EDUCATION SYSTEM'S MOTION TO DISMISS

Complaint Filed: October 25, 2010

Assigned: Hon. Philip S. Gutierrez
Date: February 28, 2011
Time: 1:30 p.m.
Ctrm.: 880

Table of Contents

Table of Authorities

Page

Cases

Statutes

INTRODUCTION

In its Complaint, plaintiff (a for-profit evening law school) attempts to allege ten distinct causes of action against the Defendant TCS Education System. Each is premised on the same basic allegations:

1. Plaintiff and TCS entered into a non-disclosure agreement ("NDA") so that TCS could evaluate whether it wanted to pursue a partnership with plaintiff.

2. TCS decided not to buy plaintiff, instead affiliating with plaintiff's competitor, Santa Barbara and Ventura Colleges of Law ("SB&V").

3. TCS supposedly used or will use plaintiff's unspecified trade secrets during the course of its affiliation with SB&V.

4. The affiliation between SB&V and TCS will make plaintiff less attractive to prospective students because SB&V will be able to offer its students greater opportunities, including increased access to student loans, that plaintiff cannot.

In short, plaintiff is upset that TCS chose to partner with SB&V and not with it. From these allegations, plaintiff claims that TCS owed it a fiduciary duty—one that prevented TCS from evaluating or partnering with any other law school in the Santa Barbara/Ventura/San Louis Obispo area. Far from preventing TCS from considering other law schools to partner with, however, the plain language of the NDA contemplates that both TCS and plaintiff would be free to consider third-party entities with which to affiliate if they ultimately chose not to do business with one another. Plaintiff's attempt to transform a plain vanilla NDA into a sweeping non-compete agreement with fiduciary obligations ignores not only the express terms agreed to by the parties but also settled black-letter law and well-entrenched California public policy. TCS is not plaintiff's fiduciary and is not precluded from competing with it.

Moreover, plaintiff does not allege how TCS used or misappropriated its purported trade secrets, much less which trade secrets or confidential information TCS

has improperly utilized. Instead of specifically identifying the actual information that TCS has disclosed or how TCS used the information improperly, plaintiff bases its misappropriation claim on the notion that "TCS cannot separate out plaintiff's trade secrets and confidential information in pursuing their affiliation with [SB&V]." (*See* Compl. ¶ 71.) Plaintiff's misappropriation claim reads more like an inevitable disclosure claim, which violates California's public policy against non-compete agreements, and is not a claim recognized under California law. Plaintiff, in sum, does not allege any ***facts*** that suggest TCS did anything other than engage in typical and perfectly appropriate pre-acquisition due diligence. Plaintiff's breach of fiduciary duty, breach of contract, misappropriation of trade secret, and related tort claims must be dismissed.

Based on the same alleged fact pattern and theory of prospective harm, plaintiff also claims that TCS is attempting to monopolize a regional law school market because it chose to partner with its competitor, rather than it. But regardless of which law school TCS partnered with, there would still be two law schools in the implausible market plaintiff alleges. And plaintiff admits that TCS's partnership with a law school is good for students; SB&V may now be able to provide its students with "administrative and technological innovations" and "increased opportunities." (Compl. ¶¶ 33, 36.) Plaintiff outright admits that "***[t]hese are all good things in the abstract***." (*Id.* ¶ 36.) (emphasis added.) These concessions fly in the face of the axiom that the antitrust laws are designed to protect "competition, not competitors." *See Brown Shoe Co. v. U.S.*, 370 U.S. 294, 344 (1962). Plaintiff's real complaint is that it will not be the one to offer law students these pro-competitive advantages, but that SB&V will. That is not an antitrust violation. Moreover, plaintiff alleges only prospective injury, and not that it has suffered damages to date. Like plaintiff's other claims, its antitrust claims should be dismissed.

BACKGROUND

Defendant TCS Education System ("TCS") is a non-profit corporation that

affiliates with specialized schools and colleges, providing schools with financial support and other resources. (Compl. ¶ 5.) In September 2009, TCS approached plaintiff regarding a potential acquisition. (*Id.* ¶ 13.) On September 24, 2009, plaintiff and TCS entered into a non-disclosure agreement. (*Id.* ¶ 16; Ex. 1 ("NDA").) The NDA required TCS to "protect the confidentiality of the Information" received from plaintiff. (NDA ¶ 2.) Moreover, the express terms of the NDA provided that "nothing in this [NDA] shall be deemed to inhibit or prohibit either party from pursuing business opportunities or other arrangements or endeavors of any kind." (NDA ¶ 10.) Upon entering into the NDA, and pursuant to TCS's due diligence requests, plaintiff provided to TCS a number of documents that it claims are confidential or contained trade secret information. (Compl. ¶ 20.)

On October 1, 2009, plaintiff proposed a price to TCS. (*Id.* ¶ 26.) On November 17, 2009, the parties met to engage in follow-up discussions related to the potential acquisition, but no offer was made by TCS at the time. (*See id.* ¶ 23.) In fact, TCS never made an offer to plaintiff, and on January 22, 2010, Defendant Fugili informed plaintiff that TCS could not meet plaintiff's price proposal and that it was not presently interested in affiliating with plaintiff. (*See id.* ¶ 25.)

