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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN CALIFORNIA INSTITUTE OF LAW, a California corporation,

Plaintiff,

vs.

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

Defendants.

CASE NO.: CV10-8026 PSG (AJWx)

[Assigned to Hon. Philip S. Gutierrez]

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

Action Filed: Oct. 25, 2010

Hearing Date: March 21, 2011
Time: 1:30 p.m.
Ctrm: 880

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Plaintiff Southern California Institute of Law ("Law School" or "plaintiff") respectfully submits this memorandum of points and authorities in opposition to the motion filed by TCS Education System ("TCS") to dismiss plaintiff's Complaint for Injunctive Relief and Damages, filed on October 25, 2010 ("Complaint").

I. INTRODUCTION

This action arises out of the blatantly anticompetitive conduct of TCS, a multi-million dollar corporation engaged in the rapid acquisition of schools and colleges in California and elsewhere. Plaintiff is a small, State-accredited, evening law school with a twenty-five year history of serving working class adults in the tri-county area of San Luis Obispo, Santa Barbara and Ventura Counties. Lured by the prospect of increasing its outreach to an underserved population of future law students, the plaintiff provided defendants with unfettered access to its Dean, faculty and confidential files in an effort to complete an acquisition transaction with TCS. Instead, the defendants misappropriated plaintiff's most guarded secrets and information in violation of a binding confidentiality agreement and secretly used the information to affiliate with the plaintiff's sole competitor in the region. Armed with the stolen information, the defendants recently announced their "deal" which is calculated to kill off competition in the region, destroy the plaintiff's business and increase tuition costs. Plaintiff seeks injunctive relief and damages.

Rather than address the Complaint's well-pled allegations, TCS mischaracterizes the case as one involving a jilted seller crying sour grapes over the loss of a potential sale. A fair reading of the Complaint establishes that TCS was contractually and legally obligated to refrain from using the plaintiff's vital, confidential information to facilitate its affiliation with plaintiff's competitor. The Confidentiality and Non-Disclosure Agreement ("NDA") at the center of this case was prepared by TCS and is anything but a "plain vanilla" NDA as TCS would have the Court believe. Memorandum of Points and Authorities in Support of Defendant TCS Education System's Motion to Dismiss, filed December 23, 2010 ((TCS

Mem."), p. 1.[1] The preamble to the NDA states that the Law School was to provide "access to proprietary, trade secret and confidential information..., which may include, without limiting the generality of the foregoing, strategies and strategic plans, business opportunities, business plans, financial reports, statements and projections, trade names and marks, documents, programs, techniques, know-how, and specifications...." Complaint ¶ 15. The NDA referred to the collective of the confidential and proprietary information, both orally conveyed and in documentary form, as "Information". *Id.* The Information was to remain the property of the Law School and used solely for the purpose of "facilitating a transaction" between TCS and the Law School which the NDA referred to as "the 'Relationship'". *Id*. TCS, its employees and agents were commanded "not to use, reproduce, or directly or indirectly disclose or allow access to the [I]nformation except as required to facilitate the *Relationship*." *Id*. (emphasis added). To alleviate any lingering concerns the Law School might have regarding the release of its Information to TCS, the NDA took the extraordinary step of mandating that:

"[TCS] shall protect the confidentiality of the Information from the date of its receipt hereunder with ***at least the same diligence and care as would be required of [TCS] if it were a fiduciary of the [Law School], that is the utmost good faith and care for the interests of the [Law School]***." *Id*. (emphasis added).

TCS faithfully promised that it would not use the Information the Law School provided to "pursu[e] business opportunities or other arrangements or endeavors of any kind" in violation of the NDA. *Id*. ¶ 18. This non-competition covenant is proper because, *inter alia*, it is intended to prevent TCS from competing with the Law School after receiving the school's confidential Information. *Id*. Paragraph 5 of the NDA obligates TCS upon termination of the "Relationship" to “promptly

[1] A copy of the NDA is attached to the Complaint as Exhibit 1.

destroy" the Information and "certify" its destruction to the Law School. *Id*. ¶ 26. The NDA is governed by California law and "continue[s] until such time as any Information received by [TCS] hereunder is returned to the [Law School] or destroyed." *Id*. ¶ 18. TCS has neither destroyed nor returned the Information the Law School provided. *Id*. ¶¶ 26 and 44.

As summarized further below, the Complaint pleads in rich factual detail the circumstances giving rise to the TCS negotiation and execution of the NDA (¶¶ 13-19), the precise Information wrongfully obtained (¶¶ 20-22), the harm that the plaintiff sustained (¶¶ 27, 30-36) , the anticompetitive effects that TCS's improper affiliation will have on law school education in the region (¶¶ 34-36 and 81-83) and the contractual, common law and statutory claims arising out of the alleged wrongdoing (¶¶ 41-97). Plainly, TCS's assault on the Complaint is unjustified and its motion to dismiss should be denied.

II. FACTUAL ALLEGATIONS

Prior to 1986, Santa Barbara & Ventura Colleges of Law ("COL") was the only law school in the tri-county region spanning San Luis Obispo, Santa Barbara, and Ventura Counties. Complaint ¶8. At that time, the only other State Bar accredited schools were miles away in either Monterey or Malibu. *Id*. Neither of these options made sense for working adults, many of whom were single parents. *Id*. Like the Law School, COL offers a part-time evening curriculum leading to a J.D. and is State Bar accredited. *Id*. Neither the Law School nor COL is ABA accredited. *Id*. In addition, neither school has accreditation from the Western Association of Schools and Colleges ("WASC"). *Id*.[2] Without these accreditations,

[2] Voluntary, non-governmental, institutional accreditation, as practiced by WASC and other regional commissions, is a unique characteristic of American education. *Id*. ¶10. Accreditation is granted at the completion of a peer review process, and assures the educational community, the general public, and other organizations that an accredited institution has met high standards of quality and effectiveness. *Id*.

neither the Law School nor COL can offer students federally funded loans. *Id*. The chief reasons why these other accreditations cannot be sought and obtained is the lack of financial and human resources that would allow the Law School or COL to meet basic eligibility criteria. *Id*. ¶¶ 8-11.

