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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN CALIFORNIA INSTITUTE OF LAW, a California corporation,

Plaintiff,

vs.

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

Defendants.

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

DEFENDANT TCS EDUCATION SYSTEM'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Complaint Filed: October 25, 2010
Discovery Cut-Off: tbd
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Hearing Date: August 8, 2011
Hearing Time: 1:30 p.m.
Hearing Dept.: 750

Defendant TCS EDUCATION SYSTEM hereby submits this Reply to Plaintiff SOUTHERN CALIFORNIA INSTITUTE OF LAW'S Opposition to Defendant's Motion to Dismiss the Complaint.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its First Amended Complaint ("FAC"), Plaintiff, a for-profit evening law school, operating under the mistaken belief that preliminary discussions regarding a potential affiliation with Defendant somehow created a fiduciary relationship, now attempts to target competition through mischaracterizing the straightforward non-disclosure agreement between the parties as an all-encompassing covenant not to compete. Through the lengthy narrative of its version of the history and chronology of events between the parties, Plaintiff hopes that this Court will extract some hint or inference of a misrepresentation by Defendant. Although it has taken the opportunity to simply repeat in the Opposition nearly all of the allegations made in the FAC, Plaintiff still cannot allege any facts that would allow this Court to make the reasonable inference that Defendant made a misrepresentation to Plaintiff.

Additionally, Plaintiff catalogs the various documents that it provided to Defendant, pursuant to the non-disclosure agreement, and for the purpose of Defendant's due diligence. Plaintiff has not, however, alleged how these documents constitute or contain any trade secrets. More significantly, Plaintiff has not, because it cannot, allege Defendant's actual or threatened misappropriation. Rather, plaintiff unjustifiably infers that Defendant must have misused or will misuse information included in Plaintiff's documents simply because the documents are in Defendant's possession.

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

II. SUMMARY OF FACTS

Plaintiff is a California corporation that operates a law school with campuses in Santa Barbara and Ventura Counties. FAC ¶ 3. Santa Barbara and Ventura Colleges of Law ("COL") is also a law school located in the tri-county area of San Luis Obispo, Santa Barbara, and Ventura Counties. FAC ¶ 3. Defendant TCS Education System ("TCS") is a not-for-profit corporation that affiliates with specialized schools and colleges, providing schools with financial support and other resources. FAC ¶ 5.

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

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

In July 2010, the State Bar's Committee of Bar Examiners ("SBCBE") approved a pending affiliation between TCS and COL, plaintiff's alleged competitor. FAC ¶ 28. Plaintiff allegedly learned of this affiliation through a press release on or about September 22, 2010. FAC ¶ 30. On October 1, 2010, TCS and COL entered into an affiliation agreement. *Id.* The affiliation will allegedly strengthen COL by adding new resources and creating new opportunities. *Id.*

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

III. LEGAL ARGUMENT

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

Accepting the truth of plaintiff's allegations, a reasonable inference of misrepresentation cannot be found in the FAC. Instead, plaintiff seeks to ignore the law and imply a misrepresentation where none exists.

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

As this Court correctly held in its initial decision dismissing plaintiff's Complaint with leave to amend, implied assertions are insufficient to state a claim for negligent misrepresentation. *Southern California Institute of Law v. TCS Educ. System* (2011) Not Reported in F.Supp.2d, 2011 WL 1296602 ("*SCIL*") at *6, citing *Wilson v. Century 21 Great W. Realty* (1993) 15 Cal.App.4th 298, 306, 18 Cal.Rptr.2d 779. Plaintiff continues to direct the Court's attention to the allegedly implied promise of TCS that it would not pursue business opportunities in competition with plaintiff. FAC ¶ 27; see Opp. at p. 14: 12-19. Such an implied promise, however, cannot form the basis of a claim for negligent misrepresentation. *SCIL, supra,* 2011 WL 1296602 at *6 (holding that representations implying that TCS "intended to become plaintiff's ally and [join together to] compete with [COL]," and "acquire" plaintiff were nothing more than implied assertions, insufficient to state a claim for negligent misrepresentation). Additionally, to the extent a misrepresentation may be inferred through conduct, any inference of a misrepresentation must be reasonable. In light of the plain language of the NDA to the contrary and plaintiff's allegations regarding the parties' conduct, a misrepresentation by TCS cannot be reasonably inferred.

In this regard, the cases cited by plaintiff are frankly inapposite. First, *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 54 Cal.Rptr.2d 468 ("*Thrifty-Tel*") does not involve even remotely similar facts. In *Thrifty-Tel*, a cyber-fraud case, defendants hacked into the telephone carrier's system, acquired the carrier's confidential access codes, and used them to make long distance phone calls. Although defendants there argued that their computer hacking did not constitute a misrepresentation, the Court agreed with Thrifty-

Tel that use of the confidential access codes was the *legal equivalent* of a misrepresentation that defendants were authorized users of Thrifty-Tel's services, and Thrifty-Tel relied to its detriment on that misrepresentation when its computer automatically granted them access to the network. *Id.* at 1567.

Second, in *Universal By-Products, Inc. v. City of Modesto* (1973) 43 Cal.App.3d 145, 117 Cal.Rptr. 525 ("*Universal By-Products*"), the facts are also highly distinguishable. There, the City of Modesto issued a notice/invitation to bidders that it would receive bids for the granting of an exclusive license to provide garbage collection services within the city for a term of eight years. Universal By-Products argued that, in representing that it would receive and consider the bids, the City of Modesto impliedly represented that it would consider the bids in good faith and that the bids were not being sought "merely to gain plaintiff's research data, expertise, analysis and monetary investment." *Id.* at 150. The Court believed that such a representation *reasonably and fairly* could be inferred from the notice to bidders. *Id.* at 152.

Neither *Thrifty-Tel* nor *Universal By-Products* concerns similar facts or circumstances. While the representations inferred in those cases were found to be fair and reasonable under the specific circumstances presented therein, the representation that plaintiff seeks this Court to infer from the conduct between plaintiff and TCS would neither be fair nor reasonable. As set forth in TCS' motion to dismiss, plaintiff alleges that TCS somehow "led [plaintiff] to believe that TCS would be its strong ally and enable [plaintiff] to compete against . . . COL." FAC ¶ 19. Despite the parties' decidedly limited dealings, plaintiff claims that it believed that TCS would purchase it. FAC ¶ 23 ("The gist of those discussions indicated that an acquisition of [plaintiff] was imminent."). Plaintiff unreasonably equates such representations of TCS' *interest* in a *potential* acquisition of plaintiff with representations that TCS

would not affiliate with a competitor. FAC ¶ 51. Such inference is particularly unreasonable in light of plaintiff's admission that TCS was "identifying suitable acquisition candidates." FAC ¶ 13. Additionally, plaintiff cannot reasonably claim that TCS concealed the potential that TCS might affiliate with someone other than plaintiff given that plaintiff admits that this was disclosed to them. *Id.*

Plaintiff also tries to unreasonably infer a misrepresentation through the NDA. Contrary to what plaintiff would have this Court believe, the plain terms of the NDA contain no promise that TCS would not compete with plaintiff. FAC ¶ 18; see NDA at ¶ 10. The true terms of paragraph 10 of the NDA read as follows:

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

In arguing that the above provision created a covenant not to compete, plaintiff urges this Court to imply a representation by TCS that is inconsistent with the express terms of the NDA. Moreover, the fact that the "implied promise" is inconsistent with the express terms of the NDA negates the element of justifiable reliance. See *Seeger v. Odell* (1941) 18 Cal.2d 409, 415 ("*Seeger*") (explaining that a plaintiff may not put faith in representations that are shown by facts within his observation to be so "patently and obviously false that he must have closed his eyes to avoid discovery of the truth.")

Plaintiff's reliance on *W. Ref. Yorktown, Inc. v. BP Corp. N. Am.* (E.D. Va.2009) 618 F.Supp.2d 513 ("*Yorktown*"), to counter the holding in *Seeger* is without merit (beyond the fact that *Yorktown* is not controlling upon this Court). In *Yorktown*, the parties offered different interpretations of ambiguous contract provisions that were both reasonable. In this case, however, plaintiff

offers no explanation as to how paragraph 10 of the NDA is ambiguous or susceptible to more than one *reasonable* meaning, and certainly not to the interpretation that plaintiff is attempting to place upon it. *Id.* at 523.

2. Plaintiff Has Failed to Plead Sufficient Facts To Establish A Duty Owed To Plaintiff To Disclose TCS' Intent To Negotiate With Santa Barbara And Ventura Colleges Of Law.

First, as discussed above, plaintiff contradicts its Opposition argument regarding concealment since TCS informed plaintiff that it was "identifying suitable acquisition candidates." FAC ¶ 13; see Opp. at p. 16: 3-17. Second, plaintiff would have this Court improperly accept its legal conclusion that TCS had "an affirmative duty…to disclose that it intended to negotiate with COL toward an affiliation." FAC ¶ 50: 3-5; see also Plaintiff's Opposition to Defendant's Motion to Dismiss (hereinafter "the Opposition" or "Opp.") at pg. 16: 4-6; *Pareto v. F.D.I.C.* (9th Cir.1998) 139 F.3d 696, 699 ("[C]onclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss."). Any facts in support of such a conclusion are wholly absent from both the FAC and the Opposition. Instead, plaintiff directs the Court to the "parties' discussions" and "TCS' contractual obligation" under the NDA, from which plaintiff unreasonably infers a duty to disclose. As discussed in the prior section, however, plaintiff *unreasonably* equates representations of TCS' interest in a potential acquisition of plaintiff and TCS' interest in conducting due diligence *before* making any such offer with representations that TCS would not affiliate with a competitor.

As plaintiff correctly states, a duty to disclose may arise through a fiduciary duty or through an intent to induce detrimental reliance at the time defendant concealed the material information. *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864, 245 Cal.Rptr. 211. Plaintiff implicitly concedes to TCS'

argument that the NDA did not create a fiduciary relationship between TCS and plaintiff; instead, plaintiff's Opposition focuses on the second manner by which a duty to disclose may exist. See Opp. at pg. 16-17.

The cases cited by plaintiff, however, do not apply to this action because, in such cases, the defendants *possessed* material information *at the time* they actually entered into business transactions with the plaintiffs. See *Los Angeles Unified Sch. Dist. v. Great Am. Ins. Co./Hayward Constr. Co.* (2010) 49 Cal.4th 739 ("*L.A.U.S.D.*"). In *L.A.U.S.D.*, the Court held that a cause of action for negligent nondisclosure could lie without a showing of fraudulent intent because the school district *was aware* of and failed to disclose nonconformities and deficiencies regarding a particular property *at the time* L.A.U.S.D. provided the plaintiff-contractor information upon which it relied when submitting a bid to repair the property. *Id* at 753. Similarly, in *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 245 Cal.Rptr. 211, the Court concluded that a triable issue of material fact existed as to whether defendant, an insurance agent, negligently failed to inform plaintiffs of a certain exclusion from the insurance policy that he obtained for plaintiffs. *Id.* at 864-867.

Here, on the other hand, the FAC merely speculates that TCS intended to induce plaintiff's reliance at the time it engaged in discussions regarding a potential affiliation with plaintiff. FAC ¶ 28. Plaintiff bases its inference solely on the timing of certain events, namely the November 17, 2009, meeting and the fact of the July 2010 approval of the pending TCS-COL affiliation by the SBCBE. FAC ¶ 28. Such an inference is not reasonable because plaintiff cannot draw a connection between the timing of these events, some eight (8) months apart, and TCS' alleged intent to affiliate with COL. For these reasons, plaintiff has not and cannot allege facts that would allow this Court to reasonably infer that TCS was aware of its intent to affiliate with COL *at the time* TCS entered the NDA and concealed such intent so that plaintiff would

disclose its confidential information.

As plaintiff has failed to allege essential elements of a claim for negligent misrepresentation, TCS requests that the Court grant its Motion to Dismiss plaintiff's second cause of action for negligent misrepresentation.

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

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

To state a claim under CUTSA, a plaintiff must allege "actual or threatened misappropriation" of a trade secret. *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1279, 95 Cal.Rptr.3d 307, 316 (citing Cal. Civ. Code § 3426.2(a)) ("*FLIR*"). Actual misappropriation is "generally speaking, improper acquisition of a trade secret or its nonconsensual use or disclosure." *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1457, 125 Cal.Rptr.2d 277. Threatened misappropriation is a threat "to misuse trade secrets, manifested by words or conduct, where the evidence indicates imminent misuse." *FLIR*, *supra*, 174 Cal.App.4th at 1279. A trade secret is defined by California law as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d).

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

Plaintiff hopes to gain some traction from the fact that the NDA states that plaintiff and TCS would provide each other with "access to proprietary, trade secret and confidential information." Opp. at p. 18: 5-10; NDA Preamble. Labeling information as a trade secret or as confidential information, however, does not conclusively establish that the information is, in fact, a trade secret or is confidential. *Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1430, 7 Cal.Rptr.3d 427, 430. More importantly, an agreement between parties defining a trade secret may not be decisive in determining whether the court will so regard it. *Am. Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal.App.3d 1318, 1325, 228 Cal.Rptr. 713.

Although this is plaintiff's second attempt at establishing misappropriation, plaintiff's inability to identify the alleged trade secrets within its list of documents it purportedly disclosed to TCS, as required under California law, continues. Plaintiff alleges that it disclosed trade secrets by providing TCS with the following documents: meeting minutes, President's annual report to the Board of Directors, State Bar annual registration filings, marketing plans, State Bar inspection reports, analysis of bar exam pass rates, documents reflecting plaintiff's financial reports and analysis, and strategies communicated verbally from plaintiff's dean to Figuli and Haynes. FAC ¶ 55-58. The FAC fails to allege how any of these documents and verbal communications constitutes a trade secret. "It is critical to any CUTSA cause of action . . . that the information claimed to have been misappropriated be clearly identified." *Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 220, 109 Cal.Rptr.3d 27, 38, *rev'd on other grounds*; *Imax Corp. v. Cinema Techs., Inc.* (9th Cir.1998) 152 F.3d 1161, 1164–65.

Plaintiff's reliance on *San Jose Construction, Inc. v. S.B.C.C., Inc.*

(2007) 155 Cal.App.4th 1528, 67 Cal.Rptr.3d 54 ("*San Jose*") actually highlights the defect in plaintiff's cause of action. In *San Jose*, the information claimed to constitute trade secrets consisted of processes, systems, and client information – rather than the documents or diskettes in which they were held – relating to specific construction projects that San Jose Construction, Inc., had invested substantial time and money in developing. *Id.* at 1535; see *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1287, 64 Cal.Rptr.2d 698 ("[A] trade secret may be embodied in documents, or other personal property, but has an intrinsic value which is based upon, or at least preserved by, being safeguarded from disclosure."). Here, however, plaintiff has failed to identify the purported trade secrets within each alleged document and verbal communication.

Moreover, the mere treatment of information as confidential does not make it a trade secret; it must nevertheless possess independent economic value. *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 66 Cal.Rptr.3d 1 (finding that source code that was kept confidential and made the subject of a non-disclosure agreement did not constitute a trade secret because it did not have independent economic value to anyone other than its programmer.); see also *GAB Bus. Serv., Inc. v. Lindsey & Newsom Claim Serv., Inc.* (2000) 83 Cal.App.4th 409, 429, 99 Cal.Rptr.2d 665 (declining to identify confidential salary information as a trade secret because it had no independent economic value). Plaintiff fails to allege how each document or verbal communication it contends is a trade secret possesses independent economic value.

As the FAC alleges, plaintiff and TCS engaged in no more than two (2) preliminary discussions relating to the potential acquisition of plaintiff (FAC ¶ 13, 16); yet, plaintiff would have this Court make the unreasonable inference that during these limited encounters, and without proof, plaintiff transmitted a

trade secret each time Dean Pulle engaged in an oral or written communication with TCS. Based on plaintiff's failure to adequately identify the trade secrets within each purported document or discussion, TCS requests that this Court grant its Motion to Dismiss plaintiff's third cause of action for misappropriation of trade secrets.

2. Plaintiff Has Failed To Allege Actual Misuse.

A cause of action for misappropriation of trade secrets requires that plaintiff allege sufficient facts to show TCS' actual or threatened misappropriation. This means that plaintiff must allege "words or conduct" by TCS that would suggest TCS' misuse. *FLIR*, *supra*, 174 Cal.App.4th at 1279.

Plaintiff is incorrect in stating that the fact that defendants have purportedly failed to return the Information or certify its destruction is sufficient to establish misappropriation. Opp. at p. 23: 14-16. Rather, misappropriation requires "words or conduct" that would suggest improper acquisition or nonconsensual use or disclosure of a trade secret. *Whyte, supra,* 101 Cal.App.4th at 1457. Accepting the truth of plaintiff's contention that defendants have failed to return the Information or certify its destruction does not produce the end result that TCS has misused or disclosed the Information to anyone.

Additionally, plaintiff alleges that TCS actually misappropriated its ideas of increasing marketing in the Santa Barbara area and advertising on buses. FAC ¶ 62. Ideas, however, do not qualify as trade secrets. *Silvaco, supra,* 184 Cal.App.4th at 220. Moreover, trade secrets do not consist of ideas, such as advertising on buses, that are generally known to the public. Civ. Code § 3426.1(d).

3. Plaintiff Has Failed To Allege Threatened Misuse.

Plaintiff misstates the law regarding threatened misappropriation. Opp.

at p. 24: 1-2; see *Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 75 Cal.Rptr.3d 771. While threatened misappropriation may be shown from continued possession of trade secrets, that theory of liability requires that the defendant *had actually misused or disclosed* some of those trade secrets in the past. *Id.* at 527. As explained above, an alleged failure to return purported trade secrets or certifying their destruction, albeit in opposition to an agreement, does not constitute misuse or disclosure of the trade secrets. Additionally, although plaintiff alleges misuse and disclosure (FAC ¶ 27-30; Opp. at p. 24: 3-20), plaintiff has failed to provide sufficient facts that would allow a reasonable inference of such a legal conclusion.

Plaintiff bases its claim of threatened misuse or disclosure on the following allegations: George R. Haynes ("Haynes), an alleged agent of TCS (FAC ¶ 13), participated in the discussions regarding TCS' potential acquisition of plaintiff and gained access to the Information; as a member of COL's Board of Trustees, Haynes is "now capable of using the plaintiff's Information to develop strategies to compete against [plaintiff]" (FAC ¶ 61); and COL is using marketing strategies that plaintiff proposed to TCS (FAC ¶ 62).

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

As plaintiff is unable to allege actual or threatened misappropriation of the purported trade secrets, TCS requests that this Court grant its Motion to Dismiss plaintiff's third cause of action for misappropriation of trade secrets.

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

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

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

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

Plaintiff seeks to enjoin TCS from engaging in its lawful business,

operating a law school in affiliation with COL. FAC ¶ 31. Additionally, plaintiff seeks to enjoin TCS from using or disclosing plaintiff's purported trade secrets, without first having established such misappropriation. FAC ¶ 65. Despite the double bases for its requested relief, neither provides this Court the imminent threat of harm required for issuance of an injunction.[1]

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

Plaintiff seeks a permanent injunction "to prevent TCS from taking further steps to pursue the affiliation with COL." FAC ¶ 31; FAC at p. 35: 12-17. Without an injunction, plaintiff *fears* that it will "lose the ability to compete, suffer a downturn in its enrollment and may go out of business." FAC ¶ 37.

