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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UCAR TECHNOLOGY (USA) INC., et al.,
Plaintiffs,
v.
YAN LI, et al.,
Defendants.

Case No. [5:17-cv-01704-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' JOINT MOTION TO DISMISS; GRANTING PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS

Re: Dkt. Nos. 47, 54

I. INTRODUCTION

Plaintiffs UCAR Technology (USA) Inc., a California corporation with a place of business in California, and UCAR Inc., a Chinese corporation with a place of business in Beijing (collectively "UCAR"), bring this suit against former employees Yan Li ("Li"), Hua Zhong ("Zhong"), Da Huo ("Huo") and Zhenzhen Kou ("Kou"), residents of California (collectively "Defendants-Counterclaimants"), for allegedly taking UCAR's trade secrets and intellectual property after they resigned from UCAR. Federal subject matter jurisdiction is predicated on UCAR's claims for violation of the Defend Trade Secrets Act, 18 U.S.C. §1836 *et seq*, and violation of the Computer Fraud and Abuse Act, 18 U.S.C. §1030. In their answer, Defendants-Counterclaimants deny that federal subject matter exists, arguing that UCAR has failed to state any viable federal claim. Defendants-Counterclaimants also assert several counterclaims, most of which are predicated upon UCAR's allegedly unlawful refusal to pay Defendants-Counterclaimants employment compensation in the form of stock options or stock.

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1 Defendants-Counterclaimants now move to dismiss UCAR’s claims and UCAR moves to
2 dismiss the counterclaims. The Court finds it appropriate to take the motions to dismiss under
3 submission for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the
4 reasons set forth below, Defendants-Counterclaimants’ motion to dismiss the Complaint is granted
5 in part and denied in part, and UCAR’s motion to dismiss the counterclaims is granted.

6 II. BACKGROUND¹

7 A. UCAR’s Complaint

8 UCAR, one of the largest chauffeured car services providers in China, offers a platform for
9 ride-hailing to millions of people who use UCAR apps on iPhones and Android-enabled smart
10 phones or use the UCAR website. To advance its technology, especially related to big data
11 analysis, UCAR allegedly set up a U.S. subsidiary and hired Defendants-Counterclaimants as a
12 team of research and development engineers. Complaint, ¶1.² Over time, the subsidiary began
13 working on technological advances related to auto development of next-generation autopilot
14 technologies. Id. Defendants-Counterclaimants spent approximately one-and-a-half years and
15 collectively received hundreds of thousands of dollars from UCAR to work on the company’s
16 trade secret technology. Id. UCAR also gave Defendants-Counterclaimants access to its
17 proprietary data. Id. During that time, Defendants-Counterclaimants transitioned into a new
18 technological field of data analysis and software related to driverless vehicles. Id. UCAR alleges
19 on information and belief that Defendants-Counterclaimants were secretly setting the stage to steal
20 UCAR’s proprietary information and all the work they had done for UCAR in order to set up a
21 competing venture of their own. Id.

22
23 ¹ The Background is a summary of the allegations in the complaint and counterclaim. All well
pleaded facts are taken as true for purposes of the instant motions to dismiss.

24 ² The employment agreements identify the employer as UCAR Technology Inc. Neither UCAR
25 Technology (USA) Inc. nor UCAR Inc. are referenced in the employment agreements.
26 Defendants-Counterclaimants do not concede that they actually contracted with UCAR, but do
acknowledge that they contracted with a UCAR entity of some form. To the extent that UCAR
alleges it is a party to the employment agreements, Defendants-Counterclaimants seek to hold
UCAR liable for, *inter alia*, breach of the employment agreements and fraud.

1 In March 2017, UCAR first learned that Defendants-Counterclaimants were considering
2 leaving the company. Id. On March 14, 2017, Defendants-Counterclaimants resigned by email.
3 Id. UCAR alleges on information and belief that Defendants-Counterclaimants took UCAR’s
4 trade secrets and intellectual property, copying information to other computers or copying data to
5 local memory on non-UCAR computers through access to remote servers and reformatting of the
6 UCAR company computers. Id. UCAR alleges that “[w]hen confronted, Defendants[-
7 Counterclaimants] effectively admitted that their actions were the product of simple greed: they
8 had learned that if they took UCAR’s property, they could obtain tens of millions of dollars of
9 investment, so they did.” Id.

10 UCAR asserts claims for (1) violation of the Defend Trade Secrets Act, 18 U.S.C. §1836 *et*
11 *seq.*, (2) trade secret misappropriation in violation of California’s Uniform Trade Secrets Act
12 (CUTSA), California Civil Code §3426 *et seq.*, (3) violation of the Computer Fraud and Abuse
13 Act, codified as 18 U.S.C. §1030, (4) breach of employment agreements, (5) breach of the
14 covenant of good faith and fair dealing, (6) unfair and unlawful business practices in violation of
15 Cal. Bus. & Prof. Code §§17200 *et seq.*, (7) property theft/conversion, (8) fraud/deceit and (9)
16 breach of fiduciary duty.

