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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SOCIALAPPS, LLC,
Plaintiff,
vs.
ZYNGA, INC.,
Defendant.

Case No.: 4:11-CV-04910 YGR

**ORDER RE ZYNGA’S MOTION TO
DISMISS PORTIONS OF THE FIRST
AMENDED COMPLAINT**

United States District Court
Northern District of California

Plaintiff SocialApps LLC (“SA”) brings the instant action for copyright infringement, violation of the California Uniform Trade Secrets Act (“CUTSA”), and various contract-based common law claims against Defendant Zynga Inc. (“Zynga”). The parties are presently before the Court on Zynga’s Motion to Dismiss the second, fourth, fifth, and sixth claims in Plaintiff’s First Amended Complaint.

Having read and considered the papers submitted and the pleadings in this action, the Court hereby GRANTS IN PART the motion as to the second claim (violation of CUTSA), and DENIES Zynga’s motion to dismiss as to the fourth, fifth, and sixth claims (breach of implied contract, breach of confidence and breach of the implied covenant of good faith and fair dealing, respectively). Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b), the Court rules on the instant motion without oral argument.

BACKGROUND

1
2 SA's First Amended Complaint ("FAC") filed September 15, 2011, alleges that SA
3 developed the first farming social network game to be accessed through Facebook. The game was
4 publicly released on Facebook in November 2008 as "myFarm."

5
6 In May 2009, Zynga approached SA about acquiring the intellectual property rights and
7 other information about myFarm. The parties entered into a letter agreement on May 19, 2009.¹
8 Pursuant to that agreement, SA provided information to Zynga for "due diligence" purposes.

9
10 SA alleges that Zynga violated the express terms of the agreement, as well as the implied
11 understandings the parties had reached in connection with the agreement, by making use of the
12 myFarm confidential source code, processes, and other information revealed pursuant to the letter
13 agreement. SA goes on to allege that Zynga thereafter used the confidential source code and other
14 information it acquired from SA to create its own game, "FarmVille," without SA's permission and
15 without compensating SA. Zynga's FarmVille game was released on Facebook on or about June
16 19, 2009. SA alleges that Zynga later used that same information to create other similar games
17 (FrontierVille, CityVille, FishVille), again without SA's consent or compensation.
18

LEGAL STANDARD

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20 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims alleged
21 in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir.2003). Review is limited
22 to the contents of the complaint and documents specifically referenced therein. *Allarcom Pay*
23

24
25 ¹ The Court has considered the copy of the "letter agreement" attached as Exhibit A to
26 the Declaration of Rachel Herrick Kassabian filed October 24, 2011, in connection with this
27 motion. The Court may do so without converting the motion to one for summary judgment since
28 the letter agreement is referenced in the pleading and the parties do not dispute the authenticity of
the copy attached to the declaration in support of the motion to dismiss, even though plaintiff has
not attached or explicitly alleged the contents of agreement in the complaint. *Knievel v. ESPN*, 393
F.3d 1068, 1076-77 (9th Cir. 2005).

1 *Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 385 (9th Cir.1995); *Branch v. Tunnell* 14
2 F.3d 449, 454 (9th Cir. 1994).

3 To survive a motion to dismiss for failure to state a claim, a complaint generally must
4 satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8. Rule
5 8(a)(2) requires only that the complaint include a “short and plain statement of the claim showing
6 that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). Specific facts are unnecessary -- the
7 statement need only give the defendant “fair notice of the claim and the grounds upon which it
8 rests.” *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007) (citing
9 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007)).
10 Any ambiguity must be resolved in plaintiff’s favor. *International Audiotext Network, Inc. v.*
11 *AT&T Co.*, 62 F.3d 69, 72 (2nd Cir. 1995).

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14 A motion under Rule 12(b)(6) may not be used to challenge only certain allegations within a
15 claim, but rather such a challenge must be made by way of a motion to strike under Rule 12(f).
16 *Thompson v. Paul*, 657 F.Supp.2d 1113, 1129 (D. Ariz. 2009). However, the Court has the
17 discretion to construe a motion to dismiss as a motion to strike pursuant to 12(f) when appropriate.
18
19 *Id.*

20 ANALYSIS

21 Zynga moves to dismiss SA’s second claim (violation of CUTSA), fourth claim (breach of
22 implied contract), fifth claim (breach of confidence) and sixth claim (breach of the implied
23 covenant of good faith and fair dealing).
24

25 1. CUTSA VIOLATION (SECOND CLAIM)

26 Zynga argues that SA’s second claim for misappropriation of trade secrets in violation of
27 CUTSA should be dismissed because some of the information allegedly misappropriated was, at
28

1 the time, publicly available to the world on the Internet. SA alleges that Zynga misappropriated
2 two types of information: (1) proprietary source code and (2) images and features for myFarm. SA
3 defines, in paragraph 35 of the FAC, “Trade Secrets” as including “its proprietary source code,
4 images for myFarm and its various features.” FAC at ¶35.

5
6 As SA has alleged, the myFarm game was publicly released in November 2008, and
7 therefore the images and features were visible to the public several months before the May 2009
8 letter agreement or June 2009 release of FarmVille. Publicly available information, by definition,
9 cannot be protected as a trade secret. Cal. Civ. Code §3426.1(d); *DVD Copy Control Assoc. v.*
10 *Bunner*, 116 Cal.App.4th 241, 251-53 (2004).

11
12 SA argues that it has properly alleged that its proprietary source code was not publicly
13 known, was maintained as confidential, and meets the definition of a trade secret. In its opposition,
14 SA makes no argument that the images and features are themselves trade secrets. On reply, Zynga
15 concedes that it is not seeking to dismiss the claim insofar as it is based upon misappropriation of
16 proprietary source code, but only as to the images and features allegation. (See Reply filed
17 November 14, 2011, at 2:18-19.)

18
19 As it is addressed only to a portion of the allegations in the claim, the Court exercises its
20 discretion to consider this a motion to strike under Rule 12(f) and STRIKES the following
21 allegations from FAC paragraph 35: “images for myFarm and its various features.” Plaintiff SA is
22 GRANTED LEAVE TO AMEND to allege more specifically which parts, if any, of the “images
23 and various features” of myFarm it contends are trade secret information.

24
25 **2. BREACH OF IMPLIED CONTRACT (FOURTH CLAIM)**

26 Zynga argues that SA’s fourth claim for breach of implied contract fails because SA alleged
27 a breach of express contract claim embracing the same subject matter. The letter agreement
28

1 included terms requiring the parties to keep each other's company information confidential. The
2 express contract claim alleges that Zynga breached the letter agreement by "developing, releasing,
3 maintaining and/or offering for sale features on social network games using Plaintiff's myFarm
4 concepts and/or game features without compensating or crediting Plaintiff." The breach of implied
5 contract repeats the same allegations.

6
7 Unlike the express and implied contracts at issue in *Tomlinson*, cited by Zynga, the
8 allegations here are not at odds with one another. *Cf. Tomlinson v. Qualcomm, Inc.* 97 Cal.App.4th
9 934, 945 (2002) (express employment agreement was at-will, making an implied agreement to the
10 contrary inconsistent and non-actionable). SA relies on the same facts to support two different
11 theories of recovery. While the allegations of the implied contract claim rely on the same
12 allegations as the express contract claim, SA is entitled to plead different theories of recovery in the
13 alternative. *See Philips Medical Capital, LLC v. Medical Insights Diagnostics Ctr., Inc.*, 471
14 F.Supp.2d 1035, 1047 (2007) (while a party cannot ultimately recover based on an implied contract
15 where there exists a valid express contract covering the same subject matter, parties may plead the
16 theories in the alternative).

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19 3. BREACH OF CONFIDENCE CLAIM (FIFTH CLAIM)

20 A. Mutual Exclusivity

21 As with the breach of implied contract claim, Zynga argues that the fifth claim for breach of
22 confidence based upon an implied agreement simply repeats the express contract allegations
23 concerning breach of the letter agreement's confidentiality provisions, and it should be dismissed
24 for that reason. A claim for breach of confidence requires that SA plead the existence of a
25 confidential relationship and Zynga's voluntary assumption thereof. *See Faris v. Engberg*, 97
26 Cal.App.3d 309, 321 (1979). The cause of action is not limited to fiduciary relationships, nor to the
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1 existence of a contract. *Faris, supra*, 97 Cal.App.3d at 321. The principle applies to one who
2 receives information in a confidential relation. . . who is under a duty not to disclose or use the
3 information, regardless of whether the confidential information is protected as a trade secret. *Id.*
4 To the extent that the claim is coterminous with a claim for express breach of a nondisclosure
5 agreement, the two claims would be mutually exclusive. *See Berkla v. Corel Corporation*, 302
6 F.3d 909, 918 (9th Cir. 2002). However, and in contrast to the procedural posture in *Berkla*, SA
7 may offer different theories of recovery based on the same allegations at the pleading stage. Thus,
8 like the fourth cause of action based upon an implied agreement, the Court finds that this claim can
9 be pleaded in the alternative to the express contract and CUTSA claims. *See Philips Medical,*
10 *supra*, 471 F.Supp.2d at 1047.

13 B. Preemption

14 Zynga argues that SA's fifth claim should be dismissed for the additional reason that it is
15 preempted by CUTSA. As noted by Zynga, CUTSA preempts all non-contractual remedies for
16 misappropriation of trade secrets. Cal. Civ. Code §3426.7(b)(2); *K.C. Multimedia Inc. v. Bank of*
17 *America Tech. & Operations, Inc.*, 171 Cal.App.4th 939, 957 (2009). Zynga argues that the breach
18 of confidence claim is based upon the same allegations as SA's CUTSA claim and that the claim is
19 therefore preempted by the comprehensive structure of CUTSA.

21 First, the Court notes that the allegations of the breach of confidence claim appear to be
22 distinct from the allegations in connection with the CUTSA claim. SA's breach of confidence
23 claim, as alleged, incorporates all the allegations of the claims that precede it. However, it only
24 specifically asserts as its basis SA's disclosure of "concepts and/or game features" to Zynga. (FAC
25 at ¶56-61.) In other words, it does not specifically allege that the breach of confidence claim is
26 founded on use of "Trade Secrets" as defined in paragraph 35 of the FAC. On their face, the
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1 allegations regarding breach of confidence in disclosure of “concepts and/or game features” do not
2 include the proprietary source code information, nor are they required to. *See Faris, supra*, 97
3 Cal.App.3d at 321.

4 Moreover, to the extent that the allegation of “concepts and/or game features” overlaps with
5 any matters asserted to be trade secret information, plaintiff may plead for relief in the alternative.
6 While CUTSA might preempt any relief with respect to information that is a protectable trade
7 secret, SA may still be entitled to recover on a breach of confidence theory for any non-trade secret
8 information.
9

10 4. BREACH OF IMPLIED COVENANT CLAIM (SIXTH CLAIM)

11 Zynga also argues that SA’s claim for breach of the implied covenant of good faith and fair
12 dealing is superfluous and duplicative of SA’s express contract claim and therefore should be
13 dismissed. In connection with this claim, SA alleges that Zynga never intended to meet its
14 responsibilities under the express and implied agreements between the parties, and that Zynga
15 deceived SA into believing it would not use the “ruse of conducting ‘due diligence’ to access
16 Plaintiff’s source code in order to steal Plaintiff’s concepts and/or game features.” (FAC at ¶68.)
17

18 The covenant of good faith and fair dealing, implied by law in every contract, exists to
19 prevent one contracting party from unfairly frustrating the other party's right to receive the benefits
20 of the agreement. *Guz v Bechtel National Inc.*, 24 Cal.4th 317, 349 (2000) citing *Waller v. Truck*
21 *Ins. Exch.* 11 Cal.4th 1, 36 (1995). “The covenant is implied as a supplement to the express
22 contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the
23 other party's rights to the benefits of the agreement.” *Waller, supra*, 11 Cal.4th at 36. “Breach of
24 the covenant of good faith and fair dealing gives rise to a contract action ... or, in limited contexts, a
25 tort action with the tort measure of compensatory damages and the right to recover punitive
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1 damages.” *Durell v. Sharp Healthcare* 183 Cal.App.4th 1350, 1369 (2010) *citing* 1 Witkin,
2 *Summary of Cal. Law* (10th ed.2005) Contracts, § 800, p. 894.

3 The allegations here are sufficient to allege conduct beyond a mere breach of the terms of
4 the agreement which would support a claim for tort damages. The complaint alleges that Zynga
5 used the agreement to obtain information for its own use and without compensation to SA, which
6 frustrated the purpose of the agreement, *i.e.* provision of information to Zynga for the purpose of
7 deciding whether to purchase the myFarm game information from SA.
8

9 CONCLUSION


10 For the foregoing reasons, Zynga’s motion to dismiss SA’s second claim for breach of the
11 CUTSA is construed as a motion to strike and is GRANTED IN PART as to the allegations in
12 paragraph 35 reading: “images for myFarm and its various features.”
13

14 Plaintiff SA is GRANTED LEAVE TO AMEND to allege more particularly the trade secret
15 material stricken by the Court from the second claim for relief. Any amended complaint must be
16 filed and served no later than 14 days after the date of this order. Any response must be filed and
17 served within 14 days thereafter, or if no amended complaint is filed, within 21 days of the date of
18 this order.
19

20 The motion to dismiss the fourth, fifth and sixth claims is DENIED.

21 IT IS SO ORDERED.
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23 Dated: February 6, 2012
24

25 
26 YVONNE GONZALEZ ROGERS
27 UNITED STATES DISTRICT COURT JUDGE
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United States District Court
Northern District of California