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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

TORNQUIST MACHINERY COMPANY, an Arizona corporation, Plaintiff, vs. STAR CNC MACHINE TOOL CORP., a New York corporation; EVERETT BENNETT, an individual, Defendants.	Case No. 00119669 Complaint Filed: March 6, 2009 Assigned to Hon. Judge Steven L. Perk, Dept. C32 **NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: May 15, 2009 Time: 11:00 a.m. Dept. C32 Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 15, 2009, at 11:00 a.m., or as soon thereafter as the matter may be heard, in Department C32 of the above-entitled Court, located at 700 Civic Center Drive West, Santa Ana, CA 92701, Defendants Star CNC Machine Tool Corp. ("Star") and Everett Bennett ("Bennett") (collectively "Defendants") will and hereby do demur to the Complaint of Plaintiff Tornquist Machinery Company ("Tornquist" or "Plaintiff").

This Demurrer is made on the grounds that the First through Eighth Causes of Action of the Complaint fail to state facts sufficient to constitute causes of action against Defendants and/or are stated ambiguously and unintelligibly. California Code of Civil Procedure §§ 430.10(e), (f), (g).

This Demurrer is based upon this Notice, the attached Demurrer and Memorandum of Points and Authorities, all records, papers and pleadings on file in this action, such oral

argument as the Court may consider at the hearing of this Demurrer, and any matters of which the Court may or must take judicial notice.

DATED: April 22, 2009

By: _____
Mary F. Mock
Attorneys for Defendants Star CNC Machine Tool Corp. and Everett Bennett

DEMURRER TO COMPLAINT

Defendants demur to the First through Eighth Causes of Action of Plaintiff's Complaint on the following grounds:

DEMURRER TO FIRST CAUSE OF ACTION

(For Unfair Competition)

1. The First Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

2. The First Cause of Action is ambiguous and unintelligible and therefore subject to a special demurrer for uncertainty.

DEMURRER TO SECOND CAUSE OF ACTION

(For Breach of Contract)

3. Plaintiffs' purported Second Cause of Action for Breach of Contract fails to indicate whether the purported contract is written, oral, or implied, and fails to include a copy of the alleged contract or a verbatim statement of its terms and is therefore subject to a special demurrer. *Code Civ. Proc.* § 430.10(g).

DEMURRER TO THIRD CAUSE OF ACTION

(For Intentional Interference with Contract)

4. The Third Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

DEMURRER TO FOURTH CAUSE OF ACTION

(For Breach Of Implied Covenant Of Good Faith And Fair Dealing)

5. The Fourth Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

6. The Fourth Cause of Action is ambiguous and unintelligible and therefore subject to a special demurrer. *Code Civ. Proc.* § 430.10(f).

DEMURRER TO FIFTH CAUSE OF ACTION

(For Breach Of Fiduciary Duty)

7. The Fifth Cause of Action fails to state facts sufficient to constitute a cause of

action. *Code Civ. Proc.* § 430.10(e).

DEMURRER TO SIXTH CAUSE OF ACTION

(For Intentional Interference With Prospective Business Advantage)

8. The Sixth Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

DEMURRER TO SEVENTH CAUSE OF ACTION

(For Fraud)

9. The Seventh Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

10. The Seventh Cause of Action is uncertain and insufficiently specific with respect to the identity of person who made the alleged misrepresentations, their authority to speak and bind Defendants, to whom the alleged misrepresentations were made, and the manner in which such alleged misrepresentations were made. *Code Civ. Proc.* § 430.10(f).

DEMURRER TO EIGHTH CAUSE OF ACTION

(For Negligent Misrepresentation)

11. The Eighth Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

DATED: April 22, 2009

By: _____

Mary F. Mock
Attorneys for Defendants Star CNC Machine Tool Corp. and Everett Bennett

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action arises out of a claim by Tornquist that Star, through its agent Bennett, wrongfully terminated what Tornquist alleges was a 20-year relationship in which Tornquist acted as the distributor of Star's products in Southern California. Specifically, Tornquist alleges that it entered into a distributorship contract with a predecessor of Star; that the relationship continued for approximately 20 years, during which time Tornquist was the exclusive distributor of Star's equipment in Southern California; and that on November 10, 2008, Star abruptly and wrongfully terminated Tornquist's distributorship contract without cause or notice. Tornquist further alleges that Bennett consistently frustrated and interfered with Tornquist's efforts to sell Star's equipment. Star's stated basis for the termination was Tornquist's failure to meet sales targets, a contention that Tornquist denies.