17 B. Counterclaims

18 All of the Defendants-Counterclaimants assert counterclaims arising out of their
19 employment with UCAR Technology (USA), Inc. They accepted jobs with UCAR Technology
20 (USA), Inc. based on promises of stock options or common stock and a shared belief that they
21 would be joining the Silicon Valley outpost of a tech company that specialized in ride hailing
22 technology. Counterclaims, ¶1. Defendants-Counterclaimants learned UCAR was part of a
23 poorly defined mass of corporate entities which did not respect corporate formalities or job titles
24 and was controlled by a small group of Beijing-based employees. Id., ¶2. Within a year and a
25 half, UCAR openly refused to pay the stock options and stock that they promised and revealed that
26 they had no intention of building up the Santa Clara engineering team, but instead intended to use

1 Defendants-Counterclaimants as a fundraising tool for the benefit of other UCAR corporate
2 entities. Id. When Defendants-Counterclaimants attempted to leave UCAR, UCAR’s
3 representative threatened to “make an example” out of them through litigation. Id., ¶4.

4 Counterclaimants assert claims for (1) breach of contract, (2) anticipatory breach of
5 contract, (3) promissory estoppel, (4) unjust enrichment, and (5) fraudulent inducement to enter
6 into an employment agreement.

7 III. STANDARDS

8 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient
9 specificity to “give the defendant fair notice of what the claim is and the grounds upon which it
10 rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929
11 (2007) (internal quotations omitted). The factual allegations in the complaint “must be enough to
12 raise a right to relief above the speculative level” such that the claim “is plausible on its face.” Id.
13 at 556–57, 127 S.Ct. 1955. A complaint that falls short of the Rule 8(a) standard may be
14 dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).
15 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal
16 theory or sufficient facts to support a cognizable legal theory.” Mendondo v. Centinela Hosp.
17 Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

18 When deciding whether to grant a motion to dismiss, the court must generally accept as
19 true all “well-pleaded factual allegations.” Ashcroft v. Iqbal, 556 U.S. 662, 664, 129 S.Ct. 1937,
20 173 L.Ed.2d 868 (2009). The court must also construe the alleged facts in the light most favorable
21 to the plaintiff. See Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d
22 938, 945 (9th Cir. 2014) (providing the court must “draw all reasonable inferences in favor of the
23 nonmoving party” for a Rule 12(b)(6) motion). However, “courts are not bound to accept as true a
24 legal conclusion couched as a factual allegation.” Iqbal, 556 U.S. at 678, 129 S.Ct. 1937.

25 Also, the court usually does not consider any material beyond the pleadings for a Rule
26 12(b)(6) analysis. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19

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1 (9th Cir. 1989). Exceptions to this rule include material submitted as part of the complaint or
2 relied upon in the complaint, and material subject to judicial notice. See [Lee v. City of Los](#)
3 [Angeles](#), 250 F.3d 668, 688–69 (9th Cir. 2001).

4 IV. DISCUSSION

5 A. Defendants-Counterclaimants’ Joint Motion to Dismiss

6 Defendants-Counterclaimants move to dismiss all of UCAR’s nine causes of action on
7 numerous grounds, and specifically seek dismissal of the unfair competition, conversion and
8 Computer Fraud and Abuse Act claims with prejudice. In support of the motion, Defendants-
9 Counterclaimants requests judicial notice of nine documents and works pursuant to Federal Rule
10 of Evidence 201. The request for judicial notice is granted as unopposed as to item no.2
11 (employment contracts), no.6 (patent), no.7 (the dates of publication for articles written by Li),
12 no.8 (the date of publication for an article written by Zhong), and no.9 (date of publication for
13 articles written by Zhenzhen Kou) and denied as to the remaining documents and works, namely
14 item no.1 (declaration of Yihui Zhang), nos.3 and 4 (declarations of Zhiya Qian) and no.5
15 (declaration of Qiangyuan Huang). The declarations are beyond the scope of the complaint and
16 not the proper subject of judicial notice. See [City of Royal Oak Retirement System v. Juniper](#)
17 [Networks, Inc.](#), 880 F.Supp.2d 1045, 1060 (N.D. Cal. 2012).

18 Claim 1: Violation of the Defend Trade Secrets Act (“DTSA”), 18 U.S.C. §1836 *et seq*

19 Defendants-Counterclaimants contend that the DTSA claim (and state law trade secret
20 misappropriation claim) are based on an impermissible “inevitable disclosure” theory and that the
21 remaining allegations are too vague or speculative to support a claim for misappropriation. UCAR
22 counters that its claim does not depend on the “inevitable disclosure” theory, and instead is based
23 on allegations that Defendants-Counterclaimants misappropriated trade secret information,
24 including at least proprietary database data and source code to use at a new company they were
25 forming.

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1 Defendants-Counterclaimants’ argument has merit with respect to certain allegations in the
2 Complaint, which includes allegations that suggest reliance on the “inevitable disclosure” theory.
3 For example, UCAR alleges that Defendants-Counterclaimants “cannot separate out UCAR’s
4 trade secrets and confidential information in starting a competing company in the exact technology
5 space that they worked in for UCAR.” Complaint, ¶¶36, 48. To the extent the complaint relies on
6 these types of “inevitable disclosure” allegations, those allegations are ordered stricken from the
7 complaint. California courts have resoundingly rejected claims based on the “inevitable
8 disclosure” theory. See e.g. Whyte v. Schlage Lock Co., 101 Cal.App.4th 1443, 1463 (2002)
9 (“Lest there be any doubt about our holding, our rejection of the inevitable disclosure doctrine is
10 complete.”).

