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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, 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)

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Complaint Filed: October 25, 2010
Discovery Cut-Off: tbd
Trial Date: tbd

Hearing Date: August 8, 2011
Hearing Time: 1:30 p.m.
Hearing Dept.: 750

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on August 8, 2011, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Department 750 of the United States District Court for the Central District of California, at the Roybal Federal Building, located at 255 East Temple Street, Los Angeles, CA 90012,

Defendant TCS Education System ("TCS"), will and hereby does move the Court for an order to dismiss the second, third, and fifth claims of plaintiff's first amended complaint ("FAC").

Defendant brings this motion due to the failure of plaintiff's FAC to state a claim for which relief can be granted, on the grounds that:

Plaintiff's Second Claim for Negligent Misrepresentation

As a matter of law, plaintiff's second claim for negligent misrepresentation fails to state sufficient facts to establish a cause of action, a defect that cannot be cured by amendment.

Plaintiff's Third Claim for Misappropriation of Trade Secrets

As a matter of law, plaintiff's third claim for misappropriation of trade secrets fails to state sufficient facts to establish a cause of action, a defect that cannot be cured by amendment.

Plaintiff's Fifth Claim for Violation of the Unfair Competition Law

As a matter of law, plaintiff's fifth claim for violation of the Unfair Competition Law fails to state sufficient facts to establish a cause of action, a defect that cannot be cured by amendment.

This Motion to Dismiss is and will be based upon this Notice of Motion, the Memorandum of Points and Authorities, any Reply, and any oral argument that may be presented at the hearing on this matter.

This Motion to Dismiss is made following the conference of counsel pursuant to L.R. 7-3 which took place on June 3, 2011. The parties were unable to reach agreement on the issues raised in the instant motion, and counsel for plaintiff agreed that TCS had satisfied its meet and confer obligations.

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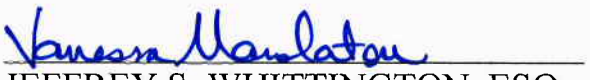
Respectfully submitted,

DATED: June 27, 2011

KAUFMAN BORGEEST & RYAN LLP

By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff, a for-profit evening law school, has filed a lawsuit against Defendant TCS Education System ("TCS") arising from certain preliminary discusions regarding a potential affiliation between plaintiff and TCS. The First Amended Complaint ("FAC") is predicated on plaintiff's assertion that TCS, by entering into a non-disclosure agreement ("NDA") with plaintiff, became plaintiff's fiduciary, owing plaintiff a duty not to affiliate with any other law school in the geographic region and not to compete with plaintiff. Plaintiff alleges that, by choosing not to acquire plaintiff and instead affiliating with plaintiff's alleged competitor, Santa Barbara and Ventura Colleges of Law ("COL"), TCS breached this purported alleged fiduciary duty. Despite any support for this proposition, plaintiff further alleges that TCS misappropriated plaintiff's trade secrets in breach of the NDA.

In short, plaintiff is upset that TCS chose not to affiliate with plaintiff and instead decided to affiliate with its alleged competitor, COL. Contrary to plaintiff's contention, TCS is not plaintiff's fiduciary, and no such duty was created through the NDA. In actuality, the NDA prescribed the manner in which TCS promised to protect the confidentiality of information it obtained from plaintiff. Moreover, the plain language of the NDA contemplates that both TCS and plaintiff would be free to pursue other business opportunities and endeavors with third parties. Plaintiff attempts to splice separate provisions of the NDA to create a covenant not to compete that is wholeheartedly absent from the terms of the agreement. Plaintiff's attempt to transform the NDA into a sweeping non-compete agreement ignores not only the express terms agreed to by the parties but also well-settled law and well-established California public policy.

