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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

U.S. LEGAL SUPPORT, INC.,  
A Texas corporation,  
  
Plaintiff,  
  
v.  
  
AMEEN HOFIONI, an individual,  
MORGAN ALBANESE, an  
individual, THE LIT GROUP,  
a Nevada corporation,  
HUTCHINGS COURT REPORTERS,  
LLC, a California  
corporation, LITIGATION  
SERVICES, a Nevada  
corporation,  
  
Defendants.

No. CIV. S-13-01770 LKK/AC

**ORDER**

This matter concerns a trade secrets dispute between Plaintiff U.S. Legal Support, Inc. and Defendants Ameen Hofioni, Morgan Albanese, The LIT Group, Hutchings Court Reporters, LLC, and Litigation Services. Plaintiff alleges that Hofioni and Albanese, its former employees, misappropriated certain trade secrets and other confidential information, and are using this information for the benefit of their new employer, The LIT Group,

1 and its affiliated entities, Hutchings and Litigation Services,<sup>1</sup>  
2 and to Plaintiff's consequent detriment.

3 The operative complaint alleges eight causes of action under  
4 California law. Defendants now move to dismiss under Fed. R. Civ.  
5 P. 12(b)(6).

6 Defendants' motion came on for hearing on November 18, 2013.  
7 For the reasons set forth below, their motion will be granted in  
8 part and denied in part.

## 9 I. BACKGROUND

### 10 A. Factual Background

11 Plaintiff is one of the country's largest providers of court  
12 reporting, record retrieval, and other legal support services.  
13 (Complaint ¶ 17.) The firm has 40 offices throughout the United  
14 States, including offices in San Francisco, Sacramento, and  
15 Fresno (collectively, its Northern California region). (Id.  
16 ¶¶ 17, 18, 43.)

17 Plaintiff "aggregat[es] and creat[es] detailed non-public  
18 data derived from [its] business relationships with its potential  
19 and current customers[.]" (Id. ¶ 24.) It uses this data to:

20 (a) Identify those persons within customer  
21 organizations responsible for procuring and  
22 ordering U.S. Legal Support's services,  
23 including secretaries, paralegals, and at  
24 times associate attorneys, whose identities  
are not readily discernible from public  
information;

25 (b) Track and anticipate customer needs for  
26 U.S. Legal Support's services based on non-

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27 <sup>1</sup> The LIT Group, Hutchings Court Reporters, LLC, and Litigation  
28 Services are collectively referred to herein as the "Entity  
Defendants."

1 public information concerning (i) the  
2 customer's historical usage of U.S. Legal  
3 Support's services; and (ii) customers'  
4 upcoming projects;

5 (c) Track U.S. Legal Support revenue by  
6 customer, including trends in the usage of  
7 U.S. Legal Support's services, which data  
8 includes detailed metrics such as (i) the  
9 customer; (ii) the customer contact within  
10 the organization that ordered the work; (iii)  
11 date of service/projected date of service;  
12 (iv) amount paid for service; (v) the revenue  
13 generated on a per job basis; (vi) the  
14 monthly revenue generated by customer for the  
15 month; and (vii) dollar and percentage  
16 changes in historical to present use of U.S.  
17 Legal Support's services; and

18 (d) Identify each U.S. sales representative  
19 and track his or her productivity as measured  
20 by depositions and records ordered. This  
21 data is tracked by week, month, and year.  
22 (Complaint ¶ 24.)

23 The Complaint terms items (a) - (d) "Confidential Information."

24 Plaintiff avers that it has spent years and millions of  
25 dollars obtaining, analyzing, and maintaining the confidentiality  
26 of, this information; that it is of great value to the company;  
27 and that its possession would give any competitor an unfair  
28 competitive advantage. (Id. ¶¶ 26, 27, 30-32.) Plaintiff protects  
its Confidential Information by restricting access to, and  
password-protecting, its computers and documents, and by  
requiring employees to sign non-disclosure agreements and comply  
with confidentiality policies. (Id. ¶¶ 33, 34.)

Plaintiff also identifies specific Microsoft Excel and PDF  
files which contain non-public data about Plaintiff's customers  
and sales representatives as its "confidential, proprietary, and

1 trade secret information.”<sup>2</sup> (Id. ¶¶ 59, 60.) These files include:

2 (a) An Excel file, entitled “CR – Reporting Sales – TTM  
3 2.2013 – Ameen Hofioni.xlsx,” which identifies every  
4 law firm and every employee at each law firm that  
5 ordered Plaintiff’s services in Defendant Hofioni’s  
6 territory, as well as sales and revenue trends for each  
7 of these customers. (Id. ¶ 60.)

8  
9 (b) Another Excel file, “AMEEN Top 25 – December  
10 2012.xlsx,” identifies those customers in Hofioni’s  
11 territory whose purchases of Plaintiff’s services  
12 increased and decreased the most in 2012. (Id.)

13  
14 (c) A PDF file, entitled “R\_PA\_SC00.pdf,” also known as  
15 a “Sales Commission Report,” identifies “monthly U.S.  
16 Legal Support revenue by firm, who within the firm  
17 purchased U.S. Legal Support’s products and services,  
18 and the lawsuit for which the services were purchased.”  
19 (Id.)

20  
21 (d) A second PDF file, entitled “R\_PA\_SC00.pdf,” also  
22 known as a “Calendar Analysis Report” or “Depos That  
23 Went Forward Report,” identifies customers in the  
24 Northern California region who are actively setting  
25 depositions. (Id.)

26  
27 <sup>2</sup> The Complaint uses this phrase repeatedly to characterize the  
28 information at issue. The legal significance of this phrase for  
Plaintiff’s claims is addressed below.

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(e) A third Excel file, "RR Incoming Orders by Sales Rep - 4.22 - 4.28.2013.xlsx" identifies Plaintiff's sales representatives nationally and the volume of orders he or she produced. (Id.)

The Complaint terms items (a) - (e) "Confidential Documents."<sup>3</sup>

Defendant Hofioni worked for Plaintiff from June 1, 2009 until July 18, 2013. At the time of his departure, he was Director of Business Development, responsible for the Northern California region. (Id. ¶¶ 11, 43.) Defendant Albanese worked for Plaintiff from August 20, 2012 to July 19, 2013; Hofioni was her supervisor; when she departed, she was a Sales Assistant. (Id. ¶ 12.) Both employees had access to Plaintiff's Confidential Information. (Id. ¶ 46.)

Plaintiff's January 2013 employee handbook provides that "[t]he protection of confidential business information and trade secrets is vital to the interests of U.S. Legal Support, Inc.[,]" and defines "confidential information" as including customer lists, customer preferences, financial information, personnel information, and trade secrets. (Id. ¶ 41.) Hofioni and Albanese both signed forms acknowledging receipt of the handbook. (Id. ¶ 38.) Hofioni and Albanese variously signed other confidential information agreements and non-disclosure agreements. (Id. ¶¶ 38-41.)

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<sup>3</sup> Plaintiff's use of the defined terms "Confidential Information" and "Confidential Documents" to refer to trade secret information, and "confidential information" to refer to non-trade secret information engenders some confusion. Plaintiff may wish to use more distinct terms in any amended complaint.

1           The Complaint alleges the following actions by Hofioni and  
2 Albanese:

- 3           • On October 2, 2012, Hofioni reported that his laptop  
4 computer was stolen; he was subsequently issued a  
5 replacement laptop. (Id. ¶ 72.) Hofioni returned a  
6 single laptop to Plaintiff upon his resignation; this  
7 laptop appears not to have been used after October 2,  
8 2012, though Hofioni claims to have used a laptop after  
9 this date. (Id. ¶ 73.) Plaintiff alleges, on  
10 information and belief, that Hofioni kept the second  
11 laptop that he was issued. (Id. ¶ 74.)
- 12           • Between April and July 2013, Hofioni and Albanese  
13 “covertly accessed and retained” the Confidential  
14 Documents listed above. (Id. ¶ 60.)
- 15           • Between April and July 2013, Hofioni sent 25 email  
16 messages from his work email address to his personal  
17 email address, many with attachments containing  
18 Plaintiff’s “confidential, proprietary, and trade  
19 secret information.” (Id. ¶ 57.)
- 20           • On two days in April 2013, Hofioni sent 20 email  
21 messages from his work email address to Albanese’s  
22 personal email address, all with attachments containing  
23 Plaintiff’s “confidential, proprietary, and trade  
24 secret information.” (Id. ¶ 58.)
- 25           • On April 22, 2013, Hofioni was subject to a “corrective  
26 action” due to inappropriate behavior towards a co-  
27 worker. (Id. ¶ 47.) That same day, he requested  
28 Plaintiff’s rates for the cities and regions in

1 California. (Id. ¶ 61.) There was no legitimate  
2 business purpose for this request. (Id. ¶ 62.)

3 • In April 2013, Hofioni also requested a list of all  
4 court reporters used by Plaintiff's San Francisco  
5 office. (Id. ¶ 63.) There was no legitimate business  
6 purpose for this request. (Id.)

7 • On information and belief, Hofioni logged into a fellow  
8 employee's account and recorded all of her customer  
9 contact information, retaining it after his  
10 resignation. Plaintiff believes that Hofioni is using  
11 this data to unfairly compete with it. (Id. ¶ 83.)

12 Plaintiff contends that these actions violated its  
13 confidentiality policies and the agreements signed by Hofioni and  
14 Albanese. (Id. ¶ 77.)

15 On July 19, 2013, Plaintiff discovered that Hofioni would be  
16 joining The LIT Group and its related entities as the Regional  
17 President for Northern California Sales, while Albanese would be  
18 joining as the Client Services Manager. (Id. ¶ 68.) According to  
19 Plaintiff, the Entity Defendants are its direct competitors, and  
20 "did not have a presence in Northern California prior to the  
21 individual defendants misappropriating [Plaintiff's] information  
22 and beginning work for [the Entity Defendants]." (Id. ¶ 3, 68.)

23 Plaintiff alleges that Hofioni and Albanese, acting on  
24 behalf of the Entity Defendants, have solicited Plaintiff's  
25 employees and customers, and interfered with Plaintiff's business  
26 relationships with its customers. (Id. ¶¶ 78, 80, 82-85, 93.)

27 Plaintiff also alleges that Hofioni has sent its customers  
28 marketing materials from the Entity Defendants which "incorporate

1 information that is nearly identical to that of U.S. Legal  
2 Support's business plans and related marketing materials."  
3 (Id. ¶ 142.)

4 Finally, Plaintiff alleges that Hofioni fraudulently  
5 obtained thousands of dollars from it, specifically by:

- 6 • Using his corporate credit card to charge items and  
7 send gifts to Plaintiff's customers in the period  
8 leading up to his resignation, in order to engender  
9 goodwill when he joined the Entity Defendants. (Id.  
10 ¶¶ 89, 92.) For example, two weeks before he resigned,  
11 he sent chocolate-covered strawberries to Plaintiff's  
12 customers, accompanied by a note providing, "Thanks so  
13 much for always allowing me to be your Court Reporting  
14 guy! I have always valued the relationship and would  
15 like nothing more than to continue to serve your Firm."  
16 (Id. ¶ 90.)

17 On information and belief, submitting expense reports for  
18 gift card purchases that he kept for his own benefit. For  
19 example, in early May, Hofioni spent over \$2000 on gift cards at  
20 a Safeway store; Plaintiff is informed and believes that he did  
21 not distribute these to the customers that he listed on his  
22 expense reports, but instead kept some or all of the cards for  
23 himself. (Id. ¶ 91.)

#### 24 **B. Procedural Background**

25 Plaintiff commenced this action on August 26, 2013. Four  
26 days later, Plaintiff filed a motion for a temporary restraining  
27 order, an order to show cause regarding issuance of a preliminary  
28



1 injunction, an order to preserve evidence, and an order for  
2 expedited discovery. (ECF No. 5.) Ultimately, these motions were  
3 resolved through a stipulated preliminary injunction and order  
4 for expedited discovery, entered by the court on September 24,  
5 2013. (ECF No. 24)

6 The operative complaint pleads eight causes of action:  
7 (i) misappropriation of trade secrets under California's  
8 codification of the Uniform Trade Secrets Act, Cal. Civ. Code  
9 §§ 3426-3426.11; (ii) breach of contract; (iii) breach of the  
10 duty of loyalty; (iv) breach of the duty of confidence;  
11 (v) statutory unfair competition, under Cal. Bus. & Prof. Code  
12 § 17200; (vi) conversion; (vii) fraud; and (viii) conspiracy. The  
13 second, third, fourth, and seventh causes of action are alleged  
14 solely against Hofioni and Albanese; the rest are alleged against  
15 all Defendants. Each cause of action is pled under California  
16 state law. (ECF No. 1.) Plaintiff seeks, *inter alia*, injunctive  
17 relief, compensatory and punitive damages, disgorgement, and the  
18 imposition of a constructive trust.

19 Defendants now move to dismiss a number of Plaintiff's  
20 claims.

## 21 **II. STANDARD**

22 A dismissal motion under Federal Rule of Civil  
23 Procedure 12(b)(6) challenges a complaint's compliance with the  
24 federal pleading requirements. Under Rule 8(a)(2), a pleading  
25 must contain a "short and plain statement of the claim showing  
26 that the pleader is entitled to relief." The complaint must give  
27 the defendant "fair notice of what the . . . claim is and the  
28

1 grounds upon which it rests.'" Bell Atlantic v. Twombly, 550 U.S.  
2 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47  
3 (1957)).

4 To meet this requirement, the complaint must be supported by  
5 factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).  
6 Moreover, this court "must accept as true all of the factual  
7 allegations contained in the complaint." Erickson v. Pardus, 551  
8 U.S. 89, 94 (2007).<sup>4</sup>

9 "While legal conclusions can provide the framework of a  
10 complaint," neither legal conclusions nor conclusory statements  
11 are themselves sufficient, and such statements are not entitled  
12 to a presumption of truth. Iqbal, 556 U.S. at 679. Iqbal and  
13 Twombly therefore prescribe a two-step process for evaluation of  
14 motions to dismiss. The court first identifies the non-conclusory  
15 factual allegations, and then determines whether these  
16 allegations, taken as true and construed in the light most  
17 favorable to the plaintiff, "plausibly give rise to an  
18 entitlement to relief." Iqbal, 556 U.S. at 679.

19 "Plausibility," as it is used in Twombly and Iqbal, does not  
20 refer to the likelihood that a pleader will succeed in proving  
21 the allegations. Instead, it refers to whether the non-conclusory  
22 factual allegations, when assumed to be true, "allow[] the court  
23 to draw the reasonable inference that the defendant is liable for

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24  
25 <sup>4</sup> Citing Twombly, 550 U.S. at 555-56, Neitzke v. Williams,  
26 490 U.S. 319, 327 (1989) ("What Rule 12(b)(6) does not  
27 countenance are dismissals based on a judge's disbelief of a  
28 complaint's factual allegations"), and Scheuer v. Rhodes, 416  
U.S. 232, 236 (1974) ("[I]t may appear on the face of the  
pleadings that a recovery is very remote and unlikely but that is  
not the test" under Rule 12(b)(6)).

1 the misconduct alleged." Iqbal, 556 U.S. at 678. "The  
2 plausibility standard is not akin to a 'probability requirement,'  
3 but it asks for more than a sheer possibility that a defendant  
4 has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 557).<sup>5</sup> A  
5 complaint may fail to show a right to relief either by lacking a  
6 cognizable legal theory or by lacking sufficient facts alleged  
7 under a cognizable legal theory. Balistreri v. Pacifica Police  
8 Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

### 9 **III. ANALYSIS**

10 When the court sits in diversity, it must ordinarily apply  
11 the substantive law of the forum in which it is located. Erie  
12 R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). California  
13 substantive law therefore governs.

#### 14 **A. What trade secrets are at issue?**

15 Defendants do not move to dismiss Plaintiff's first cause of  
16 action, for misappropriation of trade secrets, as pled against  
17

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18 <sup>5</sup> Twombly imposed an apparently new "plausibility" gloss on  
19 the previously well-known Rule 8(a) standard, and retired the  
20 long-established "no set of facts" standard of Conley v. Gibson,  
21 355 U.S. 41 (1957), although it did not overrule that case  
22 outright. See Moss v. U.S. Secret Service, 572 F.3d 962, 968 (9th  
23 Cir. 2009) (the Twombly Court "cautioned that it was not outright  
24 overruling Conley[,]" although it was retiring the "no set of  
25 facts" language from Conley). The Ninth Circuit has acknowledged  
26 the difficulty of applying the resulting standard, given the  
27 "perplexing" mix of standards the Supreme Court has applied in  
28 recent cases. See Starr v. Baca, 652 F.3d 1202, 1215 (9th Cir.  
2011) (comparing the Court's application of the "original, more  
lenient version of Rule 8(a)" in Swierkiewicz v. Sorema N.A., 534  
U.S. 506 (2002) and Erickson v. Pardus, 551 U.S. 89 (2007) (per  
curiam), with the seemingly "higher pleading standard" in Dura  
Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005), Twombly and  
Iqbal), cert. denied, 132 S. Ct. 2101 (2012). See also Cook v.  
Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (applying the "no set  
of facts" standard to a Section 1983 case).

1 Hofioni and Albanese. In fact, Defendants acknowledge in their  
2 Reply that the Complaint adequately pleads the trade secret  
3 status of the Confidential Information. (Reply 1.) The court will  
4 therefore treat the trade secret status of the Confidential  
5 Information as adequately-pled.

6 What is less certain is the trade secret status of the  
7 information in the Confidential Documents, which Plaintiff  
8 characterizes as containing "confidential, proprietary, and trade  
9 secret information." (Id. ¶ 59.) The court will infer, based on  
10 the overlap between the content of the Excel and PDF files  
11 described in the Complaint, and the description of the  
12 Confidential Information, that the Confidential Documents contain  
13 trade secret information.

14 **B. Has Plaintiff stated a claim against the Entity**  
15 **Defendants?**

16 Plaintiff's causes of action for misappropriation of trade  
17 secrets, statutory unfair competition, conversion, and conspiracy  
18 are pled against Hofioni, Albanese, and the Entity Defendants.

19 The latter move to dismiss on the grounds that the Complaint  
20 fails to state any claim against them whatsoever. Their attack is  
21 two-pronged: they contend both that Plaintiff has failed to  
22 allege sufficient facts to find them directly liable for  
23 Hofioni's and Albanese's actions, or to impute liability to them.  
24 (Motion 11, 14.)

25 As discussed elsewhere in this order, (i) Plaintiff has  
26 adequately pled causes of action for statutory unfair competition  
27 and conversion against the Entity Defendants, and (ii) California  
28 law does not recognize a standalone cause of action for

1 conspiracy. Accordingly, the court here only considers the Entity  
2 Defendants' argument that the complaint fails to state a cause of  
3 action against them for trade secrets misappropriation.

4 Plaintiff does not argue that it alleged the Entity  
5 Defendants' direct liability. Instead, Plaintiff responds that  
6 the Complaint satisfactorily alleges the Entity Defendants'  
7 vicarious liability on both *respondeat superior* and conspiracy  
8 grounds. (Opposition 8.)

9 **1. Has Plaintiff adequately pled the Entity**  
10 **Defendants' liability under a *respondeat***  
11 ***superior* theory?**

12 According to Witkin, "Under the doctrine of *respondeat*  
13 *superior*, the innocent principal or employer is liable for the  
14 torts of the agent or employee, committed while acting within the  
15 scope of employment." 3 Witkin, Summary of Cal. Law: Agency (10th  
16 ed. 2005) § 165, p. 208. The doctrine is founded in both common  
17 law, as well as on Cal. Civ. Code § 2338, which provides: "[A]  
18 principal is responsible to third persons for the negligence of  
19 his agent in the transaction of the business of the agency,  
20 including wrongful acts committed by such agent in and as a part  
21 of the transaction of such business, and for his willful omission  
22 to fulfill the obligations of the principal."

23 In support of its positions, Plaintiff cites Language Line  
24 Servs., Inc. v. Language Servs. Assocs., LLC, NO. C 10-02605 JW,  
25 2010 WL 2764714, 2010 U.S. Dist. LEXIS 140350 (N.D. Cal. Jul. 13,  
26 2010) (Ware, J.) (granting preliminary injunction in trade  
27 secrets dispute). Language Line, in turn, relies on a California  
28 appellate decision, Yamaguchi v. Harnsmut, which held that an

1 "employer may[] be vicariously liable for the employee's tort -  
2 even if it was malicious, willful, or criminal - if the  
3 employee's act was an outgrowth of his employment, inherent in  
4 the working environment, typical of or broadly incidental to the  
5 employer's business, or, in a general way, foreseeable from his  
6 duties." 106 Cal. App. 4th 472, 482 (2003) (internal quotations  
7 omitted). In Language Line, the district court - faced with a  
8 factual situation similar to the one presented by the instant  
9 case - indicated its willingness to premise employer liability on  
10 a *respondeat superior* theory.

11 The Entity Defendants nevertheless argue that the Complaint  
12 lacks allegations sufficient to support a *respondeat superior*  
13 theory, and accordingly, the claims against them must be  
14 dismissed. (Reply 6.)

15 Plaintiff contends that the following two paragraphs in the  
16 Complaint support its *respondeat superior* theory:

17 14. U.S. Legal Support is informed and  
18 believes, and based upon such information and  
19 belief alleges, that at all times relevant to  
20 this action, each of the Defendants named  
21 herein was doing business as ("dba") and/or  
22 was the agent, principal, servant,  
23 representative, employer, employee, joint-  
24 venturer, partner (of any kind), parent,  
25 subsidiary, affiliate, and/or alter ego of  
26 each and every other Defendant and, in doing  
27 the things hereinafter alleged, was acting  
28 within the course and/or scope of such  
authority as the dba, agent, principal,  
servant, representative, employer, employee,  
joint-venturer, partner (of any kind),  
parent, subsidiary, affiliate, and/or alter  
ego with the permission and consent of the  
remaining Defendants.

1           104. U.S. Legal Support is informed and  
2 believes, and based thereon alleges, that  
3 Hofioni and Albanese agreed among themselves,  
4 and with representatives of The LIT Group and  
5 its related entities, prior to Hofioni and  
6 Albanese commencing their employment with The  
7 LIT Group and its related entities and  
8 thereafter, to misappropriate U.S. Legal  
9 Support's trade secret information and then  
10 utilize said information to compete against  
11 and injure U.S. Legal Support. (Opposition  
12 8.)

13 It is difficult to disagree with the Entity Defendants'  
14 characterization of the first paragraph as consisting largely of  
15 the type of conclusory allegations warned against by Twombly and  
16 Iqbal. (Reply 5.) The second paragraph, by contrast, contains  
17 sufficient factual content to pass Twombly/Iqbal muster,  
18 particularly when considered with other allegations in the  
19 Complaint that describe the nature of the misappropriation and  
20 the trade secrets at issue.

21           Nevertheless, this paragraph takes the Complaint beyond the  
22 ambit of *respondeat superior*, a doctrine which is used to impose  
23 vicarious liability on employers for the torts of their  
24 employees.<sup>6</sup> The paragraph quoted above alleges the Entity

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25 <sup>6</sup> See, e.g., Yamaguchi, 106 Cal. App. 4th at 481 ("Under the  
26 doctrine of *respondeat superior*, an innocent employer may be  
27 liable for the torts its employee commits while acting within the  
28 scope of his employment."); Hinman v. Westinghouse Elec. Co., 2  
Cal. 3d 956, 959-960 (1970) ("The losses caused by the torts of  
employees, which as a practical matter are sure to occur in the  
conduct of the employer's enterprise, are placed upon that  
enterprise itself, as a cost of doing business."); Farms Ins.  
Grp. v. Cnty. of Santa Clara, 11 Cal. 4th 992, 1004 (1995)  
("[F]oreseeability' as a test for *respondeat superior* merely  
means that in the context of the particular enterprise an  
employee's conduct is not so unusual or startling that it would  
seem unfair to include the loss resulting from it among other  
costs of the employer's business.") (internal quotation omitted).

1 Defendants' *knowing* participation in a scheme to misappropriate  
2 trade secrets. This is in marked contrast to the situation  
3 presented in Language Line, *supra*, where the new employer  
4 contended that it could not be held liable because its "executive  
5 and management team did not know of the misappropriation." 2010  
6 WL 2764714 at \*2, 2010 U.S. Dist. LEXIS 140350 at \*6-7. The  
7 district court was nevertheless willing to impose vicarious  
8 liability under *respondeat superior* principles because "an act of  
9 this nature [*i.e.*, using trade secrets] was generally foreseeable  
10 as part of the [individuals defendants'] duties to solicit  
11 customers for [the new employer]." *Id.*, 2010 WL 2764714 at \*5,  
12 2010 U.S. Dist. LEXIS 140350 at \*12 (citing Yamaguchi, 106 Cal.  
13 App. 4th at 481-82).

14 Plaintiff may be able to assert the Entity Defendants'  
15 direct liability based on the allegations in Paragraph 104.<sup>7</sup> But  
16 as currently pled, the Complaint does not include relevant  
17 allegations that might support a *respondeat superior* theory: that  
18 Hofioni and Albanese were acting within the scope of their  
19 employment or agency, and that their misappropriation and use of  
20 Plaintiff's trade secrets were either "required by or incident to  
21 [their] duties, or could reasonably be foreseen by the employer  
22 in any event." John R. v. Oakland Sch. Dist., 48 Cal. 3d 438, 463  
23 (1989). Plaintiff's *respondeat superior* argument is therefore  
24 unavailing.<sup>8</sup>

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25 <sup>7</sup> Plaintiff would need to include additional allegations in  
26 support of a claim for corporate liability for trade secrets  
27 misappropriation.

28 <sup>8</sup> One could advance a sensible argument that, in any instance in  
which an employee is alleged to have misappropriated trade



1                                   **2. Has Plaintiff adequately pled the Entity**  
2                                   **Defendants' liability as part of a**  
3                                   **conspiracy?**

4           The elements of a conspiracy are (1) formation and operation  
5 of a conspiracy; (2) wrongful acts done in furtherance of the  
6 agreed-to plan; and (3) resulting damages. Applied Equip. Corp.  
7 v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 511 (1994).

8           Plaintiff has alleged the formation and operation of a  
9 conspiracy. Paragraph 104 of the Complaint, reproduced above,  
10 alleges that Hofioni and Albanese, prior to commencing their  
11 employment with the Entity Defendants, agreed with the Entity  
12 Defendants to misappropriate Plaintiff's trade secrets. This  
13 allegation satisfies the first element. But this paragraph is  
14 pled only in relation to the trade secrets misappropriation cause  
15 of action.

16           The second element is satisfied, as the Complaint sets forth  
17 various wrongful acts in furtherance of the conspiracy, e.g.,  
18 that between April and July 2013, Hofioni and Albanese "covertly

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19 secrets and departed for a similar position with a competitor, it  
20 is reasonably foreseeable that the employee would then use the  
21 trade secrets for the new employer's benefit. But California law  
22 does not currently recognize that *respondeat superior* liability  
23 is potentially inherent in this factual situation. Accordingly,  
24 it seems appropriate that Plaintiff be required to explicitly  
25 plead the supporting allegations. The court, in reaching this  
26 conclusion, is also guided by decisions holding that California  
27 law does not recognize the inevitable disclosure doctrine,  
28 whereby "a plaintiff may prove a claim of trade secret  
misappropriation by demonstrating the defendant's new employment  
will inevitably lead him to rely on the plaintiff's trade  
secrets." Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1458  
(2002) (quoting PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th  
Cir. 1995)). See also FLIR Systems, Inc. v. Parrish, 174 Cal.  
App. 4th 1270, 1277 (2009) ("The doctrine of inevitable  
disclosure is not the law in California").

1 accessed and retained" the Confidential Documents. (Complaint  
2 ¶ 60.)

3 Finally, Plaintiff adequately pleads damages. The Complaint  
4 provides that Hofioni and Albanese "are actively soliciting  
5 through use of U.S. Legal Support's trade secrets U.S. Legal  
6 Support's customers for business on behalf of the LIT Group and  
7 its related entities." (Complaint ¶ 93.) The Complaint also  
8 provides the specific example of Hofioni "repeatedly . . .  
9 contact[ing] the customers served by U.S. Legal Account  
10 Executive[] Jenna Derdowski during the period Hofioni and  
11 Albanese were employed by U.S. Legal Support." (Id. ¶ 83.) And  
12 Plaintiff alleges that "Defendants have already caused U.S. Legal  
13 Support monetary damage." (Id. ¶ 100.)

14 The court takes note that, under California law, conspiracy  
15 is not a stand-alone cause of action, but rather, "a legal  
16 doctrine that imposes liability on persons who, although not  
17 actually committing a tort themselves, share with the immediate  
18 tortfeasors a common plan or design in its perpetration." Applied  
19 Equip. Corp., 7 Cal. 4th at 510-511 (citing Wyatt v. Union Mortg.  
20 Co., 24 Cal.3d 773, 784 (1979)). "Standing alone, a conspiracy  
21 does no harm and engenders no tort liability. It must be  
22 activated by the commission of an actual tort." Id. at 511.  
23 Accordingly, Plaintiff must specify which torts were the objects  
24 of the conspiracy. The court infers that Plaintiff intended to  
25 plead a conspiracy to commit trade secrets misappropriation, as  
26 Paragraph 104 is pled as part of that cause of action.  
27 Nevertheless, the Complaint fails to set forth a basis for  
28 *respondeat superior* liability on the misappropriation claim.

1           **C. Are Plaintiff's third through sixth claims preempted**  
2           **by CUTSA?**

3           Defendants contend that Plaintiff's claims for breach of the  
4 duty of loyalty (alleged against Hofioni and Albanese), breach of  
5 the duty of confidence (alleged against Hofioni and Albanese),  
6 statutory unfair competition (alleged against all Defendants),  
7 and conversion (alleged against all Defendants) must be dismissed  
8 because California's codification of the Uniform Trade Secrets  
9 Act ("CUTSA"), Cal. Civ. Code § 3426 *et seq.*,<sup>9</sup> supersedes claims  
10 "based on the same nucleus of facts as [a] misappropriation of  
11 trade secrets claim for relief." K.C. Multimedia, Inc. v. Bank of  
12 America Tech. & Operations, Inc., 171 Cal. App. 4th 939, 958  
13 (2009) (internal citation and quotation omitted). (Motion 5.)

14           The California Supreme Court has yet to rule on CUTSA's  
15 supersessive scope. In such circumstances, courts in the Ninth  
16 Circuit are directed to proceed as follows:

17                   When interpreting state law, federal courts  
18                   are bound by decisions of the state's highest  
19                   court. In the absence of such a decision, a  
20                   federal court must predict how the highest  
21                   state court would decide the issue using  
                    intermediate appellate court decisions,  
                    decisions from other jurisdictions, statutes,

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22           <sup>9</sup> "[T]he eleven provisions of the [C]UTSA set forth: the  
23 definition of 'misappropriation' and 'trade secret,' injunctive  
24 relief for actual or threatened misappropriation, damages,  
25 attorney fees, methods for preserving the secrecy of trade  
26 secrets, the limitations period, the effect of the title on other  
27 statutes or remedies, statutory construction, severability, the  
28 application of title to acts occurring prior to the statutory  
date, and the application of official proceedings privilege to  
disclosure of trade secret information." AccuImage Diagnostics  
Corp v. Terarecon, Inc., 260 F. Supp. 2d 941, 953 (N.D. Cal.  
2003) (Patel, J.)

1           treatises, and restatements as guidance.  
2           However, where there is no convincing  
3           evidence that the state supreme court would  
4           decide differently, a federal court is  
          obligated to follow the decisions of the  
          state's intermediate appellate courts.

5           Lewis v. Tel. Emps. Credit Union, 87 F.3d 1537, 1545 (9th Cir.  
6           1996) (internal quotations and citations omitted).

7           To begin, it is necessary to review the definition of trade  
8           secret. Under CUTSA, a "trade secret" is information that:

9                   (1) Derives independent economic value,  
10                   actual or potential, from not being generally  
11                   known to the public or to other persons who  
                  can obtain economic value from its disclosure  
                  or use; and

12                   (2) Is the subject of efforts that are  
13                   reasonable under the circumstances to  
                  maintain its secrecy.

14           Cal. Civ. Code § 3426.1(d). "The *sine qua non* of a trade  
15           secret . . . is the plaintiff's possession of information of a  
16           type that can, at the possessor's option, be made known to  
17           others, or withheld from them, *i.e.*, kept secret." Silvaco Data  
18           Sys. v. Intel Corp., 184 Cal. App. 4th 210, 220 (2010),  
19           disapproved on other grounds by Kwikset Corp. v. Superior Court,  
20           51 Cal. 4th 310 (2011). "Trade secret law, in short, protects  
21           only *the right to control the dissemination of information.*" Id.  
22           at 221 (emphasis in original).

23           CUTSA features a peculiarly-worded savings provision:

24                   (a) Except as otherwise expressly provided,  
25                   this title does not supersede any statute  
26                   relating to misappropriation of a trade  
27                   secret, or any statute otherwise regulating  
                  trade secrets.

1 (b) This title does not affect  
2 (1) contractual remedies, whether or not  
3 based upon misappropriation of a trade  
4 secret, (2) other civil remedies that are not  
5 based upon misappropriation of a trade  
6 secret, or (3) criminal remedies, whether or  
7 not based upon misappropriation of a trade  
8 secret.

6 (c) This title does not affect the disclosure  
7 of a record by a state or local agency under  
8 the California Public Records Act . . . .

8 Cal. Civ. Code § 3426.7. As a California appeals court noted,  
9 this provision "contains two savings clauses, but no explicit  
10 declaration of supersessive effect from which to 'save'  
11 anything." Silvaco, 184 Cal. App. 4th at 233. That court  
12 nevertheless went on to reason that the provision's "peculiar  
13 construction . . . is best understood as *assuming* that CUTSA  
14 would occupy the field of trade secrets liability, and as seeking  
15 to limit the Act's supersessive effect only as it might impair  
16 the specified statutes and remedies." Id. at 234 (emphasis in  
17 original).<sup>10</sup> It is now generally accepted that "CUTSA provides the  
18 exclusive civil remedy for conduct falling within its terms, so  
19 as to supersede other civil remedies 'based upon misappropriation  
20 of a trade secret.'" Id. at 236 (quoting Cal. Civ. Code  
21 § 3426.7(a), (b)); accord K.C. Multimedia, 171 Cal. App. 4th at  
22 954 ("§ 3426.7 implicitly preempts alternative civil remedies

23 \_\_\_\_\_  
24 <sup>10</sup> These "statutes and remedies" include, *e.g.*, Cal. Pen. Code  
25 § 499c (criminalizing theft of trade secrets), Cal Pen. Code  
26 § 502 (criminalizing, *inter alia*, unauthorized access to computer  
27 systems in order to obtain data); Cal. Gov't Code § 6254.26  
28 (exempting from disclosure under the California Public Records  
Act certain information regarding "alternative investments" in  
which state public investment funds invest), and so forth. A more  
comprehensive list can be found at Silvaco, 184 Cal. App. 4th at  
235 n. 17.

1 based on trade secret misappropriation."). Both parties appear to  
2 be in agreement with this principle.

3 Defendants' motion to dismiss is based on a recent line of  
4 cases that have extended CUTSA's reach to hold that the statute  
5 also supersedes civil remedies for misappropriation of  
6 confidential or proprietary information that does not qualify for  
7 trade secret protection. Two main policy rationales underlie this  
8 approach. First, if CUTSA did not supersede these claims, then  
9 misappropriation of non-trade secrets would justify a broader  
10 range of civil remedies than misappropriation of trade secrets;  
11 it is arguable that such a result is perverse, since non-trade  
12 secrets seem to be both less valuable and subject to fewer  
13 protective measures than trade secrets. See SunPower Corp. v.  
14 SolarCity Corp., No. 12-CV-00694-LHK, 2012 WL 6160472, 2012 U.S.  
15 Dist. LEXIS 176284 (N.D. Cal. Dec. 11, 2012) (Koh, J.) ("To [not  
16 recognize the full extent of CUTSA supersession] would allow  
17 plaintiffs to avoid the preclusive effect of CUTSA (and thereby  
18 plead potentially more favorable common-law claims) by simply  
19 failing to allege one of the elements necessary for information  
20 to qualify as a trade secret.").<sup>11</sup> The second rationale rests on  
21 the premise that the law must recognize some property interest in  
22 information before its misappropriation may be deemed unlawful.  
23 See, e.g., Silvaco, 184 Cal. App. 4th at 239 n. 22 ("Information  
24 that does not fit this definition [of "trade secret," under  
25 CUTSA], and is not otherwise made property by some provision of  
26 positive law, belongs to no one, and cannot be converted or

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27 <sup>11</sup> This suggests a broader supersession than the savings clause  
28 might well support.

1 stolen."); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S.  
2 340, 344 (1991) ("That there can be no valid copyright in facts  
3 is universally understood."). One test for supersession that  
4 emerges from caselaw is as follows:

5 [A plaintiff's] claims based on its non-trade  
6 secret proprietary information are superseded  
7 unless one of the following conditions is  
8 met: (1) [the plaintiff] can allege facts  
9 that show that the non-trade secret  
10 proprietary information was made property by  
11 some provision of positive law on grounds  
12 that are qualitatively different from the  
13 grounds upon which trade secrets are  
14 considered property or (2) it can otherwise  
15 be concluded that [the non-trade secret  
16 claims] allege wrongdoing that is materially  
17 distinct from the wrongdoing alleged in a  
18 CUTSA claim.

14 SunPower Corp., 2012 WL 6160472 at \*9, 2012 U.S. Dist. LEXIS  
15 176284 at \*29 (internal quotations and citations omitted)  
16 (dismissing claims for breach of confidence, conversion, trespass  
17 to chattels, and unfair competition based on CUTSA supersession);  
18 see also Heller v. Cepia, L.L.C., No. C 11-01146 JSW, 2012 WL  
19 13572 at \*7, 2012 U.S. Dist. LEXIS 660 at \*21 (N.D. Cal. Jan. 4,  
20 2012) (White, J.) (dismissing claims for misappropriation,  
21 conversion, unjust enrichment, and trespass to chattels based on  
22 CUTSA supersession, in part because plaintiff failed to  
23 "identif[y] any law that confers property rights on his non-trade  
24 secret confidential information."); see also Silvaco, 184 Cal.  
25 App. 4th at 239 n. 22 (in dicta, "emphatically reject[ing] . . .  
26 the suggestion that the uniform act was not intended to preempt  
27 'common law conversion claims based on the taking of information  
28

1 that, though not a trade secret, was nonetheless of value to the  
2 claimant.'"); see also Mattel, Inc. v. MGA Entm't, Inc., 782 F.  
3 Supp. 2d 911, 987 (C.D. Cal. 2011) (Carter, J.) (holding, on  
4 summary judgment, that "[C]UTSA supersedes claims based on the  
5 misappropriation of confidential information, whether or not that  
6 information meets the statutory definition of a trade secret.").

7 That said, several courts have held that the question of  
8 whether claims are superseded by CUTSA is a fact-based inquiry  
9 better suited for summary judgment than a motion to dismiss:

10 Some courts have split the baby by electing  
11 to dismiss claims under CUTSA's savings  
12 clause only after determining that the  
13 protected information was a trade secret.  
14 [citations omitted.] But this approach puts  
15 parties in the uncomfortable position of  
16 conceding CUTSA liability in order to prevail  
17 on another claim. The better approach may be  
18 to determine whether the information alleged  
19 to have converted was "made property by some  
20 provision of positive law," Silvaco, 184  
21 Cal.App.4th at 239 n. 22, on grounds that are  
22 qualitatively different from the grounds upon  
23 which trade secrets are considered property.  
24 Resolving this question requires analysis of  
25 the facts: namely, what the confidential or  
26 proprietary information is, how it was  
27 converted, and the property interest alleged  
28 to have harmed as a result of that  
conversion. All of these questions can be  
addressed at summary judgment and/or trial.

23 Bryant v. Mattel, Inc., No. CV 04-9049 DOC (RNBx), 2010 WL  
24 3705668 at \*22, 2010 U.S. Dist. LEXIS 103851 at \*74 (C.D. Cal.  
25 Aug. 2, 2010) (Carter, J.). Accord Amron Intern. Diving Supply,  
26 Inc. v. Hydrolinx Diving Commc'n, Inc., No. 11-CV-1890, 2011 WL  
27 5025178 at \*10, 2011 U.S. Dist. LEXIS 122420 at \*27 (S.D. Cal.  
28 Oct. 21, 2011) (Huff, J.) ("At this point in the case, the status



1 of the information is merely a matter of allegation and until the  
2 distinction is made between [plaintiff's] allegedly  
3 misappropriated trade secret information and its confidential or  
4 non-confidential proprietary non-trade secret information, the  
5 question of preemption should not be addressed." ).

6 The court is of the view that the question of supersession  
7 is properly addressed at summary judgment. Defendants challenge  
8 Plaintiff's use of the phrase "confidential, proprietary, and  
9 trade secret information" without describing what the  
10 "confidential" and/or "proprietary" information consists of,<sup>12</sup>  
11 writing that the Complaint "fails to identify with any reasonable  
12 particularity where its trade secrets stop and its non-trade  
13 secret but still protectable information begins." (Reply 2.) The  
14 Complaint puts Defendants on sufficient notice (i) that these  
15 categories of information exist and (ii) that they provide a  
16 basis for claims for breach of the duty of loyalty, breach of the  
17 duty of confidence, statutory unfair competition, and conversion.  
18 Defendants can determine in discovery whether Plaintiff's  
19 contentions have any merit, and when appropriate, bring a summary  
20 judgment motion as to the issue of supersession.

21 **D. Has plaintiff made out a claim for conversion against**  
22 **Albanese and against the Entity Defendants?**

23 Plaintiff's sixth cause of action, for conversion, is pled  
24 against all of the Defendants. Albanese and the Entity Defendants

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25  
26 <sup>12</sup> The one exception, in paragraph 130, is substantially similar  
27 to the description of the Confidential Information in paragraph  
28 24, except that it identifies (i) certain business plans and  
(ii) "all other confidential and proprietary information that  
Defendants has access to and stole."

1 move to dismiss, on the grounds that the complaint only alleges  
2 acts of conversion by Hofioni. (Motion 19-20.) Plaintiff does not  
3 address this argument in its opposition, though, in arguing  
4 against CUTSA supersession, plaintiff asserts that its claim for  
5 conversion is based on Hofioni's alleged misappropriation of a  
6 laptop, gift cards and moneys, and tangible company documents.  
7 (Opposition 11-12.)

8 The elements of conversion under California law are "(1) the  
9 plaintiff's ownership or right to possession of personal  
10 property; (2) the defendant's disposition of the property in a  
11 manner that is inconsistent with the plaintiff's property rights;  
12 and (3) resulting damages." Fremont Indem. Co. v. Fremont Gen.  
13 Corp., 148 Cal. App. 4th 97, 119 (2007) (cited for this  
14 proposition in 5 Witkin, Summary of Cal. Law: Torts (2013 Supp.)  
15 § 699, pp. 214-15). California courts "have traditionally refused  
16 to recognize as conversion the unauthorized taking of intangible  
17 interests that are not merged with, or reflected in, something  
18 tangible," Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559,  
19 1565 (1996), though there are recognized exceptions where "both  
20 the property and the owner's right of possession and exclusive  
21 use are sufficiently definite and certain." Fremont Indem., 148  
22 Cal. App. 4th at 125.

23 The complaint provides:

24 [Plaintiff] is informed and believes, and  
25 based thereon alleges, that Hofioni and  
26 Albanese agreed among themselves, and with  
27 representatives of the LIT Group and its  
28 related entities, prior to Hofioni and  
Albanese commencing their employment with The  
LIT Group and its related entities and

1           thereafter, to take the actions set forth  
2           herein to wrongfully convert property  
3           belonging to [Plaintiff]. (Complaint ¶ 154.)

4 While this paragraph, in its use of the phrase "wrongfully  
5 convert property," verges on the sort of conclusory allegation  
6 forbidden by Twombly and Iqbal, there are sufficient additional  
7 facts pled in the complaint to make clear that Hofioni is accused  
8 of converting a laptop, gift cards, and company documents.<sup>13</sup> The  
9 remainder of this paragraph alleges that Hofioni converted these  
10 items based on an agreement to do so with Albanese and the Entity  
11 Defendants.

12           Recall that the elements of a conspiracy are (1) formation  
13 and operation of a conspiracy; (2) wrongful acts done in  
14 furtherance of the agreed-to plan; and (3) resulting damages.  
15 Applied Equip. Corp., 7 Cal. 4th at 511. Paragraph 154, *supra*,  
16 satisfies the first element. Hofioni's alleged retention of the  
17 laptop, and taking of the gift cards and documents, satisfies the  
18 second element. Finally, Plaintiff has alleged that "Defendants  
19 have already caused U.S. Legal Support monetary damage." (Id.  
20 ¶ 100.)

21           In sum, Plaintiff has adequately pled both Hofioni's  
22 conversion of its property and the existence of a conspiracy  
23 among all of the Defendants to carry out this conversion.

---

24 <sup>13</sup> As to the latter - in an email dated July 21, 2013, Hofioni  
25 informed Plaintiff that he had "shredded items." (Complaint  
26 ¶ 70.) This email was in response to Plaintiff's demand that  
27 Hofioni "fully and unconditionally certify that he did not have  
28 any confidential business information or trade secret information  
belonging" to Plaintiff. (Id. ¶ 69.) Plaintiff asserts that it is  
reasonable to infer from this exchange that Hofioni had converted  
tangible company documents. (Opposition 11.) The court agrees.

1 Accordingly, the motion to dismiss this cause of action is  
2 denied.

3 **E. Has Plaintiff stated a statutory unfair competition  
4 claim?**

5 California's statutory unfair competition law ("UCL")  
6 prohibits "any unlawful, unfair or fraudulent business act or  
7 practice and unfair, deceptive, untrue or misleading advertising  
8 and any act prohibited by [the false advertising law (§ 17500 *et*  
9 *seq.*)]." Cal. Bus. & Prof. Code § 17200. According to the  
10 California Supreme Court, the statute recognizes three varieties  
11 of unfair competition: acts or practices that are (i) unlawful,  
12 (ii) unfair, or (iii) fraudulent. Cel-Tech Commc'ns., Inc. v. Los  
13 Angeles Cellular Tel., 20 Cal. 4th 163, 180 (1999); accord Rose  
14 v. Bank of Am., N.A., 57 Cal. 4th. 390, 394 (2013).

15 Defendants contend that a "plaintiff is required to state  
16 with reasonable particularity the facts supporting an alleged  
17 violation of the UCL." (Motion 15.) However, in support of this  
18 contention, they cite Khoury v. Maly's of Cal., 14 Cal. App. 4th  
19 612, 619 (1993) and Saunders v. Superior Court, 27 Cal. App. 4th  
20 832, 841-42 (1994). These decisions address California, rather  
21 than federal, pleading standards. California, as a code pleading  
22 jurisdiction, requires complaints to contain "[a] statement of  
23 the facts constituting the cause of action, in ordinary and  
24 concise language." Cal. Code Civ. Proc. § 425.10(a)(1). By  
25 contrast, under Rule 8, "[t]he pleader [in federal court] . . .  
26 is not restricted to statement of the 'facts.'" 4 Witkin, Cal.  
27 Procedure: Pleading (5th ed. 2008) § 379, p. 515. While Twombly  
28 and Iqbal "have paved the way for a heightened 'plausibility'

1 pleading standard that requires plaintiffs to provide greater  
2 factual development in their complaints in order to survive a  
3 Rule 12(b)(6) motion to dismiss," 5 Charles Alan Right & Arthur  
4 R. Miller, Fed. Practice and Procedure: Civil § 1202 (3d ed.  
5 2012), it is nevertheless axiomatic that, even where state law  
6 claims are alleged, "[t]he manner and details of pleading in the  
7 federal courts are governed by the Federal Rules of Civil  
8 Procedure regardless of the source of substantive law to be  
9 applied in the particular action." Id. § 1204. "[A] federal  
10 pleading that satisfies the Rule 8(a) standard will not be  
11 dismissed simply because it would be vulnerable to a  
12 demurrer . . . in a forum state court." Id.

13 Despite the parties' joint failure to properly brief this  
14 matter, the court will evaluate defendants' motion under federal  
15 law.

#### 16 1. "Unlawful"

17 Plaintiff alleges unlawful conduct under the UCL. "By  
18 proscribing 'any unlawful' business practice, [the UCL] borrows  
19 violations of other laws and treats them as unlawful practices  
20 that the unfair competition law makes independently actionable."  
21 Cel-Tech, 20 Cal. 4th at 180.

