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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOBSCIENCE, INC,

No. C 13-04519 WHA

Plaintiff,

v.

**ORDER GRANTING IN PART
AND DENYING IN PART
MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

CVPARTNERS, INC, et al.,

Defendants.

In this copyright infringement action involving a recruiting software license, defendants move to dismiss all claims in the first amended complaint under FRCP 12(b)(6). For the reasons stated below, the motion is **GRANTED IN PART AND DENIED IN PART**.

STATEMENT

Plaintiff Jobscience, Inc. develops and licenses recruiting software applications. Defendants are individuals and entities alleged to have copied Jobscience's software application, which was licensed to defendant CVPartners, Inc. The theory in the operative first amended complaint (Dkt. No. 15) is that:

Defendants licensed Jobscience's software application and then conspired to misappropriate Plaintiff Jobscience's proprietary and confidential trade secrets, by gaining access through fraud and deceit, intentionally copying Jobscience software, recreating infringing software applications, creating alter ego limited liability companies to shield themselves, and then selling the product of their conspiracy for illicit financial gain to the detriment of Jobscience.

(Compl. ¶ 1).

1 According to the complaint, plaintiff created a software application called “Jobscience;”
2 the relevant additions include JS 2 Jobscience Recruiting Package Version 4.01.19 (2012) and JS
3 2 Jobscience Recruiting Package Version 2.01 (2009), both subjects of copyrights. In September
4 2010, defendant CVPartners executed a Master Agreement, with a End User License and
5 Agreement (EULA), to license plaintiff’s software application. The agreement was renewed in
6 August 2011. The complaint alleges that defendant Brandon Metcalf, formerly Senior Director
7 of Technology at CVPartners:

8 fraudulently induced Plaintiff to give him access to Jobscience
9 software code, processes and methods, by requesting such access
10 under the guise that he would access such code for the purpose
11 consistent with the Agreement and the confidentiality provisions
12 thereof. Metcalf gained access to Plaintiff’s trade secrets
13 consisting of software code and other proprietary information
14 After accessing the code through fraudulent means, by
15 misrepresenting his intent and purpose, Defendants reverse
16 engineered, copied and converted for Defendants’ own use, the
17 Jobscience copyrighted software application and its elements.

18 (Compl. ¶ 27). In November 2011, defendant Skipan SAAS LLC was formed, with Brandon
19 Metcalf as COO. In January 2012, defendant Skipan LLC was formed. “[I]n a matter of
20 months, Defendants were allegedly able to create and market a software application that took
21 Jobscience several years and millions of dollars in investment to create and perfect.” In August
22 2012, CVPartners provided notice that they were terminating the license. Plaintiff thereafter
23 discovered a “replica of the Jobscience job board” on CVPartners’ website. “The job board,
24 which was one of the functional elements of Plaintiff’s software solution, was so similar to
25 Jobscience that Jobscience’s own employees were fooled to believe that the Jobscience job board
26 was still up on the CVPartners website” (Compl. ¶¶ 21, 22, 24, 25, 28, 30, 34, 35).

27 The complaint alleges thirteen claims for relief: (1) copyright infringement, (2) breach of
28 contract, (3) intentional interference with economic relations, (4) negligent interference with
economic relations, (5) misappropriation of trade secrets, (6-7) unfair competition, (8) fraud and
deceit, (9) negligent misrepresentation, (10) conversion, (11) breach of the implied covenant of
good faith and fair dealing, (12) conspiracy, and (13) constructive trust.

On December 3, defendants moved to dismiss with prejudice all claims, as well as “the
assertion of alter-ego liability” in the first amended complaint pursuant to FRCP 12(b)(6).

1 ANALYSIS

2 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
3 accepted as true, ‘to state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.
4 Ct. 1937, 1949–50 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A
5 claim is facially plausible when there are sufficient factual allegations to draw a reasonable
6 inference that the defendants are liable for the misconduct alleged. While a court “must take all
7 of the factual allegations in the complaint as true,” it is “not bound to accept as true a legal
8 conclusion couched as a factual allegation.”

9 COPYRIGHT INFRINGEMENT (COUNT I).

10 Defendants argue that the complaint fails to state a claim for copyright infringement. To
11 plead copyright infringement, plaintiff must plead (1) ownership of a valid copyright and (2)
12 copying of protected expression by the alleged infringers. *See Feist Pubs., Inc. v. Rural Tel.*
13 *Serv. Co.*, 499 U.S. 340, 361 (1991). The second element may be established by showing that
14 the works in question are substantially similar in their protected elements and that the alleged
15 infringers had access to the copyrighted works. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174
16 (9th Cir. 2003).

17 The parties do not dispute that the first element is adequately pled. Jobscience obtained
18 copyright certificates for JS 2 Jobscience Recruiting Package Version 4.01.19 and JS 2
19 Jobscience Recruiting Package Version 2.01.

20 The issue is whether the second element is adequately pled. Defendants argue that the
21 complaint fails to allege (1) what each defendant allegedly infringed and how their actions
22 constitute infringement, (2) access to works entitled to copyright protection, and (3) virtual
23 identity of works entitled to copyright protection (Br. 5–7). Defendants also argue that
24 plaintiff’s concede that the job board “was one of the functional elements of Plaintiff’s software
25 solution” and functional elements of software are not protected under the Copyright Act (Compl.
26 ¶ 35). *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523–24 (9th Cir. 1992).

27 This order finds sufficient facts in the complaint to state a plausible claim of copyright
28 infringement. The complaint alleges that defendants infringe Jobscience’s software application:

1 “JS 2 Jobsience Recruiting Package Version 2.01 in 2009, Version 4.01.19 in 2012, and
2 Version 4.400.1 in 2013.” The allegedly infringing work is Talent Rover. Defendants allegedly
3 copied, developed derivative works, and sold Talent Rover “in direct competition with
4 Jobsience.” Defendant CVPartners’ website contains a “replica of the Jobsience job board,”
5 which “was so similar to Jobsience that Jobsience’s own employees were fooled to believe that
6 the Jobsience job board was still up on the CVPartners website,” after CVPartners terminated
7 the license. Defendants obtained access to plaintiff’s software application by virtue of
8 CVPartners’ license with Jobsience (Compl. ¶ 17, 27, 30, 32, 35). This suffices.

9 Accordingly, defendants’ motion to dismiss the copyright infringement claim is **DENIED**.

10 **BREACH OF CONTRACT (COUNT II).**

11 Defendants argue that the complaint fails to plead sufficient facts to state a claim for
12 breach of contract. As a threshold matter, the parties disagree about who the complaint alleges is
13 liable for breach of contract. Plaintiff states that it “has alleged breach of contract against all of
14 the Defendants and has, in addition, alleged a theory of liability based on alter ego” (Opp. 10).
15 Not so. The complaint unambiguously alleges breach of contract “against Defendants
16 CVPartners, Gray and Metcalf” — not all defendants (Compl. ¶ 15). Moreover, of the three
17 defendants, defendants only challenge the breach of contract claim as applied to defendants Gray
18 and Metcalf, not CVPartners (Br. 7–8). This order, therefore, addresses the breach of contract
19 claim against Gray and Metcalf only.

20 Plaintiff alleges that Gray and Metcalf are directly liable for breach of contract because
21 “as users of the software [in question], Defendants [Gray and Metcalf] were also subject to an
22 End User License and Agreement containing license terms and conditions including
23 confidentiality provisions” The complaint states that all alleged wrongdoings are breaches
24 of both the Master Agreement and the EULA (Compl. ¶¶ 21, 22, 45, 62).

25 To plead a claim for breach of contract, plaintiff must allege sufficient facts to show: (i)
26 the existence of a contract; (ii) plaintiff’s performance or excuse for failure to perform; (iii)
27 defendant’s breach; and (iv) resultant damage to plaintiff. *Hale v. Sharp Healthcare*, 183 Cal.
28 App. 4th 1373, 1387 (2010). Here, plaintiff alleges that it provided services to defendants under

1 the agreement, but “[e]very user of the Jobsience service by using the service consents to the
2 End User License Agreement, including Defendants Gray and Metcalf” and “Defendants
3 intentionally breached its contractual obligations to Plaintiff, under the confidentiality provisions
4 of the Agreement . . .” (Compl. ¶¶ 33, 39, 45, 66). As a result of the alleged breach of contract,
5 “Plaintiff has been damaged and continues to be damaged in an amount to be proven at trial.”
6 These allegations are sufficient to survive defendant’s motion to dismiss the breach of contract
7 claim, which is **DENIED**.

8 **INTERFERENCE CLAIMS (COUNTS III AND IV).**

9 Plaintiff’s third and fourth claims for relief against defendants Gray, Metcalf, Skipan
10 LLC, and Skipan SAAS are titled “intentional interference with economic relations” and
11 “negligent interference with economic relations.” In the opposition, plaintiff argues that these
12 torts are “subsumed under ‘interference with economic relations’ (interference with contractual
13 relations, interference with prospective economic advantage and negligent interference with
14 prospective economic advantage)” (Opp. 12).

15 Our court of appeals has stated:

16 In California, the elements of the tort of intentional interference
17 with prospective economic advantage are: (1) an economic
18 relationship between the plaintiff and some third party, with the
19 probability of future economic benefit to the plaintiff; (2) the
20 defendant’s knowledge of the relationship; (3) intentional
[wrongful] 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 *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008). The elements of
22 the tort of negligent interference with prospective economic advantage are similar and outlined in
23 *N. Am. Chem. Co. v. Superior Court*, 59 Cal. App. 4th 764, 786 (1997). Liability for negligent
24 conduct may only be imposed where there is a duty of care owed by the defendant to the plaintiff
25 or to a class of which the plaintiff is a member. *J’Aire Corp. v. Gregory*, 24 Cal. 3d 799, 803
26 (Cal. 1979).

27 Plaintiff’s interference claims cannot survive. The complaint fails to plead the existence
28 of an economic relationship with any third party, defendants’ knowledge of any of those parties,

1 defendants' actual disruption of the economic relationship, negligence, among other elements of
2 interference. *Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 956 (N.D.
3 Cal. 2003) (Judge Marilyn Hall Patel). Plaintiff also cannot merely assert that it "has been
4 damaged in an amount to be established according to proof at trial," but rather must assert
5 particularized factual allegations, including specific economic relationships that defendants
6 disrupted.

7 Accordingly, plaintiff's interference claims are **DISMISSED**.

8 **TRADE SECRETS (COUNT V), UNFAIR COMPETITION (COUNTS VI AND VII), AND**
9 **CONVERSION (COUNT X).**

10 Defendants argue that plaintiff's misappropriation of trade secrets, unfair competition, and
11 conversion claims are preempted by the Copyright Act. This order agrees. Section 301(a) states:

12 all legal or equitable rights that are equivalent to any of the
13 exclusive rights within the general scope of copyright as specified
14 by section 106 . . . are governed exclusively by this title.
15 Thereafter, no person is entitled to any such right or equivalent
16 right in any such work under the common law or statutes of any
17 State.

18 17 U.S.C. 301(a). Preemption applies if the content of the protected right falls within the subject
19 matter of the Copyright Act and the rights asserted under state law are equivalent to those
20 protected by the Copyright Act. *Sybersound Records*, 517 F.3d at 1150.

21 Plaintiff's misappropriation of trade secrets claim is based on the same nucleus of facts as
22 the copyright infringement claim. The complaint alleges that defendant Metcalf "gained access to
23 Plaintiff's trade secrets consisting of software code and other proprietary information." "Plaintiff
24 invested substantial time, money, and skill in developing its proprietary software applications,
25 software code, methods and other trade secrets. Defendants spent very little time and effort in
26 converting those same software applications for their own use" (Compl. ¶¶ 27, 82).

