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d/b/a HIGHER EDUCATION GROUP

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, LLC d/b/a HIGHER EDUCATION GROUP, a Colorado limited liability company,

Defendants.

Case No. CV10-8026 JAK (AJWx)
(Assigned to the Hon. John A. Kronstadt)

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF DEFENDANTS DAVID J. FIGULI AND GLOBAL EQUITIES, LLC d/b/a HIGHER EDUCATION GROUP'S MOTION TO DISMISS PORTIONS OF PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO F.R.C.P. 12(b)(6)

Complaint Filed: October 25, 2010
Trial Date: TBD

Judge: Hon. John A. Kronstadt
Hearing Date: August 8, 2011
Hearing Time: 1:30 p.m.
Hearing Dept.: 750

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TABLE OF AUTHORITIES

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STATUTES & RULES

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I. INTRODUCTION

Plaintiff Southern California Institute of Law is a small, for-profit evening law school operating in Santa Barbara and Ventura Counties. Plaintiff's Dean met twice in 2009 with representatives of defendants, totaling a few hours' time, regarding the possibility of TCS Education System ("TCS") acquiring Plaintiff. The parties entered a short, basic Confidentiality and Non-Disclosure Agreement ("NDA") during the course of their discussions, which prohibited them from disclosing each other's confidential information, but expressly permitted them to pursue other business opportunities. Plaintiff provided defendants some documents, the contents of which are unknown to defendants David Figuli ("Figuli") and his company, Global Equities, LLC, which does business as Higher Education Group ("HEG"), because he never even looked at the documents. Plaintiff presented a proposal for the terms of TCS's purchase of the law school, which TCS rejected. TCS instead went on to purchase Plaintiff's competitor, Santa Barbara and Ventura Colleges of Law ("COL"), almost a year later.

Based on those events, Plaintiff originally sued defendants for ten claims for relief for various breaches of duties and statutes, ranging from breach of the NDA, to misappropriation of trade secrets, to antitrust violations. TCS successfully moved to dismiss all but the breach of contract cause of action. Having received leave to amend, Plaintiff tried again with a First Amended Complaint ("FAC") that alleged substantially the same facts and trimmed away five claims for relief, but is basically the same lawsuit. This lawsuit comprises nothing more than Plaintiff's bitterness that TCS chose to acquire COL instead of it, which will make it that much harder to compete in the local market. The reason for this lawsuit is plain: Plaintiff is desperately taking the only measure it can think of to try to prevent a combination between TCS and COL that it fears will drive it out of business.

Defendants never stated they would not pursue alternate possible acquisitions,

nor did they utilize any of Plaintiff's confidential or trade secret-protected information in doing so. Plaintiff assumes, or speculates, that defendants have, or will, use its allegedly confidential information to gain a competitive advantage, merely from the fact that Plaintiff made certain information available to defendants. But Plaintiff has not, and cannot, allege facts showing that Plaintiff shared actual trade secrets with Figuli and HEG, much less that defendants misappropriated, or will imminently misappropriate, Plaintiff's trade secrets in any manner. Plaintiff will never be able to allege such facts because they do not exist.

These moving defendants are not accused of breaching the NDA because they were not parties to it. However, they are accused of tortiously interfering with the NDA by aiding or inducing TCS to beach it. While Figuli and HEG are confident TCS did not breach the NDA, their argument for purposes of this motion is that they cannot be sued for tortious interference because they acted at all relevant times as TCS's agents in dealing with Plaintiff. That fact is not in dispute—indeed, it is explicitly alleged in the FAC. As such, they were not a third party to the relationship; rather, in essence, they *were* TCS for the sake of discussing TCS's possible acquisition of Plaintiff. Since they were acting as agents of a party to the contract, they cannot be sued for third-party interference. In addition, the FAC fails to state the manner in which they allegedly induced or caused TCS to breach the NDA.

As nothing defendants did was unlawful or unfair, Plaintiff's Unfair Competition Law claim for relief must also be dismissed. Plaintiff has now had two bites at the apple and it is readily apparent that the facts have been presented in the best and only way Plaintiff can muster. Plaintiff simply cannot state facts supporting claims against Figuli or HEG. All three claims against those defendants therefore should now be dismissed once and for all, without leave to amend.

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II. SUMMARY OF FACTS

For purposes of this motion only, defendants assume the truth of the allegations of the FAC and present them here in summary form to provide background.

