

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BLADEROOM GROUP LIMITED, et al.,
Plaintiffs,
v.
FACEBOOK, INC., et al.,
Defendants.

Case No. [5:15-cv-01370-EJD](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS**

Re: Dkt. No. 114

This is a case about data centers, “which are the buildings that house the vast arrays of computer servers that form the backbone of the internet and the high-technology economy.” Second Am. Compl. (“SAC”), Dkt. No. 107, at ¶ 1. Plaintiffs BladeRoom Group Limited (“BRG”) and Bripco (UK) Limited (“Bripco”)¹ are two English companies who allege that Defendants Facebook, Inc. (“Facebook”), Emerson Electric Co. (“Emerson”), Emerson Network Power Solutions, Inc. and Liebert Corporation² enticed them to reveal their data center designs and construction methods with promises of acquisition and partnership, only to then copy those designs and methods and pass them off as their own.

¹ In this order, BRG and Bripco are referred to collectively as “Plaintiffs.”

² Emerson Electric Co., Emerson Network Power Solutions, Inc. and Liebert Corporation are referred to collectively as the “Emerson Defendants.”

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Federal jurisdiction arises pursuant to 28 U.S.C. §§ 1331 and 1332. Presently before the court is Facebook’s Motion to Dismiss the SAC under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 114. Plaintiffs have filed written opposition to this motion. Having carefully considered the parties’ arguments, the court concludes that most but not all of the SAC withstands a Rule 12(b)(6) review. Thus, Facebook’s motion will be granted in part and denied in part for the reasons explained below.

I. BACKGROUND

A. Plaintiffs and the BladeRoom Technology

Plaintiffs developed and perfected a method for manufacturing and installing a type of pre-fabricated data center known as a “BladeRoom.” Id. at ¶ 4. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Id. at ¶ 26. Plaintiffs built the first BladeRoom in 2009, and have since built over 40 BladeRooms on four continents. Id. at ¶ 27.

Though some of the techniques used to build a BladeRoom are publicly disclosed, Plaintiffs keep others as confidential trade secrets and limit the release of this information in several ways. Id. at ¶¶ 28, 31. They ensure that private disclosure to potential clients, suppliers and others is covered by non-disclosure agreements. Id. at ¶ 31. The computer systems containing the trade secrets are password-protected and the facilities where they are stored are physically secured. Id. Additionally, employee access to trade secrets is limited to only those that need to know of them and is subject to confidentiality agreements. Id.

Bripco is the legal owner, and BRG is the licensee, of all right, title and interest in the trade secrets and other confidential information developed by BRG, including the BladeRoom technology. Id. at ¶ 5.

B. BRG Discusses BladeRoom Technology with Emerson and Facebook

In August 2011, BRG entered into [REDACTED] [REDACTED] Id. at ¶ 34. Emerson executed a non-disclosure agreement before any substantive discussions occurred, [REDACTED] [REDACTED]. Id. at ¶ 35. BRG then hosted a meeting for several Emerson executives at its factory in England in September, 2011, [REDACTED] [REDACTED] Id. at ¶ 47. Emerson later informed BRG in October, 2011, [REDACTED] [REDACTED]. Id. at ¶ 48.

BRG also began discussing the BladeRoom technology with Facebook in October, 2011. Id. at ¶ 37. In connection with those discussions, BRG and Facebook entered into a non-disclosure agreement [REDACTED] [REDACTED]

[REDACTED] Id. at ¶ 40. [REDACTED], Facebook “urgently requested” a proposal to supply BladeRooms for a data center in North Carolina. Id. at ¶ 49. BRG provided the proposal in November, 2011, [REDACTED] [REDACTED]. Id. According to BRG, “[f]eedback from Facebook was positive, and Facebook quickly began asking to learn even more details about” BladeRooms. Id. at ¶ 50. BRG representatives met with Facebook in California, and two Facebook representatives met with BRG in England in March, 2012. Id. at ¶ 51. During this trip, BRG took the Facebook representatives on a tour of an operating BladeRoom and provided them with additional confidential information. Id. Subsequently, “Facebook continued to request yet more detailed confidential information from BRG,” and “suggested that the next step should be for a team of Facebook design and engineering staff to travel to BRG in England for an in-depth workshop with BRG’s technical teams to enable Facebook to learn more” Id. at ¶ 52.

