Filed 5/14/18 Abt v. The Marketing Store Worldwide CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DIETER ABT et al.,

Plaintiffs and Appellants,

v.

THE MARKETING STORE WORLDWIDE, LLC, et al.,

Defendants and Respondents.

B276365

(Los Angeles County Super. Ct. No. BC552072)

APPEAL from judgments of the Superior Court of Los Angeles County, Ruth Ann Kwan, Judge. Affirmed in part and reversed in part with directions.

Law Offices of Jonathan P. Chodos and Jonathan P. Chodos for Plaintiffs and Appellants.

Reed Smith, Terry B. Bates, and Kasey J. Curtis for Defendants and Respondents The Marketing Store Worldwide, LLC, and Mark Landolt.

Blady Weinreb Law Group and Marnin Weinreb for Defendant and Respondent Vimby, LLC.

Musick, Peeler & Garrett, Daniel J. Woods, Adam Michael Weg; Novack and Macey, Donald A. Tarkington, and Andrew P. Shelby for Defendant and Respondent Peter Sterling.

Yu | Mohandesi, B. Ben Mohandesi, Jordan S. Yu, and Sheri Guerami for Defendant and Respondent Patrick Lerandeau.

Plaintiffs Dieter Abt (Abt) and Meteor Worldwide, LLC (Meteor) appeal from judgments in favor of defendants: (1) The Marketing Store Worldwide, LLC, a Delaware limited liability company (TMS), (2) Mark Landolt, (3) Vimby, LLC, (4) Peter Sterling, and (5) Patrick Lerandeau.[1] The judgments were entered after the trial court sustained the defendants' demurrers to plaintiffs' fourth amended complaint without leave to amend.

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[1] After oral argument, counsel for TMS and Landolt filed, with our permission, a letter stating that counsel had obtained a certificate of status from the Secretary of State, dated February 22, 2018, indicating that Meteor's corporate powers, rights, and privileges had been suspended by the Franchise Tax Board since January 4, 2016. Counsel stated that the suspension "potentially impacts" this court's "jurisdiction to entertain Meteor's appeal until Meteor's corporate powers are reinstated." We invited Meteor to file a response, which it did, along with a certificate of revivor dated March 20, 2018, issued by the Franchise Tax Board, stating that Meteor was "relieved of suspension or forfeiture and is now in good standing with the Franchise Tax Board." Based on the certificate of revivor, of which we take judicial notice, we have jurisdiction to entertain Meteor's appeal. (See *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 373-374; *Benton v. County of Napa* (1991) 226 Cal.App.3d 1485, 1490-1491.)

We affirm the judgment in favor of Sterling. As to TMS, Landolt, Vimby, and Lerandeau, we reverse the judgments and direct the court to enter an order sustaining their demurrers as to the fifth, sixth, seventh, tenth, and eleventh causes of action, and overruling their demurrers to the twelfth cause of action.

FACTUAL AND PROCEDURAL SUMMARY[2]

A. Allegations Supporting First through Fourth Causes of Action for Fraud and Related Claims

Plaintiffs' first through fourth causes of action allege fraud, promissory fraud, fraudulent concealment, and negligent misrepresentation against McDonald's Corporation, McDonald's USA, LLC (collectively McDonalds),[3] Brad Hunter, Leland Edmondson, and Peter Sterling. The court sustained Sterling's demurrer to these causes of action and overruled the other demurrers. As to the first four causes of action, therefore, we are concerned with the sufficiency of the allegations against Sterling only.

Meteor is a business that develops computer programs and applications related to marketing and advertising. Abt is a principal and manager of Meteor. We will sometimes refer to Abt and Meteor collectively as the plaintiffs.

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[2] In accordance with our standard of review, our factual summary is based on the properly pleaded allegations of the fourth amended complaint. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

[3] Although the corporate names, McDonald's Corporation and McDonald's USA, LLC, are spelled with an apostrophe, we use "McDonalds," without the apostrophe, to avoid confusion when indicating possession.

Edmondson was the president of CPC Communications (CPC). In 2008, Edmondson was working with Hunter, an officer of McDonalds, on a project to develop a television channel—the MCD Channel—that would display content on television screens in McDonalds restaurants. Plaintiffs approached Hunter about using Meteor's technology for the MCD Channel. Hunter told plaintiffs that "their involvement would have to be through Edmondson and his company, CPC," and that McDonalds would not "deal with Meteor separately."