Several months later, in July 2010, the State Bar's Committee of Bar Examiners approved an affiliation between TCS and Santa Barbara & Ventura Colleges of Law ("SB&V"), plaintiff's competitor. (*Id.* ¶ 28.) TCS and SB&V entered into an affiliation agreement, effective October 1, 2010. (Compl. ¶ 30.) As part of the affiliation agreement, TCS will provide administrative and student support services, marketing assistance, and accounting and human resources. (*Id.*) The affiliation will strengthen SB&V by adding new resources and creating new opportunities for legal education, such as adding online courses, additional law programs, and access to advanced educational technology and academic support. (*Id.*) In addition, SB&V will now be able to offer students access to student loans and a superior legal education. (*See id.* at ¶¶ 30-31, 33, 36.) Plaintiff admits that access to student loans and

improvements in the educational process are a benefit to students, conceding "[t]hese are all good things in the abstract." (*See id.* at ¶ 36; *see also* ¶ 31 (explaining what TCS and SB&V's affiliation will "bring to the Law School and its students").) Plaintiff's complaint is that it will not be able to "offer the services promised by [SB&V] to current and prospective students or match TCS's likely administrative and technological innovations." (*See id.* at ¶ 33.) Plaintiff fears that SB&V's new partnership will leave it with "no chance of continuing to differentiate itself successfully." (*See id.* ¶ 31.)

ARGUMENT

I. THE COMPLAINT FAILS TO STATE CLAIMS FOR BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT, BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, MISAPPROPRIATION OF TRADE SECRETS, AND NEGLIGENT MISREPRESENTATION.

A. The Complaint Fails To State A Cause Of Action For Breach of Fiduciary Duty.

1. Plaintiff fails to allege the existence of a fiduciary relationship—a required element—between TCS and plaintiff.

In its third claim, Plaintiff alleges that TCS breached its obligations to act in a fiduciary capacity. (Compl. ¶ 54.) In order to plead breach of a fiduciary duty, a plaintiff must first show the existence of a fiduciary relationship. *Pierce v. Lyman*, 1 Cal. App. 4th 1093, 1101 (1991); *see also Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 221 (1983) (to be charged with fiduciary obligations, a party must "knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship with imposes that undertaking as a matter of law."). The absence of this element "is fatal to [the] cause of action." *Id.* Plaintiff's fiduciary duty claim fails because the complaint does not establish the existence of a fiduciary duty between TCS and plaintiff.

TCS entered into the NDA with plaintiff "for the purposes of facilitating a transaction (the 'Relationship') between TCS and SCIL." (NDA pre-amble.) Specifically, the transaction facilitated by the NDA was a "potential acquisition" by

TCS. (*See* Compl. 13.) It is black-letter law that arms'-length business transactions like the one alleged here do not normally give rise to fiduciary relationships. For example, in *Henry v. Associated Indemnity Corporation*, the appellate court sustained a demurrer where the complaint and exhibits did not reveal anything other than an ordinary arms'-length business relationship between the insured and the insurers and its agents. 217 Cal. App. 3d 1405, 1419 (1990). Here, plaintiff does not allege any facts that reveal that the relationship between TCS and plaintiff was anything other than "an ordinary arms'-length business relationship." That TCS and plaintiff entered into a commonplace non-disclosure agreement of the kind used by myriad companies during due diligence does not change the "arms'-length" nature of their relationship. In fact, it demonstrates the opposite. Plaintiff and TCS had no prior relationship, and entered into this non-disclosure agreement ("NDA") to facilitate due diligence and potential acquisition negotiations.

Putting all doubt to rest about the nature of the parties' relationship, the NDA itself contradicts plaintiff's claim. The very language that plaintiff holds out to create a fiduciary relationship under the NDA belies its assertion that TCS is a fiduciary to plaintiff. Plaintiff relies on a single provision in the NDA to support its claim—paragraph 2 of the NDA. *See* Compl. ¶ 17. Under this provision, TCS is required to protect the confidentiality of plaintiff's information with the same diligence and care that would be required of TCS "***if it were*** a fiduciary" of plaintiff. NDA ¶ 2 (emphasis added). Nowhere does the NDA state that TCS ***is*** plaintiff's fiduciary. Plaintiff cannot read in a fiduciary relationship from this language.

Courts routinely reject attempts by plaintiffs to use contractual fiduciary-like obligations to establish a "true fiduciary" relationship, even in the insured-insurer context. *See, e.g., Love v. Fire Ins. Exchange*, 221 Cal. App. 3d 1136, 1147-48 (1990) (stating that although an insurer's special duties to an insured are "akin to, and often resemble, duties which are also owed by fiduciaries, the fiduciary-like duties arise because of the unique nature of the insurance contract, *not* because an insurer *is* a

fiduciary") (emphasis in original); *Henry v. Associated Indemnity Corp.*, 217 Cal. App. 3d 1405, 1418-19 (1990) (explaining that although the insurer-insured relationship is akin to a fiduciary relationship, the protection afforded by that relationship is not unlimited, and the insurer has no duty to totally disregard its own interests when they conflict with the insured's interests). Here, the parties do not even have a relationship akin to an insured and an insurer. The NDA language at issue merely attempts to describe what TCS was obligated to do in connection with the use of plaintiff's confidential business information—not document that TCS had agreed to become plaintiff's fiduciary.

As the Ninth Circuit explained in *First Citizens Federal Savings & Loan Association v. Worthen Bank & Trust Co., N.A.*, in the business context, "fiduciary relationships should not be inferred absent unequivocal contractual language." 919 F.2d 510, 514 (9th Cir. 1990). Here, the "unequivocal contractual language" does not establish a fiduciary relationship. To the contrary, the NDA presumes that TCS is ***not*** plaintiff's fiduciary. *See* NDA ¶ 2. Because plaintiff does not allege a basis for imposing a fiduciary duty on TCS, its fiduciary duty claim cannot stand.