11 UCAR’s complaint, however, includes additional allegations independent of the
12 “inevitable disclosure” theory. The DTSA defines “misappropriation” to include “acquisition of a
13 trade secret of another by a person who knows or has reason to know that the trade secret was
14 acquired by improper means” and “disclosure or use of a trade secret of another” without consent.
15 18 U.S.C. §1863. UCAR alleges that Defendants-Counterclaimants initially possessed trade secret
16 information by virtue of their employment. UCAR identifies its trade secrets to include: detailed
17 proprietary data that UCAR collected from its network of more than 15,000 cars, which provided
18 valuable insight into vehicle operation and usage; testing data for UCAR applications; software
19 and testing data related to autopiloted cars developed by UCAR and subsets of the data set usable
20 for work on autopilot technology; UCAR software developed to work with vehicle autopilot
21 technology; UCAR strategic business plans; and the R&D work being done by Defendants-
22 Counterclaimants for UCAR. UCAR alleges misappropriation of its trade secrets by improper
23 acquisition: Defendants-Counterclaimants allegedly retained copies of UCAR’s proprietary and
24 confidential computer data and R&D work product following their resignation. More specifically,
25 UCAR alleges on information and belief that upon resigning, Defendants-Counterclaimants took
26 trade secret information, copying this information to other computers or copying data from

1 UCAR’s Amazon Web Services account (“AWS account”) to local memory on non-UCAR
2 computers through access to remote servers, copying the information from UCAR laptops in
3 Defendants-Counterclaimants’ possession to other non-UCAR computer storage media owned or
4 controlled by Defendants-Counterclaimants, and reformatting UCAR company computers so that
5 they had no data on them. Complaint, ¶¶1, 30. UCAR also alleges on information and belief that
6 Defendants-Counterclaimants disclosed trade secrets to third parties to, among other things, entice
7 third parties to work with Defendants-Counterclaimants and/or to invest in or set up a new
8 company to compete with UCAR. *Id.*, ¶29. UCAR alleges that Li “effectively conceded” that
9 Defendants-Counterclaimants had taken UCAR’s information and had found at least \$10 million
10 worth of investment funds for them to start a competing venture that would be worth \$70 million.
11 *Id.*, ¶31. UCAR’s allegations are sufficient at the pleading stage to state a violation of the DTSA.
12 The motion to dismiss the DTSA claim is denied.

13 Claim 2: Trade Secret Misappropriation in Violation of CUTSA

14 The CUTSA, codified at [California Civil Code § 3426 et seq.](#), “creates a statutory cause of
15 action for the misappropriation of a trade secret.” [Brescia v. Angelin](#), 172 Cal.App.4th 133, 143
16 (2009). To state a claim under CUTSA, a plaintiff must demonstrate: “(1) the plaintiff owned a
17 trade secret, (2) the defendant acquired, disclosed, or used the plaintiff’s trade secret through
18 improper means, and (3) the defendant’s actions damaged the plaintiff.” [Cytodyn, Inc. v.](#)
19 [Amerimmune Pharms., Inc.](#), 160 Cal.App.4th 288, 297 (2008).

20 As discussed above in the context of the DTSA claim, UCAR has identified its trade
21 secrets, alleged that Defendants-Counterclaimants initially possessed the trade secrets by virtue of
22 their employment and misappropriated the trade secrets by improper acquisition upon resignation
23 and disclosure to third parties, and alleged damages caused by Defendants-Counterclaimants.
24 UCAR’s allegations are sufficient to state a state law trade secret misappropriation claim. The
25 motion to dismiss the CUTSA claim is denied.

26 Claim 3: Violation of the Computer Fraud and Abuse Act (CFAA)

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1 Defendants-Counterclaimants contend that the claim for violation of the CFAA should be
2 dismissed because the CFAA prohibits the improper “access” of information, and does not
3 prohibit misuse or misappropriation, as alleged in the present case. Defendants-Counterclaimants
4 reason that UCAR admitted Defendants-Counterclaimants had access to information as part of
5 their employment, including access to the “AWS Account,” and therefore cannot be held liable
6 under the CFAA. See Koninklijke Philips N.V. v. Elec-Tech Int’l Co., No. 14-2737 BLF, 2015
7 WL 1289984, at *4 (N.D. Cal. March 20, 2015) (“it is undisputed that [defendant] was authorized
8 to access the information he allegedly stole Plaintiffs therefore cannot plead a cause of action
9 under the CFAA. . . .)

