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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

DEFENDANT'S REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT TCS EDUCATION SYSTEM'S MOTION TO DISMISS

Complaint Filed: October 25, 2010

Assigned: Hon. Philip S. Gutierrez
Date: March 21, 2011
Time: 1:30 p.m.
Ctrm.: 880

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INTRODUCTION

Plaintiff's Opposition to TCS's motion to dismiss makes it even clearer than it was in the Complaint that plaintiff is upset because it wanted to partner with TCS, but TCS chose to affiliate with a different law school, Santa Barbara & Ventura Colleges of Law ("SB&V"). While plaintiff alleges that TCS's affiliation with SB&V is actionable under various theories, plaintiff offers no explanation as to why it would have been lawful if TCS had chosen it instead. And, as it did in the Complaint, plaintiff concedes that the result of TCS's affiliation with SB&V is ***positive*** for consumers, providing "increased opportunities for all students, particularly those who might benefit from access to student loans and improvements in the educational process." (*See* Opp'n at 12.) Plaintiff argues, however, that despite the admitted "social good for some" created by the TCS/SB&V affiliation, condoning TCS's purported "wrongdoing" against plaintiff would be "Machiavellian." (*Id.*)

In its motion to dismiss, TCS cited the antitrust axiom that the Sherman Act is designed to protect "competition, not competitors." But plaintiff hardly could have described a scenario where this principal applied with greater force. Plaintiff fails to allege anything close to antitrust injury. Rather, plaintiff's Complaint is really about purported trade secret misappropriation and alleged breaches of a non-disclosure agreement. Those claims fail for the reasons described herein and in TCS's opening memorandum in support of its motion to dismiss ("Opening Brief"), but plaintiff's effort to contrive eight additional causes of action out of the same fact pattern is transparent.

Each of plaintiff's claims fails for numerous and fundamental reasons—including the common failure that plaintiff has not suffered any injury. Recognizing its lack of injury, plaintiff states it "is seeking injunctive relief primarily" for a "significant ***threat*** of injury." (Opp'n at 23, 23 n. 15 (emphasis added).) Plaintiff warns that SB&V and TCS "are poised" to harm plaintiff by increasing SB&V's market share, which "will have" an "injurious effect." (*Id.* at 22.) This prospective

and speculative theory of harm is fatal to plaintiff's claims. And now, over ***four months*** after plaintiff filed suit, it is apparent that any purported intent to pursue injunctive relief is neither credible, nor available. The TCS/SB&V affiliation has long been consummated and the school year is nearing its conclusion. All of plaintiff's claims should be dismissed.

ARGUMENT

I. PLAINTIFF'S MISAPPROPRIATION CLAIM FAILS—UNDER CUTSA OR *ANY* OTHER LEGAL THEORY—BECAUSE IT DID NOT PLEAD ACTUAL OR THREATENED MISUSE OF ITS INFORMATION.

Count Five of plaintiff's Complaint seeks damages for misappropriation under the California Uniform Trade Secrets Act ("CUTSA"), California Civil Code § 3426, *et seq*. As explained in TCS's Opening Brief, plaintiff's failure to plead actual disclosure or any other type of misuse by TCS warrants dismissal of this claim. (Op. Br. 11-12.) In its Opposition, plaintiff does not point to ***one*** allegation in the Complaint that supports actual or threatened misuse of any information by any of TCS's officials, agents, or employees.[1] Accordingly, and for the reasons previously stated in TCS's Opening Brief, the Complaint fails to state a claim that TCS has wrongfully disclosed or misused any of plaintiff's information. (Op. Br. 11-12 (explaining that the allegations in support of misappropriation primarily rely on conclusory statements and improper allegations that TCS will "inevitably rely" on its information because "TCS cannot separate out plaintiff's trade secrets and confidential information in pursuing their affiliation with [SB&V]," (*see* Compl.

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[1] In addition, Plaintiff's Opposition does nothing to cure the Complaint's failure to do anything more than recite the legal elements from CUTSA to allege the existence of a trade secret. (*See* Compl. ¶ 71.) Mere recitals of the exact language stated in California Civil Code § 3426.1 is inadequate to meet the requirement for pleading a trade secret violation. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (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).

¶ 71)).) Instead, at most, the Complaint pleads inevitable disclosure—which is ***not*** actionable under California law. *See Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1464 (Cal. App. 2002) ("[T]he inevitable disclosure doctrine cannot be used as a substitute for proving actual or threatened misappropriation of trade secrets.").

The lack of factual allegations in support of an actual or threatened misuse or disclosure amounts to a pleading deficiency as to each and every claim that is entirely or partially based on misappropriation, including plaintiff's claims for breach of implied covenant of good faith and fair dealings, breach of fiduciary duty, and unfair competition. *See infra*, Section II. Accordingly, plaintiff's misappropriation claim(s) should be dismissed.

II. ALL NON-CUTSA CLAIMS ARE PREEMPTED TO THE EXTENT THAT THEY ARE BASED ON THE SAME OPERATIVE FACTS AS PLAINTIFF'S CUTSA CLAIM.

As stated in TCS's Opening Brief, claims are preempted by CUTSA if they are "'based on the same nucleus of fact as [Plaintiff's] misappropriation of trade secrets claim for relief.'" (Op. Br. 14). Several of plaintiff's non-CUTSA claims are based on the same factual allegations that form the basis for its claim for misappropriation. (*See* Compl. ¶ 49 (alleging breach of implied covenant of good faith and fair dealing based on misappropriation), ¶¶ 55, 56 (alleging breach of fiduciary duty and aiding and abetting based on misappropriation), ¶ 97 (alleging unfair competition based on violation of CUTSA). These claims are therefore preempted and should be dismissed. Plaintiff's only response to this argument is an attempt to shoehorn its claims into CUTSA's savings clause, which exempts from preemption contractual remedies, criminal remedies, and civil remedies "that are not based upon misappropriation of a trade secret." Cal. Civ. Code § 3426.7(b). The three claims identified above—breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, and unfair competition—do not fall into any of the three categories enumerated in CUTSA's savings clause. Accordingly, all three claims should be dismissed as preempted by

CUTSA.[2]

III. TCS OWES NO FIDUCIARY OBLIGATIONS TO PLAINTIFF WHERE THE COMPLAINT FAILS TO ESTABLISH THE EXISTENCE OF A FIDUCIARY RELATIONSHIP.

Plaintiff asks this Court to impose fiduciary obligations upon TCS simply because TCS agreed that it would "protect the confidentiality of [Plaintiff's] Information…as would be required of [TCS] if it were a fiduciary of [Plaintiff]." Compl. Ex. 1, ¶ 2. The Court should reject plaintiff's attempted distortion of the Confidentiality and Non-Disclosure Agreement ("NDA") entered into by the parties.

A. TCS's Promise To Protect Plaintiff's Information As "If It Were A Fiduciary" Does Not Amount To Clear, Unequivocal Language To Act As Plaintiff's Fiduciary.

Plaintiff does not dispute the law as set forth in TCS's Opening Brief—that parties doing business with one another are presumed to be in an arm's length relationship, and in order to transform that relationship under California law, a party must knowingly undertake the role of a fiduciary through clear, unequivocal contractual language. (*See* Op. Br. 4-7.) Likewise, plaintiff does not dispute that a failure to establish that TCS knowingly undertook to be its fiduciary is fatal to its claim for breach of fiduciary duty. (*See* Op. Br. 4-7).

Having asserted no extra-contractual basis for a fiduciary relationship, plaintiff relies solely on paragraph two of the NDA as support for its position that a fiduciary relationship exists between the parties. Plaintiff, however, fails to cite any language in paragraph two that establishes that TCS "knowingly" undertook to "act on behalf and for the benefit of" plaintiff with respect to any matter other than the protection of its

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[2] Beyond TCS's preemption argument, plaintiff makes no attempt whatsoever to save its claim for unfair competition from dismissal. Aside from arguing that it is preempted under CUTSA, TCS also disputed plaintiff's standing to bring such a claim and whether plaintiff had adequately pled sufficient underlying acts to bring such a claim. (*See* Op. Br. 14, 24.) Plaintiff does not address these arguments at all. (*See* Op. Br. 24-25.)

information. Instead, plaintiff (1) argues that parties can agree to be fiduciaries in contracts, and (2) accuses TCS of hair-splitting. (Opp'n 14.)

First, of course a party can contract to be another's fiduciary. That is not TCS's point. Rather, what is dispositive here is paragraph two's failure to establish a knowing undertaking ***by TCS*** to act as ***plaintiff's*** fiduciary. Second, TCS does not split hairs. Rather, a conscious undertaking of such a duty is a requisite element that courts must look to in determining whether a fiduciary relationship exists. Paragraph two falls short.[3] *See First Citizens Fed. Sav. and Loan Assn'n v. N. Bank and Trust Co.,* 919 F.2d 510, 514 (9th Cir. 1990); *see also Oakland Raiders v. Nat'l Football League*, 131 Cal. App. 4th 621, 626 (Cal. App. 2005) (finding no fiduciary relationship arising out of the language of a settlement agreement or constitution). As explained in TCS's Opening Brief, paragraph two used the word "fiduciary" for the purpose of describing the degree of care with which TCS was to guard plaintiff's information—***not*** to define the parties' relationship as fiduciary or otherwise.

Plaintiff offers no explanation to this Court as to why, if the purpose of paragraph 2 was truly to transform the relationship between the parties into one of a fiduciary nature, the phrase at issue makes use of the past subjunctive tense. The past subjective tense is reserved for a statement contrary to fact or a hypothetical. *See, e.g.*, http://en.wikipedia.org/wiki/Conditional_sentence (explaining the uses of the past subjunctive in the context of counterfactual statements). In other words, the use

[3] The solitary decision relied on by plaintiff in arguing that paragraph 2 is sufficient to establish a fiduciary relationship is easily distinguishable. (*See* Opp'n 14.) In *Women's Fed. Sav. & Loan Ass'n ("WOFED") v. Nevada Nat'l Bank*, the plaintiff and the defendant were co-lenders to a loan and the defendant, without plaintiff's consent, extended additional monies to the borrower. 811 F.2d 1255, 1257 (9th Cir. 1987). In concluding that a fiduciary relationship existed, the Court found that the defendant voluntarily entered into a contract that provided that it was to act "'as a trustee with fiduciary duties' to protect WOFED's interests." *Id.* at 1258. A promise "to protect the confidentiality" of Plaintiff's information as "if it were a fiduciary," which is the language at issue here, is not the same as the more broad and demanding agreement to "act as a trustee with fiduciary duties" agreed to by the defendant in *WOFED*.

1 of "if it were a fiduciary" makes no sense if TCS was, in fact, plaintiff's fiduciary.

2 **B. Whether A Fiduciary Relationship Exists Can Be Determined As A**
3 **Matter Of Law On A Motion To Dismiss.**

4 Plaintiff contends that this Court should refrain from deciding on a motion to
5 dismiss whether a fiduciary relationship arises out of the language of paragraph two of
6 the NDA. But, for the reasons explained above, the NDA is ***not*** ambiguous and
7 contains no language that creates a fiduciary relationship.

8 If there was ambiguity, however, that would not warrant denial of TCS's
9 motion. In *First Citizens*, the court held that where the agreement "is ambiguous and
10 does not clearly establish a fiduciary relationship," the district court was correct in
11 granting summary judgment in favor of the defendant.[4] *See* 919 F.2d at 514.
12 Contrary to plaintiff's argument that ambiguities ***prevent*** dismissal, the Ninth Circuit
13 actually construed ambiguities ***against*** the party asserting the fiduciary relationship in
14 upholding summary judgment findings that a fiduciary relationship did not exist. To
15 the extent that the contract is ambiguous about whether a fiduciary relationship exists,
16 that contract lacks the clear, unequivocal language required to establish a knowing
17 undertaking of a fiduciary role. *See id.*

18 In addition, because plaintiff has failed to allege the underlying tort of breach of
19 fiduciary duty, among other reasons as stated in TCS's Opening Brief, plaintiff's
20 claim for aiding and abetting a breach of fiduciary duty (Count 3) must also be
21 dismissed. *See Richard B. LeVine, Inc. v. Higashi*, 131 Cal. App. 4th 566, 574-75
22 (2005) (holding that an aiding and abetting claim was precluded by lack of a breach of
23 fiduciary duty).