22 Defendants move to dismiss, contending that Plaintiff  
23 "cannot point to any 'unlawful' conduct on Defendants' part. It  
24 thus cannot allege an 'unlawful' act or practice under [the  
25 UCL.]" (Motion 17-18.) Their argument presumes that Plaintiff's  
26 non-CUTSA claims are superseded; they write, "The remaining  
27 allegations of 'unlawful' practices relate to misappropriation,  
28

1 which is preempted and otherwise insufficiently pled." (Motion  
2 17.)

3 Defendants are correct, insofar as the court has dismissed  
4 Plaintiff's cause of action for trade secrets misappropriation  
5 under a *respondeat superior* theory. However, as discussed *supra*,  
6 Plaintiff has satisfactorily pled causes of action for trade  
7 secrets misappropriation and conversion against the Entity  
8 Defendant, both pursuant to conspiracy. These causes of action,  
9 in turn, are a sufficient basis for alleging "unlawful" conduct  
10 under the UCL. Plaintiff has also adequately pled causes of  
11 action for trade secrets misappropriation, breach of contract,  
12 breach of the duty of loyalty, breach of the duty of  
13 confidence, conversion, and fraud against Hofioni and Albanese,  
14 which, in turn, will support claims under the UCL's "unlawful"  
15 prong against these individual defendants.

16 Accordingly, the motion to dismiss Plaintiff's cause of  
17 action under the UCL "unlawful" prong will be denied.

## 18 **2. "Unfair"**

19 Plaintiff alleges unfair competition under the UCL.

20 Defendants counter that, "Where a plaintiff fails to state  
21 an antitrust claim, and an unfair competition claim is based upon  
22 the same allegations, the [latter] is properly dismissed."

23 (Motion 16.) In support, Defendants quote Cel-Tech, 20 Cal. 4th  
24 at 186-7, for the proposition that "[t]he inquiry as to what is  
25 'unfair' is limited to 'conduct that threatens an incipient  
26 violation of an anti-trust law, or violates the policy and spirit  
27 of one of those laws because its effects are comparable to or the  
28

1 same as a violation of the law, or otherwise significantly  
2 threatens or harms competition.'" (Id.)

3 Defendant's position is puzzling. Cel-Tech does not require  
4 plaintiffs to base UCL unfair conduct claims solely on antitrust  
5 violations; the quoted passage quite clearly provides that such  
6 claims may be based on conduct which "otherwise significantly  
7 threatens or harms competition."

8 It is well-settled that misappropriation of trade secrets in  
9 violation of CUTSA can form the predicate for an unfair  
10 competition claim under the UCL. See Courtesy Temp. Servs. v.  
11 Camacho, 222 Cal. App. 3d 1278, 1292 ("[T]he cases are legion  
12 holding that a former employee's use of confidential information  
13 obtained from his former employer to compete with him and to  
14 solicit the business of his former employer's customers, is  
15 regarded as unfair competition.")

16 As Plaintiff has pled a cause of action for trade secrets  
17 misappropriation against all of the Defendants, it may proceed  
18 against them under the UCL's "unfair" prong.

### 19 **3. "Fraudulent"**

20 Plaintiff alleges fraudulent conduct under the UCL.

21 Defendants move to dismiss, on the grounds that Plaintiff  
22 "has not alleged any conduct that is likely to deceive the  
23 public," a requirement for a UCL fraud claim. (Motion 18.)

24 Plaintiff responds that paragraph 144 of the complaint  
25 adequately alleges fraud:

26 U.S. Legal Support is informed and believes  
27 that the statements made by The LIT Group and  
28 its related entities in their marketing  
materials contain false and misleading

1 statements because they describe  
2 relationships with companies that The LIT  
3 Group and its related entities do not in fact  
4 have.

4 While the court is satisfied that consumers of legal services  
5 could be deceived by false statements about the identities of  
6 Defendants' customers, it does not appear that Plaintiff has  
7 standing to raise a UCL fraud claim. California's Proposition 64  
8 added language "impos[ing] an actual reliance requirement on  
9 plaintiffs prosecuting a private enforcement action under the  
10 UCL's fraud prong." In re Tobacco II Cases, 46 Cal. 4th 298, 326  
11 (2009). "Reliance is proved by showing that the defendant's  
12 misrepresentation or nondisclosure was an immediate cause of the  
13 plaintiff's injury-producing conduct." Id. (quoting Mirkin v.  
14 Wasserman, 5 Cal. 4th 1082, 1110-11 (1993)).

15 As Plaintiff is not a consumer of Defendants' services, it  
16 cannot demonstrate reliance on Defendants' fraudulent statements  
17 in order to establish standing under the UCL's fraud prong.  
18 Accordingly, this claim will be dismissed with prejudice.

#### 19 **4. Damages**

20 It is well-settled that the UCL provides only equitable  
21 remedies, typically in the form of injunctive relief and  
22 restitution. Cal. Bus. & Prof. Code § 17203; see also Clayworth  
23 v. Pfizer, Inc., 49 Cal. 4th 758, 789-90 (2010) ("Section 17203  
24 makes injunctive relief the primary form of relief available  
25 under the UCL, while restitution is merely ancillary.")

26 Defendants contend that Plaintiff illegitimately seeks  
27 compensatory damages under the UCL. (Motion 18-19.) Plaintiff  
28 counters that it seeks no such damages, having pled:



1 As a proximate result of Defendants' above-  
2 mentioned acts, including those by Hofioni  
3 and Albanese for themselves and under the  
4 agreement alleged above, U.S. Legal Support  
5 suffered an injury in fact, has lost money or  
6 property as a result, and faces continued  
7 irreparable injury. Further, Defendants have  
8 been unjustly enriched in an amount to be  
9 proven at the time of trial, but which is in  
10 excess of the minimal jurisdictional amount  
11 of this Court, **entitling U.S. Legal Support  
12 to restitution and/or other equitable relief.**  
13 (Complaint ¶ 148.)

14 Plaintiff does not appear to seek remedies other than  
15 equitable relief. Defendants' motion to dismiss Plaintiff's  
16 damages plea is therefore denied.

#### 17 **IV. CONCLUSION**

18 In light of the foregoing, the court hereby orders as  
19 follows:

20 [1] To the extent that is based on a *respondeat superior*  
21 theory of liability, the first cause of action  
22 (misappropriation of trade secrets) is DISMISSED without  
23 prejudice as to The LIT Group, Hutchings Court Reporters,  
24 LLC, and Litigation Services.

25 [2] To the extent that is pled on the basis of fraudulent  
26 conduct, the fifth (statutory unfair competition) cause of  
27 action is DISMISSED with prejudice.

28 [3] The eighth cause of action (conspiracy) is DISMISSED  
with prejudice. Plaintiff may re-allege the elements of a  
conspiracy in any amended complaint, but should not plead  
conspiracy as a standalone cause of action.

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[4] In all other respects, the motion to dismiss is DENIED.

[5] Plaintiff is GRANTED leave to file an amended complaint no later than twenty-one (21) days after docketing of this order.

IT IS SO ORDERED.

DATED: December 19, 2013.



LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT