UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	No. CV 11-03800-SVW (AGRx)	Date	August 25, 2011
Title	Cahn v. Oversee.net, et al.		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE	
Paul M. Cruz	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER re MOTION TO DISMISS PURSUANT TO RULE 12(b)(6), MOTION TO STRIKE PURSUANT TO RULE 12(e) [12]

I. INTRODUCTION

On May 3, 2011, Plaintiff Monte Cahn filed a Complaint against Defendants Oversee.net, Jeff Kupietzky, and Lawrence Ng alleging a total of ten claims: (1)-(3) three separate breach of contract claims; (4) breach of the covenant of good faith and fair dealing; (5) breach of fiduciary duty; (6) an accounting; (7) intentional misrepresentation; (8) negligent misrepresentation; (9) conversion; and (10) unfair competition under California Business and Profession Code § 17200. (Complaint ¶¶ 28-93). On June 1, 2011, Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) and a Motion to Strike pursuant to Rule 12(e).[1] On June 22, 2011, Plaintiff filed a First Amended Complaint ("FAC"), eliminating the claim for breach of fiduciary duty. On July 15, 2011, Defendant filed a Motion to Dismiss the First Amended Complaint pursuant to Rule 12(b)(6) and Motion to Strike pursuant to Rule 12(f) ("MTD"). On July 25, 2011, Plaintiff filed an Opposition to Defendants' Motion to Dismiss and Motion to Strike ("Opposition"). On August 1st, 2011, Defendants filed a Reply in support of their Motion Dismiss and Motion to Strike ("Reply").

For the reasons set forth in this Order, Defendants' Motions are hereby GRANTED.

[1]Specifically, Defendants sought dismissal of Plaintiff's Second Claim for Breach of Contract, Fifth Claim for Breach of Fiduciary Duty, Seventh and Eight Claims for Intentional and Negligent Misrepresentation, Ninth Claim for Conversion, and Tenth Claim for violation of Business & Professions Code Section 17200. Defendants further moved to strike Plaintiff's prayer for punitive damages on the grounds that Plaintiff failed to plead a claim that would entitle him to punitive damages.

Initials of Preparer PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	No. CV 11-03800-SVW (AGRx)	Date	August 25, 2011
Title	Cahn v. Oversee.net, et al.		

II. FACTUAL BACKGROUND

According to the FAC, in 1999, Plaintiff Cahn, a pioneer in the field of internet domain name selling and valuing, formed Domain Systems, Inc. d/b/a Moniker.com ("Moniker"). (FAC ¶¶ 8-9). Moniker provided services including sales, brokerage, registration and management of internet domain names. (Id.). Cahn managed Moniker until 2005, at which time he sold Moniker to Seevast Corp. (Id. at ¶ 10). Cahn remained CEO of Moniker and managed the business until 2007, at which point Defendant Oversee allegedly approached Seevast and Cahn with an offer to purchase Moniker. (Id. at ¶ 12). According to the FAC, Oversee insisted that Cahn join Oversee for a period of at least three years as an explicit condition of the agreement to purchase Moniker. (Id.).

Plaintiff further alleges that Defendants Jeff Kupietzky and Lawrence Ng were "primarily responsible" for negotiating on behalf of Oversee, and that Kupietzky and Ng made a series of statements and promises in or around 2007 designed to induce Plaintiff to join Oversee after its acquisition of Moniker. (Id. at ¶ 13-16). Plaintiff alleges that, as an additional inducement for Plaintiff to join Oversee, Oversee proposed a "Management Incentive Plan" ("MIP") under which Plaintiff could earn up to $13,000,000 if certain performance goals were met. (Id. at ¶ 19). Plaintiff further alleges that Ng and Kupietzky were "primarily responsible" for making false representations designed to assure Plaintiff that he would be able to earn the $13,000,000 in payments under the MIP (Id. at ¶ 20). Plaintiff alleges that , as a result, he was induced to forego other lucrative business opportunities, and that the parties reached a mutual agreement regarding the sale of Moniker to Oversee on or around December 14, 2007. (Id. at ¶ 22). Plaintiff further alleges that he believes that, at some time on or around December 2007, Defendants formed the intent to conceal their intentions to benefit from "Moniker's great public reputation" while interfering with Plaintiff's ability to manage Moniker, thus making it impossible for Plaintiff to obtain the $13,000,000 in payments under the MIP. (Id. at ¶¶ 22-23).