Additionally, plaintiff alleges that TCS used plaintiff's purported

confidential information, including written and oral financial reports, strategies, and competition analysis (hereinafter "the Information") in order to facilitate its affiliation with COL. Plaintiff, however, asserts no facts to support any such misappropriation. Rather, plaintiff infers that TCS must have misused or will misuse the Information simply because plaintiff provided it to TCS, and TCS chose to affiliate with COL instead of plaintiff. Plaintiff utterly fails to indicate how TCS misappropriated any of plaintiff's information, much less which information was misappropriated. In a similar vein, plaintiff asserts that TCS had a duty to reveal its intent to affiliate with COL, and that had TCS done so, plaintiff would not have disclosed the Information. Plaintiff's feigned ignorance lacks credibility in light of the plain language of the NDA, to which plaintiff agreed.

Due to the fact that plaintiff has failed to meet its pleading requirements and plaintiff's demonstrated inability to properly plead its causes of action, TCS respectfully requests that this Court dismiss the second, third, and fifth causes of action of plaintiff's FAC, without leave to amend.

II. SUMMARY OF FACTS

Plaintiff is a California corporation that operates a law school with campuses in Santa Barbara and Ventura Counties. FAC ¶ 3. COL is also a law school located in the tri-county area of San Luis Obispo, Santa Barbara, and Ventura Counties. FAC ¶ 3. TCS is a not-for-profit corporation that affiliates with specialized schools and colleges, providing schools with financial support and other resources. FAC ¶ 5. Defendant David J. Figuli ("Figuli") is a Colorado-based attorney who specializes in the education industry. FAC ¶ 6. Defendant Global Equities, LLC, is a Colorado limited liability company that does business as Higher Education Group ("HEG"). Owned and operated by Figuli, HEG provides consulting services to post-secondary education institutions. FAC ¶ 7.

In September 2009, TCS approached plaintiff regarding a potential acquisition. FAC ¶ 13. On September 24, 2009, plaintiff and TCS entered into the NDA. The NDA required TCS to "protect the confidentiality of the Information" received from plaintiff. NDA ¶ 2 (attached to the FAC). Moreover, the express terms of the NDA provided that "nothing in this [NDA] shall be deemed to inhibit or prohibit either party from pursuing business opportunities or other arrangements or endeavors of any kind." NDA ¶ 10. Upon entering into the NDA, and pursuant to TCS' due diligence requests, plaintiff provided to TCS a number of documents that plaintiff alleges are confidential and/or contain trade secrets. FAC ¶ 20. Additionally, plaintiff alleges it verbally shared with TCS its strengths, weaknesses, and strategic plans to compete with COL. FAC ¶ 22.

On October 1, 2009, plaintiff proposed a price to TCS. FAC ¶ 26. On November 17, 2009, plaintiff and TCS met to engage in follow-up discussions related to the potential acquisition. FAC ¶ 23. During the discussions, TCS purportedly stated that it *anticipated* that it would make an offer by December 2009. FAC ¶ 23. On January 22, 2010, TCS informed plaintiff that it could not meet plaintiff's price proposal and that it was not presently interested in affiliating with plaintiff. FAC ¶ 25.

In July, 2010, the State Bar's Committee of Bar Examiners approved an affiliation between TCS and COL, plaintiff's alleged competitor. FAC ¶ 28. Plaintiff allegedly learned of this affiliation through a press release on or about September 22, 2010. FAC ¶ 30. On October 1, 2010, TCS and COL entered into an affiliation agreement. *Id.* The affiliation will allegedly strengthen COL by adding new resources and creating new opportunities, such as online courses, additional law programs, multi-disciplinary and joint programs in other disciplines, and access to advanced educational technology, academic support, and financial aid. *Id.* As part of the agreement, TCS will provide

administrative and student support services, marketing assistance, and accounting and human resources. *Id.*

Plaintiff allegedly fears that it will be unable to successfully compete with COL due to TCS' vast resources and marketing savvy. FAC ¶ 31. Plaintiff allegedly also fears that TCS will use the Information it was given during negotiations with plaintiff to emulate plaintiff's strengths and exploit its weaknesses. FAC ¶ 34. Furthermore, TCS' alleged potential ability to offer federal student loans, plaintiff alleges, may make COL more attractive than plaintiff to current and future students. FAC ¶ 35. Plaintiff admits that increased opportunities and access to student loans are benefits to students, conceding "[t]hese are all good things in the abstract." FAC ¶ 37. Nevertheless, plaintiff seeks injunctive relief to "level the playing field" and return plaintiff and COL to their status quo ante in order to do business as they did before the TCS affiliation with COL. FAC ¶ 37.