2. The complaint fails to establish a breach by TCS of any duty, fiduciary or otherwise.

The express terms of the NDA explicitly permit TCS to partner with other law schools. Paragraph 10 of the NDA states "nothing in this [NDA] shall be deemed to ***inhibit or prohibit either party from pursuing business opportunities or other arrangements or endeavors of any kind*** so long as the terms and provisions of this [NDA] are maintained inviolate." (emphasis added.) This is a broad provision, allowing TCS to pursue business opportunities "of any kind" so long as it maintained the confidence of plaintiff's proprietary information. *See also* NDA ¶ 5 (imposing upon TCS limited duties relating to the destruction of plaintiff's information if the relationship between the parties is terminated, none of which expressly or impliedly include a duty to refrain from competing with plaintiff).

The NDA's clear and unambiguous language constitutes a knowing and voluntary recognition that TCS was free to pursue other affiliations "of any kind," including with SB&V. As a result, it guts plaintiff's claim. Thus, even if the NDA could somehow be read to create a fiduciary duty (and it cannot), this language would expressly waive any right plaintiff had to preclude TCS from competing with it by affiliating with SB&V. *See Collins v. Collins*, 48 Cal. 2d 325, 328 (1957) (upholding ruling that plaintiff contractually waived a fiduciary duty defendant might have otherwise owed).

Accordingly, because plaintiff does not allege any actual breach of a fiduciary duty by TCS, its fiduciary duty claim should be dismissed for this reason as well. *Pierce v. Lyman*, 1 Cal. App. 4th 1093, 1101 (1991) (explaining that breach is a required element, the absence of which "is fatal to the cause of action").[1]

3. Because plaintiff's fiduciary duty claim fails, its aiding and abetting claim also must fail.

For the reasons stated above, plaintiff has failed to allege the underlying tort of breach of fiduciary duty. As a result, plaintiff's claim for aiding and abetting (Count 3) must also be dismissed. *See Richard B. LeVine, Inc. v. Higashi*, 131 Cal. App. 4th 566, 574-75 (2005) (holding that an aiding and abetting claim was precluded by lack of a breach of fiduciary duty). Moreover, as one of the alleged primary tortfeasors, TCS cannot aid and abet its own alleged breach of fiduciary duty. *See id.* at 579 (tort liability based on an aiding and abetting is "derivative," meaning liability is imposed on one person for the direct acts of another).

[1] Plaintiff also bases its breach of fiduciary duty claim on TCS's alleged misuse of information TCS obtained from plaintiff in the due diligence process. (Compl. ¶¶ 55-56.) But, as discussed in greater detail below, plaintiff does not (1) describe that information, (2) establish that such information was protectable, or most critically, (3) allege how TCS used any protectable information to plaintiff's detriment. (*See* discussion *infra* Part I.C.)

B. Plaintiff's Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing Claims Fail Because No Breach Can Exist Where TCS's Conduct Is Expressly Permitted Under The NDA.

Plaintiff's breach of contract claim (Count 1) requires it to plead an actual breach of the contract. *First Commercial Mortgage Co. v. Reece*, 89 Cal. App. 731, 745 (2001). The premise of plaintiff's breach of contract claim is, in part, that the NDA precluded TCS from deciding to partner with another law school.[2] (Compl. ¶¶ 18, 28-29, 44.) That is, plaintiff asks the court to interpret the NDA as an agreement not to compete and an exclusivity agreement. However, the actual terms of the NDA do not support plaintiff's allegations. Paragraph 10 of the NDA explicitly reserved TCS's right to consider other law schools to partner with: "[N]othing in this [NDA] shall be deemed to ***inhibit or prohibit either party from pursuing business opportunities or other arrangements or endeavors of any kind*** so long as the terms and provisions of this [NDA] are maintained inviolate." (emphasis added.) Although the complaint treats TCS's reservation of rights and obligations as mutually exclusive, the NDA preserved TCS's freedom to pursue a partnership with another school and at the same time, refrain from using plaintiff's information improperly.

The NDA cannot be rewritten so as to restrict TCS's subsequent affiliation with plaintiff's competitors. *See Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1463 (2002) (rejecting plaintiff's attempt to convert a confidentiality agreement into an after-the-fact non-compete agreement). The NDA is exactly that—a non-disclosure agreement, nothing more. Such agreements are commonplace in the situation alleged here, where two parties are contemplating a business relationship and need to conduct due diligence to determine whether they want to consummate the transaction. *See, e.g., Ajaxo Inc. v. E*Trade Financial Corp.*, 187 Cal. App. 4th 1295, 1300 (2010) (defendant entered into NDA by which it received, and promised to maintain the

[2] Plaintiff's breach of contract claim is also premised on TCS's alleged misappropriation of plaintiff's trade secrets and confidential information. (Compl. ¶ 44.) This portion of the claim cannot stand because plaintiff has failed to adequately plead a misappropriation breach by TCS. *See* discussion *infra* Part I.C.

confidence of, plaintiff's information while evaluating whether it wanted to partner with plaintiff).[3]

Plaintiff's knowledge of the limited scope of the NDA is apparent on the face of the complaint. Plaintiff knew that prior to being approached by TCS, TCS had been in the process of "identifying suitable acquisition candidates and structuring transactions." (*See* Compl. ¶ 13.) Furthermore, plaintiff admits that it disclosed information to TCS for purposes of due diligence. (*See* Compl. ¶ 20 ("Pursuant to TCS's due diligence requests," plaintiff provided an assortment of information to TCS.). The obligation plaintiff seeks to impose—a duty on TCS's part to not compete with it—is not found anywhere in the written contract.

Moreover, even if the NDA expressly prohibited TCS from soliciting plaintiff's competitors, it would be invalid because it is against California's well-entrenched public policy against such broad non-compete obligations. *See Edwards v. Arthur Anderson, LLP*, 44 Cal. 4th 937 (2008) (holding noncompetition agreement invalid). Accordingly, plaintiff's breach of contract claim should be dismissed as a matter of public policy, in addition to its failure as a matter of law to sufficiently allege the required elements.