Plaintiff alleges that, subsequent to the acquisition of Moniker by Oversee, Defendants engaged in a series of affirmative actions for the purpose of denying Plaintiff the ability to obtain benefits under the MIP. (Id. at ¶ 24A-M). Specifically, among other allegations, Plaintiff alleges that Defendants: gave Plaintiff additional responsibilities without modifying the performance goals under the MIP; improperly diverted revenues and profits from Moniker; cut Plaintiff's staff at Moniker in spite of promises to provide Moniker with sufficient resources to combat prior staffing issues; improperly reported Moniker's expenses, creating the false impression that Moniker was underperforming; restrained Moniker's marketing budget; denied Moniker the opportunity to cross-market to other Oversee subsidiaries in spite of promises to the contrary; and failed to obtain a California escrow license for Moniker that would have allowed Moniker to legally perform domain name auctions in California, where Over was based. (Id.). Plaintiff alleges that Defendants' conduct caused customers to leave

:

Initials of Preparer PMC

Moniker, thus negatively affecting Plaintiff's ability to achieve the performance goals under the MIP. (Id. at ¶ 24N).

Plaintiff alleges that, on or around June 4, 2010, Oversee offered additional compensation through a Commission Plan under which Plaintiff was to receive a pre-determined percentage payment of certain individual sales transaction. (Id. at ¶ 28). Plaintiff alleges that Defendants denied him full compensation under the Commission Plan through improper diversion of revenue and accounting errors. (Id. at ¶ 29). Plaintiff's employment with Defendant Oversee expired on December 31, 2010. (Id. at ¶ 31).

Plaintiff's FAC alleges the following claims for relief: (1) Breach of Contract - 2007 Management Incentive Plan; (2) Breach of Contract - Commission Plan 2010; (3) Breach of Contract - Restaurants.com; (4) Breach of the Implied Covenant of Good Faith and Fair Dealing; (5) Accounting; (6) Intentional Misrepresentation; (8) Negligent Misrepresentation; (9) Conversion; (10) Unfair Competition under Cal. Business & Professions Code § 17200.[2]

Defendant has filed a Motion to Dismiss certain Claims for Relief in the First Amended Complaint under Rule 12(b)(6), arguing that Plaintiff fails to state a claim upon which relief can be granted. Specifically, Defendants argue that the Fourth, Sixth, Eight Ninth and Tenth Claims for Relief all fail to state a claim upon which relief can be granted. Defendants further argue that the Sixth and Eighth Claims for Relief fail to plead fraud with particularity as required by Rule 9(b). Additionally, Defendant has filed a Motion to Strike Plaintiff's prayer for punitive damages pursuant to Rule 12(f), arguing that Plaintiff has failed to plead a claim entitling him to punitive damages.

II. LEGAL STANDARD

A. Motion to Dismiss

On a motion to dismiss, a plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "Dismissal is improper unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989) (quoting Gibson v. United States, 781 F.2d 1334, 1337 (9th Cir. 1986)).

[2]Plaintiff's FAC does not include a 7th claim for relief.

Claims for fraud must meet the heightened pleading requirements of Rule 9(b). Fed. R. Civ. P. 9(b). Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). The Ninth Circuit clarified the requirements of Rule 9(b) in In re Glenfed Inc. Securities Litigation, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc). When pleading fraud, a complaint "must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." Id. at 1548 n. 7 (quoting J.W. Moore et al., Moore's Federal Practice § 9.03, at 9-19-21 (2d. ed. 1994)). Moreover, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007) (citation and quotation omitted).