10 Defendants-Counterclaimants’ argument is unpersuasive. UCAR alleges that Defendants-
11 Counterclaimants improperly accessed UCAR computers after their resignation, destroyed without
12 authorization all of the information stored in the computers, and denied UCAR administrative
13 access to the AWS server, all of which allegedly caused damage to UCAR. At the pleading stage,
14 these allegations are sufficient to state a claim. See United States v. Nosal, 844 F.3d 1038 (9th
15 Cir. 2016) (former employee who had computer access credentials revoked violated CFAA by
16 accessing employer’s database after revocation); LVRC Holdings LLC v. Brekka, 581 F.3d 1127,
17 1136 (9th Cir. 2009) (former employee violated the CFAA by logging into company website after
18 he had ceased working for the company). The motion to dismiss the CFAA claim is denied.

19 Claim 4: Breach of Employment Agreements

20 Defendants-Counterclaimants contend that UCAR cannot state a claim for breach of the
21 employment agreements because UCAR has not, and cannot, allege facts to show that it fully
22 performed its obligations under the agreements. Defendants-Counterclaimants argue that UCAR
23 is in breach of the employment agreements because UCAR failed to grant Defendants-
24 Counterclaimants the stock options and stock to which they are entitled. In response, UCAR
25 argues that it has specifically pled full performance of the contract, and that in any event, UCAR
26 did not have a contractual obligation to grant Defendants-Counterclaimants stock or stock options.

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1 The Court finds UCAR’s allegation of full performance sufficient at the pleading stage and
2 the motion to dismiss the breach of contract claim is denied. Whether UCAR breached a
3 contractual duty to issue stock or stock options is addressed separately below in the context of
4 UCAR’s motion to dismiss the counterclaims.

5 Claim 5: Breach of the Covenant of Good Faith and Fair Dealing

6 Defendants-Counterclaimants contend that the claim for breach of the covenant of good
7 faith and fair dealing is inadequately pled in two respects: UCAR has failed to allege the requisite
8 facts to establish a fiduciary-like relationship to support a claim for tortious breach of the
9 covenant; and UCAR has failed to identify an express contractual term that was allegedly
10 frustrated.

11 In general, tort remedies are not available for breach of the implied covenant of good faith
12 and fair dealing in the absence of a special relationship with “fiduciary characteristics.” Mitsui
13 Mfrs. Bank v. Superior Court, 212 Cal.App.3d 726, 730 (1989) (relying on Foley v. Interactive
14 Data Corp., 47 Cal.3d 654 (1988)). For reasons discussed below in the context of the breach of
15 fiduciary duty claim, UCAR’s allegations are insufficient to establish a fiduciary relationship and
16 accordingly do not support a claim for tortious breach of the covenant.

17 To the extent UCAR seeks contract remedies rather than tort remedies, however, UCAR’s
18 allegations are sufficient to state a claim. Drawing all reasonable inferences in UCAR’s favor, the
19 Complaint alleges that Defendants-Counterclaimants breached provisions in their employment
20 agreements by stealing UCAR proprietary and confidential information for their own competitive
21 use against UCAR; failing to return company property, including the data that had been stored on
22 the UCAR laptops; failing to turn over UCAR’s administrative level access to the AWS Account;
23 engaging in other employment and business activities without the written consent of UCAR; and
24 assisting in the set-up of a competing company while employed at UCAR. Complaint, ¶64.

25 The motion to dismiss the breach of the covenant of good faith and fair dealing claim is
26 therefore denied; however, UCAR is precluded from seeking tort damages based upon this claim.

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Claim 6: Unfair and Unlawful Business Practices

Defendants-Counterclaimants contend that the CUTSA preempts UCAR’s unfair competition claim because the claim is based solely on the alleged theft of information. UCAR does not dispute the preemptive reach of the CUTSA: “Courts have held that where a claim is based on the ‘identical nucleus’ of facts as a trade secrets misappropriation claim, it is preempted by [C]UTSA.” Silicon Image, Inc. v. Analogix Semiconductor, Inc., No. 07-635 JCS, 2007 WL 1455903, at *9 (N.D. Cal. May 16, 2007). Instead, UCAR counters that the claim is based on allegations other than trade secret misappropriation.

In its unfair and unlawful business practices claim, UCAR re-alleges and incorporates the allegations of the entire Complaint as if fully set forth therein. Complaint, ¶71. Thus, UCAR’s claim is based, at least in part, on trade secret misappropriation allegations. UCAR’s claim is dismissed with leave to amend to eliminate the trade secret misappropriation allegations and to set forth more clearly a basis for the claim that is beyond the scope of CUTSA preemption.

Claim 7: Property Theft/Conversion

Defendants-Counterclaimants contend that the CUTSA preempts UCAR’s conversion claim because the claim is based on the same nucleus of facts as the misappropriation of trade secrets claim. Alternatively, Defendants-Counterclaimants contend that the conversion claim fails because intangible intellectual property cannot be subject to conversion as a matter of law. See Innospan Corp. v. Intuit, Inc., No. 10-4422 WHA, 2011 WL 856265 (N.D. Cal. March 9, 2011). In response, UCAR contends that the conversion claim is based upon allegations that do not and cannot serve as the basis for trade secret theft. In particular, UCAR relies on its allegations that Defendants-Counterclaimants destroyed all the information on UCAR’s laptops and took administrative access rights information. UCAR reasons that the destruction of information and taking of administrative rights information does not constitute misappropriation of trade secret information. UCAR also argues that the files that were destroyed and the denial of access to actual computer files are tangible property and support a claim for conversion.

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1 Based upon UCAR’s representation that the conversion claim is distinct from trade secret
 2 misappropriation³, the Court finds that the conversion claim is not preempted by the CUTSA.
 3 Further, the Court finds that UCAR has alleged a legally viable conversion claim based upon the
 4 destruction of information on UCAR’s laptops and the deprivation of administrative access rights
 5 information. In Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003), the Ninth Circuit held
 6 that the right to use a domain name is subject to conversion, despite the fact that it is a form of
 7 intangible property. The Ninth Circuit observed that “property” includes “every intangible benefit
 8 and prerogative susceptible of possession or disposition.” Id. (quoting Downing v. Mun. Court, 88
 9 Cal.App.2d 345, 350 (1948)). Consistent with this definition, several California courts have held
 10 that the tort of conversion applies to intangible electronically stored information in various forms.
 11 See e.g. Thrifty-Tel, Inc. v. Park, 220 Cal.App.4th 1559 (1996) (recognizing conversion of
 12 information recorded on floppy disk); A&M Records, Inc. v. Heilman, 75 Cal.App.3d, 554, 570
 13 (1977) (audio record subject to conversion); Lone Ranger Television, Inc. v. Program Radio
 14 Corp., 740 F.2d 718 (9th Cir. 1984) (intangible property interest in magnetic tapes subject to
 15 conversion); Loop AI Labs Inc. v. Gatti, No. 15-798 HSG, 2015 WL 5158461, at *3 (N.D. Cal.
 16 Sept. 2, 2015) (theft of computer and the files it contained supports conversion claim). Here,
 17 UCAR similarly alleges that Defendants-Counterclaimants destroyed intangible data stored on
 18 UCAR’s laptops. As observed in Kremen, “[i]t would be a curious jurisprudence that turned on
 19 the existence of a paper document rather than an electronic one. Torching a company’s file room
 20 would then be conversion while hacking into its mainframe and deleting its data would not. That
 21 is not the law, at least not in California.” Kremen v. Cohen, 337 F.3d at 1034. UCAR need not
 22 allege destruction of the laptops to state a claim for conversion.⁴ The motion to dismiss the
 23

24 ³ UCAR’s Opposition to Motion to Dismiss, p. 12 (“the Complaint makes several allegations that
 25 do not and cannot serve as the basis for trade secret theft.”).

26 ⁴ UCAR also argues that Defendants-Counterclaimants took various physical items from UCAR,
 27 including USB drives, telephones, security access badges and other items. UCAR Opposition,
 28 p.13. UCAR is granted leave to add this allegation to the complaint, provided that UCAR is also
 able to satisfactorily allege the remaining elements of a claim for conversion.

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1 conversion claim is denied.

2 Claim 8: Fraud/Deceit

3 Defendants-Counterclaimants contend that UCAR fails to plead fraud with particularity as
4 required by Rule 9(b), Fed.R.Civ.P. UCAR contends that it has stated a viable claim for fraud.

5 UCAR’s allegations are insufficient to satisfy Rule 9(b). To satisfy Rule 9(b), a party
6 alleging fraud must state the time, place and specific content of the false representations as well as
7 the identities of the parties to the misrepresentation. Applied Elastomerics, Inc. v. Z-Man Fishing
8 Products, No. 06-2469 CW, 2006 WL 3251732, at *6 (N.D. Cal. Nov. 8, 2006). The party
9 asserting fraud must also explain why the challenged representation was untrue or misleading. Id.
10 None of these details are alleged in the Complaint. Instead, UCAR alleges in vague and
11 conclusory terms that Defendants falsely represented that Defendants-Counterclaimants “were
12 working on valuable work product for UCAR’s benefit and that UCAR would have access to the
13 work product,” that UCAR relied on the alleged misrepresentation and suffered damages as a
14 result. Complaint, ¶¶84-90. The fraud claim is dismissed with leave to amend.

15 Claim 9: breach of fiduciary duty

16 Defendants-Counterclaimants contend that the breach of fiduciary duty claim is deficient
17 because UCAR fails to plead facts to support the existence of a fiduciary duty. Further,
18 Defendants-Counterclaimants argue that as a matter of law “employment-type relationships are
19 not fiduciary relationships.” O’Byrne v. Santa Monica-UCLA Med. Ctr., 94 Cal.App.4th 797, 811
20 (2001).

21 UCAR’s allegations are insufficient to state a claim for breach of the fiduciary duty. A
22 bare employee-employer relationship does not create a fiduciary relationship. See e.g. O’Byrne,
23 94 Cal.App.4th at 911; Amid v. Hawthorne Community Medical Group, Inc., 212 Cal.App.3d
24 1383, 1391 (1989). UCAR nevertheless argues that a fiduciary duty should be imposed based
25 upon the following:

26 Defendants, and each of them, were given a high degree of

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1 autonomy and trust by UCAR in carrying out their work for the
2 company. As a separate R&D group with their own office space,
3 their own set of computers, and their own administrative level
4 access to UCAR proprietary and confidential information including
5 the AWS Account, each Defendant had a fiduciary relationship with
6 UCAR whereby each Defendant was duty bound to act with the
7 utmost good faith for the benefit of UCAR. Each Defendant
8 voluntarily accepted this fiduciary relationship with UCAR and
9 signed agreements indicating that they had a duty of loyalty to the
10 company as part of their employment. Defendant Li, as the sole
11 Director of UCAR Technology (USA) Inc., had a particular level of
12 confidence and responsibility as well as a higher level of duty to
13 UCAR.

8 Complaint, ¶92. These allegations, however, are insufficient as to Zhong, Huo and Kou because
9 the “mere placing of a trust in another” does not create a fiduciary relationship.” Amid, 212
10 Cal.App.3d at 1391. UCAR also alleges a contractually imposed duty of loyalty as to all of the
11 Defendants-Counterclaimants. However, a breach of fiduciary duty and breach of the duty of
12 loyalty are two distinct claims under California law. E.D.C. Technologies, Inc. v. Seidel, 216
13 F.Supp.3d 1012, 1016 (N.D. Cal. 2016). The breach of fiduciary duty claim is accordingly
14 dismissed as to Zhong, Huo and Kou. The motion is denied as to Defendant-Counterclaimant, Li,
15 who is identified as a director of UCAR Technology (USA), Inc., and may have potential liability
16 for breach of a fiduciary duty in his capacity as a director.

17 B. Plaintiffs’ Motion to Dismiss Counterclaims

18 UCAR moves to dismiss the counterclaims on essentially two grounds. First, UCAR
19 contends that the employment contracts provide that any stock options would be subject to
20 approval of the Company’s Board of Directors. UCAR contends that Defendants-
21 Counterclaimants do not allege, nor can they allege, that there was Board approval for the stock
22 options and stock, and accordingly the contract claims must be dismissed. Second, UCAR argues
23 that the fraud claim lacks the specificity required by Rule 9(b), Fed.R.Civ.P.

24 Claims One and Two: Breach of Contract and Anticipatory Breach of Contract

25 The first counterclaim for breach of contract is asserted by Li, Zhong and Kou and the
26 second counterclaim for anticipatory breach of contract is asserted by Huo. Each of the four

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1 employment contracts includes the following provision regarding stock options:

2 3. Stock options.

3 a. Number of stock options. Subject to the approval of the
4 Company's Board of Directors, you will be granted options to
5 purchase such number of shares equivalent to [] of the Company's
6 issued and outstanding common stock

7 Dkt. 6, Ex. 1, 4. Zhong's employment agreement includes similar language regarding restricted
8 stock:

9 3. Share Incentives.

10 a. Number of shares under the incentive grant. Subject to the
11 approval of the Company's Board of Directors, you will be granted
12 a restricted stock unit of such number of shares equivalent to

13 Dkt. 6, Ex. 2.⁵ Defendants-Counterclaimants acknowledge that the employment contracts include
14 the clause "subject to board approval" and that they have not pled board approval. Nevertheless,
15 Defendants-Counterclaimants argue that their claims should not be dismissed because: (1)
16 UCAR's action, in choosing to list its shares on China's NEEQ market, excused any requirement
17 for Defendants-Counterclaimants to plead board approval, (2) board approval only applies to the
18 number of shares, not whether they would be paid out at all, (3) Defendants-Counterclaimants are
19 entitled to an inference at the pleading stage that Li, the sole board member of UCAR Technology
20 (USA), Inc., would have approved his own stock options and (4) the parties to the contract did not
21 intend board approval to be a requirement in the first instance.

22 The Court rejects the first argument because Defendants-Counterclaimants have not pled a
23 sufficient basis for excusing board approval. Defendants-Counterclaimants' reliance on Jacobs v.
24 Tenneco W., Inc., 186 Cal.App.3d 1413 (1986), is misplaced. In that case, plaintiffs asserted a
25 claim for breach of the implied covenant of good faith and fair dealing based upon defendants'
26 alleged failure to submit a contract for the purchase and sale of land to defendants' board of

27 _____
28 ⁵ The employment contracts further state that the stock options or restricted stock would begin
vesting after Li, Zhong and Kou had worked for UCAR for twelve months.

1 directors for approval. Here, Defendants-Counterclaimants assert breach of contract, not breach of
2 the implied covenant of good faith and fair dealing. Moreover, the grant of stock options and
3 stock in Defendants-Counterclaimants' employment contracts is subject to the discretion of the
4 board and UCAR cannot be liable for breach of contract for failing to grant any stock options. See
5 Zamora v. Zuni Solar, No. 16-1260 ODW, 2016 WL 3512439 (C.D. Cal. June 27, 2016) (granting
6 motion to dismiss breach of contract claim when contract gave company discretion to act as it
7 did); Song Fi Inc. v. Google, Inc., 108 F.Supp.3d 876, 885 (N.D. Cal. 2015) (dismissing breach of
8 contract claim because "conduct authorized by a contract cannot give rise to a claim for breach of
9 the agreement"); Schwarzkopf v. IBM, Nol. 08-2715 JF, 2010 WL 1929625, at *10 (N.D. Cal.
10 May 12, 2010) ("There is no breach of contract where 'defendants were given the right to do what
11 they did by the express provisions of the contract.'").

12 Defendants-Counterclaimants' second argument is also unpersuasive. The phrase
13 "[s]ubject to the approval of the Company's Board of Directors," is placed at the beginning of the
14 sentence and applies to the grant of stock options or restricted stock. The Company's Board of
15 Directors accordingly had discretion to deny approval of any stock options or stock. In Cohen v.
16 Resolution Trust Corp., No. 90-1065 RP, 1993 WL 282051, at *3 (S.D. Cal. May 10, 1993), a case
17 relied on by Defendants-Counterclaimants, the court evaluated a compensation bonus provision
18 that was arguably susceptible to competing interpretations and ultimately ruled in favor of
19 plaintiffs on summary judgment, finding that plaintiffs' interpretation gave a reasonable and
20 operative meaning to the provision. Relying on Cohen, Defendants-Counterclaimants argue that
21 the stock option provision at issue in this case is also susceptible to competing interpretations and
22 therefore dismissal is premature. Defendants-Counterclaimants' interpretation of the stock option
23 provisions, however, is unreasonable as a matter of law. The only reasonable interpretation of the
24 provision(s) at issue is that the grant of any stock or restricted stock is conditioned upon board
25 approval.

26 Defendants-Counterclaimants next argue that they are entitled to an inference that Li, as
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1 the sole shareholder of UCAR Technology (USA), Inc. would have approved his stock options.
2 The argument is unpersuasive. The employment contracts identify UCAR Technology Inc. as the
3 employer “Company,” not UCAR Technology (USA), Inc. The stock option provisions in the
4 employment contracts provide options for stock or stock in the “Company,” not UCAR
5 Technology (USA), Inc. Defendants-Counterclaimants do not allege any facts to show that Li, as
6 the sole shareholder of UCAR Technology (USA), Inc. had authority to approve the grants of
7 stock in UCAR Technology Inc. Nor are there facts alleged to support an inference that
8 Defendants-Counterclaimants are contractually entitled to stock or stock options in UCAR
9 Technology (USA), Inc. instead of UCAR Technology Inc. At most, Defendants-
10 Counterclaimants allege that UCAR Technology Inc., UCAR Technology (USA), Inc. and UCAR,
11 Inc. are alter-egos of each other (Dkt. 48 at 22:11-12), but they do not explain how their alter-ego
12 theory gives them any legal right to stock options or restricted stock in any corporation other than
13 UCAR Technology Inc.

14 Defendants-Counterclaimants’ fourth argument is that the board approval provision in the
15 employment contracts is the result of “mutual mistake.” Defendants-Counterclaimants, however,
16 have not alleged facts in their counterclaims to support such a theory.

17 The breach of contract and anticipatory breach of contract claims are dismissed with leave
18 to amend.

19 Claim 3: Promissory Estoppel

20 In their promissory estoppel claim, Defendants-Counterclaimants allege that (a) UCAR
21 anticipatorily breached the employment agreements by listing UCAR Technology Inc. on China’s
22 NEEQ market, and (b) to the extent UCAR’s anticipatory breach “may have effected a rescission
23 of the employment agreements,” Defendants-Counterclaimants are entitled to “restitutionary
24 remedies in promissory estoppel for the uncompensated portion of their labor which was supposed
25 to be compensated by stock options.” Dkt. 48, p.37. UCAR seeks dismissal of the promissory
26 estoppel claim, arguing among other things that UCAR did not promise to issue options or

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1 restricted stock without board approval, and Defendants-Counterclaimants have not alleged a valid
2 basis for rescission of the written contract.

3 As discussed above in the context of the contract claims, the employment agreements give
4 the board discretion to approve or disapprove the grant of stock options and restricted stock.
5 Because the board had the discretion to deny stock options and restricted stock, the decision to list
6 the stock on the NEEQ market did not constitute a breach or anticipatory breach of the
7 employment agreements as a matter of law and did not trigger a right of rescission. It follows that
8 Defendants-Counterclaimants may not proceed on a promissory estoppel claim premised on a
9 purported promise to issue stock options or restricted stock because that subject matter is governed
10 by the employment contracts. See e.g. Naidong Chen v. Fleetcor Technologies, Inc., No. 16-135
11 LHK, 2017 WL 1092342, at *13 (N.D. Cal. March 23, 2017) (because parties have an actual
12 agreement covering compensation, plaintiffs cannot rely on a contract implied in law theory);
13 Healy v. Brewster, 59 Cal.2d 455, 464 (1963); San Diego City Firefighters, Local 145 v. Bd. Of
14 Admin. Of San Diego City Employees' Retirement System, 206 Cal.App.4th 594, 618 (2012).
15 The motion to dismiss the promissory estoppel claim is granted with leave to amend.

16 Claim 4: Unjust Enrichment

17 Defendants-Counterclaimants Li, Zhong and Kou assert a claim for unjust enrichment
18 predicated upon the alleged failure to confer stock options and restricted stock. UCAR seeks
19 dismissal of this claim, arguing that as a matter of law, a quasi-contract action for unjust
20 enrichment does not lie where, as here, there is a written agreement defining the parties' respective
21 rights. In response, Defendants-Counterclaimants argue that UCAR's breach and anticipatory
22 breach of the employment agreements triggered their right to rescission and equitable remedies.

23 Defendants-Counterclaimants' rescission theory fails for the reasons already discussed in
24 the context of the contract claims and the promissory estoppel claim. Because Defendants-
25 Counterclaimants have not adequately alleged a legal basis for finding the employment contracts
26 invalid or unenforceable, the employment contracts preclude the unjust enrichment claim. See
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1 Mosier v. Stonefield Josephson, Inc., 815 F.3d 1161, 1172 (9th Cir. 2016) (quasi-contract action
2 for unjust enrichment does not lie where express binding agreements exist and define the parties'
3 rights). The unjust enrichment claim is dismissed with leave to amend.

4 Claim 5: Fraudulent Inducement

5 Defendants-Counterclaimants' fraudulent inducement claim is based upon two alleged
6 fraudulent representations: (a) that stock options or stock would be part of their compensation for
7 their employment and (b) that UCAR was a "legitimate company" that would obey all laws and
8 corporate formalities and foster a productive and open working environment. UCAR argues that
9 the claim should be dismissed because the alleged fraud is not pled with particularity as required
10 by Rule 9(b), Fed.R.Civ.P.

11 "The elements of a cause of action for fraudulent inducement to an employment contract
12 are: (1) that the employer misrepresented or concealed a material fact during the hiring process,
13 (2) knowledge of the falsity of the fact or lack of reasonable grounds for believing it to be true, (3)
14 an intent to induce reliance, (4) justifiable reliance by the employee, and (5) resulting damages."
15 Garamendi v. Golden Eagle Ins. Co., 128 Cal.App.4th 452, 470 (2005) (citing Lazar v. Superior
16 Court, 12 Cal.4th 631, 638 (1996)). The fraudulent inducement claim sounds in fraud and
17 accordingly must be pled with particularity as required by Rule 9(b), Fed.R.Civ.P.

18 In response to the motion to dismiss, Defendants-Counterclaimants argue that they have
19 satisfactorily alleged facts from which to infer fraud. Defendants-Counterclaimants allege that
20 UCAR promised stock options or stock as compensation for employment. Defendants-
21 Counterclaimants allege fraudulent intent may be inferred from the fact that at the time UCAR
22 was promising stock and stock options, UCAR was simultaneously preparing to list the Company
23 on the NEEQ market. UCAR thus allegedly knew at the time it made the offers of stock and stock
24 options that it would be unable to keep those alleged promises.

25 Insofar as the fraud claim is predicated on an alleged promise to grant stock or stock
26 options, the claim is inadequately pled. Counterclaimants fail to identify who made the promise to

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1 unconditionally grant stock or stock options, when the alleged promise was made and where the
2 alleged promise was made. The only basis for the alleged promise appears to be the employment
3 contracts. The alleged fraudulent promise to unconditionally grant stock or stock options,
4 however, is inconsistent with the terms of the contracts, which as discussed previously, gave the
5 board full discretion to grant or deny stock or options.

6 With respect to the alleged misrepresentation that UCAR was a “legitimate company,”
7 Defendants-Counterclaimants do not raise a rebuttal. Instead, Defendants-Counterclaimants
8 reframe their theory and argue that UCAR fraudulently misrepresented that it would hire engineers
9 to create a research operation in California. Defendants-Counterclaimants argue that they have
10 sufficiently alleged the identity of the parties, including UCAR representatives Charles Lu, Zhiya
11 Qian, Shuo Di, and Li, who allegedly made the false statement to Defendants-Counterclaimants in
12 May, June and July of 2015, and again in December of 2015 and January of 2016. Defendants-
13 Counterclaimants argue that UCAR never intended to hire more than approximately ten engineers
14 and never intended to conduct serious research efforts in California.

15 Despite the facts recited above, Defendants-Counterclaimant’s theory of fraud remains
16 inadequately pled. Among other things, there are no facts alleged to establish that the UCAR
17 representatives had a fraudulent intent when they made representations about hiring engineers and
18 creating a research operation. The fraud claim is dismissed with leave to amend.

19 V. CONCLUSION

20 For the reasons set forth above, Defendants-Counterclaimants’ motion to dismiss UCAR’s
21 claims is granted as to the claims for unfair and unlawful business practices and for fraud/deceit,
22 with leave to amend. The motion to dismiss is also granted, with prejudice, as to the claim for
23 breach of fiduciary duty against Zhong, Huo and Kou.

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Defendants-Counterclaimants’ motion to dismiss is denied as to the remaining claims. UCAR’s motion to dismiss the counterclaims is granted with leave to amend. The parties shall file and serve amended pleadings consistent with this Order no later than December 29, 2017.

IT IS SO ORDERED.

Dated: December 15, 2017



EDWARD J. DAVILA
United States District Judge