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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CEN COM INC., a Washington)	
corporation d/b/a American Digital)	CASE NO. C17-0560 RSM
Monitoring,)	
)	ORDER GRANTING IN PART MOTION
Plaintiff,)	TO DISMISS
)	
v.)	
)	
NUMEREX CORP., a Pennsylvania)	
corporation; NEXTALARM, LLC, a)	
Georgia limited liability corporation, and)	
DOES 1-10,)	
)	
Defendants.)	
)	

I. INTRODUCTION

This matter comes before the Court on Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint. Dkt. #76. Defendants argue that Plaintiff’s claims for breach of contract, negligence, fraud, misrepresentation, conversion, unjust enrichment, aiding and abetting, vicarious liability, civil conspiracy, and violations of Washington’s Consumer Protection Act (“CPA”), must be dismissed because they are displaced by Washington’s Uniform Trade Secrets Act (“UTSA”). *Id.* Plaintiff opposes the motion, asserting that its claims are not displaced by the UTSA because it no longer asserts a trade secret misappropriation claim, and because its claims are factually independent and well-pled in any event. Dkt. #91. For the reasons set forth below, the Court GRANTS IN PART Defendants’ Motion to Dismiss.

II. BACKGROUND

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2 This breach of contract/trade secret matter was removed to this Court on April 11, 2017.
3 Dkt. #1. According to the initial Complaint, Defendant NextAlarm, LLC (“NextAlarm”) and
4 Plaintiff Cen Com, Inc. (“Cen Com”) are businesses in the alarm-monitoring industry. Dkt. #1-
5 2 at ¶¶ 1.1 and 1.2. The parties worked together for several years. *Id.* at ¶ 4.4. That business
6 relationship allowed Cen Com to monitor NextAlarm accounts and respond to signals from those
7 accounts to summon the appropriate first responders. *Id.* Cen Com contends that while providing
8 those services, its employees learned that NextAlarm lacked crucial and commercially valuable
9 information/data regarding NextAlarm customers. *See* ¶¶ 4.6-4.7. Cen Com allegedly acquired
10 that missing information/data while providing services for NextAlarm. *Id.* When NextAlarm
11 notified Cen Com that Cen Com’s services would no longer be needed, Cen Com offered to sell
12 that data to NextAlarm, but a sale never materialized. Instead, the parties entered into a deal
13 whereby Cen Com agreed to act solely as an intermediary by forwarding NextAlarm signals to a
14 new vendor whose live operators would dispatch emergency services or contact customers as
15 needed. *Id.* at ¶ 4.8 and Ex. A thereto. The agreement required NextAlarm to use reasonable
16 efforts to ensure that the new vendor did not use Cen Com’s data for improper purposes. *Id.* and
17 ¶ 4.10.

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21 On March 7, 2018, this Court granted Defendants’ Motion for Judgment on the pleadings.
22 Dkt. #60. The Court determined that Plaintiff’s Claims 1-9 and 11 were displaced by the UTSA.
23 *Id.* The Court left Plaintiff’s claim for Vicarious Liability, recognizing that was a general theory
24 of liability rather than a separate claim. Thus, the only remaining claim for litigation was one
25 for trade secret misappropriation. *Id.* The Court then granted Plaintiff leave to amend.
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1 On March 27, 2018, Plaintiff filed its Amended Complaint. Dkt. #73. Plaintiff continues
2 to allege that:

3 defendant Numerex Corp., and its subsidiary NextAlarm, LLC, knowingly
4 and willfully, in violation of its legal and contractual duties, independently,
5 and together with a non-party, Amcest Corporation, improperly accessed,
6 took, used, and gained the benefit of confidential, proprietary, and valuable
7 data from and owned by the plaintiff Cen Com, Inc., including but not limited
8 to Cen Com's trade secret information, subscriber data, and other valuable,
9 proprietary data.

10 Dkt. #73 at ¶¶ 1.1 and 4.1. Based on these allegations, *inter alia*, Plaintiff now asserts ten claims
11 against Defendants, including claims for breach of contract, negligence, fraud/misrepresentation,
12 negligent misrepresentation, conversion, violation of Washington's CPA, unjust enrichment,
13 aiding and abetting, civil conspiracy and vicarious liability. *Id.* at ¶¶ 5.1-14.2. It no longer
14 asserts a claim for trade secret misappropriation under the UTSA.

15 III. DISCUSSION

16 A. Legal Standard for Motions to Dismiss

17 On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure
18 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most
19 favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.
20 1996). However, the court is not required to accept as true a "legal conclusion couched as a
21 factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
22 *Twombly*, 550 U.S. 544, 555 (2007)). The Complaint "must contain sufficient factual matter,
23 accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678. This
24 requirement is met when the plaintiff "pleads factual content that allows the court to draw the
25 reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Absent facial
26 plausibility, Plaintiffs' claims must be dismissed. *Twombly*, 550 U.S. at 570.
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1 Though the Court limits its Rule 12(b)(6) review to allegations of material fact set forth
2 in the Complaint, the Court may consider documents of which it has taken judicial notice. *See*
3 FRE 201; *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Here, the Court has taken
4 judicial notice of a contract between the parties, which was attached to, and incorporated by
5 reference in, the Amended Complaint. Dkt. #73, Ex. A; FRE 201; *Lee v. City of Los Angeles*,
6 250 F.3d 668, 688-89 (9th Cir. 2001).

8 **B. Claims at Issue**

9 Defendants now move for the dismissal of all causes of action in this matter on the basis
10 that Washington’s trade secret laws displace those theories of liability. Dkt. #76 at 4-5.
11 Washington’s UTSA prohibits misappropriation of trade secrets. RCW 19.108, *et seq.*; *Thola v.*
12 *Henschell*, 140 Wn. App. 70, 76, 164 P.3d 524, 528 (2007). Before the legislature enacted the
13 UTSA, the common law prohibited similar acts. *See, e.g., J.L. Cooper & Co. v. Anchor Secs.*
14 *Co.*, 9 Wn.2d 45, 64, 113 P.2d 845 (1941) (allowing equitable action against a former employee
15 who used a confidential customer list in his new business venture). But the UTSA is not a catch-
16 all for industrial torts. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 897
17 (Minn. 1983). The UTSA “displaces conflicting tort, restitutionary, and other law of this state
18 pertaining to civil liability for misappropriation of a trade secret.” RCW 19.108.900(1).
19 However, it does not affect “[c]ontractual or other civil liability or relief that is not based upon
20 misappropriation of a trade secret.” RCW 19.108.900(2)(a).
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22 In this case, Plaintiff argues that its claims should not be dismissed because it has not
23 alleged a claim under the UTSA, and therefore its claims cannot be displaced. Dkt. #91 at 5-9.
24 However, the Court agrees with Defendants that it is the statutory provision that legally displaces
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1 these common law claims, not the inclusion of a UTSA claim in the Complaint. *See* Dkts. #91
2 at 5-9 and #98 at 1-3. Indeed, the very language of the statute makes that clear:

3 (1) **This chapter displaces** conflicting tort, restitutionary, and other law of
4 this state pertaining to civil liability for misappropriation of a trade secret.

5 (2) **This chapter** does not affect:

6 (a) Contractual or other civil liability or relief that is not based upon
7 misappropriation of a trade secret

8 RCW 19.108.900 (emphasis added). Thus, this Court must once again determine whether the
9 claims asserted in the Amended Complaint are based upon misappropriation of a trade secret. If
10 they are, they will be displaced by the UTSA regardless of the fact that Plaintiff has dropped its
11 UTSA claim.