BRG alleges that soon after the March, 2012, meeting in England, one of the attending Facebook representatives met with an Emerson Network Power executive [REDACTED]

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1 [REDACTED]. Id. at ¶ 53. [REDACTED], Emerson contacted
2 BRG and sought to reopen discussions, to which BRG agreed. Id. Emerson told BRG, however,
3 that a group of individuals other than the ones who had visited BRG in 2011 [REDACTED]
4 [REDACTED]. Id. Emerson proposed that several of its representatives visit BRG’s
5 facilities in June, 2012. Id. at ¶ 54.

6 On May 29th and May 30, 2012, BRG attended a meeting with Facebook at its data center
7 campus in Prineville, Oregon, and was told the purpose of the meeting was to “survey and
8 physically see the functionality of a Facebook data center and meet Facebook’s lead architect and
9 engineers.” Id. at ¶ 56. Third party architects and contractors also attended. Id. Facebook told
10 BRG it would request a proposal for an expansion of the Prineville data center campus and asked
11 BRG to present and discuss BladeRoom technology, which it did. Id. at ¶ 57. BRG alleges that
12 unbeknownst to it at the time, Facebook had already agreed that its construction contractor [REDACTED]
13 [REDACTED] Id. at ¶ 58.

14 BRG’s previously discussed in-depth workshop with Facebook occurred in England
15 between June 19th and June 21, 2012, during which BRG revealed additional confidential
16 information. Id. at ¶¶ 60, 61. A meeting between BRG and Emerson, during which BRG also
17 revealed confidential information, occurred at the same time. Id. at ¶ 64. To maintain the
18 confidentiality of the respective discussions, BRG ensured the two companies’ representatives
19 were separated during their visits. Id.

20 But despite BRG’s efforts, representatives from Facebook and Emerson did engage in a
21 “pre-arranged, clandestine meeting” in London on June 21, 2012, and “compared notes” on what
22 each had learned from their meetings with BRG. Id. at ¶ 68. Facebook also continued to indicate
23 an interest in partnering with BRG and requested more information and proposals. Id. at ¶ 69.

24 **C. Facebook and Emerson Allegedly Misappropriate the BladeRoom Technology**

25 Facebook never placed an order for BladeRooms. Id. at ¶ 71. Instead, BRG alleges that
26 Facebook and Emerson [REDACTED]

1 [REDACTED] Id. at ¶ 74. [REDACTED]
 2 [REDACTED]
 3 [REDACTED] Id. at ¶¶ 75, 80. On
 4 January 16, 2013, Emerson publicly announced that it was launching a new business focusing on
 5 “serving the needs of massive data centers” using “customized, highly scalable, and often modular
 6 infrastructures.” Id. at ¶ 78. And in May, 2014, Facebook announced it had chosen Emerson to
 7 construct a pre-fabricated, modular data center in Sweden, which it alleges will be constructed
 8 using appropriated BladeRoom technology. Id. at ¶ 113.

9 **D. Facebook’s Disclosure of BRG Confidential Information**

10 BRG alleges that after Emerson’s announcement, Facebook began revealing BRG’s
 11 confidential information through its initiative called the “OpenCompute Project,” the goal of
 12 which “is to give the public ‘full access to the[] specifications’ used by Facebook in its data
 13 centers in order to ‘spark a collaborative dialogue’ about how to improve its approach to data
 14 centers.” Id. at ¶¶ 83, 84. BRG alleges that on January 28, 2014, a Facebook representative made
 15 a public presentation at an OpenCompute forum and referred to the BladeRoom technology as one
 16 the “rapid deployment data center” (“RDDC”) method created by Facebook. Id. at ¶ 89. The
 17 same Facebook representative also authored and published an OpenCompute blog post that
 18 allegedly included details of the BladeRoom technology. Id. at ¶ 100.

19 **E. The Instant Action**

20 Plaintiffs initiated this action on March 23, 2015, and the court granted in part and denied
 21 in part Facebook’s motion to dismiss the original complaint. Dkt. No. 59. Plaintiffs then filed an
 22 amended complaint and, later, the SAC. Dkt. Nos. 62, 107. This motion followed.

23 **II. LEGAL STANDARD**

24 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient
 25 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which
 26 it rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted).

1 The factual allegations in the complaint “must be enough to raise a right to relief above the
2 speculative level” such that the claim “is plausible on its face.” Id. at 556-57. A complaint that
3 falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief
4 can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only
5 where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable
6 legal theory.” Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

7 When deciding whether to grant a motion to dismiss, the court must generally accept as
8 true all “well-pleaded factual allegations.” Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009). The court
9 must also construe the alleged facts in the light most favorable to the plaintiff. See Retail Prop.
10 Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014)
11 (providing the court must “draw all reasonable inferences in favor of the nonmoving party” for a
12 Rule 12(b)(6) motion). However, “courts are not bound to accept as true a legal conclusion
13 couched as a factual allegation.” Iqbal, 556 U.S. at 678.

14 Also, the court usually does not consider any material beyond the pleadings for a Rule
15 12(b)(6) analysis. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19
16 (9th Cir. 1990). Exceptions to this rule include material submitted as part of the complaint or
17 relied upon in the complaint, and material subject to judicial notice. See Lee v. City of Los
18 Angeles, 250 F.3d 668, 688-69 (9th Cir. 2001).

19 **III. DISCUSSION**

20 Facebook moves to dismiss all the claims asserted in the SAC. Each is discussed below.

21 **A. Misappropriation of Trade Secrets**

22 The California Uniform Trade Secrets Act (“CUTSA”), codified at California Civil Code §
23 3426 et seq., “creates a statutory cause of action for the misappropriation of a trade secret.”
24 Brescia v. Angelin, 172 Cal. App. 4th 133, 143 (2009). A “trade secret” is “information, including
25 a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives
26 independent economic value, actual or potential, from not being generally known to the public or
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1 to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject
 2 of efforts that are reasonable under the circumstances to maintain its secrecy.” Cal. Civ. Code §
 3 3426.1(d). “Misappropriation” includes the “[a]cquisition of a trade secret of another by a person
 4 who knows or has reason to know that the trade secret was acquired by improper means.” Cal.
 5 Civ. Code § 3426.1(b). “Improper means” includes “theft, bribery, misrepresentation, breach or
 6 inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other
 7 means” but excludes “[r]everse engineering or independent derivation alone.” Cal. Civ. Code §
 8 3426.1(a).

9 To state a claim under CUTSA, a plaintiff must demonstrate: “(1) the plaintiff owned a
 10 trade secret, (2) the defendant acquired, disclosed, or used the plaintiff’s trade secret through
 11 improper means, and (3) the defendant’s actions damaged the plaintiff.” Cytodyn, Inc. v.
 12 Amerimmune Pharms., Inc., 160 Cal. App. 4th 288, 297 (2008).

13 **i. Ownership of Trade Secrets**

14 Facebook argues that neither BRG nor Bripco can maintain a claim for misappropriation of
 15 trade secrets for different reasons. As to BRG, Facebook contends its status as a licensee does not
 16 satisfy the ownership element of the claim. As to Bripco, Facebook argues the SAC does not
 17 describe how it was damaged by the alleged misappropriation. These arguments are
 18 unconvincing.

19 *a. BRG*

20 In arguing that misappropriation claims are properly limited only to owners and not
 21 licensees, Facebook focuses primarily on authority that simply echoes the claim’s elements. For
 22 example, Facebook relies on the district court’s opinion in Nextdoor.com, Inc.v. Abhyanker, No.
 23 C-12-5667 EMC, 2013 U.S. Dist. LEXIS 101440, at *27, 2013 WL 3802526 (N.D. Cal. July 19,
 24 2013), in which the court observed that “[i]n order to bring a viable claim for misappropriation of
 25 trade secrets, [the plaintiff] must own the trade secrets in question.” This statement, however, is
 26 not reflective of the legal proposition for which Facebook cites it. Instead, the statement’s
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1 supporting citation denotes it is merely recognition of the first element of a prima facie
 2 misappropriation claim under CUTSA, which is traditionally and perhaps over-simplistically
 3 phrased in terms of “ownership.” Nextdoor.com, 2013 U.S. Dist. LEXIS 101440, at *27 (citing
 4 Sargent Fletcher, Inc. v. Able Corp., 110 Cal. App. 4th 1658, 1665 (2003)). As such, neither
 5 Nextdoor.com nor the state appellate case it cites hold that trade secret misappropriation claims
 6 can only be asserted by an owner, and Facebook has not cited any other authority from California
 7 federal or state courts explicitly finding as much.

8 This issue has been addressed by courts outside this circuit, however. They have
 9 “generally come to the same conclusion: a party has standing to bring a trade secrets claim if it has
 10 *possession* of the trade secret.” Williams-Sonoma Direct, Inc. v. Arhaus, LLC, 304 F.R.D. 520,
 11 527 (W.D. Tenn. 2015) (emphasis added); accord Metso Minerals Indus. v. FLSmidth-Excel LLC,
 12 733 F. Supp. 2d 969, 978 (E.D. Wis. 2010). Those courts reason that “fee simple ownership” as
 13 an element of a trade secret misappropriation claim “may not be particularly relevant” because
 14 “the ‘proprietary aspect’ of a trade secret flows, not from the knowledge itself, but from its
 15 secrecy.” DTM Research, L.L.C. v. AT&T Corp., 245 F.3d 327, 332 (4th Cir. 2001). “It is the
 16 secret aspect of the knowledge that provides value to the person having the knowledge.” Id.
 17 “While the information forming the basis of a trade secret can be transferred, as with personal
 18 property, its continuing secrecy provides the value, and any general disclosure destroys the value.”
 19 Id.

20 The logic underlying these out-of-circuit opinions is persuasive and equally applicable
 21 here. Since CUTSA defines a trade secret as information that “[d]erives independent economic
 22 value, actual or potential, from not being generally known to the public or to other persons who
 23 can obtain economic value from its disclosure or use,” the better focus for determining whether a
 24 party can assert a misappropriation claim is on that party’s possession of secret knowledge, rather
 25 than on the party’s status as a true “owner.” See DaimlerChrysler Servs. v. Summit Nat’l, No. 02-
 26 71871, 2006 U.S. Dist. LEXIS 32049, at *26-27, 2006 WL 1420812 (E.D. Mich. May 22, 2006),
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1 aff'd, 289 F. App'x 916 (6th Cir. 2008); see also DTM Research, 245 F.3d at 332 (“[O]ne ‘owns’
2 a trade secret when one knows of it, as long as it remains a secret.”).

3 Here, though Plaintiffs allege that Bripco owns the trade secrets and BRG is a licensee,
4 they also allege that Plaintiffs’ licensing arrangement obligates BRG to maintain the
5 confidentiality of the secrets. SAC, at ¶ 30. In addition, Plaintiffs have allegedly employed
6 several mechanisms to limit the public disclosure of confidential information. Id. at ¶ 31. The
7 court finds these allegations sufficiently demonstrate that BRG possesses non-disclosed
8 knowledge and may therefore “demand remedies as provided by [CUTSA] against those who
9 ‘misappropriate’ the knowledge,” even though it is a licensee. DTM Research, 245 F.3d at 332.
10 Facebook’s challenge to BRG’s trade secret misappropriation claim based on lack of ownership is
11 therefore rejected.

12 *b. Bripco*

13 Facebook argues Bripco’s misappropriation claim must be dismissed because the damages
14 allegations are inadequately pled under Rule 8. Specifically, Facebook takes seemingly
15 contradictory positions that, on the one hand, “the SAC contains no factual allegations as to how
16 [Bripco] . . . was damaged,” and on the other, that the allegation describing how Bripco was
17 harmed is too conclusory. This argument fails.

18 A claim is plausible on its face “when the plaintiff pleads factual content that allows the
19 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
20 Iqbal, 556 U.S. at 678. The Ninth Circuit employs a two-step process for evaluating a pleading for
21 plausibility:

22 First, to be entitled to the presumption of truth, allegations in a
23 complaint or counterclaim may not simply recite the elements of a
24 cause of action, but must contain sufficient allegations of underlying
25 facts to give fair notice and to enable the opposing party to defend
26 itself effectively. Second, the factual allegations that are taken as
true must plausibly suggest an entitlement to relief, such that it is not
unfair to require the opposing party to be subjected to the expense of
discovery and continued litigation.

27 Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014).

1 “In all cases, evaluating a complaint’s plausibility is a ‘context-specific’ endeavor that
2 requires courts to ‘draw on . . . judicial experience and common sense.’” Levitt v. Yelp! Inc., 765
3 F.3d 1123, 1135 (9th Cir. 2014) (quoting Eclectic Props., 751 F.3d at 995-96).