B. Motion to Strike

Rule 12(f) permits a court to strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter" either on its own or upon a party's motion. Fed. R. Civ. P. 12(f). "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir.1983). Immaterial matter is that which has no important relationship to the claim, and impertinent matter that which does not pertain and is unnecessary to the issues in question. Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1994) (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1382, at 706-07 (1990)), rev'd on other grounds, 510 U.S. 517, 534-35 (1994).

III. DISCUSSION

Defendants have not moved to dismiss any of Plaintiff's three breach of contract claims, nor Plaintiff's claim for an accounting. (MTD at 5-6). Rather, Defendants argue that Plaintiff's remaining claims are all legally improper efforts to restate basic contract claims, and should be dismissed on that basis. (Id. at 6).

Furthermore, it should be noted that while Plaintiff's Oversee Employment Agreement contains a Florida choice of law provision, the MIP states that its terms are governed by California law. (Id. at 4). Therefore, Defendants contend that claims arising out of the MIP are governed by California law, while all other claims are governed by Florida Law. (Id.). Defendants contend that both choice of law provisions are reasonable and enforceable because Plaintiff is a Florida resident, Oversee is a California corporation with its principal place of business in Los Angeles, and Plaintiff alleges that a substantial

part of the events giving rise to Plaintiff's claims occurred in the Central District of California. (Id. at 5). Plaintiff does not appear to contest Defendant's argument regarding applicable law.

A. Plaintiff's Fourth Claim: Breach of the Covenant of Good Faith and Fair Dealing

1. The MIP and California Law.

Defendants argue that plaintiff's claim for breach of the covenant of good faith and fair dealing fails under California law because Plaintiff alleges that both the MIP were reduced to written agreements that supersede all prior negotiations. (Id. at 6, citing Cal. Civ. Code § 1625 ("The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."). Therefore, Defendants argue that Plaintiff's claims that Oversee misled him regarding the amounts he would earn pursuant to the MIP and Commission Plan are inadmissible because Plaintiff alleges that both agreements are integrated writings. (Id., citing Banco do Brasil v. Latian, 234 Cal. App. 3d 973, 1000 (1991) ("[W]here the parties to a contract have set forth the terms of their agreement in a writing which they intend as the final and complete expression of their understanding, it is deemed integrated and may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.")).

Plaintiff responds that, under California law, the implied covenant of good faith and fair dealing in every contract "not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose." (Opposition at 4 (citing Harm v. Frahser, 181 Cal. App. 2d 405, 417 (1960)). Plaintiff argues that, pursuant to the MIP, Plaintiff's compensation was based on attainment of certain performance goals. (Id. at 5.) Accordingly, Plaintiff argues that Defendants had a duty to refrain from doing anything that would impair Plaintiff's ability to meet those goals as well as an affirmative duty to do everything that the MIP presupposes Oversee would do to accomplish the purpose of the MIP. (Id.). Plaintiff argues that the litany of post-merger conduct referenced above constitutes a breach of the covenant of good faith and fair dealing because such conduct was targeted at impairing Plaintiff's ability to receive benefits under the MIP. (Id. at 6; FAC ¶¶ 24A-M).

Defendants reply that, rather than allege a failure to comply with implied contractual obligations, Plaintiff's Fourth Claim actually alleges fraudulent inducement. (Reply at 1). Accordingly, defendants argue that, to the extent that this claim is a fraudulent inducement claim, it should be dismissed for failure to plead with the requisite particularity. (Id.). Additionally, Defendants reiterate their argument that Plaintiff's Fourth Claim relies on the same allegations as Plaintiff's breach of contract claims. (Id.).

Accordingly, Defendants argue that Plaintiff's Fourth Claim is superfluous, and should therefore be dismissed.

2. The Commission Plan and Florida law

Defendants argue that, under Florida law, a party cannot state a tort claim that relies on alleged breaches of contract. (MTD at 7-8). Defendants argue that Plaintiff merely alleges that he failed to receive payment due under the Commission Plan. (Id. at 8). Therefore, Defendants argue that, because this claim is not extraneous to the contract, Plaintiff is limited to his contract claims. (Id. (citing HTP, Ltd. V. Lineas Aereas Costarricenses, S.A., 685 So.2d 1238, 1239-40 (Fla., 1996) ("The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.").