III. LEGAL ARGUMENT

A. A MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) IS PROPER WHERE THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

A defendant is entitled to move to dismiss a complaint where the complaint fails to state a cause of action. F.R.Civ.P. 12(b)(6). In reviewing a motion made pursuant to Rule 12(b)(6), the Court must accept as true all material allegations in the complaint, as well as *reasonable inferences* to be drawn from them. *Pareto v. F.D.I.C.* (9th Cir. 1998) 139 F.3rd 696, 699 (emphasis supplied). The sole issue raised by a Rule 12(b)(6) motion is whether the facts as plead would, if established, support a valid claim for relief.

Neitzke v. Williams (1989) 490 U.S. 319, 328–329. However, the Court need not accept as true conclusory allegations or legal characterizations, nor must it accept unreasonable inferences or unwarranted deductions of fact. *In re Delorean Motor Co.* (6th Cir. 1993) 991 F.2nd 1236, 1240.

The Court may also grant a motion to dismiss if an affirmative defense that would result in a complete bar to recovery can be established within the complaint. "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." *Weisbuch v. County of Los Angeles* (9th Cir. 1997) 119 F.3rd 778, 783, fn. 1.

B. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION.

To properly plead negligent misrepresentation, plaintiff must allege "(1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true; (3) with intent to induce another's reliance on the fact misrepresented, (3) ignorance of the truth and justifiable reliance thereby by the party to whom the misrepresentation was directed, and (4) damages." *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962 (citing 4 Witkin, Summary of Cal. Law § 480-82 (8th ed. 1974)). Each element must be *factually and specifically* alleged, and the policy of liberal construction of pleading will not usually be invoked. *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519, 23 Cal.Rptr.3d 1, 5.

Plaintiff's claim for negligent misrepresentation is based on the following allegations: (1) TCS represented that it would not pursue a transaction in violation of the NDA; (2) TCS concealed its intent to negotiate with COL toward an affiliation agreement; (3) plaintiff relied on TCS' representation in providing TCS with the Information; (4) plaintiff suffered

damage in that it was unable to safeguard its rights by seeking injunctive and declaratory relief to prevent the affiliation. FAC ¶ 49-51.

1. Plaintiff Has Not Pled Sufficient Facts To Show Any Representation By TCS That It Would Not Compete With Plaintiff.

Plaintiff alleges that TCS "led [plaintiff] to believe that TCS would be its strong ally and enable [plaintiff] to compete against . . . COL." FAC ¶ 19. Through the parties' brief and limited dealings, plaintiff claims that it believed that TCS would purchase it. FAC ¶ 23 ("The gist of those discussions indicated that an acquisition of [plaintiff] was imminent."). Plaintiff equates such representations of TCS' interest in a potential acquisition of plaintiff with representations that it would not affiliate with a competitor.

Negligent misrepresentation requires a positive assertion or assertion of fact. *Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 306. Implied representations made by TCS are *not* sufficient to form the basis of a negligent misrepresentation claim. *Id.* at 306 ("An 'implied' assertion or representation is not enough."). The FAC does not "factually and specifically" allege that anyone at TCS told plaintiff either that TCS was going to acquire plaintiff or that TCS would not pursue an affiliation with COL. Instead, plaintiff infers a representation from the parties' dealings, which is insufficient. FAC ¶ 49.

Plaintiff also tries to infer a misrepresentation through the NDA. "TCS faithfully promised that it would not use the Information [plaintiff] provided to 'pursu[e] business opportunities or other arrangements or endeavors of any kind" in violation of the NDA," citing the NDA at ¶ 10. FAC ¶ 18. Plaintiff continues: "This non-competition covenant is proper because, *inter alia*, it is intended to prevent TCS from competing with [plaintiff] after receiving the school's confidential Information." FAC ¶ 18.