For the same reasons, plaintiff's claim for a breach of the implied covenant of good faith and fair dealing (Count 2) fails. Plaintiff alleges that TCS breached an implied covenant not to compete by pursuing a transaction with plaintiff's competitor. (Compl. ¶ 49.) But "[i]t is universally recognized that the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal. 4th 342, 373 (1992). No implied covenant of good faith and fair dealing can be

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[3] *See also Epic Communications, Inc. v. Richwave Tech., Inc.*, 179 Cal. App. 4th 314, 319 (2009) (parties entered into an NDA "as a condition of participating in exploratory discussions" in connection with potential joint development of a product); *Hsu v. Semiconductor Sys., Inc.*, 126 Cal. App. 4th 1330, 1337 (2005) (parties entered into an NDA during discussions of a possible merger).

read to forbid acts and conduct that are authorized by the express terms of the contract. *Id*. at 374. Moreover, this claim—which seeks to impose liability on TCS for competing with plaintiff—is tethered to the alleged unenforceable covenant not to compete. For the same reasons stated above, the assertion of this claim violates California's public policy against non-compete obligations and must be dismissed. *See* discussion *supra* Part I.B.

C. The Complaint Fails To State A Cause Of Action For Misappropriation Under Both The CUTSA And The NDA.

1. Plaintiff's misappropriation claims fail because the complaint does not properly plead that the information it conveyed to TCS is a protectable trade secret.

Plaintiff asserts that TCS misappropriated its confidential and trade secret information in violation of both the California Uniform Trade Secrets Act ("CUTSA") and the NDA (Counts 1 and 5). (Compl. ¶¶ 44, 71.) "It is critical to any CUTSA cause of action…that the information claimed to have been misappropriated be clearly identified." *Silvaco Data Sys. v. Intel Corp*., 184 Cal. App. 4th 210, 221 (2010). Accordingly, a plaintiff must "describe the subject matter of the trade secret with ***sufficient particularity*** to separate it from matters of general knowledge in the trade or of special knowledge of those persons…skilled in the trade." *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1164-65 (9th Cir. 1998) (internal quotation marks omitted, emphasis added); *see also Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 253 (1968).

Plaintiff fails to allege facts establishing the identity of a trade secret. Rather, it merely recites California's definition of a trade secret:

> At all relevant times, plaintiff was in possession of confidential and trade secret information as defined by California Civil Code §3426.1(d). The proprietary business information of plaintiff constitutes trade secrets because plaintiff derives independent economic value from that information, such Information is not generally known nor readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and because the information is the subject of reasonable efforts to maintain its secrecy. Plaintiff's

confidential and proprietary trade secret information described herein is not and was not generally known to TCS, SB&V or any other actual or potential competitors. (Compl. ¶ 71; *compare to* CAL. CIV. CODE § 3426.1 (stating that a trade secret must have "independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use.").)

Plaintiff's mere recitals of the statutory definition of "trade secrets" are insufficient to plead a trade secret. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'"); *accord ECT Int'l, Inc. v. Zwerlein*, 228 Wis. 2d 343, 349-50 (1999) (echoing statutory elements to plead a misappropriation of trade secrets claim is insufficient and are nothing more than legal conclusions). Nowhere in the complaint does plaintiff allege any facts that would enhance its conclusory assertions that the information it turned over to TCS fits the statutory definition of a "trade secret." Because plaintiff fails to describe how the information at issue satisfies the elements of a protectable trade secret under the CUTSA, its misappropriation claim fails. *See Silvaco*, 184 Cal. App. 4th at 221.

2. Plaintiff's misappropriation claim also fails because the complaint does not allege that TCS disclosed plaintiff's information to anyone or used it for a purpose other than that agreed upon in the NDA.

Under the CUTSA, misappropriation occurs when a person who has a duty to maintain the secrecy of a trade secret or limit its use nonetheless discloses or uses the trade secret without express or implied consent of the trade secret owner. CAL. CIV. CODE § 3426.1(b). To allege misappropriation, a plaintiff must plead facts showing use or disclosure of the trade secret. *Cal Francisco Inv. Corp. v. Vrionis*, 14 Cal. App. 3d 318, 321-22 (1971); *see also FLIR Sys., Inc. v. Parrish*, 174 Cal. App. 4th 1270, 1279 (2009) ("The California Uniform Trade Secrets Act requires an [a]ctual or threatened misappropriation….Mere possession of trade secrets…is not enough for an injunction.") (internal quotation marks omitted). Here, while the complaint alleges

that TCS is still in possession of plaintiff's information, the complaint does not allege that TCS has ever disclosed plaintiff's information to anyone. Instead, the complaint states that "Plaintiff is informed and believes and thereon alleges that defendants intend to disclose plaintiff's trade secrets and confidential information to others, including persons employed by [SB&V], in violation of the CUTSA and the NDA." (Compl. ¶ 73.) This allegation is conclusory and unsupported, and therefore is insufficient to establish that TCS has, in fact, disclosed any of plaintiff's alleged trade secrets.[4]

The true and impermissible intent of plaintiff's allegations is clear: plaintiff seeks to assert an inevitable disclosure claim which is not allowed in California. *See Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th at 1463 (rejecting the inevitable disclosure doctrine—a doctrine that allows a plaintiff to prove trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets—because it converts a confidentiality agreement into an after-the-fact covenant not to compete in violation of California public policy); *FLIR Sys., Inc.*, 174 Cal. App. 4th at 1279 (same). The Court should reject plaintiff's end run and dismiss this claim.

