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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KRISTI VERMA, et al.
Plaintiffs,
v.
EFRAT OKEV, et al.
Defendants.

No. 2:13-cv-00865-MCE-EFB

MEMORANDUM AND ORDER

This case arises from a dispute between two married couples who are also sole shareholders in a close corporation. Kristi Verma, Vishal Verma and Zentek Corporation (“Zentek”) (collectively, “Plaintiffs”) allege fourteen causes of action against Efrat Okev, Lloyd Burton, and Augzenta, Inc. (“Augzenta”) (collectively, “Defendants”) for: (1) Breach of Fiduciary Duty; (2) Misappropriation of Corporate Assets; (3) Interference with Contract; (4) Interference with Prospective Economic Advantage; (5) Unfair, Unlawful and Fraudulent Acts and Practices; (6) Conversion; (7) Intentional Misrepresentation in violation of California Civil Code section 1572; (8) Negligent Misrepresentation in violation of California Civil Code section 1710; (9) Fraud and Deceit, Suppression, in violation of California Civil Code section 1710; (10) Breach of Covenant of Good Faith and Fair Dealing; (11) Constructive Trust; (12) Conspiracy; (13) Accounting; and (14) Temporary Restraining Order/Preliminary Injunction.

1 Currently before the Court are two motions to dismiss: (1) Defendant Augzenta's Motion
2 to Dismiss for Lack of Personal Jurisdiction ("Motion I"), ECF No. 15; and (2) all
3 Defendants' Motion to Dismiss for Failure to State a Claim ("Motion II"), ECF No. 14. For
4 the reasons set forth below, Defendant Augzenta's Motion I is DENIED, and Defendants'
5 Motion II¹ is GRANTED in part and DENIED in part.²

6
7 **BACKGROUND**³

8 The individual Plaintiffs and individual Defendants, two married couples, had been
9 close friends for many years. On or about August 1, 2005, they entered into an
10 agreement to start an IT consulting business and subsequently formed Zentek. It was
11 implicit in their agreement that no party would start a competing IT consulting and
12 management service company.

13 Zentek is a California corporation with its principal place of business in California.
14 The two wives were elected as its directors. Kristi Verma is Chief Executive Officer and
15 President, and Efrat Okev is Chief Financial Officer and Secretary. The corporation's
16 stock was split 26% to each wife and 24% to each husband, and the parties ran a
17 profitable business for many years.

18 Recently, however, Plaintiffs discovered that the individual Defendants had
19 started Augzenta, a new IT consulting and management firm. Augzenta is a Missouri
20 Corporation with its principal place of business in St. Louis, Missouri. Augzenta claims
21 that it has conducted no business in California and has no California customers.

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24 ¹ Plaintiffs objected to Motion II on the grounds that Defendants exceeded the 20-page limit set by
25 the Court. In fact, both parties exceeded the page limits, and the Court has considered all filings. In the
26 future, however, any papers not filed in compliance with the applicable rules or this Court's orders will be
rejected without further notice to the parties.

27 ² Because oral argument will not be of material assistance, the Court ordered this matter
submitted on the briefs. E.D. Cal. Local Rule 230(g).

28 ³ Unless otherwise noted, the following facts are taken from Plaintiff's Complaint. ECF No. 2.

1 Plaintiffs allege, however, that the individual Defendants used Zentek’s customer
2 lists, intellectual property, confidential trade information and secrets, and other corporate
3 assets to start Augzenta. Additionally, current Zentek customers and key employees
4 were purportedly solicited to work with and for Augzenta as well. Augzenta also uses
5 Zentek’s name and logo, and represents on its website that it is Zentek’s successor.

7 **STANDARDS**

9 **A. Motion to Dismiss for Lack of Personal Jurisdiction**

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11 A judgment rendered in violation of due process is void, and due process requires
12 that a defendant be subject to the personal jurisdiction of the court. World-Wide
13 Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (citing Pennoyer v. Neff, 95
14 U.S. 714, 732-733 (1878); Int’l Shoe Co. v. Washington, 326 U.S. 310 (1945)). In
15 opposing a defendant’s motion to dismiss for lack of personal jurisdiction, the plaintiff
16 bears the burden of establishing the court’s jurisdiction over the defendant. Wash. Shoe
17 Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 671 (9th Cir. 2012) (citation omitted).
18 However, when the defendant’s motion is based on written materials rather than an
19 evidentiary hearing, the plaintiff need only make a “prima facie showing of jurisdictional
20 facts” to withstand the motion to dismiss. Id. at 672 (citing Pebble Beach Co. v. Caddy,
21 453 F.3d 1151, 1154 (9th Cir. 2006)). The court resolves all disputed facts in favor of
22 the plaintiff. Wash. Shoe, 704 F.3d at 672.