In citing to paragraph 10 of the NDA out of context and splicing it conclusory commentary, plaintiff improperly attempts to transform paragraph 10 into a covenant not to compete. The true terms of paragraph 10 of the NDA read much differently:

> Notwithstanding anything in this [NDA] to the contrary, nothing in this [NDA] shall be deemed to inhibit or prohibit either party from pursuing business opportunities or other arrangements or endeavors of any kind so long as the terms and provisions of this [NDA] are maintained inviolate. NDA ¶ 10.

In other words, the parties absolutely agreed to remain free to pursue business endeavors "of any kind" so long as TCS kept plaintiff's Information confidential. Paragraph 10 of the NDA does not set forth any type of representation by TCS that it would not compete with plaintiff. Due to the fact that implied representations are insufficient, plaintiff cannot read into the NDA a promise not to compete where one is not affirmatively asserted.

Moreover, the fact that the "implied promise" is inconsistent with the express terms of the NDA negates the element of justifiable reliance. See *Seeger v. Odell* (1941) 18 Cal.2d 409, 415 (explaining that a plaintiff may not put faith in representations that are shown by facts within his observation to be so "patently and obviously false that he must have closed his eyes to avoid discovery of the truth.") Because plaintiff has failed to allege essential elements of a claim for negligent misrepresentation, the claim must fail.

2. Plaintiff Has Not Pled Sufficient Facts To Establish A Duty Owed To Plaintiff To Disclose TCS' Intent To Negotiate With Santa Barbara And Ventura Colleges Of Law.

Concealment is a species of fraud or deceit. Civ.Code, §§ 1710(3),

1572(3); see *Lovejoy v. AT&T Corp.* (2004) 119 Cal.App.4th 151, 157-158, 14 Cal.Rptr.3d 117, 121. The elements of an action for negligent misrepresentation based on concealment are: (1) defendant's concealment or suppression of a material fact, (2) a duty of defendant to disclose the fact to the plaintiff, (3) the plaintiff must have been unaware of the fact and would not have acted as it did if it had known of the concealed or suppressed fact, and (5) resulting damage to the plaintiff. *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613. It is almost universally held that mere silence does not constitute fraudulent concealment absent a fiduciary relationship. *Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 562.

Plaintiff alleges that TCS concealed its intent to negotiate with COL toward an affiliation, and that such concealment led it to disclose the Information to TCS. FAC ¶ 50. Plaintiff speculates that TCS had such an intent at the time it engaged in discussions regarding a potential affiliation with plaintiff. FAC ¶ 28 ("It may reasonably be inferred that defendants approached COL during the time they were engaged in discussions with [plaintiff] or soon thereafter, but concealed their wrongful intent from the plaintiff.") Plaintiff bases its inference solely on the timing of certain events, namely the November 17, 2009, meeting and the fact of the July 2010 approval of the TCS-COL affiliation. FAC ¶ 28. Such an inference is not reasonable, however, because plaintiff cannot draw a connection between the timing of these events, some eight (8) months apart, and TCS' alleged intent to affiliate with COL. Plaintiff utterly fails to allege any affirmative facts that would support the allegation that TCS intended to affiliate with COL at the time of its discussions with plaintiff.

Plaintiff further alleges that TCS was under a duty to disclose this alleged intent. FAC ¶ 50. First, the FAC fails to allege that TCS' intent to

negotiate with COL was a material fact. Second, the FAC does not allege facts to establish that TCS owed plaintiff a duty to disclose.

Plaintiff attempts to create a fiduciary duty in TCS from paragraph 2 of the NDA, which instructs TCS to guard the confidentiality of plaintiff's Information as if TCS were plaintiff's fiduciary. FAC ¶ 29. However, "before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that relationship as a matter of law." *City of Hope Nat. Med. Ctr. v. Genentech, Inc.* (2008) 43 Cal.4th 375, 386, 181 P.3d 142, 148 (concluding that without a mutually beneficial contract – i.e., not a contract only benefiting one party – a legally imposed fiduciary relationship, or a "knowing" undertaking of fiduciary obligations, there was no fiduciary relationship created); see also *First Citizens Federal Sav. And Loan Assn' v. Worthen Bank and Trust* (9th Cir. 1990) 919 F.2d 510, 514 (To create a fiduciary relationship by contract, the language must "clearly establish a fiduciary relationship by contract.")

