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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. [15-cv-00811-SI](#)

NPK INDUSTRIES,
Plaintiff,
v.
DENNIS HUNTER, et al.,
Defendants.

**ORDER DENYING DEFENDANTS’
MOTION TO STRIKE PLAINTIFF’S
SECOND AMENDED COMPLAINT,
AND DENYING IN PART AND
GRANTING IN PART DEFENDANTS’
MOTION TO DISMISS**

Re: Dkt. No. 40

Now before the Court is defendants’ motion to dismiss, or in the alternative, to strike plaintiff’s Second Amended Complaint. Dkt. No. 40. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and VACATES the hearing set for September 18, 2015. Having carefully considered the papers submitted, the Court hereby rules as follows.

BACKGROUND

Plaintiff NPK Industries, an Oregon Limited Liability Company, manufactures, markets, distributes, and sells plant washes and other horticultural products. Second Amend. Compl. (“SAC”) ¶¶ 1, 8. NPK has brought suit against defendants Dennis Hunter, RBD Online, Inc. (“RBD”), and CBD Guild (“CBD”) for: (1) intentional interference with prospective economic advantage; (2) common law trade libel; (3) unfair competition; (4) conversion; (5) civil aiding and abetting; and (6) civil conspiracy. *See generally* SAC. Hunter is an individual residing in California; RBD and CBD are companies allegedly owned or controlled by Hunter. *Id.* ¶¶ 2-4.

NPK alleges that the defendants, at the direction of Hunter, devised plans to steal valuable

1 intellectual property and other proprietary information from NPK in order to start a competing
2 plant wash business with “disgruntled” NPK employees, Nicholas Jackson and Jessica Lilga.
3 SAC ¶¶ 13-14. NPK asserts that Hunter relayed a sham offer to purchase Jackson’s NPK shares,
4 in hopes that NPK would buy out Jackson, freeing him from his non-compete agreement with
5 NPK. *Id.* ¶¶ 14-15. Furthermore, plaintiff alleges that Hunter agreed to provide Jackson and Lilga
6 with legal and financial assistance in return for relaying NPK’s top secret, valuable commercial
7 information. *Id.* ¶ 16. When this plan failed, Hunter allegedly orchestrated a “litigation plan” to
8 acquire NPK’s business records and other confidential information through discovery. *Id.* ¶ 17.
9 Hunter and RBD also allegedly made false reports against NPK to various law enforcement
10 agencies, in order to “interrupt[] and debilitat[e] NPK’s operations so that Hunter and RBD could
11 steal NPK’s business.” *Id.* ¶ 20. Plaintiff also alleges that Hunter contacted NPK’s business
12 partners and customers to disparage NPK products and began an email campaign stating that NPK
13 products contained mold. *Id.* ¶¶ 21-23.

14 In addition to the proceeding before this Court, NPK is currently a named defendant in
15 another case before the United States District Court for the District of Oregon, *Yeti Enters. Inc. v.*
16 *NPK, LLC*, Case No. 3:13-cv-01203-ST. According to defendants, that case involves claims for
17 “trademark infringement, breach of contract, fraud, and other causes of action brought against
18 NPK,” based on similar factual circumstances surrounding NPK’s loss of business. *See* Joint Case
19 Mgmt. Conf. Stmt. at 4.

20 On May 20, 2015, plaintiff filed its Second Amended Complaint, having received leave to
21 do so from this Court. Dkt. Nos. 24, 25. On July 31, 2015, defendants filed a motion to dismiss,
22 or in the alternative, motion to strike the Second Amended Complaint. Dkt. No. 40. Defendants
23 allege that the complaint “contains redundant, immaterial, impertinent, or scandalous matter” that
24 must be stricken, and that once the Court disregards these allegations, plaintiff has failed to state a
25 claim for which relief can be granted. Motion at 1-2. Defendants have also filed a request for
26 judicial notice, which plaintiff has opposed. Dkt Nos. 41, 45-1.

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1 **DISCUSSION**

2 **I. Motion to Strike**

3 Defendants argue that several of plaintiff’s factual allegations should be stricken as
4 immaterial because they “have no bearing on NPK’s claims or . . . are false on their face.” Motion
5 at 5. The Court finds that defendants have not met the legal standard for a motion to strike and
6 denies the motion in its entirety.