Plaintiff responds that, under Florida law, an action for breach of the implied covenant of good faith and fair dealing "is not an independent cause of action, but attaches to the performance of a specific contractual obligation." (Opposition at 7 (quoting Centurion Air Cargo v. UPS Co., 420 F.3d 1146, 1151-52 (11th Cir. 2005). Plaintiff argues that the litany of post-merger conduct referenced above constituted deliberate interference with Plaintiff's ability to manage the business, thus impairing his rights under the Commission Plan. (Id.). Accordingly, Plaintiff argues that he has pled a viable claim for breach of the covenant of good faith and fair dealing under the Commission Plan.

Defendants reply that Florida law dose not recognize a claim for breach of the implied covenant of good faith and fair dealing "where the allegations underlying the claim for breach of the implied covenant are duplicative of those which support the claim for breach of contract." (Reply at 3 (quoting Enola Contracting Services, Inc. v. URS Group, Inc., 2008 WL 1844612 *3 (N.D. Fla. April 23, 2008). Defendants further argue that Plaintiff's Fourth Claim arises solely under the MIP, and thus arises only under California law. (Id.). Specifically, Defendants note that Plaintiff relies solely on paragraph 24 of the FAC in support of his claim, and that paragraph 24 of the FAC solely concerns allegations regarding the MIP, not the Commission Plan. (Id.). Accordingly, Defendants argue that: (1) Plaintiff's Fourth Claim does not invoke Florida law; and (2) under Florida law, Plaintiff's Fourth Claim is invalid because it is duplicative of Plaintiff's breach of contract claims. (Id. at 4).

3. Conclusion

Defendants are correct that Plaintiff's Fourth Claim relies on the same factual allegations as Plaintiff's breach of contract claims. Furthermore, in Freeman & Mills, Inc. v. Belcher Oil Co., 11

Cal.4th 85, 102 (1995) the California Supreme Court established "a general rule precluding tort recovery for noninsurance contract breach, at least in the absence of violation of 'an independent duty arising from principles of tort law' than the bad faith denial of the existence of, or liability under, the breached contract." (Internal citation omitted). Any duties owed by Defendants to Plaintiff arose from the parties' contractual relationship. Furthermore, it is unclear from Plaintiff's FAC the extent to which Plaintiff's Fourth Claim relies on California and/or Florida law. Accordingly, Defendant's Motion to Dismiss is GRANTED regarding Plaintiff's Fourth Claim.

B. Plaintiff's Sixth and Eighth Claims: Intentional and Negligent Misrepresentation

Defendant argues that Plaintiff's claims for Intentional and Negligent Misrepresentation are actually allegations that Oversee breached the MIP by failing to comply with its terms, and/or by impairing Plaintiff's ability to earn bonuses under the MIP. (MTD at 8-9). Defendants further argue that Plaintiff has failed to plead his misrepresentation claims with the particularity required under Rule 9(b). (Id.). Specifically, Defendants argue that Plaintiff makes a conclusory allegation that Defendants "represented to Cahn that he would have the ability to earn up to $13,000,000 in payments under the MIP" but fails to specify where, when and by what means each of the Defendants made any alleged misrepresentation. (Id. at 10; FAC ¶¶ 63, 71). Furthermore, Defendants argue that Plaintiff fails to allege why any such representations were false. (Id.).

Additionally, Defendants argue that Plaintiff's misrepresentation claims are restatements of his breach of contract claims because "the only fraud asserted against Oversee is an alleged false promise to perform the contractual duties at issue." (Id. at 11-12). Finally, Defendants argue that the alleged misrepresentations regarding Plaintiff's ability to earn up to $13,000,000 in bonuses were statements regarding future events, and are thus non-actionable opinions. (Id. at 12; Tarmann v. State Farm Mut. Auto Ins. Co., 2 Cal. App. 4th 153, 158 (1991) ("Predictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud.")).

Plaintiff responds that he has pled his misrepresentation claims with the requisite particularity, noting that a pleading "is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." (Opposition at 9 (quoting Neubronner v. Milken, 6 F.3d 666, 671-72 (9th Cir. 1993)). Plaintiff argues that he has met this burden because the FAC makes specific allegations regarding the various alleged misrepresentations made by Defendants Kupietzky and Ng as well as why those alleged misrepresentations were false. (Id. at 9-10; citing FAC ¶¶ 13-21, 24A-M, 67, 76).

Plaintiff further notes that, subsequent to filing his complaint, Plaintiff became aware of a contract between Defendant Oversee and Google. (Id. at 10-11). Plaintiff contends that the acquisition

of Moniker by Oversee violated Oversee's alleged contract with Google. (Id.). Accordingly, Plaintiff argues that Defendants knew that Plaintiff could never reach the performance goals under the MIP, and therefore Plaintiff could not possibly earn the $13 million in bonus payments under the MIP. (Id.). Plaintiff thus characterizes his misrepresentation claims as "[a]n action for promissory fraud," alleging that Defendants induced Plaintiff to enter into his employment agreement and the MIP via the above-referenced misrepresentations. (Id. at 11).

Additionally, Plaintiff responds that his misrepresentation claims are not restatements of his contract claims. (Id.). Plaintiff argues that California courts have allowed tort damages in contract cases "where the contract was fraudulently induced." (Id. at 11-12 (quoting Erlich v. Menezes, 21 Cal. 4th 543 (1999)). Plaintiff argues that, but for Defendants' alleged false representations, Plaintiff would not have entered into the MIP. (Id. at 12; citing Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal.4th 979, 990-991 (2004)). Accordingly, Plaintiff argues that Defendants' alleged misrepresentations are independently actionable. (Id.).

Finally, Plaintiff argues that Oversee's argument that predictions of future events are not actionable is only partially correct. (Id. at 13). Plaintiff notes that a "promise of future conduct is actionable as fraud only if made without a present intent to perform." (Id., (quoting Magpali v. Farmers Group, Inc., 48 Cal. App.4th 471, 481 (1996)). Plaintiff argues that because Defendants were aware during the 2007 negotiations that Plaintiff would never be able to meet the performance goals necessary to trigger payment under the MIP, Defendants' alleged "promise" to pay Plaintiff up to $13,000,000 in bonuses constitutes actionable fraud. (Opposition at 13-14).

Defendants reply that Plaintiff's Opposition makes it clear that the allegedly fraudulent statements cited by Plaintiff in his misrepresentation claims are also incorporated into Plaintiff's breach of contract claims. (Reply at 4). Accordingly, Defendants argue that Plaintiff's misrepresentation claim is actually a breach of contract claim, improperly restated. (Id.).

Defendants further argue that, if Plaintiff is actually attempting to establish the elements of fraud in the inducement, then the proper remedy is rescission of the MIP. (Id. at 5; Ford v. Shearson Lehman/American Express, Inc., 180 Cal. App. 3d 1011, 1028 (1986) ("In the usual case of fraud, where the promisor knows what he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable. In order to escape from its obligations the aggrieved party must rescind, by prompt notice and offer to restore the consideration received, if any.") (Emphasis in original; internal citations omitted)).

Additionally, Defendants reiterate their arguments that: (1) Plaintiff's misrepresentation claims were not pled with the requisite particularity; and (2) any alleged representations by Kupietzky and Ng

concerning the MIP merged into the MIP pursuant to Cal. Civ. Code § 1625. (Id. at 8). Finally, Defendants argue that Plaintiffs' reliance on Magpali is misplaced because Magpali "does not allow a plaintiff to support a fraud claim by relying on representations about future *contractual* performance." (Id. at 8-9). Because all of the alleged misrepresentations relate to contractual performance, Defendants argue that Plaintiff should be limited to his contract claims, and his fraud claims should thus be dismissed. (Id.).

Plaintiff's claims for misrepresentation do not meet the particularity requirements of Rule 9. Furthermore, Plaintiff's allegations all relate to representations regarding Defendants' future performance of its obligations under the MIP. Therefore, Defendants' motion is GRANTED regarding Plaintiff's Sixth and Eighth Claims..