Plaintiff hopes that this Court will follow its flawed logic in transforming the NDA into something it is not. Nowhere in the NDA is there a provision whereby the parties agreed to disclose their separate business endeavors. The plain language of paragraph 2 actually presupposes that the parties are not in a fiduciary relationship. Plaintiff and TCS entered into the NDA so that TCS could obtain plaintiff's Information and conduct its due diligence, as plaintiff concedes. See FAC ¶ 22 ("The purpose of opening [plaintiff's] books and granting unlimited access to TCS was to facilitate an acquisition of [plaintiff] as the NDA expressly states.") The sole purpose of the NDA was to ensure the confidentiality of the Information, not to create any sort of fiduciary obligation or relationship.

Finally, plaintiff alleges that a duty to disclose TCS' intent to negotiate

with COL was created through the parties' dealings. Plaintiff alleges that the parties engaged in several discussions between September 2009 and November 2009 regarding the manner in which an alliance with TCS would enable plaintiff to compete with COL. FAC ¶ 19. Plaintiff, however, fails to "factually and specifically" allege how such discussions created a duty of TCS to disclose its intent to negotiate with COL. Based on the foregoing, plaintiff has failed to state a claim for negligent misrepresentation.

C. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR MISAPPROPRIATION OF TRADE SECRETS.

Plaintiff alleges that TCS has misappropriated and/or threatens to misappropriate plaintiff's Information, which plaintiff alleges constitutes trade secrets, in violation of the California Uniform Trade Secrets Act ("CUTSA"), Civil Code § 3426, *et seq*, and the NDA.

To state a claim under CUTSA, a plaintiff must allege "actual or threatened misappropriation" of a trade secret. *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1279, 95 Cal.Rptr.3d 307, 316 (citing Cal. Civ. 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.* (2002) 101 Cal.App.4th 1443, 1457. Threatened misappropriation is a threat "to misuse trade secrets, manifested by words or conduct, where the evidence indicates imminent misuse." *FLIR*, *supra*, 174 Cal.App.4th at 1279. A trade secret is defined by California law 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." Cal. Civ. Code § 3426.1(d).

1. Plaintiff Has Failed To Clearly Identify The Alleged Trade Secrets.

Plaintiff alleges that it disclosed trade secrets through providing TCS with the following documents: meeting minutes, President's annual report to the Board of Directors, State Bar annual registration filings, marketing plans, State Bar inspection reports, analysis of bar exam pass rates, documents reflecting plaintiff's financial reports and analysis, and strategies communicated verbally from plaintiff's dean to Figuli and Haynes. FAC ¶ 55-58. The FAC fails to allege how any of these documents and verbal communications constitutes a trade secret. "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.* (2010) 184 Cal.App.4th 210, 220, 109 Cal.Rptr.3d 27, 38, *rev'd on other grounds*.

Plaintiff would have this Court blindly accept each document and verbal communication from plaintiff as a trade secret under CUTSA. Doing so, however, contravenes the principle that trade secrets protect information, rather than ideas. *Id.* (holding that an exhibit that described the design of a product, rather than the information concerning it, could not constitute a trade secret); see also *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1287 ("[A] trade secret may be embodied in documents, or other personal property, but has an intrinsic value which is based upon, or at least preserved by, being safeguarded from disclosure.").

Moreover, the mere treatment of information as confidential does not make it a trade secret; it must nevertheless possess independent economic value. *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 66 Cal.Rptr.3d 1 (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.* (2000) 83 Cal.App.4th 409, 429 (confidential salary information not a trade secret because it had no independent economic value). Plaintiff fails to allege how each document or verbal communication it contends is a trade secret possesses independent economic value to anyone other than plaintiff.

2. Plaintiff Has Failed To Allege TCS' Misuse Or Threatened Misuse.

A cause of action for misappropriation of trade secrets requires that plaintiff allege sufficient facts to show TCS' actual or threatened misappropriation. This means that plaintiff must allege "words or conduct" by TCS that would suggest TCS' misuse.