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13 In Claim One, Plaintiff asserts a claim for breach of contract. Dkt. #1-2 at ¶¶ 5.1-5.5.
14 Plaintiff alleges that Defendants breached the contract by failing to pay a number of fees and to
15 timely make payments, by taking and using data for purposes other than those set forth in the
16 contract, and by failing to protect certain information. *Id.* at ¶¶ 5.3 – 5.3.5. The alleged breach
17 described in ¶ 5.3.5, alleging a breach for taking and using data for purposes other than those set
18 forth in the contract, and for failing to protect certain information, relates to trade secret
19 misappropriation and that part of the claim is therefore displaced. Thus, the claim will be
20 dismissed to that extent.

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22 With respect to the alleged failure to make contractual payments, the Court disagrees with
23 Defendants that such allegations are untimely. *See* Dkt. #76 at 12-13. In its initial Complaint,
24 Plaintiff alleged “that the conduct described in this Complaint constitutes a breach of contract”
25 by Defendants. Dkt. #1-2 at ¶ 5.3. Plaintiff included the allegation that: “[u]nder the terms of
26 Cen Com’s July 29, 2016 Wholesale Alarm Delivery Agreement, NextAlarm and Numerex owe
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1 Cen Com outstanding amounts for services rendered.” Dkt. #1-2 at ¶ 4.23. This meets the notice
2 pleading requirements of Federal Rule of Civil Procedure 8. Indeed, “[n]otice pleading requires
3 the plaintiff to set forth in his complaint *claims for relief*, not causes of action, statutes or legal
4 theories.” *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008) (emphasis in original). Thus, a
5 complaint need only put a defendant on notice of the claims the defendant will face. The
6 Complaint does not limit the facts or legal theories a plaintiff can later rely on to prove those
7 claims. *Thomas v. Flagstar Bank, N.A.*, 2018 U.S. Dist. LEXIS 49644, *6 (W.D. Wash. Mar.
8 26, 2018). Plaintiff’s additional allegations in Claim One clarify the basis for the claim. For
9 those reasons, the claim will not be dismissed to the extent that it is based on the alleged failure
10 to pay certain fees and to timely make payments.
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13 With respect to Claims Two through Seven, for the reasons set forth in Defendants’
14 motion, the Court agrees that these claims continue to center on the alleged theft/data mining of
15 proprietary information, and Plaintiff’s belief that Defendant may still be actively data mining
16 and intentionally stealing Plaintiff’s information, which formed the same bases of the claims as
17 initially pled. *Id.* at ¶¶ 6.1-11.4. Nearly every factual allegation is based on the alleged theft
18 and/or misuse of Plaintiff’s confidential or proprietary information. Dkt. #73 at ¶¶ 4.1, 4.5-4.7,
19 4.10, 4.14-4.15, 5.1, 5.3.5, 6.1, 6.3, 7.1-7.3, 8.1-8.3, 9.1-9.3, 10.1-10.2, 11.1-11.3, 12.1-12.2,
20 13.1-13.5, and 14.1-14.2. Moreover, the fact that Plaintiff has dropped its UTSA claim in order
21 to assert its (incorrect) argument that it can now proceed with its other claims, implies that
22 Plaintiff is aware these claims are based on trade secret misappropriation. See Dkt. #91 at 5-9.
23 Thus, as with a portion of the breach of contract claim, Claims Two through Seven are also
24 displaced by the UTSA. Accordingly, those claims will also be dismissed.
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1 With respect to Claim Eight for aiding and abetting, and Claim Nine for civil conspiracy,
2 those claims rely directly on the now dismissed claims. *See* Dkt. #73 at ¶¶ 12.1-13.6. Therefore,
3 those claims must be dismissed as well.

4 Finally, with respect to Plaintiff's Tenth Claim for vicarious liability, *id.* at ¶¶ 14.1-14.2,
5 as this Court has previously stated, Washington courts recognize that vicarious liability is a
6 general theory of civil liability that is not based on trade secret misappropriation and, therefore,
7 the UTSA does not preempt it. However, the only claim now remaining is one for breach of
8 contract based on the failure to make certain payments asserted directly against the Defendants.
9 Thus, there is no claim remaining for which vicarious liability could be asserted. Thus, the Court
10 will dismiss Claim Ten.
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12 **C. Leave to Amend**

13 Ordinarily, leave to amend a complaint should be freely given following an order of
14 dismissal, "unless it is absolutely clear that the deficiencies of the complaint could not be cured
15 by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987); *see also DeSoto v. Yellow*
16 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) ("A district court does not err in denying
17 leave to amend where the amendment would be futile." (citing *Reddy v. Litton Indus., Inc.*, 912
18 F.2d 291, 296 (9th Cir. 1990)). However, the Court declines to grant such leave in this case.
19 First, the Court concludes that granting leave to amend the dismissed claims would be futile
20 given that Plaintiff has failed to cure the deficiencies stated in the Court's prior Order granting
21 leave to amend, and given that the majority of its claims are displaced by Washington Statute as
22 discussed above.
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26 Moreover, with respect to any trade misappropriation claim Plaintiff may have had,
27 Plaintiff has abandoned that claim by failing to reassert it in the Amended Complaint. As noted
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1 above, Plaintiff's initial Complaint alleged twelve causes of action, including a claim for trade
2 secret misappropriation. The only causes of action remaining after the Court entered its Order
3 granting Defendants' judgment on the pleadings were that claim for misappropriation of trade
4 secrets and a claim for vicarious liability. Dkt. #60. That Order set forth the Court's complete
5 legal reasoning behind its rulings and provided Plaintiff leave to amend. *Id.* Plaintiff elected not
6 to reassert its claim for misappropriation of trade secrets in its Amended Complaint. As a result,
7 Plaintiff abandoned that cause of action. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1274 (9th
8 Cir. 2017) ("In its FAC, [plaintiff] did not replead the claim, effectively abandoning it."); *Chubb*
9 *Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 973 n.14 (9th Cir. 2013) ("Chubb
10 originally brought a claim for equitable indemnity, which the district court dismissed with *leave*
11 *to amend*. Because Chubb did not voluntarily renew these claims, however, it effectively
12 abandoned them.") (emphasis in original). Plaintiff did not address this issue in response to the
13 instant motion. *See* Dkt. #91. Thus, the Court holds Plaintiff to the strategic decision Plaintiff
14 made not to reassert the trade secret misappropriation claim, and will not allow further
15 amendment.
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19 IV. CONCLUSION

20 Having reviewed Defendants' Motion to Dismiss, the opposition thereto and reply in
21 support thereof, along with the remainder of the record, the Court hereby finds and ORDERS:

- 22 1. Defendants' Motion to Dismiss (Dkt. #76) is GRANTED IN PART as discussed
23 above. All of Plaintiff's claims are DISMISSED with prejudice, with the exception
24 of the portion of Claim One for breach of contract on the basis that Defendants failed
25 to pay certain fees and/or make timely payments as required by the contract.
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2. Defendant's pending Second Motion to Compel (Dkt. #71) is STRICKEN AS MOOT. Nothing in this Order precludes any discovery motion solely as it relates to the only remaining breach of contract claim on the basis that Defendants failed to pay certain fees and/or make timely payments as required by the contract.
 3. Plaintiff's pending Motion to Compel and for Relief from Deadline (Dkt. #82), Plaintiff's pending Motion to Compel Third-Party Production (Dkts. #104 and #105) and Plaintiff's pending Motion for Terminating Sanctions (Dkt. #108) are STRICKEN AS MOOT. Nothing in this Order precludes any discovery motion solely as it relates to the only remaining breach of contract claim on the basis that Defendants failed to pay certain fees and/or make timely payments as required by the contract.

14 DATED this 17th day of May 2018.

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17 RICARDO S. MARTINEZ
18 CHIEF UNITED STATES DISTRICT JUDGE
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