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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KEITH ANGELIN et al., Plaintiffs, Cross-Defendants and Appellants, v. WILLIAM BRESCIA, Defendant, Cross-Complainant and Respondent.	B213088 (Los Angeles County Super. Ct. No. BC324320)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. Reversed and remanded.

Cypress, Hyura E. Choi and Robert J. Muller for Plaintiffs, Cross-Defendants and Appellants.

Marder, Zink & Karlzen and John A. Marder for Defendant, Cross-Complainant and Respondent.

INTRODUCTION

Cross-defendant and appellant Instone, LLC appeals from a judgment following a trial in which a jury awarded cross-complainant and respondent

William Brescia $4.9 million on his causes of action for breach of express contract, breach of implied-in-fact contract, and breach of confidence against Instone and other cross-defendants not parties to this appeal. Brescia was the creator of a formula for high protein, low carbohydrate pudding, and the jury determined that Instone and the other cross-defendants sold pudding products based on his formula without compensating him, in violation of their agreements with him and their duty of confidence.

We conclude that the jury's findings for Brescia on his claims for breach of express and implied contract were not supported by substantial evidence: No evidence was presented at trial that Instone breached its narrow obligations under its express agreements with Brescia not to use or disclose proprietary information provided to it by Brescia, and no evidence was introduced of any conduct based on which a reasonable factfinder could conclude that Instone had an implied agreement to make royalty payments to Brescia in the event Instone used his pudding formula. We also hold that Brescia's breach of confidence claim was preempted by the California Uniform Trade Secrets Act (CUTSA). Thus, we reverse the judgment in favor of Brescia and vacate the damages award.

For his part, Brescia appeals the trial court's judgment dismissing his claim for misappropriation of trade secrets against Instone for failure to identify his trade secrets with sufficient particularity. We agree that our previous decision in *Brescia v. Angelin* (2009) 172 Cal.App.4th 133, 138-139 (*Brescia*), reversing the trial court's decision on this issue as to other cross-defendants, constitutes the law of the case and mandates the reversal of the judgment dismissing that misappropriation claim.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Brescia's Development of the Pudding and Licensing Deal With Performance Worldwide

In 1999, Brescia, who worked in the sports nutrition field, came up with the concept of a high protein, lactose free, low carbohydrate, shelf stable pudding. Brescia began experimenting on his stovetop to create such a pudding, and in early 2000, hired Schuster Laboratories, Inc., an analytical laboratory with a food science department, to conduct research and development. Brescia worked with the laboratory for three years; Schuster researched potential market competition, created pudding samples, provided feedback, and coordinated pilot batch runs by manufacturers. Brescia paid the laboratory approximately $150,000 over the three years.

Brescia began to shop his product around to various sports nutrition companies, including GEN, for whom he had worked early in his career. After GEN signed a confidentiality agreement in January 2003, Brescia provided samples of the pudding at a meeting with GEN employees Craig Tapscott, Rob Migliore, and Keith Angelin. In April 2003, Brescia and GEN entered into an agreement whereby Brescia agreed to license to GEN the exclusive rights to produce, manufacture, distribute and sell Brescia's pudding formula, creation, process and product, in exchange for certain payments and royalties from the sales. Brescia and Performance Worldwide USA, Inc. (Performance) hired food scientist Christopher Scinto to fine-tune the ingredients and to oversee the development of the pudding.

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[1] Consistent with the applicable standards of review, we recount the facts in the record in the light most favorable to the jury's verdicts. (*Brennan v. Townsend & O'Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336, 1340.)

Later in 2003, GEN closed its doors, but its former officers, including Angelin, founded a health food company called Performance. Angelin communicated with Brescia regarding a new exclusive licensing agreement between Performance and Brescia to replace the GEN licensing agreement, and ultimately a new licensing agreement was signed in January 2004.

In that licensing agreement, Performance acknowledged that the pudding formula invented by Brescia was a protected trade secret owned by Brescia. Brescia granted Performance the exclusive right to use the formula in connection with a high protein, low carbohydrate pudding with an extended shelf life. The contract would terminate at the end of 2006, with Performance having the option to extend the agreement for an additional three years. Performance agreed to pay Brescia a royalty of four percent of its gross revenues from sales of the pudding. Royalties would be paid quarterly, with interest at the rate of one and one-half percent per month on any late payments. Performance agreed to minimum guaranteed annual payments to Brescia: $50,000 for 2004, $100,000 for 2005, and $150,000 for 2006. In the event the agreement was extended after 2006, Brescia would be paid a minimum of $200,000 each year.

Brescia and Performance's Agreements with Instone

In December 2003, Brescia and Performance approached a newly formed sports nutrition company, Forza Nutrition LLC, doing business as Instone,[2] about the possibility of Instone distributing Brescia's pudding. Brescia and Instone signed a mutual non-use and nondisclosure agreement on December 6, 2003, indicating that the parties wished to explore a business opportunity of mutual interest and that the parties might disclose confidential business or technical

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[2] The parties stipulated below that Instone and Forza are one and the same.

information to each other which was to be treated as confidential. The agreement provided in part that "[n]othing herein shall obligate [Instone] or [Brescia] to proceed with any transaction between them, and each party reserves the right, in its sole discretion, to terminate the discussions contemplated by this Agreement concerning the Business Opportunity."

Brescia and Instone also signed a confidentiality agreement on December 23, 2003, "concerning the potential sale and distribution" of Brescia's pudding (referred to in the agreement as Pro Pudding). The agreement provided that Brescia would "communicate certain proprietary technical information to the Company [Instone] for the purpose of inducing the Company to sell, distribute, manufacture and market" Brescia's pudding. Instone agreed that "any technical information received by them from Brescia" would be governed by certain enumerated terms and conditions. The agreement defined the terms "Proprietary Information" and "Trade Secret" to mean "the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula or improvement which is secret and is not generally available to the public, that Brescia clearly marks and specifically identifies as confidential, and that gives the one who uses it an advantage over competitors who do not know or use the Proprietary Information and/or the Trade Secret." Instone acknowledged that all Trade Secrets and other Proprietary Information would remain the sole and exclusive property of Brescia. Instone further agreed that, "in receiving Proprietary Information from Brescia," it would "use reasonable efforts to prevent disclosure, in whole or in part, of such Proprietary Information to any third party, whether affiliated or not nor [*sic*] aid nor abet its publication or dissemination, without the prior written consent of Brescia." Also, Instone agreed that "in receiving Proprietary Information from Brescia [Instone] shall make no commercial use, in whole or in part, of any such Proprietary Information without the prior written consent of Brescia."

The agreement further provided that "[n]o rights or obligations other than those expressly recited herein are to be implied from this Agreement. . . . Brescia understands that the Company may currently or in the future be developing products internally, or receiving information in confidence from others, that may be similar to Brescia's Information. Accordingly, nothing in this Agreement shall be construed as a representation or interference [*sic*] that the Company will not develop products, for itself or others, that compete with Pro Pudding, provided such product is not developed based upon Brescia's Information submitted hereunder." The agreement contains an integration clause, providing that "[t]his Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter of this Agreement, and any and all written or oral agreements previously existing between the parties hereto on this subject are expressly cancelled."

Instone also entered into a non-disclosure and confidentiality agreement with Performance with respect to Brescia's pudding formula. In that January 27, 2004 agreement, Instone acknowledged that it "may receive, may have access to and may learn of certain confidential information concerning the Formula . . . which information is the sole and exclusive property of and has economic value to [Performance]." The term "Confidential Information" was to "be broadly defined" and "shall include (i) all information disclosed by [Performance] to [Instone], (ii) information developed or learned by [Instone] in connection with the Formula . . . , (iii) all information that has or could have commercial value or other utility to [Performance] in connection with the Formula . . . , and (iv) all information of which the unauthorized disclosure could be detrimental to the interests of [Performance] . . . , whether or not such information is identified as confidential information by [Performance].” Examples of such “Confidential Information” would include, but not be limited to, all trade secrets, as defined under Civil Code section 3426.1, and all formulas, processes, techniques, and inventions. Instone agreed that it “shall not, whether knowingly or otherwise, use or disclose, or induce or assist in the use or disclosure of, the Confidential Information, or anything related thereto, without [Performance’s] prior express written consent.”

Brescia provided samples of his pudding to Instone in December 2003. However, neither the pudding formula nor the list of ingredients was attached to Brescia’s and Performance’s agreements with Instone, and Brescia never provided the pudding formula to Instone.

Instone’s Agreement with Freedom Foods

Angelin left Performance in December 2003. Even before Angelin stopped working for Performance, he and Scinto had begun planning to develop and sell a high protein, low carbohydrate, low fat, shelf stable pudding on their own. Angelin formed his own company, Freedom Foods, along with Scinto and two others. In early February 2004, two weeks after Angelin resigned from Performance (and a short time after Performance and Instone had signed their non-use and confidentiality agreements) Instone entered into discussions with Angelin regarding a pudding.

Ultimately, Instone entered into a licensing agreement with Freedom Foods whereby Freedom Foods made the pudding, put Instone’s label on it, and sold it to Instone, which sold and shipped the product to retail outlets, including GNC and Vitamin Shoppe. Although Instone licensed the formula from Freedom Foods, Instone was never privy to the pudding formula, beyond what the label disclosed about the ingredients. Before it entered this agreement with Freedom Foods, Instone learned that Angelin and Scinto had been affiliated with Performance at the time Performance was shopping its pudding to Instone. Instone was concerned and suspicious about whether the two pudding formulas were the same, but proceeded with the Freedom Foods deal based on assurances from Freedom Foods and Scinto that the formulas were different. Instone did not consult with Brescia or Performance as to whether this was true. However, it required Freedom Foods to agree to indemnify Instone with respect to any legal action regarding the pudding and to set aside $50,000 in an escrow account in anticipation of a legal action brought by Brescia.

Instone paid Freedom Foods $13.87 to $15.24 for a case (24 cans) of pudding, depending on the flavor. Freedom Foods' gross revenue from sales of the pudding, both from its sales to Instone and from its own private label sold over the internet, was $3.487 million over 2005 and 2006, with $2.8 million of that amount earned in 2005. However, the cost to produce the goods was over $3.3 million, and there were additional fixed costs. Freedom Foods suffered sizeable losses in each year and never made a profit. According to Angelin, the profit margins were very low and thus the product could only be profitable if sold in very large volumes.

Instone sold the pudding to retailers such as GNC for approximately $22 or $23 per case. Instone's gross revenue from sales of the pudding to GNC, Vitamin Shoppe and other retailers was approximately $5 million in 2005 and 2006 combined. Most of these sales were in 2005, because Instone began experiencing financial difficulties in 2006. Because of its lack of capital, Instone was unable to put 50 percent down on its orders to Freedom Foods, as the deal required, and also had to stop marketing its products.

The Lawsuit

After a dispute at a 2004 trade show at which Brescia publicly accused Angelin and Freedom Foods of stealing his pudding formula, Angelin and Freedom Foods sued Brescia for trade libel and other claims. In response, Brescia filed a cross-complaint against Angelin and Freedom Foods, adding as cross-defendants Scinto and Instone. The cross-complaint alleged causes of action for: (1) misappropriation of trade secrets (California Uniform Trade Secrets Act (CUTSA), Civ. Code, § 3426 et seq.), (2) breach of express contract, (3) breach of implied contract, (4) intentional interference with prospective advantage, and (5) breach of confidence. Brescia later amended his cross-complaint to add Sylvester Stallone, Chairman of Instone's Board, and John Arnold, its Chief Executive Officer, as cross-defendants on the first cause of action.

Ruling on a demurrer filed by Stallone and Arnold (but not joined by the other cross-defendants), the trial court dismissed Brescia's first cause of action for misappropriation of trade secrets on the ground that he failed to identify his alleged trade secrets with reasonable particularity as required by Code of Civil Procedure section 2019.210 (section 2019.210). (*Brescia*, *supra*, 172 Cal.App.4th at pp. 139-142.) Stallone and Arnold were thus dismissed from the case entirely. The remaining cross-defendants subsequently brought a motion for judgment on the pleadings as to all the causes of action. On January 9, 2008, the trial court granted their motion as to the cause of action for misappropriation of trade secrets for the same reason specified in ruling on Stallone and Arnold's demurrer. The court also dismissed the cause of action for intentional interference with prospective advantage. However, the court denied the cross-defendants' motion for judgment on the pleadings on the claims for breach of express contract, breach of implied-in-fact contract, and breach of confidence.

Brescia appealed the dismissal of his claim for misappropriation of trade secrets against Stallone and Arnold. While the appeal was pending, the trial court (a different judge than the one who tried the case) considered but ultimately did not act on Brescia's request to postpone the trial on the remaining causes of action against Angelin, Freedom Foods, Scinto, and Instone, despite Brescia's argument that if the appellate court reversed the trial court's ruling on the misappropriation of trade secrets claim, that claim would need to be tried as to all the cross-defendants. After the trial on the other causes of action was completed, this court reversed the trial court's ruling and held that Brescia had identified his alleged trade secrets with reasonable particularity and reinstated the misappropriation claim as to Sylvester and Arnold. (*Brescia v. Angelin, supra,* 172 Cal.App.4th 133.)

Trial Verdict and Judgment

After a five-day trial, the case was submitted to the jury with directions to return a special verdict. The special verdict form asked whether Brescia entered into an express contract with Instone. The jury found that he did, and found that Instone had breached its agreement with Brescia. The jury determined that Brescia's damages for breach of the express contract were $4.9 million.

Although Brescia's counsel had also argued that Instone had breached its obligations under its separate agreement with Performance, and that Brescia was a third-party beneficiary of that agreement, the jury was not asked to decide whether Instone had breached the contract between Performance and Instone.

The jury also concluded that Brescia had entered an implied-in-fact contract with Instone, and that Instone had breached that agreement as well, causing damages in the amount of $4.9 million. In addition, the jury found Instone liable on the breach of confidence claim resulting in damages of $4.9 million. Finally, the jury found Brescia not liable on Angelin's libel claim against him.

Instone filed motions for judgment notwithstanding the verdict as well as motions for a new trial, all of which the trial court denied. The court thus entered judgment in favor of Brescia on his cross-claims for breach of express contract, breach of implied-in-fact contract, and breach of confidence. Of the cross-defendants, only Instone appeals from that judgment.

Pursuant to the trial court's earlier order on the cross-defendants' motion for judgment on the pleadings, the court also entered judgment in favor of cross-defendants Angelin, Instone, Freedom Foods, and Scinto on Brescia's cause of action for misappropriation of trade secrets. Brescia appeals that portion of the judgment as to Instone.

DISCUSSION

I. Instone's Appeal

Instone appeals from the jury verdict as well as from the denial of its motions for judgment notwithstanding the verdict and motions for a new trial. In reviewing a challenge to a jury verdict, we apply the deferential substantial evidence standard of review, resolving all conflicts in the evidence in favor of the prevailing party and drawing all reasonable inferences in a manner that upholds the verdict. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.)

Similarly, "'[a] motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.' [Citations.] On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citations.] If there is, we must affirm the denial of the motion. [Citations.] If the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions, however, our review is de novo. [Citation.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.)