Plaintiff bases its claim on the following allegations: George R. Haynes ("Haynes), an agent of TCS (FAC ¶ 13), participated in the discussions regarding TCS' potential acquisition of plaintiff and gained access to the Information; 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]" (FAC ¶ 61); and COL is using marketing strategies that plaintiff proposed to TCS (FAC ¶ 62).

In alleging the foregoing, plaintiff does nothing more than establish that Haynes had access to the Information, which is insufficient. *FLIR*, *supra*, 174 Cal.App.4th at 1279 ("Mere possession of trade secrets" is "not enough for an injunction.") Plaintiff alleges that Haynes is "capable" of misusing the Information (FAC ¶ 61), but has not alleged that Haynes' words or conduct demonstrate imminent misuse, as required. *Id.*

Additionally, plaintiff alleges that TCS actually misappropriated its

ideas of increasing marketing in the Santa Barbara area and advertising on buses. FAC ¶ 62. As discussed above, ideas do not qualify as trade secrets. *Silvaco, supra,* 184 Cal.App.4th at 220, 109 Cal.Rptr.3d at 38. Moreover, trade secrets do not consist of ideas that are generally known to the public. Civ. Code § 3426.1(d). Plaintiff has not alleged and cannot reasonably allege that ideas of increasing a school's marketing in the local region and/or advertising on buses are not generally known to the public. It is common knowledge that increasing marketing may increase business.

The true and impermissible intent of plaintiff's allegations is clear: plaintiff seeks to assert an inevitable disclosure claim which is not allowed in California. See *Whyte v. Schlage Lock Co.*, *supra*, 101 Cal.App.4th at 1463 (rejecting the inevitable disclosure doctrine – a doctrine that allows a plaintiff to prove trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets – because it converts a confidentiality agreement into an after-the-fact covenant not to compete in violation of California public policy); *FLIR Sys., Inc.*, *supra*, 174 Cal.App.4th at 1279. As plaintiff's intent is clear, this Court should reject plaintiff's claim for misappropriation of trade secrets without leave to amend.

D. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR UNFAIR COMPETITION.

Plaintiff alleges that TCS has and continues to violate California's Unfair Competition Law ("UCL"), through breach of contract and violations of CUTSA. FAC ¶ 73-74. The UCL prohibits "unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising," as well as any act prohibited by California's false advertising state. See *Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc.* (9th Cir.2005) 421 F.3d 981, 985 (quoting Cal. Bus. & Prof. Code § 17200). An "unlawful" business act under § 17200 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.* (2006) 142 Cal.App.4th 1457, 1474, 49 Cal.Rptr.3d 227, 242.

Breach of contract alone is insufficient to state an unlawful UCL claim, unless the breach is "unlawful, unfair, or fraudulent." *Spring Design, Inc. v. Barnesandnoble.com, LLC, No.* CV 09-5185 JW, 2010 WL 5422556, at *9 (N.D. Cal. Dec. 27, 2010) citing *Puentes v. Wells Fargo Home Mortg., Inc.* (2008) 160 Cal.App.4th 638, 645, 72 Cal.Rptr.3d 903, 909. Plaintiff has not alleged that TCS unlawfully breached the NDA. Additionally, the alleged violations of CUTSA are insufficient to form the basis of a UCL claim because plaintiff has failed to sufficiently identify any trade secrets and has failed to allege actual or threatened misappropriation, as explained in Section B, above. For the foregoing reasons, plaintiff has not made out a claim for unlawful competition in violation of § 17200.

E. THE FIRST AMENDED COMPLAINT FAILS TO DEMONSTRATE PLAINTIFF'S ENTITLEMENT TO INJUNCTIVE RELIEF.

Plaintiff seeks a permanent injunction "to prevent TCS from taking further steps to pursue the affiliation with COL." FAC ¶ 31. To qualify for a permanent injunction, the plaintiff must prove (1) the elements of a cause of action involving the wrongful act sought to be enjoined; and (2) the grounds for equitable relief. *San Diego Unified Port Dist. v. Gallagher* (1998) 62 Cal.App.4th 501, 503.

