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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HAT WORLD, INC., d/b/a
LIDS TEAM SPORTS,

NO. CIV. S-12-01591 LKK/EFB

Plaintiff,

v.

KEVIN KELLY,

Defendant.

_____ /

Plaintiff Hat World, Inc., alleges seven causes of action against defendant, who is a former Hat World employee. The complaint alleges generally that the defendant misappropriated property and confidential information when he left his employment with Hat World. The information claimed included customer lists, purchase orders, invoices, and spreadsheets. Pending before the court is a motion by defendants to dismiss all but one of plaintiff's claims for relief, and a motion by plaintiff for a preliminary injunction. For the reasons discussed herein, the Motion to Dismiss is GRANTED in part and DENIED in part. The Motion for a Preliminary Injunction is DENIED.

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I. Background

The following factual allegations are taken from the complaint. For the purpose of the pending motions only, they are taken as true.

Plaintiff Hat World, through its subsidiary Lids, sells customized sports uniforms, apparel, footwear, and equipment to institutional sports teams. The company also offers custom screen printing and embroidery. The company owns a license with Nike that allows it to sell products with the Nike "swoosh" logo. Lids operates in all fifty of the United States. Defendant Kelly began working for Hat World in April 2010. Kelly signed a Confidentiality Agreement, which provides in part:

Employee [Kelly] acknowledges that during his/her employment, s/he may have access to and acquire knowledge of trade secrets and/or confidential information of the Employer [Hat World], including, but not necessarily limited to, business plans, financial information, marketing plans, client or customer information, client or customer lists, vendor information, and contracts, that have economic value and/or give the Employer a competitive advantage in the marketplace. Employee agrees not to use, reproduce, disclose, or make available the Employer's trade secrets or confidential information for his/her own benefit or the benefit of any person or entity other than the Employer without express permission or proper authorization from the Employer.

Ex. A to Compl. ECF 1-2.

Defendant worked as a sales representative for Hat World until February 2012. Kelly worked on 110 accounts throughout Northern California. As part of his job, Kelly cultivated customer goodwill, and maintained information about the company's purchasers. In addition, Kelly had access to confidential and proprietary business

1 information, including customer lists, customer preferences, price
2 lists, costs, revenue data, and pricing and discount structure.

3 During his last week of employment with Hat World, defendant
4 transferred files from his work computer to his personal email
5 account. Also during the tail-end of his employment with Hat World,
6 Kelly failed to final or process purchases from customers.
7 Plaintiffs allege on information and belief that Kelly had already
8 been hired by Eastbay while he was working for Hat World, and that
9 he was attempting to set up orders for Eastbay with Hat World
10 customers.

11 Hat World became aware of defendant's employment with Eastbay
12 in March 2012. Hat World alleges that defendant has targeted Hat
13 World customers identified in the confidential files that Kelly
14 emailed to himself while working for Hat World. Upon his
15 resignation, Kelly failed to return a laptop computer, personal
16 digital assistant, product samples, and product catalogs belonging
17 to Hat World. Kelly has now returned the laptop, but not the
18 remaining items.

19 The complaint alleges that while working for Eastbay, Kelly
20 has used proprietary Hat World order forms to send price quotes to
21 customers, that Kelly has fulfilled orders on behalf of Eastbay
22 when those orders were placed with Kelly while he was employed by
23 Hatworld.

24 The complaint also alleges that Kelly has been soliciting
25 other Hat World sales representatives to work for Eastbay, and is
26 using his knowledge about Hat World's cost structure in order to

1 underbid for Hat World accounts and place Hat World at a
2 competitive disadvantage.

3 After recovering the laptop computer from Kelly, Hat World
4 learned that Kelly had continued to access confidential information
5 and his Hat World email account after his resignation from Hat
6 World.

7 Based on the foregoing allegations, plaintiff's complaint
8 asserts seven causes of action: (1) Misappropriation of Trade
9 Secrets in violation of the California Uniform Trade Secrets Act
10 ("CUTSA"); (2) Unfair Competition in Violation of California
11 Business and Professions Code Sections 17200 et. seq.; (3)
12 Conversion; (4) Intentional Interference with Contractual
13 Relations; (5) Intentional Interference with Prospective Economic
14 Relations; (6) Breach of Confidentiality Agreement; and (7)
15 Violation of the Computer Fraud and Abuse Act.

16 Now pending before the court are plaintiff's motion for a
17 preliminary injunction, and defendant's motion to dismiss.

18 **II. Standards**

19 **A. Standard for a Motion to Dismiss**

20 A dismissal motion under Fed. R. Civ. P. 12(b)(6) challenges
21 a complaint's compliance with the federal pleading requirements.
22 Under Fed. R. Civ. P. 8(a)(2), a pleading must contain a "short and
23 plain statement of the claim showing that the pleader is entitled
24 to relief." The complaint must give the defendant "'fair notice of
25 what the ... claim is and the grounds upon which it rests.'" Bell
26 Atlantic v. Twombly, 550 U.S. 544, 555 (2007), quoting Conley v.

1 Gibson, 355 U.S. 41, 47 (1957).

2 To meet this requirement, the complaint must be supported by
3 factual allegations. Ashcroft v. Iqbal, 556 U.S. 662 (2009).
4 Moreover, this court "must accept as true all of the factual
5 allegations contained in the complaint." Erickson v. Pardus, 551
6 U.S. 89, 94 (2007).¹

7 "While legal conclusions can provide the framework of a
8 complaint," neither legal conclusions nor conclusory statements are
9 themselves sufficient, and such statements are not entitled to a
10 presumption of truth. Iqbal, 556 U.S. at ___, 129 S. Ct. at
11 1949-50. Iqbal and Twombly therefore prescribe a two step process
12 for evaluation of motions to dismiss. The court first identifies
13 the non-conclusory factual allegations, and then determines whether
14 these allegations, taken as true and construed in the light most
15 favorable to the plaintiff, "plausibly give rise to an entitlement
16 to relief." Iqbal, 556 U.S. at ___, 129 S. Ct. at 1949-50.

17 "Plausibility," as it is used in Twombly and Iqbal, does not
18 refer to the likelihood that a pleader will succeed in proving the
19 allegations. Instead, it refers to whether the non-conclusory
20 factual allegations, when assumed to be true, "allow[] the court
21 to draw the reasonable inference that the defendant is liable for
22

23 ¹ Citing Twombly, 556 U.S. at 555-56, Neitzke v. Williams, 490
24 U.S. 319, 327 (1989) ("[w]hat Rule 12(b)(6) does not countenance
25 are dismissals based on a judge's disbelief of a complaint's
26 factual allegations"), and Scheuer v. Rhodes, 416 U.S. 232, 236
(1974) ("it may appear on the face of the pleadings that a recovery
is very remote and unlikely but that is not the test" under
Rule 12(b)(6)).

1 the misconduct alleged." Iqbal, 556 U.S. at ____, 129 S. Ct. at
2 1949. "The plausibility standard is not akin to a 'probability
3 requirement,' but it asks for more than a sheer possibility that a
4 defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at
5 557).² A complaint may fail to show a right to relief either by
6 lacking a cognizable legal theory or by lacking sufficient facts
7 alleged under a cognizable legal theory. Balistreri v. Pacifica
8 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

9 **B. Standard for a Motion for a Preliminary Injunction**

10 Fed. R. Civ. P. 65 provides authority to issue either
11 preliminary injunctions or temporary restraining orders. A
12 preliminary injunction is an "extraordinary remedy." Winter v.
13 Natural Resources Defense Council, Inc., 555 U.S. 7, 22 (2008)
14 (internal citation omitted). When a court considers whether to
15 grant a motion for a preliminary injunction, it balances "the
16

17 ² Twombly imposed an apparently new "plausibility" gloss on
18 the previously well-known Rule 8(a) standard, and retired the
19 long-established "no set of facts" standard of Conley v. Gibson,
20 355 U.S. 41 (1957), although it did not overrule that case
21 outright. See Moss v. U.S. Secret Service, 572 F.3d 962, 968 (9th
22 Cir. 2009) (the Twombly Court "cautioned that it was not outright
23 overruling Conley . . .," although it was retiring the "no set of
24 facts" language from Conley). The Ninth Circuit has acknowledged
25 the difficulty of applying the resulting standard, given the
26 "perplexing" mix of standards the Supreme Court has applied in
recent cases. See Starr v. Baca, 652 F.3d 1202, 1215 (9th
Cir. 2011) (comparing the Court's application of the "original,
more lenient version of Rule 8(a)" in Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) and Erickson v. Pardus, 551 U.S. 89 (2007) (per
curiam), with the seemingly "higher pleading standard" in Dura
Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005), Twombly and
Iqbal), rehearing en banc denied, __ F.3d __, 2011 WL 4582500
(October 5, 2011). See also Cook v. Brewer, 637 F.3d 1002, 1004
(9th Cir. 2011) (applying the "no set of facts" standard to a
Section 1983 case).

1 ("CUTSA"). Defendant also argues that the seventh claim should be
2 dismissed for failure to state a claim.

3 **i. CUTSA Preemption**

4 CUTSA generally provides remedies, including injunctive relief
5 and damages, for improper acquisition or use of trade secrets that
6 have been the subject of reasonable efforts to maintain secrecy.
7 Cal Civ Code § 3426. The statute has a "comprehensive structure and
8 breadth," and "occupies the field" with respect to common law trade
9 secret misappropriation claims. K.C. Multimedia, Inc. v. Bank of
10 America Technology & Operations, Inc., 171 Cal. App. 4th 939, 954
11 (Cal. App. 6th Dist. 2009). Thus, CUTSA provides the exclusive
12 civil remedy for trade secret misappropriation under California
13 law. Silvaco Data Sys. v. Intel Corp., 184 Cal. App. 4th 210, 236
14 (6th Dist. 2010). See also Cacique, Inc. v. Robert Reiser & Co.,
15 169 F.3d 619 (9th Cir. 1999) ("California courts have held that the
16 common law of trade secrets has been displaced where it conflicts
17 with California's version of the UTSA.").

18 This preemption applies to all common law claims that are
19 "based on the same nucleus of facts as the misappropriation of
20 trade secrets claim." K.C. Multimedia, Inc. 171 Cal App. 4th at
21 958. "In other words, preemption generally applies where there is
22 no material distinction between the wrongdoing underlying the CUTSA
23 claim and the non-CUTSA claim." Ikon Office Solutions, Inc. v.
24 Rezente, 2011 U.S. Dist. LEXIS 40053 (E.D. Cal. 2011).

25 The text of the statute identifies three categories of claims
26 that it does not preempt: contractual remedies, whether or not

1 based on misappropriation of trade secrets, other civil remedies
2 not based on trade secret misappropriation, and criminal remedies
3 whether or not based on misappropriation of a trade secret. Cal Civ
4 Code § 3426.7.

5 With respect to plaintiff's first claim the parties agree that
6 "reference to the common law claim for misappropriation of trade
7 secrets would be preempted by CUTSA." Pl.'s Opp'n 4, ECF No. 48.
8 Accordingly, the first claim for relief is DISMISSED with leave to
9 amend.

10 Defendant argues that claims two, three, four, and five "are
11 predicated entirely on the factual allegation that Mr. Kelly
12 misappropriated Hat World's trade secrets." Def.'s Mot 4, ECF No.
13 35. Plaintiff appears to concede that the claims are preempted
14 insofar as they are based on misappropriation of trade secrets, but
15 argues that there is a basis for each claim even setting aside
16 references to trade secrets. For example, the complaint's second
17 claim alleges that Kelly violated California's Unfair Competition
18 Law ("UCL") by "misappropriation of Hat World's trade secrets and
19 other confidential and proprietary information, unlawful
20 solicitation of Hat World customers and employees, and unlawful
21 conversion of purchase orders for Hat World products," Compl. ¶61.
22 Plaintiff's opposition argues that the claim is not preempted
23 because the alleged conduct "clearly constitutes an unlawful or
24 fraudulent business act or practice sufficient to state a claim
25 under the UCL and is not premised on the misappropriation of
26 Plaintiff's confidential information," Pl.'s Opp'n 5.

1 Similarly, the complaint's fourth claim alleges that defendant
2 interfered with Hat World's contractual relationships by "unlawful
3 use of Hat World's confidential information and misappropriation of
4 its trade secrets to solicit Hat World customers and sales
5 representatives." Compl. 14. In the opposition, plaintiff argues
6 that the claim should not be dismissed because it alleges tortious
7 interference by additional methods beyond misappropriation of trade
8 secrets.

9 Because plaintiff appears to concede that its claims are
10 preempted insofar as they are based on misappropriation of trade
11 secrets, but argues that the claims remain viable because of
12 conduct falling outside of CUTSA's scope, the court DISMISSES the
13 complaint, and GRANTS plaintiff leave to amend the complaint to
14 disentangle claims that are preempted by CUTSA from those that are
15 premised on a separate nucleus of facts.

16 **ii. Computer Fraud and Abuse**

17 Plaintiff's seventh claim alleges that defendant violated the
18 Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030 when he
19 "knowingly and with the intent to defraud accessed without
20 authorization, and/or exceeded his authorization in accessing,
21 Plaintiff's computers, computer systems, and databases in an effort
22 to damage and/or misappropriate Hat World's confidential and
23 protected information." This claim arises from the allegation that
24 during his employment, defendant accessed Hat World's computers and
25 servers for purposes other than company business, and that he
26 accessed the computers and servers on February 15 and February 16,

1 after all authorization to access the computers "would have
2 terminated" following Kelly's resignation. Compl. ¶ 47. Defendant
3 argues that plaintiff has failed to state a claim because the
4 complaint does not allege that defendant accessed any information
5 that he was not authorized to access.

6 In the Ninth Circuit, "the plain language of the CFAA targets
7 the unauthorized procurement or alteration of information, not its
8 misuse or misappropriation. . . the phrase 'exceeds authorized
9 access' in the CFAA does not extend to violations of use
10 restrictions." United States v. Nosal, 676 F.3d 854, 860 (9th Cir.
11 2012). In short, the CFAA is an "anti-hacking" statute and not a
12 misappropriation statute. Id.

13 Here, plaintiff's CFAA claim has two independent components:
14 one is that defendant accessed computers and servers for purposes
15 other than company business. Compl. ¶ 82. The second is that he
16 accessed those computers after he resigned. As to the first
17 component, the court agrees with defendant that the alleged conduct
18 does not violate the CFAA because defendant was authorized to
19 access the information. As to the second components, the court
20 concludes that plaintiff has stated a claim under the CFAA by
21 alleging facts from which the court can plausibly conclude that
22 defendant exceeded his authorized access by continuing to access
23 information stored on company computers and servers after his
24 resignation.

25 Accordingly, the motion to dismiss is GRANTED in part and
26 DENIED in part. Plaintiff's first claim for relief is DISMISSED

1 insofar as it refers to violations of the common law of
2 misappropriation of trade secrets. Plaintiff's second, third,
3 fourth, and fifth claims are DISMISSED with leave to amend.
4 Plaintiff's seventh claim for relief is DISMISSED with respect to
5 defendant's accessing of Hat World computers during his employment,
6 but it is not dismissed with respect to access to the computers
7 after his resignation.

8 **B. Motion for a Preliminary Injunction**

9 The court will consider plaintiff's motion for a preliminary
10 injunction insofar as it rests on the CUTSA and breach of
11 confidentiality agreement³ claims, which this order does not
12 dismiss. Plaintiff's motion seeks a preliminary injunction to

13 prevent Defendant Kelly from directly or indirectly,
14 individually or in concert with others: (a) using or
15 disclosing any of Hat World's confidential information and
16 trade secrets; (b) using Hat World's confidential
17 information and trade secrets to solicit Hat World
18 customers; (c) soliciting any Hat World customers identified
19 in materials previously misappropriated by Defendant (as
20 described in more detail in documents filed herewith under
21 seal), until the earlier of the trial date or the one-year
22 anniversary of the Court's order; (d) using Hat World's
23 confidential information and trade secrets to solicit Hat
24 World employees; (e) using Eastbay products to fill, or
25 otherwise filling on behalf of Eastbay, any customer
26 purchase orders previously placed with Hat World; and (f)
otherwise breaching the Confidentiality Agreement identified
in Plaintiff's Complaint.

22 Mot. for Preliminary Injunction 20, ECF No. 7.

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25 ³ As noted, contract claims are not preempted by CUTSA, and
26 defendant did not seek to dismiss claim six (breach of
confidentiality agreement).

1 **i. Likelihood of Success on the Merits**

2 **a. CUTSA Claim**

3 Plaintiff alleges that defendant misappropriated customer
4 lists containing customer preferences, purchasing history, price
5 quotes, and product specifications, and that he has used this
6 information to benefit himself and Eastbay by targeting customers
7 based on their past purchasing history.

8 Under CUTSA, a "trade secret" is "information, including a
9 formula, pattern, compilation, program, device, method, technique,
10 or process, that: (1) Derives independent economic value, actual or
11 potential, from not being generally known to the public or to other
12 persons who can obtain economic value from its disclosure or use;
13 and (2) Is the subject of efforts that are reasonable under the
14 circumstances to maintain its secrecy." Cal Civ Code § 3426.1(d).

15 Customer lists may be considered trade secrets "where the
16 employer has expended time and effort identifying customers with
17 particular needs or characteristics." Morlife, Inc. v. Perry, 56
18 Cal. App. 4th 1514, 1521 (Cal. App. 1st Dist. 1997). The customer
19 list must have economic value in order to qualify as a trade
20 secret. This means that the secrecy of the list provides a business
21 with a substantial advantage. Id. The ability of a former employee
22 to "solicit both more selectively and more effectively" is a
23 substantial advantage. Id.

24 Plaintiff here has submitted a declaration by a Hat World
25 executive that explains that the customer lists contain detailed
26 information that is "integral to the successful operation and

1 growth of Hat World's business." Moldander Decl. ¶ 8, ECF No. 8.
2 Further, the declaration states that the customer information is
3 not readily available to the public, and describes the efforts put
4 in place by Hat World to preserve the secrecy of the customer
5 lists. The employee handbook prohibits disclosure of this
6 confidential information, employees are required to execute
7 confidentiality agreements, and employees are regularly instructed
8 that the information is confidential. Further, access to the
9 information on company computers is restricted to employees with
10 passwords. Molander Decl.

11 Defendant counters that much of the information on the
12 customer lists, such as the identity of the customers and the
13 individuals in charge of purchasing, is readily available to the
14 public, as most of the customers are local high school athletic
15 teams. Defendant also argues that defendant has produced no
16 evidence that defendant forwarded to himself the portions of the
17 customer lists that could be deemed "trade secrets." Defendant
18 states in a declaration that he did not forward to himself "any
19 compilation of information created by Lids regarding Lids
20 customers. Lids never provided me with any detailed report
21 reflecting each customer's history of purchases or summary
22 information about any particular habits, general needs, or
23 preferences." Kelly Decl. ¶ 22. Plaintiff has not submitted to the
24 court an example of a customer list that it claims constitutes
25 "trade secrets."

26 Although Hat World's preliminary injunction motion focuses

1 entirely on customer lists, defendant has provided copies of emails
2 and other documents that appear to indicate that activity directed
3 from his private email account in the last weeks of his employment
4 and during the days after his resignation was not for the benefit
5 of himself or Eastbay. For example, in an email chain spanning from
6 February 20, 2012 to February 24, defendant communicated with
7 Lids/Hat World employee Thomas Moore from his personal email
8 account. In the email exchange, defendant appears to be assisting
9 Mr. Moore in completing an order placed with Lids by one of
10 defendant's former clients. Ex. 4 to Kelly Decl. Likewise, on
11 February 16, 2012, after defendant's resignation, he sent an email
12 to Hat World/Lids employee Taylor Gorman directing Mr. Gorman to
13 "make sure that this late Hypercool Jersey is shipping overnight to
14 the customer when it arrives." It appears to the court that in
15 these communications, defendant was tying up loose ends from the
16 end of his employment with Hat World.

17 Reviewing the evidence submitted by both parties, the court
18 concludes that plaintiff has not shown a strong likelihood of
19 success on the merits because it has not provided any evidence that
20 defendant misappropriated detailed customer information that
21 qualifies as "trade secret," while defendant has provided evidence
22 in the form of a declaration that he did not obtain any such
23 information.

24 In their motion for a preliminary injunction, plaintiffs focus
25 solely on the customer lists but have not provided the court with
26 an example of the lists, which it claims are "trade secrets."

1 Plaintiffs do not cite other trade secrets that defendant is
2 alleged to have misappropriated in violation of CUTSA. Similarly,
3 in their discussion of defendant's alleged breach of the
4 confidentiality agreement, plaintiffs refer only to customer lists.
5 Accordingly, the court finds that plaintiffs have not shown a
6 likelihood of success on the merits of the breach of contract
7 claim.

8 **ii. Irreparable Harm**

9 Plaintiffs argue that they will suffer irreparable harm in the
10 absence of an injunction because defendant's conduct is damaging
11 plaintiff's "goodwill" in the eyes of its customers. It is true
12 that harm to good will may be considered irreparable.

13 Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.,
14 944 F.2d 597 (9th Cir. 1991). Plaintiff asserts in its motion that
15 many customers have ceased doing business with Hat World since
16 Kelly's departure, but provides no evidence that injunctive relief
17 will prevent that harm. By contrast, defendant has submitted
18 declarations by himself and other former employees and customers of
19 Hat World which indicate that customers left Hat World due to
20 dissatisfaction with products and service. See, e.g., Decl. Don
21 Borges ("there was a problem with virtually every order.").

22 Accordingly, plaintiff has not shown the court that
23 defendant's conduct is causing any irreparable harm that would be
24 prevented by a preliminary injunction.

25 Considering the evidence and arguments currently before it,
26 the court concludes that a preliminary injunction is not warranted

1 because plaintiff has not shown irreparable harm, and has not shown
2 a likelihood of success on the merits. As an injunction may not
3 issue without a showing of irreparable harm, the court need not
4 proceed to the final two factors.

5 **IV. Conclusion**

6 For the foregoing reasons, the court ORDERS as follows:


7 [1] Defendant's motion to dismiss, ECF No. 35, is GRANTED
8 in part and DENIED in part.

9 [2] Plaintiff is GRANTED twenty-one (21) days to file an
10 amended complaint consistent with this opinion.

11 [3] Plaintiff's motion for a preliminary injunction, ECF
12 No. 7, is DENIED.

13 IT IS SO ORDERED.

14 DATED: August 10, 2012.

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18 LAWRENCE K. KARLTON
19 SENIOR JUDGE
20 UNITED STATES DISTRICT COURT
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