George A. Shohet SBN 112697
LAW OFFICES OF GEORGE A. SHOHET, A PROFESSIONAL CORPORATION
245 Main Street, Suite 310
Venice, CA 90291-5216
Tel.: (310) 452-3176
Fax: (310) 452-2270

Gretchen M. Nelson SBN 112566
KREINDLER & KREINDLER LLP
707 Wilshire Blvd, Suite 4100
Los Angeles, CA 90017
Tel.: (213) 622-6469
Fax: (213) 622-6019

Attorneys for Plaintiff
Southern California Institute of Law

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 Hon. John A. Kronstadt]

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Action Filed: Oct. 25, 2010

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Plaintiff Southern California Institute of Law ("Law School" or "plaintiff") respectfully submits this memorandum of points and authorities in opposition to the motions filed by defendants TCS Education System ("TCS"), David J. Figuli ("Figuli") and Global Equities, LLC d/b/a Higher Education Group ("HEG") to dismiss plaintiff's First Amended Complaint for Injunctive Relief and Damages, filed on May 23, 2010 ("FAC").[1]

I. INTRODUCTION

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

Rather than address the FAC's well-pled allegations, defendants mischaracterize the case as one involving a jilted seller crying sour grapes over the loss of a potential sale. A fair reading of the FAC establishes that defendants were contractually and legally obligated to refrain from using the plaintiff's vital,

[1] Page references to defendants' memoranda of points and authorities are: "TCS Mem. at __" and "Figuli/HEG Mem. at __."

confidential information to facilitate TCS's affiliation with plaintiff's competitor. The Confidentiality and Non-Disclosure Agreement ("NDA") at the center of this case was prepared by defendants and is anything but a plain vanilla NDA as defendants would have the Court believe.[2] Instead, it is broad in scope and intended to prevent the very wrongdoing inflicted on the plaintiff. As the Court previously ruled in upholding plaintiff's claim for breach of contract, plaintiff's "allegations that TCS misused confidential information in pursuit of other business opportunities defeats TCS's argument that there is no broadly worded non-compete provision that could serve as the basis for a breach of contract claim." *Southern California Institute of Law v. TCS Educ. System*, No. CV 10–8026 PSG (AJWx), 2011 WL 1296602, at *3 (C.D. Cal. Apr. 5, 2011).

The Court's prior ruling granted in part and denied in part plaintiff's original complaint and gave the plaintiff an opportunity to replead. *Id*. at *11. In amending the complaint, plaintiff eliminated certain claims and added a new claim against defendants Figuli and HEG for tortious interference with contract. FAC ¶¶67-72. The FAC now pleads claims for breach of contract against TCS, negligent misrepresentation against TCS, misappropriation of trade secrets against all defendants, California Uniform Trade Secrets Act ("CUTSA"), Civ. Code §3426, *et seq*., tortious interference with contract against Figuli and HEG and violation of California's Unfair Competition Law, Bus. & Prof. Code §17200, *et seq*. Defendants do not seek to dismiss the breach of contract claim, but seek dismissal of the other claims pled against them. In addition, TCS erroneously contends that permanent injunctive relief is improper. For the reasons discussed below, defendants' motions should be denied.

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[2] A copy of the NDA is attached to the FAC as Exhibit 1 and may be considered by the Court in ruling on the motions. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

II. FACTUAL ALLEGATIONS

Prior to 1986, Santa Barbara & Ventura Colleges of Law ("COL") was the only law school in the tri-county region spanning San Luis Obispo, Santa Barbara, and Ventura Counties. FAC at ¶8. At that time, the only other State Bar accredited schools were miles away in either Monterey or Malibu. *Id*. Neither of these options made sense for working adults, many of whom were single parents. *Id*. Like the Law School, COL offers a part-time evening curriculum leading to a J.D. and is State Bar accredited. *Id*. Neither the Law School nor COL is ABA accredited. *Id*. In addition, neither school has accreditation from the Western Association of Schools and Colleges ("WASC"). *Id*.[3] Without these accreditations, neither the Law School nor COL can offer students federally funded loans. *Id*. The chief reasons why these other accreditations cannot be sought and obtained is the lack of financial and human resources that would allow the Law School or COL to meet basic eligibility criteria. *Id*. at ¶¶ 8-11.

Over the past twenty-five years, the Law School and COL have competed for students and faculty. *Id*. at ¶12. COL is much larger than the Law School and has approximately 250 students, thirty-seven faculty members and an administrative staff of nine. *Id*. By contrast, the Law School has approximately one hundred students, thirty-one part-time faculty members and an administrative staff consisting of a Dean, Vice-Dean and Registrar. *Id*. at ¶4. In spite of the fact that COL is larger and has more resources, the Law School established a strong presence in the tri-county region because of its willingness to keep tuition costs low while maintaining

[3] Voluntary, non-governmental, institutional accreditation, as practiced by WASC and other regional commissions, is a unique characteristic of American education. *Id*. at ¶10.

a strong faculty and academic program. *Id*. at ¶12.[4] This commitment has allowed many current and past students to afford to earn a law degree. *Id*. The Law School has enrolled a number of students who transferred in good academic standing from COL, citing the strong program and lower tuition costs as key factors. *Id*.

In mid-September 2009, Dean Stanislaus Pulle of the Law School was approached by defendant Figuli and one George R. Haynes ("Haynes"), the former Vice President of Academic Affairs for the Santa Barbara Graduate Institute of Psychology (the "Institute"), regarding a potential acquisition by TCS. *Id*. at ¶13. The Institute had just become affiliated with TCS. *Id*. Figuli, a Colorado-based attorney, stated that he had extensive background in strategic acquisitions in the education sector and that, through defendant HEG, Figuli's company, he was identifying suitable acquisition candidates and structuring transactions for TCS. *Id*. at ¶¶6, 7 and 13. Figuli and Haynes explained that TCS was interested in acquiring the Law School. *Id*. at ¶13. The Law School was encouraged by the prospect of an acquisition by TCS because it would facilitate WASC accreditation, increase enrollment, establish new programs, extend educational opportunities to foreign students and leverage existing resources, such as using one or both of the school's campuses for daytime programs. *Id*. at ¶14.

On September 24, 2009, the Law School and TCS entered into the NDA. *Id*. at ¶16. Throughout the parties' discussions, Figuli and TCS led the Law School to believe that TCS would be its strong ally and enable the Law School to compete more successfully against the larger, and better funded, COL. *Id*. at ¶19. The manner in which an alliance with TCS would enable the Law School to grow and

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

better compete with COL was discussed in great detail during September, October and November 2009. *Id*. The discussions focused on marketing strategies, addition of new degree programs, initiation of Internet based instruction, WASC-accreditation and the corresponding ability to offer federally funded tuition loans to attract new students and other strategic plans. *Id*. In addition, issues of governance, structures of control, methods of securing expanded accreditation, and curriculum expansion were addressed. *Id*.

Confident that it was working toward an acquisition, in early October 2009, the Law School released its most guarded Information to the defendants. *Id*. at ¶20.[5] Many of the documents provided to defendants are ones that are treated as confidential by the State Bar of California Committee of Bar Examiners ("CBE"), including the Law School's financial records and personal information about instructors. *Accredited Law School Rules, Rules of the State Bar of California*, Title 4, Div. 2 (January 1, 2009) ("Rules"), Rule 4.108. Although the confidential nature of the documents released to the defendants is apparent, the importance of Dean Pulle's imprimatur on the materials and his frank discussion of everything he, the Board and faculty had considered -- past, present and future -- cannot be overstated. *Id*. at ¶21.

