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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LEATT CORPORATION, a Nevada corporation; and EXCEED HOLDINGS (PTY) LTD., a South African company,

Plaintiffs,

vs.

INNOVATIVE SAFETY TECHNOLOGY, LLC, a California limited liability company; KEVIN HEATH ENTERPRISES, INC., a California corporation; KEVIN HEATH, an individual; and E.V. TECHNOLOGY, a Chinese business entity,

Defendants.

CASE NO. 09-CV-1301 - IEG (POR)

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

[Doc. No. 67]

This is a case about alleged trade secret misappropriation. Currently before the Court is Defendants Kevin Heath, Kevin Heath Enterprises, Inc., and E.V. Technology’s (collectively, “Heath Defendants”) Motion to Dismiss Plaintiffs’ claims for enforcement of foreign arbitration award, unfair competition, and tortious interference. Having considered the parties’ arguments, and for the reasons set forth below, the Court **GRANTS IN PART and DENIES IN PART** the motion to dismiss.

BACKGROUND

I. Factual background

The factual and procedural background in this case is set forth in great detail in the Court’s previous order. See Leatt Corp. v. Innovative Safety Tech., LLC, No. 09-CV-1301-IEG (POR), 2010

1 WL 1526382, at **1-5 (S.D. Cal. Apr. 15, 2010). As relevant to this motion, Plaintiffs Leatt
2 Corporation (“Leatt”) and Exceed Holdings (Pty) Ltd. (“Xceed”) allege to have spent many years of
3 independent research and development to create neck safety braces for use in motorsports. By 2006,
4 these efforts culminated in the development of the Moto-R brace for use with cars and the Moto-GPX
5 brace for use with motorcycles. A new version of the Moto-R was allegedly prototyped in or around
6 the late summer and/or early fall of 2006 (“Prototype 1”). Leatt then designed and built a second
7 prototype around the summer of 2007 (“Prototype 2”).

8 According to Plaintiffs, starting from January 2008, two of their employees—Grant Nelson and
9 Karl Ebel—stole and improperly disclosed and commercialized Plaintiffs’ proprietary and confidential
10 information concerning Prototype 2. Subsequently, Plaintiffs allege Nelson and Ebel, working together
11 with an investor by the name of Doug Williams, developed and began production of a neck brace with
12 a raised stabilizer bar similar to Prototype 2 (“the DefNder”). In or around June 2008, Nelson, Ebel,
13 and Williams formed Defendant Innovative Safety Technology, LLC (“IST”), which listed all three
14 as managers or members.

15 In summer or fall of 2008, IST entered into a distribution agreement with Defendant Kevin
16 Heath, who arranged for the DefNder to be manufactured in China and to be imported and sold in the
17 United States through two of his companies: E.V. Technology (“EVT”), a Chinese business entity,
18 and Kevin Heath Enterprises, Inc. (“KHE”), a California corporation. Plaintiffs allege Mr. Heath
19 personally, and through his companies, directed, authorized, and participated in the wrongful acts
20 committed by the other Defendants, and that he assisted and worked in concert with IST to
21 manufacture, import, market, sell, and offer for sale the DefNder.

22 **II. The South African action**

23 To protect their proprietary and confidential information, Plaintiffs first filed suit in South
24 Africa against Nelson and Ebel, and subsequently Williams, for misappropriating Plaintiffs’ trade
25 secrets and for copyright infringement. On December 5, 2008, Plaintiffs received an interdict (similar
26 to a preliminary injunction) against Nelson and Ebel that prohibited them from disclosing, copying,
27 selling, or distributing certain specific features of Prototype 2, including any sale or distribution of the
28 DefNder product. On June 11, 2009, Plaintiffs received a similar interdict against Williams.