4 Looking to the SAC, Facebook’s first position that the pleading lacks any allegations of
5 Bripco’s damages is unsupportable because it does, in fact, contain such an allegation. And its
6 second position fares no better, because Plaintiffs allege in the SAC that Facebook “damaged the
7 market for [Bripco’s] licensing of its trade secret to others.” SAC, at ¶ 137. That allegation is
8 sufficient under Rule 8 because it is more than just a recitation of the damages element; to the
9 contrary, the allegation notifies Facebook of a particular form of damages at issue in this action
10 that can be explored through discovery. Moreover, this allegation, if assumed true, suggests
11 Bripco’s entitlement to relief because it satisfies the third element of a misappropriation claim.
12 Though Facebook would like more detail about how its purported conduct harmed Bripco’s
13 licensing market, those specifics are not required at the pleading stage. See StreamCast Networks,
14 Inc. v. IBIS LLC, No. CV 05-04239, 2006 U.S. Dist. LEXIS 97607, at *16, 2006 WL 5720345
15 (C.D. Cal. May 2, 2006) (“Under Rule 8, the fact of damage-and the type of damage-can be
16 alleged in conclusory terms.”); see also Mintel Learning Tech., Inc. v. Ambow Educ. Holding,
17 Ltd., No. 5:11-CV-01504-EJD, 2012 U.S. Dist. LEXIS 30953, at *7, 2012 WL 762126 (N.D. Cal.
18 Mar. 8, 2012) (“While omitting facts as to a necessary element of the cause of action may often
19 render a claim insufficient, the failure to specifically plead the amount of harm or the mechanism
20 of causation is not necessarily fatal to a complaint.”).

21 In sum, Bripco’s damages allegations are not so implausible or speculative so as to render
22 them inadequate under Rule 8.

23 **ii. Secrecy**

24 Turning to the second element of a misappropriation claim, Facebook argues the SAC’s
25 allegations show that Plaintiffs failed to undertake reasonable efforts to maintain the secrecy of the
26 BladeRoom technology because they disclosed it to third-party architects and contractors at the
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1 meeting in Prineville, Oregon in May, 2012. In response, Plaintiffs emphasize the SAC's
 2 allegation that those third parties were ██████████ of Facebook and ██████████
 3 ██████████ SAC, at ¶ 57. They also argue that a decision on the
 4 reasonableness of Plaintiffs' efforts to maintain the secrecy of their trade secret information is a
 5 fact that question that cannot be decided on a motion to dismiss.

6 It is true that "[s]ecrecy is an essential characteristic of information that is protectable as a
 7 trade secret." Altavion, Inc. v. Konica Minolta Sys. Lab., Inc., 226 Cal. App. 4th 26, 57 (2014). It
 8 is also well established that "[i]f an individual discloses his trade secret to others who are under
 9 no obligation to protect the confidentiality of the information, or otherwise publicly discloses the
 10 secret, his property right is extinguished." Id. (quoting In re Providian Credit Card Cases, 96 Cal.
 11 App. 4th 292, 304 (2002)).

12 But at the same time, CUTSA's definition of what can constitute a "trade secret" does not
 13 require that confidential information be kept completely clandestine or mandate the use of non-
 14 disclosure agreements in all instances. In fact, CUTSA does not dictate a particular level of
 15 secrecy needed to maintain the character of information as a trade secret. Instead, CUTSA
 16 requires efforts at secrecy that are "reasonable under the circumstances." Cal. Civ. Code §
 17 3426.1(d). Moreover, it includes the acquisition of information by misrepresentation as a type of
 18 "improper means" that can constitute misappropriation. Cal. Civ. Code § 3426.1(a).

19 In light of how these key terms are defined, Plaintiffs' argument is the more persuasive - at
 20 least for this motion. Construing the SAC in Plaintiffs favor, they contend that Facebook
 21 essentially enticed BRG to disclose confidential information to Facebook and third parties in May,
 22 2012, by misrepresenting the true purpose of the meeting. To that end, Plaintiffs allege that
 23 Facebook told BRG that it would be asked to submit a bid for an expansion of the Prineville data
 24 center, while in actuality Facebook had already agreed that its own contractors would submit a
 25 substantially lower bid for the same work. SAC, at ¶¶ 57, 58. The allegations also suggest that
 26 BRG believed the third parties attending the meeting were ██████████

1 [REDACTED], and it did not employ additional confidentiality measures for that
2 reason. *Id.* at ¶ 57. Thus, though Facebook’s argument regarding voluntary disclosure is certainly
3 appealing and may ultimately prevail depending on what is revealed through an investigation of
4 the facts, Plaintiffs theory that its efforts at secrecy were reasonable under the circumstances is
5 plausible enough to overcome a motion to dismiss.

6 Furthermore, Facebook’s assertion that the misappropriation claim is “defective” because
7 the SAC “does not distinguish the information that was disclosed from any protectable trade
8 secrets” is misplaced and the case it relies on, Top Agent Network, Inc. v. Zillow, Inc., No. 14-cv-
9 04769-RS, 2015 U.S. Dist. LEXIS 161556, 2015 WL 7709655 (N.D. Cal. Apr. 13, 2015), is
10 inapposite. This argument presumes either facts not alleged or the validity of a preceding
11 argument: that whatever information was disclosed at the May, 2012, meeting no longer qualifies
12 as a trade secret. But Plaintiffs do not allege that BRG’s presentation consisted of protectable and
13 non-protectable information, as the plaintiff did in Top Agent Network, and the court has rejected
14 the argument that the SAC fails to plausibly allege reasonable efforts at secrecy.

15 Accordingly, the trade secret misappropriation claim is not subject to dismissal because of
16 allegations describing the disclosure of confidential information to third parties.

17 **iii. Inadequate Allegations of Misappropriation**

18 In its final challenge to the misappropriation claim, Facebook argues it must be dismissed
19 because Plaintiffs have not articulated what trade secrets allegedly provided to Facebook were
20 actually misappropriated. As the court understands it, Facebook advocates for a level of pleading
21 requiring the plaintiff to specifically identify in a complaint the mechanism of misappropriation
22 for each and every asserted trade secret. The court disagrees that Rule 8 requires that type of
23 detail. *See Eclectic Props.*, 751 F.3d at 996.

24 Here, the SAC contains enough factual information to provide Facebook with “fair notice”
25 of how and when it allegedly misappropriated all of the trade secrets described in that pleading,
26 such that additional allegations on that topic are not mandated by Rule 8. The current allegations
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1 adequately inform Facebook of what is asserted against it for the purpose of proceeding with
2 discovery.

3 Since all of its arguments are unsuccessful, Facebook’s motion to dismiss the
4 misappropriation of trade secrets claim will be denied.

5 **B. Lanham Act**

6 Plaintiffs allege that Facebook violated § 43(a) of the Lanham Act by falsely claiming that
7 it and its contractors performed the architectural, engineering, and design services that led to the
8 RDDC. Facebook moves to dismiss this claim on two grounds. First, it argues that § 43(a) does
9 not prohibit the copying of ideas. Second, it argues the SAC is devoid of facts alleging a
10 commercial use. Facebook is correct on both points.

11 Section 43(a) of the Lanham Act imposes liability on “[a]ny person who, on or in
12 connection with any goods or services . . . uses in commerce any word, term, name, symbol, or
13 device, or any combination thereof, or any false designation of origin, false or misleading
14 description of fact, or false or misleading representation of fact,” which is likely to confuse or
15 deceive as to the origin of those goods and services. 15 U.S.C. § 1125(a). This language is broad
16 enough to permit “reverse passing off” claims, where “[t]he producer misrepresents someone
17 else’s goods or services as his own.” Dastar v. Twentieth Century Fox Film Corp., 539 U.S. 23,
18 28-30 (2003). But it also has two notable and important limitations.

19 First, the Supreme Court has held that the phrase “origin of goods” only “refers to the
20 producer of the tangible goods that are offered for sale, and not to the author of any idea, concept,
21 or communication embodied in those goods.” Id. at 37. This is because the protections of the
22 Lanham Act “were *not* designed to protect originality or creativity” in the same way as copyright
23 and patent laws. Id. (emphasis preserved).

24 Second, the Lanham Act only applies in circumstances involving a “commercial
25 transaction” in which “the trademark is being used to confuse potential consumers.” Bosley Med.
26 Inst., Inc. v. Kremer, 403 F.3d 672, 676 (9th Cir. 2005). Indeed, “the Lanham Act seeks to
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1 prevent consumer confusion that enables a seller to pass off his goods as the goods of another
2 Trademark infringement protects only against mistaken *purchasing decisions* and not against
3 confusion generally.” *Id.* at 677 (quoting *Lang v. Ret. Living Publ’g Co., Inc.*, 949 F.2d 576,
4 582-83 (2d Cir. 1991)) (emphasis preserved).

5 These limitations fatally undermine Plaintiffs’ “reverse passing off” claim. Though they
6 argue the claim is based on a misrepresentation about the origin of the services needed to create
7 the BladeRoom technology rather than the technology itself, Plaintiffs fail to allege or
8 convincingly argue exactly how Facebook is offering those services in a commercial transaction,
9 such that there is opportunity for consumers to make “mistaken purchasing decisions” of those
10 services. *Id.* at 679 (“[T]he appropriate inquiry is whether [the defendant] offers *competing*
11 services to the public.”) (emphasis preserved). The conclusory allegation that Facebook
12 “competes with BRG as a data center design provider and innovator” does not provide that
13 explanation and, in any event, is not entitled to a presumption of truth. SAC, at ¶ 148.

14 Nor do the allegations describing how Facebook has publicly shared its *designs* assist in
15 that regard. *See, e.g., id.* at ¶ 85 (“Facebook claims to share its data center designs and
16 information openly with the public”). Even if it is true as Plaintiffs allege that Facebook
17 made a public disclosure in an effort to reduce its data center costs, and even assuming that sort of
18 effort can satisfy the Lanham Act’s “commercial transaction” requirement, there is no allegation
19 that Facebook publicly shared any related *services* with that same motivation.³

20 Since the allegations of falsely-designated services do not support a “reverse passing off”
21 theory, the only other allegations relevant to the claim are those stating that Facebook has falsely
22 asserted the origin of the RDDC method. But those allegations, which are focused on
23 misrepresentation in connection with an idea or concept rather than on a good or service, are
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25
26 ³ For this reason, Plaintiffs’ comparison of their allegations to those examined by the Seventh
27 Circuit in *M. Arthur Gensler Jr. & Assocs. v. Strabala*, 764 F.3d 735 (2014), is ineffective. The
28 limited facts discussed in the opinion indicate that the defendant, an architect, was actually
offering services in connection with the alleged misrepresentation.

1 equally insufficient under the holding of Dastar.

2 For these reasons, Plaintiffs have not stated a plausible claim for a violation of § 43(a) of
3 the Lanham Act. Though the court doubts Plaintiffs can ever do so in light of the factual scenario
4 described in the SAC, it will nonetheless dismiss the claim with leave to amend to allow them an
5 opportunity to restate the claim if they believe they can. See Krainski v. Nevada ex rel. Bd. of
6 Regents of Nevada Sys. of Higher Educ., 616 F.3d 963, 972 (9th Cir. 2010) (“Dismissal without
7 leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be
8 saved by any amendment.”).

9 **C. Unfair Competition Law**

10 The Unfair Competition Law (“UCL”) prohibits business practices that are unlawful,
11 unfair, or fraudulent. Cal. Bus. & Prof. Code § 17200. “Its purpose ‘is to protect both consumers
12 and competitors by promoting fair competition in commercial markets for goods and services,’”
13 and its language is framed broadly in service of that purpose. Kwikset v. Super. Ct., 51 Cal. 4th
14 310, 320 (2011) (quoting Kasky v. Nike, Inc., 27 Cal.4th 939, 949 (2002)).

15 Two of the UCL’s three “prongs” are relevant to Plaintiffs’ claim. The first is the
16 “unlawful” prong, which “borrows violations of other laws and treats them as independently
17 actionable.” Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 837 (2006).
18 “Virtually any law - federal, state or local - can serve as a predicate for an action” under the
19 UCL’s unlawful prong. Smith v. State Farm Mut. Ins. Co., 93 Cal. App. 4th 700, 718 (2001). The
20 second is the “unfair” prong. California courts have struggled to define exactly what constitutes
21 an “unfair” business practice, and often apply different tests depending on whether the action is
22 involves consumers or competitors. Drum v. San Fernando Valley Bar Assn., 182 Cal. App. 4th
23 247, 253 (2010). But any standard that is applied must accomplish the UCL’s inclusive purpose,
24 which authorizes a cause of action to “a person who has suffered injury in fact and has lost money
25 or property as a result of the unfair competition.” Cal. Bus. & Prof. Code § 17204.

26 Facebook moves to dismiss Plaintiffs’ claim under the “unlawful” prong of the UCL

1 because it relies on the allegations underlying the CUTSA and Lanham Act claims, which it
2 argues also fail. Because Plaintiffs' CUTSA claim survives this motion, so does its UCL claim to
3 the extent it is based on those same allegations.

4 As to the claim under the "unfair" prong, Facebook argues it is deficient because Plaintiffs
5 do not allege they are consumers or competitors of Facebook in the area of data center technology.
6 Though Facebook cites cases, including this court's prior dismissal order, that ostensibly support
7 such a limitation on who can bring claim for "unfair" practices, further review of the relevant
8 authority reveals that this type of categorical restriction is inappropriate given the UCL's
9 comprehensive purpose. Notably, nothing in the UCL's text limits claims only to consumers or
10 competitors, though both types of plaintiffs can certainly qualify under its language. See In re
11 Pomona Valley Med. Grp., 476 F.3d 665, 675 (9th Cir. 2007) ("As the California courts have
12 explained, the unfair competition statute is not limited to 'conduct that is unfair to competitors.'").
13 Instead, the UCL more broadly requires the plaintiff demonstrate a loss of money or property as a
14 result of unfair competition. Kwikset, 51 Cal. 4th at 322.