Over the past twenty-five years, the Law School and COL have competed for students and faculty. *Id*. ¶12. COL is much larger than the Law School and has approximately 250 students, thirty-seven faculty members and an administrative staff of nine. *Id*. By contrast, the Law School has approximately one hundred students, thirty-one part-time faculty members and an administrative staff consisting of a Dean, Vice-Dean and Registrar. *Id*. ¶ 4. In spite of the fact that COL is larger and has more resources, the Law School established a strong presence in the tri-county region because of its willingness to keep tuition costs low while maintaining a strong faculty and academic program. *Id*. ¶12.[3] This commitment has allowed many current and past students to afford to earn a law degree. *Id*. The Law School has enrolled a number of students who transferred in good academic standing from COL, citing the strong program and lower tuition costs as key factors. *Id*.

In mid-September 2009, Dean Stanislaus Pulle of the Law School was approached by defendant David J. Figuli ("Figuli") and one George R. Haynes ("Haynes"), the former Vice President of Academic Affairs for the Santa Barbara Graduate Institute of Psychology (the "Institute"), regarding a potential acquisition by TCS. *Id*. ¶13. The Institute had just become affiliated with TCS, and Haynes

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While no institution in the United States is required to seek accreditation, it is highly coveted both in terms of institutional stature and the ability to qualify students for federally funded student loans under Title IV of the Higher Education Act. *Id*.

[3] The Law School maintains one of the lowest tuition rates among law schools in the state. *Id*. ¶3. Tuition rates are currently $350 per unit whereas many comparable law schools charge in the range of $800 or more per unit. *Id*. COL charges $450 per unit. *Id*.

made the introduction. *Id*. Figuli, a Colorado-based attorney, stated that he had extensive background in strategic acquisitions in the education sector and that, through defendant Higher Education Group, Figuli's company, he was identifying suitable acquisition candidates and structuring transactions for TCS. *Id*. ¶¶ 6, 7 and 13. Figuli and Haynes explained that TCS was interested in acquiring a California law school. *Id*. ¶13. The Law School was encouraged by the prospect of an acquisition with TCS because it would facilitate WASC accreditation, increase enrollment, establish new programs, extend educational opportunities to foreign students and leverage existing resources, such as using one or both of the school's campuses for daytime programs. *Id*. ¶14.[4]

On September 24, 2009, the Law School and TCS entered into the NDA. *Id*. ¶16. Figuli and TCS led the Law School to believe that TCS would be its strong ally and enable the Law School to compete against the larger, and better funded, COL.

[4] Dean Pulle represented to Figuli and Haynes that an integral part of the school's mission was to serve low and moderate income working adults and keep the total cost of the J.D. program in the range of $30,000.00 over the course of the typical four year term. *Id*. ¶15. Further, Dean Pulle emphasized the commitment by the Law School's Board of Directors and faculty to reduce law school earnings if necessary to ensure that the program would remain affordable and accessible. *Id*. Dean Pulle made it clear to Figuli and Haynes that the Law School was not interested in an affiliation if that would change the school's core mission or values, which included a focus on rigorous academic standards. *Id*. As proof of the success of its approach, Dean Pulle emphasized the Law School's increasing profile in the community as a high quality law degree program, its outstanding faculty and Board members and the many notable keynote speakers at its graduation ceremonies. *Id*. Among the past keynote speakers at the Law School's commencement ceremonies were Justices of the California Supreme Court and Court of Appeal, former State Attorney General Bill Lockyer , Kenneth A. Starr, presiding judges of the local Superior Courts in Santa Barbara and Ventura, and members of the California legislature. *Id*. ¶4. This year's keynote speaker is California Supreme Court Chief Justice Tani Cantil-Sakauye. *Id*.

Id. ¶19. The manner in which an alliance with TCS would enable the Law School to grow and successfully compete with COL was discussed in great detail during September, October and November 2009. *Id*. At no point during any of these discussions did Figuli or TCS suggest that the price the Law School had proposed was unreasonable or unacceptable. *Id*. Instead, the discussions focused on marketing strategies, addition of new degree programs, initiation of Internet based instruction,WASC-accreditation and the corresponding ability to offer federally funded tuition loans to attract new students and other plans. *Id*. In addition, issues of governance, structures of control, methods of securing expanded accreditation, and curriculum expansion were addressed. *Id*.

Confident that it was working toward an acquisition, in early October 2009, the Law School released its most guarded Information to the defendants. *Id*. ¶20. Among the documents that Dean Pulle and the Law School's Board of Directors prepared and released was a document entitled "Acquisition Profile and Initial Strategy For Regional Accreditation" dated October 1, 2009 ("Acquisition Profile"). *Id*. The Acquisition Profile set forth the Law School's plans and strategy, competitive challenges, financial affairs, cash flows, debts, faculty matters, contractual obligations, capital stock structure and its proposed terms for the sale of the Law School, including what the Dean and the Law School's Board of Directors perceived as a fair price for the shares of common stock held by the Law School's shareholders. *Id*.[5] Many of the documents provided to defendants are ones that are

[5] In addition, pursuant to TCS's due diligence requests, the Law School provided defendants with the following documents: (a) The Law School's By-Laws; (b) Stockholder ledgers; (c) Minutes of the Law School's Board of Director meetings; (d) The Dean's Annual Report to the Law School's Board of Directors with detailed enrollment data for three years; (e) An analysis of the Law School's financial condition with reference to the school's rent payments, cash on hand, ownership interests, and structure of administrative and faculty compensation (including actual dollar amounts); (f) The Law School's Balance Sheet, including beginning and

treated as confidential by the State Bar of California Committee of Bar Examiners ("CBE"), including the Law School's financial records and personal information about instructors. *Accredited Law School Rules, Rules of the State Bar of California*, Title 4, Div. 2 (January 1, 2009) ("Rules"), Rule 4.108.

