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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ENCOMPASS HOLDINGS, INC.,)	
)	
Plaintiff(s),)	No. C09-1816 BZ
)	
v.)	
)	
CAREY F. DALY II, et al.,)	ORDER GRANTING BRINKMAN'S
)	MOTION TO DISMISS
Defendant(s).)	
)	
_____)	

Before me is third-party defendant Daren Brinkman's motion to dismiss the claims asserted against him by defendants Carey F. Daly and Randall J. Lanham (collectively "Daly") in their third amended "counterclaim" ("TAC").¹ At a hearing on May 6, 2011, I set aside Brinkman's default and was prepared to grant Brinkman's motion to dismiss the second amended counterclaim, which only named Brinkman in the RICO claims. Counsel for Daly represented that, since filing the second amended counterclaim,

¹ All parties have consented to my jurisdiction for all proceedings including entry of final judgment, pursuant to 28 U.S.C. § 636(c).

1 he had discovered substantial additional information that
2 implicated Brinkman and sought leave to file a third amended
3 counterclaim. I granted leave. The TAC added more factual
4 allegations to these RICO claims, added a claim against
5 Brinkman and others for constructive fraud, and added
6 Brinkman's name to several of the previous counterclaims which
7 have remained almost exactly the same, (e.g., interference with
8 prospective business advantage, defamation, unfair business
9 practices in violation of California Business and Professions
10 Code Section 17200, conspiracy to defraud, and intentional
11 infliction of emotional distress).

12 Brinkman's motion to dismiss Daly's constructive fraud
13 claim is **GRANTED**. Constructive fraud consists of any act,
14 omission, or concealment involving a breach of legal or
15 equitable duty which results in damages to another even though
16 the conduct is not otherwise fraudulent. Cal. Civ. Code §
17 1573; Salahutdin v. Valley of Calif., Inc., 24 Cal.App.4th 555,
18 562 (1994). Brinkman, the attorney who represented the
19 committee of unsecured creditors during Nacio's bankruptcy
20 proceedings (Daly was Nacio's former CEO and an unsecured
21 creditor in the proceedings), is alleged to have breached his
22 fiduciary duty to Daly by revealing Daly's confidential
23 information to Encompass to help ensure that Encompass's bid
24 for Nacio was successful, and by submitting false declarations
25 to the bankruptcy court. This claim mistakenly presupposes
26 that Brinkman owed a fiduciary duty to individual unsecured
27 creditors, such as Daly.

28 Section 1103(b) of the Bankruptcy Code permits a committee

1 to employ an attorney but prohibits that attorney from
2 representing "any other entity having an adverse interest in
3 connection with the case." The cases construing this provision
4 are divided on whether an attorney for a committee owes a
5 fiduciary duty to the committee's constituents. Under the
6 particular circumstances presented here, I am persuaded that
7 the view expressed in 7 Collier on Bankruptcy ¶ 1103.03[7]
8 should apply:

9 The professionals represent the committee itself and
10 not the entire class represented by the committee.
11 Some cases have alluded to the concept that a
12 committee professional has a broader duty than simply
13 a duty to the committee [citation omitted]. Such
14 statements are misplaced. The committee itself
15 represents the members of the class and the
16 professionals follow the instructions of the
17 committee. The professionals should not be placed in
18 a position where they are expected or encouraged to
19 second guess the committee as to how best to further
20 the interests of the committee's constituency.
21 Professionals should also take care not to align
22 themselves too closely with particular committee
23 members or with factions on a committee.

24 Owing a fiduciary duty to only the committee rather than
25 each individual unsecured creditor recognizes that individual
26 members of the committee or individual creditors often have
27 adverse interests, which prevents an attorney from being in a
28 fiduciary relationship with each of them. This is particularly
true here, where Daly alleges he voluntarily created a
confidential relationship with Brinkman and gave him
information which Brinkman was supposed to keep secret from
other unsecured creditors like Encompass and Encompass's CEO.
Under such circumstances, Brinkman did not owe Daly a fiduciary
duty and cannot be liable for constructive fraud.

Another flaw in this and Daly's other state law claims is

1 that Brinkman's alleged filing of false declarations with the
2 bankruptcy court was privileged conduct. Since most of Daly's
3 counterclaims arise under state law, state privileges apply.
4 Evidence Rule 501. California Civil Code § 47 provides an
5 absolute privilege for statements made in the course of a
6 judicial proceeding. Accordingly, to the extent any of Daly's
7 state law claims are based on the allegedly false bankruptcy
8 court declarations, they are not actionable. See Albertson v.
9 Raboff, 46 Cal. 2d 375, 381 (1956); Pollock v. University of
10 Southern California, (2003) 112 Cal.App.4th 1416, 1430-1431.
11 (applying § 47 to a declaration filed in a lawsuit).

12 Brinkman's motion to dismiss Daly's claim for interference
13 with prospective business advantage is also **GRANTED**. To
14 recover for this tort, plaintiffs must prove the following
15 elements:

16 1) an economic relationship between the plaintiff and
17 some third party, with the probability of future
18 economic benefit to the plaintiff; (2) the
19 defendant's knowledge of the relationship; (3)
20 intentional acts on the part of the defendant
designed to disrupt the relationship; (4) actual
disruption of the relationship; and (5) economic harm
to the plaintiff proximately caused by the acts of
the defendant.

21 Youst v. Longo, 43 Cal.3d 64, 71 (1987). Daly has pled an
22 agreement with a third party to negotiate an infusion of new
23 capital into Nacio and that Encompass's CEO knew about this
24 economic relationship. But nowhere in the TAC has Daly pled
25 that Brinkman was aware of this relationship. At the hearing,
26 Daly's counsel argued that Brinkman's knowledge about the
27 letter of intent and economic relationship can be inferred
28 because Brinkman was working with Encompass's CEO. I am

1 unwilling to make such inferences about unpled facts,
2 particularly since Daly has had multiple opportunities to amend
3 his counterclaim in the more than two years since this action
4 was filed and has never alleged that Brinkman knew about this
5 economic relationship.

6 Brinkman next challenges Daly's defamation claim. This
7 tort requires Daly to establish "the intentional publication of
8 a statement of fact that is false, unprivileged, and has a
9 natural tendency to injure or which causes special damage."

10 Smith v. Maldonado, 72 Cal.App.4th 637, 645 (1999); Cal. Civ.
11 Code §§ 45-46. General allegations of defamatory statements
12 that do not identify the substance of what was said are
13 insufficient to withstand a motion to dismiss. Scott v. Solano
14 County Health and Social Services Dept., 459 F.Supp.2d 959, 973
15 (E.D. Cal. 2006); Jacobson v. Schwarzenegger, 357 F.Supp.2d
16 1198, 1216 (C.D. Cal. 2004). In the TAC, Daly alleges that
17 Brinkman's employee, Joseph Berardi, and others met with a
18 "high-level employee" of Nacio and provided him with documents
19 falsely claiming that Encompass was in control of Nacio. This
20 allegation, however, does not entitle Daly to relief for
21 defamation because the statement that Encompass was in control
22 of Nacio does not defame Daly. See Scott, 459 F.Supp.2d at 973
23 ("Publication means communication to a third person who
24 understands the defamatory meaning of the statement and its
25 application to the person to whom reference is made")(internal
26 citations and quotations omitted). The TAC also alleges that
27 Berardi told the "high-level employee" that Daly had been
28 terminated as CEO for breaching his agreement with Encompass

1 and wrongfully taking over Nacio. But there is no allegation
2 in the TAC that Berardi's statement was false.² Because Daly
3 has failed to identify any statements that adequately plead the
4 elements of defamation, the claim is **DISMISSED**.

5 I also **DISMISS** Daly's claim for intentional infliction of
6 emotional distress. The elements of this tort are:

7 (1) extreme and outrageous conduct by the defendant
8 with the intention of causing, or reckless disregard
9 of the probability of causing, emotional distress;
10 (2) the plaintiff[] suffering severe or extreme
emotional distress; and (3) actual and proximate
causation of the emotional distress by the
defendant's outrageous conduct.

11 Christensen v. Superior Court, 54 Cal.3d 868, 903
12 (1991)(quoting Davidson v. City of Westminster, 32 Cal.3d 197,
13 209 (1982)). For conduct to be outrageous, it must be "so
14 extreme as to exceed all bounds of that usually tolerated in a
15 civilized community." Id. None of Daly's allegations against
16 Brinkman amount to conduct that meets this definition of
17 outrageous. Moreover, Daly bases his claim for intentional
18 infliction of emotional distress on his allegations for fraud,
19 defamation, unfair business practices, and interference with
20 prospective business advantage, each of which I have found to
21 be insufficient to state a valid claim for relief.

22 Daly's TAC further alleges that Brinkman is liable for
23 conspiracy to defraud and conspiracy to commit substantive RICO
24 offenses. These claims require Daly to allege that Brinkman
25 entered into a conspiracy with others as well as to allege the
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27 ² Neither in his opposition nor when asked at the
28 hearing, did Daly point out where he alleged that Berardi's
statement was false.

1 underlying wrongs. See Applied Equipment Corp., v. Litton
2 Saudi Arabia Ltd., 7 Cal.4th 503, 510-11 (1994); Salinas v.
3 U.S., 522 U.S. 52, 63 (1997). Here, Daly asserts in conclusory
4 fashion that Brinkman entered into a conspiracy with Encompass
5 and other third-party defendants. But Daly fails to support
6 this conclusory allegation with any facts which show that
7 Brinkman intended or even knew that he was entering into a
8 conspiracy with others. Most of Daly's factual allegations,
9 some of which date back to 1999, discuss conduct of other
10 parties, such as Encompass and its directors, engaging in
11 alleged criminal enterprises. Daly never alleges that Brinkman
12 was involved in any of this conduct or even knew about it.
13 Most importantly, Brinkman is not alleged to have any
14 involvement with the underlying business agreement between Daly
15 and Encompass that led to this dispute. Instead, Brinkman is
16 only connected to the other defendants and allegations in the
17 TAC through Daly's assertion that Encompass and its CEO
18 "enlisted the aid and cooperation of Brinkman" during the
19 bankruptcy proceedings. Daly goes on to allege that Brinkman
20 acted in concert with Encompass and manipulated the bankruptcy
21 bid process, submitted false declarations to the bankruptcy
22 court, and terminated Daly's employment with Nacio. Daly,
23 however, never pleads any factual allegations that support the
24 claim that Brinkman agreed to pursue the fraudulent or criminal
25 objective of any conspiracy between Encompass and others.
26 Without such a connection, Brinkman cannot be liable for
27 conspiracy.