D. <u>Plaintiff Fails To State A Claim For Negligent Misrepresentation.</u>

Plaintiff's claim for negligent misrepresentation (Count 4) fails for a number of reasons. To allege such a claim, a plaintiff must plead (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the

[4] Likewise, plaintiff's allegations that TCS is using or will use its trade secrets in the near future are nothing more than speculative conclusory statements that do not establish actual misuse. *See, e.g.*, Compl. ¶ 71("TCS is now in a competitive relationship to the plaintiff and is using or will in the near future use plaintiff's trade secrets and confidential information."). The complaint's assertions that TCS affiliated with another law school do not lead to the inference that TCS is disclosing or using any of plaintiff's information in violation of the CUTSA or its contractual obligations under the NDA.

misrepresentation was directed, and (5) damages. *Fox v. Pollack*, 181 Cal. App. 3d 954, 962 (1986). Each element in a cause of action for negligent misrepresentation "must be factually and specifically alleged." *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004).

Here, the complaint fails to "factually and specifically" allege that anyone at TCS actually misrepresented a fact to plaintiff. The premise of plaintiff's misrepresentation claim is, in part, that TCS represented that it would not pursue an affiliation with plaintiff's competitor. (Compl. ¶ 63.) But the complaint does not allege that anyone at TCS told plaintiff that it would not pursue an affiliation with plaintiff's competitor. Instead, plaintiff alleges that TCS's affirmative representations carried "an implied promise and representation that defendants would not pursue an affiliation with [SB&V]." (Compl. ¶ 63.) Negligent misrepresentation, however, requires a positive assertion or assertion of fact. *Wilson v. Century 21 Great Western Realty*, 15 Cal. App. 4th 298, 306 (1993). Implied representations made by TCS are ***not*** sufficient to form the basis of a negligent misrepresentation claim. *See id.* at 306 (quoting *Byrum v. Brand*, 219 Cal. App. 3d 926, 942 (1990) ("An 'implied' assertion or representation is not enough.")): *Residential Capital v. Cal-Western Reconveyance Corp.*, 108 Cal. App. 4th 807, 828 (2003).

Even more fundamentally, the "implied promise" plaintiff alleges is inconsistent with the express terms of the NDA, which states that the parties may pursue business opportunities with others. (*See* NDA ¶ 10.) Not only does this undercut the notion that plaintiff was victim to an omission, it also negates another required element of a negligent misrepresentation claim—ignorance of the truth and justifiable reliance. *See Seeger v. Odell*, 18 Cal. 2d 409, 415 (1941) (explaining that a plaintiff may not put faith in representations which are shown by facts within his observation to be so "patently and obviously false that he must have closed his eyes to avoid discovery of the truth"). Because plaintiff has failed to allege essential elements of a claim for negligent misrepresentation, its claim must fail.

II. PLAINTIFF'S CLAIMS FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, BREACH OF FIDUCIARY DUTY AND UNFAIR COMPETITION ARE PREEMPTED BY THE CUTSA.

The California Uniform Trade Secrets Act preempts alternative claims to the extent that they are based on the same nucleus of fact as the misappropriation of trade secrets claim for relief. *K.C. Multimedia, Inc. v. Bank of America Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 958 (2009); *Silvaco*, 184 Cal. App. 4th at 232 (quoting CAL. CIV. CODE § 3426.7) ("CUTSA provides the exclusive civil remedy for conduct falling within its term, so as to supersede other civil remedies 'based upon misappropriation of a trade secret'"). Plaintiff's claims for breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, and unfair competition (second, third, and tenth claims, respectively) are partially predicated on the same nucleus of facts as plaintiff's misappropriation of trade secrets claim. (*See* Compl. ¶¶ 49, 55, 97.) With respect to breach of implied covenant of good faith and fair dealing and breach of fiduciary duty, plaintiff asserts that TCS's breaches arose out TCS's use of trade secrets. (*See* Compl. ¶¶ 49, 55.) Additionally, plaintiff admits that its unfair competition claim arises out of TCS's violation of the CUTSA. (*See* Compl. ¶ 97.) As a result, plaintiff's second, third, and tenth claims are preempted by the CUTSA to the extent that they are, at least in part, based on TCS's alleged misappropriation of trade secrets. *See Digital Envoy, Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1035 (N.D. Cal. 2005) (holding that plaintiff's claims for unfair competition and unjust enrichment were preempted by the CUTSA where those claims were based on the same nucleus of facts as the misappropriation claim).

III. PLAINTIFF'S FEDERAL AND STATE ANTITRUST CLAIMS FAIL AS A MATTER OF LAW

Plaintiff alleges, in total, three federal antitrust claims: (1) attempted monopolization; (2) monopolization; and, (3) conspiracy to monopolize. (*See* Compl. ¶¶ 77-92 (sixth, seventh and eighth claims).) These antitrust claims are premised on allegations that TCS, in an attempt to drive plaintiff out of the evening law school

market, partnered with SB&V. (*See id*. at ¶¶80-82.) Plaintiff predicts that it will be driven out of the market in the future and that once it is gone, TCS and SB&V will increase tuition. (*See id.* at ¶¶ 81, 83.) Each of plaintiff's antitrust claims fail for multiple reasons. First, plaintiff cannot allege an actual antitrust injury that is protected by the federal antitrust laws, which not only prevents it from satisfying the statutory elements of an antitrust violation, but also precludes plaintiff from establishing the standing necessary to assert an antitrust claim. Second, there are additional flaws unique to each of plaintiff's antitrust claims, as discussed below.

A. Each Of Plaintiff's Antitrust Claims Fail Because Plaintiff Cannot Establish Antitrust Injury Or Standing.

The touchstone of antitrust jurisprudence is that the antitrust laws protect competition, not competitors. *See Brown Shoe Co. v. U.S.*, 370 U.S. 294, 344 (1962) ("It is competition, not competitors, which the Act protects."). Even when a competitor suffers injury at the hands of another competitor, in order for the injury to be actionable under antitrust laws, the injury must be of a type that the antitrust laws were meant to protect. *See Am. Ad Mgmt., Inc. v. Gen, Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999). There are four requirements for establishing antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. *Id.* Here, plaintiff does not allege any facts in support of the elements required to plead antitrust injury, and thus, the complaint does not establish that plaintiff has suffered an antitrust injury that warrants protection under antitrust laws.