1. An Injunction May Not Be Issued To Enforce An Invalid Noncompete Agreement.

The primary purpose of plaintiff's requested relief is to enjoin TCS from its lawful business, operating a law school in affiliation with COL. FAC ¶ 31.

Plaintiff requests that the Court enjoin TCS from further affiliating with COL so that TCS and COL could return to doing business as they did before defendants' alleged misappropriation of trade secrets. FAC ¶ 37. Without an injunction, plaintiff fears that it will "lose the ability to compete, suffer a downturn in its enrollment and may go out of business." *Id.*

Plaintiff bases its request for injunctive relief on its allegation that the NDA is actually a covenant not to compete, which TCS has allegedly breached. FAC ¶ 18. As discussed above, the express terms of the NDA indicate its purpose is to protect plaintiff's confidential Information in furtherance of facilitating a transaction between plaintiff and TCS. NDA Preamble. Plaintiff itself concedes such a purpose. FAC ¶ 22 ("The purpose of opening [plaintiff's] books and granting unlimited access to TCS was to facilitate an acquisition of [plaintiff] as the NDA expressly states."). Furthermore, paragraph 2 of the NDA expressly allows the parties to pursue other business endeavors "of any kind" so long as TCS maintained the confidentiality of plaintiff's Information. NDA ¶ 2.

Despite the terms of the NDA, plaintiff seeks to transform the NDA into a covenant not to compete, whereby TCS promised not to pursue a transaction in competition with plaintiff. FAC ¶ 18. In other words, plaintiff wants to enjoin TCS from affiliating with and/or operating a law school in the tri-county region, spanning Santa Barbara, San Luis Obispo, and Ventura counties. Even if the NDA constitutes a covenant not to compete, it would be void and unenforceable under California law and well-founded public policy against broad restrictions on lawful business. *Dowell v. Biosense Webster, Inc.* (2009) 179 Cal.App.4th 564, 574, 102 Cal.Rptr.3d 1, 8, citing Cal. Bus. and Prof. Code § 16600 (California courts "have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility.").

Where a plaintiff attempts to transform a nondisclosure agreement into an after-the-fact noncompete agreement, an injunction may not issue to enforce the invalid agreement. See *Whyte, supra*, 101 Cal.App.4th at 1447 (affirming the trial court's denial of an injunction); see also *Del Monte Fresh Produce Co. v. Dole Food Co., Inc.* (S.D.Fla.2001) 148 F.Supp.2d 1326, 1337 ("[A] court should not allow a plaintiff to use inevitable disclosure as an after-the-fact noncompete agreement to enjoin an employee from working for the employer of his or her choice."); Bus. & Prof. Code § 16600. Based on the foregoing authority, plaintiff should not be allowed to enjoin TCS from pursuing its lawful business of operating a law school in the tri-county region.

2. An Injunction Is Improper Where The FAC Fails To Show Clear, Impending Injury.

Plaintiff is not entitled to an injunction based on its claim for misappropriation of trade secrets. Cal. Civ. Code § 3426.2(a) provides: "Actual or threatened misappropriation may be enjoined." An injunction is only proper, however, where the right to be protected is clear, and the injury is impending and so immediately likely that it may only be avoided by issuance of an injunction. *East Bay Mun. Utility Dist. v. Department of Forestry & Fire* (1996) 43 Cal.App.4th 1113, 1126.

The issuance of an injunction based on a claim of threatened misappropriation requires "a greater showing than mere possession by a defendant of trade secrets where the defendant acquired the trade secret by proper means." *Central Valley General Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 528, 75 Cal.Rptr.3d 771, 792; citing Cal Civ. Code § 3426.1(b)(1); see also *Del Monte Fresh Produce Co., supra,* 148 F.Supp.2d at 1335 (interpreting both California's and Florida's versions of the Uniform Trade Secrets Act to require more than mere possession of a trade secret by a defendant; injunction will issue only where there is substantial threat of

impending injury.).