C. Plaintiff's Ninth Claim: Conversion

The elements of a claim for conversion are: "(1) plaintiffs' ownership or right to possession of property at the time of the conversion; (2) defendants' conversion by a wrongful act or disposition of plaintiffs' property rights; and (3) damages." Messerall v. Fulwilder, 199 Cal. App. 3d 1324, 1329 (1988). Defendants argue that Plaintiff's claim for conversion fails because Plaintiff fails to allege that "Oversee knowingly and intentionally asserted wrongful control over Cahn's domain names." (MTD at 14). Because Plaintiff's FAC merely alleges a "mix up," as opposed to an intentional act, Defendants argue that Plaintiff's claim for conversion fails. (Id.).

Plaintiff responds that a conversion claim "rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff." (Plaintiff's Opposition to Defendant's Motion to Dismiss at 14 (quoting Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1065 (1998)). Plaintiff notes that his FAC alleges that Oversee "exercised possession of approximately 4,500 domain names which [Plaintiff] personally owned." (Id. at 15). Accordingly, Plaintiff argues that, so long as Defendants intended to assert control over Moniker's domain names, Defendants' alleged ignorance that a number of domain names that Plaintiff personally owned were "mixed in" with Moniker's is irrelevant. (Id.).

Defendants reply that, while they acknowledge that conversion is a strict liability tort, Plaintiff has failed to allege any intentional act by Defendants in support of his conversion claim. (Reply at 9-10). Specifically, Defendants note that Plaintiff argues that he discovered that 4,500 of his domain names were "mixed up" with Moniker's domain names, and that Defendant Oversee was receiving revenue from those domain names. (Id. at 10). However, Defendants note that at no point does Plaintiff's FAC allege a specific intentional act by Defendants. (Id.). Accordingly, Defendants argue that Plaintiff's claim for conversion should be dismissed.

Defendants are correct that Plaintiff's conversion claim fails to allege any intentional act by Defendants. Therefore, Defendant's motion is GRANTED regarding Plaintiff's Ninth Claim.

D. Plaintiff's Tenth Claim: Unfair Competition under Cal. Business & Professions Code § 17200

Defendants argue that Plaintiff's claim for Unfair Competition fails because it fails to allege a valid claim under Cal. Business & Professions Code § 17200 ("UCL"), and it fails to allege entitlement to a remedy available under the UCL (MTD at 15). Specifically, defendants argue that a plaintiff must sufficiently allege unlawful, unfair or fraudulent business practices. (Id.). Defendants further note that the complaint "must state with reasonable particularity the facts supporting the statutory elements of the violation." Silicon Knights, Inc. v. Crystal Dynamics, Inc., 983 F. Supp. 1303, 1316 (N.D. Cal. 1997). Defendants argue that Plaintiff's FAC fails to allege any unfair, unlawful or fraudulent business practice, and that Plaintiff cannot meet the requirements of any of the three prongs of a UCL claim. (Id.). Defendants further argue that Plaintiff improperly seeks general and punitive damages pursuant to his UCL claim. (Id. at 16; Cal. Bus. & Prof. Code § 17203). Defendants acknowledge that Plaintiff's Prayer for Relief requests "restitution of all wrongfully withheld amounts and disgorgement of ill-gotten profits." (Id. at 17). However, Defendant argues that this allegation fails because the UCL only allows restitution to recover money or assets taken from Plaintiff by Defendant. (Id.; See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1146 (2003)). Defendants argue that Plaintiff is not seeking money he paid to Oversee, but is requesting damages. (Id.). Accordingly, Defendants argue that Plaintiff's UCL claim should be dismissed.

Plaintiff responds that his FAC states a cognizable UCL claim because it alleges conduct constituting both unfair and fraudulent business practices. (Opposition at 15). Plaintiff notes that the UCL's scope is broad, encompassing "any unlawful, unfair or fraudulent practice" even where the practice at issue is not proscribed by law. (Id. at 16; see Schnall v. Hertz Corp., 78 Cal. App.4th 1144, 1153-54 (2000)).

An unfair business practice occurs when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal. App. 4th 700, 719 (2001) (internal citation omitted). Plaintiff argues that Defendants engaged in an unfair business practice by making intentional misrepresentations that induced Plaintiff to enter into his employment agreement and the MIP. (Opposition at 16-17). Plaintiff further argues that the public was harmed because Plaintiff communicated Defendants' allegedly false promises to his customers. (Id. at 17). In addition, Plaintiff for the first time alleges that Defendants' conduct was unfair because that conduct also violated antitrust

law.[3] (Id. at 17).

Plaintiff also argues that he has properly pled fraudulent conduct under the UCL. (Id. at 18). Plaintiff notes that the "fraudulent" prong of the UCL only requires a showing that members of the public "are likely to be deceived." (Id., see Bank of the West v. Superior Court, 2 Cal.4th 1254, 1267 (1992)). Plaintiff argues that his FAC states that Moniker's employees and customers were misled as a result of Defendants' alleged misrepresentations. (Id.). Accordingly, Plaintiff argues that he has stated a claim under the "fraudulent" prong of the UCL.

Finally, Plaintiff argues that his FAC seeks an appropriate remedy because the Prayer for Relief explicitly requests restitution. (Id. at 19). Plaintiff argues that he is seeking restoration of money acquired through unfair practices. (Id., see Korea Supply Co. V. Lockheed Martin Corp., 29 Cal. 4th 1134, 1147-48 (2003)).

Defendant replies that Plaintiff fails to state a valid claim under the UCL because Plaintiff is actually alleging that he, not the Defendants, misled Moniker customers. (Defendants' Reply Memorandum at 10). Furthermore, Defendants argue that Plaintiff the Court in Korea Supply explained that an order for restitution under the UCL is one "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the money was taken." (Id. at 11; Korea Supply Co., 29 Cal. 4th at 1149). Defendants therefore argue that Plaintiff's claim that Defendants frustrated his expectation to future earnings is not a valid claim for restitution under the UCL. (Id.).

Finally, Defendants note that Plaintiff's antitrust violation theory is not articulated in the FAC, characterizing this assertion as a desperate attempt by Plaintiff to salvage his UCL claim. (Id.).

Plaintiff has failed to identify a remedy available to him under the UCL. Accordingly, Plaintiff's 10th Claim is DISMISSED.

---

[3] "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word "unfair" in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 186 -187 (1999).

E. Plaintiff's Prayer for Punitive Damages

Defendants argue that, because Plaintiff's claim for Intentional Misrepresentation lacks merit, Plaintiff's prayer for punitive damages should thus be stricken. (Defendants' Motion to Dismiss First Amended Complaint at 18; see Wilkerson v. Butler, 229 F.R.D. 166, 172 (E.D. Cal. 2005) ("A motion to strike is appropriate to address requested relief, such as punitive damages, which is not recoverable as a matter of law.").

Plaintiff responds that he has stated a viable claim for Intentional Misrepresentation. (Opposition at 19). Plaintiff further argues that, because he has pled facts demonstrating willful, unlawful and malicious conduct by the Defendants, he is entitled to seek exemplary damages. (Id., see Cal. Civ. Code § 3294(a) ("In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.").

Whether Plaintiff can seek punitive damages necessarily depends on whether Plaintiff can state a valid claim for intentional misrepresentation. Therefore, because Defendant's Motion to Dismiss is GRANTED regarding Plaintiff's Sixth and Eighth Claims, Defendant's Motion to Strike is GRANTED regarding Plaintiff's prayer for punitive damages.

IV. CONCLUSION

The essence of Plaintiff's claims at issue is an attempt to plead a breach of contract claim in tort. Accordingly, Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) and Motion to Strike pursuant to Rule 12(f) are hereby GRANTED. Plaintiff's Fourth, Sixth, Eighth, Ninth and Tenth Claims are therefore DISMISSED WITHOUT PREJUDICE with leave to amend. Should Plaintiff refile his claim for intentional misrepresentation/fraudulent inducement, that claim must be pled with particularity pursuant to Rule 9(b).

Initials of Preparer PMC