1. Competition for increased market share that results in a loss of profits to competitors does not violate antitrust laws.

As a result of TCS and SB&V's affiliation, Plaintiff speculates that it "will lose the ability to compete, suffer a downturn in its enrollment and may go out of business." (*See* Compl. ¶ 36.) The source of plaintiff's alleged injury is that SB&V,

with TCS's assistance, will now be able to offer students access to student loans and a superior legal education. (*See id.* at ¶¶ 30-31, 33, 36.) Plaintiff admits that access to student loans and improvements in the educational process are a benefit to students, even going so far as to concede "[t]hese are all good things in the abstract." (*See id.* at ¶ 36; *see also* ¶ 31 (explaining what TCS and SB&V's affiliation will "bring to the Law School and its students").) Plaintiff's complaint is that it will not be able to "offer the services promised by [SB&V] to current and prospective students or match TCS's likely administrative and technological innovations." (*See id.* at ¶ 33.) Essentially, plaintiff alleges that SB&V may become a superior, yet more expensive law school that students may prefer over plaintiff. This is not an antitrust violation; it is the free market at work.

"Plaintiffs sometimes forget that the antitrust injury analysis must begin with the identification of the defendant's specific unlawful conduct." *Am. Ad Mgmt., Inc.*, 190 F.3d at 1055. Here, the complaint does not attribute any anticompetitive conduct to TCS. Mere allegations that a monopoly exists are insufficient. (*See* Compl. ¶ 80.) "Section 2 of the Sherman Act proscribes monopolization; it does not render unlawful all monopolies." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998 (9th Cir. 2010) (quoting *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 543 (9th Cir. 1983) (internal quotation marks omitted)). Success achieved by a monopolist solely through the process of invention and innovation is necessarily tolerated by the antitrust laws. *Id.* The sign of unlawful monopolistic conduct is a scenario wherein a monopolist peddles the same product it always has but achieves increased profits only due to exclusionary conduct. At the most, the complaint here alleges SB&V might increase its enrollment by offering a better service than that of plaintiff's. Acquisition of market power in this way, achieved by improving a product and providing a new benefit to consumers, is ***not*** an unlawful monopolization. *See Allied Orthopedic Appliances Inc.*, 592 F.3d at 998-99 ("[A] design change that improves a product by providing a new benefit to consumers does

not violate Section 2 absent some associated anticompetitive conduct."). There is no causal antitrust injury where the pleading establishes that the procompetitive benefits of the alleged anticompetitive conduct clearly outweigh any anticompetitive effects. *See Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145 (9th Cir. 2003).

Contrary to alleging any antitrust injury, plaintiff's concessions regarding the improvements SB&V will now offer its students constitutes ***increased***, not decreased competition. And the damages plaintiff seeks are designed to provide it with the profits it would have realized if TCS had not interrupted the status quo and committed resources to improving the services SB&V can offer students.[5] (*See* Compl. ¶ 83.) Use of antitrust laws to recover for increased competition has been held by the Supreme Court to be "inimical" to the procompetitive purposes of antitrust jurisprudence. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("[T]he antitrust laws are not merely indifferent to the injury claimed here….[i]t is inimical to the purposes of these laws to award damages for the type of injury claimed here."). In a case analogous to the one at hand, *Cargill, Inc. v. Monfort of Colorado, Inc.*, the plaintiff alleged that if its competitors were allowed to merge, they would be able to lower prices and eventually drive plaintiff out of business, thereby reducing competition. 479 U.S. 104, 114-17 (1986). The United States Supreme Court rejected this allegation as a basis for antitrust injury, explaining that courts are not required "to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws." *Id.* at 116. The Court went on to conclude that "competition for increased market share is not an activity forbidden by the antitrust laws" and that the kind of injury claimed by the plaintiff was nothing more than vigorous competition. *Id.* at 116 (internal punctuation mark omitted).

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[5] At this point, it is not even clear that the affiliation between TCS and SB&V has actually affected any change at all in the alleged market. There are currently still two law schools in the market—the only difference is one now has TCS as a partner.

Moreover, if SB&V raises its prices, as plaintiff alleges it might do, then plaintiff will be that much less expensive than SB&V and potentially ***more*** attractive to certain students. No antitrust injury exists where plaintiff stands to benefit from increased prices, even where prices increase as a result of anticompetitive conduct. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335-37 (1990); *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1102 (9th Cir. 1999). Indeed, plaintiff alleges in its complaint that for years students have been transferring from SB&V to plaintiff due to plaintiff's cheaper tuition. (*See* Compl. ¶ 12.)

2. Plaintiff's antitrust claims fail for lack of standing.

To have standing to bring an antitrust case, plaintiff must demonstrate that the harm plaintiff has suffered or might suffer is an antitrust injury. *Big Bear Lodging Ass'n*, 182 F.3d at 1102. For the reasons stated above, plaintiff is unable to allege a causal antitrust injury, and thus, does not having standing to bring the antitrust claims alleged in its complaint.

Moreover, even if this court were to consider the affiliation between TCS and SB&V to be anticompetitive in the abstract, all of plaintiff's alleged injuries are prospective. (*See, e.g.*, Compl. ¶ 36 ("Without injunctive relief, the Law School will lose the ability to compete, suffer a downturn in its enrollment and may go out of business."); ¶ 83 ("The plaintiff has been injured in its business and property by the threat of losing current and prospective students."). The complaint makes clear that the plaintiff has suffered no injury to date. Plaintiff's prospective harm will occur only if plaintiff loses so many students that it "goes out of business." (*See id.* at ¶ 83.) As mentioned earlier, it is quite possible that, to the contrary, plaintiff will become the more attractive legal education service provider, and hence, will not be forced out of business. Not only is the effect alleged by plaintiff too attenuated and prospective to constitute actionable injury, but it also fails to confer antitrust standing on plaintiff.[6]

[6] To the extent plaintiff seeks to assert injury to prospective students (which it cannot), (*see* Compl. ¶ 83), that injury is likewise attenuated and speculative. Prospective

See Big Bear Lodging Ass'n, 182 F.3d at 1102. Furthermore, without alleging an immediate, threatened injury, plaintiff is unable to state a claim for injunctive relief under the Clayton Act. *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200-03 (9th Cir. 1980) (finding plaintiff did not make the requisite showing of irreparable harm where it failed to allege immediate threatened injury).

B. Each Of Plaintiff's Antitrust Claims Fail For Additional Reasons.

In addition to the threshold defect of failing to allege antitrust injury, plaintiff cannot allege the elements of each of its antirust theories.

1. Because Plaintiff Has Not Pleaded That TCS's Alleged Conduct Substantially Affects Interstate Commerce, Federal Antitrust Laws Do Not Govern.

To plead a violation of the Sherman Act, plaintiff must plead either transactions in the stream of interstate commerce or intrastate transactions which substantially affect interstate commerce. *Las Vegas Merchant Plumbers Ass'n v. U.S.*, 210 F.2d 732, 739-740 (9th Cir. 1954). The complaint not only limits the relevant geographic market to one state—California, but also limits it even further to the tri-county region of San Luis Obispo, Santa Barbara, and Ventura counties. (*See* Compl. ¶ 79). Both Plaintiff and SB&V's campuses are located in the San Luis Obispo, Santa Barbara, and Ventura counties. (Compl. ¶ 3.) On its face, the complaint fails to allege business activities that are interstate in nature.

To invoke the Sherman Act for intrastate activities, plaintiff must plead that the parties' intrastate activities have a substantial effect on interstate commerce. *See Yellow Cab Co. of Nevada v. Cab Employers, Auto. and Warehousemen, Local No. 881*, 457 F.2d 1032, 1035 n.2 (1972) ("The Sherman Act is not violated when the activities are intrastate in character unless it can be shown that interstate commerce

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students would theoretically have to pay higher tuition implemented by SB&V, but even then, they would be paying higher tuition for the admittedly greater legal education SB&V will provide as a result of its affiliation with TCS.

has been substantially affected thereby."). Plaintiff's very narrow market definition is inconsistent with plaintiff's allegations that "[e]vening law schools affect interstate commerce." (*See* Compl. ¶ 78.) Furthermore, the plain language of plaintiff's allegations falls short of the mark. Rather than assert, specifically, that either plaintiff or the defendants engage in transactions that substantially effect interstate commerce, plaintiff makes a wide-cast assertion that "[e]vening law schools affect commerce…." (*See id*.) Moreover, it is not enough to allege an effect on interstate commerce without pleading that the effects identified are substantial. Plaintiff's general allegation fails to allege that the schools "substantially affect" interstate commerce. As a result, the federal antitrust statutes do not govern TCS's conduct.

2. Plaintiff has failed to allege the other elements required to establish its monopolization and attempted monopolization claims.

Plaintiff charges that TCS either monopolized or attempted to monopolize the evening law school market in the tri-county region. These separate offenses are governed by different tests. To establish monopolization, a plaintiff must prove:

(1) possession of monopoly power in the relevant market;

(2) willful acquisition or maintenance of that power; and

(3) causal antitrust injury.

Pac. Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir. 1992).

To establish that a defendant attempted to monopolize, a plaintiff must prove:

(1) specific intent to control prices or destroy competition with respect to a part of commerce;

(2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose;

(3) a dangerous probability of success; and

(4) causal "antitrust" injury.

Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008).

Plaintiff's monopolization and attempted monopolization claims do not satisfy

the statutory elements unique to each claim. ***First***, the complaint does not allege that TCS has any power to control prices or exclude competition. Monopoly power is "the power to control prices or exclude competition." *United States v. du Pont & Co.*, 351 U.S. 377, 391 (1956). As discussed *supra* in Section III.A.1, plaintiff admits in the complaint that students have transferred to it from SB&V in the past because of plaintiff's lower tuition, and plaintiff fails to plausibly explain why the continued—and increased—disparity between its tuition and SB&V will cause its tuition to rise. Nor does plaintiff demonstrate that any competition has been foreclosed by TCS's affiliation with SB&V. To the contrary, as discussed throughout this Memorandum, plaintiff admits that the TCS/SB&V affiliation ***enhances*** competition by offering law students additional opportunities at SB&V.

Second, plaintiff has not alleged any wrongful act. The second elements of monopolization and attempted monopolization claims are related. "Conduct that does not constitute 'willful acquisition or maintenance' of monopoly power (thus precluding establishment of the offense of monopolization) *cannot* constitute the 'predatory or anticompetitive conduct' required to establish the offense of attempt to monopolize." *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1382 (9th Cir. 1983).(emphasis in original.) Even assuming that TCS possessed monopoly power, if TCS's conduct is lawful, then it cannot constitute an attempt to monopolize, thereby eliminating the need to consider an attempted monopolization offense. *See id.* For the reasons explained above, *see* discussion *supra* Part III.A.1, TCS's conduct in helping to create increased competition by providing SB&V with greater capabilities is not unlawful. Expansion of services to compete are not indicative of anticompetitive or predatory conduct. *See Pac. Express, Inc. v. United Airlines, Inc.* 959 F.2d 814, 818 (9th Cir. 1992) ("Undoubtedly, the entry of [defendant]…into [plaintiff's] markets injured [plaintiff's] business opportunities. However, [plaintiff] can only recover if its loss "stems from a competition- *reducing* aspect or effect of the defendant's behavior.").