1 Subsequently, the South African action was referred to arbitration. The Arbitrator eventually
2 determined that the overall shapes of Prototype 1 and 2 did not form part of the state of the art as of
3 January 25, 2008. (SFAC, Ex. G, ¶ 98 [hereinafter, “Arbitration Award”].) The Arbitrator also
4 concluded that even though elements of Prototype 2 were present on the Moto-R device and in other
5 devices available in the marketplace, “there were significant design differences as between Prototype
6 2 and the prior art,” and therefore “the overall design of Prototype 2 constituted confidential
7 information.” (Id. ¶ 113.) In the end, although there were some differences, the Arbitrator found that
8 the DefNder conceptually resembled Prototype 2, particularly in relation to the stabilizer bar. (Id. ¶¶
9 257, 350.) The Arbitrator found that Nelson used his knowledge of the design of Prototype 2 in
10 designing the DefNder, and that such knowledge constituted confidential information proprietary to
11 Plaintiffs. (Id. ¶¶ 348-53.) According to the Arbitrator, the following confidential information was
12 misused by Nelson: (1) the harness channels and their strategic placement, (2) the elevated frontal
13 support bars (the stabilizer bars), and (3) the overall shape of the brace. (Id. ¶ 355.) The Arbitrator also
14 found that Ebel and Williams were liable for aiding and abetting Nelson. (Id. ¶ 362.) Finally, having
15 concluded that the misappropriation provided Nelson with a “springboard” of between 18 and 24
16 months, the Arbitrator found that justice would be served if Nelson, Ebel, and Williams were enjoined
17 until July 31, 2010 from using or disclosing the above confidential information. (Id. ¶¶ 377, 386.)

18 **III. Procedural history**

19 Plaintiffs commenced the present action in this Court on June 16, 2009. [Doc. No. 1]. After
20 the Court ruled on Defendants’ Motion to Dismiss, Plaintiffs filed a First Amended Complaint
21 (“FAC”) on September 14, 2009. [See Doc. Nos. 16, 17]. Plaintiffs thereafter moved for a preliminary
22 injunction, which the Court granted in part and denied in part on April 15, 2010. [Doc. No. 64].
23 Subsequently, Plaintiffs filed a Supplemental First Amended Complaint (“SFAC”), alleging causes
24 of action for: (1) misappropriation of trade secrets; (2) unfair competition; (3) tortious interference;
25 and (4) enforcement of foreign arbitration award. [Doc. No. 66].

26 Currently before the Court is Heath Defendants’ motion to dismiss, filed on May 7, 2010.
27 Plaintiffs filed an opposition, and the Heath Defendants replied. The Court subsequently took the
28 motion under submission pursuant to Civil Local Rule 7.1(d)(1).

1 19, 23 (2d Cir. 1997); see also Balen v. Holland Am. Line Inc., 583 F.3d 647, 652 (9th Cir. 2009)
2 (“The Supreme Court has consistently recognized ‘the emphatic federal policy in favor of arbitral
3 dispute resolution,’ a policy that ‘applies with special force in the field of international commerce.’”
4 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985))).

5 The Heath Defendants argue the Court should refuse enforcement of the award because they
6 were not “parties” to the South African arbitration as required by the FAA. See 9 U.S.C. § 207
7 (“Within three years after an arbitral award falling under the Convention is made, any party to the
8 arbitration may apply to any court having jurisdiction under this chapter for an order confirming the
9 award as against any other *party* to the arbitration.” (emphasis added)). The Heath Defendants,
10 however, unduly minimize the scope of the Convention. Article III of the Convention provides that
11 “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance
12 with the rules of procedure of the territory where the award is relied upon, under the conditions laid
13 down in the [various provisions of the Convention].” In the United States, courts have recognized that
14 non-signatories may be bound by an arbitration agreement under “ordinary contract and agency
15 principles,” such as agency or alter ego. See, e.g., Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir.
16 2006); In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine,
17 311 F.3d 488, 494-95 (2d Cir. 2002) [hereinafter Monegasque]; Letizia v. Prudential Bache Sec., Inc.,
18 802 F.2d 1185, 1187-88 (9th Cir. 1986). The Court will analyze each of these theories in turn.¹

19 A. Alter ego

20 The alter ego doctrine applies when “‘there is such unity of interest and ownership that the
21 separate personalities of the two entities no longer exist’” and “‘failure to disregard their separate
22 identities would result in fraud or injustice.’” Harris Rutsky & Co. Ins. Services, Inc. v. Bell &
23 Clements Ltd., 328 F.3d 1122, 1134-35 (9th Cir. 2003) (citation omitted). The presence of the same

25 ¹ The Heath Defendants also argue the FAA does not apply in this case because there is no
26 “legal relationship . . . which is considered as commercial” between Plaintiffs and the Heath
27 Defendants. See Walker & Zanger (West Coast) Ltd. v. Stone Design S.A., 4 F. Supp. 2d 931, 936
28 (C.D. Cal. 1997); Prograph Int’l Inc. v. Barhydt, 928 F. Supp. 983, 988 (N.D. Cal. 1996). However,
in the present case, that relationship *does* exist between Defendants Nelson and Ebel, who were
Plaintiffs’ employees, and Plaintiffs. The Heath Defendants do not dispute this. The question for the
Court, therefore, is whether an arbitration award arising from *this* legal relationship can be enforced
against the Heath Defendants under the principles of either alter ego and/or agency.

1 officers and/or 100% control through stock ownership does not, by itself, make one entity an alter ego
2 of another. Id. at 1135. Rather, what is necessary is such “control over day-to-day activities” as to
3 render one entity “the mere instrumentality” of the other. Id.; accord Doe v. Unocal Corp., 248 F.3d
4 915, 926 (9th Cir. 2001) (“The first prong of [the alter ego] test has alternately been stated as requiring
5 a showing that the parent controls the subsidiary ‘to such a degree as to render the latter the mere
6 instrumentality of the former.’” (quoting Calvert v. Huckins, 875 F. Supp. 674, 678 (E.D. Cal. 1995))).

7 Thus, the Ninth Circuit has explained that:

8 [W]here a parent corporation uses its subsidiary “as a marketing conduit” and attempts
9 to shield itself from liability based on its subsidiaries’ activities, piercing the corporate
10 veil is appropriate and the alter-ego test is satisfied. That test is also satisfied where the
record indicates that the parent dictates “[e]very facet [of the subsidiary’s]
business—from broad policy decisions to routine matters of day-to-day operation [.]”

11 Unocal Corp., 248 F.3d at 926-27 (internal citations omitted).

12 Nonetheless, for the first prong of the alter ego test to be met under California law, Plaintiffs
13 must allege at least *some ownership* of Defendant IST by the Heath Defendants. See S.E.C. v. Hickey,
14 322 F.3d 1123, 1130 (9th Cir. 2003) (noting the “clear rule of law established by the California courts
15 that an individual *must* own at least part of a corporation for an alter ego relationship to exist.”). In
16 the present case, while the SFAC arguably alleges necessary control by Mr. Heath over Defendant
17 IST, it fails to allege *any* ownership by Mr. Heath of at least a portion of Defendant IST. Without any
18 such showing, no alter ego relationship can exist under California law.² See id.

19 **B. Agency**

20 On the other hand, Plaintiffs have alleged sufficient facts to support their agency theory. To
21 satisfy the agency test, the plaintiff must demonstrate that one entity (the agent) represents another
22 (the principal) by performing services “sufficiently important” to the principal ““that if it did not have
23 a representative to perform them, the [principal] would undertake to preform substantially similar
24 services.”” See Harris Rutsky, 328 F.3d at 1135 (quoting Chan v. Society Expeditions, Inc., 39 F.3d

26 ² The Court does note, however, that there is reason to question the reasoning behind the
27 absolute rule articulated in Hickey. As at least one California court noted, the Ninth Circuit’s decision
28 in Hickey might represent an “incorrect statement[] of California law on this subject.” See Logix Dev.
Corp. v. Faherty, No. B178872, 2007 WL 3358745, at **10-11 (Cal. Ct. App. Nov. 14, 2007)
(unpublished). Absent binding state authority, however, this Court is bound to apply California law
as interpreted by the Ninth Circuit. Cf. Zuniga v. United Can Co., 812 F.2d 443, 450 (9th Cir. 1987).

1 1398, 1405-06 (9th Cir. 1994)). Thus, the agency test is satisfied “where the [agent] was ‘either
2 established for, or is engaged in, activities that, but for the existence of the [agent], the [principal]
3 would have to undertake itself.’” See id. (quoting Chan, 39 F.3d at 1405-06 n.9).

4 In the present case, the SFAC adequately alleges that Mr. Heath was one of the primary
5 architects behind the wrongdoings alleged. Thus, the SFAC alleges that Mr. Heath met with Nelson
6 and Ebel on several occasions between January 2005 and January 2008, whereby the three of them
7 formed a relationship that would eventually lead to Mr. Heath’s manufacture, importation, and sale
8 of the DefNder in the United States. (SFAC ¶¶ 46-47.) Specifically, the SFAC alleges Mr. Heath met
9 with Nelson, Ebel, and Williams in January 2008, just before both Nelson and Ebel resigned from
10 Leatt, where the four of them discussed their impending business ventures. (SFAC ¶ 48.) Indeed, the
11 SFAC alleges that Mr. Heath, individually and through his companies, directed, authorized, and
12 participated in all of the allegedly wrongful acts committed by Defendant IST and other Defendants.
13 (See SFAC ¶¶ 49-51.) Furthermore, the SFAC sufficiently alleges that Defendant IST “represented”
14 Mr. Heath during this time by performing services “sufficiently important” to Mr. Heath that if he did
15 not have a representative to perform them, Mr. Heath would have to undertake to perform
16 substantially similar services. See Harris Rutsky, 328 F.3d at 1135. Specifically, at the very least, there
17 are sufficient facts alleged to conclude that without Defendant IST, Mr. Heath would have had to
18 design and promote the DefNder product all by himself. (See SFAC ¶¶ 46-51.)

19 Similarly, the SFAC alleges sufficient facts to conclude that at all relevant times Mr. Heath
20 exercised the necessary control over Defendant IST. For example, the SFAC alleges Mr. Heath is
21 currently an investor of IST. (SFAC ¶ 89.) The SFAC also alleges Mr. Heath personally registered the
22 <defNder.com> domain name in December 2008, which currently provides a link to the
23 <defNderneckbrace.com> website that sells the DefNder product, and that he also personally owns
24 and operates the website located at <defender.com>. (SFAC ¶¶ 52-53.) The SFAC further alleges Mr.
25 Heath assisted Mr. Williams in registering the domain name <willrace.com>, which is a website for
26 Williams Racing Developments, an entity owned and operated by a relative of Mr. Williams. (SFAC
27 ¶ 54.) According to the SFAC, the Williams Racing Development company as well as the registration
28 for the <willrace.com> domain name use the very same Santee, California address as that of Mr.

1 Health’s own companies. (Id.) Furthermore, upon receiving Plaintiffs’ cease and desist letters, Mr.
2 Heath allegedly changed the ownership of the <defNderneckbrace.com> from his Speedworld Indoor
3 Racing, Inc. company to another company solely owned by him–Defendant KHE. (SFAC ¶ 58.)

4 Based on all of the foregoing, Plaintiffs have alleged sufficient facts to demonstrate that the
5 Heath Defendants could be bound by the actions of the other Defendants under the agency theory, and
6 therefore could be bound by the South African Arbitration Award.³ Accordingly, the Motion to
7 Dismiss Plaintiffs’ fourth cause of action is DENIED.

8 **II. State law tort claims**

9 Plaintiffs’ second and third causes of action allege unfair competition and tortious interference,
10 respectively. The Heath Defendants move to dismiss both of these claims as preempted under the
11 Uniform Trade Secrets Act, CAL. CIV. CODE § 3426 et seq. (“UTSA”). In opposition, Plaintiffs argue
12 the dismissal is not warranted because these causes of action include additional and independent
13 allegations of wrongdoing based upon non-trade secret, but otherwise protectable, information.
14 Moreover, because preemption under the UTSA requires a factual analysis of the claims, Plaintiffs
15 argue dismissal is inappropriate at the pleading stage.

16 The “broad view” is that the UTSA’s comprehensive structure and breadth suggests a
17 legislative intent to occupy the field. See K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations,
18 Inc., 171 Cal. App. 4th 939, 957 (2009) (citing AccuImage Diagnostics Corp. v. Terarecon, Inc., 260
19 F. Supp. 2d 941, 953 (N.D. Cal. 2003)). Accordingly, the UTSA is deemed to “preempt” all common
20 law claims that are “based on the same nucleus of facts as the misappropriation of trade secrets claim
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24 ³ Contrary to the Heath Defendants’ arguments, this does not violate the “deep-rooted historic
25 tradition” of American jurisprudence that “everyone should have his own day in court.” See Taylor
26 v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 2171 (2008). As the Supreme Court in Taylor noted, there
27 are several well-recognized exceptions to the rule against nonparty preclusion, such as: (1) agreement
28 to be bound; (2) pre-existing substantive legal relationship between the person to be bound and a party
to the judgment; (3) adequate representation by someone with the same interests who was a party to
the suit; (4) assuming control over the litigation in which the judgment was rendered; (5) relitigation
through a proxy; and (6) a special statutory scheme that may expressly foreclose successive litigation
by nonlitigants in certain circumstances. Id. at 2172-73. In this case, a showing of a valid agency
relationship between the Heath Defendants, who were not parties to the South African arbitration, and
other Defendants, who were, is likely sufficient to fall within one of these exceptions.

1 for relief.”⁴ Id. at 959 (citing Digital Envoy, Inc. v. Google, Inc., 370 F. Supp. 2d 1025, 1035 (N.D.
2 Cal. 2005)); accord Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc., 318 F. Supp. 2d
3 216, 219-21 (D. Del. 2004) (applying California law).

4 Other claims are not preempted, however, when based upon a broader spectrum of misconduct
5 than misappropriation. See CAL. CIV. CODE § 3426.7(b) (noting that the UTSA does not affect “other
6 civil remedies that are not based upon misappropriation of a trade secret”); see also Ali v. Fasteners
7 for Retail, Inc., 544 F. Supp. 2d 1064, 1070 (E.D. Cal. 2008) (concluding that plaintiff’s fiduciary duty
8 claim was not preempted by the UTSA); Phoenix Techs. Ltd. v. DeviceVM, No. C 09-04697 CW,
9 2009 WL 4723400, at **4-5 (N.D. Cal. Dec. 8, 2009) (concluding that plaintiffs’ unfair competition
10 and tort claims were not preempted by the UTSA to the extent they were based on facts that were not
11 part of the nexus that formed the basis for their UTSA claim); Think Village-Kiwi, LLC v. Adobe
12 Sys., Inc., No. C 08-04166 SI, 2009 WL 902337, at **2-3 (N.D. Cal. Apr. 1, 2009) (allowing
13 amendment of the complaint to add common law claims for misappropriation and breach of
14 confidence to the extent those claims were based on a protectable interest other than a trade secret).

15 In this case, it appears Plaintiffs’ second and third causes of action are based on more than just
16 the misappropriation of Plaintiffs’ trade secrets. For example, Plaintiffs’ unfair competition claim
17 states that the conduct underlying it includes, but is *not* limited to, misappropriation of trade secrets.
18 (SFAC ¶ 114.) Similarly, Plaintiffs’ tortious interference claim states that the interference was based
19 upon knowledge of Plaintiffs’ prospective business relationships (which may or may not be a trade
20 secret) as well as violation of Plaintiffs’ common law rights *in addition to* any trade secret
21 misappropriation. (SFAC ¶¶ 118-22.) Finally, throughout their SFAC, Plaintiffs base their injury not
22 only on the theft of their trade secrets, but also on other “confidential” and/or “proprietary”
23 information. (See, e.g., SFAC ¶¶ 32, 36-37, 41, 50, 62-63, 89.) To the extent these claims are based
24 upon non-trade secret information, the Court agrees that they should be allowed to go forward at this

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27 ⁴ Although the California Supreme Court has criticized the use of the word “preempt” to
28 describe the supersession of one state law by another, see Zengen, Inc. v. Comerica Bank, 41 Cal. 4th
239, 247 n.5 (2007), the Court uses this term to be consistent with the decision in K.C. Multimedia,
171 Cal. App. 4th at 959, as well as every district court to apply that decision.

1 stage.⁵ See Phoenix Techs., 2009 WL 4723400, at **4-5 (noting that K.C. Multimedia “does not
2 undermine the analytic framework enunciated in First Advantage and Think Village-Kiwi allowing
3 claims to go forward where the gravamen of the claims does not rest on the misappropriation of trade
4 secrets”); First Advantage Background Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929, 942
5 (N.D. Cal. 2008) (allowing a cross-claim for false promises to proceed so long as the confidential
6 information that it was based on was not a trade secret).

7 Accordingly, to the extent Plaintiffs’ second and third causes of action are based upon
8 misappropriation of trade secrets, they are preempted by the UTSA and the Court GRANTS IN PART
9 the motion to dismiss in this regard. However, to the extent these causes of action are based upon facts
10 that are not part of the nexus that forms the basis for Plaintiffs’ UTSA claim, they are not preempted,
11 and the Court DENIES IN PART the motion to dismiss in this regard.

12 CONCLUSION

13 For the foregoing reasons, the Heath Defendants’ motion to dismiss is **GRANTED IN PART**
14 **and DENIED IN PART**. Specifically, the motion is **DENIED** to the extent it seeks dismissal of
15 Plaintiffs’ fourth cause of action for enforcement of the Arbitration Award. On the other hand, the
16 motion to dismiss is **GRANTED IN PART** with respect to Plaintiffs’ unfair competition and tortious
17 interference claims to the extent those claims are based upon misappropriation of Plaintiffs’ trade
18 secrets. In that regard, those claims are **DISMISSED WITH PREJUDICE**. However, the motion to

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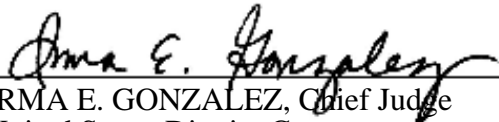
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23 ⁵ In this regard, the Court is not persuaded by the Heath Defendants’ heavy reliance on the
24 California Court of Appeals’ recent decision in Silvaco Data Sys. v. Intel Corp., 184 Cal. App. 4th 210
25 (2010). A careful reading of the Silvaco decision reveals that it does not undermine the conclusion that
26 the UTSA only preempts additional claims that depend on the misappropriation of a trade secret. See,
27 e.g., 184 Cal. App. 4th at 236 (“We thus reaffirm that CUTSA provides the exclusive civil remedy for
28 conduct falling within its terms, so as to supersede other civil remedies ‘based upon misappropriation
of a trade secret.’” (citation omitted)); id. at 238 (“CUTSA’s supersession clause applies to claims
‘based upon misappropriation of a trade secret.’” (citation omitted)). Indeed, the Silvaco court itself
found the plaintiff’s unfair competition claim in that case not to be preempted where it did not depend
on the existence of a trade secret, “but on knowingly facilitating another in the violation of its
obligations under a judicial decree.” Id. at 241-42. Similarly, in the present case, Plaintiffs’ unfair
competition and tortious interference claims are not preempted by the UTSA to the extent they depend
on the misappropriation of otherwise confidential or proprietary, but not trade secret, information as
well as upon knowledge of Plaintiffs’ prospective business relationships.

1 dismiss is **DENIED IN PART** with respect to Plaintiffs' unfair competition and tortious interference
2 claims to the extent these claims are not based upon misappropriation of Plaintiffs' trade secrets.

3 **IT IS SO ORDERED.**

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DATED: July 15, 2010


IRMA E. GONZALEZ, Chief Judge
United States District Court