27 To plead a claim for trade secret misappropriation under the California Uniform Trade
28 Secrets Act (CUTSA), California Civil Code 3426, *et seq.*, the complaint must assert (1) the
existence of a trade secret, and (2) misappropriation of the trade secret. Trade secret means:

information, including a formula, pattern, compilation, program,
device, method, technique, or process, that: (1) Derives
independent economic value, actual or potential, from not being
generally known to the public or to other persons who can obtain

1 economic value from its disclosure or use; and (2) Is the subject of
2 efforts that are reasonable under the circumstances to maintain its
3 secrecy.

4 California Civil Code 3426.1. Plaintiff has not pled the existence of a trade secret. Simply
5 referring to “proprietary software applications” — which serve as the basis for plaintiff’s
6 copyright infringement claim — and vague “software code, methods and other trade secrets”
7 cannot suffice. Indeed, plaintiff cannot show efforts to maintain privacy of the so-called trade
8 secret because it received copyrights for its software applications. Plaintiff’s misappropriation of
9 trade secrets claim is thus preempted by the Copyright Act.

10 Defendants also argue that the unfair competition and conversion claims are preempted.
11 This too is correct. Plaintiff alleges that defendants “misappropriat[ed] and conver[ted] Plaintiff’s
12 software application for their own use” and “stole and converted Plaintiff’s proprietary software
13 applications” (Compl. ¶¶ 91, 98, 122). These conclusory allegations fail to show claims of unfair
14 competition and conversion based on facts distinct from the copyright infringement claim.

15 Accordingly, plaintiff’s claims for misappropriation of trade secrets, unfair competition,
16 and conversion are **DISMISSED**.

17 **FRAUD AND DECEIT (COUNT VIII) AND NEGLIGENT MISREPRESENTATION (COUNT IX).**

18 Defendants argue that plaintiff’s fraud and deceit and negligent misrepresentation claims
19 fail to meet the heightened pleading requirements under FRCP 9(b). Rule 9(b) states “[i]n
20 alleging fraud or mistake, a party must state with particularity the circumstances constituting
21 fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be
22 alleged generally.” “Under California law, the indispensable elements of a fraud claim include a
23 false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.”
24 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) (internal quotation marks
25 and citations omitted). Plaintiff’s complaint is entirely inadequate in this regard. The complaint
26 alleges that:

27 Defendants made material misrepresentations of fact and omitted to
28 state material facts with the knowledge that such statements, and/or
omissions, were false and/or misleading. In particular, Defendants
induced Plaintiff to share Plaintiff’s trade secrets, obtaining access
to proprietary software code by misrepresenting the purpose for
access to the code and concealing the Defendants’ intent to teal

1 [sic] and convert Plaintiff’s proprietary software and design to
2 produce, manufacture, distribute, and sell copied and derivative
works for their own account.
3 (Compl. ¶ 104). The first sentence is again parroted in plaintiff’s negligent misrepresentation
4 claim (Compl. ¶ 113). Plaintiff’s complaint is devoid of any specific allegations of who, what,
5 when, where, and how the allegedly fraudulent conduct occurred. All that is stated is that
6 defendant Brandon Metcalf “fraudulently induced Plaintiff to give him access to Jobsience
7 software code, process and methods, by requesting such access under the guise that he would
8 access the code for the purpose consistent with the Agreement and the confidentiality provisions
9 thereof” (Compl. ¶ 27). This falls below the heightened pleading requirements of FRCP 9(b). No
10 particularized allegations surrounding the circumstances of the alleged fraudulent conduct by
11 each specific defendant are made.

12 Accordingly, plaintiff’s claims for fraud and deceit and negligent misrepresentation are
13 **DISMISSED.**

14 Defendants also argue that plaintiff’s tort claims for interference, unfair competition, fraud
15 and deceit, and negligent misrepresentation should be dismissed under the contract-tort
16 transmutation bar because plaintiff fails to allege an independent duty arising from principles of
17 tort law to support these claims. Plaintiff never substantively responded to this argument. It is,
18 however, unnecessary to reach this argument for the reasons stated above.

19 **BREACH OF THE IMPLIED COVENANT (COUNT XI).**

20 Our court of appeals has held that “[g]enerally, no cause of action for the tortious breach
21 of the implied covenant of good faith and fair dealing can arise [under California law] unless the
22 parties are in a ‘special relationship’ with ‘fiduciary characteristics’ . . . [t]hus, the implied
23 covenant tort is not available to parties of an ordinary commercial transaction where the parties
24 deal at arms’ length.” *Pension Trust Fund v. Fed. Ins. Co.*, 307 F.3d 944, 955 (9th Cir. 2002).
25 Defendants argue that plaintiff fails to plead sufficient facts to show a “special relationship with
26 fiduciary characteristics” (Br. 23). The opposition does not respond to this argument.

27 A variety of factors are considered when determining whether a special relationship with
28 fiduciary characteristics exists, including:

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whether the parties were in unequal bargaining positions, whether the damaged party entered the contract for a nonprofit motive, whether ordinary contract damages were inadequate, whether one party is especially vulnerable because of the type of harm it may suffer and the adhesive nature of a contract requires the damaged party to place trust in the other to perform, and the other party knew of the vulnerability.

Mitsui Mfrs. Bank v. Superior Court, 212 Cal. App. 3d 726, 733 (1989). Plaintiff has not pled sufficient facts to show any of these or similar factors in the complaint.

Thus, plaintiff’s claim for breach of the implied covenant of good faith and fair dealing is

DISMISSED.

CONSPIRACY (COUNT XII) AND CONSTRUCTIVE TRUST (COUNT XIII).

As a threshold matter, civil conspiracy is not a separate and distinct cause of action under California law. *Entm’t Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1228 (9th Cir. 1997), cert. denied, 523 U.S. 1021 (1998). Plaintiff’s reliance on *Neblett v. Elliott*, 46 Cal. App. 2d 294, 295 (1941), is unavailing because that was a libel decision. Plaintiff’s conspiracy claim is **DISMISSED WITHOUT LEAVE TO AMEND.**

Similarly, constructive trust is not a claim for relief. *See Malfatti v. Mortgage Elec. Registrations Sys.*, No. 11-cv-03142-LB, 2011 WL 5975055, at *3 (N.D. Cal. Nov. 29, 2011). Plaintiff’s claim for constructive trust is **DISMISSED WITHOUT LEAVE TO AMEND.**

CONCLUSION

In sum, defendants’ motion to dismiss the copyright infringement and breach of contract claims are **DENIED**. Plaintiff’s interference, misappropriation of trade secrets, unfair competition, conversion, and breach of implied covenant of good faith and fair dealing are **DISMISSED**. Plaintiff’s conspiracy and constructive trust claims are **DISMISSED WITHOUT LEAVE TO AMEND.**

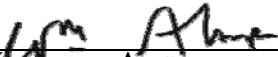
It is premature to outright grant leave to amend at this point because it is not entirely clear how and if the deficiencies in the first amended complaint can be cured. Plaintiff may file a motion for leave to amend the first amended complaint (except as to those dismissed without leave to amend), if supportable, within **FOURTEEN CALENDAR DAYS** of this order, noticed on a 35-day track. The motion should specifically detail how deficiencies outlined in this order can be cured and append the proposed second amended complaint (and a redline showing the proposed

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changes). Plaintiff, of course, can decide not to file a motion for leave to amend the first amended complaint and proceed on the copyright infringement claim against all defendants and breach of contract claim against defendants CVPartners, Inc., Kent Gray, and Brandon Metcalf.

IT IS SO ORDERED.

Dated: January 9, 2014.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE