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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

REMOVABLE MEDIA SOLUTIONS,
INC.,

NO. CIV. S-08-3084 LKK/GGH

Plaintiff,

v.

O R D E R

AAR MOBILITY SYSTEMS, INC.,
GREG SCHELLHASE, DOES 1-100
and CORPORATION A-Z, inclusive,

Defendants.

_____ /

This case is before the court on diversity jurisdiction. Plaintiff Removable Media Solutions, Inc. ("RMSI") previously sought to sell a telecommunications device to the California National Guard. RMSI sought the assistance of defendant AAR Manufacturing, Inc., ("AAR") in this endeavor. The California National Guard eventually elected to retain the services of AAR but not RMSI in producing the device, and AAR subsequently sold similar devices to other states.

RMSI's surviving claims allege that AAR thereby breached "non-

1 circumvent" and "non-disclosure" agreements. AAR seeks summary
2 judgment on both claims.¹ For the reasons stated below, the court
3 grants AAR's motion as to the non-circumvent agreement but denies
4 the motion as to the non-disclosure agreement.

5 **I. Background²**

6 In 2003, RMSI entered an agreement with the California
7 National Guard wherein RMSI would develop a device to provide
8 "wireless communications access for persons located at an incident
9 or emergency site to their appropriate command center." The
10 parties refer to this as a "RATT box," without explaining what RATT
11 stands for. RMSI did not invent the concept underlying the RATT
12 box and such a device could be built with other companies'
13 technology, but RMSI offered a cheaper solution than those
14 available from other providers.

15 After this initial agreement, it was decided that the RATT box
16 should be truck mounted. To assist in this endeavor, RMSI
17 contacted AAR as a potential provider of shelters into which the
18 RATT box could be built. The two companies entered into an
19 agreement. In connection therewith, AAR signed separate
20 "noncircumvent" and "nondisclosure" agreements in April of 2004.

21
22 ¹ RMSI's complaint also enumerates claims for misappropriation
23 of trade secrets under Cal. Civ. Code § 3426.1(d) and for breach
24 of other unspecified contracts. RMSI explicitly states its non-
opposition to AAR's motion for summary judgment as to these claims.

25 ² The facts provided in this section are undisputed, with one
26 exception stated below. Unless another citation is given, quoted
language is taken the parties' statements of undisputed facts and
has been specifically affirmed by the other party.

1 Under the noncircumvent agreement, the parties agreed to:

2 refrain from either directly or indirectly
3 soliciting business and contracts from sources
4 not their own which have been made available
5 to them through this agreement, without the
6 express permission of the Party who made the
7 original introduction. In addition, all
8 Parties to this Agreement . . . will maintain
9 complete confidentiality regarding business
10 sources and will only disclose such business
11 sources under mutual Agreement and only after
12 written permission has been received from the
13 originator of the source.

9 Decl. of Hans. U. Stucki in Supp. of Def.'s Mot. Summ. J., Ex. D.
10 Under the nondisclosure agreement, AAR agreed, inter alia, "not to
11 use any Confidential Information disclosed to it by [RMSI] for
12 [AAR's] own use or for any purpose other than to carry out
13 discussions with [RMSI] concerning, and the undertaking of the
14 Relationship." Id. Ex. E. After these agreements were executed,
15 work on the project moved ahead with AAR as a "participant and
16 shelter provider." Throughout this time, the California National
17 Guard's primary contact regarding the project was RMSI.

18 On September 2, 2004, David Golden, the project manager for
19 the California National Guard, sent an email to the parties stating
20 that the California National Guard wished AAR to serve in the role
21 of "[s]helter config [sic] and project management." AAR had not
22 directly or indirectly "solicited" this role. Nonetheless, AAR
23 agreed to so serve. "RMSI's role [was] diminished to the
24 surveillance function only. RMSI had not agreed to, and was
25 unhappy about[,] its diminished role."

26 On September 20, 2004, Golden sent an email to RMSI inquiring

1 whether RMSI wished to remain associated with the project. The
2 motives underlying this email are disputed, but neither party
3 argues that these motives are relevant to the present motion.

4 Finally, on September 29, 2004, Golden "directed AAR to
5 discontinue use of RMSI from any future projects," after which "AAR
6 continued with the project as [p]roject manager, working directly
7 with" the California National Guard. "While AAR did not have
8 knowledge of the basis for this decision, it agreed to discontinue
9 use of RMSI and carried out the direction from" the California
10 National Guard. AAR did not discuss with RMSI whether, in doing
11 this, AAR breached the non-disclosure and non-circumvent
12 agreements. Nonetheless, Tom Luisi, on behalf of RMSI, informed
13 AAR that he believed that AAR's actions breached the agreements.

14 AAR build and sold sixteen RATT box units. Eight of these
15 were sold to the California National Guard. Of the remaining
16 eight, two were sold "to the Georgia National Guard through [the
17 California National Guard]," two to the Montana National Guard and
18 four to the Illinois National Guard.

19 **II. Standard for Summary Judgment under Fed. R. Civ. P. 56**

20 Summary judgment is appropriate when there exists no genuine
21 issue as to any material fact. Such circumstances entitle the
22 moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c);
23 see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970);
24 Secor Ltd. v. Cetus Corp., 51 F.3d 848, 853 (9th Cir. 1995). Under
25 summary judgment practice, the moving party

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1 always bears the initial responsibility of
2 informing the district court of the basis for
3 its motion, and identifying those portions of
4 "the pleadings, depositions, answers to
5 interrogatories, and admissions on file,
6 together with the affidavits, if any," which
7 it believes demonstrate the absence of a
8 genuine issue of material fact.

9 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R.
10 Civ. P. 56(c)).

11 If the moving party meets its initial responsibility, the
12 burden then shifts to the opposing party to establish the existence
13 of a genuine issue of material fact. Matsushita Elec. Indus. Co. v.
14 Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); see also First
15 Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89
16 (1968); Secor Ltd., 51 F.3d at 853. In doing so, the opposing party
17 may not rely upon the denials of its pleadings, but must tender
18 evidence of specific facts in the form of affidavits and/or other
19 admissible materials in support of its contention that the dispute
20 exists. Fed. R. Civ. P. 56(e); see also First Nat'l Bank, 391 U.S.
21 at 289. In evaluating the evidence, the court draws all reasonable
22 inferences from the facts before it in favor of the opposing party.
23 Matsushita, 475 U.S. at 587-88 (citing United States v. Diebold,
24 Inc., 369 U.S. 654, 655 (1962) (per curiam)); County of Tuolumne v.
25 Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).
26 Nevertheless, it is the opposing party's obligation to produce a
factual predicate as a basis for such inferences. See Richards v.
Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). The
opposing party "must do more than simply show that there is some

1 metaphysical doubt as to the material facts Where the
2 record taken as a whole could not lead a rational trier of fact to
3 find for the nonmoving party, there is no 'genuine issue for
4 trial.'" Matsushita, 475 U.S. at 586-87 (citations omitted).

5 **III. Analysis**

6 **A. Breach of The Non-circumvent Agreement**

7 AAR argues that it is entitled to summary judgment on this
8 claim because RMSI has provided no facts in support thereof and
9 alternatively because this agreement is rendered unenforceable by
10 Cal. Bus. and Prof. Code § 16600. RMSI's opposition memorandum
11 challenges solely the latter ground, but the former provides an
12 adequate basis for granting summary judgment.

13 Under California law, a claim for breach of contract includes
14 four elements: that a contract exists between the parties, that the
15 plaintiff performed his contractual duties or was excused from
16 nonperformance, that the defendant breached those contractual
17 duties, and that plaintiff's damages were a result of the breach.
18 Reichert v. General Ins. Co., 68 Cal. 2d 822, 830 (1968); First
19 Commercial Mortgage Co. v. Reece, 89 Cal. App. 4th 731, 745 (2001).

20 Here, RMSI has not provided evidence indicating that AAR
21 breached the non-circumvent agreement. It appears that two of the
22 agreement's prohibitions are potentially applicable. First, the
23 agreement prohibits the parties from "soliciting business and
24 contracts from sources not their own which have been made available
25 to them through this agreement, without the express permission of
26 the Party who made the original introduction." At oral argument,

1 RMSI argued that AAR's acceptance of the California National
2 Guard's propositions constituted solicitation of business with the
3 National Guard. The court cannot agree. Under California law,
4 interpretation of a written contract's terms is a question of law
5 for the court, which the court may ordinarily decide on summary
6 judgment. Waller v. Truck Ins. Exchange, 11 Cal. 4th 1, 18 (1995),
7 1 Witkin, Summary 10th Contracts § 741 (2005). Courts normally
8 interpret terms in accordance with "plain meaning or the meaning a
9 layperson would ordinarily attach" Waller, 11 Ca. 4th at
10 18. The plain meaning of "solicit" requires proactive seeking out.
11 Merriam-Webster's Online Dictionary (2010) (retrieved July 26,
12 2010, from <http://www.merriam-webster.com/dictionary/solicit>),
13 Black's Law Dictionary 1427 (8th Ed. 2004). RMSI agrees that AAR
14 did not request or initiate its involvement with the California
15 National Guard directly or indirectly. Pl.'s Response to Def.'s
16 SUF #16. As to other states' national guards, regardless of
17 whether AAR solicited the sales, RMSI has not argued that these
18 other entities were sources "made available to [AAR] through" the
19 parties' agreement, nor has RMSI offered any evidence on this
20 issue. Thus, there is no evidence that AAR breached this term of
21 the agreement.

22 Second, the agreement obliged AAR to "maintain complete
23 confidentiality regarding business sources." Again, RMSI offers
24 neither argument nor evidence of a breach of this term.

25 Because RMSI would bear the burdens of proof and production on
26 the question of breach at trial, RMSI's failure to provide evidence

1 on this question entitles AAR to summary judgment on this claim.

2 **B. Breach of the Non-disclosure Agreement**

3 The other remaining claim is for breach of the non-disclosure
4 agreement. AAR's sole argument for summary judgment on this claim
5 is that it is preempted by the Uniform Trade Secrets Act, as
6 adopted by California, and in particular by Cal. Civ. Code §
7 3426.7.³ In pertinent part, this statute provides that:

8 (a) Except as otherwise expressly provided,
9 this title does not supersede any statute
10 relating to misappropriation of a trade
11 secret, or any statute otherwise regulating
12 trade secrets.

11 (b) This title does not affect

- 12 (1) contractual remedies, whether or not
13 based upon misappropriation of a trade
14 secret,
15 (2) other civil remedies that are not
16 based upon misappropriation of a trade
17 secret, or
18 (3) criminal remedies, whether or not
19 based upon misappropriation of a trade
20 secret.

17 Undaunted by the statute's explicit statement that it does not
18 affect contractual remedies, AAR argues that the statute preempts
19 the claim for breach of the non-disclosure agreement. This
20 assault on the plain language of the statute fails.

21 Courts have held that except for the three exemptions noted in
22

23 ³ At oral argument, AAR asserted in passing that summary
24 judgment was also appropriate as to this claim because RMSI had
25 failed to provide evidence in support thereof. This argument was
26 not made in AAR's moving papers--AAR conspicuously argued only that
the breach of non-circumvent agreement claim was without
evidentiary support. Accordingly, the court does not consider this
argument here.

1 subsection (b), the statute implicitly "preempts common law claims
2 that are based on misappropriation of a trade secret." Ali v.
3 Fasteners for Retail, Inc., 544 F. Supp. 2d 1064, 1070 (E.D. Cal.
4 2008) (internal quotation marks omitted); see also K.C. Multimedia,
5 Inc. v. Bank of America Technology & Operations, Inc., 171 Cal.
6 App. 4th 939, 954 (2009), Accuimage Diagnostics Corp. v. Terarecon,
7 Inc., 260 F. Supp. 2d 941, 954 (N.D. Cal. 2003) (holding that this
8 interpretation was implied by Cadence Design Systems, Inc. v.
9 Avant! Corp., 29 Cal.4th 215, 224 (2002)).

10 AAR's argument that this implicit preemption extends to
11 contract claims invokes a gross misreading of the caselaw. AAR
12 quotes the statement from Digital Envoy, Inc. v. Google, Inc., 370
13 F. Supp. 2d 1025 (N.D. Cal. 2005) that "all state law claims based
14 on the same nucleus of facts as the trade secrets claim are
15 preempted under California's UTSA." Id. at 1034.⁴ AAR argues that
16 notwithstanding the statute's explicit saving of contract claims,
17 courts have stated that "common law claims" arising out of the same
18 operative facts as a trade secret claims are preempted, and that
19 contract claims are common law claims, so contract claims must be
20 preempted.

21 To the extent that Digital Envoy held that "all claims" are
22 preempted, it plainly referred to "all claims" argued to be
23 preempted in that case, i.e., claims for unfair competition and

24
25 ⁴ The court observes that this precise statement is not part
26 of the holding in Digital Envoy, but instead a summary of Callaway
Golf Co. v. Dunlop Slazenger Group Am., Inc., 318 F. Supp. 2d 216,
219 (D. Del. 2004).

1 unjust enrichment. Id. at 1035 ("California's statute . . .
2 preempts Digital's claims for unfair competition and unjust
3 enrichment."). Digital Envoy and other cases have explicitly
4 recognized that § 3426.7 does not preempt contract claims. Id. (§
5 3426.7 "explicitly states that claims based upon breach of contract
6 . . . are not preempted by the statute."); see also First Advantage
7 Background Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929,
8 936 (N.D. Cal. 2008), HiRel Connectors, Inc. v. United States, No.
9 CV 01-11069, 2006 U.S. Dist. LEXIS 93332 (C.D. Cal. July 18, 2006)
10 ("Plaintiff's claim for breach of contract is not preempted by
11 California's Uniform Trade Secrets Act."). While few California
12 courts have spoken to the scope of this statute, at least one state
13 court has allowed a claim for breach of a non-disclosure agreement
14 to proceed in parallel with a claim for misappropriation of trade
15 secrets. Glue-Fold, Inc. v. Slautterback Corp., 82 Cal. App. 4th
16 1018, 1021 (2000). Although Glue-Fold did not discuss possible
17 preemption of the contract claim, this may well be because the
18 issue was so clear as to require no discussion.

19 Although this conclusion should be obvious, the court has
20 exhaustively searched cases citing § 3426.7, finding no cases
21 providing even implicit support for AAR's theory. AAR's motion is
22 therefore denied as to this claim.

23 **IV. Conclusion**

24 For the reasons stated above, defendant AAR's motion for
25 summary judgment (Dkt. No. 20) is GRANTED IN PART. The court
26 GRANTS summary adjudication to defendant as to the first and third

1 claims enumerated in plaintiff's complaint, and as to plaintiff's
2 second claim insofar as that claim is predicated on breach of the
3 non-circumvent agreement. The court DENIES defendant's motion as
4 to plaintiff's second claim insofar as that claim is predicated on
5 breach of the non-disclosure agreement.

6 IT IS SO ORDERED.

7 DATED: July 28, 2010.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT