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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GLOBAL MANUFACTURE GROUP,  
LLC,

Plaintiff and Appellant,

v.

TITAN INTERNATIONAL, INC., et al.,

Defendants and Respondents.

G044824

(Super. Ct. No. 30-2008-00114865)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Mohammed K. Ghods and William A. Stahr for Plaintiff and Appellant.

Morris Polich & Purdy, Richard H. Nakamura, Jr., and David J. Vendler for Defendant and Respondent Titan International, Inc.

Bononi Law Group, William S. Waldo and Lizbeth Ochoa for Defendant and Respondent Automotive Wheels, Inc.

Global Manufacture Group, LLC (Global) signed a contract to sell manufacturing equipment to a Chinese company, GMG International Tendering Co. Ltd. (Tendering). At the time, Global did not own the equipment, but it soon entered into a contract to buy the equipment from Automotive Wheels, Inc. (Automotive) and Titan International, Inc. (hereafter referred to collectively and in the singular as Titan unless the context requires otherwise). Despite several extensions, Global was unable to secure funding to pay for the equipment and its contract with Titan was deemed null and void. Thereafter, Titan sold the equipment directly to Tendering.

The trial court dismissed Global's lawsuit against Titan after sustaining without leave to amend demurrers to the third amended complaint (TAC). Although the TAC is not a model of clarity, we can discern it alleges two distinct wrongs: (1) Titan caused Global to lose a potential customer and expected profits from reselling equipment in China; and (2) Titan wrongfully used information provided by Global's employee to sell equipment directly to Tendering in China and make a profit. We agree with the trial court's ruling Global failed to state a valid cause of action. The judgment is affirmed.

## I

We must accept as true all facts pleaded in the complaint. (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170.) The complaint alleged: "This case concerns a dispute relating to the sale of certain manufacturing equipment . . . . As herein alleged, [Titan] interfered with [Global's] contract with its employee Stan Clark [(hereafter Clark),] and induced this employee to provide [Global's] confidential customer and deal information . . . in order to sell the subject equipment using the same contract terms and letter of credit behind [Global's] back and without compensating [Global] for its expenses or expected profits."

In the complaint, Global explained how its relationship with Titan began: "At all relevant times, [Global] was interested in purchasing certain wheel producing equipment and relocating the equipment to factories in China. In or about 2002, [Global]

learned of certain automotive wheel production lines located in a facility in Brea, California (hereinafter the ‘Brea Equipment’), and commenced negotiations with the company then operating said equipment named CRC and its CEO Richard Rylander.”

Global alleged, “In the fall of 2003, GMG learned that CRC did not actually own the Brea Equipment, but was leasing it from Titan and/or [Automotive].” Global stated it began negotiating with “President and Chief Executive Officer, Maurice M. Taylor, Jr. (‘Taylor’)” who used the names of Automotive and Titan “interchangeably and their respective letterheads, making no distinction between the two entities in dealing with [Global].” In the complaint, Global asserted Automotive was a subsidiary of Titan.

The complaint alleged Global went to great expense and effort to become the middleman in this deal. For example, Global’s representatives made many trips to China, and it secured visas for various Chinese company officials to visit the United States. And based on Taylor’s recommendation, Global hired Titan’s former plant manager, Clark, to handle the sale and relocation of the Brea Equipment “to Chinese factory destinations.”

Clark was asked to sign an employment contract in which he agreed not to disclose any of Global’s “proprietary information.” The complaint contained a lengthy recitation of the employment contract, including the statement Clark agreed not to divulge confidential information such as “lists of customers and other information of a similar nature to the extent not available to the public . . . .”

The complaint alleged that on April 8, 2004, Global entered into an agreement with Tendering “to sell it two (2) of the four (4) rim production lines from the Brea Equipment for a price of \$3.5 million dollars. . . . A second sale for the remainder of the production equipment was also contemplated. This second sale would have resulted in an estimated profit of \$3,700,000 to [Global].”

Two months later, on June 9, 2004, Global entered into a “Sales Agreement” with Titan. The Sales Agreement was attached to the complaint. Global

agreed to purchase equipment for \$5,200,000 “at [c]losing,” and the amount was to be “paid by an irrevocable documentary letter of credit in a form satisfactory to [Titan] naming [Titan] as beneficiary thereof and expiring six (6) months from the [c]losing [d]ate” of June 21, 2004.

Global alleged it was always “ready, willing and able to pay for the purchase of the equipment at issue, and at various relevant times tendered letters of credit to [Titan] . . . .” However, the complaint only described two letters of credit. The first letter was submitted “within [seven] days of final execution of the Sales Agreement” Global’s complaint stated this “letter of credit was obtained through Deutsche Bank with terms to expire [six] months from the [c]losing [d]ate, as required . . . [by] the Sales Agreement.” Global “believes . . . LaSalle Bank, not a party to the Sales Agreement but acting as an intermediary bank for [Titan] in the letter of credit process, indicated that it would not accept the payment terms of the letter of credit.” Global maintained the rejection by a third party amounted to a breach of the contract but it wished to complete the transaction and took steps to address the concerns raised by LaSalle Bank. The second letter was obtained in November 2004. It was referred to in the complaint as a letter of credit “#4000997/04 from Bank of China, whose terms matched the terms and conditions required by LaSalle Bank.” More about this second letter will be described anon.

After the first letter of credit was rejected, Global alleged Titan changed the terms of the deal. On August 30, 2004, Titan’s chief financial officer (CFO) Kent Hackamack sent Global a letter stating Titan removed several items of equipment from the list for the sales transaction and it “demand[ed] an irrevocable letter of credit for \$4,880,000 by September 3, 2004.” In response, Global’s general counsel, Thomas L. Green, wrote a letter stating the existing letter of credit only needed to be revised. Global’s complaint alleged it notified Titan that changing the amount of equipment was a breach of the Sales Agreement and “complicated further performance

because the full equipment list (which included the removed equipment) had already been approved by the Chinese government for the import permit.”<sup>1</sup>

The letter concluded with the statement, “Global and our partner in China remain ready and willing to issue a letter of credit pursuant to your request, however, the removal of [several items of equipment] must be approved by the Chinese government and officials . . . .”

Although not discussed in the complaint, Green’s letter sheds additional light on the reasons why the first letter of credit was rejected by LaSalle Bank. Green wrote, “Global’s partner in China obtained a draft letter of credit through Deutsche Bank . . . . However, LaSalle Bank apparently would not accept the payment terms of the letter of credit, at which time [Global’s president, John] Wang[,] went to China in order to meet with our partner and the Chinese government, and was able to accelerate payment to ‘at sight[.]’ Our partner reasonably required bank interest of 1 [percent] per month, totaling \$312,000 (6 [percent] of \$5.2 M).”

On the day of Hackmack’s stated deadline, September 3, he faxed a letter to Global (attached as an exhibit to the complaint). It stated, Titan received Green’s letter “in which Global . . . states it is not able to post the \$4.9 million irrevocable [l]etter of [c]redit by September 3, 2004. As discussed per our phone conversation on September 3, 2004, you asked if Global . . . could: [¶] (i) post an irrevocable [l]etter of [c]redit for \$2.1 million U.S. dollars, acceptable by our bank (LaSalle Bank), by September 7, 2004, for equipment listed on Exhibit 1 and, [¶] (ii) post another irrevocable [l]etter of [c]redit for \$2.8 million U.S. dollars, acceptable by our bank (LaSalle Bank), by September 14, 2004, for equipment listed on Exhibit 2. [¶] [Titan’s] president . . . has approved the

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<sup>1</sup> The letter was attached to the complaint as Exhibit E. We have reviewed the letter, and contrary to allegations in the complaint, Green did not say removing equipment was a breach of the Sales Agreement. He simply stated the removal would require Global to obtain additional approval from the Chinese government.

above proposal. [¶] Again, if [Titan] does not receive the first (i) irrevocable [l]etter of [c]redit by September 7, 2004, all oral and written agreements including exhibits . . . will become null and void.”

In the complaint, Global alleged Hackamack “misrepresented the contents of a telephone conference . . . and unilaterally set two new extremely short deadlines for posting two letters of credit.” Global did not allege the nature of the alleged misrepresentation. However, it maintained that injecting additional deal terms was a breach of the Sales Agreement’s express requirement all amendments must be in writing and signed by the parties. It concluded, “these arbitrary deadlines were used by [Titan] as a ruse to try to break free from their contractual obligations owed to [Global] in order to steal and deal with [Global’s] Chinese [c]ustomer directly . . . .”

The complaint declared that on the September 7, 2004 deadline, Global “expressly rejected [Titan’s] unilateral imposition of September 7, 2004 as a deadline for submission of letters of credit . . .” and Global advised Titan it “would provide the letters of credit as soon as practicable.” Global stated it accused Titan of putting it under “undue duress and that the substantial time and money [Global] had spent to develop the deal was being put in jeopardy by [Titan’s] imposition of unilateral arbitrary terms.”

Global avowed, “despite asserting that the transaction was terminated as of September 7, 2004, for the remainder of 2004,” that Taylor “provided further oral assurances” to Wang that if Global could submit a letter of credit meeting LaSalle Bank’s demands the equipment would be sold as planned. Global alleged that three months later, in November 2004, it “obtained letter of credit #4000997/04 from Bank of China, whose terms matched the terms and conditions required by LaSalle Bank. However, unbeknownst to [Global, Titan] had been secretly using [Global’s] own faithless employee . . . Clark, to make a direct deal with [Global’s] Chinese [c]ustomer . . . and had no intention of honoring their word to sell the equipment to [Global.] Instead, [Titan] apparently realized that [it] could make millions of dollars more if [it] bypassed

[Global] completely and used . . . Clark’s knowledge of and access to [Global’s] proprietary and confidential trade secret information to consummate a direct deal with” Tendering in China.

