

1 duty of loyalty.¹ (Docket No. 90.) Presently before the court
2 is Christy Friend's motion to dismiss the claims against her for
3 interference with prospective economic relations and breach of
4 duty of loyalty for failure to state a claim pursuant to Federal
5 Rule of Civil Procedure 12(b)(6).

6 I. Factual and Procedural Background

7 Plaintiff sells, leases, and services office equipment
8 and systems including copiers and printers, and provides services
9 including technical support, document outsourcing, equipment
10 maintenance, and network facilities management. (SAC ¶ 2.)
11 Friend began working for plaintiff on October 22, 2008, in its
12 Sacramento, California, "Marketplace" as an Account Executive.
13 (Id. ¶ 6.) Friend was responsible for the sale and lease of
14 plaintiff's equipment, systems, and services, and the general
15 management of customer relationships and account services for
16 approximately 275 customers. (Id. ¶¶ 23-24.)

17 Friend resigned from employment with plaintiff on July
18 13, 2009. (Id. ¶ 6.) Plaintiff alleges that Friend now works
19 for Delta Copy Systems, Inc. ("DCSI"), a direct competitor of
20 plaintiff. (Id. ¶¶ 5, 8.) Plaintiff alleges that in the months
21 before her resignation, Friend deliberately delayed and failed to
22 conclude deals that she had "been working on for quite some time"
23 for plaintiff so that she could finalize them after her
24 resignation on behalf of DCSI. (Id. ¶ 79, 82-83.) Friend
25 allegedly failed to conclude any transactions for plaintiff in
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27 ¹ The court previously granted in part and denied in part
28 defendants' motion to dismiss the First Amended Complaint. (Dec.
9, 2010, Order (Docket No. 85).)

1 the twelve weeks prior to her resignation. (Id. ¶ 46.) Within a
2 few weeks of her employment with DCSI, though, Friend allegedly
3 stated that she had closed six deals for DCSI since joining the
4 company and had already transacted \$100,000.00 in revenue.

5 (Id. ¶ 83.) One of those transactions was a new contract with a
6 school district that she had been working on for five months on
7 behalf of plaintiff. (Id. ¶¶ 49, 77.) When the school district
8 account was going to be transferred to another sales
9 representative weeks before Friend's resignation as part of a
10 territory realignment, Rezente blocked the transfer, allegedly in
11 an attempt to delay the closing of the transaction. (Id. ¶ 78.)
12 The school district eventually signed a contract with DCSI.

13 (Id. ¶ 84.)

14 II. Discussion

15 On a motion to dismiss, the court must accept the
16 allegations in the complaint as true and draw all reasonable
17 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
18 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
19 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
20 (1972). "To survive a motion to dismiss, a complaint must
21 contain sufficient factual matter, accepted as true, to 'state a
22 claim to relief that is plausible on its face.'" Ashcroft v.
23 Iqbal, --- U.S. ----, ----, 129 S. Ct. 1937, 1949 (2009) (quoting
24 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This
25 "plausibility standard," however, "asks for more than a sheer
26 possibility that a defendant has acted unlawfully," and where a
27 complaint pleads facts that are "merely consistent with" a
28 defendant's liability, it "stops short of the line between

1 possibility and plausibility." Iqbal, 129 S. Ct. at 1949
2 (quoting Twombly, 550 U.S. at 556-57) (internal quotation mark
3 omitted).

4 In general, a court may not consider items outside the
5 pleadings upon deciding a motion to dismiss, but may consider
6 items of which it can take judicial notice. Barron v. Reich, 13
7 F.3d 1370, 1377 (9th Cir. 1994). A court may take judicial
8 notice of facts "not subject to reasonable dispute" because they
9 are either "(1) generally known within the territorial
10 jurisdiction of the trial court or (2) capable of accurate and
11 ready determination by resort to sources whose accuracy cannot
12 reasonably be questioned." Fed. R. Evid. 201. Judicial notice
13 may properly be taken of matters of public record outside the
14 pleadings. MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th
15 Cir. 1986) (taking judicial notice of a motion to dismiss in a
16 separate suit). Plaintiff has asked the court to take judicial
17 notice of several items on this docket; as these are matters of
18 public record, the court will take judicial notice of them.

19 A. Breach of Duty of Loyalty Claim

20 Plaintiff alleges that Friend breached her duty of
21 loyalty by recruiting others to leave Ikon, failing to inform
22 Ikon of her conflict of interest, deliberately stalling and
23 preventing the transaction of business and the closing of
24 potential deals in order to steer and close the deals on behalf
25 of DCSI, and encouraging potential Ikon customers to delay or
26 reject concluding any deal with Ikon. (SAC ¶ 134.)

27 The elements of a cause of action for breach of a duty
28 of loyalty are: "(1) the existence of a relationship giving rise

1 to a duty of loyalty; (2) one or more breaches of that duty; and
2 (3) damage proximately caused by that breach." Huong Que, Inc.
3 v. Luu, 150 Cal. App. 4th 400, 410 (6th Dist. 2007). The duty of
4 loyalty requires an agent "to act loyally for the principal's
5 benefit in all matters connected with the agency relationship."
6 Id. at 411.

7 Employees owe a duty of loyalty to their employers.
8 See Stokes v. Dole Nut Co., 41 Cal. App. 4th 285, 295 (3d Dist.
9 1995) ("[D]uring the term of employment, an employer is entitled
10 to its employees' undivided loyalty. . . . The duty of loyalty
11 is breached . . . when the employee takes action which is
12 inimical to the best interests of the employer.") (citations and
13 internal quotation marks omitted).

14 Plaintiff's allegations regarding Friend's recruitment
15 of other employees are insufficient to constitute breach of
16 loyalty, as the recruitment allegedly took place after Friend's
17 employment, and thus her duty of loyalty, ended. (See SAC ¶¶ 47,
18 67.) However, the allegations regarding her obstruction of deals
19 while employed for plaintiff are sufficient to state a claim.
20 During her employment, a relationship between Friend and
21 plaintiff existed giving rise to a duty of loyalty, and she
22 allegedly breached that duty by not only failing to do her job
23 but actively preventing deals that it was job to make. Plaintiff
24 alleges that these breaches resulted in damages of lost business.
25 (Id. ¶ 135.)

26 Friend argues that the allegations concerning the delay
27 and prevention of deals during her employment are preempted by
28 CUTSA, which provides the exclusive remedy for trade secret

1 misappropriation under California law. See *Silvaco Data Sys. v.*
2 *Intel Corp.*, 184 Cal. App. 4th 210, 236 (6th Dist. 2010) ("We
3 thus reaffirm that CUTSA provides the exclusive civil remedy for
4 conduct falling within its terms, so as to supersede other civil
5 remedies 'based upon misappropriation of a trade secret.'")
6 (quoting Cal. Civ. Code § 3426.7), disapproved of on other
7 grounds by *Kwikset Corp. v. Sup. Ct.*, 51 Cal. 4th 310 (2011); see
8 also *Gabriel Techs. Corp. v. Qualcomm Inc.*, No. 08cv1992, 2009 WL
9 3326631, at *11 (S.D. Cal. Sept. 3, 2009). CUTSA preempts all
10 common law claims that are "based on the same nucleus of facts as
11 the misappropriation of trade secrets claim for relief." *K.C.*
12 *Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171
13 Cal. App. 4th 939, 958 (6th Dist. 2009) (quoting *Digital Envoy,*
14 *Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1035 (N.D. Cal.
15 2005)) (internal quotation marks omitted).

16 In other words, preemption generally applies where
17 "there is no material distinction" between the wrongdoing
18 underlying the CUTSA claim and the non-CUTSA claim. See *Phoenix*
19 *Techs. Ltd. v. DeviceVM*, No. C 09-04697, 2009 WL 4723400, at *4
20 (N.D. Cal. Dec. 8, 2009) (quoting *Convolve, Inc. v. Compaq*
21 *Computer Corp.*, No. 00 CV 5141, 2006 WL 839022, at *6 (S.D.N.Y.
22 Mar. 31, 2006) (applying California law)). "[O]ther civil
23 remedies that are not based upon misappropriation of a trade
24 secret" and contractual or criminal remedies are not preempted.
25 Cal. Civ. Code § 3426.7(b).

26 The facts relevant to plaintiff's breach of duty of
27 loyalty claim are distinct from those relevant to the
28 misappropriation claim. Plaintiff alleges in its

1 misappropriation of trade secrets claim that defendants took
2 plaintiff's customer lists and other alleged trade secrets to
3 DCSI and used the trade secret information to make sales on
4 behalf of DCSI. (See SAC ¶¶ 90-125.) The loyalty claim is
5 essentially based on allegations that during her employment,
6 Friend sabotaged her work for plaintiff; the misappropriation
7 claim is based on allegations that Friend took and used trade
8 secrets in her new employment. Because these allegations are not
9 based on the same nucleus of facts, plaintiff's loyalty claim is
10 not preempted.

11 Accordingly, the court will deny Friend's motion to
12 dismiss the breach of duty of loyalty claim against her.²

13 B. Interference with Prospective Economic Relations Claim

14 The elements of a claim of intentional interference
15 with prospective economic relations are: (1) an economic
16 relationship between the plaintiff and a third party, with the
17 probability of future economic benefit to the plaintiff; (2)
18 knowledge by the defendant of the relationship; (3) intentional
19 acts by the defendant designed to disrupt the relationship; (4)
20 actual disruption of the relationship; and (5) economic harm
21 proximately caused by the acts of the defendant. Korea Supply
22 Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153 (2003). As
23 part of the third element, the plaintiff "must plead and prove as
24 part of its case-in-chief that the defendant not only knowingly

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26 ² Defense counsel made a passing reference to a
27 "causation and damages" argument at oral argument without fully
28 explaining what the argument entailed. The court finds that
plaintiff sufficiently alleged causation and damages to survive
the motion to dismiss, and will not speculate as to what else
counsel may have meant by that argument.

1 interfered with the plaintiff's expectancy, but engaged in
2 conduct that was wrongful by some legal measure other than the
3 fact of interference itself." Della Penna v. Toyota Motor Sales,
4 U.S.A., Inc., 11 Cal. 4th 376, 393 (1995); Korea Supply Co., 29
5 Cal. 4th at 1154.

6 Plaintiff alleges that Friend interfered in several
7 unidentified economic relationships as well as the relationship
8 with the school district by sabotaging the completion of deals
9 while working for plaintiff and then completing identical deals
10 on behalf of DCSI soon after her resignation. Plaintiff has
11 certainly alleged that Friend had knowledge of these
12 relationships, that the relationships were actually disrupted,
13 and that plaintiff was harmed by Friend's acts in that it lost
14 business. However, the parties dispute whether plaintiff has
15 sufficiently alleged that the relationships contained the
16 probability of future economic benefit or that Friend committed
17 any independently wrongful acts to disrupt the relationships.

18 With respect to the first element, the tort of
19 interference with prospective economic relations applies to
20 "interference with existing noncontractual relations which hold
21 the promise of future economic advantage. In other words, it
22 protects the expectation that the relationship eventually will
23 yield the desired benefit, not necessarily the more speculative
24 expectation that a potentially beneficial relationship will
25 eventually arise." Westside Ctr. Assocs. v. Safeway Stores 23,
26 Inc., 42 Cal. App. 4th 507, 524 (5th Dist. 1996); see id. at 527
27 ("Without an existing relationship with an identifiable buyer,
28 [the plaintiff's] expectation of a future sale was 'at most a

1 hope for an economic relationship and a desire for future
2 benefit'" (quoting Blank v. Kirwan, 39 Cal. 3d 311, 331 (1985));
3 Roth v. Rhodes, 25 Cal. App. 4th 530, 546 (4th Dist. 1994)
4 (holding that, in doctor's lawsuit based on defendants' refusal
5 to lease office space to him, doctor failed to allege requisite
6 "existing relationship" because future patients were merely
7 "speculative").

8 Plaintiff has sufficiently alleged that its economic
9 relationship with the school district contained the probability
10 of future economic benefit. Before Friend resigned, she and
11 Rezente blocked a transfer of the school district account so that
12 she could remain on the account. Friend had been working with
13 the school district for five months on a contract on behalf of
14 plaintiff, and yet DCSI signed a contract with the school
15 district within weeks of Friend's arrival. This is sufficient to
16 survive a motion to dismiss by plausibly alleging that the school
17 district would have signed the contract with plaintiff but for
18 Friend's actions.

19 California regulations generally requiring school
20 districts to allocate contracts based on a competitive bidding
21 process, see Cal. Pub. Contract Code § 20111, do not alter the
22 court's conclusion that plaintiff has sufficiently alleged the
23 probability of future economic benefit. Several exceptions to
24 the bidding requirement exist. See id. § 20118. The court
25 cannot determine, based on the facts alleged, whether the school
26 district contract would be subject to the competitive bidding
27 requirement. Plaintiff is required on a motion to dismiss to
28 allege sufficient facts, accepted as true, to state a plausible

1 claim to relief, not to disprove every set of facts that could
2 potentially keep it from succeeding on that claim. See Iqbal,
3 129 S. Ct. at 1949. Accordingly, plaintiff has sufficiently
4 alleged the first element.

5 As to the third element, independently wrongful conduct
6 designed to disrupt the relationship, the California Supreme
7 Court has explained that "an act is independently wrongful if it
8 is unlawful, that is, if it is proscribed by some constitutional,
9 statutory, regulatory, common law, or other determinable legal
10 standard." Korea Supply Co., 29 Cal. 4th at 1159.

11 The wrongful conduct plaintiff alleges Friend engaged
12 in includes the conduct the court found to be sufficiently
13 alleged in the breach of duty of loyalty claim: preventing
14 contracts from reaching completion while in plaintiff's employ.
15 The alleged breach of the duty of loyalty is sufficient to show
16 that Friend allegedly engaged in conduct that was wrongful in
17 itself. Accordingly, plaintiff has sufficiently pled its
18 interference with prospective economic relations claim and the
19 court will deny Friend's motion to dismiss that claim.

20 IT IS THEREFORE ORDERED that Christy Friend's motion to
21 dismiss the interference with prospective economic relations and
22 breach of duty of loyalty claims against her in plaintiff's
23 Second Amended Complaint be, and the same hereby is, DENIED.

24 DATED: April 13, 2011

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27 WILLIAM B. SHUBB
28 UNITED STATES DISTRICT JUDGE