Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BADEN SPORTS, INC.,

Plaintiff,

v.

WILSON SPORTING GOODS CO.,

Defendant.

No. C11-0603 MJP

WILSON SPORTING GOODS CO.'S MOTION TO DISMISS BADEN'S SECOND AND THIRD CLAIMS FOR RELIEF PURSUANT TO RULE 12(6)(6)

NOTED ON MOTION CALENDAR: June 10, 2011

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I. MOTION TO DISMISS

Wilson Sporting Goods Co. ("Wilson"), by and through it counsel of record, moves this Court for an order of dismissal pursuant Fed. R. Civ. P. 12(b)(6) of Baden Sports, Inc.'s ("Baden") Second Claim for Relief for Misappropriation of a Trade Secret and Third Claim For Relief of Common Law Unfair Competition.

Baden's claim for misappropriation of a trade secret fails to plead a legally protectable trade secret. For Baden's complaint to survive a Rule 12(b)(6) motion to dismiss, Baden must plead facts sufficient to demonstrate that it is plausible that it can prove the existence of a legally protectable trade secret. See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); and see *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 49 (1987)(Plaintiff must prove the existence of a legally protectable trade secret). Baden instead simply alleges trade secret protection for a table upon which it conducts a well known activity, inflating balls. Baden must plead more than a sheer possibility of protectable trade secret and provide Wilson notice of trade secrets it is asserting in this case. *See Ashcroft v. Iqbal*, 129 S.Ct. at 1949. Inflating balls on a tabular surface is not a protectable trade secret.

Additionally, the court should bar Baden's claim of common law unfair competition because it is preempted by the Washington Uniform Trade Secrets Act R.C.W. 19.108.900. The facts supporting Baden's claim for common law unfair competition are the identical facts that Baden alleges constitute trade secret misappropriation. "A plaintiff may not rely on acts that constitute trade secret misappropriation to support other causes of action." *Thola v. Henschell*, 140 Wash.App. 70, 82 (2007).

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II. INTRODUCTION

Baden's complaint alleges trade secret protection for a ball inflation table. *See generally* Dkt. 1. The complaint asserts that the ball inflation table is the table upon which Baden inflates balls. Simply alleging that its inflation table is a trade secret does not provide adequate notice regarding what it is about how Baden inflates balls that is not generally known. Footballs, basketballs, soccer balls, volleyballs, etc. are inflated everyday by numerous manufacturers and participants of those sports. Every distributor of inflatable balls must inflate the balls, and some may do it on a table. Baden's complaint fails to plead a protectable trade secret – some secret attributes(s) of the ball inflation table.

Baden's complaint in no way distinguishes its table from known tables. Baden's complaint fails to provide Wilson sufficient notice of the trade secrets Baden is asserting in the case. All tables have common attributes – legs, a surface area of some size and shape, a height, a color, and a type of material. Obviously these common attributes of a table cannot be the trade secrets of Baden. Further, it is inherent that inflatable balls are inflated. This is a well know activity for inflatable ball manufactures and participants alike. But Baden alleges as its secret no more than a ball inflation table. Inflating a ball on a table is not, in and of itself, a trade secret claim upon which relief can be granted. Baden fails in its pleading to point to any secret attributes or components of the table, thereby failing to demonstrate the plausibility of proving the existence of a legally protectable trade secret. In view of this failure, a dismissal is appropriate of Baden's Second Claim for Misappropriation of a Trade Secret.

The Court should also dismiss Baden's Third Claim for Relief of Common Law Unfair Competition because it is preempted by Baden's attempt to assert a trade secret claim under the Washington Uniform Trade Secrets Act R.C.W. 19.108.900. The alleged facts supporting Baden's claim for common law unfair competition are

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the identical facts alleged by Baden to support its claim for trade secret misappropriation. Namely, Baden alleges that Wilson enticed a former Baden employee to provide the secrets of Baden's inflation table. Wilson denies this allegation. Nevertheless, Baden may not rely on the facts that it alleges constitute trade secret misappropriation to support its common law cause of action. *Thola v. Henschell*, 140 Wash.App. at 82. The Court should dismiss Baden's Third Claim for this reason.

III. STATEMENT OF FACTS

Inflatable balls, including footballs, basketballs, and volleyballs, are inflated or blown-up before use. Baden's complaint alleges that at some point in time Baden's founder Mr. Schindler and his employee Mr. Sharpe built a table upon which Baden inflates balls. Dkt. 1, ¶¶ 16, 17. Baden claims that Mr. Schindler died about 10 years ago, and that Mr. Sharpe built a second inflation table for a second Baden facility in approximately 2006. Dkt. 1, ¶¶ 22, 23.

Baden alleges that Mr. Sharpe is "the only person in the world having the knowledge and skills to replicate the table without actually having one in-hand." Dkt. 1, ¶¶ 22. Mr. Sharpe retired from Baden in 2009 after 22 years of employment and upon retirement allegedly "executed an acknowledgement about Baden's proprietary information." Dkt. 1, ¶ 24. Baden claims that Mr. Sharpe lacks business experience and was therefore enticed into providing Wilson details about Baden's table. Dkt. 1, ¶ 29. Baden's complaint does not allege that Mr. Sharpe was bound by a duty of confidentiality or secrecy. Moreover, the complaint does not allege what components or features of the inflation table are generally unknown or secret.

Wilson attempted to obtain by informal means a more detailed identification of Baden's alleged trade secrets prior to filing this motion. Declaration of Bradley T.

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Fox in Support of Wilson Sporting Goods Co.'s Motion to Dismiss Baden's Second and Third Claims for Relief Pursuant To Rule 12(B)(6), at ¶¶ 2, 3. Wilson and Baden corresponded numerous times, but Baden repeatedly responded that its trade secret is the inflation table. Wilson then decided to include Baden's Second Claim in this Rule 12(b)(6) motion to dismiss.

IV. LEGAL ARGUMENT

A. Pleading Requirements For a Federal Court Complaint

A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although the Rule 8 pleading standard does not require "detailed factual allegations," a complaint fails to meet the Rule 8 standard if it alleges only "naked assertion[s]" lacking "further factual enhancement." *Ashcroft v. Iqbal*, 129 S.Ct. at 1949 (*citing* Bell v. *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 557). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (*citing* Bell v. *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555).

A plaintiff must state a plausible claim for relief to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 129 S.Ct. at 1949. The plausibility standard requires "more than a sheer possibility" that the defendant is liable for the acts alleged. *Id.* Determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Ashcroft v. Iqbal*, 129 S.Ct. at 1950. Rule 8 did "not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* Here, where Baden has not pled facts to permit the court to infer more than the mere possibility of a protectable trade secret, the complaint should be dismissed. *See Id.*

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B. Washington's Uniform Trade Secrets Act

Plaintiffs asserting a trade secrets claim bear the burden of proving "that legally protectable secrets exist." *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d at 49. Washington's Uniform Trade Secrets Act defines a "trade secret" as follows:

> …information, including a…device, method, technique, or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.18.010(4).

The Court must therefore determine whether Baden's complaint identifies a trade secret at issue that was not generally known or readily ascertainable by proper means. RCW 19.18.010; *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d at 49, 50.

Additionally, the Washington Uniform Trade Secrets Act preempts other causes of action that arise out of the same set of facts that support a claim for misappropriation of a trade secret. RCW 19.108.900. "A plaintiff may not rely on acts that constitute trade secret misappropriation to support other causes of action." *Thola v. Henschell*, 140 Wash.App. at 82.

C. The Court Should Dismiss Baden's Complaint Because It Fails To Plead More Than The Mere Possibility That A Trade Secret Exists.

It is well known that inflatable balls are inflated at some point in time before play, and Baden has failed to plead in its complaint how its method of inflating a ball on a table is a protectable trade secret. Baden's complaint fails to provide Wilson any notice regarding the trade secrets that it asserts Wilson misappropriated. Without notice of alleged trade secrets, Wilson cannot adequately prepare its defense. Baden asserts the conclusion that its inflation table is a trade secret because the general public has never seen a ball inflated upon it. But every

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inflatable ball distributor inflates balls, and Baden has not pled a single fact that distinguishes its method of inflating a ball on a table from other manufacturers' methods of ball inflation. Unless and until Baden identifies those aspects of its inflation table that it asserts to be trade secret, Wilson will not know what it is defending against, and Baden will be able to mold its alleged secrets to whatever is best for its case, including by specifying attributes of Wilson's inflation process as Baden secrets. Trade secret law does not contemplate that a plaintiff can define its alleged secrets by what it discovers the defendant is doing. Baden either has or believes it has trade secrets and it should identify them now.

Baden has pled no facts demonstrating how a well known activity, inflating balls, is in Baden's case a trade secret. Presumably, a ball is put on a tabular surface, a probe is inserted into the ball, air is introduced into the ball, and the ball is removed. But these activities would be common to all distributors of inflatable balls. Thus, Baden omits the plausibility of a secret in its pleadings. Is it the shape or size of the table, the height, electronics attached to the table, or how the ball is located on the table? To claim the entire inflation table as a trade secret is an untenable position because common sense confirms that certain elements are publically known to exist in all methods of inflating balls.

Baden may desire to allege that the inflation of balls on a table is a complicated process requiring significant intellectual property. But if that is the case, Baden must plead some characteristic, component, or feature that constitutes its alleged trade secret. Rule 8 pleading standards require pleading a "plausible" statement of facts to support a legally protectable trade secret. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. at 570. Baden's bald assertion that no one has seen it inflate balls on a table should not permit Baden discovery into Wilson's inflation method.

The court should require Baden to identify a plausible trade secret prior to unlocking Wilson's doors for discovery. Without a proper identification of Baden's

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trade secrets and proper notice to Wilson, Baden could presumably inspect Wilson's inflation method, and claim as its own secrets certain inspected portions of Wilson's method. Simply put, a broad allegation by Baden that its method of ball inflation on a table is a trade secret should not permit Baden to inspect, discover, and claim rights to a competitor's method of ball inflation.[1] Baden has not pled more than the "mere possibility" of a claim, and the law requires more. *See Ashcroft v. Iqbal*, 129 S.Ct. at 1950.

Alternatively, Baden's alleged trade secrets in its ball inflation table are at best unclear and require a more definite statement. Fed. R. Civ. P. 12(e) provides that a "party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." The Court has held that the remedy for an allegation lacking sufficient specificity to provide adequate notice is a Rule 12(e) motion for a more definite statement. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002).

Again, Baden should demonstrate in its pleadings the attributes and features of its inflation table that it asserts comprise trade secrets. If the court finds Baden's allegations of trade secret protection in the entire table provide a base pleading that may be supplemented, the court should require Baden to provide a more definite statement of its trade secret protection under Fed. R. Civ. P. 12(e) prior to being permitted discovery into Wilson's manufacturing methods.

[1] At a minimum, Baden should not be allowed to receive discovery regarding Wilson's inflation device unless and until Baden specifically identifies what it is about its table that it alleges to be trade secret.

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D. The Court Should Dismiss Baden's Claim For Common Law Unfair Competition Because It Is Preempted By Washington's Uniform Trade Secrets Act.

Baden alleges the identical facts to support both its trade secret claim and its claim for common law unfair competition. To determine whether the Washington Uniform Trade Secrets act preempts Baden's common law claim under RCW 19.108.900, the court must (1) assess the facts that support Baden's unfair competition claim; (2) determine whether the facts that support the unfair competition claim are the same as those that support the misappropriation of a trade secret claim; and (3) hold that the trade secrets act preempts liability on the common law claim unless the unfair competition claim is factually independent from the trade secret claim. *Thola v. Henschell*, 140 Wash.App. at 82; *Ultimate Timing, L.L.C. v. Simms*, 715 F.Supp.2d 1195, 1208 (W.D.Wash.2010). Here, Baden supports both claims with the allegation that Wilson improperly enticed Mr. Sharpe to disclose Baden's trade secrets respecting it inflation table to Wilson. Dkt. 1, ¶ 59. Further, Baden seeks an injunction "barring further contacts with Baden vendors or employees for the purpose or [sic] acquiring Baden's ball inflation technology." Dkt. 1, ¶ 60. Baden does not support its unfair competition claim with any allegations independent from its trade secret assertions.

Baden's complaint is clear, the facts asserted in support of its claim for unfair completion are the same facts asserted in support of its claim for misappropriation of a trade secret. Since Baden's unfair competition claim is not factually independent from its claim for misappropriation of a trade secret, under RCW 19.108.900 and *Thola*, the Court should rule that the unfair competition claim is preempted and grant Wilson's motion to dismiss pursuant to Rule 12(b)(6).

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V. CONCLUSION

For the reasons stated above, the Court should grant Wilson's motion pursuant to Rule 12(b)(6) and dismiss Baden's Second Claim for Relief – Misappropriation of a Trade Secret and Baden's Third Claim for Relief – Common Law Unfair Competition.

Dated this 24th day of May, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2011 I served a copy of the WILSON SPORTING GOODS CO.'S MOTION TO DISMISS BADEN'S SECOND AND THIRD CLAIMS FOR RELIEF PURSUANT TO RULE 12(6)(6) and accompanying [PROPOSED] ORDER GRANTING WILSON SPORTING GOODS CO.'S MOTION TO DISMISS BADEN'S SECOND AND THIRD CLAIMS FOR RELIEF PURSUANT TO RULE 12(6)(6) on the Attorneys for the Plaintiff using electronic mail at the address listed below and registered with the ECF system for this matter.

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Dated this 24th day of May, 2011.

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