In the present case, plaintiff speculates that TCS will use the Information because it is in the possession of Haynes who has become a member of COL's Board of Trustees, and is "now capable of using the plaintiff's Information to develop strategies to compete against [plaintiff]." FAC ¶ 61. Speculation that a defendant will use plaintiff's trade secrets is not sufficient to allow the issuance of an injunction. *FLIR Systems, Inc., supra,* 174 Cal.App.4th at 1279 (finding that speculation that a departing employee may misappropriate a trade secret in a startup business will not support an injunction). As such, an injunction is inappropriate in this case, where plaintiff cannot demonstrate anything more than mere speculation of threatened misappropriation.

F. LEAVE TO AMEND SHOULD BE DENIED WHEN THE PLAINTIFF CANNOT AMEND THE PLEADING TO STATE A CAUSE OF ACTION.

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.* (9th Cir. 1986) 806 F.2nd 1393, 1401. 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* (9th Cir. 1988) 845 F.2nd 193, 195–196. As the aforementioned points demonstrate and despite two (2) attempts to do so, plaintiff remains unable to allege that TCS made an affirmative representation that it would not compete against plaintiff. Plaintiff can only infer such a representation through the fact that it discussed a potential acquisition of plaintiff. An implied representation, however, is insufficient to establish negligent misrepresentation. Moreover, despite plaintiff's efforts, plaintiff cannot transform a straightforward nondisclosure agreement into a covenant not to compete. TCS agreed to keep the Information

confidential for the purposes of conducting due diligence; neither party agreed not to compete.

Additionally, plaintiff is unable to allege facts to show that the various documents and verbal communications it supplied constitute trade secrets because they do not contain independent economic value. Moreover, plaintiff is still unable to allege words or conduct by TCS that would suggest an imminent threat of their misuse. It maintains that TCS continues to possess its Information, but mere possession of trade secrets is not enough to establish misappropriation. Finally, plaintiff cannot allege any unlawful conduct sufficient to give rise to an unlawful competition claim. As such, defendant TCS respectfully requests that this Court dismiss plaintiff's second claim for negligent misrepresentation, third claim for misappropriation of trade secrets, and fifth claim for violation of the Unfair Competition Law, with prejudice and without leave to amend.

IV. CONCLUSION

Based on the aforementioned arguments, defendant TCS respectfully requests that this Court dismiss plaintiff's second claim for negligent misrepresentation, third claim for misappropriation of trade secrets, and fifth claim for violation of the Unfair Competition Law, with prejudice and without leave to amend.

Respectfully submitted,

DATED: June 27, 2011

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PROOF OF SERVICE
UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CASE NAME: Southern California Institute of Law v. TCS Education System, et al.
CASE NO.: CV10-8026 PSG

I declare as follows:

I am employed in the County of Los Angeles, California. I am over the age of 18 years, and not a party to the within action; my business address is 23975 Park Sorrento, Suite 370, Calabasas, California 91302. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

On July 27, 2011, I served a true and correct copy, with all exhibits, of the following document(s) described as follows:

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[ ] on the interested parties in the within action by placing the above documents in the United States mail for Express Mail delivery at 23975 Park Sorrento, Suite 370, Calabasas, California 91302 in a sealed envelope, with Express Mail postage thereon fully prepaid; by depositing copies of the above documents in a box or other facility regularly maintained by Federal Express, with delivery fees paid by the sender's account. (Code of Civil Procedure § 1013(c).) *(Overnight Delivery Service)*

[ ] on the interested parties in the within action by faxing a true and correct copy of the above documents to the facsimile number listed below. *(Fax Service)*

[X] on the party or parties named below, by following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with a United States Postal Service, where it would be deposited for first class delivery, postage fully prepaid, in the United States Postal Service, that same day in the ordinary course of business, addressed as set forth below. *(Regular Office Deposit)*

[X] via electronic service through CM/ECF

SEE ATTACHED SERVICE LIST

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 27, 2011, at Calabasas, California.

By: Rina Howard
Signature of Declarant

By: Rina Howard
Name of Declarant

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