On November 17, 2009, Dean Pulle met with Figuli, Haynes and Jeff Keith ("Keith"), TCS's CFO, who oversees TCS's acquisitions and affiliations. *Id*. at ¶¶16, 23-24.[6] As part of meeting, the group toured the Law School's campuses, met with the Vice Dean and even a local Santa Barbara realtor regarding the potential

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[5] The FAC sets forth in detail all of the confidential and trade secret documents released to the defendants. *Id*. at ¶20.

[6] Because many schools and colleges are non-profits they cannot be acquired like a for profit entity. The comparable method for doing so is called an "affiliation." FAC ¶5:8-9.

purchase of the campus building. *Id*. at ¶23. During those discussions, the parties addressed the reconfiguration of the Law School's Board of Directors, the establishment of Joint Advisory Boards, and the hiring of additional faculty and new law deans, among other topics. *Id*. The gist of those discussions indicated that an acquisition of the Law School by TCS was imminent. *Id*. At the conclusion of the meeting, Keith stated that he expected TCS to make an offer no later than mid-December 2009. *Id*.

The Law School did not receive any communication from TCS in December 2009. *Id*. at ¶25. On January 21, 2010, Dean Pulle sent an e-mail to Figuli, with copies to Haynes and Keith, requesting a "status report" on the process toward an acquisition. *Id*. A few hours later, on January 22, 2010, Figuli e-mailed Dean Pulle stating that TCS believed that because it could not offer an acquisition price that it thought would be acceptable to the Law School, it was not interested in an acquisition "*at this time*." *Id*. Prior to Figuli's e-mail, no one connected with TCS suggested that the Law School's proposed price was too high and there was no indication that the Law School was not prepared to negotiate on price. *Id*. at ¶26. The last phrase in Figuli's e-mail that TCS would pass on the opportunity "at this time" left open the possibility that it might still consider the acquisition in the future. *Id*. Dean Pulle conveyed that impression to his Board and certain faculty who had been involved in the negotiations. *Id*. This inference is further bolstered by the fact that paragraph 5 of the NDA obligates TCS upon termination of the "Relationship" to "promptly destroy" the documentary information provided to the defendants and "certify" its destruction to the Law School. *Id*. As stated above, the Law School's documentary information was neither destroyed nor returned and no certification of its destruction has been provided.

The FAC alleges that defendants approached COL during the time they were engaged in discussions with the Law School or soon thereafter, but concealed their wrongful intent from the plaintiff. *Id*. at ¶¶28-29. The Law School first learned of

defendants' wrongful conduct through news reports on or about September 22, 2010. *Id*. at ¶30. The press release, dated September 21, 2010, jointly published by TCS and COL and carried on their respective Websites and by various news services, including *Reuters* and the *Pacific Coast Business Times*, confirmed that TCS and COL had entered into an affiliation agreement. *Id*.

Over the years, the Law School successfully competed with rival COL by keeping its tuition low and offering what many view as the superior legal education. *Id*. at ¶31. With TCS's vast resources, including its marketing savvy, the Law School has little hope of continuing to differentiate itself successfully, will suffer a downturn in enrollment and could go out of business. *Id*. at ¶37.[7] Not only is TCS-COL wealthy and resource rich, they are armed with the Law School's misappropriated information and the best strategic thinking of its Deans, faculty and Board placing the Law School at a distinct competitive disadvantage. *Id*. at ¶34. Haynes, who was privy to virtually all of the parties' discussions and reviewed the Law School's confidential documents, serves on COL's Board of Trustees. *Id*. at ¶33. In addition, TCS and COL are marketing their affiliation publicly as a major advantage citing much of the same strategies and innovations the Law School previously discussed with the defendants. *Id*. at ¶¶31-32.[8]

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

[8] COL's rivalry with the Law School is both long-lived and often intense. *Id*. at ¶32. At an Open House held on October 19, 2010, COL's Assistant Dean Barbara Doyle emphatically discouraged prospective law students from attending the Law School exclaiming, "Oh no, no, no, that's our competitor, don't go there!" *Id*.

III. ARGUMENT

A. Legal Standard Applicable To A Motion To Dismiss

A complaint will survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) when it contains "'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007). This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element. *Id.* In ruling on a motion to dismiss, courts view all allegations in the complaint in the light most favorable to the non-moving party and accept all material allegations-as well as any reasonable inferences to be drawn from them-as true. *William O. Gilley Enters., Inc. v. Atlantic Richfield Co*., 588 F.3d 659, 662 (9thCir. 2009) (*per curiam*); *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).[9] Overall, motions to dismiss for failure to state a claim are "disfavored" and should only be granted in "extraordinary" cases. *Catch Curve, Inc. v. Venali*, Inc., 519 F. Supp. 2d 1028, 1034 (C.D. Cal. 2007).

B. Negligent Misrepresentation Is Properly Pled Against TCS

In arguing for dismissal of the negligent misrepresentation claim, TCS contends that (i) there is no allegation of "an assertion of fact", but only "implied representations" which it contends are not actionable (TCS Mem. at 6); (ii) that it is

[9] In addition, Rule 12(b) motions must be considered in light of Federal Rule of Civil Procedure 8(a) which only requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Iqbal*, 129 S. Ct. at 1953; 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1221 (3d ed. 2004) (noting that Rule 8's pleading standard applies with the same degree of rigor "in every case, regardless of its size, complexity, or the numbers of parties that may be involved).

improper to infer "a representation from the parties' dealings" (*Id*.); (iii) plaintiff has not alleged justifiable reliance because the "implied promise" that TCS would not compete with the plaintiff is negated by the express terms of the NDA (*Id*. at 7); and (iv) TCS did not owe the plaintiff a duty to disclose its intention to negotiate for and affiliate with COL. *Id*. at 7-9. Each of these arguments should be rejected because TCS overlooks allegations in the FAC that support the misrepresentation claim and improperly seeks to have its construction of the NDA and parties' dealings accepted as true.

Courts in the Ninth Circuit have debated the issue of whether or not negligent misrepresentation claims must satisfy Fed. R. Civ. P. 9(b) which requires particularity in pleading claims that sound in fraud.[10] Although fraud claims are not alleged in this case, the FAC contains sufficient allegations to establish the requisite particularity called for by Rule 9(b) should the Court decide to apply the rule. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d at 1106 (Under Rule 9(b) "a plaintiff must set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false." (citation and quotations omitted)); *Moore v. Kayport Packaging Exp., Inc.*, 885 F.2d

[10] *See e.g., Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) ("In a case where fraud is not an essential element of a claim, only allegations ('averments') of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b). Allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a)."); *Compare Premium Capital Funding, LLC v. AR Home Loans, Inc*., No. Civ. S-07-1185 LKK/EFB, 2007 U.S. Dist. LEXIS 76927 *4 (E.D. Cal. Oct. 2, 2007) ("Only allegations of fraud or mistake must be pleaded with particularity, Fed. R. Civ. P. 9(b), not general negligence or negligent misrepresentation claims.") *with Verso Paper LLC v. HireRight, Inc*., No. SACV 10-1959 DOC (RNBx), 2011 U.S. Dist. LEXIS 55067 **12-13 (C.D. Cal. May 20, 2011) ("It is well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements." (citation omitted)).