A trial court's denial of a motion for a new trial may be disturbed only for abuse of discretion. (*Hartt v. County of Los Angeles* (2011) 197 Cal.App.4th 1391, 1409.) We review the entire record, including the evidence, so as to make an independent determination as to whether a prejudicial error was committed. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160.)

A. Breach of Express Contract

Instone argues that it cannot be liable for breaching the non-disclosure and confidentiality agreements it entered into with Brescia because no evidence was presented that Instone breached any provision of those agreements. We agree.

As quoted, above, in our summary of the evidence, the agreements contemplated that Brescia would "communicate certain proprietary technical information to [Instone] for the purpose of inducing [Instone] to sell, distribute, manufacture and market" Brescia's pudding, and that, "in receiving Proprietary Information from Brescia," Instone would neither use nor disclose any of the proprietary information provided to it by Brescia without his consent. Although the agreements contemplated that Brescia would provide proprietary information to Instone regarding his pudding, Brescia did not do so, and on appeal concedes as much. Rather, he provided a sample of his pudding, not information regarding the ingredients or the formula.

As Instone correctly argues, even if it sold a pudding manufactured by Freedom Foods that ultimately utilized Brescia's formula, it never used or disclosed proprietary information provided to it by Brescia and thus did not violate the express provisions of Instone's non-disclosure and confidentiality agreements with Brescia. In short, the agreements concern Instone's obligations to keep confidential and to not use any confidential information *provided by Brescia* in the course of the parties' exploring a business arrangement. Selling Freedom Foods' pudding based on Brescia's formula does not constitute a breach of any provision of these agreements. Therefore, the evidence at trial did not support a finding that Instone breached its express agreements with Brescia.

We note that the agreement between Instone and *Performance* has a somewhat broader scope, in that it provides that Instone "shall not, whether knowingly or otherwise, use or disclose, *or induce or assist in the use* or disclosure of, the Confidential Information, or anything related thereto, without [Performance's] prior express written consent." (Italics added.) Moreover, the term "Confidential Information" was to be "broadly defined" and included not only information disclosed by Performance to Instone, but also "information developed or learned by [Instone] in connection with the Formula . . . , (iii) all information that has or could have commercial value or other utility to [Performance] in connection with the Formula . . . , and (iv) all information of which the unauthorized disclosure could be detrimental to the interests of [Performance] . . . , whether or not such information is identified as confidential information by [Performance]."

Brescia's attorney argued that Brescia was a third party beneficiary of the Instone-Performance agreement. That is, he asserted, in substance, that by agreeing to sell Freedom Foods' pudding based on Brescia's formula, Instone "induce[d] or assist[ed] in the use" of such information to both Performance's and

Brescia's detriment.[3] However, the jury received no jury instructions on this theory, and the special verdict form submitted to the jury asked only whether Instone breached its contract *with Brescia*. It made no mention of the contract between Instone and Performance. Moreover, Brescia did not object to the omission of any reference to Instone's agreement with Performance in the special verdict form. In the absence of a finding by the jury in its special verdict, supported by appropriate jury instructions, that Instone breached its agreement with Performance and that Brescia was a third party beneficiary of that contract, we cannot imply such a finding. (*Vanderpol v. Starr* (2011) 194 Cal.App.4th 385, 396 [where special verdict form did not ask for particular finding a reviewing court will not infer such a finding to support the verdict]; *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678 [while a general verdict implies findings on all issues in one party's favor, a special verdict "requires the jury to resolve all of the controverted issues in the case"].) Therefore, we conclude that the jury's verdict that Instone was liable on the first cause of action for breach of an express contract was not supported by substantial evidence.

B. Breach of Implied-in-Fact Contract

The jury also found that Instone entered into and subsequently breached an implied-in-fact contract with Brescia, causing him damages in the amount of $4.9 million. Instone asserts that the fact that its confidentiality agreement with Brescia contained an integration clause precluded a finding of an implied contract between Instone and Brescia, and, in any event, there is no evidence of such an agreement

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[3] Brescia undoubtedly was the third-party beneficiary of this agreement between Instone and Performance.

between them. We disagree that the express agreement between the parties necessarily precludes a finding that an implied contract existed, but agree with Instone that substantial evidence did not support the jury's finding that Instone entered an implied agreement to make royalty payments to Brescia in the event the company sold pudding based on his formula.

"The existence and terms of an implied contract are manifested by conduct. [Citation.] . . . Accordingly, a contract implied in fact 'consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words.' [Citation.] [¶] Even when a written contract exists, '"'[e]vidence derived from experience and practice can now trigger the incorporation of additional, implied terms.'"' [Citation.] 'Implied contractual terms "ordinarily stand on equal footing with express terms"' [citation], provided that, 'as a general matter, implied terms should never be read to vary express terms' [citation]." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1178-1179.)

Instone is correct that the jury was not free to imply the existence of a contract that would contradict the terms of the express confidentiality and nondisclosure agreements between Instone and Brescia. However, those express agreements did not touch upon the subject of compensation to Brescia in the event Instone sold pudding based on his formula. Rather, as discussed above, they concerned only Instone's obligations to keep confidential and to not use any proprietary information provided by Brescia in the course of the parties' exploration of a business opportunity. Thus, although Brescia's express confidentiality agreement states that it is fully integrated with respect to the subject matter therein, that subject matter does not encompass an agreement to pay Brescia if Instone sold the pudding he created. Therefore, the existence of the written agreements does not bar a finding that an implied-in-fact agreement existed between Instone and Brescia.

The next question is whether substantial evidence supported the jury's finding that an implied contract existed obligating Instone to pay Brescia royalties in the event that it sold a pudding based on his formula. "A cause of action for breach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor's conduct." (*Yari v. Producers Guild of America, Inc.* (2008) 161 Cal.App.4th 172, 182.) "In interpreting the contract, we must 'give effect to the mutual intention of the parties as it existed' at the time the contract was executed. (Civ. Code, § 1636.) . . . To determine the reasonable expectation of the parties we examine 'the totality of the circumstances. . . . Agreement may be "'shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances.'"' [Citation.]" (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 831-832; see Civ. Code, § 1647.)

Brescia fails to identify any act or conduct by Brescia or anyone at Instone that would support the conclusion that Instone entered into an implied agreement with Brescia to pay him reasonable royalties in the event that Instone sold pudding based on his formula. The only evidence in the record with respect to any meeting of the minds between Brescia and Instone is limited to the terms set forth in Brescia's express confidentiality and nondisclosure agreements whereby Brescia agreed to disclose confidential information with respect to his pudding in return for Instone's agreement to keep the information confidential and to refrain from using the information Brescia provided to Instone. The jury's finding of a further implied agreement to pay Brescia for use of his formula is thus not supported by any evidence, and we reverse the judgment finding Instone liable for breach of an implied-in-fact agreement.

C. Breach of Confidence Claim

On appeal, Instone contends that Brescia's claim for breach of confidence is preempted by the California Uniform Trade Secrets Act (CUTSA; Civ. Code, §§ 3426, et seq.). In its motion for a new trial and/or a judgment in Instone's favor notwithstanding the verdict, Instone did not raise this issue. Instone raised the preemption argument only in its pretrial motion for judgment on the pleadings; therefore, we review whether the trial court correctly denied that motion for judgment on the pleadings. We review that decision under the same de novo standard of review we apply to a decision to sustain or overrule a demurrer. (*McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1144.)

"The protection which is extended to trade secrets fundamentally rests upon the theory that they are improperly acquired by a defendant, usually through theft or a breach of confidence." (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 50.) Thus, it has been held that the CUTSA "preempts common law claims that are 'based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.' [Citation.] Depending on the particular facts pleaded, the statute can operate to preempt . . . specific common claims [including] breach of confidence. . . ." (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 958-959; see *Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 236 (*Silvaco*) [reaffirming that "CUTSA provides the exclusive civil remedy for conduct falling within its terms, so as to supersede other civil remedies 'based upon misappropriation of a trade secret.'"], disapproved on other grounds by *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310; Civ. Code, § 3426.7, subd. (b).)

In comparing the facts pleaded in the operative cross-complaint with respect to the two causes of action for misappropriation of trade secrets and breach of confidence, we conclude that the claims are indeed based on the same nucleus of facts. The first cause of action for statutory misappropriation of trade secrets alleges that Instone gained access to Brescia's trade secret information by establishing a relationship with Instone to explore Brescia's formula, product and concept, and entered into agreements with Brescia regarding his pudding property and concept that broadly defined confidential information and trade secrets to be protected. Subsequently, Instone knowingly used and made disclosures of Brescia's trade secrets when it knew that other cross-defendants had misappropriated or used improper means to obtain them.

Similarly, the complaint alleges that Instone and other cross-defendants breached their duty of confidence as follows: "Brescia disclosed or allowed to be disclosed valuable confidential information in confidence to all Cross-Defendants with the clear understanding that this information was to be kept confidential. [¶] Cross-Defendants gained access to this information by virtue of their trusted positions. [¶] All Cross-Defendants entered contracts requiring that they not disclose **Brescia's** confidential information. [¶] In spite of the confidential agreements signed by Cross-Defendants they breached their duty of confidence by proceeding to use and assist others in using and exploiting **Brescia's** formula, product and concept."

Both causes of action, as pleaded, are based on the core allegation that Instone promised not to disclose or use confidential information regarding Brescia's pudding concept, and that Instone subsequently used and assisted others in using and exploiting the pudding concept and formula. The breach of confidence claim was therefore preempted by the CUTSA and should not have been tried.

II. Brescia's Appeal

For his part, Brescia appeals the trial court's pretrial decision dismissing Brescia's claim for misappropriation of trade secrets. The trial court dismissed the cause of action for misappropriation of trade secrets as to Instone for the same reason that it granted Stallone and Arnold's demurrer as to that claim: the court concluded that Brescia failed to identify his alleged trade secrets with reasonable particularity as required by section 2019.210. However, we reversed that decision as to Stallone and Arnold in our 2009 decision. (*Brescia*, *supra*, 172 Cal.App.4th at pp. 143-153.) As Instone concedes, our decision that Brescia complied with section 2019.210 is the law of the case and likewise compels the reversal of the trial court's decision to dismiss the trade secret claim as to Instone. We therefore remand that claim to the trial court as well.

We reject Instone's assertion that we should exercise our discretion and dismiss the trade secret claim based on the Court of Appeal's decision in *Silvaco*. (*Silvaco, supra,* 184 Cal.App.4th 210.) In that case, the court determined that the defendant Intel Corporation was not liable for misappropriating the plaintiff's trade secrets where Intel merely purchased and ran software from a competitor of the plaintiff that had misappropriated and incorporated the plaintiff's trade secrets in the software. (*Silvaco, supra*, 184 Cal.App.4th at pp. 215-216, 222-226.) Instone contends that just as Intel was found not to have "used" the trade secret merely by executing the software incorporating the misappropriated trade secret, Instone could not have "used" Brescia's trade secrets because it never received the formula and was only a reseller of the pudding. This argument was never addressed to the trial court and we decline to consider it. Of course, nothing precludes Instone from raising the issue in the trial court.

DISPOSITION

We reverse the judgment in favor of Brescia, dismiss his three causes of action for breach of express contract, breach of implied-in-fact agreement, and breach of the duty of confidence, and vacate the $4.9 million damages award. We also reverse the trial court's ruling dismissing Brescia's first cause of action for misappropriation of trade secrets as to Instone and remand the case to the trial court for trial (or other appropriate proceedings) on liability and damages on that claim. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.