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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

LEATT CORPORATION, a Nevada corporation; and EXCEED HOLDINGS (PTY) LTD., a South African company,

Plaintiffs,

vs.

INNOVATIVE SAFETY TECHNOLOGY, LLC, a California limited liability company; KEVIN HEATH ENTERPRISES, INC., a California corporation; KEVIN HEATH, an individual; and E.V. TECHNOLOGY, a Chinese business entity,

Defendants.

CASE NO. 09-CV-1301 - IEG (POR)  
ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

[Doc. No. 67]

This is a case about alleged trade secret misappropriation. Currently before the Court is Defendants Kevin Heath, Kevin Heath Enterprises, Inc., and E.V. Technology’s (collectively, “Heath Defendants”) Motion to Dismiss Plaintiffs’ claims for enforcement of foreign arbitration award, unfair competition, and tortious interference. Having considered the parties’ arguments, and for the reasons set forth below, the Court **GRANTS IN PART and DENIES IN PART** the motion to dismiss.

**BACKGROUND**

**I. Factual background**

The factual and procedural background in this case is set forth in great detail in the Court’s previous order. See Leatt Corp. v. Innovative Safety Tech., LLC, No. 09-CV-1301-IEG (POR), 2010

1 WL 1526382, at \*\*1-5 (S.D. Cal. Apr. 15, 2010). As relevant to this motion, Plaintiffs Leatt  
2 Corporation (“Leatt”) and Exceed Holdings (Pty) Ltd. (“Xceed”) allege to have spent many years of  
3 independent research and development to create neck safety braces for use in motorsports. By 2006,  
4 these efforts culminated in the development of the Moto-R brace for use with cars and the Moto-GPX  
5 brace for use with motorcycles. A new version of the Moto-R was allegedly prototyped in or around  
6 the late summer and/or early fall of 2006 (“Prototype 1”). Leatt then designed and built a second  
7 prototype around the summer of 2007 (“Prototype 2”).

8 According to Plaintiffs, starting from January 2008, two of their employees—Grant Nelson and  
9 Karl Ebel—stole and improperly disclosed and commercialized Plaintiffs’ proprietary and confidential  
10 information concerning Prototype 2. Subsequently, Plaintiffs allege Nelson and Ebel, working together  
11 with an investor by the name of Doug Williams, developed and began production of a neck brace with  
12 a raised stabilizer bar similar to Prototype 2 (“the DefNder”). In or around June 2008, Nelson, Ebel,  
13 and Williams formed Defendant Innovative Safety Technology, LLC (“IST”), which listed all three  
14 as managers or members.

15 In summer or fall of 2008, IST entered into a distribution agreement with Defendant Kevin  
16 Heath, who arranged for the DefNder to be manufactured in China and to be imported and sold in the  
17 United States through two of his companies: E.V. Technology (“EVT”), a Chinese business entity,  
18 and Kevin Heath Enterprises, Inc. (“KHE”), a California corporation. Plaintiffs allege Mr. Heath  
19 personally, and through his companies, directed, authorized, and participated in the wrongful acts  
20 committed by the other Defendants, and that he assisted and worked in concert with IST to  
21 manufacture, import, market, sell, and offer for sale the DefNder.

## 22 **II. The South African action**

23 To protect their proprietary and confidential information, Plaintiffs first filed suit in South  
24 Africa against Nelson and Ebel, and subsequently Williams, for misappropriating Plaintiffs’ trade  
25 secrets and for copyright infringement. On December 5, 2008, Plaintiffs received an interdict (similar  
26 to a preliminary injunction) against Nelson and Ebel that prohibited them from disclosing, copying,  
27 selling, or distributing certain specific features of Prototype 2, including any sale or distribution of the  
28 DefNder product. On June 11, 2009, Plaintiffs received a similar interdict against Williams.

1 Subsequently, the South African action was referred to arbitration. The Arbitrator eventually  
2 determined that the overall shapes of Prototype 1 and 2 did not form part of the state of the art as of  
3 January 25, 2008. (SFAC, Ex. G, ¶ 98 [hereinafter, “Arbitration Award”].) The Arbitrator also  
4 concluded that even though elements of Prototype 2 were present on the Moto-R device and in other  
5 devices available in the marketplace, “there were significant design differences as between Prototype  
6 2 and the prior art,” and therefore “the overall design of Prototype 2 constituted confidential  
7 information.” (Id. ¶ 113.) In the end, although there were some differences, the Arbitrator found that  
8 the DefNder conceptually resembled Prototype 2, particularly in relation to the stabilizer bar. (Id. ¶¶  
9 257, 350.) The Arbitrator found that Nelson used his knowledge of the design of Prototype 2 in  
10 designing the DefNder, and that such knowledge constituted confidential information proprietary to  
11 Plaintiffs. (Id. ¶¶ 348-53.) According to the Arbitrator, the following confidential information was  
12 misused by Nelson: (1) the harness channels and their strategic placement, (2) the elevated frontal  
13 support bars (the stabilizer bars), and (3) the overall shape of the brace. (Id. ¶ 355.) The Arbitrator also  
14 found that Ebel and Williams were liable for aiding and abetting Nelson. (Id. ¶ 362.) Finally, having  
15 concluded that the misappropriation provided Nelson with a “springboard” of between 18 and 24  
16 months, the Arbitrator found that justice would be served if Nelson, Ebel, and Williams were enjoined  
17 until July 31, 2010 from using or disclosing the above confidential information. (Id. ¶¶ 377, 386.)

### 18 **III. Procedural history**

19 Plaintiffs commenced the present action in this Court on June 16, 2009. [Doc. No. 1]. After  
20 the Court ruled on Defendants’ Motion to Dismiss, Plaintiffs filed a First Amended Complaint  
21 (“FAC”) on September 14, 2009. [See Doc. Nos. 16, 17]. Plaintiffs thereafter moved for a preliminary  
22 injunction, which the Court granted in part and denied in part on April 15, 2010. [Doc. No. 64].  
23 Subsequently, Plaintiffs filed a Supplemental First Amended Complaint (“SFAC”), alleging causes  
24 of action for: (1) misappropriation of trade secrets; (2) unfair competition; (3) tortious interference;  
25 and (4) enforcement of foreign arbitration award. [Doc. No. 66].

26 Currently before the Court is Heath Defendants’ motion to dismiss, filed on May 7, 2010.  
27 Plaintiffs filed an opposition, and the Heath Defendants replied. The Court subsequently took the  
28 motion under submission pursuant to Civil Local Rule 7.1(d)(1).

## LEGAL STANDARD

1  
2 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings. A  
3 complaint survives a motion to dismiss if it contains “enough facts to state a claim to relief that is  
4 plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S.544, 570 (2007). The court may dismiss  
5 a complaint as a matter of law for: (1) “lack of cognizable legal theory,” or (2) “insufficient facts  
6 under a cognizable legal claim.” SmileCare Dental Group v. Delta Dental Plan of Cal., 88 F.3d 780,  
7 783 (9th Cir. 1996) (citation omitted). The court only reviews the contents of the complaint, accepting  
8 all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party.  
9 al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009) (citation omitted).

10 Despite the deference, the court need not accept “legal conclusions” as true. Ashcroft v. Iqbal,  
11 --- U.S. ---, 129 S. Ct. 1937, 1949-50 (2009). It is also improper for the court to assume “the [plaintiff]  
12 can prove facts that [he or she] has not alleged.” Assoc. Gen. Contractors of Cal., Inc. v. Cal. State  
13 Council of Carpenters, 459 U.S. 519, 526 (1983). On the other hand, “[w]hen there are well-pleaded  
14 factual allegations, a court should assume their veracity and then determine whether they plausibly  
15 give rise to an entitlement to relief.” Iqbal, 129 S. Ct. at 1950.

## DISCUSSION

16  
17 The Heath Defendants first seek dismissal of Plaintiffs’ claim for enforcement of a foreign  
18 arbitration award on the ground that they were not parties and did not participate in any way, shape,  
19 or form in the South African action. Next, the Heath Defendants also seek dismissal of Plaintiffs’  
20 unfair competition and tortious interference claims because they are preempted by the Uniform Trade  
21 Secrets Act. The Court addresses each of these arguments in turn.

### I. Enforcement of a foreign arbitration award

22  
23 In their fourth cause of action, Plaintiffs rely on the Convention on the Recognition and  
24 Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 53  
25 (“Convention”), as implemented by the Federal Arbitration Act, 9 U.S.C. §§ 201-08 (“FAA”), to seek  
26 enforcement of the Arbitration Award against Defendants. Under the Convention, “the district court’s  
27 role in reviewing a foreign arbitral award is strictly limited” and “the showing required to avoid  
28 summary confirmance is high.” Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc., 126 F.3d 15,

1 19, 23 (2d Cir. 1997); see also Balen v. Holland Am. Line Inc., 583 F.3d 647, 652 (9th Cir. 2009)  
 2 (“The Supreme Court has consistently recognized ‘the emphatic federal policy in favor of arbitral  
 3 dispute resolution,’ a policy that ‘applies with special force in the field of international commerce.’”  
 4 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985))).

5 The Heath Defendants argue the Court should refuse enforcement of the award because they  
 6 were not “parties” to the South African arbitration as required by the FAA. See 9 U.S.C. § 207  
 7 (“Within three years after an arbitral award falling under the Convention is made, any party to the  
 8 arbitration may apply to any court having jurisdiction under this chapter for an order confirming the  
 9 award as against any other *party* to the arbitration.” (emphasis added)). The Heath Defendants,  
 10 however, unduly minimize the scope of the Convention. Article III of the Convention provides that  
 11 “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance  
 12 with the rules of procedure of the territory where the award is relied upon, under the conditions laid  
 13 down in the [various provisions of the Convention].” In the United States, courts have recognized that  
 14 non-signatories may be bound by an arbitration agreement under “ordinary contract and agency  
 15 principles,” such as agency or alter ego. See, e.g., Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir.  
 16 2006); In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine,  
 17 311 F.3d 488, 494-95 (2d Cir. 2002) [hereinafter Monegasque]; Letizia v. Prudential Bache Sec., Inc.,  
 18 802 F.2d 1185, 1187-88 (9th Cir. 1986). The Court will analyze each of these theories in turn.<sup>1</sup>

19 A. Alter ego

20 The alter ego doctrine applies when “‘there is such unity of interest and ownership that the  
 21 separate personalities of the two entities no longer exist’” and “‘failure to disregard their separate  
 22 identities would result in fraud or injustice.’” Harris Rutsky & Co. Ins. Services, Inc. v. Bell &  
 23 Clements Ltd., 328 F.3d 1122, 1134-35 (9th Cir. 2003) (citation omitted). The presence of the same

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25 <sup>1</sup> The Heath Defendants also argue the FAA does not apply in this case because there is no  
 26 “legal relationship . . . which is considered as commercial” between Plaintiffs and the Heath  
 27 Defendants. See Walker & Zanger (West Coast) Ltd. v. Stone Design S.A., 4 F. Supp. 2d 931, 936  
 28 (C.D. Cal. 1997); Prograph Int’l Inc. v. Barhydt, 928 F. Supp. 983, 988 (N.D. Cal. 1996). However,  
 in the present case, that relationship *does* exist between Defendants Nelson and Ebel, who were  
 Plaintiffs’ employees, and Plaintiffs. The Heath Defendants do not dispute this. The question for the  
 Court, therefore, is whether an arbitration award arising from *this* legal relationship can be enforced  
 against the Heath Defendants under the principles of either alter ego and/or agency.

1 officers and/or 100% control through stock ownership does not, by itself, make one entity an alter ego  
 2 of another. Id. at 1135. Rather, what is necessary is such “control over day-to-day activities” as to  
 3 render one entity “the mere instrumentality” of the other. Id.; accord Doe v. Unocal Corp., 248 F.3d  
 4 915, 926 (9th Cir. 2001) (“The first prong of [the alter ego] test has alternately been stated as requiring  
 5 a showing that the parent controls the subsidiary ‘to such a degree as to render the latter the mere  
 6 instrumentality of the former.’” (quoting Calvert v. Huckins, 875 F. Supp. 674, 678 (E.D. Cal. 1995))).

7 Thus, the Ninth Circuit has explained that:

8 [W]here a parent corporation uses its subsidiary “as a marketing conduit” and attempts  
 9 to shield itself from liability based on its subsidiaries’ activities, piercing the corporate  
 10 veil is appropriate and the alter-ego test is satisfied. That test is also satisfied where the  
 record indicates that the parent dictates “[e]very facet [of the subsidiary’s]  
 business—from broad policy decisions to routine matters of day-to-day operation [.]”

11 Unocal Corp., 248 F.3d at 926-27 (internal citations omitted).

12 Nonetheless, for the first prong of the alter ego test to be met under California law, Plaintiffs  
 13 must allege at least *some ownership* of Defendant IST by the Heath Defendants. See S.E.C. v. Hickey,  
 14 322 F.3d 1123, 1130 (9th Cir. 2003) (noting the “clear rule of law established by the California courts  
 15 that an individual *must* own at least part of a corporation for an alter ego relationship to exist.”). In  
 16 the present case, while the SFAC arguably alleges necessary control by Mr. Heath over Defendant  
 17 IST, it fails to allege *any* ownership by Mr. Heath of at least a portion of Defendant IST. Without any  
 18 such showing, no alter ego relationship can exist under California law.<sup>2</sup> See id.

19 **B. Agency**

20 On the other hand, Plaintiffs have alleged sufficient facts to support their agency theory. To  
 21 satisfy the agency test, the plaintiff must demonstrate that one entity (the agent) represents another  
 22 (the principal) by performing services “sufficiently important” to the principal ““that if it did not have  
 23 a representative to perform them, the [principal] would undertake to preform substantially similar  
 24 services.”” See Harris Rutsky, 328 F.3d at 1135 (quoting Chan v. Society Expeditions, Inc., 39 F.3d  
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26 <sup>2</sup> The Court does note, however, that there is reason to question the reasoning behind the  
 27 absolute rule articulated in Hickey. As at least one California court noted, the Ninth Circuit’s decision  
 28 in Hickey might represent an “incorrect statement[] of California law on this subject.” See Logix Dev.  
Corp. v. Faherty, No. B178872, 2007 WL 3358745, at \*\*10-11 (Cal. Ct. App. Nov. 14, 2007)  
 (unpublished). Absent binding state authority, however, this Court is bound to apply California law  
 as interpreted by the Ninth Circuit. Cf. Zuniga v. United Can Co., 812 F.2d 443, 450 (9th Cir. 1987).

1 1398, 1405-06 (9th Cir. 1994)). Thus, the agency test is satisfied “where the [agent] was ‘either  
2 established for, or is engaged in, activities that, but for the existence of the [agent], the [principal]  
3 would have to undertake itself.’” See id. (quoting Chan, 39 F.3d at 1405-06 n.9).

4 In the present case, the SFAC adequately alleges that Mr. Heath was one of the primary  
5 architects behind the wrongdoings alleged. Thus, the SFAC alleges that Mr. Heath met with Nelson  
6 and Ebel on several occasions between January 2005 and January 2008, whereby the three of them  
7 formed a relationship that would eventually lead to Mr. Heath’s manufacture, importation, and sale  
8 of the DefNder in the United States. (SFAC ¶¶ 46-47.) Specifically, the SFAC alleges Mr. Heath met  
9 with Nelson, Ebel, and Williams in January 2008, just before both Nelson and Ebel resigned from  
10 Leatt, where the four of them discussed their impending business ventures. (SFAC ¶ 48.) Indeed, the  
11 SFAC alleges that Mr. Heath, individually and through his companies, directed, authorized, and  
12 participated in all of the allegedly wrongful acts committed by Defendant IST and other Defendants.  
13 (See SFAC ¶¶ 49-51.) Furthermore, the SFAC sufficiently alleges that Defendant IST “represented”  
14 Mr. Heath during this time by performing services “sufficiently important” to Mr. Heath that if he did  
15 not have a representative to perform them, Mr. Heath would have to undertake to perform  
16 substantially similar services. See Harris Rutsky, 328 F.3d at 1135. Specifically, at the very least, there  
17 are sufficient facts alleged to conclude that without Defendant IST, Mr. Heath would have had to  
18 design and promote the DefNder product all by himself. (See SFAC ¶¶ 46-51.)

19 Similarly, the SFAC alleges sufficient facts to conclude that at all relevant times Mr. Heath  
20 exercised the necessary control over Defendant IST. For example, the SFAC alleges Mr. Heath is  
21 currently an investor of IST. (SFAC ¶ 89.) The SFAC also alleges Mr. Heath personally registered the  
22 <defNder.com> domain name in December 2008, which currently provides a link to the  
23 <defNderneckbrace.com> website that sells the DefNder product, and that he also personally owns  
24 and operates the website located at <defender.com>. (SFAC ¶¶ 52-53.) The SFAC further alleges Mr.  
25 Heath assisted Mr. Williams in registering the domain name <willrace.com>, which is a website for  
26 Williams Racing Developments, an entity owned and operated by a relative of Mr. Williams. (SFAC  
27 ¶ 54.) According to the SFAC, the Williams Racing Development company as well as the registration  
28 for the <willrace.com> domain name use the very same Santee, California address as that of Mr.

1 Health's own companies. (Id.) Furthermore, upon receiving Plaintiffs' cease and desist letters, Mr.  
 2 Heath allegedly changed the ownership of the <defNderneckbrace.com> from his Speedworld Indoor  
 3 Racing, Inc. company to another company solely owned by him—Defendant KHE. (SFAC ¶ 58.)

4 Based on all of the foregoing, Plaintiffs have alleged sufficient facts to demonstrate that the  
 5 Heath Defendants could be bound by the actions of the other Defendants under the agency theory, and  
 6 therefore could be bound by the South African Arbitration Award.<sup>3</sup> Accordingly, the Motion to  
 7 Dismiss Plaintiffs' fourth cause of action is DENIED.

## 8 **II. State law tort claims**

9 Plaintiffs' second and third causes of action allege unfair competition and tortious interference,  
 10 respectively. The Heath Defendants move to dismiss both of these claims as preempted under the  
 11 Uniform Trade Secrets Act, CAL. CIV. CODE § 3426 et seq. ("UTSA"). In opposition, Plaintiffs argue  
 12 the dismissal is not warranted because these causes of action include additional and independent  
 13 allegations of wrongdoing based upon non-trade secret, but otherwise protectable, information.  
 14 Moreover, because preemption under the UTSA requires a factual analysis of the claims, Plaintiffs  
 15 argue dismissal is inappropriate at the pleading stage.

16 The "broad view" is that the UTSA's comprehensive structure and breadth suggests a  
 17 legislative intent to occupy the field. See K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations,  
 18 Inc., 171 Cal. App. 4th 939, 957 (2009) (citing AccuImage Diagnostics Corp. v. Terarecon, Inc., 260  
 19 F. Supp. 2d 941, 953 (N.D. Cal. 2003)). Accordingly, the UTSA is deemed to "preempt" all common  
 20 law claims that are "based on the same nucleus of facts as the misappropriation of trade secrets claim  
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 24 <sup>3</sup> Contrary to the Heath Defendants' arguments, this does not violate the "deep-rooted historic  
 25 tradition" of American jurisprudence that "everyone should have his own day in court." See Taylor  
 26 v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 2171 (2008). As the Supreme Court in Taylor noted, there  
 27 are several well-recognized exceptions to the rule against nonparty preclusion, such as: (1) agreement  
 28 to be bound; (2) pre-existing substantive legal relationship between the person to be bound and a party  
 to the judgment; (3) adequate representation by someone with the same interests who was a party to  
 the suit; (4) assuming control over the litigation in which the judgment was rendered; (5) relitigation  
 through a proxy; and (6) a special statutory scheme that may expressly foreclose successive litigation  
 by nonlitigants in certain circumstances. Id. at 2172-73. In this case, a showing of a valid agency  
 relationship between the Heath Defendants, who were not parties to the South African arbitration, and  
 other Defendants, who were, is likely sufficient to fall within one of these exceptions.



1 for relief.”<sup>4</sup> Id. at 959 (citing Digital Envoy, Inc. v. Google, Inc., 370 F. Supp. 2d 1025, 1035 (N.D.  
2 Cal. 2005)); accord Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc., 318 F. Supp. 2d  
3 216, 219-21 (D. Del. 2004) (applying California law).

4 Other claims are not preempted, however, when based upon a broader spectrum of misconduct  
5 than misappropriation. See CAL. CIV. CODE § 3426.7(b) (noting that the UTSA does not affect “other  
6 civil remedies that are not based upon misappropriation of a trade secret”); see also Ali v. Fasteners  
7 for Retail, Inc., 544 F. Supp. 2d 1064, 1070 (E.D. Cal. 2008) (concluding that plaintiff’s fiduciary duty  
8 claim was not preempted by the UTSA); Phoenix Techs. Ltd. v. DeviceVM, No. C 09-04697 CW,  
9 2009 WL 4723400, at \*\*4-5 (N.D. Cal. Dec. 8, 2009) (concluding that plaintiffs’ unfair competition  
10 and tort claims were not preempted by the UTSA to the extent they were based on facts that were not  
11 part of the nexus that formed the basis for their UTSA claim); Think Village-Kiwi, LLC v. Adobe  
12 Sys., Inc., No. C 08-04166 SI, 2009 WL 902337, at \*\*2-3 (N.D. Cal. Apr. 1, 2009) (allowing  
13 amendment of the complaint to add common law claims for misappropriation and breach of  
14 confidence to the extent those claims were based on a protectable interest other than a trade secret).

15 In this case, it appears Plaintiffs’ second and third causes of action are based on more than just  
16 the misappropriation of Plaintiffs’ trade secrets. For example, Plaintiffs’ unfair competition claim  
17 states that the conduct underlying it includes, but is *not* limited to, misappropriation of trade secrets.  
18 (SFAC ¶ 114.) Similarly, Plaintiffs’ tortious interference claim states that the interference was based  
19 upon knowledge of Plaintiffs’ prospective business relationships (which may or may not be a trade  
20 secret) as well as violation of Plaintiffs’ common law rights *in addition to* any trade secret  
21 misappropriation. (SFAC ¶¶ 118-22.) Finally, throughout their SFAC, Plaintiffs base their injury not  
22 only on the theft of their trade secrets, but also on other “confidential” and/or “proprietary”  
23 information. (See, e.g., SFAC ¶¶ 32, 36-37, 41, 50, 62-63, 89.) To the extent these claims are based  
24 upon non-trade secret information, the Court agrees that they should be allowed to go forward at this

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27 <sup>4</sup> Although the California Supreme Court has criticized the use of the word “preempt” to  
28 describe the supersession of one state law by another, see Zengen, Inc. v. Comerica Bank, 41 Cal. 4th  
239, 247 n.5 (2007), the Court uses this term to be consistent with the decision in K.C. Multimedia,  
171 Cal. App. 4th at 959, as well as every district court to apply that decision.

1 stage.<sup>5</sup> See Phoenix Techs., 2009 WL 4723400, at \*\*4-5 (noting that K.C. Multimedia “does not  
 2 undermine the analytic framework enunciated in First Advantage and Think Village-Kiwi allowing  
 3 claims to go forward where the gravamen of the claims does not rest on the misappropriation of trade  
 4 secrets”); First Advantage Background Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929, 942  
 5 (N.D. Cal. 2008) (allowing a cross-claim for false promises to proceed so long as the confidential  
 6 information that it was based on was not a trade secret).

7 Accordingly, to the extent Plaintiffs’ second and third causes of action are based upon  
 8 misappropriation of trade secrets, they are preempted by the UTSA and the Court GRANTS IN PART  
 9 the motion to dismiss in this regard. However, to the extent these causes of action are based upon facts  
 10 that are not part of the nexus that forms the basis for Plaintiffs’ UTSA claim, they are not preempted,  
 11 and the Court DENIES IN PART the motion to dismiss in this regard.

## 12 CONCLUSION

13 For the foregoing reasons, the Heath Defendants’ motion to dismiss is **GRANTED IN PART**  
 14 **and DENIED IN PART**. Specifically, the motion is **DENIED** to the extent it seeks dismissal of  
 15 Plaintiffs’ fourth cause of action for enforcement of the Arbitration Award. On the other hand, the  
 16 motion to dismiss is **GRANTED IN PART** with respect to Plaintiffs’ unfair competition and tortious  
 17 interference claims to the extent those claims are based upon misappropriation of Plaintiffs’ trade  
 18 secrets. In that regard, those claims are **DISMISSED WITH PREJUDICE**. However, the motion to

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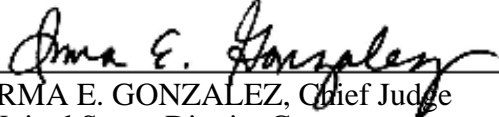
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 23 <sup>5</sup> In this regard, the Court is not persuaded by the Heath Defendants’ heavy reliance on the  
 24 California Court of Appeals’ recent decision in Silvaco Data Sys. v. Intel Corp., 184 Cal. App. 4th 210  
 25 (2010). A careful reading of the Silvaco decision reveals that it does not undermine the conclusion that  
 26 the UTSA only preempts additional claims that depend on the misappropriation of a trade secret. See,  
 27 e.g., 184 Cal. App. 4th at 236 (“We thus reaffirm that CUTSA provides the exclusive civil remedy for  
 28 conduct falling within its terms, so as to supersede other civil remedies ‘based upon misappropriation  
 of a trade secret.’” (citation omitted)); id. at 238 (“CUTSA’s supersession clause applies to claims  
 ‘based upon misappropriation of a trade secret.’” (citation omitted)). Indeed, the Silvaco court itself  
 found the plaintiff’s unfair competition claim in that case not to be preempted where it did not depend  
 on the existence of a trade secret, “but on knowingly facilitating another in the violation of its  
 obligations under a judicial decree.” Id. at 241-42. Similarly, in the present case, Plaintiffs’ unfair  
 competition and tortious interference claims are not preempted by the UTSA to the extent they depend  
 on the misappropriation of otherwise confidential or proprietary, but not trade secret, information as  
 well as upon knowledge of Plaintiffs’ prospective business relationships.

1 dismiss is **DENIED IN PART** with respect to Plaintiffs' unfair competition and tortious interference  
2 claims to the extent these claims are not based upon misappropriation of Plaintiffs' trade secrets.

3 **IT IS SO ORDERED.**

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5 DATED: July 15, 2010

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7 IRMA E. GONZALEZ, Chief Judge  
8 United States District Court  
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