Although the confidential nature of the foregoing documents is apparent, the importance of Dean Pulle's imprimatur on the materials and his frank discussion of everything he, the Board and faculty had considered -- past, present and future -- cannot be overstated. *Id*. ¶21. For example, the documents related to the school's most recent CBE inspection report are perhaps a law school's most sensitive and guarded Information. *Id*. While less detailed, the Law School's annual registration filing with the State Bar also covers many of the same topics. *Id*. These documents lay out, line by line, in elaborate detail, all the strengths and weaknesses (both real and perceived) of the Law School's operation, and give insight into an accrediting body's opinion on all facets of the school from basic curriculum to the governing Board's discharge of its solemn duties to the school's various constituencies. *Id*.

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ending balances for the past three years, and the taxes paid on the school's revenues; (g) Budgets and Profit & Loss Statements for 2009; (h) Independent CPA Compilation Reports for fiscal years 2005, 2006, 2007 and 2008; (i) U.S. corporate tax returns for three years for 2007, 2008, and 2009; (j) A report of cash balances as of August 31, 2010; (k) A marketing plan, including a pricing and competition analysis; (l) A detailed description of the Dean's Compensation Package, including his retirement plan; (m) Wage and salary information for staff and faculty; (n) Employee contracts, including sample faculty contracts; (o) Personnel files and personal academic biographies on faculty and administrative staff; (p) Faculty and Student Policy Manuals; (q) The Law School's real estate leases; (r) State Bar Inspection Reports, including the Law School's responses to the comments made by the inspectors and follow-up correspondence with the State Bar; and (s) Comprehensive State Bar annual registration filings that covered academic standing of all students, a report on drop-out rates, a budget for a library acquisition, faculty grading charts, a self-study completed by the Law School. *Id*. ¶20.

The materials include the Law School's responses to those inquiries, addressing all of the State Bar's compliments, criticisms and recommendations. *Id*.

On November 17, 2009, Dean Pulle met with Figuli, Haynes and a TCS senior executive. *Id*. ¶¶23-24. As part of meeting, the group toured the Law School's campuses, met with the Vice Dean and even a local Santa Barbara realtor regarding the potential purchase of the campus building. *Id*. During those discussions, the parties addressed the reconfiguration of the Law School's Board of Directors, the establishment of Joint Advisory Boards, and the hiring of additional faculty and new law deans, among other topics. *Id*. The gist of those discussions indicated that an acquisition of the Law School by TCS was imminent. *Id*. At the conclusion of the meeting, the TCS executive stated that he expected that TCS would make an offer no later than mid-December 2009. *Id*.

The Law School did not receive any communication from TCS in December 2009. *Id*. ¶25. On January 21, 2010, Dean Pulle sent an e-mail to Figuli, with copies to Haynes and the TCS executive, requesting a "status report" on the process toward an acquisition. *Id*. A few hours later, on January 22, 2010, Figuli e-mailed Dean Pulle stating that TCS believed that because it could not offer an acquisition price that would be acceptable to the Law School, it was not interested in an acquisition "*at this time*." *Id*. (emphasis added). Prior to Figuli's e-mail, no one connected with TCS suggested that the Law School's proposed price was unacceptable or that TCS could not afford to pay. *Id*. ¶26. The last phrase in Figuli's e-mail that TCS would pass on the opportunity "at this time" left open the possibility that it might still consider the acquisition in the future. *Id*. Dean Pulle conveyed that impression to his Board and certain faculty who had been involved in the negotiations. *Id*. This inference is further bolstered by the fact that paragraph 5 of the NDA obligates TCS upon termination of the "Relationship" to "promptly destroy" the Information and "certify" its destruction to the Law School. *Id*. As

stated above, the Law School's documentary Information was neither destroyed nor returned and no certification of its destruction has been provided.

It may reasonably be inferred that defendants approached COL during the time they were engaged in discussions with the Law School or soon thereafter, but concealed their wrongful intent from the plaintiff. *Id.* ¶28. This inference is supported by the large gap in time between the November 17, 2009 meeting and Figuli's January 22, 2010 e-mail sent only hours after Dean Pulle inquired about why he had not heard anything further from TCS. *Id.* COL's Website confirms that TCS approached COL regarding the possible affiliation. *Id.* The defendants further admit in documents on their Websites that COL and TCS obtained approval from the CBE for their affiliation in July 2010. *Id.* It takes a month or more to obtain such approval. *Id.* When one considers the time needed to conduct due diligence and negotiate their affiliation, it is reasonable to infer that defendants' initial contact with COL occurred contemporaneously with or soon after their discussions with the Law School. *Id.* The misuse of the Law School's Information is likewise apparent from these facts because defendants were bound to act with the highest of fiduciary standards toward the Plaintiff. *Id. citing* NDA ¶2. Having gained access to plaintiff's Information, the NDA restricted the defendants from using the Information other than to "facilitat[e] a transaction" with the plaintiff and effectively barred defendants from becoming the Law School's competitor because to do so would violate their contractual and fiduciary obligations. *Id.*

