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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA STATE EMPLOYEES ASSOCIATION,	)	Case No. 2:14-CV-02494 JAM-KJN
	)	
Plaintiff,	)	<b>ORDER GRANTING PLAINTIFF'S</b>
	)	<b>MOTION TO DISMISS</b>
v.	)	
	)	
RICHARD BOGART; and DOES 1	)	
through 25, inclusive,	)	
	)	
Defendants.	)	
<hr/>		
RICHARD BOGART,	)	
	)	
Counter-Plaintiff,	)	
	)	
v.	)	
	)	
CALIFORNIA STATE EMPLOYEES ASSOCIATION,	)	
	)	
Counter-Defendant.	)	

Plaintiff California State Employees Association ("CSEA") moves to dismiss (Doc. #9) the second and third causes of action in Defendant Richard Bogart's ("Bogart") First Amended Cross-Complaint ("FACC") (Doc. #8). Bogart opposes the motion (Doc. #12) and CSEA filed a reply (Doc. #14). For the following reasons, CSEA's motion is GRANTED.<sup>1</sup>

<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for January 14, 2015.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 According to Bogart's FACC, "for a number of years," Richard  
3 Bogart "worked as an insurance broker for Anthem Life Insurance  
4 Company." FACC ¶ 3. During his time with Anthem, Bogart  
5 "developed a long-standing mutually beneficial relationship with  
6 CSEA," which is a federation of four affiliated organizations of  
7 California state employees. FACC ¶ 3. In 2007, a member of CSEA's  
8 leadership "asked Mr. Bogart if he could research, identify and  
9 analyze two possible vendors who would be able to assist CSEA in  
10 offering CSEA members a discount electronics purchasing program . .  
11 . as a non-insurance benefit of membership." FACC ¶ 4. Bogart  
12 brokered an agreement between CSEA and Purchasing Power, a company  
13 specializing in establishing and managing purchasing programs for  
14 employees through which payments for certain, offered products are  
15 automatically deducted from employee paychecks through payroll.  
16 FACC ¶ 4. On December 8, 2007, Bogart "entered a Marketing  
17 Agreement with Purchasing Power under which Mr. Bogart was to  
18 receive a four percent commission on all CSEA member purchases from  
19 Purchasing Power." FACC ¶ 5.

20 From 2007 through early 2014, Bogart received commissions  
21 pursuant to the Marketing Agreement. FACC ¶ 6. However, after a  
22 leadership change at CSEA, the new director of member benefits  
23 wrote a letter to Purchasing Power, informing it that CSEA "does  
24 not have or utilize[] an independent contractor or broker for its  
25 business" and that "CSEA did not sign an independent contract or  
26 broker agreement with Mr. Bogart." FACC ¶¶ 7-8. As a result of  
27 this letter, "Purchasing Power terminated its contract with Mr.  
28 Bogart and stopped paying him commissions in April 2014." FACC

1 ¶ 9. Beginning in April 2014, Purchasing Power began paying the  
2 four percent commission directly to CSEA. FACC ¶ 9.

3 On August 21, 2014, CSEA filed a complaint in Sacramento  
4 County Superior Court, alleging against Bogart seven causes of  
5 action, including conversion, deceit/fraudulent concealment, and  
6 constructive fraud. On October 22, 2014, Bogart filed a  
7 counterclaim (mistakenly labeled as a cross-claim) against CSEA.  
8 Shortly thereafter, Bogart removed the case to this Court, on the  
9 basis of diversity jurisdiction. On November 25, 2014, Bogart  
10 filed his FACC against CSEA. The FACC includes the following  
11 causes of action: (1) intentional interference with contractual  
12 relations; (2) conversion; and (3) violation of Business and  
13 Professions Code § 17200, commonly known as the Unfair Competition  
14 Law ("UCL").

## 15 16 II. OPINION

### 17 A. Conversion

18 CSEA argues that Bogart has failed to state a claim for  
19 conversion because "California courts do not recognize a claim for  
20 conversion arising from a contractual right of payment." Mot. at  
21 6. Specifically, CSEA argues that Bogart's alleged contractual  
22 right to the payment of commissions did not entitle him to "the  
23 immediate possession necessary to establish a cause of action for  
24 the tort of conversion." Mot. at 6 (citing In re Bailey, 197 F.3d  
25 997, 1000 (9th Cir.1999)). Bogart responds that his conversion  
26 claim does not rely on a "contractual right to payment," but rather  
27 alleges an ownership interest in a "specific, identifiable, and  
28 traceable" sum of money. Opp. at 3-4.

1 Under California law, the elements of a conversion claim are  
2 as follows: "(1) the plaintiff's ownership or right to possession  
3 of the property at the time of the conversion; (2) the defendant's  
4 conversion by a wrongful act or disposition of property rights; and  
5 (3) damages." Mindys Cosmetics, Inc. v. Dakar, 611 F.3d 590, 601  
6 (9th Cir. 2010). With respect to the first element of conversion,  
7 a plaintiff "must show that she was entitled to immediate  
8 possession at the time of conversion." In re Bailey, 197 F.3d 997,  
9 1000 (9th Cir. 1999). Importantly, the Ninth Circuit has noted  
10 that, under California law, "a mere contractual right of payment,  
11 without more, does not entitle the obligee to the immediate  
12 possession necessary to establish a cause of action for the tort of  
13 conversion." Id. (citing Imperial Val. Co. v. Globe Grain &  
14 Milling Co., 187 Cal. 352 (1921).

15 The sole "wrongful act" alleged by Bogart is CSEA's March 27,  
16 2014 letter to Purchasing Power, which resulted in Purchasing  
17 Power's "refus[al] to pay Mr. Bogart commissions on sales beginning  
18 in April 2014[.]" FACCC ¶¶ 8, 13. This allegation fails to  
19 establish that Bogart was "entitled to immediate possession [of the  
20 commission payments] *at the time of conversion.*" Bailey, 197 F.3d  
21 at 1000 (emphasis added). Notably, Bogart does not allege that he  
22 was deprived of his commission payments for any months up to, and  
23 including, March 2014. Rather, Bogart alleges that he failed to  
24 receive commissions "each month, from April 2014 to November 2014."  
25 FACCC ¶ 17. At the time of the alleged conversion - March 27, 2014  
26 - Bogart claims he was contractually entitled to continue receiving  
27 future commission payments from Purchasing Power. As noted above,  
28 however, "a mere contractual right of payment, without more, does

1 not entitle the obligee to the immediate possession necessary" to  
2 state a claim for conversion. Id. (citing Imperial Val. Co. v.  
3 Globe Grain & Milling Co., 187 Cal. 352 (1921); see also Gerawan  
4 Farming, Inc. v. Rehrig Pac. Co., 2012 WL 691758, at \*6 (E.D. Cal.  
5 Mar. 2, 2012) (dismissing claim for conversion because "there is  
6 nothing to suggest that the royalty payments due to [plaintiff]  
7 amounted to anything more than a contractual right to payment").  
8 Bogart has not sufficiently alleged the first element of his  
9 conversion claim. This failure is fatal to his claim.

10 To the extent that Bogart contends that the unpaid commissions  
11 are "specific, identifiable, and traceable" funds, this argument is  
12 misplaced. Opp. at 3. As Bogart accurately notes, "[m]oney can be  
13 the subject of an action for conversion if a specific sum capable  
14 of identification is involved." Farmers Ins. Exch. v. Zerlin, 53  
15 Cal.App.4th 445, 452 (1997). However, this rule supplements - but  
16 does not replace - the three essential elements of a conversion  
17 claim listed above. Mindys Cosmetics, 611 F.3d at 601 (9th Cir.  
18 2010). In other words, the "specific, identifiable sum"  
19 requirement is necessary, but not sufficient, to state a claim for  
20 conversion. As discussed above, Bogart has failed to allege that  
21 he was entitled to immediate possession of the funds at the time of  
22 CSEA's alleged conversion. Therefore, it matters not whether the  
23 sum sought by Bogart is specific and identifiable.

24 Similarly, Bogart's reliance on Mathews is unavailing. Opp.  
25 at 3 (citing Mathews v. Orion Healthcorp Inc, 2014 WL 4245986 (N.D.  
26 Cal. Aug. 27, 2014). In Mathews, the name-plaintiff sued his  
27 employer for conversion, alleging that the employer had improperly  
28 withheld his commission payments. Mathews, 2014 WL 4245986, at \*1.

1 Under Mathews' employment contract, he was entitled to receive  
2 commissions on a monthly basis. Id. at \*1-2. He received those  
3 commissions up to, and including, June 2013. Id. at \*3. However,  
4 on July 12, 2013, his employer sent out an email notifying  
5 employees that the commission payments would be delayed  
6 indefinitely. Id. at \*3. The district court granted Mathews'  
7 motion for summary judgment with regard to his July 2013  
8 commissions, which "had already been accrued in June." Id. at \*7.  
9 However, the district court did not find in favor of the plaintiff  
10 with regard to the August 2013 commissions, or any commissions  
11 thereafter: i.e. those commissions which had not yet accrued at the  
12 time of the employer's July 12, 2013 email. Id. at \*7-8. The  
13 district court's findings in Mathews support this Court's  
14 conclusion that Bogart has failed to allege a conversion claim  
15 against CSEA. Unlike the July 2013 commissions in Mathews, Bogart  
16 is unable to show that he was entitled to immediate possession of  
17 the April 2014 commissions at the time of CSEA's March 27, 2014  
18 letter. Rather, Bogart's future commissions are analogous to the  
19 August 2013 commissions in Mathews, which accrued after the  
20 Mathews' employer's July 12, 2013 email.

21 For all of these reasons, CSEA's motion to dismiss Bogart's  
22 second cause of action for conversion is granted. Since Bogart has  
23 not proposed any additional allegations that would be both  
24 consistent with the FACCC and sufficient to state a claim for  
25 conversion this claim is dismissed with prejudice. See Eminence  
26 Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir.  
27 2003) (holding that dismissal without leave to amend is appropriate  
28 "where it is "clear . . . that the complaint could not be saved by

1 amendment").