The operative Complaint contains eight cause of action, as follows: (1) unfair competition; (2) breach of contract; (3) intentional interference with contract; (4) breach of implied covenant of good faith and fair dealing; (5) breach of fiduciary duty; (6) intentional interference with prospective business advantage; (7) fraud; and (8) negligent misrepresentation. The first, second, fourth, and fifth causes of action run against Star only; the third cause of action runs against Bennett only; and the sixth, seventh, and eighth causes of action run against both defendants.

II. LEGAL STANDARD ON DEMURRER

Pursuant to Code of Civil Procedure § 430.10: "The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action and/or (f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible. Mere "recitals, references to, or allegations of material facts, which are left to surmise are subject to special Demurrer for uncertainty." *Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537. A complaint that fails to state the date or time of the facts averred to is uncertain and subject

to demurrer on that ground. *Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 634 (disapproved on other grounds in *Stockton v. Sup. Ct.* (2007) 42 Cal.4th 730.)

For purposes of a demurrer, all allegations of the complaint are deemed to be true. *Moore v. Conliffe* (1994) 7 Cal.4th 634, 638. A demurrer should be sustained without leave to amend if the conduct complained of is not actionable as a matter of law. *See*, *e.g.*, *Droz v. Pacific National Insurance Co.* (1982) 138 Cal.App.3d 181, 187 (affirming grant of demurrer without leave to amend where "the allegations of the complaint impose no liability under substantive law").

III. THE FIRST CLAIM FOR VIOLATION OF THE UNFAIR BUSINESS PRACTICES ACT FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

The main purpose of California Business and Professions Code § 17200 *et seq.* ("Unfair Competition Law" or "UCL") is the "preservation of fair business competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal. 4th 163, 180. The UCL authorizes civil suits for "unfair competition" which it defines, in relevant part, to "include any unlawful, unfair or fraudulent business act or practice." *Bus. & Prof. Code*, §17200.

Plaintiff's cause of action for unfair competition fails for a number of reasons. First, the cause of action fails to allege any purportedly "unlawful" business practices with the required specificity. The "unlawful" practices prohibited by the UCL are "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory or court-made." *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-9. If a business practice is alleged to be "unlawful" under the unfair competition law, the plaintiff must allege the specific law that was purportedly violated. *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616 (sustaining demurrer to Section 17200 claim without leave to amend because plaintiff did not identify which section of the law had been violated and merely alleged that "defendants breached [Section 17200] by refusing to sell [the products] to plaintiff for the purpose of ruining and interfering with his beauty supply business, with the effect of misleading plaintiff's customers."). Here, Plaintiff fails to identify which law - - whether civil or criminal, federal, state, or municipal, statutory,

regulatory or court-made - - was violated by Star.

Second, the cause of action fails to allege any purportedly "unfair" business practices with the required specificity. "Unfair" practices prohibited by the UCL have been interpreted broadly (*see*, *e.g.*, *People ex rel. Renne v. Servantes* (2001) 86 Cal.App.4th 1081, 1095), but cannot be based upon general common law principles. *Textron Financial Corp. v. National Union Fire Insurance Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1072 ("reliance on general common law principles to support a cause of action for unfair competition is unavailing"). Plaintiff merely states in its perfunctory three-paragraph cause of action that "Star has committed unfair competition" [Complaint, ¶ 127], but nowhere specifies the particular "unfair competition" upon which the claim is based.

Plaintiff's failure to plead the particular unfair competition underlying the cause of action is particularly inadequate in this case, because if the basis for the Plaintiff's unfair competition claim is a cause of action that cannot be maintained (because it is either improperly pled or pre-empted, etc.), the unfair competition claim cannot be maintained either. *Khoury v. Maly's of Calif., Inc.*, *supra*, 14 Cal.App.4th 612, 619 (finding that dismissal of the claim upon which an unfair competition claim is based results in dismissal of unfair competition claim as well).

Third, the cause of action fails to allege any purportedly "fraudulent" business practices with the required specificity. The "fraudulent" practices prohibited by the UCL do not refer to the common law tort of fraud. Rather, this prong of the statute requires a showing that members of the public are likely to be deceived by the practices. *South Bay Chevrolet v. GMAC* (1999) 72 Cal.App.4th 861, 888. None of Star's alleged conduct alleged is likely to deceive the public, and, indeed, no allegation of likely public deceit is made.

Fourth, Plaintiff does not allege sufficient facts to support the relief requested. Plaintiff claims generally that "Star has unfairly acquired or retained money" for which Plaintiff is entitled to "restitution." [Complaint, ¶ 129.] Restitution, however, is merely a remedy, and cannot by itself support a claim for unfair competition.

Under the UCL, a court is only permitted to grant injunctive relief, if appropriate.

Bus. & Prof. Code §17203. Damages are not available for a violation of the unfair competition law. *Bank of the West v. Superior Court* (1992) 2 Cal.App.4th 1254, 1266. The only monetary relief available under the unfair competition law "is the disgorgement of money that has been wrongfully obtained" or, in the language of the statute, an order "restor[ing] … money … which may have been acquired by means of … unfair competition." *Id.* The statute's use of the terms "restore" and "acquired" has been interpreted by the courts to require the offending party to have "obtained something to which it was not entitled *and* the victim must have given up something which he or she was entitled to keep." *Day v. AT&T* (1998) 63 Cal.App.4th 325, 340. If a plaintiff never had possession of money or property, restitution from a defendant is not a "restoration" of money or property to the plaintiff. As the court said in *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer* (C.D. Cal. 2001) 178 F.Supp.2d 1099, 1122: "There is a difference between 'getting' and 'getting back.' The abstract property rights that [the plaintiff] invokes do not entitle it to get something it never had."

Here, based on the totality of the pleading, it is clear that Plaintiff is not seeking injunctive "restitution" under the UCL, but traditional damages. Plaintiff does not and cannot allege that it gave Star something that Plaintiff was entitled to keep. Plaintiff's claim that it is entitled to "restitution" of money is really a disguised form of damages that cannot support a claim for unfair business competition. For this reason, also, the Demurrer to the first cause of action should be sustained.

IV. THE SECOND CLAIM FOR BREACH OF CONTACT IS UNCERTAIN BECAUSE IT LACKS THE REQUIRED SPECIFICITY

Where an action is based on an alleged breach of contract, the complaint must indicate on its face whether the contract is written, oral, or implied by conduct. *Otworth v. Southern Pacific Transportation Co*. (1985) 166 Cal.App.3d 452, 458-459. Further, when there is an allegation that a contract is written, "the terms of a contract must be set forth verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." *Id*. at 459; *see also A. Teichert & Son, Inc. v. California* (1965) 238 Cal.App.2d 736, 748, *disapproved on other grounds*, 65 Cal. 2d 787, 792 ("[i]f writings form a necessary link in a

cause of action, they should be quoted in the complaint, set out *in haec verba* or incorporated by reference"). Failure to do so is ground for a special demurrer. *Cal. Civ. Proc. Code* § 430.10(g).

Here, Plaintiff alleges that "Star breached the agreement between Star and Tornquist through the actions described herein" and "further breached the agreement…when Star wrongfully and abruptly terminated the agreement." [Complaint, ¶¶ 133-134.] Plaintiff fails to allege whether the referenced agreements are written, oral, or implied. Moreover, nowhere in the Complaint does Plaintiff attach a copy of the alleged contract or set forth its terms verbatim. Thus, the second cause of action for Breach of Contract is improperly pled and this Demurrer should be sustained.

V. THE THIRD CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACT FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

Plaintiff brings this cause of action against Bennett, Star's regional manager. Plaintiff clearly acknowledges that Bennett's only connection with this matter was that he was acting as an agent and/or employee for Star. [*See*, *e.g.*, Complaint ¶ 3.] As such, this claim is without merit.

The elements of a cause of action for intentional interference with contract are: (1) a valid contract between plaintiff and a third party; (2) the defendant's knowledge of this contract; (3) defendant's intentional act designed to induce breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and, (5) resulting damages. *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1125. Assuming *arguendo* that Plaintiff could prove the elements necessary for this intentional interference claim, Plaintiff's claim must fail because California law recognizes a "manager's privilege" as an absolute defense to the tort of an intentional interference with contract. *Shoemaker v. Myers* (1990) 52 Cal.3d 1; *Halvorsen v. Aramark Uniform Services* (1998) 65 Cal.App.4th 1383. [1]

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[1] One of the early modern cases on the manager's privilege described it as follows: "The privilege to induce an otherwise apparently tortious breach of contract is extended by law to (footnote continued)

In *Shoemaker, supra*, the Court held that "it is well established that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract." 52 Cal.3d at 24. In *Halvorsen*, *supra*, the plaintiff sued the defendant manager for inducing the employer to terminate plaintiff's employment contract. The court sustained a demurrer holding that the manager's privilege was a bar to the plaintiff's action.