The Law School first learned of defendants' wrongful conduct through news reports on or about September 22, 2010. *Id.* ¶30. The press release, dated September 21, 2010, jointly published by TCS and COL and carried on their respective Websites and by various news services, including *Reuters* and the *Pacific Coast Business Times*, confirmed that TCS and COL entered into an affiliation agreement effective October 1, 2010. *Id.* Referring to COL as "the Central Coast's preeminent law school," the press release confirms that under its new leadership,

COL, using TCS's expertise in regulatory affairs, plans to seek WASC accreditation which will bring access to federal student financial aid programs. *Id*. In the September 21, 2010, press release, COL Dean Heather Georgakis, is quoted as saying, “This affiliation will strengthen the law school and its long-term growth potential by adding new resources, generating economies of scale and creating new opportunities for law- related education.” *Id*. Among the "new opportunities" planned by TCS and COL are adding online courses, additional law programs (as may be allowed by the State Bar), multi-disciplinary and joint programs in other disciplines within the expertise of TCS's affiliates, and access to advanced educational technology and academic support. *Id*. ¶¶30-31. As part of the agreement, TCS will also provide administrative and student support services, marketing assistance, accounting and human resources. *Id*.

Until now, the Law School has successfully competed with rival COL by keeping its tuition low and offering what many view as the superior legal education. *Id*. ¶31. With TCS's vast resources, including its marketing savvy, the Law School has no chance of continuing to differentiate itself successfully. *Id*. TCS and COL have already begun marketing the affiliation as major advantage on their Websites and at Open Houses being held at COL's campuses. *Id*.[6]

With the combined resources of COL and TCS, it will be much more difficult, if not impossible, for the small Law School to compete. *Id*. ¶33. With its present

[6] COL's rivalry with the Law School is both long-lived and often intense. *Id*. ¶32. At an Open House held on October 19, 2010, COL's Assistant Dean Barbara Doyle emphatically discouraged prospective law students from attending the Law School exclaiming, "Oh no, no, no, that's our competitor, don't go there!" *Id*. Assistant Dean Doyle's presentation focused on the "advantages" of attending COL from the perspective of cost and the relative value of the anticipated education, based in part on TCS's affiliation, and argued that COL compared favorably to several other California law schools. *Id*. Notably absent from her presentation was any comparison to the Law School. *Id*.

resources, the Law School cannot possibly offer the services promised by COL to current and prospective students or match TCS's likely administrative and technological innovations. *Id*. Not only is TCS-COL wealthy and resource rich, they are armed with the Law School's misappropriated Information and best strategic thinking of its deans, faculty and Board placing the Law School at a distinct competitive disadvantage. *Id*. ¶34. To the extent the Law School's confidences reveal strengths, TCS and COL can now use the information to emulate the Law School's strengths. *Id*. To the extent the misappropriated Information reveals the Law School's weaknesses, they can direct their efforts at exploiting those weaknesses. *Id*. Additionally, by unlawfully using its market power, TCS is in a position to poach on current and future students of the Law School through the promise of federally funded tuition loans. *Id*. This is even more of a threat in light of the current tight credit market. *Id*.[7]

By contrast, had TCS sought to compete fairly, even with its wealth and resources, it would be a relatively weak competitor if it were to try and start a law school on its own. *Id*. ¶35. The barriers to entry in California for new law schools are considerable, including the likelihood of a decade or more of effort to achieve State Bar accreditation. *Id*. Prior to contacting the Law School, TCS supported certain affiliated colleges and graduate schools in the fields of psychology, health and human services and education. *Id*. ¶5. TCS did not have a prior affiliation with a law school and, accordingly, did not have an expertise in operating a law school. *Id*. California has extensive regulatory requirements for accredited law schools. In

[7] Any actual or perceived inability of the Law School to financially support itself would place the Law School out of compliance with CBE's financial requirements. *See* Rule 4.160(K) and CBE Guidelines for Accredited law School Rules 10.1 and 10.2 (August 28, 2009). Among other things, the Rule and Guidelines mandate that a law school maintain adequate present and anticipated financial resources to support its programs and operations.

addition to the lesser status accorded unaccredited schools, first year students are required to take and pass the "Baby Bar" (formally, the "First Year Law Students' Examination-FYLSX") before they can move ahead in school. *Id*. ¶35. The pass rate on this exam is usually only 10 to 15 percent which can be devastating financially to a new law school given the high attrition rate. *Id.* This is the main reason why TCS sought to acquire an existing school -- a key point Figuli and other TCS representatives discussed with Dean Pulle. *Id*.

The Law School has competed successfully with COL for many years and welcomes increased opportunities for all students, particularly those who might benefit from access to student loans and improvements in the educational process. *Id*. ¶36. But the law should not condone wrongdoing even if the wrongdoing may create social good for some. *Id*. To do otherwise is Machiavellian. As a result of defendants' wrongdoing, the Law School will lose the ability to compete, suffer a downturn in its enrollment and may go out of business. *Id*. Working class students and the Law School's dedicated faculty and administrative staff will all fall victim to defendants' misconduct masquerading as "social impact" and progress. *Id*.

III. ARGUMENT

A. Legal Standard Applicable To A Motion To Dismiss

A complaint will survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6)when it contains "'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007). This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element. *Id.* In ruling on a motion to dismiss, courts view all allegations in the complaint in the light most favorable to the non-moving party

and accept all material allegations-as well as any reasonable inferences to be drawn from them-as true. *William O. Gilley Enters., Inc. v. Atlantic Richfield Co*., 588 F.3d 659, 662 (9thCir. 2009) (*per curiam*); *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).[8] Overall, motions to dismiss for failure to state a claim are "disfavored" and should only be granted in "extraordinary" cases. *Catch Curve, Inc. v. Venali*, Inc., 519 F. Supp. 2d 1028, 1034 (C.D. Cal. 2007).