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25 [4] That the district court in *First Citizens* passed on this legal issue at the summary judgment stage has no bearing on whether this issue is ripe for decision now; the
26 Ninth Circuit addressed the issue as a legal, not factual, question, and did not rely on anything other than the contract provisions in determining whether a fiduciary
27 relationship existed. *See First Citizens*, 919 F.2d at 513 ("Careful examination of the Agreement between *First Citizens* and *Worthen* shows that it contains no language
28 which would clearly establish a fiduciary relationship.").

IV. PLAINTIFF'S ATTEMPT TO CONJURE A DUTY NOT TO COMPETE FROM THE NDA FAILS.

A. There Is No Non-Compete Provision Found Anywhere In The Non-Disclosure Agreement Entered Into By The Parties.

"An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing."[5] *Solis v. Kirkwood Resort Co.*, 94 Cal. App. 4th 354, 360 (Cal. App. 3 Dist. 2001). Plaintiff has never alleged a specific provision in the NDA that restricts TCS's ability to compete with plaintiff. (*See* Compl. ¶¶ 41-52.) The absence of such a provision is underscored by plaintiff's failure to point one out in its Opposition. (*See* Opp'n 16-18.)

Without specifying a contract provision from which TCS owes plaintiff a duty not to compete, there can be no breach of contract claim arising out of the four corners of the contract. Plaintiff devotes lengthy discussion to the enforceability of non-compete agreements outside of the employer-employee context and the trade secret exception (*See* Opp'n 17-18). Whether non-competes are enforceable in California generally has no bearing on whether the parties agreed in the express terms of this particular contract that TCS would not compete with plaintiff. Moreover, regarding the unenforceability of a non-compete agreement, plaintiff offers no case law or statute in support of its argument that California's public policy against non-competes only applies in the limited context of employer-employee relationships. To the contrary, CA Bus & Prof. Code § 16600 states, without limitation, "***every contract*** by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." (Emphasis added.) Similarly, plaintiff's claim that such a covenant would be enforceable under a trade secret exception also lacks support. The only case that plaintiff cites to in support of an alleged trade secret exception is *Whyte v. Schlage*, which predates *Edwards v. Arthur Andersen LLP*, the

[5] Whether an ambiguity exists in the first place is a question of law, not of fact, that this Court is able to decide at this stage. *See Missing Link, Inc. v. eBay, Inc.*, No. C-07-04487 (RMW), 2008 WL 3496865 (N.D. Cal. Aug. 12, 2008).

case where the California Supreme Court held that there is no "narrow restraint" exception to the general rule against noncompetition agreements. 44 Cal. 4th 937, 949-950 (Cal. 2008).[6]

B. Plaintiff's Claims For Breach of Fiduciary Duty And Breach Of An Implied Covenant Of Good Faith And Fair Dealing Do Not Give Rise To A Duty Not to Compete.

The only potential basis for plaintiff's claim that TCS cannot compete with plaintiff is that this Court should read one into the contract, either by way of fiduciary duties TCS allegedly owed to plaintiff, (*see* Compl. ¶ 55), or by way of an implied covenant of good faith and fair dealing, (*see* Compl. ¶ 49). Neither of these doctrines establish the existence of a non-compete agreement between the two parties. As explained above, *see* Part III, *supra*, plaintiff has failed to establish the existence of a fiduciary relationship between TCS and plaintiff. Furthermore, for the reasons set forth below, plaintiff's transparent attempt to use the implied covenant of good faith and fair dealing to transform the NDA into a non-compete agreement also fails.

In its moving papers, TCS argued that its affiliation with SB&V could not violate the implied covenant of good faith and fair dealing because TCS did what it was expressly given the right to do in paragraph ten of the NDA. (Op. Br. 8.) Paragraph ten of the NDA states: "***[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." (Compl. Ex. 1, ¶ 10, emphasis added.) Plaintiff fails to counter TCS's argument that a covenant not to compete contradicts the express terms in paragraph ten of the NDA.

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[6] Plaintiff fails to mention that the continued viability of the trade secret exception has been questioned by California courts ever since the *Edwards* decision was handed down, *see, e.g., Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564, 577 (Cal. App. 2 Dist. 2009) ("Although we doubt the continued viability of the common law trade secret exception to covenants not to compete, we need not resolve the issue here.").