Beginning in July 2009, plaintiffs began making investments in the MCD Channel project based on representations by Hunter and Edmondson regarding the status of the project's development, the strength of McDonalds's commitment to the project, the schedule for its testing and deployment, the number of stores in which the channel would be used, the cost of the channel, and revenue to be realized from the channel. Hunter also represented that McDonalds would use Meteor's technology for the MCD Channel.

Hunter and Edmondson made these representations and concealed material facts with the intent to induce plaintiffs to invest in the MCD Channel. The representations were false and Hunter and Edmondson knew or should have known they were false. Plaintiffs relied on the false representations and invested $2 million between July 2009 and May 2010 to fund testing of the channel. At some point prior to May 2013, the MCD Channel was "rolled out to approximately 720 stores in Southern California."

Between 2010 and 2013, Hunter and Edmondson continued to make knowingly false representations and conceal material facts concerning the development of the MCD Channel and its anticipated revenue with the intent to induce plaintiffs to invest further funds, and plaintiffs relied upon the misrepresentations in making further investments. As a result of the fraudulent misrepresentations and concealment, plaintiffs suffered at least $9 million in damages.

In May 2013, Abt met with Sterling, a senior executive with McDonalds who is responsible for McDonalds's marketing activities in North America. "Sterling affirmed that [McDonalds] was fully committed to the MCD Channel, apologized for [McDonalds's] past failures to follow through and perform as represented, and stated that he would become personally involved in the project." Sterling "expressly re-confirmed Hunter's prior representations" that McDonalds would use Meteor as an exclusive provider for the MCD Channel. Sterling also told Abt, " 'I want to apologize to you Dieter, on behalf of [McDonalds], we certainly have culpability for what has gone wrong in the channel.' " Sterling added, " 'I am glad you got rid of Lee Edmondson, and you will never hear from Brad Hunter again, because from now on, you will only deal with me.' "

Abt explained to Sterling that he got involved in the project " 'because of what was promised to [him] in business for Meteor, and expressed frustration that . . . Meteor had not been brought in.' " Sterling told Abt, " 'That will change as of now. Make a date, come to Chicago so we can meet and resolve how to proceed.' "

In June 2013, Abt and Lerandeau, Meteor's Chief Technology Officer at the time, met with Sterling "to discuss how Meteor would be integrated into the MCD Channel and other [McDonalds] initiatives. In reliance on Sterling's direct representations, [Abt] and Meteor continued to provide an additional $570,000 in funding to keep the MCD Channel operational."

Hunter and Sterling "continued to make further false representations to Plaintiffs about [McDonalds's] full support of the MCD Channel and its agreement to fully cooperate in an implementation of the MCD Channel consistent with the calendars and business plans," which Hunter had approved, and McDonalds's "willingness to exclusively deal with Meteor." "Sterling was fully aware of Hunter's activities and supported and endorsed said activities."

Defendants knew or should have known that their representations to plaintiffs were false, and they made them to induce plaintiffs to invest their funds in the MCD Channel. Plaintiffs relied on defendants' false representations in deciding to provide funds for the MCD Channel, and were damaged as a result.

In ruling on the demurrers, the trial court ruled that plaintiffs adequately alleged causes of action for fraud against Hunter, McDonalds, and Edmondson, but not against Sterling.

B. Allegations Supporting Fifth through Seventh Causes of Action for Fraud and Related Claims

The fifth through seventh causes of action for fraud, promissory fraud, and fraudulent concealment are alleged against McDonalds, TMS, Landolt (the president of TMS), Sterling, Vimby, and Lerandeau. The court sustained the demurrers by each defendant as to those causes of action.

In 2008, Meteor and Lerandeau entered into a nondisclosure agreement with Meteor in which he agreed not to disclose, sell, or use any trade secrets or proprietary information (as defined in the agreement) except as required for Meteor's business. According to the agreement, Lerandeau remained bound by the confidentiality provision during and after his employment with Meteor.

In 2011 and 2012, plaintiffs and another software company developed a proprietary computer program called IMS, and customized the program for the MCD Channel. Lerandeau was involved in the development of the software and had "full detailed knowledge of all of Meteor's mobile technology and mobile applications." Plaintiffs allege that such information constitutes a trade secret under the Uniform Trade Secrets Act (UTSA)

(Civ. Code, § 3246 et seq.) By the end of 2012, IMS was ready to be implemented.

In late 2012, Sterling initiated efforts to get Landolt and TMS involved "in making the MCD Channel a success." In January 2013, Lerandeau met with Landolt, among others, and made a presentation regarding the IMS technology. According to the fourth amended complaint, "[i]t was made clear at the meeting that Meteor would be the distributor for the IMS system."

In early 2013, Abt and Landolt discussed forming a joint venture to continue development and implementation of the MCD Channel. Landolt, "with Sterling's express approval," proposed that CPC be replaced with a new company, referred to as Newco, in which TMS and existing investors would participate. "These discussions resulted in a commitment from TMS and Landolt to pursue a joint venture." In late May 2013, Sterling and Landolt "presented the plan" to a group of McDonalds franchisees.

In connection with these discussions, TMS executed a nondisclosure agreement in March 2013 under which TMS agreed with CPC to hold CPC's "Confidential Information" "in strict confidence" and to use such information only for certain purposes set forth in the agreement. "Confidential Information" is defined as "confidential ideas, discoveries, designs, technology and/or information." The agreement does not mention plaintiffs' IMS program.

In June 2013, Abt and Lerandeau met with Sterling "to discuss how Meteor would be integrated into the MCD Channel and other [McDonalds] initiatives. In reliance on Sterling's and Landolt's direct representations, [plaintiffs] continued to provide an additional $570,000 in funding to keep the MCD Channel operational, and to provide an opportunity to complete the new arrangement with TMS that had been agreed upon in principle."

Between April 2013 and September 2013, while discussions were being held concerning the formation of a joint venture, Sterling, Landolt, TMS, and Vimby conspired with Lerandeau to have Lerandeau provide them with all of Meteor's technology, including the IMS system and Meteor's application and SMS technology, and Lerandeau agreed to "hand over to them all of Plaintiffs' information, trade secrets and technology" in violation of his duties to plaintiffs. This information included "all of [the] software and knowledge associated with the full implementation of an SMS program for the MCD Channel."

In September 2013, plaintiffs gave their consent to let Lerandeau work for TMS based on Lerandeau's false representations to plaintiffs that "he was, and would be continuing to work on Plaintiffs' behalf." Plaintiffs would not have given such consent if they had known that Lerandeau would "betray" them and "secretly provide" plaintiffs' assets, information, and technology to the other defendants.

Lerandeau's disclosure of plaintiffs' information to defendants violated his obligations under his nondisclosure agreement with Meteor. Vimby, TMS, and Landolt had been informed of Lerandeau's nondisclosure obligations to plaintiffs and were aware that the information Lerandeau provided to them constituted trade secrets. Their use of that information, plaintiffs allege, violated the UTSA.

After TMS and Vimby acquired plaintiffs' trade secrets from Lerandeau, they persuaded Sterling that McDonalds should deal with them and cut plaintiffs out of any deal with McDonalds. Sterling agreed, but wanted TMS to obtain from plaintiffs a release of claims that plaintiffs might have against Sterling and McDonalds. Plaintiffs refused to execute such a release.

During 2013 and 2014, Sterling deliberately misled plaintiffs as to the willingness of McDonalds to cooperate in the formation of a joint venture between plaintiffs and TMS, and induced plaintiffs to continue to fund the costs of operating the MCD Channel. TMS and Landolt also deceived plaintiffs about their intentions about forming a joint venture with plaintiffs. They were merely "pretending to do so in an effort to secure from Plaintiffs a full release of [McDonalds], Hunter and Sterling of liability for their conduct . . . and to steal for themselves[] all of the technology and development of the MCD Channel."

By late February 2014, TMS and McDonalds had decided they would no longer pursue a deal with plaintiffs, and Vimby was positioned to "essentially take the place of Plaintiffs and CPC as providers and operators of the MCD Channel." In July 2015, TMS, Vimby, and McDonalds "jointly undertook to launch an MCD Channel that is essentially identical to that developed by Plaintiffs."

C. Allegations Supporting Tenth and Eleventh Causes of Action for Interference with Prospective Economic Advantage

The tenth and eleventh causes of action for intentional and negligent interference with prospective economic advantage are alleged against TMS, Landolt, Vimby, and Lerandeau. The court sustained the demurrers of each defendant as to those causes of action.

Plaintiffs contend that the alleged facts, summarized above, "demonstrate that [they] had an existing economic relationship with [McDonalds], with the probability of future economic benefit to [them]." The defendants had knowledge of that relationship and negligently or intentionally acted and conspired to "undermine and disrupt that relationship, and cause[d] [McDonalds] to stop dealing with Plaintiffs, and to instead deal with [defendants]." The defendants did so by (1) "stealing" or "improperly taking all of Plaintiffs' assets and private information, . . . including but not limited to all of Meteor's technology, expertise, data bases, connections, and contracts," (2) deceiving plaintiffs as to the defendants' true intentions and causing plaintiffs to provide further financial support to the MCD Channel, and (3) attempting to deceive plaintiffs "into providing complete releases by representing that if [plaintiffs] provided the releases, [defendants] would enter into a joint venture with Plaintiffs, when in fact they had no intention of doing so."

In addition, Vimby conspired with Lerandeau, TMS, and Landolt to use what it knew was plaintiffs' confidential information and trade secrets in order to persuade Sterling and McDonalds "not to cooperate in the formation of a joint venture between Plaintiffs and TMS." This led McDonalds to enter into a new relationship with TMS, Landolt, Vimby, and Lerandeau. Plaintiffs suffered harm as a result of the alleged interference.

D. Allegations Supporting the Twelfth Cause of Action for Violation of the UTSA

In support of their twelfth cause of action against Vimby, TMS, Landolt, and Lerandeau for violation of the UTSA, plaintiffs incorporate the allegations supporting the fifth through seventh causes of action, including the allegations regarding the Lerandeau's nondisclosure obligations and the IMS technology. They further allege that defendants knew or should have known that the information that Lerandeau disclosed to them were trade secrets and that Lerandeau improperly disclosed such information in violation of his nondisclosure agreement. The defendants acquired and used, and thereby misappropriated, such trade secrets, which caused plaintiffs harm.

DISCUSSION

I. Standard of Review

On appeal from a judgment after the court sustains a general demurrer without leave to amend, "we determine whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*) When the demurrer "is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Ibid.*)

II. First through Fourth Causes of Action Against Sterling

A cause of action for fraud is stated by pleading that the defendant made a misrepresentation (or concealed a material fact when there was a duty to disclose the fact) with knowledge of the statement's falsity and the intent to defraud, coupled with the plaintiff's justifiable reliance and resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; *Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1186.) Generally, a misrepresentation to be actionable "must pertain to past or existing material facts. [Citation.] Statements or predictions regarding future events are deemed to be mere opinions which are not actionable." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469.)

Promissory fraud is based on the recognition that a "promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 638.)

"[F]raud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus " 'the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.' " [Citation.] [¶] This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." ' " (*Lazar v. Superior Court*, *supra*, 12 Cal.4th at p. 645.) The particularity requirement applies to each element of fraud, which must be pleaded "factually and specifically." (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 156.)

It appears from the fourth amended complaint that Sterling spoke to plaintiffs for the first time in May 2013. At that time he informed Abt that McDonalds "was fully committed to the MCD Channel, apologized for [McDonalds's] past failure to follow through and perform as represented, and stated that he would become personally involved in the project." Sterling also apologized " 'on behalf of [McDonalds]' " and admitted that " 'we certainly have culpability for what has gone wrong in the channel.' "

The statement that McDonalds "was fully committed to the MCD Channel" is too vague to satisfy the requirement of particularity for fraud. (See *Lim v. The.TV Corp. Internat.* (2002) 99 Cal.App.4th 684, 694.) Sterling did not say what, specifically, McDonalds was committed to do with respect to the MCD Channel. There is no allegation that McDonalds had any contract concerning the MCD Channel or that it had made any financial investment in the MCD Channel or that it planned to do so; the nature and scope of its commitment is unspecified and speculative. The reference to "commitment," therefore, could not have been reasonably understood as a promise to commit substantial resources to the project going forward. In the context in which it was made, the statement appears to indicate, at most, McDonalds's general approval and (nonfinancial) support of the MCD Channel. The statement lacks the specificity required for fraud and could not reasonably have induced plaintiffs' reliance. (See *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 216 [promises too vague to be enforced will not support a fraud claim].)

Even if Sterling's statements concerning McDonalds's commitment to the MCD Channel or its willingness to approve Meteor as an exclusive provider constitute actionable promises by Sterling, plaintiffs failed to allege with the requisite particularity that Sterling did not believe that McDonalds did not have the stated commitment or willingness at the time Sterling made such statements. General allegations, such as those made here, that the defendants had no intention of performing "said representations and fulfilling said promises" are insufficient. (See *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1498 ["each element of a promissory fraud claim must be alleged with particularity"].)

Sterling's apology for McDonalds's "past failure" and his admission of McDonalds's culpability are not allegedly false statements; McDonalds did allegedly "fail" in its dealings with plaintiffs before Sterling got involved. The further statement that Sterling "would become personally involved in the project" and " 'you will only deal with me' " are nonactionable statements about the future, not existing facts. (See *Borba v. Thomas* (1977) 70 Cal.App.3d 144, 152.) Indeed, Sterling continued to be personally involved in the matter. For the same reason, Sterling's statements acknowledging Abt's frustration as to Meteor's lack of involvement and assuring Abt that that " 'will change as of now,' " together with his invitation to " 'come to Chicago so we can meet and resolve how to proceed' " are not actionable misrepresentations.

Plaintiffs also make numerous, less specific allegations such as: "Sterling continued to make further false representations to Plaintiffs about [McDonalds's] full support of the MCD Channel and its agreement to fully cooperate in an implementation of the MCD Channel consistent with the calendars and business plans that had been submitted to and approved repeatedly by Hunter, and [McDonalds's] willingness to exclusively deal with Meteor." These and similar allegations do not satisfy the pleading requirement of particularity.

Plaintiffs contend that Sterling should be liable for fraud under the indirect communication doctrine based upon statements he made to others with the intent that the statements be repeated and acted upon by plaintiffs. (See, e.g., *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1095; *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605.) Plaintiffs point to their allegations that Sterling and Hunter are both senior executives at McDonalds with "authority to speak for" McDonalds, and that "Sterling was communicating his position through Hunter and Landolt, each of whom he knew was repeating those statements." The requirement of pleading fraud with particularity, however, still applies to claims relying on indirect communications. Here, plaintiffs have not specified the particular fraudulent statements Sterling allegedly made to others or that Sterling made such statements with the intent that they be repeated to and relied upon by plaintiffs.

Because plaintiffs have failed to allege any actionable misrepresentations by Sterling during the period covered by the first four causes of action, the court properly sustained Sterling's demurrer to those causes of action.

III. Fifth through Seventh Causes of Action Against All Respondents[4]

Plaintiffs' fifth through seventh causes of action for fraud, promissory fraud, and fraudulent concealment concern events in 2013 and 2014 in which CPC was wound down, the possibility of a new joint venture between plaintiffs and TMS arose, that possibility ended after defendants acquired plaintiffs' trade secrets from Lerandeau and plaintiffs refused to sign a release, and TMS and Vimby took control of and ultimately implemented the MCD Channel. In their opening brief in this appeal, plaintiffs rely on the following allegations to support their fraud claims.

"[I]n 2013 and 2014, . . . [McDonalds] and Sterling deliberately misled Plaintiffs as to their willingness to cooperate in the formation of a [new joint venture] between TMS and Plaintiffs, and specifically induced Plaintiffs to continue to fund operations at the MCD Channel at a cost of no less than $570,000, which Plaintiffs would not have done, but for the false representations of Sterling."

"[W]hen Landolt and TMS acted as alleged hereinabove, they were deceiving Plaintiffs as to their true intentions, and in fact did not intend to form a joint venture with Plaintiffs and the investors, but were instead only pretending to do so in an effort to secure from Plaintiffs a full release of [McDonalds], Hunter and Sterling of liability for their conduct as alleged herein, and to steal

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[4] TMS contends that plaintiffs have forfeited their appeal because their opening brief is, at best, a " 'random and somewhat garbled recital of alleged grievances, without . . . any separate statement of points or classification of claimed errors.' " Plaintiffs' prolix opening brief is not a model of clarity, and TMS's point has some merit. Nevertheless, plaintiffs' brief is not so unintelligible that it results in forfeiture of the appeal.

for themselves, all of the technology and development of the MCD Channel that Plaintiffs and the investors had developed, and to steal the opportunity to own and operate the MCD Channel in the future with Lerandeau and [Vimby] and the other Defendants and without Plaintiffs."

"[A]ll of the above was undertaken in concert with, and with the express knowledge, consent and support of Sterling and other senior management at [McDonalds]."

Plaintiffs do not allege any particular false statements by Lerandeau or Sterling other than those that supported the first four fraud causes of action against Sterling, and the conclusory statement that Sterling "misled" them as to the willingness to cooperate fails to satisfy the requirement of " 'pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." ' " (*Lazar v. Superior Court*, *supra*, 12 Cal.4th at p. 645.) Lerandeau's and Sterling's demurrers as to these causes of action were therefore properly sustained.

The alleged fraudulent representations by Landolt that TMS would agree to form a new joint venture with plaintiffs if plaintiffs signed a release of liability cannot support a fraud claim in this case because plaintiffs were not induced to sign a release.

The fourth amended complaint does not allege that Vimby made any representations to plaintiffs.

Plaintiffs' fraud claims are not saved by their general allegations of a conspiracy among the defendants to commit fraud. The only fraudulent statements made pursuant to the alleged conspiracy are Landolt's statements to induce plaintiffs to sign a release. Because such statements did not induce plaintiffs' reliance and cause them to sign a release—i.e., Landolt did not commit fraud—there is no liability for a conspiracy to commit fraud.[5]

IV. Tenth and Eleventh Causes of Action for Interference with Prospective Economic Advantage Against all Respondents

Plaintiffs' tenth and eleventh causes of action allege intentional and negligent interference with prospective economic advantage against Vimby, TMS, Landolt, and Lerandeau.

To plead and prove a claim for intentional interference with prospective economic advantage, a plaintiff must allege: " ' "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' " (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) The elements of a cause of action for negligent interference with prospective economic advantage are substantially identical, with the exception that the defendant causes a disruption to the plaintiff's prospective economic relationship by the defendant's breach of a duty of care owed to the plaintiff, rather than any intentional act designed to disrupt the

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[5] Defendants assert that plaintiffs lack standing to pursue the fifth through twelfth causes of action because these causes of action must be asserted, if at all, by CPC, not by plaintiffs. Because we reject plaintiffs' arguments as to the merits of the fraud and interference causes of action, we need not address the standing arguments as to those claims. We do address the standing argument as to the twelfth cause of action in part V below.

economic relationship. (*Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1078.)

Vimby, TMS, Landolt, and Lerandeau contend that plaintiffs have failed to allege an economic relationship between the plaintiffs and McDonalds that would support an interference cause of action. We agree.

To preclude lawsuits based on "overly speculative expectancies," the plaintiff asserting a tortious interference claim must establish that the alleged prospective business relationship was "reasonably certain to occur." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 522 ["it must be reasonably probable that the prospective economic advantage would have been realized"].)

Here, plaintiffs alleged that the business relationship that the defendants interfered with was with McDonalds, and contend on appeal that they alleged "a long term and multi-million dollar economic relationship that was in the process of being reformed." There are two problems with this argument.

First, plaintiffs alleged that McDonalds required that their involvement with the MCD Channel project would need to occur through CPC; there would thus be no direct financial relationship between plaintiffs and McDonalds. Although plaintiffs refer vaguely to making investments in and providing funding for the MCD Channel, the investments and funding apparently consisted of loans to, or equity investments in, CPC; plaintiffs thus had an ongoing business relationship with CPC, not McDonalds. After CPC failed, plaintiffs alleged that the parties discussed a possible joint venture between plaintiffs and TMS. There is no allegation, however, that McDonalds was going to be a party in that joint venture.

Second, even if the complaint alleges an indirect relationship with McDonalds that would satisfy the economic relationship requirement, plaintiffs allege that McDonalds never intended to perform its promises of support for the MCD Channel or of dealing exclusively with Meteor. The possibility of a business relationship with McDonalds, if such a possibility ever existed, was thus thwarted by McDonalds itself, not because of any actions by TMS, Landolt, Vimby, or Lerandeau. To the extent plaintiffs' interference claims are based on interference with the prospective joint venture with TMS, the claim is similarly defeated by the allegations that defendants "had no intention" of entering into the joint venture with plaintiffs; they were merely discussing with plaintiffs the prospect of a joint venture as a ruse to induce plaintiffs to execute releases of their claims against McDonalds. Because the prospective business partners never intended to consummate any business deal with plaintiffs, there was no reasonable probability that such a deal would have been realized.

Because the fourth amended complaint fails to allege any facts showing a reasonable probability of a economic relationship with McDonalds or with TMS, plaintiffs have failed to state a cause of action for intentional or negligent interference with such a relationship.

V. Twelfth Cause of Action for Violation of UTSA Against TMS, Landolt, Vimby, and Lerandeau

Plaintiffs twelfth cause of action alleges that Vimby, TMS, Landolt, and Lerandeau violated the UTSA. (Civ. Code, § 3426 et seq.)