15 Plaintiffs' claim under the "unfair" prong endures under this more liberal examination.
16 Plaintiffs list in the SAC several practices that are plausibly unfair, including allegations that
17 Facebook released information related to the BladeRoom technology through OpenCompute,
18 which they also allege damaged their licensing markets and emboldened their competitors. The
19 court finds these allegations sufficiently describe how Plaintiffs lost money as a result of
20 Facebook's purportedly unfair business practices. And though Facebook suggests otherwise, this
21 conduct describes much more than a breach of a contract.

22 In addition, the court rejects Facebook's argument that the UCL claim is preempted by
23 CUTSA. This form of preemption applies to a claim "based on the same nucleus of facts as the
24 misappropriation of trade secrets claim for relief." K.C. Multimedia, Inc. v. Bank of America
25 Tech. & Operations, Inc., 171 Cal. App. 4th 939, 954 (2009). A claim is not preempted, however,
26 "if it is based upon alleged facts beyond trade secret misappropriation." Titan Global LLC v.

1 Organo Gold Int'l, Inc., No.: 12-CV-2104-LHK, 2012 U.S. Dist. LEXIS 171484, at *30, 2012 WL
 2 6019285 (N.D. Cal. Dec. 2, 2012). Here, Plaintiffs' UCL allegations - in particular those alleging
 3 Facebook's public disclosure of Plaintiffs' technology - go well beyond those that constitute the
 4 acts of trade secret misappropriation. Therefore, the UCL claim is not preempted by CUTSA.

5 **D. Breach of Contract**

6 Facebook moves to dismiss the breach of contract claim, at least as asserted by Bripco,
 7 because it was not a party to the non-disclosure agreement between BRG and Facebook. Though
 8 that is true, Bripco's breach of contract claim is not subject to dismissal for that reason because a
 9 "contract made by an agent for an undisclosed principal is for most purposes the contract of the
 10 principal and it may sue . . . thereon," unless the principal is excluded by the terms of the
 11 agreement. Total Recall Techs. v. Luckey, 2016 U.S. Dist. LEXIS 5659, at *11, 2016 WL 199796
 12 (N.D. Cal. Jan. 16, 2016) (quoting Tom Trading, Inc. v. Better Blue, Inc., 26 Fed. Appx. 733, 735
 13 (9th Cir. 2002)).

14 Here, the terms of the non-disclosure agreement do not exclude Bripco. Furthermore, the
 15 fact that Bripco licensed its trade secrets to BRG, who in turn revealed that information to
 16 Facebook under the alleged protections of a non-disclosure agreement, at least implies that BRG
 17 was acting in the capacity as Bripco's agent during the transaction. See Pearson Educ., Inc. v.
 18 Alahmad, No. 2:12-cv-2936-KJM-CKD, 2013 U.S. Dist. LEXIS 53991, at *15, 2013 WL
 19 1641533 (E.D. Cal. Apr. 16, 2013) (citing Parrish v. Nat'l Football League Players Ass'n, 534 F.
 20 Supp. 2d 1081, 1097 (N.D. Cal. 2007)). Because it is still plausibly pled, Facebook's second
 21 attempt to dismiss the breach of contract claim will be denied.

22 **IV. ORDER**

23 Based on the foregoing, Facebook's Motion to Dismiss (Dkt. No. 114) is GRANTED IN
 24 PART and DENIED IN PART. The motion is GRANTED as to the third cause of action for
 25 violation of § 43(a) of the Lanham Act, which is DISMISSED WITH LEAVE TO AMEND. The
 26 motion is DENIED in all other aspects.

1 To be clear, Plaintiffs are permitted leave to amend only the claim for violation of the
2 Lanham Act, and any amended complaint must be filed on or before **February 28, 2017**.
3 Plaintiffs may not add new claims or new parties solely by virtue of this order.

4 If no amended complaint is filed by February 28, 2017, Facebook shall file an Answer to
5 the SAC on or before **March 15, 2017**.

6
7 **IT IS SO ORDERED.**

8 Dated: February 10, 2017

9 
10 EDWARD J. DAVILA
11 United States District Judge

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United States District Court
Northern District of California