If SB&V's share in the market is not wrongful in and of itself—and there is no allegation that it is—then the only alleged "wrongful" aspect of the monopolization or attempted monopolization claims is the purported misuse of trade secrets to acquire or attempt to acquire the monopoly. For the reasons stated above, plaintiff has not alleged a misuse of trade secrets. *See* discussion *supra* Part I.C. Moreover, even if plaintiff had established that TCS improperly used its information in its affiliation with SB&V, that would not constitute a basis for a Sherman Act claim. An actionable claim under other tort or trade secret laws does not necessarily form the basis for an antitrust claim. *See Cascade Cabinet Co. v. Western Cabinet & Millwork Inc.*, 710 F.2d 1366, 1374 (9th Cir. 1983) ("The antitrust laws were not intended to reach the type of conduct of which Cascade complains…. It was not designed, and has never been interpreted, to reach all business practices, unfair or otherwise, damaging to individual companies."). The alleged (future) harm here flows from the purported misappropriation of trade secrets, not a violation of the antitrust laws. As a result, both the monopolization and attempted monopolization claims fail for this independent reason.

Third, plaintiff has not alleged a specific intent on TCS's part to monopolize. "Specific intent and anticompetitive conduct are essential elements of a claim of attempted monopolization." *Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1059 (9th Cir. 1982). Specific intent may be proved by direct evidence or by inferences drawn from anticompetitive conduct. *Id*. The complaint does not make any allegations that directly show a specific intent by TCS to monopolize. Moreover, no inference of such intent can be drawn where TCS has not engaged in any anticompetitive conduct. *Cf. Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 846 (9th Cir. 1980) (inferring specific intent where averments of predatory conduct were sufficient to establish anticompetitive conduct in violation of antitrust laws).

3. Plaintiff has failed to plead conspiracy to monopolize against all defendants.

Plaintiff alleges that all the defendants entered into an agreement to conspire to monopolize the evening law school market in the relevant geographic area. (Compl. ¶ 91.) "A section one claimant must initially prove three elements: (1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition." *Oltz v. St. Peter's Cmty Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988). An antitrust conspiracy requires a plurality of actors concerting their efforts towards a common goal. *See Mut. Fund Investors, Inc. v. Putnam Mgmt Co., Inc.*, 553 F.2d 620, 625 (9th Cir. 1977). On its face, the complaint alleges agency relationships that prevent plaintiff from establishing a plurality of actors. Plaintiff alleges that "[e]ach of the defendants was the agent of the other defendants in regard to all events and actions described herein and acted within the course and scope of such agency at all relevant times." (Compl. ¶ 37.) Plaintiff's conspiracy allegations are necessarily inconsistent with its agency allegations. *See Jack Russell Terrier Network of Northern Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984)); *see also Bondi v. Jewels by Edwar, Ltd.*, 267 Cal. App. 2d 672 (1968) (complaint alleging that defendant corporation entered into a combination or conspiracy with its officers and directors, who at all times were acting as agents of the corporate defendant, did not state cause of action). If it is true that Defendants are agents of one another, plaintiff is merely re-pleading single firm monopolization. To the extent that Defendants are separate entities capable of conspiring, plaintiff fails to sufficiently allege the circumstances under which the Defendants reached an agreement to monopolize the law school market.

C. Plaintiff's State Antitrust Claims Fail For The Same Reasons Its Federal Antitrust Claims Fail.

Plaintiff alleges that the same conduct that gives rise to federal antitrust violations also gives rise to state antitrust violations. (*See* Compl. ¶ 93-95.) Because California antitrust statutes are based on equivalent federal statutes, federal criteria is applicable when interpreting a violation under the Cartwright Act. *See Lloyd Design Corp. v. Mercedes-Benz of N. Am., Inc.*, 66 Cal. App. 4th 716, 721 (1998). Accordingly, plaintiff's state law antitrust claim fails for the same reasons its federal claims fail, as discussed above.

IV. THE COMPLAINT FAILS TO STATE A CLAIM FOR UNFAIR COMPETITION

A. The Complaint Fails To State A Claim For Unfair Competition Because The Complaint Fails To Properly Allege The Acts Underlying Its Unfair Competition Claim.

Under California Business & Professions Code § 17200, any "unlawful, unfair or fraudulent business act or practice" is considered "unfair competition." Plaintiff alleges that TCS engaged in unfair competition by violating state and federal antitrust laws and California's Uniform Trade Secrets Act. (Compl. ¶ 97.) For the reasons stated above, plaintiff has failed to adequately plead that TCS engaged in unlawful or unfair business acts such as monopolization or misappropriation. Having failed to adequately establish any of the underlying acts that form the bases of plaintiff's unfair competition claim, plaintiff's claim cannot stand. *See Khoury v. Maly's of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (1993) (sustaining demurrer where the complaint identified no particular section of the statutory scheme that was violated).

B. Plaintiff Has Failed To Establish Standing To Bring An Unfair Competition Claim.

A private person only has standing to assert an unfair competition claim if he or she has suffered an injury in fact and has lost money or property as a result of unfair competition. *Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223,

228-29 (2006). As explained above, plaintiff has not alleged any actual injury to date. *See* discussion *supra* Part 3.A. Thus, plaintiff lacks standing to bring a suit for unfair competition. *See Californians For Disability Rights*, 39 Cal. 4th 223 (2006) (holding that plaintiff lacked standing to bring an unfair competition claim where it did not allege that it suffered any actual injury).

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Respectfully submitted,

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