The facts in this case lead to the same conclusion. Plaintiff clearly alleges that Bennett was the agent and employee of Star who managed a relevant geographical region for Star, [Complaint, ¶ 38-40,] and that Bennett, in that capacity, took actions designed to interfere with the contract between Tornquist and Star [Complaint, ¶ 138]. In these circumstances the manager's privilege clearly applies. Star's demurrer to the third cause of action should be sustained without leave to amend.

VI. THE FOURTH CLAIM FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IS UNCERTAIN BECAUSE IT FAILS TO STATE A CLAIM AND IS DUPLICATIVE OF THE SECOND CLAIM

A. Plaintiffs' Cause of Action for Breach of the Implied Covenant Fails to State a Claim

It is well established that without a viable contractual relationship, a claim for breach of the implied covenant cannot be stated. *See Smith v. San Francisco* (1990) 225 Cal.App.3d 38, 49 ("[t]he prerequisite for any action for breach of the implied covenant . . . is the existence of a contractual relationship between the parties, since the covenant is an implied term of the contract"); *Waller v. Truck Insurance Exchange* (1995) 11 Cal. 4th 1, 36 (the covenant

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further certain social interests deemed of sufficient importance to merit protection from liability. Thus, a manager or agent may…properly endeavor to protect the interests of his principal by counseling the breach of a contract with a third party which he reasonably believes to be harmful to his employer's best interests. [Citation.]" (*Olivet v. Frischling* (1980) 104 Cal.App.3d 831, 840-841, 164 Cal.Rptr. 87, fn. omitted, disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510, 28 Cal.Rptr.2d 475, 869 P.2d 454; accord, *Aalgaard v. Merchants Nat. Bank, Inc.* (1990) 224 Cal.App.3d 674, 684, 274 Cal.Rptr. 81.)

is implied as a supplement to express contract terms and "[a]bsent that contractual right . . . the implied covenant has nothing upon which to act as supplement"). This limitation on claims for breach of the implied covenant is axiomatic because the implied covenant of good faith and fair dealing does not exist until a contract comes into existence; there is no independent cause of action for breach of the implied covenant of good faith and fair dealing. *Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1153 ("[w]ithout a contractual relationship, [a party] cannot state a cause of action for breach of the implied covenant").

At present, Plaintiff has not yet stated a proper or viable contract action against Star. As such, Plaintiff has failed to state a claim for Breach of the Implied Covenant.

B. Plaintiffs' Cause of Action for Breach of the Implied Covenant Alleges Nothing More Than a Breach of Contract and Therefore Fails to State a Claim

Under California law, the implied covenant of good faith and fair dealing requires that neither party to a contract do anything that will frustrate the rights of the other party to receive the benefits of the contract. *Waller*, *supra*, 11 Cal. 4th at 36; *Love*, *supra*, 221 Cal.App.3d at 1153. A breach of the implied covenant of good faith and fair dealing involves something beyond the breach of the contractual duty itself. *Careau & Co. v. Security Pacific Business Credit* (1990) 222 Cal.App.3d 1371, 1394. "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." *Id.* at 1395.

In the instant action, Plaintiffs' allegations regarding the purported breach of contract are virtually identical to those in the claim for breach of the implied covenant of good faith and fair dealing. [Complaint, ¶¶ 130-135, 140-144.] The only difference is that in the contract claim, Plaintiff alleges that "Star breached the agreement" and in the covenant claim, Plaintiff alleges that "Star has breached the covenant of good faith and fair dealing…."

[Complaint, ¶¶133, 142.] Because the fourth cause of action for Breach of Implied Covenant alleges nothing more than a breach of contract, it fails to state a claim for breach of covenant. [2]

VII. THE FIFTH CLAIM FOR BREACH OF FIDUCIARY DUTY FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

"A fiduciary relationship is created where a person reposes trust and confidence in another and the person in whom such confidence is reposed obtains control over the other person's affairs." *Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 809. California courts have rejected attempts to extend fiduciary obligations to relationships where the imposition of such an affirmative duty is unwarranted, including the relationship between a manufacturer/producer and its distributor. *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 633. For instance, no fiduciary relationship was found to exist between the following: (1) a manufacturer and its authorized dealer (*Rickel v. Schwinn Bicycle Co.* (1983) 144 Cal.App.3d 648, 653–655); and (2) a movie distributor and movie producers under a distribution contract (*Recorded Picture Co. [Productions] Ltd. v. Nelson Entm't* (1997) 53 Cal.App.4th 350, 369–370).