B. <u>The Breach of Fiduciary Duty Claim Is Properly Alleged</u>

TCS is alleged to have obligated itself to a discrete set of fiduciary duties by entering into the NDA. TCS breached those duties by: (a) keeping the Law School's confidential Information in its possession and refusing to certify the destruction of the Information; (b) misusing the Information, documentary and otherwise, to compare the Law School to COL, facilitate its affiliation transaction with COL and obtain an unfair competitive advantage over the plaintiff; (c) failing to protect the confidentiality of the Information in at least the same manner as a fiduciary of the Law School would do; and (e) violating its covenant not to compete against the Law School by using the Information it obtained pursuant to the NDA to pursue an affiliation with COL. Complaint ¶¶44, 53 and 56. In arguing for dismissal of this claim, TCS asks the Court to determine that TCS did not owe any fiduciary

[8] In addition, Rule 12(b) motions must be considered in light of Federal Rule of Civil Procedure 8(a) which only requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Twombly* expressly rejected the notion that a heightened pleading standard applies in antitrust cases (550 U.S at569, n.14), and *Iqbal* made clear that Rule 8's pleading standard applies with the same level of rigor in all civil actions. 129 S. Ct. at 1953. *See also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1221 (3d ed. 2004) (noting that Rule 8's pleading standard applies with the same degree of rigor "in every case, regardless of its size, complexity, or the numbers of parties that may be involved).

responsibility to the Law School because the NDA obligated TCS to use the Law School's Information only as "'*if it were* a fiduciary' of plaintiff." TCS Mem. at 5. TCS split hairs so finely that the clause and its plain meaning are obscured. Such an unreasonable construction runs afoul of applicable law. Cal. Civ. Code §1641("[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."); *City of El Caion v. El Caion Police Officers' Assn*., 49 Cal. App. 4th 64, 71 (1996) ("If possible, the court should give effect to every provision. An interpretation which renders part of the instrument to be surplusage should be avoided."); *see also Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 503 (2005); Cal. Civ. Code §1644 ("The words of a contract are to be understood in their ordinary and popular sense....").

The primary case TCS relies on acknowledges that a party to a contract may subject itself to fiduciary responsibility. TCS Mem. at 6 *citing First Citizens Federal Savings & Loan Ass'n v. Worthen Bank & Trust Co., N.A.* 919 F.2d 510, 514 (9th Cir. 1990) (holding that "in the context of loan participation agreements among sophisticated lending institutions...fiduciary relationships should not be inferred absent unequivocal contractual language...."). *First Citizens* discussed and cited with approval *Women's Fed. Sav. & Loan Ass'n v. Nevada Nat'l Bank*, 811 F.2d 1255, 1258 (9th Cir. 1987). In *Woman's Fed*., the defendant made the virtually identical argument that TCS makes, namely that the reference to a fiduciary obligation in the contract was "superfluous, and that it did not impose any enforceable duties." The court rejected the argument holding: "NNB voluntarily entered a contract that called for it to act 'as a trustee with fiduciary duties' toward WOFED. It cannot argue now that this language has no meaning." *Id*.

Next, TCS incorrectly argues that plaintiff somehow waived any fiduciary right by agreeing that TCS could pursue "*business opportunities or other arrangements or endeavors of any kind* so long as the terms and provisions of this

[NDA] are maintained inviolate." TCS Mem. at 6-7 (emphasis in original). The clause explicitly restricts TCS's right to pursue other opportunities, etc. to ones that do not violate the NDA. Complaint ¶18. Here, the Complaint alleges multiple violations of the NDA, including the misuse of the plaintiff's confidential Information to pursue the COL affiliation.[9]

Even assuming *arguendo* that the meaning of the strongly-worded fiduciary clause in this case is susceptible to a difference of opinion, a motion to dismiss is an improper vehicle for resolving the issue. *See, e.g. W. Ref. Yorktown, Inc. v. BP Corp. N. Am.*, 618 F. Supp. 2d 513, 526-27 (E.D. Va. 2009) (Although the parties attack the opposing interpretations as leading to an "ad absurdum" result, the reality is that both constructions are commercially reasonable, one clearly favoring Defendant as it severely restricts Plaintiff's ability to recover for environmental remediation, and the other clearly favoring Plaintiff as it permits recovery for cleanup costs expended many years after the Agreement was signed. Therefore, Defendants cannot prevail at the 12(b)(6) stage because Defendants' construction of

[9] The harm created by defendants' misconduct goes beyond the misappropriation of plaintiff's confidential Information. Complaint ¶29. TCS can now use the Information to eliminate the Law School's ability to compete and put it out of business. *Id.* TCS effectively gave up the right to acquire COL once it obtained plaintiff's information in a fiduciary context. *Id.* The NDA was drafted by TCS and it assumed the fiduciary role entirely on its own volition. *Id.* The *sine qua non* of the Law School's release of its Information was TCS's fiduciary promise. The essence of fiduciary responsibility is *candor*, *loyalty* and *safeguarding trust*. Otherwise, deception and self-interest are likely outcomes -- the antithesis of fiduciary law. In the legendary words of the Honorable Benjamin N. Cardozo: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

the agreement, while reasonable, requires an inference in favor of Defendant and this Court must draw all reasonable inferences in favor of Plaintiff for the purposes of this motion to dismiss." (*citations and quotations omitted*)).[10]

C. <u>The Breach of Contract Claims Are Properly Alleged</u>

TCS improperly contends (again) that the NDA should be construed to allow it to affiliate with COL. TCS Mem. at 8. TCS's argument for dismissal of plaintiff's claim for breach of the implied covenant of good faith and fair dealing is premised on the same erroneous ground. *Id*. at 9. Resolving factual issues and drawing inferences in a defendant's favor is improper on a motion to dismiss. *W. Ref. Yorktown, Inc. v. BP Corp. N. Am., supra*.