The complaint declared, “[Global] is informed, believes and thereon alleges that [Titan] rejected [Global’s] submission of letter of credit #4000997/04 from Bank of China but accepted the same letter of credit #4000997/04 from Bank of China (except for the name of the beneficiary, which was changed from [Global] to [Titan]) when it sold the subject equipment directly to [Global’s] Chinese [c]ustomer, eventually cheating [Global] out of the \$600,000 worth of expenses incurred . . . and the \$800,000 worth of profits [Global] was going to make on the sale of the first group of equipment. [Global] further alleges that it spent over two years of time and incurred considerable expenses putting together the deal and performed all terms and conditions of the Sales Agreement, including the letter of credit requirements of the Sales Agreement . . . .”

Global accused Titan of misleading it to believe Titan was acting in good faith with regard to the equipment sale. The complaint alleged, Titan and Clark “conspired to steal” Global’s Chinese customer. Titan, with Clark’s assistance, entered into a direct sales agreement with Tendering in October 2004. Global attached a copy of the contract and accused Titan of failing to notify it, obtain its consent, or pay consideration for stealing its customer. It alleged the co-conspirators (Titan and Clark) acted with deliberate intent to deprive Global of the benefit of its contract with Tendering. In addition, Global asserted Titan induced Clark to breach his confidentiality agreement with Global. Global added it did not learn about the transaction between Titan and Tendering until the spring of 2008 (four years later) due to unrelated litigation involving Titan. Global alleged it suffered \$5 million in damages.

In November 2008, Global filed a complaint, and voluntarily amended it on March 19, 2009. The first amended complaint (FAC) against Titan and Clark alleged

causes of action for (1) fraud by concealment, (2) breach of fiduciary duty and conspiracy to induce breach of fiduciary duty, (3) intentional interference with contract relations, (4) interference with prospective economic relations, and (5) breach of contract (alleged against Clark only).

Titan demurred to the FAC and Global filed an opposition. After several continuances, the court ruled as follows: “The complaint fails to allege that [Global] tendered the payment for the equipment to [Titan]. If payment was never made [Global] never had the right to acquire the equipment. There could have been neither reliance nor damage by virtue of the alleged concealment. Also, there could have been no damage caused by the alleged interference as [Global] was unable to perform. Regarding the breach of fiduciary duty cause of action, the demurrer is sustained without leave [to amend]. There was no fiduciary duty between moving parties and [Global]. Since there was no fiduciary duty . . . there could be no conspiracy to breach same. [Citation.]”

On March 3, 2010, Global filed its second amended complaint (SAC), alleging additional causes of action for violation of Business and Professions Code section 17200,<sup>2</sup> unjust enrichment, and willful misconduct. Global amended the second cause of action to allege breach of fiduciary duty against only Clark and not Titan. Again, Titan demurred to the complaint alleging the original defects had not been cured and the complaint failed to state facts to support the new claims. Global filed an opposition and objected to Titan’s two supporting declarations.

On May 28, 2010, the trial court sustained the demurrer with leave to amend. The minute order stated, “While [Global] has pled general language that it ‘was ready, willing and able’ to tender payment for the equipment and tendered ‘letters of credit to defendant’ [Global] still does not allege that it tendered an irrevocable documentary letter of credit as required by the sales agreement. Without this allegation

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<sup>2</sup> All further statutory references are to the Business and Professions Code, unless otherwise indicated.

there can be no reliance, causation, harm, negligence or interference because [Global] never acquired the right to purchase the equipment. [Global] may have conditional leave to amend if [it] can properly allege that the irrevocable letters of credit called for in the sales agreement and the letter of [September 3, 2004,] were submitted under the modified terms set forth in the [September 3, 2004] letter.” The court sustained Global’s objections to the declarations and gave Global until June 14, to file a third amended complaint (TAC).

On June 14, 2010, Global filed its TAC and alleged the same causes of action. The complaint’s factual allegations were expanded to allege more details about the first letter of credit, Hackamack’s September 3 deadline for a new letter of credit, Global’s rejection of the new deadline, and the subsequent September 7 deadline. The court sustained Titan’s demurrer without leave to amend and entered a judgment of dismissal.

The court’s minute order explained, “This is [Global’s] fourth attempt to cure the defects in its pleading. At the last hearing . . . conditional leave to amend was granted ‘if [Global] can properly allege that the irrevocable letters of credit called for in the sales agreement and the [September 3] letter . . . were submitted under the modified terms set forth in the [September 3, 2004] letter.’ [Global] has failed to so allege. The court can only infer that it failed to do so because it cannot make that allegation.”

## II

### *A. Standard of Review*

“We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and facts of which judicial notice can be taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context. [Citation]’ [Citations.] [¶] If the allegations in the complaint conflict with the

exhibits, we rely on and accept as true the contents of the exhibits. However, in doing so, if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we must accept the construction offered by plaintiff. [Citations.]”

(*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 82-83

(*SC Manufactured Homes*), fn. omitted.)

#### *B. Interference with Contractual Relations*

To state a claim for interference with contractual relations, Global was required to plead: (1) a valid contract existed between Global and Clark and/or between Global and Tendering; (2) Titan’s knowledge of each of those contracts; (3) Titan’s intentional acts were designed to induce a breach or disruption of the contractual relationship; (4) an actual breach or disruption of the contractual relationship; and (5) resulting damage to Global. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

Global failed to allege facts showing the third element that Titan’s intentional acts were designed to induce a breach with respect to either Clark’s employment contract or the Chinese resale agreement. Starting with the employment contract, we conclude the complaint clearly alleged Clark revealed private customer information in breach of his written agreement not to disclose proprietary information. Specifically, the alleged facts suggest Clark intentionally interfered *with his own* employment contract by purportedly revealing customer information. However, there was nothing indicating a wrongful “intentional act” by Titan. Global’s statement Titan “induced” Clark to breach his employment agreement is a legal conclusion not based on any specific facts.

We recognize Global attached to the complaint an e-mail Titan’s representative wrote to Clark after the Sale Agreement terminated asking him, “if you have anyone who is interested, we would be happy to talk to them.” Global argues this

e-mail proves Titan induced Clark to reveal Global's confidential customer information. We have carefully reviewed the entire e-mail.<sup>3</sup> It specifically refers to attaching a letter written to Wang on September 7, the date the transaction with Titan terminated. It also asks if Clark knows anyone who "is interested," but does not explain the nature of the subject Titan wishes to discuss. This e-mail does not establish Titan induced Clark to reveal anything. As stated earlier in this opinion, in reviewing a demurrer, "[w]e assume the truth of . . . facts that reasonably can be inferred from those expressly pleaded . . . ." (*SC Manufactured Homes, supra*, 162 Cal.App.4th at pp. 82-83.) Global failed to plead any fact proving Titan induced Clark to breach his employment agreement.

In any event, Global's complaint does not describe any other action taken by Titan after the e-mail, or if in fact this e-mail actually prompted Clark to tell Titan about Tendering. The complaint also does not allege whether Clark ever told Titan that Tendering was the same Chinese customer that Global had targeted for reselling the equipment. Titan was never told the name of the Chinese customer during its dealing with Global, and it cannot be assumed Titan would have known Tendering was the same Chinese customer unless Clark also revealed this information. We found no specific facts to support the alleged conspiracy between Clark and Titan other than Global's general accusation that it was a conspiracy. In summary, Global failed to plead sufficient facts to support the claim Titan intentionally interfered with Clark's employment contract.

Moreover, the complaint alleged Clark did not give Titan any purported confidential customer information until sometime *after* Global's deal with Titan was terminated. Thus, Global had already lost its right to purchase the equipment and its

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<sup>3</sup> The entire e-mail, dated September 27, 2004, reads as follows: "Good morning [Clark], [¶] Morry asked me to send you a copy of the attached letter that was sent to John Wang on [September] 7. If you need a signed copy . . . I can fax [*sic*] to you, just let me know. [¶] Morry also wanted to let you know that if you have anyone who is interested, we would be happy to talk to them. [¶] Thanks, [¶] Janet." The letter referenced in the e-mail was not attached to the complaint.

expectation of any potential profits earned from reselling to Tendering. The court correctly concluded any alleged interference with the employment contract did not result in any damages to Global. And to the small extent Clark caused Global collateral damages by his employment, those issues would be addressed in Global's suit against Clark.

Turning next to Global's resale agreement with Tendering, Global blames Titan for this deal falling through by directly fulfilling Tendering's equipment needs. However, the complaint alleged Global, acting as a middleman in this sale to a Chinese company, did not own any equipment and needed to obtain it from elsewhere. Titan agreed to supply the equipment for resale if certain terms and conditions were satisfied. Global's complaint acknowledged it did not provide an acceptable line of credit to purchase the equipment from Automotive before the contract's first deadline (June 21, 2004), the second deadline (September 3, 2004), or the final deadline (September 7, 2004). Consequently, Global had no right to acquire the equipment from Titan. Based on the facts pleaded, it was Global's failure to timely obtain a letter of credit and its failure to acquire the equipment that precluded any subsequent deal with Tendering.

Evidence that Global obtained a line of credit in November 2004, long after the Sales Agreement with Titan was deemed null and void, does not assist Global. At that point, Titan was under no legal or contractual obligation to sell the equipment to Global. Global does not allege Titan breached an oral contract or that they had some sort of exclusive agreement. Titan was free to sell its product to any qualified buyer.

We also agree with Titan's assertion below and on appeal that a fatal flaw in Global's interference claim lies in its failure to plead facts to establish damages. Global's failure to submit the required letter of credit terminated Titan's obligation to sell the equipment to Global. Because Global did not own the equipment or have any right to resell it, Global had no profits to lose.

Global suggests the trial court “should have inferred that had Titan not decided to cheat Global and steal away its valued customer, a new contract between Global and Titan was all but assured . . . .” We remind Global that in considering demurrers, the court may only assume “the truth of . . . facts that reasonably can be inferred from those expressly pleaded . . . .” (*SC Manufactured Homes, supra*, 162 Cal.App.4th at pp. 82-83.) In this case, Global pled it was given a number of extensions beyond the original June 2004 deadline, and Titan’s last written correspondence stated the agreement would be “null and void” if the letter of credit could not be produced by September 2004. Titan waited over three months for the deal to be completed. Global failed to plead any facts to establish Titan would be willing to keep \$5 million dollars of merchandise on hand indefinitely. Global’s allegation a second contract could have been executed in the future is based on nothing but wishful thinking and speculation.

Global asserted Titan’s “theft of Tendering as a buyer” using Clark’s confidential information “necessarily disrupted Global’s contract with Tendering and ultimately made its performance impossible.” Generally, a theft occurs when one takes possession of personal property owned or possessed by another. Titan sold the equipment to Tendering in October 2004, when it was no longer under any contractual obligation to give Global the equipment and Global did not have any other equipment for Tendering to buy. As stated above, there were no specific facts alleged showing Titan intentionally stole Tendering from Global. Facts regarding the manner and scope of Clark’s disclosure to Titan were not included in the complaint.

In addition, Global cannot recover damages for the theft of a customer that did not exclusively belong to it. There are no allegations of an exclusive sales agreement with Tendering or some other special relationship between these companies. Rather, our review of their resale agreement shows it was not triggered until Global actually obtained something to sell. Stated another way, because Global had no equipment to sell, it cannot

complain about theft of a mere potential buyer (for goods it did not possess). (See *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 599-600 [“If a party is not obligated to perform a contract and may refuse to do so at his election without penalty, then the other party to that agreement enjoys nothing more than an expectancy. A stranger interfering with that relationship quite obviously does not disturb an enforceable contract but only a *prospective* economic relationship”], overruled on another point in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, fn. 11 (*Korea Supply*).)

Global suggests it had a legally conveyable interest in the equipment it wanted to resell to Tendering. It cites to the case *Patty v. Berryman* (1949) 95 Cal.App.2d 159 (*Patty*), to support its theory “a party can validly contract to sell something to another that it does not yet own.” We agree a party can act as a middleman to resell something to another, but the *Patty* case does not hold a party has a legally transferrable interest in specific goods absent a valid contract recognizing that interest.

In *Patty, supra*, 95 Cal.App.2d 159, plaintiff entered into a contract with defendant, who agreed to purchase 22 prefabricated houses from plaintiff. At the time this contract was executed, plaintiff did not own the 22 houses but had contracted with a third party to buy them. (*Id.* at p. 161.) Before the time for delivery of the houses, defendant repudiated the contract. (*Id.* at pp. 162-163.) Plaintiff brought an action to recover his loss of anticipated profits suffered due to defendant’s breach of the contract. (*Id.* at p. 163.) The trial court awarded plaintiff damages based on the measure of lost profits. Defendant challenged the ruling, asserting the middleman’s agreement with him was an unenforceable unilateral contract. (*Ibid.*)

The *Patty* court rejected the argument plaintiff’s failure to actually own the houses rendered the contract invalid. (*Patty, supra*, 95 Cal.App.2d at p. 168.) The court acknowledged that ordinarily in a sale agreement, payment of the purchase price and delivery of the goods are concurrent conditions. (*Id.* at p. 169) “[T]hat rule is not strictly

applied where the buyer knows the seller does not own the goods involved when the contract is executed. . . . [¶] Where a seller contracts to sell property he does not own, the law applies a common sense rule that a seller is allowed a reasonable time after payment by the buyer during which he can purchase the goods required to meet his promise. [Citations.] In such cases the seller probably must have some interest in the goods. He cannot, when the buyer tenders the purchase price, then, for the first time, commence to acquire the property. But here [plaintiff] had the houses tied up by his contract with [the third party], and simply had to pay [the third party] to complete his title. [Citation.]” The court concluded that because defendant knew plaintiff was purchasing the goods from a third party he waived any right to object and defendant’s obligation to purchase the goods was binding. (*Ibid.*)

The *Patty* court’s determination plaintiff acquired an “interest” in the goods was based on its finding plaintiff entered into a binding contract with a third party to supply the 22 prefabricated houses. Contrary to Global’s contention, the court did not suggest the plaintiff in *Patty* would have acquired an interest in the goods without having a binding contract with the third party supplier. To the contrary, the court stated plaintiff, acting as a middleman, was obligated to acquire within “a reasonable time” the property required to meet his promise with defendant or the deal with defendant would be deemed invalid.

We found no case law, and Global cites to none, holding a middleman’s agreement with a potential buyer will alone convey a transferable interest in the subject property. The middleman, owning no property of its own, must secure an interest in property through a valid contract with a third party. In this case, Global’s agreement with the third party, Titan, terminated in September 2004. Consequently, its right to convey its interest in that property also terminated. As aptly noted by Titan, “A company cannot sell that which it never owned.” Global failed to allege an interference with contractual relations claim.

### *C. The Equitable Doctrine of Unjust Enrichment*

In the TAC, Global alleged Titan was “unjustly enriched by [its] theft of [Global’s] proprietary information and [its] Chinese [c]ustomer insofar as they were able to save costs and expenses that they otherwise would have had to incur in order to find a suitable buyer for the Brea Equipment.”

“It is of course the law that when one obtains a benefit which may not be justly retained, unjust enrichment results, and restitution is in order. [Citation.] However, the ‘mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.’ [Citation.]” (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 134 (*Marina Tenants*)). Thus, the mere allegation Titan saved money by not having to find a suitable buyer does not entitle Global to relief unless they can allege a cognizable legal right was violated. (*Ibid.*)

“Although a court of equity may employ broad powers in the application of equitable remedies, it cannot create new rights under the guise of doing equity. [Citation.] Nor will equity lend its aid to accomplish by indirection what the law forbids to be done directly. [Citation.] Equity follows the law and when the law determines the rights of the respective parties, a court of equity is without power to decree relief which the law denies. [Citation.]” (*Marina Tenants, supra*, 181 Cal.App.3d at p. 134.)

The many contracts in this case set forth the parties’ rights. As described in detail above, the facts do not support the claim Global’s legal contractual rights were violated by Titan’s sale to Tendering. Simply stated, Titan’s obligation to sell equipment to Global had expired. The parties did not agree to an anti-competition clause. No contractual provision prohibited Titan from selling its equipment directly to paying customers.

Alternatively Global asserts Titan wrongfully acquired benefits by directly selling to Tendering because the deal was based on the illegal theft of confidential customer information. As we have explained in the prior section, the complaint does not

contain factual allegations to support Global's legal conclusion Titan stole information or induced Clark to conspire with it and steal customers away from Global. Rather, the complaint established Global did not perform its contract with Titan and had nothing to sell Tendering. The allegations do not support a claim Titan's subsequent dealings with Tendering justified a claim for unjust enrichment.

*D. Conspiracy to Induce Breach of Fiduciary Duty*

The court sustained the demurrer without leave to amend Global's conspiracy claim in the FAC on the grounds, "There was no fiduciary duty between moving parties and [Global]. Since there was no fiduciary duty . . . there could be no conspiracy to breach same. [Citation.]" On appeal, Global asserts this ruling is incorrect because "no independent fiduciary relationship is necessary in order to state this cause of action." It is wrong.

The FAC alleged Clark was Global's fiduciary agent. It stated Clark breached his fiduciary duties by stealing customer information "and conspiring with" Titan to steal Tendering. The complaint alleged Titan "conspired to induce" Clark to breach his fiduciary duties to Global.

As stated in Titan's demurrer, this claim fails because it is based on the faulty legal premise that Global and Clark had a fiduciary relationship. "In general, employment-type relationships are not fiduciary relationships. [Citation.] In the absence of a fiduciary relationship, there can be no breach of fiduciary duty as a matter of law." (*O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 811-812; 15 Cal.Jur.3d (2012) Corporations, § 273 [employees who are not officers or directors are generally not considered to be fiduciaries].) And in the absence of a breach, Global's claim there was a conspiracy to induce a breach necessarily also fails.

In addition, the claim fails because Global never alleged facts showing it had a fiduciary relationship with Titan. Even if Clark owed a fiduciary duty to Global, Titan could not be held liable for conspiracy relating to Clark's breach of Clark's

fiduciary duty to Global. “Conspiracy is not an independent cause of action, but rather a doctrine imposing liability for a tort upon those involved in its commission. [Citation.] And ‘tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff . . . and is potentially subject to liability for breach of that duty.’ [Citation.]” (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 590.)

On appeal, Global asserts there are cases holding no independent fiduciary relationship is necessary in order to state a conspiracy of a fiduciary duty claim. He argues all that is needed is evidence Titan, for its own financial gain or advantage, induced Clark to breach his duty. (Citing e.g., *Doctors’ Co. v. Superior Court* (1989) 49 Cal.3d 39 (*Doctors’ Co.*)). He has misconstrued the cases. For example, in the *Doctors’ Co.* case, the Supreme Court upheld the general rule requiring an independent fiduciary relationship, holding the attorneys and an expert engaged by an insurance company could not be liable for conspiring with it to violate Insurance Code section 790.03 [regulating unfair practices by insurers]. The court recognized the noninsurer defendants were not bound by the insurers’ statutory duties and explained, “A cause of action for civil conspiracy may not arise . . . if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty.” (*Doctors’ Co.*, *supra*, 49 Cal.3d at p. 44.)

Global’s argument there is an exception to the above general rule is based on its misinterpretation of the Supreme Court’s discussion of the rules regarding agents and employees. The Supreme Court noted that generally agents and employees cannot conspire with their principal or employer where they act on its behalf, “‘and not as individuals for their individual advantage.’” (*Doctors’ Co.*, *supra*, 49 Cal.3d at p. 45.) The Supreme Court explained, “Because the noninsurer defendants are not subject to th[e] duty and were acting merely as agents of the insurer ‘and not as individuals for their

individual advantage’ [citation], ‘they cannot be held accountable on a theory of conspiracy.’ [Citation.]” (*Ibid.*) The court recognized agents may be held liable if they conspire to commit a tort for their own personal advantage or gain, rather than simply on behalf of their principal or employer. (*Id.* at pp. 46-47.)

Focusing on the above language, Global argues the Supreme Court recognized a “financial gain” exception that should apply to all individuals, not only to agents conspiring with their employers for personal gain. This same misapplication of the Supreme Court’s ruling was rejected in *1-800 Contacts, supra*, 107 Cal.App.4th at page 592 (relying on *Applied Equipment Corp v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 510-511 [a party to a contract cannot be liable for conspiracy to interfere tortiously with that contract because one cannot be liable for conspiracy if one is legally incapable of committing the tort].) We agree with this sound reasoning and also conclude there is no “personal gain” exception. As such, we find Titan, having no fiduciary duty to Global, cannot be held liable under a conspiracy theory for Clark’s breach of Clark’s own fiduciary duty to Global.

#### *E. Fraud by Concealment*

“[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. (BAJI No. 12.35 (7th ed. 1986).)” (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613 (*Marketing West*).

“In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances:

(1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; [and] (3) the defendant actively conceals discovery from the plaintiff.’ . . . [Citation.]” (*Marketing West, supra*, 6 Cal.App.4th at p. 613.)

“[T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, “if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure.” [Citation.]” (*Marketing West, supra*, 6 Cal.App.4th at p. 613.)

In the TAC, Global alleged Titan had a duty to disclose information “related to [its] intent to steal” Tendering as a customer. Specifically, the complaint alleged Titan concealed its intent to directly deal with Tendering and mislead Global by “pretending [it was] no longer interested in dealing with the Chinese. In fact, at one point, Taylor . . . falsely declared ‘I’m done with the Chinese.’” Global asserted that “on September 27, 2004, Taylor’s assistant e-mailed . . . Clark on Taylor’s behalf to inquire if Clark knew of any customers that would be interested in the Brea Equipment.” It alleged, Clark, who was still Global’s employee at that time, did not report the inquiry from Taylor to Global. In addition, it was alleged Clark failed to disclose “anything about his efforts to help” Titan sell to Tendering.

The cause of action fails because Global did not allege any facts indicating that after the sales agreement with Titan expired, Titan had a duty to disclose its next customer. The complaint alleged the Sales Agreement terminated on September 7. The complaint does not assert there was any special relationship after September 7 to justify

imposition of a duty on Titan to disclose to whom it planned to sell its equipment. We found no contractual, statutory, or common law duty to disclose.

Global maintains it alleged facts proving it was still willing to purchase equipment from Titan, and Titan's president indicated at some point he was not interested in making a deal with the Chinese. Global fails to point to legal authority explaining why these facts matter to whether Titan had a duty to disclose in October 2004 that it was negotiating a deal with Tendering. Global and Titan were no longer in a relationship giving rise to any duties.

Global's contention on appeal that there was a conspiracy does not help save this cause of action. It argues Titan "as co-conspirator" with Clark incurred the same liability. As discussed in greater detail above, because Titan did not owe a duty of disclosure to Global, Titan cannot be held liable for allegedly conspiring with Clark to breach alleged Clark's duty to disclose. (See *1-800 Contacts*, *supra*, 107 Cal.App.4th 590.)

And finally, Global did not allege facts to support the legal conclusion Titan stole Tendering as a customer. As stated above, the circumstances by which Titan learned about Tendering from Clark are not discussed in the complaint. Titan was under no duty to disclose a theft it did not commit.

#### *F. Unfair Competition Law (UCL)*

"The UCL prohibits, inter alia, 'any unlawful, unfair or fraudulent business act or practice . . . .' (§17200.) In order to give substance to this prohibition, a UCL action "'borrows" violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices . . . ." [Citation.]" (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1590 (*Peterson*)).

Here, the court sustained Titan's demurrer to Global's UCL cause of action for lack of standing. "Section 17204 of the UCL governs a plaintiff's standing to assert a UCL claim. (§§ 17204, 17203.) Prior to the enactment of Proposition 64 in November

2004, the UCL ‘did not predicate standing “on a showing of injury or damage” and was thus ‘subject to abuse by attorneys who used it as the basis for legal “shakedown” schemes’ and frivolous lawsuits. [Citations.] To address this problem, Proposition 64 amended section 17204 to accord standing only to certain specified public officials and to any person who ““has suffered injury in fact and has lost money or property as a result of such unfair competition.”” [Citation.] Thus, in the aftermath of Proposition 64, only plaintiffs who have suffered actual damage may pursue a private UCL action. A private plaintiff must make a twofold showing: he or she must demonstrate injury in fact *and* a loss of money or property caused by unfair competition. [Citations.]” (*Peterson, supra*, 164 Cal.App.4th at p. 1590.)

Global contends it alleged sufficient facts to meet both requirements for standing under section 17204. It failed to plead the first requirement. “[I]njury in fact . . . is defined . . . as a ““distinct and palpable injury”” suffered “as a result of the defendant’s actions.”” (*Peterson, supra*, 164 Cal.App.4th at p. 1590.) It also has been defined as ““an invasion of a legally protected interest which is (a) concrete and particularized, [citations]; and (b) ‘actual or imminent, not “conjectural” or “hypothetical,” [citations].” [Citation.]” (*Ibid.*)

Global argues the complaint clearly alleged it “suffered injury in fact and lost money and/or property as a result of [Titan’s] acts of unfair competition in violation of the UCL, and as such [Global] is entitled to injunctive, restitutionary and other appropriate relief as authorized by the UCL.” We agree with Titan and the trial court’s conclusion these damage allegations are conclusory and lack factual support. Global’s financial losses were not caused by Titan’s actions. It lost a potential customer and sale profits because it did not timely submit an acceptable irrevocable letter of credit as required by the Sales Agreement with Titan. The complaint does not support a claim of theft. And Clark’s breach of his employment agreement was not specifically linked to

any affirmative action by Titan. We conclude Global failed to allege any damages caused by unfair practices to have standing to maintain a private action under the UCL.

### *G. Willful Misconduct*

The court sustained Titan's demurrer to Global's willful misconduct cause of action without comment. In its demurrer, Titan maintained California does not recognize willful misconduct as an independent cause of action. Global cites to several cases it believes discuss willful misconduct as a separate tort. Global is mistaken.

The issue was address by the court in *Berkley v. Dowds* (2007) 152 Cal.App.4th 518 (*Berkley*). It ruled, "The parties have argued extensively about whether a tort called 'willful misconduct' is recognized in California. It is not a separate tort, but simply ""an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care' [citations]." [Citation.] Its pleading requirements are similar to negligence but stricter. [Citation.]" (*Id.* at p. 526.) Specifically, "It is now settled that 'Three essential elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril.' [Citation.]" (*Bains v. Western Pacific R.R. Co.* (1976) 56 Cal.App.3d 902, 905.)

Thus, to the extent willful misconduct is simply an aggravated form of negligence, Global was required to plead, at a minimum, "[T]he well-known elements of any negligence cause of action [which are] duty, breach of duty, proximate cause and damages. [Citations.]" [Citation.]" (*Berkley, supra*, 152 Cal.App.4th at p. 526.) The court correctly determined Global failed to do so. Missing were the basic requirements that Titan owed Global a duty of care or that it caused any damages. The court properly sustained the demurrer.

#### *H. Interference With Prospective Economic Relations*

The elements of a cause of action for interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional and wrongful conduct designed to interfere with or disrupt this relationship; (4) interference with or disruption of this relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's wrongful conduct. (*Korea Supply, supra*, 29 Cal.4th at p. 1153.)

“To establish intentional interference with prospective economic advantage, a plaintiff must plead and prove ‘the defendant’s interference was wrongful “by some legal measure other than the fact of interference itself.”’ [Citation.] An act is independently wrongful ‘if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.’ [Citation.]” (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 241.) “The 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. [Citation.]” (*Korea Supply, supra*, 29 Cal.4th at pp. 1158-1159.)

Global contends it properly alleged Titan's wrongful conduct included several torts “besides mere interference, including fraud and conspiracy to defraud, as well as misappropriation of Global's confidential and proprietary information.” We find the complaint was inadequate in this regard. Global failed to allege facts to support its legal conclusion there was fraud or a conspiracy to defraud when Titan sold equipment directly to Tendering. Earlier in this opinion we addressed Global's fraud, conspiracy, and misappropriation allegations. We have concluded the facts stated in the complaint were insufficient to support a viable cause of action. In short, Global failed to adequately

plead facts that, if true, prove Titan's sale to Tendering was a wrongful interference with Global's prospective economic relations.

III

The judgment is affirmed. Respondents shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.