Plaintiff is a California corporation founded in 1986 that operates an evening law school with campuses in Santa Barbara and Ventura Counties. FAC ¶ 3. COL is the only other law school in the tri-county area of San Luis Obispo, Santa Barbara, and Ventura Counties. FAC ¶ 3. TCS is a non-profit Illinois corporation that affiliates with specialized schools and colleges, providing them with business acumen, financial support and other resources for them to expand and/or improve services. FAC ¶ 5. Figuli is a Colorado attorney whose practice concentrates on the higher education industry, including facilitating affiliations and alliances and assisting with compliance and accreditation. FAC ¶ 6. Figuli is the CEO of HEG, the corporate entity through which Figuli provides consulting and other services to post-secondary education institutions. FAC ¶ 7.

In mid-September 2009, TCS approached Plaintiff regarding a potential acquisition of Plaintiff by TCS. FAC ¶ 13. On September 24, 2009, Plaintiff and TCS executed the NDA, which required the parties to maintain the confidentiality of any proprietary or trade secret information received from the other party. FAC ¶ 16; Exhibit 1 to FAC, preamble and ¶ 1. However, the NDA provided further 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." Exhibit 1 to FAC, ¶ 10.

Between September and November 2009, the parties discussed the feasibility and merits of a potential acquisition of Plaintiff by TCS. FAC ¶¶ 19, 23. TCS was represented by George Haynes, a former administrator of one of TCS's affiliated schools, and Figuli, whom TCS retained to assist it in brokering acquisitions of

education institutions. FAC ¶¶ 7, 13. HEG (acting through Figuli) represented to Plaintiff to be, and was, TSC's authorized agent for purposes of discussing the possible purchase. FAC ¶¶ 13, 38.

On October 1, 2009, Plaintiff proposed a price to TCS. FAC ¶ 26. Later in October 2009, Plaintiff provided to Figuli and TCS a number of documents that it claims are confidential or contain trade secrets. FAC ¶ 20. Additionally, Plaintiff verbally shared with TCS and Figuli its strengths, weaknesses, and strategic plans to compete with COL. FAC ¶ 22.

On January 22, 2010, Figuli emailed to Plaintiff TCS's refusal of Plaintiff's proposed terms of sale and stated TCS was not presently interested in acquiring Plaintiff. FAC ¶ 25.

In July 2010, the State Bar's Committee of Bar Examiners approved an affiliation between TCS and COL. FAC ¶ 28. On October 1, 2010, TCS and COL entered into an affiliation agreement. FAC ¶ 30.

Now that TCS has acquired COL, Plaintiff claims to have "no chance" to successfully compete with COL due to TCS's "vast resources" and "marketing savvy." FAC ¶ 31. Plaintiff further fears that TCS will use information it was given during discussions regarding the potential acquisition of Plaintiff to "emulate Plaintiff's strengths" and "exploit its weaknesses." FAC ¶ 34. Plaintiff alleges that absent an injunction undoing and prohibiting TCS's and COL's affiliation, Plaintiff "will lose the ability to compete, suffer a downturn in its enrollment and may go out of business." FAC ¶ 37.

III. ARGUMENT

A. Standards Applicable to Rule 12(b)(6) Motions.

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a cause of action if the plaintiff fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a

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complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It is insufficient for a complaint to make merely conclusory allegations or a "formulaic recitation of the elements of a cause of action." *Id.* Nor is the Court obligated to accept as true unreasonable inferences or unwarranted deductions of fact. *In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993).

The Court may also grant a motion to dismiss if the complaint alleges undisputed facts that would result in a complete bar to recovery. *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783, fn. 1 (9th Cir. 1997) ("If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts.").

B. The FAC Fails to State a Claim for Misappropriation of Trade Secrets.

Plaintiff asserts that Figuli and HEG misappropriated its confidential and trade secret information in violation of both the California Uniform Trade Secrets Act, Cal. Civil Code § 3426, *et seq.* ("CUTSA"), and the NDA.

To state a claim under CUTSA, a plaintiff must allege "actual or threatened misappropriation" of a trade secret.[1] *FLIR Systems, Inc. v. Parrish*, 174 Cal.App.4th 1270, 1279 (2009) (citing Civil Code § 3426.2(a)). Alleging "[m]ere possession of trade secrets" is "not enough." *Id.* Actual misappropriation is "generally speaking, improper acquisition of a trade secret or its nonconsensual use or disclosure." *Whyte v. Schlage Lock Co.*, 101 Cal.App.4th 1443, 1457 (2002). Threatened misappropriation is a threat "to misuse trade secrets, manifested by words or conduct,

[1] A trade secret is defined by CUTSA as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) [d]erives 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; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Civil Code § 3426.1(d).

where the evidence indicates imminent misuse." *FLIR Systems*, *supra*, 174 Cal.App.4th at 1279.