TCS challenges the breach of contract claim arguing incorrectly that the NDA was not breached by TCS's alleged misuse and refusal to return plaintiff's confidential Information because it fails to plead "a misappropriation breach" under the California Uniform Trade Secrets Act ("CUTSA"). TCS Mem. at 8, n. 2. This argument strains credulity by attempting to condition plaintiff's breach of contract claim on proving a statutory violation. The two claims are independent. *Ajaxo Inc. v. E*Trade Group Inc*., 135 Cal. App. 4th 21, 62 n.38 (2005) ("In some cases, a breach of contract cause of action may be available where disclosed information does not qualify as a 'trade secret' under the UTSA (Civ. Code, § 3426 et seq.) if the information is protected under a confidentiality or nondisclosure agreement....").[11]

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[10] TCS's argument that it cannot aid and abet its own fiduciary breach is a straw man argument as it is alleged to be an aider and abettor of the fiduciary breaches of defendants Figuli and HEG. Complaint ¶¶54-58.

[11] TCS cites three cases involving non-disclosure agreements stating that they are commonplace when a transaction between business entities is being contemplated. TCS Mem. at 8-9. While this may be true, it does nothing to inform the Court as to whether or not TCS breached the NDA in this case, assumed certain fiduciary duties to the plaintiff or was precluded from affiliating with COL. The NDA cases TCS cites make it clear that claims of trade secret misappropriation, breach of contract

Relying on authorities that limit the ability of employers to include noncompetition clauses in employment agreements, TCS next argues that public policy precludes it from agreeing to any form of noncompetition clause with the Law School. *Id*. at 8-9. This argument deserves short shrift.

The statutory basis for TCS's argument is Business & Professions Code §16600 which is interpreted to prevent an employer from contracting "to restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions." *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 946-47 (Cal. 2008). Clearly, an employment agreement is not at issue in this case. Moreover, the *Edwards* Court acknowledged the trade secret exception to its ban on generalized noncompetition clauses in employment agreements. *Id*. at 946, n.4. In *The Retirement Group v. Galante*, 176 Cal. App. 4th 1226, 1238 (2009), the court explained California law as follows: "We distill from the foregoing cases that section 16600 bars a court from specifically enforcing (by way of injunctive relief) a *contractual* clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business, but a court may enjoin tortious conduct (as violative of either the Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.) and/or the unfair competition law) by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer."

Similarly, in *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443 (2002), the court rejected the inevitable disclosure doctrine which precludes an employee from taking a job that "will inevitably lead him to rely on the plaintiff's trade secrets."

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and other violations of law may arise out of the misuse of information provided pursuant to a nondisclosure agreement. *See e.g., Ajaxo Inc. v. E*Trade Group Inc.*, 187 Cal. App. 4th 1295 (2010).

PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995) (stating that unless the employee has "an uncanny ability to compartmentalize information" the employee will necessarily rely--consciously or subconsciously--upon knowledge of the former employer's trade secrets in performing his or her new job duties.). Thus, the doctrine relieves the employer from making a showing of actual or threatened misappropriation. In rejecting the doctrine, the *Whyte* court reasoned:

"The doctrine of inevitable disclosure thus rewrites the employment agreement and such retroactive alterations distort the terms of the employment relationship and upset the balance which courts have attempted to achieve in construing non-compete agreements. The result...is "the imperceptible shift in bargaining power that necessarily occurs upon the commencement of an employment relationship marked by the execution of a confidentiality agreement. When that relationship eventually ends, the parties' confidentiality agreement may be wielded as a restrictive covenant, depending on how the employer views the new job its former employee has accepted. This can be a powerful weapon in the hands of an employer; the risk of litigation alone may have a chilling effect on the employee."
101 Cal. App. 4th at1463 (citations and quotations omitted).

On the other hand, *Whyte* recognized that narrowly drafted restrictive covenants are permissible to the extent necessary to protect an employer's trade secrets. 101 Cal. App. 4th at1462-1463.

Restricting TCS from affiliating with COL after acquiring plaintiff's confidential Information is a reasonable limitation on TCS's business activities as it merely requires TCS to honor its own contract and comply with the law.

D. <u>The CUTSA Claim is Proper</u>

TCS argues incorrectly that the Complaint fails to plead that the confidential Information it misappropriated constitutes trade secrets. TCS Mem. at 10-11. The Complaint identifies the financial, strategic and regulatory documents provided to TCS and the type of information revealed to TCS over the course of the parties' discussions spanning a two month period. Such information included candid details

about the Law School's academic program, faculty, students, enrollment, strengths and weaknesses in its operations, marketing and recruitment strategies and its plans for competing with COL. Information found to be trade secrets is extremely broad and includes any business data which, if kept secret, provides the holder with an economic advantage over a competitor. Cal. Civ. Code § 3426.1, subd. (d); *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1520-1522 (1997). The NDA admits that the information the plaintiff was to provide constitutes "proprietary, trade secret and confidential information...." Complaint ¶17.

TCS seeks to obfuscate its alleged wrongdoing by arguing that there are no allegations that it disclosed plaintiff's trade secrets to another person. TCS Mem. at 11-12. To the contrary, the central theory of the case is that TCS misappropriated plaintiff's confidential Information and is using it to unfairly compete with the Law School through an affiliation with COL. CUTSA prohibits the acquisition and use of trade secrets by "improper means" which includes "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." Civ. Code § 3426.1(a).

E. <u>Negligent Misrepresentation is Properly Alleged</u>

In arguing for dismissal of the negligent misrepresentation claim, TCS ignores the Complaint's allegations that it falsely represented, both in the NDA and orally, that it intended to become plaintiff's ally and would not pursue an affiliation with COL. Complaint ¶¶63-64. Before gaining access to plaintiff's confidences, TCS had a duty to disclose to the Law School that it might explore an acquisition with plaintiff's rival and would consider competing with plaintiff if an agreement to acquire the Law School was not reached. *Id.* *Los Angeles Unified School District v. Great American Insurance Company/Hayward Construction Company* , 49 Cal.4th 739, 750, n. 5 (2010) (stating that a negligent misrepresentation claim may be based on "'[t]he suppression of a fact, by one who is bound to disclose it, or who

gives information of other facts which are likely to mislead for want of communication of that fact' (*Civ. Code, § 1710, subd. 3*)."

F. CUTSA Does Not Preempt Plaintiff's Common Law Claims

TCS incorrectly argues that plaintiff's claims for breaches of fiduciary duty and the implied covenant of good faith and fair dealing are preempted by CUTSA. Civil Code §3426.7 provides in part: "(b) This title does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon misappropriation of a trade secret, or (3) criminal remedies, whether or not based upon misappropriation of a trade secret." The purportedly preempted claims are predicated on the contractual duties TCS owes to the plaintiff and breaches of those duties, including its wrongful affiliation with COL. The claims are not solely based on a misappropriation theory.

G. The Antitrust Claims Are Properly Alleged

Plaintiff asserts three causes of action for violations of Section 2 of the Sherman Antitrust Act of 1890 (the "Sherman Act"), 15 U.S.C. § 2.[12] TSC argues incorrectly that plaintiff cannot establish antitrust injury or standing.[13] TCS wrongly contends that plaintiff has not "attribute[d] any anticompetitive conduct to TCS." TCS Mem. at 16. In short, TCS incorrectly theorizes that its affiliation with COL will purportedly increase competition. *Id*. at 17.

To bring a Sherman Act claim and recover damages under the antitrust laws, a private plaintiff must prove the existence of "antitrust injury, which is injury of the type the antitrust laws were intended to prevent and that flows from that which

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[12] Plaintiff's antitrust claims are attempted monopolization, monopolization and conspiracy to monopolize. Since TCS's arguments are largely the same with respect to the three claims, plaintiff refers to the claims collectively as the "antitrust claims."

[13] TSC's standing argument is likewise grounded on a failure to allege antitrust injury. TSC's Mem. at 18.

makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis in original). "The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) *quoting Brunswick Corp.*, 429 U.S. at 489. "[B]ecause the Sherman Act's concern is consumer welfare, antitrust injury occurs only when the claimed injury flows from acts harmful to consumers." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1445 (9th Cir. 1995).

Conduct that restricts consumer choice or makes the market "'unresponsive to consumer preference'" harms consumers and results in antitrust injury. *See, e.g., Sullivan v. NFL*, 34 F.3d 1091, 1101, & n. 3 (1st Cir. 1994); *Associated General Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) ("coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions . . ."); *Theme Promotions, Inc. v. News America Mktg. FSI*, 546 F.3d 991, 1004 (9th Cir. 2008) (the "reduction in choice of market alternatives" is cognizable antitrust injury).

In *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990), the court explained the harm to consumers that flows from an absence of competition:

"When a producer is shielded from competition, he is likely to provide lesser service at a higher price; the victim is the consumer who gets a raw deal. This is the evil the antitrust laws are meant to avert." 903 F.2d at 668. And, when an "agreement detrimentally change[s] the market make-up and limit[s] consumers' choice to one source of output" this causes the cognizable antitrust injury of "'prevent[ing] its victims from making free choices between market alternatives.'" *Glen Holly Entm't, Inc. v. Tektronis, Inc.*, 352 F.3d 367, 374 (9th Cir. 2003) (citation omitted).

TCS reminds the Court that "the antitrust laws were enacted for the protection of competition not competitors." TCS Mem. at 2 and 15 *citing Brown Shoe Co.*,

supra. ***But, the "convergence of injury to a market competitor and injury to competition is possible when the relevant market is both narrow and discrete and the market participants are few."*** *Les Schockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508-09 (9th Cir. 1989) (emphasis added). Indeed,"[c]onduct that eliminates rivals reduces competition." *Rebel Oil*, 51 F.3d at 1433. "Elimination of a single competitor may violate [the Sherman Act] if it harms competition." *E.W. French & Sons, Inc. v. General Portland, Inc.*, 885 F.2d 1392, 1401 (9th Cir. 1989).

Plaintiff and COL are the only two competitors in the relevant market. Complaint ¶¶ 3, 8, 12, 32, 36. Plaintiff maintains the lowest tuition rates and offers an academically rigorous education. *Id.* COL has the greater market share of students with an estimated 71% share as compared to plaintiff which has only 29%. *Id.* ¶80. As a result of TSC's affiliation and misappropriation of plaintiff's trade secrets, COL and TCS are poised to increase that market share significantly and eliminate the lower cost provider of law school education in the relevant market. Since the barriers to entry are so great no other law school stands a chance of filling in the breach leaving TCS/COL as the only option available to law students. Complaint ¶¶ 35, 78.