2 B. Violation of the UCL

3 CSEA argues that Bogart's UCL claim should be dismissed in  
4 part, to the extent that it alleges fraudulent business practices,  
5 unfair business practices, or unlawful business practices through  
6 conversion. Mot. at 8. Bogart does not directly address CSEA's  
7 argument with regard to his claim of fraudulent or unfair business  
8 practices, but argues generally that CSEA's motion to dismiss the  
9 third cause of action in part is improper, and that the proper  
10 vehicle for such a challenge is a Rule 12(f) motion to strike.  
11 Opp. at 5. Bogart also argues that his claim for unlawful business  
12 practices survives as it is derivative of his conversion claim.  
13 Opp. at 5.

14 As an initial matter, CSEA's motion to dismiss Bogart's UCL  
15 claim in part is properly before the Court. A party may move to  
16 dismiss specific "prongs" of a UCL claim, without moving to dismiss  
17 the claim in its entirety. See, e.g., Goldsmith v. Allergan, Inc.,  
18 2011 WL 2909313, at \*7-8 (C.D. Cal. May 25, 2011) (ruling on a  
19 motion to dismiss individual "prongs" of the plaintiff's UCL claim,  
20 such as the "unlawful-prong UCL claim" and the "unfair-prong UCL  
21 claim"). Bogart's reliance on Thompson v. Paul, 657 F. Supp. 2d  
22 1113, 1130 (D. Ariz. 2019) is unpersuasive. CSEA is not asking the  
23 Court to strike individual allegations within the UCL claim, but  
24 rather to dismiss the claim in part, to the extent that it relies  
25 on specific theories. Opp. at 5. Such a request is procedurally  
26 proper.

27 CSEA first argues that Bogart's UCL claim should be dismissed,  
28 to the extent that it alleges "fraudulent" business practices by

1 CSEA. Mot. at 8. Bogart does not appear to oppose this argument.  
2 To state a claim for "fraudulent" business practices under the UCL,  
3 a plaintiff must "allege that consumers are likely to be deceived  
4 by the defendant's conduct." Jackson v. Ocwen Loan Servicing, LLC,  
5 2011 WL 587587, at \*4 (E.D. Cal. Feb. 9, 2011). Bogart has failed  
6 to allege that CSEA's conduct would have been likely to deceive  
7 "consumers." For this reason, the "fraudulent-prong" of Bogart's  
8 UCL claim is dismissed with leave to amend.

9 CSEA next argues that Bogart's UCL claim should be dismissed,  
10 to the extent that it alleges "unfair" business practices by CSEA.  
11 Mot. at 8. Bogart also does not appear to oppose this argument. A  
12 business practice is "unfair" under the UCL "if either (1) it is  
13 tethered to [a] specific constitutional, statutory, or regulatory  
14 provision, or (2) its harm to consumers outweighs its utility."  
15 MacDonald v. Ford Motor Co., 2014 WL 1340339, at \*9 (N.D. Cal. Mar.  
16 31, 2014). Bogart's opposition does not include any argument that  
17 his UCL claim is "tethered to [a] specific constitutional,  
18 statutory, or regulatory provision," nor has he alleged any facts  
19 that would allow the Court to conclude that CSEA's business  
20 practices harmed consumers. For this reason, the "unfair-prong" of  
21 Bogart's UCL claim is dismissed with leave to amend.

22 Finally, CSEA argues that Bogart's UCL claim should be  
23 dismissed, to the extent that the allegation of "unlawful" business  
24 practices is based on a theory of conversion. As discussed above,  
25 Bogart has failed to state a claim for conversion. Accordingly,  
26 the "unlawful-prong" of Bogart's UCL claim is dismissed with  
27 prejudice, to the extent that it is based on conversion. See  
28 supra, at 7 (discussing futility of amendment of Bogart's



1 conversion claim). However, as the "unlawful-prong" is also based  
2 on a theory of intentional interference with contractual relations  
3 - which has not been challenged by CSEA - the prong itself survives  
4 CSEA's motion to dismiss. See CRST Van Expedited, Inc. v. Werner  
5 Enterprises, Inc., 479 F.3d 1099, 1107 (9th Cir. 2007) (holding  
6 that intentional interference with a contract constitutes an  
7 "unlawful" practice for purposes of the UCL).

8  
9 III. ORDER

10 For the reasons set forth above, the Court DISMISSES WITHOUT  
11 LEAVE TO AMEND Bogart's claim for conversion in its entirety. The  
12 Court DISMISSES WITH LEAVE TO AMEND the "fraudulent-prong" and  
13 "unfair-prong" of Bogart's UCL claim. Finally, the Court DISMISSES  
14 WITHOUT LEAVE TO AMEND the "unlawful-prong" of Bogart's UCL claim,  
15 to the extent it is based on conversion. Bogart's Second Amended  
16 Counter-Claim must be filed within twenty (20) days from the date  
17 of this Order. CSEA's responsive pleading is due within twenty  
18 (20) days thereafter. If Bogart elects not to file a Second  
19 Amended Counter-Claim, the matter will proceed consistent with this  
20 Order.

21 IT IS SO ORDERED.

22 Dated: February 2, 2015

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JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE