

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

3
4 ARTHUR J. GALLAGHER & CO.,

No. C 14-0909 CW

5 Plaintiff,

ORDER GRANTING IN
PART MOTION TO
DISMISS (Docket
No. 22)

6 v.

7 CHRISTOPHER LANG,

8 Defendant.

9 _____/

10
11 Plaintiff Arthur J. Gallagher & Co. brought this action
12 against its former employee, Defendant Christopher Lang, for
13 breach of contract and various business-related torts. Defendant
14 moves to dismiss the amended complaint. Plaintiff opposes the
15 motion. After considering the parties' submissions, the Court
16 grants the motion in part and denies it in part.

17 BACKGROUND

18 This Court granted in part Defendant's prior motion to
19 dismiss, and granted Plaintiff leave to amend its complaint. The
20 following facts are alleged in the amended complaint.

21 Gallagher is an insurance brokerage firm with its principal
22 place of business in Illinois. In September 2008, it acquired the
23 California Insurance Center, the firm where Lang was employed
24 immediately prior to his employment with Gallagher. On the date
25 of the acquisition, Lang signed an employment agreement with
26 Gallagher. A copy of that agreement was filed after Gallagher
27 filed his amended complaint.

28

1 Section 5 of the employment agreement addressed termination
2 of Lang's employment. Section 5(d) provided that Lang could
3 terminate the employment agreement for any reason upon giving
4 sixty days' notice to Gallagher;¹ and Section 5(g) provided that,
5 both during his employment and after the termination of his
6 employment, Lang would make himself available to Gallagher's legal
7 counsel to provide information relevant to any actual or potential
8 legal proceeding. Docket No. 21, Errata, Ex. A, Employment
9 Agreement, at 10-11.

10 Section 7 of the employment agreement stated that Gallagher
11 provided Lang with confidential trade secret information, and that
12 Lang agreed that, upon termination of his employment, he would
13 return to Gallagher "all copies or tangible embodiments of
14 materials" containing such information. Id. at 13-15.

15 Section 8 of the employment agreement included the non-
16 competition and non-solicitation provisions that this Court
17 previously held to be unenforceable as contrary to California
18 public policy. Docket No. 18, Order, at 6-11. Additionally,
19 Section 8(b) prohibited Lang from recruiting Gallagher's
20 employees:

21 The Executive [Lang] recognizes that employees
22 of the Corporation [Gallagher] and its
23 affiliates are a valuable resource of the
Corporation and its affiliates and are

24 ¹ In addition, Section 5(c) of the employment agreement
25 provided that Lang could terminate his employment without
26 providing sixty days' notice under certain conditions defined in
27 the employment agreement as constituting "Good Reason." Neither
28 party argues that those conditions are present in this case, or
that Lang terminated his employment pursuant to Section 5(c).
Employment Agreement 9-10.

1 integral to their full enjoyment of the
2 goodwill and other assets acquired in the
3 Transaction. Accordingly, the Executive
4 agrees that, for a period equal to two (2)
5 years following the termination of the
6 employment of the Executive with the
7 Corporation or its affiliates (as applicable)
8 for any reason whatsoever, the Executive will
9 not directly solicit, induce or recruit any
10 employee of the Corporation or its affiliates
11 to leave the employ of the Corporation or its
12 affiliates.

13 Employment Agreement 17.

14 In January 2014, Lang submitted his resignation to Gallagher.
15 Shortly thereafter, he formed a new insurance brokerage firm with
16 two of Gallagher's other former employees, who had left their
17 employment with Gallagher shortly before Lang himself left.
18 Several clients soon ended their relationship with Gallagher and
19 brought their business to Lang's new firm. Gallagher alleges that
20 "the amount of this lost business to Gallagher exceeds \$400,000.
21 If [Lang] had provided the required 60-days written notice prior
22 to his departure, it is very likely that many, if not all, clients
23 would have remained with Gallagher." Am. Compl. ¶ 22.

24 On June 6, 2014, Gallagher filed its amended complaint,
25 charging Lang with breach of contract, to wit: failure to provide
26 written notice of his resignation sixty days prior to leaving the
27 firm, as required by Section 5(d); refusing to meet with the
28 firm's legal counsel after leaving the firm, as required by
Section 5(g); failing to return certain materials to the firm, as
required by Section 7(c); and recruiting employees to leave the
firm, in violation of Section 8(b). The amended complaint also
asserts claims for intentional interference with prospective
economic advantage, negligent interference with contracts and

1 prospective economic advantage, unjust enrichment and unfair
2 competition.² It seeks both monetary and injunctive relief.

3 LEGAL STANDARD

4 A complaint must contain a "short and plain statement of the
5 claim showing that the pleader is entitled to relief." Fed. R.
6 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
7 state a claim, dismissal is appropriate only when the complaint
8 does not give the defendant fair notice of a legally cognizable
9 claim and the grounds on which it rests. Bell Atl. Corp. v.
10 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
11 complaint is sufficient to state a claim, the court will take all
12 material allegations as true and construe them in the light most
13 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
14 896, 898 (9th Cir. 1986). However, this principle is inapplicable
15 to legal conclusions; "threadbare recitals of the elements of a
16 cause of action, supported by mere conclusory statements," are not
17 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
18 (citing Twombly, 550 U.S. at 555).

19 When granting a motion to dismiss, the court is generally
20 required to grant the plaintiff leave to amend, even if no request
21 to amend the pleading was made, unless amendment would be futile.
22 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
23 F.2d 242, 246-47 (9th Cir. 1990). However, where a court has

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25 ² Each of Gallagher's causes of action was advanced in its
26 initial complaint; however, in the initial complaint unjust
27 enrichment and unfair competition were asserted as a single cause
28 of action, while in the amended complaint each is asserted as an
independent cause of action. Compare Compl. ¶¶ 38-41, with Am.
Compl. ¶¶ 36-44.

1 previously granted a plaintiff an opportunity to amend its
2 complaint after a motion to dismiss, and the amended complaint
3 still fails to state claims with the required particularity, the
4 court may grant a motion to dismiss without granting the plaintiff
5 leave to amend. Arroyo v. Chattem, Inc., 926 F. Supp. 2d 1070,
6 1081 (N.D. Cal. 2012).

7 DISCUSSION

8 A. Breach of Contract (First Cause of Action)

9 Lang contends that Gallagher failed to state a claim for
10 breach of contract for three reasons. First, he argues that
11 Gallagher's allegations concerning damages are merely speculative,
12 and therefore are not sufficient to state a claim. Second, he
13 asserts that the facts alleged in the amended complaint fail to
14 show a breach of the no-recruiting provision of Section 8(b).
15 Third, Lang argues that Gallagher failed to plead with sufficient
16 specificity its claim that Lang breached the employment agreement
17 by failing to return materials. Each of these arguments is
18 addressed in turn.

19 1. Sufficiency of Damages Claim

20 Lang asserts that Gallagher's claim that if he had provided
21 sixty days' notice as required by Section 5(d), "it is likely that
22 many, if not all, clients would have remained with Gallagher," is
23 merely speculative and therefore fails to state a claim for breach
24 of contract.

25 "The elements of a cause of action for breach of contract
26 are: 1) the existence of the contract; 2) performance by the
27 plaintiff or excuse for nonperformance; 3) breach by the
28 defendant; and 4) damages." McNeary-Calloway v. JP Morgan Chase

1 Bank, N.A., 863 F. Supp. 2d 928, 954 (N.D. Cal. 2012). In order
2 to plead the damages prong sufficiently, a plaintiff must allege
3 "appreciable and actual damage." See Aguilera v. Pirelli
4 Armstrong Tire Corp., 223 F.3d 1010, 1015 (9th Cir. 2000) (citing
5 Patent Scaffolding Co. v. William Simpson Constr. Co., 256 Cal.
6 App. 2d 506, 511 (1967) ("A breach of contract without damage is
7 not actionable.")).³

8 The Court is not persuaded by Lang's argument that
9 Gallagher's damages claim is merely speculative. At the pleading
10 stage, a plaintiff need only make a "short and plain statement"
11 showing that it is entitled to relief. Fed. R. Civ. P. 8(a)(2).
12 "'Lost profits' . . . are specific allegations of damage that are
13 sufficient to satisfy the requirement to plead 'actual and
14 appreciable' damages under California breach of contract law."
15 Benedict v. Hewlett-Packard Co., 2014 U.S. Dist. LEXIS 7331, at
16 *18 (N.D. Cal.). Here, Gallagher has alleged that, as a result of
17 Lang's failure to provide sixty days' notice as required by the
18 employment agreement, it lost more than a dozen clients accounting
19 for more than \$400,000 in revenue. Am. Compl. ¶ 22. Gallagher's
20 allegations are sufficient to survive a motion to dismiss.

21 Lang further argues that Gallagher has failed to claim any
22 specific damage from the alleged breaches of Sections 5(g)

23 _____
24 ³ Although Aguilera was stating a summary judgment standard,
25 courts in this district have repeatedly used the "appreciable and
26 actual damage" standard to determine whether a plaintiff has plead
27 a breach of contract claim sufficiently. See, e.g., Yunker v.
28 Pandora Media, Inc., 2014 U.S. Dist. LEXIS 30829, at *15 (N.D.
Cal.); Belluomini v. CitiGroup, Inc., 2013 U.S. Dist. LEXIS
103882, at *13 (N.D. Cal.); Architectural Res. Grp., Inc. v. Hks,
Inc., 2013 U.S. Dist. LEXIS 20247, at *8-9 (N.D. Cal.).

1 (failure to meet with Gallagher's counsel), 7(c) (failure to
2 return materials to Gallagher), and 8(b) (recruiting away two
3 Gallagher employees).

4 "The Supreme Court has emphasized that analyzing the
5 sufficiency of a complaint's allegations is a 'context-specific
6 task that requires the reviewing court to draw on its judicial
7 experience and common sense.'" Sheppard v. David Evans & Assocs.,
8 694 F.3d 1045, 1051 (9th Cir. 2012) (quoting Iqbal, 556 U.S. at
9 679). "[T]he complaint should be read as a whole, not parsed
10 piece by piece to determine whether each allegation, in isolation,
11 is plausible." Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594
12 (8th Cir. 2009). Here, Gallagher has asserted a single claim for
13 breach of contract, alleging multiple breaches, and claiming that
14 it sustained damages as a result of those alleged breaches. At
15 this stage, such allegations are sufficient to state a claim for
16 breach of contract.

17 2. No-Recruiting Provision

18 Lang contends that Gallagher has failed to allege breach of
19 contact sufficiently with regard to the no-recruiting provision in
20 Section 8(b) of the employment agreement, first, because the
21 amended complaint does not allege that Lang recruited Gallagher's
22 employees after he resigned his employment, and second, because
23 even if Lang did breach the no-recruiting provision the amended
24 complaint fails to allege that such a breach resulted in any
25 damages to Gallagher.

26 Under California law, "[t]he whole of a contract is to be
27 taken together, so as to give effect to every part, if reasonably
28 practicable, each clause helping to interpret the other." Cal.

1 Civ. Code § 1641. In addition, "[t]he language of a contract is
2 to govern its interpretation, if the language is clear and
3 explicit, and does not involve an absurdity." Cal. Civ. Code §
4 1638. In other words, a court "may not read [a] contract in a
5 manner that leads to an absurd result." Kassbaum v. Steppenwolf
6 Prods., Inc., 236 F.3d 487, 491 (9th Cir. 2000) (citing Cal. Civ.
7 Code § 1638).

8 Lang argues that "[t]here is no allegation that Lang
9 solicited Plaintiff's employees following the termination of his
10 employment. . . . The Employment Agreement does not prohibit Lang
11 from soliciting the employees prior to his termination."
12 (Memorandum, 4 (citations to amended complaint omitted)). In
13 other words, Lang asks the Court to interpret Section 8(b) of the
14 employment agreement as barring him from recruiting Gallagher
15 employees after he had left Gallagher, but allowing him to recruit
16 employees while he was still employed by Gallagher. Gallagher
17 urges that the employment agreement prohibited Lang from
18 recruiting Gallagher employees both during the term of his
19 employment and after he left. The Court need not decide this
20 question at this stage; the Court need only determine whether
21 Gallagher has stated a claim for breach of contract. The Court
22 finds Gallagher's interpretation of the contract to be reasonable,
23 and therefore finds that he has plead breach of contract
24 sufficiently with regard to Section 8(b) of the employment
25 agreement.

26 3. Return of Materials

27 Lang argues that Gallagher has failed to allege sufficiently
28 any breach of Section 7(c) because it does not specifically

1 identify the materials that Lang allegedly failed to return.

2 The Court is not persuaded. The employment agreement
3 expressly requires that Lang "return to the Corporation
4 [Gallagher] all materials and all copies or tangible embodiments
5 of materials" and property of Gallagher. Employment Agreement 15.
6 Gallagher alleges that Lang did not do so, and that it has been
7 harmed by Lang's failure to do so. That is sufficient to state a
8 claim for breach of contract.

9 For these reasons, with respect to Gallagher's breach of
10 contract claim, Lang's motion to dismiss is DENIED.

11 B. Intentional and Negligent Interference with Prospective
12 Economic Advantage (Second and Third Causes of Action)

13 Lang argues that Gallagher failed to state claims for
14 intentional and negligent interference with prospective economic
15 advantage because he did not allege any independent wrongful act.

16 To state a claim for intentional interference with
17 prospective economic advantage, a plaintiff must allege "'(1) an
18 economic relationship between the plaintiff and some third party,
19 with the probability of future economic benefit to the plaintiff;
20 (2) the defendant's knowledge of the relationship; (3) intentional
21 acts on the part of the defendant designed to disrupt the
22 relationship; (4) actual disruption of the relationship; and
23 (5) economic harm to the plaintiff proximately caused by the acts
24 of the defendant.'" Korea Supply Co. v. Lockheed Martin Corp., 29
25 Cal. 4th 1134, 1153 (2003) (citations omitted). The elements to
26 state a claim for negligent interference with prospective economic
27 advantage are the same, except instead of alleging intentional
28 acts, the plaintiff must allege that the defendant knew or should

1 have known that the relationship would be disrupted if it failed
2 to act with reasonable care; and that the defendant failed to act
3 with reasonable care. Theme Promotions, Inc. v. News Am. Mktg.,
4 546 F.3d 991, 1004 (9th Cir. 2008). In addition, for either tort,
5 a plaintiff must allege that the defendant's conduct was "wrongful
6 by some legal measure other than the fact of the interference
7 itself." Korea Supply, 29 Cal. 4th at 1153. "An act is
8 independently wrongful if it is unlawful, that is, if it is
9 proscribed by some constitutional, statutory, regulatory, common
10 law, or other determinable legal standard." Id. at 1159.

11 In its opposition to the motion, Gallagher argues that Lang
12 committed an independent wrongful act by violating his duty of
13 loyalty and his fiduciary duty set forth in sections 2860 and 2863
14 of the California Labor Code. However, Gallagher's amended
15 complaint contains no allegations of any duty of loyalty or of
16 fiduciary duty that Lang owed Gallagher, and contains no reference
17 whatsoever to California Labor Code sections 2860 or 2863. Thus,
18 Gallagher has failed to state a claim sufficiently.

19 More important, Gallagher seeks to use the same factual
20 allegations to support both its breach of contract claim and its
21 claims for intentional and negligent interference with economic
22 advantage. Thus, Gallagher's "allegations sound in contract, not
23 in tort." First Advantage Background Servs. Corp. v. Private
24 Eyes, Inc., No. C-07-2424, Order at 5 (Docket No. 30) (N.D. Cal.
25 Sept. 5, 2007) (citing JRS Prods., Inc. v. Matsushita Elec. Corp.
26 of Am., 115 Cal. App. 4th 168, 181-82 (2004); Khoury v. Maly's of
27 California, Inc., 14 Cal App. 4th 612, 618 (1993) ("If a contract
28 plaintiff could plead in a conclusory way that the defendant

1 maliciously intended to drive the plaintiff out of business, the
2 tort of interference with prospective business advantage would be
3 routinely pleaded in breach of contract cases.")).

4 Accordingly, the Court dismisses Gallagher's claims for
5 intentional and negligent interference with prospective economic
6 advantage. Gallagher requests leave to amend; however, it does
7 not specify any additional facts it could provide in a subsequent
8 amended complaint that would state a claim. Pl.'s Opp. at 10
9 (Docket No. 29). Because the Court previously afforded Gallagher
10 an opportunity to re-plead this claim under California law, and
11 the claim is still insufficiently plead, this dismissal is without
12 leave to amend.

13 C. Unjust Enrichment (Fourth Cause of Action)

14 Lang argues that Gallagher cannot state a claim for unjust
15 enrichment because California law does not recognize such an
16 action.

17 The relationship between Gallagher and Lang is governed by a
18 contract. Even if unjust enrichment is a recognized cause of
19 action, under California law, "unjust enrichment is an action in
20 quasi-contract, which does not lie when an enforceable, binding
21 agreement exists defining the rights of the parties." Paracor
22 Fin., Inc. v. GE Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996)
23 (citing Wal-Noon Corp. v. Hill, 45 Cal. App. 3d 605, 613 (1975)).
24 Gallagher, in its response to the motion, makes no defense of its
25 unjust enrichment claim.

26 Accordingly, the Court dismisses Gallagher's unjust
27 enrichment claim. Because the claim cannot be amended to cure the
28 defect, the dismissal is without leave to amend.

1 D. Unfair Competition (Fifth Cause of Action)

2 California's Unfair Competition Law (UCL) prohibits "any
3 unlawful, unfair or fraudulent business act or practice." Cal.
4 Bus. & Prof. Code § 17200. The UCL incorporates other laws and
5 treats violations of those laws as unlawful business practices
6 independently actionable under state law. Chabner v. United Omaha
7 Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of
8 almost any federal, state or local law may serve as the basis for
9 a UCL claim. Saunders v. Superior Court, 27 Cal. App. 4th 832,
10 838-39. In addition, a business practice may be "unfair or
11 fraudulent in violation of the UCL even if the practice does not
12 violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798,
13 827 (2003).

14 Gallagher's fifth cause of action alleges that Lang violated
15 section 17200 by "unfairly and improperly inducing employees to
16 leave Gallagher in contravention of defendant's contractual
17 obligations, and by engaging in other wrongful acts." Am. Compl.
18 ¶ 41. In its opposition to the motion, Gallagher further argues
19 that by recruiting employees away from Gallagher, Lang both
20 violated the Employment Agreement and breached his duty of loyalty
21 and fiduciary duty owed to Gallagher pursuant to California Labor
22 Code sections 2860 and 2863.

23 "A breach of contract claim may form the predicate for a
24 section 17200 claim, provided it also constitutes conduct that is
25 unlawful, unfair, or fraudulent." Sybersound Records, Inc. v. UAV
26 Corp., 517 F.3d 1137, 1152 (9th Cir. 2008) (quoting Nat'l Rural
27 Telecoms. Coop. v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1074 (C.D.
28 Cal. 2003)) (internal alteration, citation and quotations

1 omitted). As previously noted, the amended complaint does not
2 even allege, much less state a claim sufficiently, that Lang
3 violated any duty of loyalty or fiduciary duty to Gallagher.
4 Gallagher's generic assertion that Lang violated section 17200 "by
5 engaging in other wrongful acts" is not sufficient to state a
6 claim.


7 Accordingly, the Court dismisses Gallagher's claim for unfair
8 competition. Gallagher requests leave to amend; however, it does
9 not specify any additional facts it could provide in a subsequent
10 amended complaint that would state a claim. Pl.'s Opp. at 10
11 (Docket No. 29). Because the Court previously afforded Gallagher
12 an opportunity to re-plead this claim under California law, and
13 the claim is still insufficiently plead, this dismissal is without
14 leave to amend.

15 CONCLUSION

16 For the reasons set forth above, Defendant's motion to
17 dismiss (Docket No. 22) is GRANTED IN PART and DENIED IN PART.
18 Plaintiff has stated a claim for breach of contract based on
19 Defendant's alleged breaches of Sections 5(d), 5(g), 7(c), and
20 8(b) of the employment agreement. All of Plaintiff's other claims
21 are dismissed without leave to amend.

22 IT IS SO ORDERED.

23
24 Dated: 9/2/2014


25 CLAUDIA WILKEN
26 United States District Judge
27
28