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d/b/a HIGHER EDUCATION GROUP

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN CALIFORNIA INSTITUTE OF LAW, a California corporation,

Plaintiff,

vs.

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

Defendants.

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

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

Complaint Filed: October 25, 2010
Trial Date: TBD

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

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I. INTRODUCTION

In many ways, Plaintiff's late-submitted Opposition to the defendants' Motions to Dismiss mirrors the spirit of the lawsuit itself. It employs verbosity and vagueness as a substitute for substance, and it goes to all lengths to conjure legal claims where the facts do not support them. Unbelievably, the Opposition goes so far as to argue that David Figuli and his company, Global Equities, LLC d/b/a Higher Education Group ("HEG"), were not acting at all relevant times as the agents of TCS Education System ("TCS"), even though that fact is specifically alleged in the First Amended Complaint ("FAC") and is central to Plaintiff's claims against TCS.

The FAC alleges, in substance, that Figuli/HEG acted as TCS's representative in negotiating an affiliation with Plaintiff, rejecting the deal, and instead forging an affiliation between TCS and Plaintiff's chief competitor. Yet, for purposes of maintaining a tortious interference claim against Figuli and HEG, Plaintiff argues they were outsiders acting entirely on their own, just carrying out their own business. Plaintiff is not merely attempting to plead in the alternative; it is playing "fast and loose" with the judicial process in order to keep parties in legal jeopardy who never belonged there in the first place. To the extent Plaintiff has any claims at all, its real beef is with TCS, and the complaint should reflect that reality.

Plaintiff supplied some information to the defendants at one point that Plaintiff labels as confidential. TCS agreed not to disclose or use the information in any way outside potentially merging with Plaintiff. But that does not mean that Plaintiff actually supplied trade secrets to the defendants, or that the defendants did, or will, misuse trade secrets in any way. The FAC does not contain facts that would support such claims against Figuli and HEG (or any of the defendants, for that matter).

As Plaintiff has had two tries to state valid claims against Figuli and HEG, and has failed to do so, it is time to pare this lawsuit down to its true essence: did TCS, through its agents, violate its agreement with Plaintiff by keeping, using or disclosing

some information supplied by Plaintiff in a manner exceeding the scope permitted by the agreement? The answer is decidedly "no," and once the scope of the complaint is properly narrowed, TCS will get on with the business of proving that. To get there, the claims for relief against Figuli and HEG must be dismissed with prejudice.

II. ARGUMENT

A. Plaintiff's Opposition Was Late and Should Be Disregarded.

Plaintiff's Opposition to the defendants' motions to dismiss was due on July 18, 2011. Local Rule 7-9 (oppositions to motions due 21 days before hearing). The week before it was due, the defendants agreed to stipulate to, and the Court granted, Plaintiff's request to file just one Opposition to both motions to dismiss, with an extended maximum length of 35 pages. Despite these accommodations, and despite having three weeks to prepare an Opposition after the motion to dismiss was filed, Plaintiff filed its Opposition on July 19, 2011, offering no excuse or explanation for its lateness. This left the defendants only four business days to prepare a Reply, which was still due on July 25, 2011. *See* Local Rule 7-10.

Local Rule 7-12 permits the Court to decline to consider any memorandum filed late (or even to deem the motions consented-to). In this case, at least disregarding the Opposition is warranted, as Plaintiff is represented by counsel, had plenty of time to prepare an opposition, was granted special accommodations for opposing the motions, and then, by filing late, cost the defendants one of the five work days they had to prepare a Reply to an unusually long Opposition.

B. *Iqbal* Significantly Raised Pleading Standards.

The "plausible on its face" pleading requirement recently announced in *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937 (2009), "is a significant change, with broad-reaching implications." *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at

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969 (quoting *Iqbal*, 129 S.Ct. at 1949). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.*

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

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

Plaintiff persists in listing documents and pieces of information, applying generic labels, expecting the Court and defendants to agree that such items must inherently contain or constitute trade secrets. *See* Plaintiff's Mem. of Pts. & Auth. in Opp. to Defs.' Motion to Dismiss ("Opp. Mem.") at pg. 18, ll. 15-19. Although the items listed in the Opposition do not exactly correspond to the items pled in the FAC, the flaw in the approach is the same. The FAC does not state which items of information allegedly disclosed to defendants are known only to Plaintiff, are not readily available or discernible to the public or other law school administrators, and have independent economic value providing a competitive advantage to Plaintiff.

The FAC uses catch phrases like "plans and strategy," "competitive challenges," "financial affairs," and "strengths [and] weaknesses." FAC ¶¶ 20, 22. It also mentions minutes of Board meetings, tax filings, financial statements, wage and salary information, faculty biographies, policy manuals, leases, a State Bar Registration filing, and Bar Exam pass rates. *Id.* at ¶ 20. The FAC cryptically asserts that documents associated with something called a "State Bar inspection report" are "perhaps a law school's most sensitive and guarded secret." *Id.* at ¶ 21.

These allegations contain a lot of words without conveying what they must in order to state a claim that they are trade secrets. Which of these items is truly a secret? Some of it clearly gets disclosed to governing bodies. Some of it gets widely disseminated to students, prospective students, and the public at large. Some is available from the Bar Examiners. What "plans, strategies and challenges" would

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not also be known by anyone involved in running a law school? The case relied upon by Plaintiff, *Brescia v. Angelin*, 172 Cal.App.4th 133 (2009), holds that if the mere identification of the trade secret does not "describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and [] permit the defendant to ascertain at least the boundaries within which the secret lies," then that information must be pled particularly. *Id.* at 147, 149-150. From the FAC, it is impossible to discern what exactly is being designated as a trade secret, let alone the boundaries of the various identified documents within which trade secrets lie, and what economically valuable information is allegedly known only to Plaintiff.

Which "plans and strategies" are pieces of valuable, empirical data, as opposed to just an abstract concept that cannot comprise a trade secret? *See Silvaco Data Systems v. Intel Corp.*, 184 Cal.App.4th 210, 220-221 (2010). What is so independently economically valuable about any of the items listed (let alone all of it)? How would a competitor gain an economic advantage by having any of this information? *See Yield Dynamics, Inc. v. TEA Systems Corp.*, 154 Cal.App.4th 547, 568 (2007) ("the core inquiry is the value to the owner in keeping the information secret from persons who could exploit it to the relative disadvantage of the original owner"). The fact that Plaintiff may have expended some time, effort and expense to compile the information mentioned in the FAC does not mean it has economic value to anyone else. Contrary to what the Opposition asserts, the FAC does not allege that the defendants "expressly requested" the information Plaintiff provided—in actuality, they did not request it, want it, need it, or use it in any way.

Self-servingly describing this information as "sensitive," "secret" and Plaintiff's "crown jewels" does not render it a trade secret. A similarly generic form of pleading trade secrets was found to be insufficient to state a claim for violation of CUTSA in *Farhang v. Indian Institute of Technology*, 2010 WL 2228936, **13-14

(N.D.Cal. June 1, 2010) (mere description of what plaintiff's core technology does would be insufficient by itself to state claim; allegations of "business models and implementations," described only as including "specifics regarding the actual implementation of the global railways and Indian Railways project," does not identify trade secrets with sufficient particularity).

Further, the fact that Plaintiff's information was made the subject of the NDA does not establish it as a trade secret. *See Yield Dynamics*, *supra*, 154 Cal.App.4th at 561 (source code that was kept confidential and made the subject of a non-disclosure agreement nevertheless did not constitute a trade secret because it did not have independent economic value to anyone other than its programmer). In short, the allegations that information Plaintiff allegedly provided to defendants comprises trade secrets are entirely conclusory. The FAC does not state facts that establish the trade secret nature of anything allegedly disclosed to the defendants.

2. The FAC Does Not Adequately Plead Misappropriation.

The FAC alleges in purely conclusory fashion that the defendants have misused or could misuse its trade secrets to gain an advantage in competing against Plaintiff. A similar approach led a court to dismiss a plaintiff's trade secrets cause of action in *Farhang*, *supra*, 2010 WL 2228936 at *15 ("The [complaint] states that defendants disclosed plaintiffs' trade secrets without their express or implied consent.... This conclusory statement, however, is not supported by adequate factual allegations.... [P]laintiffs have failed to allege facts providing a reasonable basis for inferring that [defendant] improperly disclosed or used plaintiffs' trade secrets and thus have failed to 'raise a right to relief above the speculative level.'")

Careful scrutiny of the lengthy FAC reveals that there are no allegations of fact that support any manner of actual or threatened misuse of trade secrets by Figuli and HEG. *See Moss*, *supra*, 572 F.3d at 970 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.") (quoting

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Iqbal, 129 S.Ct. at 1950) (emphasis added). The FAC does not allege that the defendants improperly acquired its purported trade secrets; rather, it alleges Plaintiff voluntarily provided them to facilitate TCS's consideration of affiliating with Plaintiff.[1] Plaintiff therefore must plead facts that plausibly demonstrate that the defendants improperly used or disclosed the trade secrets, or will do so imminently, not merely the possibility that they did or will do so. Plaintiff has, at best, alleged that the defendants could have misappropriated trade secrets, but has not pled facts rendering it plausible that they did or will (in part because it has not pled facts showing the competitive value of any of the information to TCS).

All Plaintiff's allegations boil down to is that TCS rejected Plaintiff's proposal, ended up affiliating with Santa Barbara and Ventura Colleges of Law ("COL"), and Plaintiff is concerned the information it provided could be used to compete against it. The mere act of TCS acquiring COL after first exploring a possible acquisition of Plaintiff does not demonstrate imminent misuse of Plaintiff's alleged trade secrets. The fact that COL recognized and publicized the advantages of affiliating with TCS does not support misappropriation of trade secrets either, as those advantages would be obvious to anyone who is considering such an affiliation. Similarly, COL's intention to pursue WASC accreditation, as any school in its position would, does not create an inference of misappropriation.

Plaintiff's way of trying to get around the requirement of showing actual or

[1] *Central Valley Gen. Hosp. v. Smith*, 162 Cal.App.4th 501 (2008), relied upon by Plaintiff, did not hold that possession of trade secrets and wrongly refusing to return them after a demand constitutes misappropriation. Rather, it only assumed for the sake of discussion that that could be a form of misappropriation, then found that the defendant had not engaged in such conduct. *Id.* at 528. In any event, the defendants here also have not engaged in such conduct. They have never refused to return any of Plaintiff's information. The information was transmitted electronically, so there is no way to "return" it. Since this dispute began, Plaintiff has never demanded only destruction of its information—it has demanded that TCS go through with its affiliation with Plaintiff, end its affiliation with COL, or both.

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threatened misappropriation is to allege that the "NDA…effectively barred defendants from becoming [Plaintiff]'s competitor because to do so would violate their contractual and fiduciary-like obligations." FAC ¶ 29. This allegation is the essence of inevitable disclosure (i.e., once TCS had Plaintiff's trade secrets, it could not affiliate with a competitor because it would be in a position to misuse the trade secrets). The inevitable disclosure doctrine has been roundly rejected by California courts and federal courts applying California law because it violates California's strong public policy in favor of competition.

Moreover, there is nothing about the courts' rejection of the inevitable disclosure doctrine that permits it to be applied outside the employer/employee relationship. Business and Professions Code section 16600, which was the statutory foundation for *Whyte*, *FLIR Systems* and other decisions rejecting inevitable disclosure, prohibits all contracts that restrain "anyone" from engaging in a trade. The notion of using the NDA to prevent an entity from competing with Plaintiff without regard to actual or threatened misappropriation of trade secrets is just as invidious to section 16600 as invoking a confidentiality agreement to prevent a particular employee from working for a competitor.

Above all, what cannot be lost on Figuli's and HEG's motion is the following: even if the conclusory allegations of misuse or threatened misuse were sufficient, the only party that is in competition with Plaintiff and could benefit from misusing its trade secrets is TCS (now that it is affiliated with COL), not Figuli and HEG.

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

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

Plaintiff's Opposition totally misses the mark on Figuli and HEG's first argument for dismissal of the tortious interference with contract claim. The defendants were not arguing anything about specific intent versus implied intent. They were arguing that the FAC contains no facts showing they did anything to

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induce TCS's alleged breach of the NDA, whether with specific intent or some other kind of intent. The cases Plaintiff cites still refer to "acts" on the part of a defendant that result in interference. Since the mere act of negotiating an affiliation with COL on TCS's behalf did not in any way violate the NDA, Plaintiff cannot rely on Figuli's participation in that act by itself to establish tortious interference.

Further, just because Figuli may have helped put TCS in a position to misuse Plaintiff's NDA information does not mean he knew it would occur or was substantially certain to occur. Even if TCS breached the NDA, Plaintiff would need to plead facts showing overt acts by Figuli that encouraged or provoked such breach in order to state a claim. This did not occur, which is why Plaintiff cannot aver such facts, other than in purely conclusory fashion.

Plaintiff argues that one could possibly infer Figuli's role in a breach simply from the sequence that, on behalf of TCS, he stopped talking with Plaintiff and, without informing Plaintiff, started talking with COL, about an affiliation. But Figuli had no obligation to inform Plaintiff he and TCS were going to contact COL, so it does not support an inference of tortious interference. The range of possible inferences one could draw from the alleged facts does not equate to Plaintiff making a plausible case of interference.

2. Agents May Not Be Sued for Tortious Interference with Contract.

Plaintiff is almost falling over itself trying to backtrack from the FAC in order to save its fourth claim. The Opposition goes to some length to argue why Figuli and HEG would not qualify as agents of TCS.[2] That is interesting, because if it is true,

[2] For example, it suggests that "there is no allegation or evidence that TCS had the power to control Figuli and HEG." Opp. Mem. at pg. 30, ll. 26-27. Actually, the allegation that TCS "retained" Figuli and HEG (FAC ¶ 7) is evidence of exactly such power. Nor does the FAC allege TCS lacked the power to control Figuli and HEG. (Who does Plaintiff think instructed Figuli to reject Plaintiff's proposal?) Plaintiff also suggests that since Figuli/HEG were selling their representation to TCS pursuant to their own business, they were not agents. Opp. Mem. at pg. 31, ll. 7-10. If this

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then nothing Figuli did would create liability for TCS. But the main issue here is what does the FAC allege? It alleges that Figuli and HEG represented themselves to Plaintiff to be TCS's agents, and were, in fact, TCS's agents. FAC ¶¶ 13, 38.[3] Nothing alleged in the FAC is inconsistent with Figuli's/HEG's agency, which is why the *Doctors Med. Ctr.* case Plaintiff cites (Opp. Mem. at pg. 31) is inapposite.

In addition, the FAC alleges that, pursuant to the NDA, "TCS and Figuli were charged with maintaining and using all of the foregoing Information with 'at least' the same care as [Plaintiff's] most trusted fiduciary." FAC ¶ 22 (emphasis added). Since Figuli was undisputedly not a signatory to the NDA, the only way he could be bound by its terms would be as an agent of TCS, the party to the contract. Footnote 19 of the Opposition appears to make this very point: that Figuli still had to abide by the NDA since he acted as TCS's agent throughout the parties' discussions.

So basically, when it comes to holding TCS liable for misrepresentations and breaches allegedly committed by Figuli, Plaintiff wants Figuli to be TCS's agent. But when it comes to holding Figuli independently liable, it does not want him to be TCS's agent. Plaintiff cannot have it both ways, and the reality amply depicted by

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were the standard, then no outside attorneys, negotiators, brokers, etc. would ever be considered agents of their clients.

[3] Beyond that, it alleges in great detail that Figuli is a lawyer who specializes in matters relating to institutions of higher education, including affiliations, and that TCS regularly "retains" Figuli and HEG in achieving such affiliations. *See generally* FAC ¶¶ 5-7. The FAC goes on to allege that Figuli acted on behalf of, and spoke for, TCS in various ways throughout discussions with Plaintiff about possible affiliation. *See, e.g.*, FAC ¶¶ 14 ("Figuli stated that TCS was very interested in pursuing an acquisition of [Plaintiff]"); 15 ("Figuli agreed to the parameters set by [Plaintiff]"); 19 ("Figuli and TCS led [Plaintiff] to believe that TCS would be its strong ally"); 24 ("On November 18, 2009, Figuli e-mailed Dean Pulle thanking him for his thoughts and confirmed these suggestions would be taken into account"); 25 (Figuli sent Dean Pulle an email on January 22, 2010, stating in part, "it is our perception that an arrangement that would be acceptable to us would be very disappointing to your board. As a result of that analysis, we think it would be best for TCS to take a pass on the SCIL opportunity at this time.").

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the FAC (and not disputed by anyone) is that Figuli and HEG were TCS's agents.

Regardless of whether the "agent immunity rule" is the correct moniker to apply, the main case Plaintiff relies on acknowledges the principle that agents acting on behalf of a corporation cannot be sued for inducing a breach of the corporation's contract. *Applied Equipment Corp. v. Litton Saudi Arabia*, 7 Cal.4th 503, 512 (1994). The *Applied Equipment Corp.* court applied that rule to reject a conspiracy claim, but it did not in any way limit the rule to conspiracy claims. In fact, it relied on *Shoemaker v. Myers*, 52 Cal.3d 1, 24-25 (1990), which dealt directly with a claim of tortious interference with contract against a company's agent, not a claim of conspiracy. *Shoemaker* states the axiom that "corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract." *Id.* at 24 (emphasis added). If its holding were limited to employees, as Plaintiff contends, it would not have said "agents and employees."

E. The FAC Fails to State a Claim for Violation of the UCL.

The parties appear to be in agreement that the Unfair Competition Law ("UCL") claim for relief relies entirely on the viability of the other claims. Since the only other claims against Figuli and HEG should be dismissed as argued above, there is no dispute that the UCL claim must suffer the same fate.

III. CONCLUSION

For the foregoing reasons, and as granting leave to amend yet again would be an exercise in futility, Figuli and HEG respectfully request that this Court dismiss Plaintiff's 3rd, 4th and 5th claims for relief without leave to amend.

Dated: July 25, 2011

STRAZULO FITZGERALD LLP

By /s/ Cody Jaffe
Maurice Fitzgerald
Cody Jaffe
Attorneys for Defendants David J. Figuli and Global Equities, LLC d/b/a Higher Education Group

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 25, 2011.

/s/ Code Jaffe

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