Where the relevant market is discrete and the market participants so few, TSC's exclusionary domination of the only other competitor could and no doubt will have an injurious effect on competition in the law school market and on current and future law students. In *Axiom Advisers & Consultants, Inc. v. School Innovations & Advocacy, Inc.*, No. 05-Cv-02395, 2006 U.S. Dist. LEXIS 11404, at *23 (E.D. Cal. March 20, 2006), the court held that an allegation which stated, "[defendant's] conduct has injured competition and consumers and that its acts have an anticompetitive effect of harming the competitive process, limiting consumer choice, and harming consumers" was sufficient to plead antitrust injury. Plaintiffs' complaint is far more detailed. Complaint ¶¶ 27-36; 81-83.

Actual injury need not occur for plaintiff to seek an equitable remedy from the courts. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969) ("[Section] 16 of the Clayton Act, 15 U.S.C. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and *authorizes injunctive relief upon the demonstration of 'threatened' injury. . .; he need only demonstrate a significant threat of injury* from the impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." (emphasis added)).[14] In other words, a plaintiff such as the Law School need not wait to be driven out of business before seeking equitable relief in the form of an injunction. Rather, it is sufficient to allege, as plaintiff has done, that the affiliation between TCS and COL presents a significant threat of injury. Complaint ¶¶ 30-34; 81-83.[15]

TCS's remaining challenges to the antitrust claims are meritless. First, plaintiff alleges that COL and the Law School affect interstate commerce in that, among other things, the schools use instrumentalities of interstate commerce to advertise and market themselves, enroll students who come to California from other states for the purpose of attending the schools and graduates from the schools sometimes pursue careers in other states. *Id.* ¶ 78. Further, plaintiff alleges that TCS which is headquartered in Chicago, Illinois, has over 4,000 students at TCS-affiliated campuses in Chicago, Washington, D.C., Los Angeles, Irvine, Pasadena,

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[14] Injunctive relief may be granted even where an antitrust plaintiff fails to prove actual damages or lacks standing to sue for damages. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 112 (1986).

[15] Thus, TCS's argument that plaintiff lacks standing because it has only alleged prospective injuries lacks merit. Here, plaintiff is seeking injunctive relief primarily – relief that the Clayton Act permits. TCS's reliance on *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197 (9th Cir. 1980) is completely misplaced because that case involved the propriety of the district court's grant of a preliminary injunction, not the question of whether plaintiff has adequately plead antitrust injury sufficient to show standing.

Santa Barbara and elsewhere. *Id.* ¶ 5. Indeed the very affiliation of TCS – an Illinois corporation formed for the purpose of acquiring and affiliating with specialized colleges in an array of locations and COL, a California accredited law school, is a transaction that affects interstate commerce.

The foregoing allegations are similar to those found sufficient to satisfy the interstate commerce requirement in *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College*, 128 F.3d 59, 66 (2nd Cir. 1997). There the court held that the plaintiff fraternities alleged facts to support a nexus between the allegedly illegal conduct -- Hamilton College's monopolization of residential services for its students -- and interstate commerce based on allegations that the college solicited applications from around the United States and accepted students from other states. *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (non-profit summer camp, catering to out-of-state residents is "unquestionably engaged in commerce").

Second, contrary to TCS's claim, plaintiff has alleged that TCS has the power to control prices and exclude competition. *See, e.g.,* Complaint ¶¶ 30, 31, 33 (allegations that TCS will seek WASC accreditation so as to bring access to federal student financial aid programs to COL; the affiliation will add new resources to COL generating economies of scale; TCS will provide administrative and student services, marketing assistance, accounting and human resources and TCS and COL will annually decide on major budge and strategic issues).

Third, plaintiff has alleged a welter of wrongful acts and the "willful acquisition" of monopoly power. TCS wrongfully misappropriated plaintiff's confidential Information and has used that information to combine with COL – plaintiff's sole competitor and the one that has and will continue to maintain over 70% of the market share. Complaint ¶¶ 16-29; 34; 80-81. *See, e.g., Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980) (generally a market share of at least 65% is sufficient to establish monopoly power if barriers to

market entry exist). By affiliating with COL, TCS has achieved monopoly power in the relevant market -- a market with significant barriers to entry. Complaint ¶¶ 30-36; 78, 80-82. The threat of injury arises from a violation of the antitrust laws not, as TCS maintains, harm from the misappropriation of plaintiff's trade secrets.

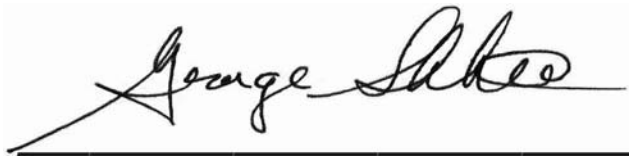
Fourth, TCS's argument that plaintiff has not alleged a specific intent to monopolize is completely unfounded. Plaintiff has alleged that TCS first approached Law School, which has 29% of the market share, and only after having obtained Law School's confidential business information, turned around and affiliated with Law School's sole competitor which has 71% of the market share. A fair inference to be drawn for those facts alone is that TCS intended to monopolize the market for law school education in the region.[16]

IV. CONCLUSION

For all of the foregoing reasons and authorities, plaintiff respectfully requests that the Court deny TCS's motion to dismiss in its entirety. Alternatively, plaintiff requests leave to amend if any of its claims are found deficient.

DATED: February 11, 2010 THE LAW OFFICES OF GEORGE A. SHOHET

KREINDLER & KREINDLER LLP

By: 

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[16] TCS seizes on a standard agency allegation in the Complaint and contends that because all defendants are alleged to be agents of one another plaintiff is pleading single firm monopolization. TCS Mem. at 23. Fairly read, the Complaint alleges separate actors and conspiratorial conduct.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who have consented to electronic service are being served with a copy of the foregoing document via Central District of California CM/ECF system on Febraury 11, 2011

/s/ George A. Shohet