To plead a claim for misappropriation of trade secrets, the plaintiff must allege: " '(1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff.' " (*CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc.* (2008) 160 Cal.App.4th 288, 297.) A trade secret is statutorily defined as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d).) More succinctly, a trade secret "is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret." (*DVD Copy Control Assn., Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251).

"Whether information is a trade secret is ordinarily a question of fact." (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1537.) At the pleading stage, the plaintiff "does not have to spell out the details of the trade secret to avoid a demurrer to a complaint," but must "allege the ultimate facts showing the existence of a trade secret or other confidential data to state such a cause of action." (*Diodes, Inc. v. Franzen* (1968) 260 Cal.App.2d 244, 252 (*Diodes*).)

Here, plaintiffs described the alleged trade secrets as Meteor's IMS program and other proprietary technology. Plaintiffs alleged that Meteor had "customiz[ed]" the IMS program "to the specific needs of the MCD Channel." The program allegedly provides "a fully automated operation and management software that would greatly reduce the cost of operating the MCD Channel, and also allow it to be easily scaled up to thousands of locations with a high level of customization for each location, along with sophisticated scheduling and tracking of all of the on-air programming and the accounting that would be needed to track, by screen, advertising in thousands of locations around the country. IMS also used greatly simplified equipment that was physically much smaller than the equipment [McDonalds] had insisted on. Furthermore, the IMS system would allow simultaneous management of the menu screens, the media screens, the delivery of online games, SMS interactivity and data." The "software was proprietary, and no third parties had access to the implementation of IMS . . . , or were familiar with its capabilities."

These facts describe information—in particular, the IMS software—that would give those holding that information a competitive advantage in any bid to provide software for the MCD Channel. That advantage is valuable because the information is unknown to others. (See *Cal Francisco Inv. Corp. v. Vrionis* (1971) 14 Cal.App.3d 318, 322 [protected trade secrets are often characterized by "the need for their continued use by the former employer in order to maintain a competitive advantage over others"].) It thus satisfies the first prong of the test for identifying a trade secret at the pleading stage.

Citing *Diodes*, *supra*, 260 Cal.App.2d 244, Vimby, TMS, Landolt, and Lerandeau contend that plaintiffs failed to "describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies." (See *id.* at p. 253.) Although plaintiff must satisfy this standard before embarking on discovery concerning the trade secret claim, it is not a pleading requirement. As the court in *Brescia v. Angelin* (2009) 172 Cal.App.4th 133 explained, the Legislature codified this requirement not in the UTSA, but in the Civil Discovery Act (Code Civ. Proc., § 2019.210 [former Code Civ. Proc., § 2019, subd. (d]) which requires "the party alleging the misappropriation [of a trade secret to] identify the trade secret with reasonable particularity" "*before commencing* *discovery*." (Code Civ. Proc., § 2019.210, italics added; see also *Brescia v. Angelin*, *supra*, 172 Cal.App.4th at p. 149 [the statute "imposes a precondition to discovery"]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 8:60, p. 8B-13.) Thus, although a trade secret claimant must meet this test before commencing discovery on the claim, the pleading standard is less demanding. As the *Diodes* court stated, the details of a trade secret need not be disclosed in a complaint because doing so "would mean that the complainant would have to destroy the very thing for which he sought protection by making public the secret itself." (*Diodes*, *supra*, 260 Cal.App.2d at p. 252.)

The second prong—the plaintiff made reasonable efforts to keep the information secret—is satisfied by the allegations that Meteor required Lerandeau to execute, and Lerandeau did execute, an agreement generally preventing him from disclosing the trade secrets. (See *MAI Systems Corp. v. Peak Computer, Inc.* (9th Cir. 1993) 991 F.2d 511, 521.)[6]

Lerandeau asserts that the fourth amended complaint reveals that plaintiffs failed to keep the IMS program secret because Lerandeau "made a full presentation of the capabilities of IMS, and how it would greatly reduce the operating costs of the MCD Channel and allow it to be efficiently expanded well beyond the initial 750 store Southern California roll out then in place."

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[6] Plaintiffs also rely on a nondisclosure agreement between CPC and TMS. As TMS points out, neither plaintiff is a party to that agreement. It does not appear, therefore, that this supports plaintiffs' claim that *they* undertook reasonable efforts to protect *their* trade secrets. Although the agreement does not appear to strengthen the plaintiffs' argument, it is not necessary to establish the sufficiency of the complaint.