Contrary to plaintiff's contentions, (*see* Opp'n 18), the Court need not resolve any factual issues or draw any inferences in order to determine that preventing competition between TCS and plaintiff runs counter to the express terms of paragraph ten. *See Missing Link, Inc. v. eBay, Inc.*, No. C-07-04487 (RMW), 2008 WL 3496865 (N.D. Cal. Aug. 12, 2008) (granting defendant's motion to dismiss plaintiff's claim for breach of implied covenant of good faith where the contract language expressly permitted defendant to take the very action that was the subject of plaintiff's breach of implied covenant claim). Dismissal of this claim is appropriate now.

V. PLAINTIFF FAILS TO STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION WHERE THE COMPLAINT LACKS ANY FALSE, AFFIRMATIVE STATEMENTS OF FACT MADE BY TCS

In its Opposition, plaintiffs claim that the Complaint alleges that TCS misrepresented two pieces of information: (1) that it intended to become plaintiff's "ally" and (2) that it would not pursue an affiliation with SB&V. (*See* Opp'n 19.) Putting aside that the Complaint's allegations are insufficient to establish any misrepresentations, plaintiff still would not be entitled to recover for the types of misrepresentations if sufficiently alleged. First, both purportedly alleged misrepresentations are based on statements of future intent, not statements of ***fact***, which are the proper subject matter for negligent misrepresentation claims. *Fox v. Pollack*, 181 Cal. App. 3d 954, 962 (1986) (one element is "a misrepresentation of a past or existing material fact"); *Barnhart v. New York Life Ins. Co.*, 141 F.3d 1310, 1314 (9th Cir. 1998); *Int'l Business Machines Corp. v. Fasco Industries, Inc.*, No. C-93-20326 (RPA), 1995 WL 110557, *3 (N.D. Cal. 1995). Moreover, the second alleged misrepresentation is improper because the Complaint does not allege an affirmative statement that TCS would not pursue an affiliation with SB&V, but rather, that such a promise was "implied" by TCS. [7] (*See* Compl. ¶ 63.) For the reasons

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[7] Plaintiff attempts in its Opposition to re-write paragraph 63 of the complaint to allege a non-disclosure by TCS rather than an implied promise, but that is not what

stated in TCS's moving papers, this "implied promise" cannot serve as the basis for a negligent misrepresentation claim. (Op. Br. 13.) Plaintiff also fails to counter TCS's argument that even if such an affirmative statement were made, its reliance would have been unjustifiable given the NDA's express authority that TCS was free to pursue other business opportunities of any kind. (*See* Compl. Ex. 1, ¶ 10.)

VI. PLAINTIFF'S ANTITRUST CLAIMS FAIL BECAUSE THEY ARE NOT BASED ON ANY WRONGFUL ANTICOMPETITIVE CONDUCT

It is more clear now than ever that plaintiff's antitrust claims fail. In its Opposition, plaintiff confirmed that its antitrust claims are based on two core allegations: (1) in the course of affiliating with SB&V, TCS misused plaintiff's confidential information, and (2) that through its affiliation, TCS has 71% of the market, which SB&V (lawfully) possessed prior to its affiliation with TCS. (*See* Opp'n 22.) For the reasons stated in TCS's Opening Brief, these facts, even if true, do not amount to an antitrust violation.[8] (*See* Op. Br. 21-22 (explaining that any alleged harm from a misappropriation of trade secrets is not the basis for a violation of the antitrust laws, and that SB&V/TCS's alleged possession of 71% of the market is not unlawful).)

In its Opposition, plaintiff strings together a patchwork of general antitrust propositions that do nothing more than confirm that conduct resulting in the elimination of rivals, in some instances, amounts to anticompetitive conduct that is prohibited under the Sherman Act. (*See* Opp'n 22.) Stating general antitrust principles does not help plaintiff's claims. Plaintiff misses the point: It failed to

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the Complaint alleges. (Compare Opp'n 19-20 with Compl. ¶ 63.) Moreover, even if paragraph 63 adequately alleged a non-disclosure, plaintiff has failed to allege, in non-conclusory fashion, that TCS was under a duty to disclose that it might pursue future affiliations with SB&V. The case plaintiff relies on requires a showing that a party accused of suppressing a fact is "bound to disclose it." (*See* Opp'n at 19.)

[8] In addition, plaintiff does not address its antitrust claim under the Cartwright Act. As a result, the court should dismiss this claim for the reasons stated in TCS's moving papers. (*See* Op. Br. 24).

identify a wrong that is prohibited under the antitrust laws that has led or will lead to harm to competition. (Op. Br. 15-16.) *See also Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 136-37 (1988) (holding no antitrust claim lies where injury does not "flow" from harm to competition, even where "business behavior. . . is improper for various reasons. . . .")

Moreover, plaintiff makes no attempt to distinguish its claims from those alleged in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479, U.S. 104 (1986), where the United States Supreme Court held that lost profits due to competition with a firm that increased its market share through a merger was not antitrust injury. (*See* Op. Br. 17.) *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (holding that lost profits due to increased competition by a large firm is not antitrust injury). For the reasons stated in TCS's Opening Brief, plaintiff has failed to allege any wrongful anticompetitive conduct by TCS to exclude plaintiff from the market,[9] and its antitrust claims should be dismissed. (Op. Br. 15-18.)

Moreover, plaintiff states it is primarily seeking injunctive relief, but fails to allege how an injunction would be appropriate here. There is no alleged antitrust injury to prevent through an injunction. The Complaint fails to identify the precise anticompetitive conduct it suspects TCS will undertake in order to eliminate plaintiff, much less any allegations that such anticompetitive conduct is imminent. (*See* Compl.

[9] Even if plaintiff had adequately alleged wrongful anticompetitive conduct by TCS, such conduct is not governed by federal antitrust laws because plaintiff fails to establish a substantial effect on interstate commerce. Plaintiff attempts to satisfy the interstate requirement by conflating any and all of TCS's conduct with TCS's alleged misconduct, an approach that is rejected by the very case law that plaintiff relies on. (*See* Opp'n 23 (citing *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College*, 128 F.3d 59 (2nd Cir. 1997)). Plaintiff's allegations regarding the "substantial" impact that TCS's affiliation with SB&V has on interstate commerce hardly rise to the level of detailed allegations upheld in *Hamilton*, where the plaintiff there alleged the percentage of out-of-state students serviced by the defendant and the amount of revenue generated from these out-of-state students. *See id.* Plaintiff's argument regarding interstate commerce is also at odds with its alleged narrow geographic market definition.

¶¶ 77-89.) For example, the Complaint does not allege any attempt by TCS or SB&V to lower its prices below plaintiff's to attract more students; nor does it offer any reason to think that the defendants will do so in the near future. In fact, plaintiff suggests the opposite—that SB&V's tuition may ***increase***. (*See* Compl. ¶¶ 81, 83.) With lower tuition than SB&V, plaintiff stands to attract more—not fewer—students, assuming of course it offers a commercially-acceptable education.

Not only has plaintiff failed to move for injunctive relief since filing its case, the injunctive relief it seeks is overbroad. Rather than enjoining specific types of conduct that would be harmful to plaintiff, plaintiff asks this Court to prevent TCS from implementing any affiliation with SB&V and to declare the affiliation agreement "null and void." (*See* Compl. at 38, Prayer for Relief.) How exactly that would work in practice now that the affiliation is complete is unclear; but what is clear is that plaintiff seeks to undo the SB&V/TCS partnership. And moreover, to the extent plaintiff's theory is true—that more students will attend SB&V because of its affiliation with SB&V—students would be harmed by plaintiff's request to declare the affiliation "null and void." This Court should not deprive students of the admittedly superior education now available to them just because plaintiff is upset that TCS chose to affiliate with SB&V rather than with plaintiff.

CONCLUSION

For the foregoing reasons, TCS respectfully requests that the Court grant its Motion to Dismiss and dismiss the Complaint.

DATED: March 7, 2011

Respectfully submitted,

KIRKLAND & ELLIS LLP

/s/ Christopher T. Casamassima

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Tanya Jackson
Attorneys for TCS EDUCATION SYSTEM