531, 540 (9th Cir. 1989) (the particularity requirement is satisfied if the complaint "identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations."); *Malmen v. World Sav. Inc.*, CV 10-9009 AHM (JEMx), 2011 U.S. Dist. LEXIS 44076 (C.D. Cal. Apr. 18, 2011) (holding that once the basic requirements of Rule 9(b) are met, there is no requirement that the plaintiff include additional particularized facts which may be revealed through discovery).[11]

1. The Elements of Negligent Misrepresentation

California courts acknowledge that various forms of misrepresentation can and do occur in the business world and have shown great flexibility in developing tort law to redress such wrongdoing. The court in *Eddy v. Sharp*, 199 Cal. App. 3d 858, 864 (1988) explained the parameters of the tort, stating:

> "In this state, negligent misrepresentation is a form of deceit defined as: 'The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.' (Civ. Code, § 1710, subd. 2.) To be actionable as deceit, the representation must have made with the intent to induce the recipient to alter his position to his injury or his risk. (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 488 [275 P.2d 15].) The defendant's intent to induce the plaintiff to alter his position can be inferred from the fact that defendant knew the plaintiff would act in reliance upon the representation.
>
> As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured person. (*Hale v. George A. Hormel & Co.* (1975) 48 Cal.App.3d 73, 86 [121 Cal.Rptr. 144].) The determination of whether a duty exists is primarily a question of law. (*Weirum v. RKO General, Inc*. (1975) 15 Cal.3d 40 [123 Cal.Rptr.468, 539 P.2d 36].
>
> 'One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, . . . facts basic

[11] TCS does not contend that plaintiff failed to particularize "the who, what, when, where, and how" of the misrepresentations, but instead seeks dismissal on different grounds as set forth above.

> to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.' (Rest.2d Torts, § 551, subd. (2)(e); *Wells v. John Hancock Mut. Life Ins. Co.* (1978) 85 Cal.App.3d 66, 72, fn. 8 [149 Cal.Rptr.171]; *Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 691, fn. 3."

Among the fundamental elements of the tort of negligent misrepresentation is that the defendant has made a "misrepresentation." *Conroy v. Regents of University of California*, 45 Cal. 4th 1244, 1255 (2009). The "misrepresentation" element may be established by showing either a positive assertion of a past or existing fact or "the suppression of fact by one bound to disclose it." *Los Angeles Unified School District v. Great American Insurance Company/Hayward Construction Company*, 49 Cal.4th 739, 750 (2010); *Conte v. Wyeth, Inc.*, 168 Cal.App.4th 89, 101, fn. 7 (2008). In addition, a misrepresentation need not be written or oral, but may be implied by conduct or circumstances. *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1567 (1996) (unauthorized use of computer access codes to hack into a telephone carrier's system is an implied misrepresentation of another's identity); *Universal By-Products, Inc. v. City of Modesto*, 43 Cal.App.3d 145, 151 (1973) (city's solicitation of bids for refuse collection carried with it an implied representation that the city " would consider the bids in good faith and not merely to gain the benefit of [plaintiff's] research and expertise").

2. The FAC Alleges That TCS Made Express And Implied Misrepresentations And Concealed Material Facts It Was Bound To Disclose

Prior to entering into the NDA and providing TCS with its confidential documents and information, the parties held preliminary discussions in September 2009 where the Law School was informed by TCS's representatives Figuli and Haynes that TCS was seriously interested in acquiring a California law school and had identified the Law School for that purpose. FAC ¶13:10-11 and ¶14:26-2.

Thereafter, on September 24, 2009, TCS and the Law School entered into the NDA which made the following promises and representations, *inter alia*: (i) the confidential information and trade secrets provided by the Law School to TCS, both in documents and orally conveyed, would remain the property of the Law School and used solely by TCS to facilitate a transaction between the two entities; (*Id*. at ¶17); (ii) TCS would not "use, reproduce, or directly or indirectly disclose or allow access to" such information except as required to facilitate the transaction (*Id*.); (iii) TCS would protect the confidentiality of the information "with at least the same diligence and care as would be required of [TCS] if it were a fiduciary of the [Law School], that is the utmost good faith and care for the interests of the [Law School]" (*Id*.); and (iv) that TCS would not "pursu[e] business opportunities or other arrangements or endeavors of any kind" in violation of the NDA. *Id*. at ¶ 18. The NDA could be terminated only after the information conveyed by the Law School was returned or certified as destroyed by TCS. *Id*.

In addition to the foregoing, TCS represented during meetings in September, October and November 2009, that it intended to become the Law School's strong ally and enable the Law School to compete against the larger, and better funded, COL. *Id*. at ¶¶19, 23 and 24. The manner in which an alliance with TCS would enable the Law School to grow and better compete with COL was discussed in great detail during these meetings. *Id*. At no point during any of these discussions did Figuli or TCS suggest that the price the Law School had proposed was unreasonable or unacceptable. *Id*. Instead, the discussions focused on marketing strategies, addition of new degree programs, initiation of Internet based instruction,WASC-accreditation and the corresponding ability to offer federally funded tuition loans to attract new students and other plans. *Id*. In addition, issues of governance, structures of control, methods of securing expanded accreditation, and curriculum expansion were addressed. *Id*.

Confident that it was working toward an acquisition, on October 8, 2009, the Law School released its most guarded Information to the defendants under the terms of the NDA. *Id*. at ¶20. The FAC alleges that the purpose of opening the Law School's books and granting access to its Board of Directors, Deans and faculty was to facilitate an acquisition of the Law School as the NDA expressly contemplates. *Id*. at ¶22:2-8. The Law School had no reason to supply the information for the any other purpose. *Id*. Had defendants even hinted at the possibility that TCS was contemplating another California law school, particularly COL, the Law School would not have supplied the information or candidly discussed its plans and strategy with TCS's representatives. *Id*.

On November 17, 2009, following the parties' meeting which involved touring both of the Law School's campuses, TCS's CFO Keith informed the Law School that TCS would be making an offer to acquire the school. *Id*. at ¶23:15-20. Thereafter, additional correspondence occurred with Figuli, but then the communications suddenly ceased. *Id*. at ¶¶24-25. Within hours of Dean Pulle e-mailing Figuli to inquire about why the school had not heard anything further, Figuli wrote back announcing that TCS was "pass[ing]" on the "opportunity *at this time*." *Id*. at ¶25. At no point prior to the September 2010 media reports announcing the TCS-COL affiliation, did TCS alert the Law School that it was negotiating with COL, seeking regulatory approval from the State Bar for the affiliation or in the process of inking the deal. *Id*. at ¶¶28 and 30.

Based on the NDA and the course of dealings between the parties, the FAC alleges:

"50. Once TCS gained access to the Law School's confidential Information, TCS was under an affirmative duty to use and maintain the Information in a fiduciary-like manner. The parties' discussions and TCS's contractual obligation created an affirmative duty on TCS's part to disclose that it intended to negotiate with COL toward an affiliation. In making the representation that it would not

pursue a transaction in violation of the NDA, TCS acted without reasonable grounds for believing the representation to be true.

51. Plaintiff was unaware of the material misrepresentation and justifiably relied on TCS's promise that it would not pursue a transaction in violation of the NDA. Had plaintiff known the true facts, it would not have agreed to provide its confidential Information to the defendants. TCS's non-disclosure amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing. Because TCS did not disclose its intention to affiliate with COL, the Law School was unable to safeguard its rights by seeking injunctive and declaratory relief to prevent the affiliation."

FAC ¶¶ 50-51.

TCS misrepresented that it would only use the Law School's information for the purpose of facilitating a transaction with the Law School, but instead used that information to compare the school to COL. *Id*. at ¶27. TCS misrepresented that it would not pursue business opportunities or endeavors in violation of the NDA, which implied that it would not affiliate with COL and thereby become the Law School's competitor. *Id*. at ¶¶27, 29 and 51. These express and implied misrepresentations are actionable. *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th at 1567; *Universal By-Products, Inc. v. City of Modesto*, 43 Cal.App.3d at 151.

TCS relies on *Wilson v. Century 21 Great Western Realty*, 15 Cal. App. 4th 298, 306 (1993) in arguing that implied representations are insufficient to form the basis of a negligent misrepresentation claim. But the case does not stand for such a categorical rule. Rather, the court held that the defendant real estate brokers had not made any positive assertions about the foundation of the plaintiffs' home which was

sold in "as is" condition and lacked actual knowledge that the foundation had problems. *Id*. at 301-302, 306.[12]

Defendant also cites *Seeger v. Odell*, 18 Cal.2d 409, 415 (1941) for the proposition that "patently and obviously" false representations defeat a claim for negligent misrepresentation due to the lack of justifiable reliance. Hoping to gain traction for its interpretation of the NDA, TCS argues that there is no way to interpret the agreement other than the way it would like it to be. TCS Mem. at 7. At a minimum, there is a dispute over the meaning of the NDA which cannot be resolved at the pleading stage. *See, e.g*. *W. Ref. Yorktown, Inc. v. BP Corp. N. Am.*, 618 F. Supp. 2d 513, 526-27 (E.D. Va. 2009) ("Although the parties attack the opposing interpretations as leading to an 'ad absurdum' result, the reality is that both constructions are commercially reasonable, one clearly favoring Defendant as it severely restricts Plaintiff's ability to recover for environmental remediation, and the other clearly favoring Plaintiff as it permits recovery for cleanup costs expended many years after the Agreement was signed. Therefore, Defendants cannot prevail at the 12(b)(6) stage because Defendants' construction of the agreement, while reasonable, requires an inference in favor of Defendant and this Court must draw all

[12] To the extent *Wilson, supra,* may be read to preclude negligent misrepresentation based on nondisclosure, it does not comport with California statutory or Supreme Court authority. Civ. Code, § 1710, subd. 3; *Los Angeles Unified School District v. Great American Insurance Company/Hayward Construction Company,* 49 Cal.4th at 750, n. 5; *see also Schnelling v. Budd,* 291 F. Supp. 2d 1186, 1191 and n.3 (D. Nev. 2003) (holding that Nevada would endorse the negligent misrepresentation by nondisclosure approach of Restatement (Second) of Torts § 551 and citing *Wilson* as possible contrary authority).

reasonable inferences in favor of Plaintiff for the purposes of this motion to dismiss." (*citations and quotations omitted*)).[13]

TCS's argument that it had no duty to disclose the fact that it was negotiating and intending to affiliate with COL plainly contradicts plaintiff's express allegation that it had "an affirmative duty...to disclose that it intended to negotiate with COL toward an affiliation." FAC ¶50:3-5. TCS also challenges plaintiff's allegations that it was negotiating contemporaneously with COL and the Law School as "not reasonable" because the COL affiliation was announced eight months after TCS ceased further negotiations with the plaintiff. TCS Mem. at 8. The FAC alleges facts, including TCS's abrupt and unexpected cessation of communications with the Law School, the failure to make the promised purchase offer, its improper retention of the plaintiff's confidential documents, the timing of regulatory approval for the affiliation, the fact that TCS approached COL, not the other way around, and Haynes' membership on the COL Board of Trustees, which create an inference that the negotiations occurred contemporaneously. FAC ¶¶23, 25-26, 28 and 33; *Twombly*, 550 U.S. at 556 (mere "plausibility" not "probability" is all that is required at the pleading stage).

Contrary to TCS's argument, a fiduciary relationship is not the only means for creating an expectation of disclosure. TCS Mem. at 9. As shown above, a contract, course of dealing and the defendant's superior knowledge that it is in possession of facts which are unknown to the plaintiff, can result, individually or collectively, in such a duty. *See Los Angeles Unified School District v. Great American Insurance Company/Hayward Construction Company*, 49 Cal.4th at 749-50 (owner's failure to disclose deficient work performed by a previous contractor was a proper basis for

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[13] *Privacywear, Inc. v. QTS & CTFC, LLC*, No. EDCV 07-1532-VAP (OPx), 2009 U.S. Dist. LEXIS 74496, **20-21 (C.D. Cal. Aug. 20, 2009) (holding that reliance allegations may be pled generally pursuant to Fed. R. Civ. P. 8).

holding that the plaintiff was misled into entering into the construction contract); *Eddy v. Sharp*, 199 Cal. App. 3d at 866 (insurance agent's duty to prospective customers arose due to agent's preparation of a proposal which he knew the plaintiffs would rely on in purchasing the insurance policy); Witkin, *Summary of Cal. Law* (10th ed. 2005) Torts, § 796, pp. 1151-1152 ("And tort law also recognizes that a party having exclusive knowledge of information materially affecting the value of a transaction may have a duty to disclose that information to the other party even in the absence of a fiduciary relationship.")

Here, the FAC alleges that the NDA, which is still in effect, and the course of the parties' dealings created an expectation that having received the Law School's information, TCS would not thereafter affiliate with COL and become plaintiff's rival. The FAC alleges that having induced the plaintiff to reveal all of its most confidential and vital information, TCS could not turn around and affiliate with COL without disclosing its intention. FAC ¶¶50-51.[14]

C. <u>The Claim for Trade Secret Misappropriation Is Properly Pled</u>

Defendants attack the sufficiency of plaintiff's claim for misappropriation of trade secrets on two grounds. First, they argue that the allegedly misappropriated trade secrets are inadequately identified. TCS Mem. at 11-12; Figuli/HEG Mem., pp. 6-7. Second, they contend that the FAC fails to plead facts showing defendants'

[14] TCS also incorrectly argues that the FAC fails to allege that the concealment of its "intent to negotiate with COL was a material fact." TCS Mem. at 8-9. The FAC expressly alleges that "Plaintiff was unaware of the ***material*** misrepresentation and justifiably relied on TCS's promise that it would not pursue a transaction in violation of the NDA." FAC ¶51:8-10 (emphasis added). Although materiality need not be pled with particularity, the FAC emphasizes that plaintiff would never have turned over its confidential information and trade secrets had it known or suspected TCS's duplicity. *See, e.g., id*. at ¶22:2-8.

misuse or threatened misuse. TCS Mem. at 12-13; Figuli/HEG Mem. at. 8-9. Defendants are incorrect on both fronts.

1. Plaintiff Alleges The Existence Of Trade Secrets Which Derive Independent Economic Value By Remaining Confidential

Information found to be a trade secret is extremely broad and includes any business data which, if kept secret, provides the holder with an economic advantage over a competitor. Cal. Civ. Code § 3426.1, subd. (d); *Morlife, Inc. v. Perry*, 56 Cal.App.4th 1514, 1520-1522 (1997). Here, the NDA admits that the information the plaintiff was to provide constitutes "proprietary, trade secret and confidential information...." FAC ¶¶ 6, 16-17.[15]

The FAC specifically identifies the financial, strategic and regulatory documents provided to TCS and the type of information revealed to TCS over the course of discussions spanning a two month period. *Id.* at ¶¶20-23. The documents and information provided under the terms of the NDA include details regarding the Law School's academic program, faculty, students, enrollment, operational strengths and weaknesses, marketing plans which include pricing and a competition analysis, recruitment strategies, plans for competing with COL, detailed financial information, internal analyses of the Law School's bar exam passage rates and a detailed Acquisition Profile and Strategy for Regional Accreditation. *Id*. at ¶¶20-23, 55-58. The documents compare and contrast many facets of the Law School's academics, operations, regulatory competency and competitive strategies, including

[15] Although labeling information as a trade secret is not conclusive, it is an important factor in deciding whether information is a trade secret. *Morlife v. Perry, supra*, 56 Cal.App.4th at 1522; *San Jose Construction, Inc. v. S.B.C.C., Inc.*, 155 Cal.App.4th 1528, 1543 (2007) (defendant's execution of an agreement that documents and information including "processes, compilation of information, records, specifications and customer information" and "bidding, estimating and costing processes" were confidential trade secrets created triable issues of fact as to the existence of trade secrets).

new curriculum, teaching methods, ways of attracting high quality faculty, advertising strategies and cost containment policies. *Id*. at ¶56.

After providing these sensitive and confidential documents, Dean Pulle, who has a forty year history in law school education, discussed their content with Figuli, and TCS representatives, providing further insight into the Law School's strengths, weaknesses, and strategic plans as well as strategies for structuring a partnership with TCS that would increase the school's competitive advantage and benefit TCS. *Id*. at ¶4:4-7 and ¶22. Plaintiff further alleges that the documents and information were carefully guarded by the Law School to avoid disclosure. *Id*. at ¶20. Although certain entities, such as CBE inspectors, tax authorities and government regulators may have had access to certain documents from time-to-time, only a very few individuals, all of whom were associated with the Law School, had full access to all of the information and documents, prior to plaintiff's transmittal of the information to the defendants. *Id*. at ¶54.

The designation of a trade secret is to be liberally construed with all reasonable doubts regarding the adequacy of the designation resolved in plaintiff's favor. *Brescia v. Angelin*, 172 Cal.App.4th 133, 143 (2009). The purpose of requiring some level of specificity in identifying trade secrets is to permit the "defendant to ascertain whether and in what way the information is distinguished from matters already known, and to permit the court to fashion appropriate discovery." *Id*. Here, plaintiff has more than satisfied that obligation.

Defendants erroneously argue that "much of this information would appear to be either available to the public or within the knowledge of people skilled in the industry." Figuli/HEG Mem. at 6. But that argument fails on a motion to dismiss because, "whether information is publicly known is 'relative' and 'requires a fact-intensive analysis.'" *Spring Design, Inc. v. Barnesandnoble.com, LLC*, No. c-09-05185JW, 2010 WL 5422556, **4-5 (N.D. Cal. Dec. 27, 2010), *citing DVD Copy Control Ass'n, Inc. v. Bunner*, 116 Cal..App.4th 241, 252 (2004); *San Jose*

Construction, Inc. v. S.B.C.C., Inc., 155 Cal.App.4th 1528, 1537 (2007) ("whether information is a trade secret is ordinarily a question of fact").

Moreover, "[i]n determining whether information is generally known, the focus is on the information or product as a whole, not its individual components." *Leatt Corp v. Innovative Safety Tech., LLC*, No. 09-CV-1301-IEG, 2010 WL 1526382 * 6 (S.D. Cal. April 15, 2010); *Verigy US, Inc. v. Mayder*, No. C-07-04330 RMW, 2008 WL 564634, * 6 (N.D. Cal. Feb. 29, 2008) ("the combination of publicly-known elements can be a trade secret provided the combination itself is not generally known"); *O-2 Micro Intern. Ltd. v. Monolithic Power Systems, Inc.*, 420 F.Supp.2d. 1070, 1089-1090 (N.D. Cal. 2006) ("combinations of public information from a variety of different sources when combined in a novel way can be a trade secret"); *San Jose Constuction, Inc.*, *supra*, 155 Cal.App.4th at 1538-39 (reversing summary judgment in defendant's favor finding that there were triable issues of fact as to whether a contractor's project binders including correspondence between plaintiff, architects and owners, project descriptions, building measurements, cost estimates, budget proposals, drawings, were trade secrets). Here, the information provided by the Law School to the defendants was the entirety of the school's core internal information -- operational information, analyses and projections, as well as strategies for the present and the future. The information is the equivalent of the Law School's "crown jewels."[16]

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[16] Defendants' reliance on *American Paper & Packaging Products, Inc. v. Kirgan*, 183 Cal.App.3d 1318 (1986) is misplaced. In *American Paper*, the court held that customer lists can be protectable trade secrets under CUTSA, but information generally known in the trade and already used by good faith competitors "is not a protectable trade secret." *Id*. at 1326. Most of the plaintiff's information was not generally known in the trade because it uniquely related to the Law School and was kept out of the hands of COL and other third parties. *American Paper* which arguably limits the scope of protection of trade secrets has been criticized by other California courts. *See, e.g., ABBA Rubber Co. v. Seaquist*, 235 Cal.App.3d 1, 21 (1999); *Courtesy Temporary Service, Inc. v. Camacho*, 222 Cal.App.3d 1278, 1286

The FAC identifies the trade secret information transmitted to defendants in a manner that surpasses the detail required by most courts. *See, e.g.*, *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972) (upholding as a trade secret a "detailed plan for the creation, promotion, financing and sale of contracts for 'prepaid' or 'pre-need' funeral services"); *DLC Dermacare LLC v. Castillo*, No. CV-10-333-PHX-DGC, 2010 WL 5391458 (D. Ariz. Dec. 14, 2010) (trade secret misappropriation claim adequately pled based on allegations that plaintiff's "operation of DermaCare facilities, including manuals, training materials, and marketing information" were trade secrets and defendant used the manuals in operating competing facilities).

Defendants' argument that plaintiff's trade secrets have "no evident independent economic value" should be given short shrift. Figuli/HEG Mem. at 6. Information that is maintained as confidential and obtained as a result of a significant expenditure of time and resources undoubtedly has "independent economic value" to its owner. *Religious Tech. Ctr. v. Netcom On-Line Commec'n Servs., Inc.*, 923 F.Supp.1231, 1253 (N.D. Cal. 1995) (independent economic value can be shown by "circumstantial evidence of the resources invested in producing the information, the precautions taken to protect its secrecy, and the willingness of others to pay for its access"); *Courtesy Temp. Serv. Inc. v. Camacho*, 222 Cal.App.3d 1278, 1287 (1990) (a protectable trade secret exists where information is "procured by substantial time, effort, and expense"); *San Jose Construction, Inc.*, *supra*, 155 Cal.App.4th at 1540-43 ("taken together, the parties' evidence thus suggests an issue of material fact concerning whether the project information derived independent economic value from not being generally known to competitors in the commercial construction business").

(1990) (declining to follow *American Paper*, because it "misconstrued California's trade secret statute and its legislative intent").

The FAC alleges the time and effort the Law School expended in developing the information which was provided to the defendants, including, *inter alia*, the Acquisition Profile, the marketing, recruitment and competition strategies, curriculum and teaching analysis. *See, e.g.,* FAC ¶58 ("the Law School's Board of Directors has spent years planning and implementing strategies that have allowed the Law School to become successful and gain stature.") and ¶¶ 55-57 and 59. Moreover, the information revealed to defendants is certainly of interest to COL – the Law School's primary competitor.[17]

Defendants' argument that the trade secret information is nothing more than ideas is also unfounded. Figuli/HEG Mem. at 7. The FAC identifies an array of factual information, plans, projections and analyses that collectively form concrete, valuable pieces of information that are far from mere ideas. Further, the fact that the documents and information were expressly requested by TCS and Figuli/HEG (the purported due diligence experts) for the purpose of negotiating an acquisition, refutes any argument that the information is only comprised of ideas.

2. Misappropriation Or The Threat of Misappropriation Is Well Pled

Defendants argue that there are no allegations that they disclosed plaintiff's trade secrets to another or that there is any threat that they will do so. TCS Mem.

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[17] *Yield Dynamics, Inc. v. TEA Systems Corp.,* 154 Cal.App.4th 547 (2007) does not support a contrary view. There, the appellate court affirmed a judgment in defendants' favor after a *full* trial on plaintiff's claim that defendants' misappropriated eight segments of a source code. The court stated that plaintiff presented *no* evidence (i) that the segments were valuable to a competitor, (ii) the functions were unknown in the industry; or (iii) of the length of time it would take to create the functions. *Id*. at 561, n. 13. On a motion to dismiss prior to discovery, a different standard applies. *Brocade Communications Sys., Inc. v. A10 Networks, Inc.*, No. 10-CV-03428-LHK, Slip Op., 2011 WL 1044899, *5 (N.D. Cal. Mar. 23, 2011) (court's role on a motion to dismiss is to determine whether or not plaintiff has "alleged facts sufficient to 'provide the grounds of [its] entitlement to relief'" citing *Twombly,* 550 U.S. at 555.

at12-13; Figuli/HEG Mem. at 8-9. To the contrary, the central theory of the case is that defendants misappropriated plaintiff's confidential information and are using it to unfairly compete with the Law School through TCS's affiliation with COL. FAC, ¶¶ 1, 8-12, 26-29, 31-34, 60-63.

"Misappropriation of a trade secret includes: '(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;' . . . 'Improper means' in turn, is defined to include 'theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.'" *SpringDesign, Inc., supra,* 2010 WL 542556 * 6, citing Cal. Civ. Code § 3426.1(b) and *DVD Copy Control Ass'n., supra*, 116 Cal.App.4th at 251, n. 7.

Plaintiff alleges that it provided the confidential documents to defendants pursuant to the terms of an NDA that expressly required that defendants return the documents or provide a certification of destruction. FAC, ¶ 26. Defendants have failed to return the information or provide the required certification. *Id.* That fact alone is sufficient to show misappropriation which "can occur through improper *acquisition* of a trade secret, not only through use." *San Jose Construction, Inc., supra*, 155 Cal.App.4th at 1544 (emphasis in original). Disclosing or using information in breach of a duty to maintain secrecy constitutes "improper means" under CUTSA. Cal. Civ. Code § 3426.1(a).

In addition, a claim for injunctive relief under CUTSA can be made based solely on the threat of misappropriation. *Central Valley General Hospital v. Smith*, 162 Cal.App.4th 501, 523-525 (2008). Threatened misappropriation may be shown (or inferred) in various ways, including facts demonstrating that the defendants misused or disclosed trade secrets in the past; evidence that the defendants intend to

improperly use or disclose the trade secrets; and possession of trade secrets by the defendants who refuses to return the secrets following a demand. *Id*. at 527-528.[18]

Plaintiff alleges that defendants used or disclosed the confidential trade secret information in conjunction with the affiliation with COL and have also stated facts from which a strong inference can be drawn that the information is being used to compete against the Law School. FAC ¶¶27-30 (allegations that defendants have used plaintiff's trade secret information in negotiating and affiliating with COL, COL's intended efforts to seek WASC accreditation, the development of a "fiduciary council" that seemingly bears a striking resemblance to the "Joint Advisory Boards" proposed by Dean Pulle (¶ 23)); ¶¶ 31-32 (describing the advantages of the affiliation between COL and TCS which were the very ones proposed by the Law School in the private meetings with Figuli, Haynes and TCS CFO Keith); ¶¶ 55-62 (discussing the scope of the trade secrets and alleging that defendants have "actually misappropriated or threaten to misappropriate" the information and identifying facts from which it can be inferred that defendants have improperly used the information); and ¶¶ 13-15, 22-24, 25, 27, 31-32, 33, 61 (describing Haynes active role in the negotiations and receipt of confidential trade secret information and Haynes subsequent appointment to COL's Board of Trustees. The foregoing facts support plaintiff's claim that defendants used and threaten to use plaintiff's confidential trade secret information.[19]

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[18] In *Central Valley*, although the court ultimately held that the facts failed to support the issuance of an injunction based on threatened misappropriation it did so *not* on the pleadings but after an *18-day trial* on a full factual record. *Id.*, at 510.

[19] Figuli's effort to distance himself from the NDA by proclaiming that he was not a signatory to the document is unavailing. Figuli/HEG Mem., p. 9, n. 2. Figuli and HEG received the Law School's confidential documents and information directly from the Law School and actively participated in all facets of the parties' discussions. *See, e.g.*, FAC, ¶¶ 20, 21 and 23.

Defendants fail to address the foregoing allegations and instead erroneously argue that plaintiff is pleading nothing more than an inevitable disclosure claim. TCS Mem. at 13; Figuli/HEG Mem. at 9. The "inevitable disclosure doctrine" allows "a trade secret owner to prevent a former employee from working for a competitor despite the owner's failure to prove the employee has taken or threatens to use trade secrets. Under that doctrine the employee may be enjoined by demonstrating the employee's new job duties will inevitably cause the employee to rely upon knowledge of the former employer's trade secrets." *Whyte v. Schlage Lock Co.*, 101 Cal.App.4th 1443, 1446 (2002). California courts have been reluctant to adopt the inevitable disclosure doctrine on policy grounds since it can restrict employment and "'distort the terms of the employment relationship and upset the balance which courts have attempted to achieve in construing non-compete agreements.'" *Id*., pp. 1462, 1463 *citing EarthWeb, Inc. v. Schlack*, 71 F.Supp.2d 229, 311 (S.D. N.Y. 1999). *Whyte* acknowledged that narrowly drafted restrictive covenants in employment contracts are permissible to the extent necessary to protect an employer's trade secrets. 101 Cal.App.4th at 462-1463. Plainly, the doctrine applies to the employer/employee relationship – a relationship that does not exist in the present case. Rather, plaintiff seeks to enjoin an unrelated company, TCS, and its agents from continuing to wrongfully use the Law School's confidential information as means of competing against it. *Cf. Southern California Institute of Law v. TCS Educ. System*, 2011 WL 1296602, at *3 n.2 (holding that the non-competition covenant in the NDA is not barred by statute or applicable case law).

D. Tortious Interference With Contract Is Properly Alleged Against Figuli and HEG

Defendants seek dismissal of the negligent misrepresentation claim based on two erroneous arguments.[20] First, they contend that the plaintiff has not alleged what intentional acts Figuli and HEG committed that induced TCS's breach of the NDA. Figuli/HEG Mem. at 10. Second, defendants theorize that because they were working on behalf of TCS when TCS breached the NDA, they are excused from liability under the so-called "agent immunity rule." *Id*. at 11. The Court should reject these arguments.

1. Defendants' Intent To Disrupt Plaintiff's Contractual Rights Is Well Pled

In *Quelimane*, *supra*, the California Supreme Court stated that the tort of interference with contract does not require the plaintiff to plead or prove that the defendant acted with specific intent to induce the breach or disruption. 19 Cal. 4th at 56. In determining that intentional interference with contract does not contain a specific intent requirement, the Court relied on the Restatement Second of Torts. *Id.* The Restatement, section 766, comment j, makes clear that the tort of intentional interference with contract applies not only when a defendant acts with the purpose or desire to interfere but that "[i]t applies also to intentional interference ... in which

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[20] The elements of the claim are: (i) the plaintiff had an existing, enforceable contract with a third party; (ii) the defendant knew of the contract; (iii) defendant committed intentional acts designed to interfere with or disrupt the contract; (iii) there was actual interference with or disruption of the contractual relationship between the plaintiff and the third party; and (iv) there were resulting damages to the plaintiff. *Quelimane Co., Inc. v. Stewart Title Guar. Co.* 19 Cal.4th 26, 55 (1998); *SCEcorp. v. Superior Court*, 3 Cal.App.4th 673, 677 (1992). Remedies include damages and injunctive relief. *Remillard-Dandini Co. v. Dandini* , 46 Cal. App. 2d 678, 680 (1941); *California Auto Court Assn. v. Cohn* 98 Cal. App. 2d 145, 149 (1950); 5 Witkin, *Summary of California Law*, Torts, § 740, p. 1068 (10th Ed. 2005).

the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action." Id. *citing* Rest.2d Torts, § 766, com. j, p. 12.[21] Moreover, intent to interfere may be inferred from a defendant's actions. *Savage v. Pacific Gas & Elec. Co.*, 21 Cal. App. 4th 434, 449 (1993).

Contrary to defendants' argument, the FAC alleges facts in support of the allegation that defendants Figuli and HEG knew that their conduct in negotiating TCS's affiliation with COL interfered with the Law School's contractual rights. Figuli and HEG obtained the Law School's confidential information and trade secrets pursuant to the NDA, which Figuli allegedly drafted. FAC ¶6:17-18; ¶¶13-16; 19-20; 22-24 and 68. Figuli actively participated in all of the strategic discussions with the Law School where the plaintiff's confidences and trade secrets were considered. *Id*. at ¶¶13-16; 19-20; and 22-24. Figuli and HEG still possess copies of the Law School's confidential documents. *Id*. at ¶ 20: 26-27 (documents were sent directly to Figuli and HEG); and ¶27: 21-23 (Haynes admits to Dean Pulle that Figuli is still in possession of the Law School's confidential documents). Defendants refuse to return the documents or certify their destruction. *Id*. at ¶45 (alleging continuing breach of NDA because of defendants' refusal to return the confidential documents or certify their destruction).

The FAC alleges that Figuli concealed from the plaintiff that he was negotiating with COL in violation of the NDA. *Id*. at ¶26:11-15; ¶27:23-25; and ¶28. On January 22, 2010, Figuli wrote to Dean Pulle stating that TCS was passing on the "opportunity" to acquire the Law School "at this time." *Id*. at ¶25. It may be

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[21] The California Supreme Court reaffirmed this holding in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1155 (2003) (proof of specific intent is also not required to establish interference with prospective economic advantage).

inferred that the sudden cessation of the negotiations between TCS and the plaintiff were brought about by Figuli's "analysis" that a better bargain could be struck with COL. *Id*. at ¶25:21-22. It may also be inferred that defendants were negotiating with COL contemporaneously with their negotiations with the Law School. *Id*. at ¶28. Using the information obtained from the Law School to compare and contrast with COL is a breach as access to such information was strictly limited to use for the purpose of facilitating a transaction between TCS and the Law School. *Id*. at ¶17; ¶26:13-15; ¶27:16-21.

The fact that TCS did not terminate the NDA and retained the Law School's confidential documents misled the Law School into believing that TCS might pursue an acquisition with them in the future. *Id*. at ¶26:3-15. Figuli's concealment of the COL negotiations prevented the plaintiff from taking action to enforce its rights under the NDA to enjoin the misuse of its confidential information and trade secrets and seek to block the affiliation from occurring. *Id*. at ¶¶69-70.

In September 2010, after the Law School learned of the affiliation through media reports (¶30), Haynes admitted to Dean Pulle that Figuli "actively participated in negotiating TCS's affiliation with COL." *Id*. at ¶27: 23-25; *see also* ¶13:13-16 (Figuli and HEG are key negotiators on TCS affiliations and acquisitions). Figuli and HEG knew that the NDA required the return or destruction of the plaintiff's confidential documents and precluded TCS from competing with the Law School after gaining access to the Law School's confidential information and trade secrets. *Id*. at ¶27 and ¶29:12-20; *Southern California Institute of Law v. TCS Educ. System*, 2011 WL 1296602, at *3 (plaintiff's "allegations that TCS misused confidential information in pursuit of other business opportunities defeats TCS's argument that there is no broadly worded non-compete provision that could serve as the basis for a breach of contract claim.").

Figuli and HEG's conduct in wrongfully refusing to return the plaintiff's confidential documents, using the Law School's confidential information and trade

secrets to compare the Law School to COL, concealing their intention to assist TCS in pursuing an affiliation with COL and negotiating that affiliation, are all intentional acts that caused TCS to breach the NDA. As shown above, even if Figuli and HEG contend that they did not specifically intend to cause TCS's breach of the NDA, the foregoing acts demonstrate that these defendants knew that their acts would interfere with plaintiff's contractual rights by placing TCS in a position where it would be able to compete against the plaintiff while in wrongful possession of plaintiff's confidential information and trade secrets.

2. The "Agent Immunity" Defense Is Inapplicable And, In Any Event, Cannot Be Properly Adjudicated On A Motion To Dismiss

Defendants rely on the general rule that corporate agents when acting in their official capacities cannot be held liable for tortiously interfering with the corporation's contract. Figuli/HEG Mem. at 11. They mischaracterize this theory, however, as the "agent immunity rule." *Id.*[22] Because the plaintiff is not contending that Figuli and HEG conspired to induce the breach of the NDA, the rule has no application in this case.

Figuli and HEG rely on two sentences in the FAC which they argue should be interpreted by the Court to mean that plaintiff is alleging that these defendants were acting as TCS's agents regardless of the extent of their own alleged wrongdoing. Figuli/HEG Mem. at 10-11. When read in context, the first allegation merely states that when Figuli and Haynes encountered Dean Pulle for the first time, they stated

[22] The agent immunity rule provides that "duly acting agents and employees cannot be held liable for conspiring with their own principals...." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 512(1994). "While the agent's immunity rule derives from the principle that ordinarily corporate agents and employees acting for or on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract, the rule, on its face, applies only to claims of conspiracy to commit a tort or violate a statute." *Mintz v. Blue Cross of California*, 172 Cal.App.4th 1594, 1605 (2009) (italics, quotations and citations omitted).

that they were approaching the Law School on TCS's behalf and that Figuli was assisting TCS in identifying suitable acquisition candidates and structuring transactions for it. FAC ¶13.

The second allegation relied on by the defendants is simply a one sentence agency allegation that generally applies to all defendants. *Id.* at ¶38. Generic agency allegations of this sort should not be read in isolation, but must be considered in light of other allegations. *See e.g.*, *Doctors Med. Ctr. of Modesto v. Global Excel Mgmt.*, No. 1:08-cv-01231 OWW DLB, 2009 U.S. Dist. LEXIS 71634 **9-11 (E.D. Cal. Aug. 14, 2009).

California Civil Code § 2295 defines agent as follows: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." Under California law, the primary characteristic of an agency relationship is the principal's right to control the agent's conduct. *In re Tsurukawa*, 287 B.R. 515, 521 (9th Cir. 2002). The essential characteristics of an agency relationship are as follows: "(1) An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself; (2) an agent is a fiduciary with respect to matters within the scope of the agency; and (3) a principal has the right to control the conduct of the agent with respect to matters entrusted to him." *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.*, 148 Cal. App. 4th 937, 964 (2007) (citation omitted). Moreover, the existence of agency is a question of fact. *Michelson v. Hamada*, 29 Cal. App. 4th 1566, 1576 (1994).

The relationship between Figuli and HEG, on the one hand, and TCS, on the other, does not fit the definition of agency. Figuli and HEG could not bind TCS to the NDA or any other agreement. The NDA was executed by Keith, a duly authorized officer of TCS. FAC ¶16:19-21. There is no allegation or evidence that TCS had the power to control Figuli and HEG. Figuli and HEG are not employees or officers of TCS, nor are they signatories to the NDA. Instead, these defendants

are hired by TCS to find deals and then negotiate with the target toward a TCS acquisition or affiliation. FAC ¶7:10-12. They hold themselves out as leading experts in the "American higher education industry" and detail their expertise in offering clients a wide array of transactional and regulatory advice, structuring affiliations, acquisitions and reorganizations, raising capital, conducting due diligence investigations and providing other specialized business and legal services. *Id. at* ¶6. Thus, Figuli and HEG were not working solely to benefit TCS or under its direction or control like subordinate employees. Rather, these defendants make a business of selling their services to the education industry, including TCS, and hold themselves out as experts. Further, TCS did not direct Figuli to keep copies of the Law School's confidential documents and seek out a deal with COL. Figuli and HEG engaged in such conduct voluntarily with knowledge that in doing so the Law School's rights and business would be adversely affected.

In *Doctors Med. Ctr. of Modesto v. Global Excel Mgmt., supra*, the district court denied a judgment on the pleadings and upheld a contract interference claim under California law. One of the defendants, an entity that reviewed claims submitted by medical facilities for payment, had allegedly wrongfully reduced the invoice submitted by the plaintiff hospital after it had rendered medical services to a patient. 2009 U.S. Dist. LEXIS 71634 at **1-2. The claims reviewer contended that it was merely acting as an agent and adviser for another defendant whom the plaintiff alleged was a "health plan". *Id*. at *4. The complaint contained a generic agency allegation applicable to all defendants which the defendant claims reviewer relied on in arguing that it was the agent of the alleged health plan. *Id*. at **9-11. The Court concluded that the agency allegation, in the face of contrary factual allegations made by the plaintiff, could not serve as a basis for the granting the

motion because plaintiff's contrary allegation had to be accepted as true. *Id*. at **11-12.[23]

Even if one were to conclude that the cryptic allegations cited by defendants are inconsistent with plaintiff's contention that Figuli and HEG are not TCS's agents, dismissal of the tortious interference claim is unwarranted. A complaint may make alternative or inconsistent claims and allegations. *See* Fed. R. Civ. P. 8(d)(2) and (3); *MB Financial Group, Inc. v. U.S. Postal Service*, 545 F.3d 814, 818 (9th Cir. 2008) .

The cases cited in support of defendants' agency argument are readily distinguishable. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503(1994) overruled decisions which held that a party to a contract could be held liable for conspiracy to interfere with the contract. *Id*. at 511, 513–514. The starting point for the Court's analysis was the prohibition against imposing tort liability for contractual interference on a party to the contract. *Id*. The Court noted that conspiracy is not an independent tort. *Id*. Instead, such liability is premised on the notion that the coconspirator is legally capable of committing some underlying tort which will then serve as the basis for conspiracy liability. *Id*. Imposing conspiracy liability for interference with a contract on a party to that contract is therefore irreconcilable with the rule excluding contracting parties from liability for

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[23] The claims reviewer also contended that it was entitled to certain statutory and common law privileges that precluded the plaintiff from suing it. The district court rejected the defendant's argument that the common law adviser's privilege applied based on the plaintiff's allegation that the reviewer was not an agent of the alleged health plan defendant. *Id*. at **15-17. In doing so, the court distinguished *Mintz v. Blue Cross of California*, 172 Cal.App.4th at 1603-1604 on the basis that, *inter alia*, the contract of insurance attached to the complaint in that case expressly established that the defendant claims administrator was the agent of the insurer and was therefore standing in the shoes of the insurer when it determined claims. 2009 U.S. Dist. LEXIS 71634 at *15.

contractual interference. *Id*. The facts of *Applied Equipment* are likewise inapposite because there was no claim that a third party had interfered with a contract.[24]

The other cases cited by defendants involve claims by employees who sought to sue their fellow employees for causing their wrongful termination. Figuli/HEG Mem. at 11 *citing Shoemaker v. Myers*, 52 Cal.3d 1, 10, 23-25 (1990); *Wise v. Southern Pacific Co.* , 223 Cal.App.2d 50, 71–73 (1963).[25] These cases provide no support for dismissing the tortious interference claim because they reflect the simple fact that entities cannot act except through their agents and employees.

E. Plaintiff Has Adequately Stated A Claim for Violations of the UCL

Defendants challenge the adequacy of plaintiff's claim for violation of California's Unfair Competition Law ("UCL"), Cal. Business & Professions Code, § 17200, based on the purported insufficiency of the claim for misappropriation of trade secrets. TCS Mem. at 13-14; Figuli/HEG Mem. at 12. Inherent in defendants' argument is their concession that a validly stated CUTSA claim will support a claim for violations of the UCL – a concession that is amply supported by case law. *See, e.g., San Jose Construction, Inc., supra,* 155 Cal.App.4th at 1546 (denying summary

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[24] Defendants quote from *Applied Equipment*, 7 Cal.4th at 514 wherein the Court stated that 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." Figuli/HEG Mem. at 10:4-6. In *Woods v. Fox Broadcasting Subsidiaries*, 129 Cal. App.4th 344, 352 (2005), the court rejected an argument that this quoted language meant that not only were contracting parties immune from interference claims, so too were another class of defendants who, although not parties to a contract, were not true "strangers" to the contract because they had some general interest in the contractual relationship. Properly read, the quoted language only refers to interference by a "third person" who is not a "party to the contract." *Id.* at 353.

[25] *Wise,* 223 Cal.App.2d at 71–72, which held that one contracting party, by use of a conspiracy theory, could impose liability on another for the tort of interference, was overruled by *Applied Equipment,* 7 Cal.4th at 510.

judgment on UCL claim where triable issues of fact were presented as to defendants' misappropriation of trade secrets); *Spring Design, Inc. v. Barnesandnoble.com, LLC, supra,* 2010 WL 5422556, *9 ("a claim for trade secret misappropriation can also support a claim for violation of the UCL"); *Oculus Innovative Sciences, Inc. v. Prodinnv, S.A. De C.V.*, No. C-08-04707 MMC, Slip Op. 2010 WL 4774659 (N.D. Cal. Nov. 16, 2010) (holding that injunctive relief under the UCL and CUTSA is an available remedy). As demonstrated above, the FAC pleads a valid claim under CUTSA and accordingly the validity of that claim compels a denial of defendants' motion to dismiss the UCL claim.[26]

F. <u>TCS Improperly Seeks To Have This Court Predetermine Plaintiff's Entitlement To Injunctive Relief</u>

Allegations seeking permanent injunction should not be dismissed or stricken at the pleading stage when the underlying claims are not dismissed. *See SEC v. Life Wealth Mgmt., No*. CV 10-4769 RSWL (MANx), 2010 U.S. Dist. LEXIS 130521, **3-4 (C.D. Cal. Nov. 24, 2010); *In re Lloyd's Am. Trust Fund Litig*., 954 F. Supp. 656, 682 (S.D.N.Y. 1997); *Tanglewood E. Homeowners v. Charles-Thomas, Inc*., 849 F.2d 1568, 1576 (5th Cir. 1988). Plaintiff alleges a continuing breach of the NDA, which TCS does ***not*** seek to dismiss, continuing violations of CUTSA and other violations of statutory and common law by TCS. *SEC v. Tiffany Industries, Inc*., 535 F. Supp. 1160, 1164-65 (E.D. Mo. 1982) (injunctive relief claim requires a factual assessment improper on a motion to dismiss).

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[26] TCS also argues that the UCL claim is deficient as to it insofar as plaintiff seeks to state a UCL claim based on the breach of contract claim. TCS Mem. at 14. Plaintiff's UCL claim is not solely based on the breach of the NDA but also the misappropriation and misuse of plaintiff's confidential information. Under these circumstances dismissal of plaintiff's UCL claim is not proper. *Spring Design, Inc., supra*, 2010 WL 5422556, *9 (refusing to grant summary judgment as to UCL claim because plaintiff's claim was based on more than just a breach of a non-disclosure agreement).

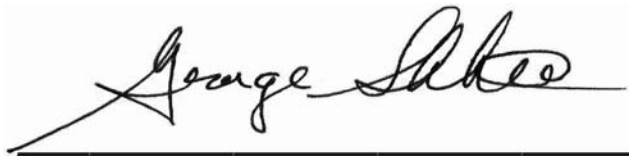
IV. CONCLUSION

For all of the foregoing reasons and authorities, plaintiff respectfully requests that the Court deny defendants' motions in their entirety. Alternatively, plaintiff requests leave to amend if any of its claims are found deficient.[27]

DATED: July 19, 2011

THE LAW OFFICES OF GEORGE A. SHOHET

KREINDLER & KREINDLER LLP

By: 

George A. Shohet
Attorneys for Plaintiff

[27] Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who have consented to electronic service are being served with a copy of the foregoing document via Central District of California CM/ECF system on July 19, 2011

/s/ George A. Shohet