It is possible that discovery on this point will establish that the "secret" information that made the IMS system valuable had been disclosed during this presentation. We cannot determine from these allegations, however, whether or to what extent Lerandeau revealed the trade secret qualities of the software during that presentation.

Lerandeau further asserts that any information he had had lost its protectable trade secret status when plaintiffs allowed him to work with TMS in September 2013. Whether the permission to work with TMS included permission to disclose to TMS plaintiffs' trade secrets cannot be determined from the pleading.

Plaintiffs have also satisfied the pleading requirement that the defendants acquired, disclosed, or used the plaintiffs' trade secret through improper means. (Civ. Code, § 3426.1, subd. (b).) "Improper means" includes "breach or inducement of a breach of a duty to maintain secrecy." (Civ. Code, § 3426.1, subd. (a).) The fourth amended complaint alleges that TMS, Landolt, and Vimby acquired the plaintiffs' trade secrets by conspiring with Lerandeau to have Lerandeau provide the information to the others. Each was allegedly "fully informed of Lerandeau's non-disclosure obligations to Plaintiffs." TMS then approached Lerandeau and persuaded him to breach his contractual obligations to plaintiffs by providing the defendants with plaintiffs' technology, including the IMS system. TMS, Landolt, and Vimby were aware "that the information that [Lerandeau] was providing to them were trade secrets belonging to Plaintiffs." By inducing Lerandeau's breach of his nondisclosure agreement, the defendants acquired the trade secrets by "improper means." (Civ. Code, § 3426.1, subd. (a).) The defendants thereafter used the information to develop "an MCD Channel that is essentially identical to that developed by Plaintiffs." Plaintiffs have therefore adequately pled a cause of action for misappropriation of trade secrets.

Vimby raises various challenges to the plaintiffs' conspiracy allegations and asserts that it did not get involved with the other parties until after the conspiracy had formed. These challenges, however, are factual and beyond the scope of the demurrer. Vimby also states that the allegations of its role in convincing Lerandeau to violate his contractual obligations to plaintiffs is inconsistent with facts alleged in the first and second amended complaints. Vimby does not, however, cite to the record to support the assertion. We do not, therefore, consider it. (See *Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1149.)

Defendants argue that plaintiffs lack standing to assert the misappropriation of trade secrets cause of action; they contend the alleged trade secrets belonged to CPC, not plaintiffs. We reject the argument because plaintiffs alleged that they developed the IMS technology and that only Abt, "senior Meteor staff," and Lerandeau "were familiar with its details and capabilities." The "base software was proprietary," they further alleged, "and no third parties had access to [its] implementation." These allegations are sufficient to allege plaintiffs' ownership of the IMS technology and, therefore, the right to sue for its misappropriation. (See *CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc.*, *supra*, 160 Cal.App.4th at p. 297 [party asserting trade secret misappropriation must own the trade secret].) Although it is possible, as defendants contend, that CPC is the owner of the alleged trade secrets and therefore the owner of the cause of action, this is a factual question that must await discovery and the presentation of evidence. Plaintiffs' ownership of the trade secrets is adequately alleged, and therefore they have standing to assert their misappropriation.

VI. Plaintiffs' Request for Leave to Amend

The trial court sustained the defendants' demurrers without leave to amend. Plaintiffs request that, if we uphold the sustaining of the demurrers, that they be allowed leave to amend. We review a ruling denying leave to amend after the sustaining of a demurrer for abuse of discretion. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) The court abuses such discretion if "there is a reasonable possibility that the defect can be cured by amendment . . . . The burden of proving such reasonable possibility is squarely on the plaintiff." (*Ibid.*)

Plaintiffs have had five opportunities to allege actionable fraudulent misrepresentations and a reasonably probable prospective economic advantage with which defendants wrongfully interfered. They have failed to do so, and have not persuasively indicated how they could cure the defects if given a sixth chance. The trial court did not abuse its discretion in denying leave to amend.

DISPOSITION

The judgment in favor of respondent Sterling is affirmed. Sterling is awarded his costs on appeal.

The judgments against TMS, Landolt, Vimby, and Lerandeau are reversed. The trial court is directed to vacate its order sustaining their demurrers and enter a new order sustaining their demurrers to the fifth, sixth, seventh, tenth, and eleventh causes of action and overruling the demurrer to the twelfth cause of action. Appellants (ABT and Meteor) and respondents (TMS, Landolt, Vimby, and Lerandeau) shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.