28 To counter Brinkman's position that the TAC lacks

1 sufficient factual allegations, Daly resorts to the argument
2 that he has previously used when other third-party defendants
3 moved to dismiss his claims. Daly contends that he has
4 adequately asserted his claims because federal pleading
5 standards are not stringent and only require him to provide
6 other parties with notice of his claims. As I explained in
7 previous orders, this is not the case after Bell Atlantic Corp.
8 v. Twombly, 550 U.S. 544, 555 (2007), and Ashcroft v. Iqbal,
9 129 S.Ct. 1937, 1949 (2009), which found that plaintiffs must
10 do more than plead a "formulaic recitation of the elements of a
11 cause of action" and must instead plead "factual content that
12 allows the court to draw a reasonable inference that the
13 defendant is liable for the misconduct alleged." Accordingly,
14 Brinkman's motion is **GRANTED** with respect to Daly's claims
15 under the RICO Act and for conspiracy to defraud.

16 Lastly, Daly's Section 17200 claim, which prohibits "any
17 unlawful, unfair, or fraudulent business act or practice," is
18 **DISMISSED**. Kwikset Corp. v. Superior Court, 51 Cal.4th 310,
19 320 (2011).³ Daly can no longer predicate a claim for unlawful
20 conduct under Section 17200 because I have dismissed Daly's
21 other claims and he has not identified any other unlawful
22 conduct for which Brinkman would be liable. See Nool v. HomeQ
23 Servicing, 653 F.Supp.2d 1047, 1056 (E.D. Cal. 2009) ("The
24 viability of a claim under [Section 17200's unlawful prong]
25 depends on the viability of an underlying claim of unlawful
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27 ³ Because Section 17200 is written in the disjunctive,
28 it affords relief for all three types of unfair competition.
Pastoria v. Nationwide Ins., 112 Cal.App.4th 1490, 1496 (2003).

conduct"). Daly's claim of fraudulent conduct also appears to be based solely on the other claims asserted by Daly which have now been dismissed. Daly's TAC does not identify any other business practice of Brinkman's that would support the claim that members of the public were deceived.

With respect to the unfair prong, Daly does not identify which of Brinkman's practices outside of the dismissed claims were unfair. Moreover, Daly's TAC has not met the requirement that any allegations of unfairness be connected to a legislatively declared policy. In Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company, the Court held that in actions where competitors allege anticompetitive practices, any finding of unfairness under Section 17200 must "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." 20 Cal.4th 163, 186-76 (1999). Although the California Supreme Court has not directly addressed the definition of unfair for consumer claims under Section 17200, multiple courts have held that such claims for unfairness must similarly be tethered to a legislative policy in order to be actionable. See Van Slyke v. Capital One Bank, 2007 WL 3343943 at *11 (N.D. Cal. 2007) ("Although the California Supreme Court did not reach the issue of consumer cases, the rationale of Cel-Tech nonetheless compels the conclusion, at least in this Court's judgment, that the unfairness prong must also be tethered to some legislative policy; otherwise the courts will roam across the landscape of consumer transactions picking and choosing which they like and which they dislike); Simila v. American Sterling Bank, 2010 WL

1 3988171 at *6 (S.D. Cal. 2010)(discussing the division among
2 California courts with respect to the application of the
3 tethering and balancing tests under the unfair prong and
4 finding that the tethering test is "more in line with the
5 California Supreme Court's reasoning in Cel-Tech"). Without
6 deciding whether Daly's relation to Brinkman is more like a
7 consumer or a competitor, Daly's TAC fails to connect his
8 unfairness allegations, whatever they may be, to any
9 legislative policy. For the foregoing reasons, **IT IS ORDERED**
10 that Brinkman's motion to dismiss is **GRANTED WITH PREJUDICE**.⁴

11 Dated: July 28, 2011

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13 _____
14 Bernard Zimmerman
United States Magistrate Judge

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22 ⁴ Daly did not ask for leave to amend in his papers or
23 at the hearing. Had he, it is not likely I would have granted
24 it because Daly has already had several chances to amend his
25 counterclaim. Furthermore, this action is now over two years
26 old, discovery closes soon and trial is less than five months
27 away. See Moore v. Kayport Package Exp., Inc., 885 F.2d 531,
28 538 (9th Cir. 1989)("In deciding whether justice requires
granting leave to amend, factors to be considered include the
presence or absence of undue delay, bad faith, dilatory motive,
repeated failure to cure deficiencies by previous amendments,
undue prejudice to the opposing party and futility of the
proposed amendment").