7
8 **A. Legal Standard under Rule 12(f)**

9 Federal Rule of Civil Procedure 12(f) provides that a court may “strike from a pleading an
10 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”
11 “‘Immaterial’ means that the matter has no bearing on the controversy before the court.
12 [Citations.] If there is *any doubt* as to whether the allegations might be an issue in the action,
13 courts will deny the motion.” *In re 2TheMart.com, Inc. Sec. Litig.*, 114 F. Supp. 2d 955, 965
14 (C.D. Cal. 2000). Moreover, motions to strike are generally disfavored. *Rosales v. Citibank*, 133
15 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001).

16
17 **B. Allegations Regarding Defendants’ Plan to Buy Out Jackson**

18 Defendants assert that the allegations regarding Hunter and RBD’s attempt to buy out
19 Jackson should be stricken as immaterial because “[t]here was no injury . . . [and] more
20 importantly, nothing came of Mr. Hunter and RBD’s alleged attempt.” Motion at 6. NPK has
21 alleged in its complaint it they has lost valuable information to defendants, including NPK’s
22 “intellectual property and other valuable confidential and proprietary trade information,” which
23 resulted in NPK losing “key employees, products, labels, customer lists, registrations and other
24 valuable intellectual property.” SAC ¶ 16; Plaintiff’s Response at 5. Plaintiff argues that
25 defendants’ “buy-out tactics are a factual foundation for NPK’s claims and are not immaterial.”
26 Plaintiff’s Response at 5. If taken as true, these allegations are material to plaintiff’s claims in the
27 present suit, including plaintiff’s claims for intentional interference with prospective economic
28 advantage and conversion. Therefore, the Court agrees with plaintiff that the allegations regarding

1 the buy-out plan should not be stricken.
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3 **C. Allegations Regarding the “Litigation Plan”**

4 Defendants argue that the allegations regarding a litigation strategy intended “to obtain
5 NPK’s confidential information by way of discovery” should be stricken as immaterial. *See*
6 Motion at 6. Defendants argue that striking the allegations is appropriate because: (1) NPK made
7 contradictory allegations in *Yeti*; (2) NPK could have sought a protective order; (3) the litigation
8 plan was abandoned and therefore resulted in no harm; and (4) “any request for documents in such
9 litigation would probably be protected by the litigation privilege.” Motion at 6.

10 Defendants’ argument fails for numerous reasons. First, as discussed further below, the
11 Court declines to take judicial notice of the factual allegations made in the *Yeti* pleadings, while
12 the factual allegations pled in the Second Amended Complaint in this case must be taken as true
13 for the purposes of this motion. Second, defendants do not cite to any authority for the proposition
14 that availability of an “obvious remedy” renders an allegation immaterial. Third, plaintiff NPK
15 does not allege in its complaint that defendants abandoned the litigation plan. Fourth, the fact that
16 the litigation privilege may have protected plaintiff against defendants’ discovery efforts has no
17 bearing on the materiality of plaintiff’s allegations. In addition, the Court agrees with plaintiff that
18 these arguments are inappropriate at the pleading stage of litigation. *See* Plaintiff’s Response at 5
19 n.1.
20

21 **D. Allegations Regarding Disparaging Emails**

22 Defendants argue that allegations about disparaging emails should be stricken as
23 immaterial because they are false on their face. Motion at 7. The Court concludes that
24 defendants’ motion presents factual questions that cannot be resolved at this stage of the litigation.
25 Plaintiff alleges that Hunter began an email campaign stating that NPK products contained mold.
26 SAC ¶ 23; Plaintiff’s Response at 6. Defendants assert that Hunter sent only one “mass e-mail”
27 regarding NPK and that it was not disparaging. *See* Hunter Decl. ¶ 2; Motion at 7. A motion to
28 strike is not the appropriate vehicle for resolving such a factual dispute, and defendants have failed

1 to meet the legal standard on a motion to strike.¹ See Fed. R. Civ. P. 12(f).

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3 **E. References to the Confidentiality Agreements**

4 Defendants move to strike as immaterial all references to NPK’s employment and
5 confidentiality agreements because they were not attached to the complaint and because they are
6 allegedly unenforceable on their face. Motion at 7. Again, the Court finds that such factual
7 disputes are not properly resolved in a motion to strike. Further, although the Court may consider
8 “documents attached to the complaint [and] documents incorporated by reference in the
9 complaint” at the pleading stage, a plaintiff need not attach proof in support of assertions made in
10 the complaint. See *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Accordingly, the
11 motion to strike is denied.

12

13 **II. Motion to Dismiss**

14 Defendants next argue that, after “disregarding the immaterial allegations of the Second
15 Amended Complaint, the remaining allegations for each of NPK’s six claims” must be dismissed
16 for failure to state a claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Motion at
17 9.

18 At the outset, the Court notes that it has diversity jurisdiction in this case. The parties here
19 have not provided the Court with arguments regarding choice of law. Both parties appear to rely
20 on California law, with the exception of plaintiff’s citations to Oregon law with regard to NPK’s
21 confidentiality agreements with its employees. See Motion at 9, 13; Plaintiff’s Response at 5, 7-9.
22 The parties have not briefed the Court as to which state law applies; for the purposes of this
23 motion, the Court will apply California law as the law of the forum state.²

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26 ¹ Defendants may renew their argument on a fuller factual record in a motion for summary
judgment.

27 ² Although the Court applies California law for the purposes of this motion, it makes no
28 determination at this time as to the applicable choice of law with regard to the confidentiality
agreements.

1 **A. Legal Standard under Rule 12(b)(6)**

2 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
3 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
4 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
5 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard
6 requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant
7 has acted unlawfully.” *Ashcroft v. Iqbal*, 556 US. 662, 678 (2009). The Court must assume that
8 the plaintiff’s allegations are true and must draw all reasonable inferences in the plaintiff’s favor.
9 *Usher v. City of L.A.*, 828 F.2d 556, 561 (9th Cir. 1987). As a general rule, the Court may not
10 consider materials beyond the pleadings when ruling on a Rule 12(b)(6) motion. *Lee v. City of*
11 *L.A.*, 250 F.3d 668, 688 (9th Cir. 2001). However, pursuant to Federal Rule of Evidence 201, the
12 Court may take judicial notice of “matters of public record,” such as prior court proceedings. *Id.*
13 at 688-89.

14 **B. Intentional Interference with Prospective Economic Advantage and Unfair**
15 **Competition**

16 NPK brings three counts of intentional interference with prospective economic advantage
17 and one count of unfair competition. *See generally* SAC. NPK alleges that defendants interfered
18 with the contractual relationship between NPK and its business partners, Yeti and Green Planet,
19 and between NPK and its employees. SAC ¶¶ 27-47. NPK also claims that Hunter and RBD
20 solicited NPK employees to steal NPK’s proprietary information and used such information to
21 unfairly compete against NPK. SAC ¶¶ 55-57. Defendants move to dismiss on the grounds that
22 NPK made contradictory allegations in the pleadings of the *Yeti* case. *See* Motion at 9-11.

23 As discussed below, the Court cannot take judicial notice of disputed facts from other
24 proceedings or factual findings from another case. *See* § III, *infra*; *Lee*, 250 F.3d at 689. The
25 Court must assume all allegations in the complaint in this case are true. *See Usher*, 828 F.2d at
26 561. That defendants dispute the underlying facts does not mean that plaintiff has failed to state a
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1 claim under Rule 12(b)(6).³ Accordingly, defendants’ motion to dismiss is denied as to the claims
2 of intentional interference with prospective economic advantage counts and unfair competition.

3

4 **C. Conversion**

5 Plaintiff alleges that defendants used, kept, and refused to return NPK’s property. SAC ¶
6 64. This includes its records, customer files, customer contact information, customer lists,
7 corporate minutes, an advertisement, distribution contracts, and other business records. *Id.*
8 Defendants argue that the claim for conversion should be dismissed because plaintiff has failed to
9 make demand upon the defendants for the converted property. Motion at 12 n.16. Plaintiff argues
10 that demand would have been futile because it was unaware of the stolen property until after the
11 harm was done. Plaintiff’s Response at 12.

12 The Court agrees that plaintiffs were not required to plead that they made a demand. *See*
13 *Weinberg v. Dayton Storage Co.*, 50 Cal. App. 2d 750, 757 (1942) (“[T]here is no necessity for a
14 demand where . . . a demand would be futile.”); *see also* 14A Cal. Jur. 3d, Conversions, § 56
15 (2015) (“[N]o demand is required where the conversion charged is a wrongful sale or use of the
16 property by the defendant.”). Insofar as defendants assert that plaintiff’s claim for conversion
17 must be dismissed because the allegations are contradictory to the pleadings in *Yeti*, the Court
18 rejects this argument for the same reasons as above. Defendants’ motion to dismiss the claim for
19 conversion is denied.

20

21 **D. Trade Libel**

22 Defendants move to dismiss plaintiff’s trade libel claims, stating that plaintiff has failed to
23 allege “how, when, and to whom the alleged disparaging statements were made.” Motion at 12.

24 To successfully state a claim for trade libel or defamation, a plaintiff must allege: (1) who
25 made the statements, (2) to whom the statements were made, (3) the time and place of publication,

26

27 ³ To the extent that defendants’ submission of matters outside the pleadings is an attempt
28 to convert their motion to dismiss into a motion for summary judgment, the Court exercises its
power to exclude such evidence and declines to treat the motion as a motion for summary
judgment. *See* Fed. R. Civ. P. 12(d).

1 and (4) the substance of the statements. *See First Adv. Background Servs. Corp. v. Private Eyes,*
2 *Inc.*, 569 F. Supp. 2d 929, 937 (N.D. Cal. 2008); *Films of Distinction v. Allegro Film Prods., Inc.*,
3 12 F. Supp. 2d 1068, 1081 n.8 (C.D. Cal. 1998) (“In the Ninth Circuit, a product defamation or
4 trade libel claim must be based on specific statements, and “[t]he defamatory character of the
5 language must be apparent from the words themselves.” (quoting *Auvil v. CBS “60 Minutes”*, 67
6 F.3d 816, 822 (9th Cir. 1995)). “[A] cause of action for damages for trade libel requires pleading
7 and proof of special damages in the form of pecuniary loss.” *See Leonardini v. Shell Oil Co.*, 216
8 Cal. App. 3d 547, 572 (1989) (citation omitted). The plaintiff must “identify particular customers
9 and transactions of which it was deprived as a result of the libel.” *Mann v. Quality Old Time*
10 *Serv., Inc.*, 120 Cal. App. 4th 90, 109 (2004).

11 Contrary to defendants’ contentions, plaintiff’s Second Amended Complaint does specify
12 who made the allegedly disparaging remarks, to whom, and when. Plaintiff alleges that
13 defendants Hunter and RBD, through phone calls, visits and emails, made disparaging statements
14 about NPK to NPK’s customers and business partners, several of whom NPK identifies by name.
15 SAC ¶¶ 21-23. Plaintiff alleges that these activities took place beginning in July 2013 and
16 November 2013. *Id.* Thus, defendants’ motion fails on these grounds.

17 However, plaintiff has failed to plead special damages as required. *See Leonardini*, 216
18 Cal. App. 3d at 572. Plaintiff states that “NPK has suffered special damages and/or pecuniary
19 harm” but does not identify any “particular customers [or] transactions of which it was deprived”
20 due to defendants’ conduct. *See SAC ¶ 52; Mann*, 120 Cal. App. 4th at 109. Accordingly,
21 defendants’ motion to dismiss the claim for trade libel is granted with leave to amend.

22
23 **E. Joint Liability and Civil Conspiracy**

24 Plaintiff’s seventh claim is for “joint liability – aiding and abetting.” Joint liability is a
25 theory of liability, not a distinct cause of action under California law. *Scott v. JPMorgan Chase*
26 *Bank, N.A.*, 214 Cal. App. 4th 743, 762 (2013). Accordingly, this claim is dismissed with
27 prejudice.

28 Plaintiff’s eighth cause of action for “civil conspiracy” is similarly deficient. “Under

1 California law, there is no separate and distinct tort cause of action for civil conspiracy.” *Entm’t*
2 *Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1228 (9th Cir. 1997). “The
3 major significance of [a] conspiracy lies in the fact that it renders each participant in the wrongful
4 act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of
5 whether or not he was a direct actor and regardless of the degree of his activity.” *Younan v.*
6 *Equifax Inc.*, 111 Cal. App. 3d 498, 508 (1980).

7 Plaintiff’s claim for conspiracy survives only to the extent that plaintiff successfully
8 alleges an underlying wrongful act. Plaintiff must specify which alleged torts are the predicate
9 offenses for its conspiracy claim. It must also allege specific facts about how each defendant
10 conspired to commit the allegedly wrongful acts. Accordingly, plaintiff’s claim for conspiracy is
11 dismissed with leave to amend.

12

13 **F. CBD Guild Dismissal**

14 Defendants make a final attempt at dismissal by stating that “[t]he Second Amended
15 Complaint contains no substantive claims against Defendant CBD Guild.” *See* Motion at 13.
16 However, plaintiff has alleged that CBD “promised Lilga employment and other benefits and
17 incentives to leave NPK and take its top secret, valuable commercial information,” and that CBD
18 intentionally interfered with plaintiff’s prospective economic advantage. *See* SAC ¶¶ 16, 41-47.
19 Defendants have not specified which claims fail as to CBD and have cited no authority in support
20 of their argument. Defendants’ motion to dismiss CBD is denied.

21

22 **III. Defendants’ Request for Judicial Notice**

23 With its motion, defendants filed a request seeking judicial notice of the following
24 documents from *Yeti Enterprises Inc. v. NPK, LLC*, No. 3:13-cv-01203-ST (“*Yeti*”): (1) Third
25 Amended Complaint; (2) Findings and Recommendations; (3) Defendants’ Answer to Plaintiffs’
26 Third Amended Complaint and Counterclaims; and (4) United States District Court of Oregon
27 Civil Docket for *Yeti*. Dkt. No. 41.

28 Federal Rule of Evidence 201 provides that “[t]he court may judicially notice a fact that is

1 not subject to reasonable dispute because it: (1) is generally known within the trial court's
2 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose
3 accuracy cannot reasonably be questioned." While "a court may take judicial notice of the
4 existence of matters of public record, such as a prior order or decision," it should not, however,
5 take notice of "the truth of the facts cited therein." *Marsh v. San Diego Cnty.*, 432 F. Supp. 2d
6 1035, 1043 (S.D. Cal. 2006) (citations omitted). "[T]aking judicial notice of findings of fact from
7 another case exceeds the limits of Rule 201." *Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir.
8 2003), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014); *see also M/V*
9 *Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) ("[A] court
10 may not take judicial notice of proceedings or records in another cause so as to supply, without
11 formal introduction of evidence, facts essential to support a contention in a cause then before it").

12 All of the *Yeti* documents that defendants submit are available to the public and are
13 certified and maintained by an official office. Thus, their accuracy cannot be reasonably disputed.
14 Accordingly, the Court grants defendants' request for judicial notice insofar as defendants ask the
15 Court to recognize that NPK is currently a party to litigation in the District of Oregon. However,
16 the Court denies the request to the extent that it asks this Court to take notice of the truth of the
17 facts asserted therein.⁴

18 19 CONCLUSION

20 For the foregoing reasons and for good cause shown, the Court hereby DENIES
21 defendants' motion to strike in its entirety. The Court GRANTS defendants' motion to dismiss,
22 with leave to amend, the claims for trade libel and civil conspiracy. The Court GRANTS with
23 prejudice defendants' motion to dismiss the claim for joint liability. In all other respects,
24 defendants' motion to dismiss is DENIED.

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27 ⁴ In its reply, defendants cite to *Andrews v. Metro N.C.R. Co.*, 882 F.2d 705, 707 (2d Cir.
28 *Andrews*, however, involved admissions based on prior pleadings in the same action. *Andrews*,
882 F.2d at 707. Here, the pleadings submitted for judicial notice are from a different case.
Therefore, *Andrews* is not applicable.

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Any amended complaint shall be filed no later than October 2, 2015.

IT IS SO ORDERED.

Dated: September 16, 2015



SUSAN ILLSTON
United States District Judge