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1 **B. Motion to Dismiss for Failure to State a Claim for Relief**

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3 On a motion to dismiss for failure to state a claim under Federal Rule of Civil
4 Procedure 12(b)(6), all allegations of material fact must be accepted as true and
5 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.
6 Co., 80 F.3d 336,337-38 (9th Cir. 1996). Rule 8(a)(2) requires only “a short and plain
7 statement of the claim showing that the pleader is entitled to relief” in order to “give the
8 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell
9 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,
10 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require
11 detailed factual allegations. However, “a plaintiff’s obligation to provide the grounds of
12 his entitlement to relief requires more than labels and conclusions, and a formulaic
13 recitation of the elements of a cause of action will not do.” Id. (internal citations and
14 quotations omitted). A court is not required to accept as true a “legal conclusion
15 couched as a factual allegation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009)
16 (quoting Twombly, 550 U.S. at 555). “Factual allegations must be enough to raise a
17 right to relief above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 Charles
18 Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)
19 (stating that the pleading must contain something more than “a statement of facts that
20 merely creates a suspicion [of] a legally cognizable right of action.”)).

21 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket
22 assertion, of entitlement to relief.” Twombly, 550 U.S. at 556 n.3 (internal citations and
23 quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard
24 to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of
25 the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing 5 Charles
26 Alan Wright & Arthur R. Miller, supra, at § 1202). A pleading must contain “only enough
27 facts to state a claim to relief that is plausible on its face.” Id. at 570.

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1 If the “plaintiffs . . . have not nudged their claims across the line from conceivable to
2 plausible, their complaint must be dismissed.” Id. However, “[a] well-pleaded complaint
3 may proceed even if it strikes a savvy judge that actual proof of those facts is
4 improbable, and ‘that a recovery is very remote and unlikely.’” Id. at 556 (quoting
5 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

6 A court granting a motion to dismiss a complaint must then decide whether to
7 grant leave to amend. Leave to amend should be “freely given” where there is no
8 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
9 to the opposing party by virtue of allowance of the amendment, [or] futility of the
10 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
11 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
12 be considered when deciding whether to grant leave to amend). Not all of these factors
13 merit equal weight. Rather, “the consideration of prejudice to the opposing
14 party . . . carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833
15 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is
16 clear that “the complaint could not be saved by any amendment.” Intri-Plex Techs. v.
17 Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411
18 F.3d 1006, 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149,
19 1160 (9th Cir. 1989) (“Leave need not be granted where the amendment of the
20 complaint . . . constitutes an exercise in futility”)).

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1 **ANALYSIS⁴**

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3 **A. Personal Jurisdiction⁵**

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5 Defendant Augzenta argues that it is not subject to this Court’s personal
6 jurisdiction. When there is no federal statute authorizing personal jurisdiction, the district
7 court applies the law of the state in which the district court sits. Mavrix Photo, Inc. v.
8 Brand Techs., Inc., 647 F.3d 1218, 1223 (9th Cir. 2011). California Code of Civil
9 Procedure section 410.10, California’s long-arm statute, is “coextensive” with federal due
10 process requirements. Id. Accordingly, the “jurisdictional analyses under state law and
11 federal due process are the same.” Id.

12 There are two types of personal jurisdiction: general and specific. General
13 jurisdiction exists and permits the court to hear all claims against a defendant “when their
14 affiliations with the State are so continuous and systematic as to render them essentially
15 at home in the forum State.” Goodyear Dunlop Tires Operations, S.A. v. Brown, 131
16 S.Ct. 2846, 2851 (2011) (internal quotations omitted). Specific personal jurisdiction, on
17 the other hand, exists when a defendant’s “in-state activity is continuous and systematic
18 and that activity gave rise to the episode-in-suit.” Id. at 2853 (citing Int’l Shoe, 326 U.S.
19 at 317) (internal quotation marks omitted). However, “the commission of certain ‘single
20 or occasional acts’ in a State may be sufficient to render a corporation answerable in
21 that State with respect to those acts” Id. (quoting Int’l Shoe, 326 U.S. at 318).

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24 ⁴ Both parties object to portions of declarations offered by the other parties. However, the Court
25 did not need to consider those objected-to portions of the declarations in ruling on the instant motions.
26 Both objections are thus denied as moot.

27 ⁵ The Court recognizes that, as a threshold matter, Plaintiffs contend that Augzenta was a
28 suspended corporation at the time the motion to dismiss was filed and thus was not entitled to defend itself
in this action. Plaintiffs’ argument is rejected. Once a previously suspended corporation is reinstated, any
procedural action taken on behalf of the corporation while it was suspended is valid, as if the suspension
never occurred. See Benton v. County of Napa, 226 Cal. App. 3d 1485, 1490 (1991). There is no dispute
that Augzenta is active now. Accordingly, its actions taken during its suspension will thus be treated as if
the suspension never occurred.

1 Plaintiffs do not contend Augzenta has sufficient contacts with California to establish
2 general personal jurisdiction, so the Court need only an inquire into specific jurisdiction.

3 Defendant Augzenta asserts that this Court does not have personal jurisdiction
4 over it because it is a Missouri Corporation and has no contacts with California. The lack
5 of direct business contacts in California, however, is not dispositive. In the Ninth Circuit,
6 sufficient minimum contacts exist for a non-resident defendant to be subject to specific
7 personal jurisdiction if: (1) the defendant, among other things, “purposefully directed its
8 activities at the forum”; (2) the claim arises out of or relates to defendant’s activities
9 related to the forum; and (3) the exercise of jurisdiction comports with fair play and
10 substantial justice. Wash. Shoe, 704 F.3d at 672. If Plaintiffs make the requisite
11 showing as to the first two elements, the burden shifts to Defendant to present a
12 “compelling case” that the exercise of jurisdiction would be unreasonable. Burger King
13 Corp. v. Rudzewicz, 471 U.S. 462 (1985).

14 15 **1. Purposeful Direction**

16
17 To satisfy the first part of the minimum contacts analysis in torts cases, courts
18 typically apply the purposeful direction or “effects test.” Wash. Shoe, 704 F.3d at 672-
19 73. The test requires a defendant to have: “(1) committed an intentional act,
20 (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is
21 likely to be suffered in the forum state.” Id. at 673 (internal quotation marks omitted).
22 The effects test allows the court to exercise personal jurisdiction over a defendant when
23 the intentional act took place outside the forum state. Id.

24 An intentional act is “an external manifestation of the actor’s intent to perform an
25 actual, physical act in the real world, not including any of its actual or intended results.”
26 Id. at 674. In Washington Shoe the defendant committed an intentional act “by
27 intentionally engaging in the actual, physical acts of purchasing and selling [an] allegedly
28 infringing [product].” Id.

1 In the instant case, Augzenta has committed an intentional act by intentionally using
2 customer lists, customers, and employees of Plaintiff Zentek, as well as by purporting to
3 be Zentek’s successor, in an effort to generate business for itself.

4 As for the second prong of the instant test, an action is expressly aimed at the
5 forum state when “the defendant is alleged to have engaged in wrongful conduct
6 targeted at a plaintiff whom the defendant knows to be a resident of the forum.” *Id.* at
7 675 (citations and internal quotations omitted). All Defendants were fully aware that
8 Plaintiff Zentek was a California Corporation. Plaintiffs allege that Augzenta wrongfully
9 intended to take business away from Plaintiff Zentek in order to generate business for
10 itself. Accordingly, Plaintiffs adequately pled that Augzenta’s conduct was expressly
11 aimed at the forum state.

12 Finally, Defendant Augzenta also must have caused harm that it “[knew was]
13 likely to be suffered in the forum state.” *Marvix Photo*, 647 F.3d at 1231. As already
14 indicated, Augzenta was surely aware that Plaintiff Zentek was a California Corporation
15 and that by intentionally harming Zentek’s business, Defendant Augzenta inflicted harm
16 on a California entity.

17 Accordingly, Plaintiffs have satisfied the effects test and have carried their burden
18 with respect to the first part of the Ninth Circuit’s specific personal jurisdiction analysis.

20 2. Arising Out of Forum-Related Activities

21
22 A “but for” test is used to determine whether a claim arises out of or relates to
23 Defendant Augzenta’s forum-related activities. *Ballard v. Savage*, 65 F.3d 1495, 1500
24 (9th Cir. 1995). Plaintiffs must show that but for Defendant Augzenta’s forum-related
25 activities, they would not have suffered the alleged injury. *See Myers v. Bennet Law*
26 *Offices*, 238 F.3d 1068, 1075 (9th Cir. 2001).

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1 Plaintiffs allege that they were in a profitable business venture with individual
2 Defendants. Plaintiff Zentek was purportedly profitable up to the point when Defendant
3 Augzenta used Zentek's customer lists, customers and employees, and pretended to be
4 Plaintiff Zentek's successor, in an effort to create new business for itself. Augzenta's
5 actions resulted in Zentek's loss of prospective business. Accordingly, Plaintiffs have
6 successfully pled that but for Defendant Augzenta's acts, Plaintiff Zentek would have
7 realized that prospective business.

8
9 **3. Exercise of Personal Jurisdiction Over Defendant Augzenta is**
10 **Reasonable**

11 Because Plaintiffs met their burden of establishing the first two parts of the test for
12 specific personal jurisdiction, the burden shifts to Augzenta to present a compelling case
13 that this Court's exercise of personal jurisdiction would be unreasonable. When making
14 this reasonableness inquiry, the Ninth Circuit requires consideration of seven factors:
15 (1) the extent of the defendant's purposeful injection into the forum state's affairs; (2) the
16 burden on the defendant to defend itself in the forum state; (3) any conflict with the
17 sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the
18 dispute; (5) the judicial efficiency in resolution of the controversy; (6) the importance of
19 the forum in convenient and effective relief for the plaintiff; and (7) the existence of an
20 alternative forum. CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1079 (9th
21 Cir. 2011).

22 The first factor favors a California forum because, as already discussed, Augzenta
23 purposefully injected itself into the forum. Moreover, there is effectively no burden on
24 Augzenta because the individual Defendants are the founders of that corporation and
25 will already be defending the lawsuit in California. Requiring Augzenta to defend itself in
26 California as well will have virtually no impact on the evidence gathered, the individuals
27 required to appear before the Court, and the overall costs of the litigation.

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1 Indeed, it would be much more efficient for Defendants to litigate a single lawsuit in
2 California rather than two separate suits in two different states.

3 In addition, California is a more convenient forum for Plaintiffs, since they are
4 California residents, and “California has a strong interest in providing a forum for its
5 residents and citizens who are toriously injured.” Dole Food Co., Inc. v. Watts, 303 F.3d
6 1104, 1115-16 (9th Cir. 2002). The fact that Plaintiff Zentek conducts some or all of its
7 business outside California does not alter the state’s interest. Id. at 1116. Finally, even
8 if Missouri provides a viable alternative forum, Augzenta has made no assertion that
9 there is a sovereignty conflict between California and Missouri with regards to the instant
10 case. On balance, Augzenta fails to demonstrate that it is unreasonable for the Court to
11 require it to litigate in California.

12 In sum, Plaintiffs made a prima facie showing sufficient to shift the burden to
13 Augzenta to show that litigating in California is unreasonable. Auguzenta failed to meet
14 its burden, and this Court has specific jurisdiction over Augzenta. Motion I is thus
15 DENIED.

16
17 **B. Failure to State a Claim for Relief**
18

19 Defendants next move to dismiss each cause of action for failure to state a claim
20 because: (1) as president of the corporation, Plaintiff K. Verma, does not have the power
21 to commence an action on behalf of the business; (2) the bulk, if not all of the causes of
22 action, are derivative in nature, and Plaintiffs failed to make a proper demand on the
23 corporation or to allege any demand would have been futile; and (3) even if the claims
24 are properly pled as derivative, they all fail because Plaintiffs have not pled facts with
25 enough specificity. As set forth below, to the extent Plaintiffs rely on the power of the
26 President to bring suit on behalf of Zentek, the motion to dismiss is GRANTED.

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1 However, a derivative suit has been adequately pled, and the motion to dismiss on that
2 basis is DENIED. Finally, Defendants' motion on the merits is GRANTED in part and
3 DENIED in part.

4 5 **1. Power of the President to Bring Suit**

6
7 A threshold question as to the merits is whether the president of a closely held
8 corporation has the inherent or implied authority to bring a lawsuit on behalf of the
9 corporation against an outside entity, an employee of the corporation, and the Chief
10 Financial officer, who is the only other director of the Plaintiff Corporation. The answer
11 to this question is less than clear. See, e.g., Streeten v. Robinson, 102 Cal. 542 (1894);
12 Golden State Glass Corp. v. Superior Court of Los Angeles Cnty., 13 Cal2d 384 (1939);
13 Sealand Inv. Corp. v. Emprise Inc., 190 Cal. App. 2d 305 (1961); Anmaco, Inc. v.
14 Bohlken, 13 Cal. App. 4th 891(1993); American Center for Educ., Inc. v. Cavnar, 80 Cal.
15 App. 3d 476 (1978). It nonetheless is clear, however, that the corporate bylaws may
16 grant or deny a president the power to bring suit. Streeten, 102 Cal. at 545 (holding that
17 the vice president of the company had the power to hire an attorney because the board
18 had previously passed a resolution giving the vice president power to "sign any and all
19 legal document relating to the business of the company"); Golden State Glass Corp., 13
20 Cal.2d at 396-97 (holding that two of the four company directors had power to employ an
21 attorney because they were in control of the company due to the facts that they owned
22 two thirds of the shares and one of the remaining two directors no longer actively
23 involved himself with the decision making); Anmaco, 13 Cal. App. 4th at 899-900
24 (holding that the president of the corporation did not have the power to bring suit against
25 the only other director, who was the CEO and equal shareholder, because the corporate
26 by-laws specifically precluded the president from doing so). Accordingly, absent some
27 allegation as to what is permitted or prohibited by the corporation's bylaws in this case, it
28 is unclear whether any inherent power is even relevant.

1 More specifically, there are insufficient facts pled to survive Motion II because
2 there is no mention in the Complaint, motions or briefs as to what the corporate by-laws
3 say on the matter of presidential duties and powers. Since the bylaws will ultimately
4 govern, some mention must be made of them before relying on some sort of inherent
5 power that may or may not have been trumped by the corporation's formative
6 documents. Streeten 102 Cal. at 545; Anmaco Inc., 13 Cal. App. 4th at 898. Therefore,
7 to the extent Plaintiff Zentek depends on the president's power to bring this suit, the
8 Complaint is dismissed with leave to amend.

9
10 **2. Derivative Suit**

11
12 This suit may nonetheless proceed before this Court as a derivative action.
13 Whether an action is direct or derivative is determined by the law of the state of
14 incorporation. Lapidus v. Hecht, 232 F.3d 679, 682 (9th Cir. 2000). Zentek is a
15 California corporation, so California law governs.

16 Under California law a derivative suit is a "representative action brought on behalf
17 of the corporation," and the shareholder plaintiff acts "in fiduciary capacity substantially
18 as guardian ad litem for the [entity]." Chih The Shen v. Miller, 212 Cal. App. 4th 48, 57
19 (2012). A derivative suit is appropriate where the "gravamen of the complaint is injury to
20 the corporation, or to the whole body of its stock or property without any severance or
21 distribution among individual holders, or it seeks to recover assets for the corporation or
22 to prevent dissipation of its assets." Jones v. H. F. Ahmanson & Co., 1 Cal. 3d 93, 106
23 (1969) (internal quotations omitted). At least some of Plaintiffs' causes of action are
24 based on an injury to the value or profitability of the Plaintiff corporation, which affects all
25 shareholders (e.g., claims of interference with prospective economic advantage and
26 breach of fiduciary duty), and Plaintiffs must therefore plead adequate facts to satisfy the
27 requirements of a derivative cause of action.

28 ///

1 Pursuant to California law, prior to filing a derivative action, a demand must be
2 made, in writing, on the board. Cal. Corp. Code § 800(b)(2). According to Plaintiffs, they
3 “demanded that Defendants account for Plaintiffs’ injury to Zentek Corporation,” and
4 “[o]n numerous occasions, Plaintiffs have demanded Defendants to cease each of the
5 activities set forth in the prior paragraphs.” Compl. ¶¶ 100, 103, May 2, 2013, ECF No.
6 2. There is nothing in the Complaint to indicate that these demands were in writing, that
7 they conveyed an intent to pursue litigation, or that the demands were actually made to
8 Zentek’s board. These allegations are thus insufficient to establish that a demand was
9 made.

10 However, California law nonetheless also allows a shareholder to move forward
11 with a derivative action without making a written demand on the board when such
12 demand would be futile. Bader, 179 Cal. App. at 789. Futility must be pled with
13 particularity. Fed. R. Civ. P. 23.1(b)(3)(B). Demand would be futile if “the particularized
14 factual allegations . . . create a reasonable doubt that, as of the time the complaint is
15 filed, the board of directors could have properly exercised its independent and
16 disinterested business judgment in responding to a demand.” Bader, 179 Cal. App. at
17 791-92 (internal quotation marks omitted). The mere threat of liability alone is
18 insufficient to prove futility, but rather specific facts are needed that cast doubt on
19 whether the director’s decision to take or not take action is based on corporate merits
20 rather than extraneous influences. Id. at 792.

21 Plaintiffs allege that the individual Defendants are married to each other and both
22 couples own fifty percent of Zentek. The Complaint further alleges that the individual
23 Defendants were both involved in the misappropriation of Zentek’s assets, intellectual
24 property, and client lists in order to start a new and competing firm. The Complaint
25 states specific facts that indicate to this Court that if a demand had been made to the
26 board, outside influences and considerations would have reasonably impacted
27 Defendant Okev’s decision to pursue litigation.

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1 Such influences include Defendant Okev and her husband’s potential personal liability,
2 possible damage to their new business venture, and negative financial impact from the
3 suit and the collapse of Augzenta. Therefore, Plaintiffs have adequately set forth the
4 necessary allegations to bring derivative claims on behalf of Zentek, and Defendants’
5 motion to dismiss on this basis is DENIED.

6 7 **3. Individual Claim Analysis**

8 **a. Pleading Standards**

9
10 Defendants argue that Plaintiffs’ First through Sixth Causes of Action are
11 preempted by California’s Uniform Trade Secrets Act (“CUTSA”) and that the state’s
12 heightened pleading standards thus apply. See Cal. Code Civ. P. § 2019.210.
13 Defendants are incorrect. Federal rules govern federal pleading standards. Erie R. Co.
14 v. Tompkins, 304 U.S. 64 (1938). Therefore, Defendants’ argument that this Court apply
15 a heightened standard based on CUTSA is rejected.

16 17 **b. Breach of Fiduciary Duty (First Cause of Action)**

18
19 The elements required to state a claim for breach of fiduciary duty are:
20 (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damages
21 resulting from the breach. Pellegrini v. Weiss, 165 Cal. App. 4th 515, 524 (2008).
22 Defendants do not dispute that they owed Plaintiffs a fiduciary duty. Instead Defendants
23 argue that Plaintiffs alleged insufficient facts to establish breach because the Complaint
24 does not state “what assets were taken, when they were taken, who the employees were
25 or how many were involved, or how many or the value of the customers that were
26 allegedly wrongfully solicited.” Mot. II at 21. Plaintiffs are required to provide more than
27 just labels, conclusions or a recitation of the elements. Twombly, 550 U.S. at 555.

28 ///

1 Plaintiffs also assert that damages resulted from the assets being taken by Defendants.
2 Plaintiffs do not assert, however, any facts to satisfy the first two elements, namely that
3 they “invested substantial time, skill or money in developing its property” or that
4 Defendants appropriated those assets at little or no cost to them. Id. Therefore, Motion
5 II is GRANTED with leave to amend as to Plaintiffs’ Second Cause of Action.

6
7 **d. Interference with Contract (Third Cause of Action)**
8

9 The elements of an interference with contract claim are: (1) a valid contract
10 between the plaintiff and a third party; (2) defendant’s knowledge of the contract;
11 (3) intentional acts of the defendant designed to induce a breach or disruption of the
12 contract; (4) actual breach or disruption of the contract; and (5) resulting damages.
13 Mintz v. Blue Cross of Cal., 172 Cal. App. 4th 1594,1603 (2009). Plaintiffs are required
14 to allege that the contract would have been performed, but for Defendants’ interference.
15 Hahn v. Diaz-Barba, 194 Cal. App. 4th 1177, 1196 (2011). While Plaintiffs generally
16 allege that some contracts existed, they fail to allege any of those contracts would
17 ultimately have been performed. Therefore, Motion II is GRANTED with leave to amend
18 as to the Third Cause of Action.

19
20 **e. Interference with Prospective Economic Advantage**
21 **(Fourth Cause of Action)**

22 The elements of an interference with prospective economic advantage cause of
23 action are: (1) an economic relationship between plaintiff and a third party, and
24 probability of economic benefit to plaintiff in the future; (2) defendant’s knowledge of the
25 relationship; (3) intentional acts of the defendant designed to disrupt the relationship;
26 (4) actual disruption; and (5) that defendant’s intentional interference was the proximate
27 cause of the economic harm to the plaintiff. Korean Supply Co. v. Lockheed Martin
28 Corp., 29 Cal. 4th 1134, 1153 (2003).

1 As part of the third element, Plaintiffs must plead that the intentional acts of Defendants
2 are wrongful under some legal theory aside from the interference itself. Della Penna v.
3 Toyota Motor Sales, U.S.S., Inc., 11 Cal. 4th 376, 393 (1995).

4 Plaintiffs allege that Zentek was in business and generating a profit working with
5 customers, i.e. third parties. Defendants had knowledge of these relationships with
6 customers because each of the individual Defendants was at least one of the board
7 members of both Zentek and Augzenta, and both individual Defendants were
8 shareholders of both companies. Plaintiffs allege Defendants acted intentionally by
9 taking Zentek’s customers, taking and using customer lists, representing that they were
10 Zentek’s successor, and ultimately taking Zentek’s business. Plaintiffs allege that these
11 acts caused Zentek to lose business, and therefore revenue. Since these wrongs arise
12 out of an independent legal theory—Defendants’ breach of their fiduciary duty—Plaintiffs
13 have adequately stated a claim for interference with prospective economic advantage.
14 Therefore, Motion II is DENIED as to the Fourth Cause of Action.

15
16 **f. Fraud Claims (Seventh, Eighth and Ninth Causes of**
17 **Action)**

18 Plaintiffs’ Seventh, Eighth, and Ninth Causes of Action are all fraud-based. Fraud
19 claims are subject to a heightened pleading standard and need to be stated with
20 particularity. See, e.g., Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)
21 (the heightened pleading standard of Rule 9(b) requires plaintiff to plead facts as to
22 “who, what, when, where, and how” of the alleged fraud).⁶

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26 ⁶ Plaintiffs inaccurately cite Concha v. London, 62 F.3d 1493, 1503, for the proposition that a
27 heightened pleading standard is not required in cases involving fiduciaries. Their argument conveniently
28 ignores the Ninth Circuit’s caveat to that rule in cases, like this one, involving fraud or mistake. See id.
 (“We therefore hold that Rule 9(b) is not applicable in cases in which the complaint alleges breaches of
fiduciary duty under ERISA, and does not allege fraud or mistake.”) (emphasis added).

1 The elements of fraud in California are “a) misrepresentation; b) knowledge of
2 falsity; c) intent to defraud, i.e., to induce reliance; d) justifiable reliance; and e) resulting
3 damage.” In re Estate of Young, 160 Cal. App. 4th 62, 79 (2008) (internal citation
4 omitted). The elements of negligent misrepresentation are the same as fraud, except
5 intent to induce reliance is not required. Cadlo v. Owens-Illinois, Inc., 125 Cal. App. 4th
6 513, 519 (2004). Plaintiffs have not alleged with specificity that Defendants knew any
7 statements they made were false, nor that Defendants intended to defraud Plaintiffs or
8 induce Plaintiffs’ reliance. To the contrary, Plaintiffs state that Defendants told them
9 Zentek would be profitable—apparently a true statement, as Plaintiffs state in their
10 Complaint that Zentek was a “profitable business for many years.” Compl. at ¶ 17.

11 Additionally, Defendants are required to have knowledge of the falsity of the
12 statements at the time they were made or at least prior to Plaintiffs’ reliance on the
13 statements. Black v. Shearson, Hammill & Co., 266 Cal. App. 2d 362 (1968). Plaintiffs
14 represent in the Complaint that Defendants knew Zentek would not be profitable and that
15 Defendants would not honor their commitments only after planning and actually
16 misappropriating the business assets, not when the statements were made. Plaintiffs
17 quickly contradict these assertions with a basic recitation of the elements of fraud by
18 alleging that Defendants “knew [its statements] to be false” and made those
19 representations “with the intention to deceive and defraud.” Compl. at ¶ 66. However,
20 the specific facts asserted by Plaintiffs do not support these general allegations of fraud.
21 Therefore, Motion II is granted with leave to amend as to Plaintiffs’ Seventh through
22 Ninth Causes of Action.

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**g. Breach of Covenant of Good Faith and Fair Dealing
(Tenth Cause of Action)**

In every contract there is an implied covenant of good faith and fair dealing that requires each party to the contract to “refrain from doing anything to injure the right of the other to receive the agreement’s benefits.” Wilson v. 21st Century Ins. Co., 42 Cal. 4th 713, 720 (2007), as modified, (Dec. 19, 2007) (quoting Frommoethelydo v. Fire Ins. Exchange 42 Cal. 3d 208, 214-215 (1986)). Defendants again attempt to impose on Plaintiffs a heightened pleading requirement by insisting that Plaintiffs allege the “substance and operative terms” of the agreement and whether it is oral or written. Mot. II at 25. Again, however, the Complaint only needs to have “enough factual matter (taken as true) to suggest that an agreement was made.” Twombly, 550 U.S. at 556.

Plaintiffs’ Complaint states that there was an agreement between the individual parties to go into business together, describes what that agreement was for, and when the agreement was made. Additionally, “[i]mplicit in that agreement was that no party would start a competing IT consulting and management service company.” Compl. at ¶ 14. Defendants purportedly nonetheless created a new corporation that took business away from Plaintiff Zentek. These allegations are sufficient to state a claim of breach of covenant of good faith and fair dealing. Motion II is DENIED as to the Tenth Cause of Action.

**h. Constructive Trust, Conspiracy, Accounting, and
Temporary Restraining Order/Preliminary Injunction
(Eleventh through Fourteenth Causes of Action)**

Plaintiffs have alleged separate causes of action for constructive trust, accounting, temporary restraining order/preliminary injunction, and conspiracy. However, none of these claims are valid causes of action. The first three are all remedies. See 5 Witkin, Cal. Proc. 5th §§ 820, 823, 840 (2008) (observing that constructive trust, accounting, and preliminary injunction are remedies to claims).

1 Moreover, conspiracy is not actionable by itself, but rather provides a mechanism to
2 prove that an individual is liable for another wrong. Id. at § 921. Motion II is thus
3 GRANTED with leave to amend as to Plaintiffs' Eleventh through Fourteenth Causes of
4 Action.

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6 **D. Punitive Damages**

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8 Finally, Defendants argue that punitive damages have also not been pled with
9 appropriate particularity. Additionally, Defendants argue punitive damages are not
10 available at all as to Plaintiff's Unfair Competition Law ("UCL") claim (Fifth Cause of
11 Action).

12 Again, Defendants improperly attempt to impose a heightened pleading standard
13 based on state law. Federal law requires only a "short and plain statement of the claim
14 showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Even under Rule 9(b),
15 "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged
16 generally." Fed. R. Civ. P. 9(b). Accordingly, the Ninth Circuit has determined that
17 "plaintiffs may aver scienter generally, just as the rule states—that is, simply by saying
18 that scienter existed." In re GlenFed, Inc. Secs. Litig., 42 F.3d 1541, 1547 (9th Cir.
19 1994).

20 Construing these rules together, where Plaintiffs have stated a proper claim for
21 relief that allows for punitive damages, the demand for those damages is adequate if
22 Plaintiff has alleged that the appropriate scienter is present. Plaintiffs have generally
23 alleged here that "Defendants acted with fraud, malice and with intent to damage
24 Plaintiffs, entitling Plaintiffs to an award of punitive damages." Compl. at ¶ 31. Plaintiffs'
25 punitive damages allegations are thus sufficient and Defendants' motion is DENIED as
26 to Plaintiffs' First, Fourth, and Sixth Causes of Action.

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