Plaintiff bases its request for injunctive relief on its allegation that the NDA is actually a covenant not to compete, which TCS has allegedly breached. FAC ¶ 18. As discussed above, the express terms of the NDA indicate its purpose is to protect plaintiff's confidential Information in furtherance of facilitating a transaction between plaintiff and TCS. NDA Preamble. Plaintiff itself concedes such a purpose. FAC ¶ 22. Furthermore, the NDA expressly allowed the parties to pursue other business endeavors "of any kind" so long as TCS maintained the confidentiality of plaintiff's Information. NDA ¶ 2.

Despite the terms of the NDA, plaintiff seeks to transform the NDA into a covenant not to compete, whereby TCS promised not to pursue a transaction in competition with plaintiff. FAC ¶ 18. Assuming *arguendo* that the NDA constitutes a covenant not to compete, it would be void and unenforceable under California law and well-founded public policy against broad restrictions

[1] To qualify for a permanent injunction, the plaintiff must prove (1) the elements of a cause of action involving the wrongful act sought to be enjoined; and (2) the grounds for equitable relief. *San Diego Unified Port Dist. v. Gallagher* (1998) 62 Cal.App.4th 501, 503.

on lawful business. *Dowell v. Biosense Webster, Inc.* (2009) 179 Cal.App.4th 564, 574, 102 Cal.Rptr.3d 1, 8, citing Cal. Bus. and Prof. Code § 16600 (California courts "have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility.").

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

Based on the foregoing authority, plaintiff should not be allowed to enjoin TCS from pursuing its lawful business of operating a law school in the tri-county region.

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

An injunction based on purported misappropriation of trade secrets in inappropriate in this case, where plaintiff has failed to allege the required element of impending and immediate injury. *East Bay Mun. Utility Dist. v. Department of Forestry & Fire* (1996) 43 Cal.App.4th 1113, 1126, 51 Cal.Rptr.2d 299; see also *Del Monte Fresh Produce Co. v. Dole Food Co., Inc.* (S.D.Fla.2001) 148 F.Supp.2d 1326, 1335 (injunction will issue only where there is substantial threat of impending injury). Plaintiff provides no facts that would suggest or impending and immediate injury. Moreover, plaintiff offers no explanation in its Opposition as to why such a required showing would not apply to the circumstances in this case.

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

Plaintiff seeks redemption in *SEC v. Tiffany Industries, Inc.* (E.D. Mo. 1982) 535 F.Supp. 1160 ("*Tiffany's*"). In that case, the court was deterred from dismissing plaintiff's cause of action for a preliminary injunction because of the seriousness of plaintiff's allegations of violations of the Securities Laws and past illegal activity. *Id.* at 1165. There, the SEC had *sufficiently alleged* that Tiffany Industries, Inc. ("Tiffany's"), had committed illegal securities violations such that an inference that future violations of the law may occur was reasonable. *Id.*

Contrary to plaintiff's allegation, *Tiffany's* does not stand for the proposition that a claim for injunctive relief may not be dismissed on a motion under F.R.Civ.P. 12(b)(6). *Id.* Rather, the *Tiffany's* Court recognized that an injunction cannot issue where the plaintiff cannot "establish the existence of a threatened wrong." *Id.* The Court went on to state that the SEC had sufficiently pleaded such a threat to withstand dismissal of its claim. That is not the case here, however, where plaintiff has not and cannot establish either that the NDA is a valid non-compete agreement which this Court may enforce, or that there is an immediate threat of misappropriation of trade secrets.

Plaintiff also cites other case law for the contention that a claim for permanent injunctive relief should not ordinarily be dismissed at the pleadings

stage. See *SEC v. Life Wealth Mgmt.*, Not Reported in F.Supp.2d, 2010 WL 4916609 (C.D.Cal.2010) at *1; *In re Lloyd's Am. Trust Fund Litig.* (S.D.N.Y. 1997) 954 F.Supp. 656, 682; *Tanglewood E. Homeowners v. Charles-Thomas, Inc.* (5th Cir.1988) 849 F.2d 1568, 1576. Inasmuch as plaintiff seeks injunctive relief without first establishing a threatened wrong, TCS requests that this Court deny the requested relief for plaintiff's failure to allege any threatened misappropriation, as discussed in Section B.

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

Leave to amend should be denied if the court determines that "allegation(s) of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distributing Co. v. Serv–Well Furniture Co., Inc.* (9th Cir. 1986) 806 F.2nd 1393, 1401. This typically applies where the facts are not in dispute, and the sole issue is whether there is liability as a matter of substantive law. *Albrecht v. Lund* (9th Cir. 1988) 845 F.2nd 193, 195–196. As the aforementioned points demonstrate and despite two (2) attempts to do so, plaintiff remains unable to allege that TCS made an affirmative representation that it would not compete against plaintiff. Plaintiff can only infer such a representation through preliminary discussions over a mere 2 meetings. An implied representation, however, is insufficient to establish negligent misrepresentation. Moreover, despite plaintiff's efforts, plaintiff cannot transform a straightforward nondisclosure agreement into a covenant not to compete. TCS agreed to keep the Information confidential for the purposes of conducting due diligence; neither party agreed not to compete.

Additionally, plaintiff is unable to allege facts to show that the various documents and verbal communications it supplied constitute trade secrets or that TCS ever used or disclosed them. Moreover, plaintiff is still unable to

allege words or conduct by TCS that would suggest an imminent threat of their misuse. It maintains that TCS continues to possess its Information, but mere possession of trade secrets is not enough to establish misappropriation. Finally, plaintiff cannot allege any unlawful conduct sufficient to give rise to an unlawful competition claim. As such, defendant TCS respectfully requests that this Court dismiss plaintiff's second claim for negligent misrepresentation, third claim for misappropriation of trade secrets, and fifth claim for violation of the Unfair Competition Law, with prejudice and without leave to amend.

F. THE COURT MAY AWARD SANCTIONS FOR PLAINTIFF'S FAILURE TO FOLLOW THE LOCAL RULES.

Local Rule 7-13 allows this Court to issue sanctions, pursuant to Local Rule 83-7, against a party that files any document in opposition to any motion noticed for hearing after the time for filing has expired. An opposing party shall file its brief in opposition to the motion not later than twenty-one (21) days before the date designated for the hearing of the motion. Local Rule 7-9.

TCS' noticed the hearing on its Motion to Dismiss for August 8, 2011. As such, Plaintiff's Opposition to TCS' Motion to Dismiss was due on July 18, 2011; however, Plaintiff filed its Opposition on July 19, 2011. Plaintiff's untimeliness appears particularly unacceptable in light of the fact that Plaintiff requested the Court's approval in filing a memorandum of points and authorities exceeding the page limit, and clearly could have sought the Court's approval of an extension to file its Opposition. Plaintiff, however, not only failed to seek this Court's approval; it never sought to stipulate with TCS as to a continuance of the deadline to file its Opposition. For these reasons, sanctions against Plaintiff are appropriate.

IV. CONCLUSION

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

Respectfully submitted,

DATED: July 25, 2011

KAUFMAN BORGEEST & RYAN LLP

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

I declare as follows:

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

On July 25, 2011, I served a true and correct copy, with all exhibits, of the following document(s) described as follows:

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

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

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

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

[X] via electronic service through CM/ECF

SEE ATTACHED SERVICE LIST

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 25, 2011, at Calabasas, California.

By: Vanessa Manolatou
Signature of Declarant

By: Vanessa Manolatou
Name of Declarant

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