"It is critical to any CUTSA cause of action…that the information claimed to have been misappropriated be clearly identified." *Silvaco Data Systems v. Intel Corp.*, 184 Cal.App.4th 210, 221 (2010). Accordingly, the complaint 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).

1. The FAC Fails to Identify the Allegedly Misappropriated Trade Secrets with Sufficient Particularity.

Plaintiff alleges that it disclosed trade secrets by providing TCS with documents and verbally-communicated information including: Board meeting minutes; the President's annual report to the Board of Directors; State Bar annual registration filings; marketing plans; State Bar inspection reports; the Dean's analysis of bar exam pass rates for the previous five years; documents reflecting Plaintiff's financial reports and analysis; and strategies for differentiating Plaintiff from other schools and achieving accreditation. FAC ¶¶ 55-58.

On its face, much of this information would appear to be either available to the public or within the knowledge of people skilled in the industry. *See American Paper & Packaging Products, Inc. v. Kirgan*, 183 Cal.App.3d 1318, 1326 (1986) (information that is readily ascertainable by a business competitor derives no independent value from not being generally known). With respect to some of the identified documents, it is not immediately apparent what information allegedly constituting trade secrets they contained.

Some of the information, although confidential, has no evident independent economic value, which is a *sine qua non* of a trade secret. *See Yield Dynamics, Inc.*

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v. TEA Systems Corp., 154 Cal.App.4th 547, 561 (2007) (finding that source code that was kept confidential and made the subject of a non-disclosure agreement did not constitute a trade secret because it did not have independent economic value to anyone other than its programmer); *see also GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, 83 Cal.App.4th 409, 429 (2000) (confidential salary information not a trade secret because it had no independent economic value).

Yet other portions of the alleged trade secrets sound more like ideas (which are not protected by trade secret law), as opposed to concrete, valuable pieces of information derived from effort, expense and invention. *See Silvaco Data Systems*, *supra*, 184 Cal.App.4th at 220-221 ("Trade secret law does not protect ideas as such. Indeed a trade secret may consist of something we would not ordinarily consider an idea (a conceptual datum) at all, but more a fact (an empirical datum), such as a customer's preferences, or the location of a mineral deposit. In either case, the trade secret is not the idea or fact itself, but information tending to communicate (disclose) the idea or fact to another. Trade secret law, in short, protects only the right to control the dissemination of information.")

Plaintiff is essentially asking the Court to accept that virtually everything Plaintiff and defendants discussed or transmitted constituted trade secrets. Plaintiff's one specific example of an alleged "trade secret" allegedly misappropriated by TCS was the idea to market more heavily in Santa Barbara, including on buses. FAC ¶ 62. But this idea is not a discrete, protected piece of information with independent economic value, hence it does not constitute a trade secret at all. The FAC is, at best, grossly overbroad in its allegations of misappropriation of trade secrets, and it is impossible to discern what information specifically was a trade secret and why, even on Plaintiff's second attempt to articulate such facts.

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2. The FAC Fails to Identify Any Alleged Misappropriation with Particularity.

To allege misappropriation of trade secrets, a plaintiff must plead facts showing unauthorized use or disclosure of a trade secret. *Cal Francisco Inv. Corp. v. Vrionis*, 14 Cal.App.3d 318, 321-322 (1971). Or, if the misuse is merely threatened, plaintiff must offer words or conduct indicating *imminent* misuse. *FLIR Systems*, *supra*, 174 Cal.App.4th at 1279 ("A trade secret will not be protected by the extraordinary remedy of an injunction on mere suspicion or apprehension of injury.").

The FAC fails to allege any specific facts showing actual or threatened misappropriation of trade secrets by any of the defendants, let alone Figuli and HEG. Rather, the allegations are purely conclusory and make the unwarranted assumption that defendants have misused or will misuse trade secrets simply because they possess or possessed them. *See, e.g.*, FAC ¶ 13 ("the defendants made a calculated decision to misuse [Plaintiff's] Information…as a means for acquiring…COL. TCS, through its affiliation with COL, has now become [Plaintiff]'s sole competitor with full knowledge of [Plaintiff]'s most intimate and confidential information and trade secrets."); FAC ¶ 60 ("Defendants have actually misappropriated and/or threaten to misappropriate plaintiff's trade secrets without plaintiff's consent in violation of…CUTSA.… By affiliating with COL, TCS is now in a competitive relationship to the plaintiff. It is using and will continue to use plaintiff's trade secrets and other confidential information to advance COL's interest."); FAC ¶ 61 (as a member of COL's Board of Trustees, Haynes is "now capable of using the plaintiff's Information to develop strategies to compete against [Plaintiff].").

The potential to misuse trade secrets is not the same as actual misuse or even threatened misuse. Such conclusory allegations need not be relied upon by the Court, according to *Ashcroft*, 129 S.Ct. at 1948. The only specific facts Plaintiff offers to infer misappropriation are the allegations of COL's increased advertising in Santa

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Barbara, including on buses. FAC ¶ 62. But those facts do not even begin to prove misappropriation or threatened misappropriation of trade secrets. First, as noted above, those ideas are not trade secrets at all. Second, for a law school that admittedly serves Santa Barbara to advertise for itself in Santa Barbara does not suggest misappropriation of a valuable piece of information that belonged uniquely to Plaintiff. Even advertising on buses is not such a novel concept that only Plaintiff could have come up with it.

The true and impermissible intent of Plaintiff's lawsuit is clear: Plaintiff seeks to assert that, once defendants and Plaintiff had discussed the possibility of TCS acquiring Plaintiff, TCS could no longer consider acquiring, or acquire, any other competing local law school. This is, in essence, an "inevitable disclosure" claim—a doctrine that, in the employment context, allows a plaintiff company to prove trade secret misappropriation by demonstrating that an employee's new employment will inevitably lead him to rely on the plaintiff's trade secrets, so he cannot work for any employer in the same field. This doctrine has been rejected in California. *See Whyte*, *supra*, 101 Cal.App.4th at 1463 (the inevitable disclosure doctrine impermissibly converts a confidentiality agreement into an after-the-fact covenant not to compete in violation of California public policy); *FLIR Systems*, *supra*, 174 Cal.App.4th at 1279.

As Plaintiff has no evidence of actual or imminent misappropriation of trade secrets, but is instead simply trying to preclude TCS from competing by virtue of its exposure to Plaintiff's alleged trade secrets, the Court should throw out Plaintiff's Third Claim for Relief without leave to amend.[2]

C. The FAC Fails to State a Claim for Tortious Interference with Contract.

Plaintiff alleges in its Fourth Claim for Relief that Figuli and HEG tortiously interfered with a contract by inducing or causing TCS to breach the NDA. FAC ¶ 69.

[2] To the extent Plaintiff's misappropriation claim is founded on violation of the terms of the NDA, that claim should be dismissed as against Figuli and HEG because they were not parties to the NDA. The FAC alleges that only TCS and Plaintiff entered the NDA, and the NDA itself (Exhibit 1 to the FAC) demonstrates the same on its face.

"It has long been held that a *stranger* to a contract may be liable in tort for intentionally interfering with the performance of the contract." *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990) (emphasis added); *see also Applied Equipment Corp. v. Litton Saudi Arabia*, 7 Cal.4th 503, 514 (1994) ("The tort duty not to interfere with the contract falls only on strangers—interlopers who have no legitimate interest in the scope or course of the contract's performance."). In order to plead a tortious interference claim, Plaintiff must show: (1) a valid contract between the plaintiff and a *third party*; (2) defendants' knowledge of the contract; (3) defendants' intentional acts designed to induce breach or disruption of the contract; (4) actual breach or disruption; and (5) resulting damage. *Pac. Gas & Elec. Co.*, *supra*, 50 Cal.3d at 1126.

1. The FAC Does not State Facts Indicating the Form of Interference.

Plaintiff has not adequately pled at least two of the five required elements. First, the FAC fails to allege what intentional acts Figuli/HEG committed that were designed to induce TCS's breach of the NDA. Rather, Plaintiff's allegations are strictly conclusory and generic. *See* FAC ¶ 69 ("Figuli and HEG [] intentionally induced and caused TCS to breach the NDA. Defendants directed, controlled, manipulated and caused TCS to repudiate its obligations regarding the NDA. The defendants did such acts intentionally to harm the plaintiff and frustrate plaintiff's rights.") These allegations are nothing more than "formulaic recitation of the elements of the cause of action," which is insufficient to state a claim, according to *Ashcroft*, 129 S.Ct. at 1949.

2. Figuli and HEG May Not Be Sued for Tortious Interference with Contract.

Second, the FAC specifically alleges that Figuli represented to Plaintiff that he and HEG "were authorized to act on behalf of TCS as its agents and advisors." FAC ¶ 13. Further, the FAC alleges that, in fact, "Each of [Figuli and HEG] was the agent

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of [TCS] in regard to all events and actions described herein and acted within the course and scope of such agency at all relevant times." FAC ¶ 38. The FAC generally describes Figuli and HEG as representing, and acting on behalf of, TCS with respect to all relevant events. In the respect that Figuli and HEG were, indeed, acting at all relevant times as TCS's agents, these allegations are undisputed.

"It is axiomatic that there can be no action for inducement of breach of contract against the other party to the contract." *Shoemaker v. Myers*, 52 Cal.3d 1, 24 (1990). "It is also well established that corporate agents…acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract." *Id.* This is because agents who are vested with the power to act for the corporation "stand in the place of" the corporation, as the corporation—the party to the contract—"cannot act except through such agents." *Id.* Thus, there is no viable "inducement of breach of contract" that is distinguishable from a cause of action for breach of contract. *Id.*; *see also Applied Equipment Corp.*, *supra*, 7 Cal.4th at 512, fn. 4 ("[O]rdinarily corporate agents…acting for and on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged."), *quoting Wise v. Southern Pacific Co.*, 223 Cal.App.2d 50, 72-73 (1963).

This so-called "agent immunity rule" applies in the present case, where the alleged acts constituting the inducement to breach the NDA were committed by undisputed agents of TCS in the course and scope of such agency. TCS was, of course, the principal corporation, and the party to the NDA. If indeed there was a breach of the NDA, Plaintiff's only remedy is for breach of contract against TCS. There is no amendment Plaintiff could make to the complaint that would alter this fundamental reality.

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D. The FAC Fails to State a Claim for Violation of the Unfair Competition Law.

Plaintiff alleges that Figuli and HEG have violated, and continue to violate, California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. ("UCL"), through their violations of CUTSA. FAC ¶ 74. The UCL prohibits any "unlawful, unfair, or fraudulent business act or practice." *See Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc.*, 421 F.3d 981, 985 (9th Cir.2005) (quoting the UCL). An "unlawful" act or practice under UCL is any business practice that is prohibited by law, whether "civil or criminal, statutory or judicially made…[,] federal, state or local." *McKell v. Washington Mutual, Inc.*, 142 Cal.App.4th 1457, 1474 (2006).

For the reasons argued above, Plaintiff has failed to state claims that Figuli and HEG engaged in any unlawful or unfair business acts or practices, including misappropriation of trade secrets or tortiously interfering with Plaintiff's contract. As the underlying violations and wrongful acts have not been adequately pled against these moving defendants, there is likewise no established basis for Plaintiff's UCL claim. *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).

E. Leave to Amend Should Be Denied.

Plaintiff has now had two attempts to plead the five claims for relief contained in the FAC. The Court's memorandum of its ruling on TCS's original motion to dismiss explained exactly in what ways the original complaint was deficient, but Plaintiff has failed to correct those deficiencies. If the facts by which Plaintiff could state claims against Figuli and HEG existed, Plaintiff would have alleged them by now.

Leave to amend should be denied if the Court determines that "allegation(s) of other facts consistent with the challenged pleading could not possibly cure the

deficiency." *Schreiber Distributing Co. v. Serv–Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986). This typically applies where the facts are not in dispute, and the sole issue is whether there is liability as a matter of substantive law. *Albrecht v. Lund*, 845 F.2d 193, 195-196 (9th Cir. 1988). As the foregoing points demonstrate, Plaintiff is unable to allege that the defendants misappropriated, or threaten to misappropriate, its trade secrets, without asserting inevitable disclosure, which would impermissibly transform the innocuous NDA into a covenant not to compete. All Plaintiff can muster is that defendants possess, or once possessed, alleged trade secrets, and could *hypothetically* put them to unfair use.

Additionally, Plaintiff appears unable to allege facts establishing that the various documents and information it supplied constitute trade secrets as defined by CUTSA and interpreted by the courts. Since Plaintiff cannot allege facts stating other violations of law, it likewise cannot amend the complaint to plead any basis for a UCL claim. As such, defendants Figuli and HEG respectfully request that this Court dismiss Plaintiff's third claim for misappropriation of trade secrets, fourth claim for tortious interference with contract, and fifth claim for violation of the Unfair Competition Law without leave to amend.

IV. CONCLUSION

For the foregoing reasons, Figuli and HEG respectfully request that the Court grant this motion and dismiss the Third, Fourth, and Fifth Claims for Relief of the First Amended Complaint with prejudice.

Dated: June 27, 2011

STRAZULO FITZGERALD LLP

By /s/ Cody Jaffe
Maurice Fitzgerald
Cody Jaffe

Attorneys for Defendants David J. Figuli and Global Equities, LLC d/b/a Higher Education Group

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