In *Rickel v. Schwinn Bicycle Co.*, *supra*, 144 Cal.App.3d 648, plaintiff bike shop owners sued a bicycle manufacturer for breach of fiduciary duty arising from a distribution agreement. *Id.* at 651. Because there was no California authority applying fiduciary standards to dealings specifically between manufacturers and their authorized distributors at the time, the Court of Appeal looked to the traditional definition of a fiduciary relationship. *Id.* at 653.[3] A fiduciary relationship is "founded upon the trust or confidence reposed by one person in the integrity and

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[2] A demurrer should be sustained to a duplicative cause of action where it merely repeats similar allegations adding nothing by way of fact or theory. *Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1135. Merely attaching a different label to an allegation does not save a duplicative cause of action. *Id.* It is proper to sustain a demurrer to a duplicative cause of action without leave to amend. *Careau & Co. v. Security Pacific Business Credit, Inc.*, supra; *see also Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 501.

[3] *Rickel* is still the governing authority on this point some 25 years later; see *Wolf v. Sup. Ct.*, (2003) 107 Cal.App.4th 25, 33 ("[E]ven distribution agreements, negotiated at arms' length, do not create a fiduciary relationship between the product's owner and the distributor even thought both parties stand to benefit from the distributor's sales…[citing *Rickel*.]"

fidelity of another" and "precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed." *Id.* at 654. The Court held that because nonmutual profit was inherent in the relationship between a distributor and a manufacturer, their relationship was not a fiduciary one. *Id.* The Court stated, "California law is that parties to a contract, by that fact alone, have no fiduciary duties toward one another." *Id.* (*citing Gonsalves v. Hodgson* (1951) 38 Cal. 2d 91, 97-98; *Waverly Productions, Inc. v. RKO General, Inc.* (1963) 217 Cal.App.2d 721, 732).

Similarly here, the only relationship existing between Tornquist and Star is contractual. In its Fifth Cause of Action, Tornquist refers to the "20-year partnership with Star" by which "Star owed Tornquist certain fiduciary duties." [Complaint, ¶ 146-147.] However, this Cause of Action incorporates the previous allegations of the Complaint, which make clear that the "20-year partnership" arose only out of a distributorship ***contract*** allegedly entered nearly 20 years ago. [Complaint, ¶ 10.] There is no fiduciary relationship between Tornquist and Star, and the Demurrer to this fifth cause of action should be sustained without leave to amend.

VIII. THE SIXTH CLAIM FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

The elements of an intentional interference claim with prospective economic or business advantage are as follows: (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. *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1153.

The California Supreme Court has stated that while intentionally interfering with an existing contract is a wrong in and of itself, intentionally interfering with a plaintiff's prospective economic advantage is not. To establish a claim for interference with prospective economic advantage, therefore, a plaintiff must plead that the defendant engaged in an independently

wrongful act. *Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal. 4th 1134, 1158; *see also Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal. 4th 376, 393); *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 116; *Reeves v. Hanlon* (2004) 33 Cal. 4th 1140. This is because "[t]he tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct." *Id.* at 1159 (*citing Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.* (9th Cir. 2001) 271 F.3d 825, 832.) The California Supreme Court went on to define an "independently wrongful act" as one that is "unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal. 4th 1134, 1159.

Here, Plaintiff has failed to plead that Defendants engaged in any independently wrongful acts under this claim, as none of its incorporated allegations refer to independently wrongful (i.e. unlawful) acts. For example, Plaintiff alleges that Bennett "has changed every dealer in his territory at least once if not more." [Complaint, ¶ 52.] Plaintiff's complaint is replete with such allegations of Bennett's allegedly erratic and incompetent managerial behavior and Star's "consent" to such behavior. [Complaint, ¶¶ 22-125.] However, none of this alleged conduct rises to the required level of an independently wrongful act as defined by the California Supreme Court in *Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal. 4th 1134, 1159.

The sixth cause of action fails to state a claim for intentional interference with prospective economic/business advantage and the demurrer on this claim should be sustained without leave to amend.

IX. THE SEVENTH CLAIM FOR PROMISSORY FRAUD IS UNCERTAIN BECAUSE IT LACKS THE REQUIRED SPECIFICITY

Fraud must be specifically pleaded. "The effect of this rule is twofold: (a) General pleading of the legal conclusion of 'fraud' is insufficient and the facts constituting the fraud must be alleged; (b) Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings . . . will not

ordinarily be invoked to sustain a pleading defective in any material respect." *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 216, *superseded on other grounds*, (*citing* 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 574; *see Hall v. Department of Adoptions* (1975) 47 Cal.App.3d 898, 904; *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 109; *Lavine v. Jessup* (1958) 161 Cal.App.2d 59, 69.)

Thus, a plaintiff alleging fraud must state what was said, by whom, in what manner (i.e., oral or in writing), when, and, in the case of a corporate defendant, under what authority to bind the corporation. *See Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 782.

Here, Plaintiff's fraud claim lacks the required specificity on most if not all of these grounds. For example, Plaintiff alleges that "Star and Bennett made fraudulent promises without intent to perform those promises." Complaint, ¶ 161. This allegation lacks the required specificity because it fails to state what the promises were, whether the promises were oral or written, when the promises were made, and says nothing about the alleged promisors' authority to bind Star, a corporation. Thus, the Demurrer to the seventh cause of action for promissory fraud should be sustained.

X. THE EIGHTH CLAIM FOR NEGLIGENT MISREPRESENTATION FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

Plaintiff's Seventh Cause of Action is for a type of fraud often referred to as "promissory fraud;" i.e., a promise made without the intent to perform. [Complaint, ¶¶ 160-165.] Plaintiff's Eighth Cause of Action relies upon exactly the same facts [Complaint, ¶ 166 incorporating by reference all previous allegations of the complaint], and attempts to plead them alternatively as a claim for negligent misrepresentation. The central allegation of Plaintiff's Eighth Cause of Action is that "Star and/or Bennett made negligent representations to Tornquist that certain actions would not be taken in order to induce and convince Tornquist to continue its agreement and relationship with Star." [*See*, *e.g.*, Complaint ¶ 167.] While pleading alternative legal theories based on the same facts is usually acceptable, in this instance Plaintiff's Eighth Cause of Action fails because California law clearly holds that a promise made without the intent

to perform cannot form the basis for a claim of negligent misrepresentation.

Plaintiff's Eighth Cause of Action is on all fours with, and is governed by, the decision is *Tarmann v. State Farm* (1991) 2 Cal.App.4th 153. There, plaintiff alleged claims for fraud and negligent misrepresentation based on her contention that the defendant insurer had falsely promised that it would pay for repairs to her automobile upon their completion. When the insurance company in fact declined to pay, plaintiff brought an action alleging that the insurer's representations about payment were either intentionally or negligently false.

The trial court sustained Defendant's demurrer to the negligent misrepresentation claim without leave to amend, and the Court of Appeal affirmed. In so doing, it began its analysis by noting that "to be actionable, a negligent misrepresentation must be ordinarily be as to past or existing material facts. [P]redictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud. [Citations omitted]." 2 Cal.App.4th at 158.

The Court went on to compare the elements of fraud and negligent misrepresentation, as follows:

> To maintain an action for deceit based on a false promise, one must specifically allege and prove, among other things, that the promisor did not intend to perform at the time he or she made the promise and that it was intended to deceive or induce the promisee to do or not do a particular thing. [Citations omitted]. Given this requirement, an action based on a false promise is simply a type of intentional misrepresentation, i.e., actual fraud. ***The specific intent requirement also precludes pleading a false promise claim as a negligent misrepresentation, i.e., 'the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.'*** (Civil Code Section 1710, subd. (2).) Simply put, making a promise with an honest but unreasonable intent to perform is wholly different from making one with no intent

> to perform and, therefore, does not constitute a false promise.
>
> Moreover, we decline to establish a new type of actionable deceit: the negligent false promise. In light of our discussion, the trial court properly sustained the demurrer to [Plaintiff's] cause of action for negligent misrepresentation.

2 Cal.App.4th at 159 (Emphasis added.)

Here, because of the essential difference between a claim for fraud and one for negligent misrepresentation, Plaintiff cannot have it both ways. Its allegations that Defendants made promises about future action without the intent to perform simply cannot support a claim for negligent misrepresentation. The Demurrer to this eighth cause of action, as in *Tarmann*, should be sustained without leave to amend.

XI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant its Demurrer as to the First through Eighth Causes of Action in Plaintiff's Complaint.

DATED: April 22, 2009

By: _____

Mary F. Mock
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Star CNC Machine Tool Corp.
and Everett Bennett

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