IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SCA PROMOTIONS, INC.,	§	
	§	
Plaintiff and Counter-Defendant,	§	
	§	
v.	§	3:14-CV-00957-P
	§	
YAHOO! INC.,	§	
	§	
Defendant and Counter-Plaintiff.	§	

ORDER

Now before the Court is Plaintiff/Counter-Defendant's Motion to Dismiss pursuant to Rule 12(b)(6), filed on May 12, 2014. Doc. 16. Defendant/Counter-Plaintiff filed a Response on June 20, 2014. Doc. 24. Plaintiff/Counter-Defendant filed a Reply on July 11, 2014. Doc. 27. After reviewing the parties' briefing, the evidence, and the applicable law, the Court GRANTS the Motion to Dismiss Counter-Plaintiff's negligent breach of contract, breach of covenant of confidentiality, and negligent misrepresentation claims and DENIES the Motion to Dismiss the Counter-Plaintiff's breach of contract, breach of fiduciary duty, and misappropriation of trade secrets claims.

I. Background

In December 2013, Plaintiff/Counter-Defendant SCA Promotions, Inc. ("SCA") and Defendant/Counter-Plaintiff Yahoo! Inc. ("Yahoo") entered into a written contract ("Contract") related to a promotion Yahoo was sponsoring. Doc. 1-4 at 3. The promotion offered a $1 billion prize to anyone who correctly predicted the winners of each of the 63 games of the 2014 NCAA Men's Basketball Tournament. Doc. 1-4 at 3. Pursuant to the agreement, SCA was obligated to

pay the $1 billion prize if someone won the contest. Doc. 1-4 at 3. SCA would also assist Yahoo with securing underwriting for the promotion. Doc. 11 at 7. SCA asserts that, in exchange, Yahoo agreed to pay SCA a fee of $11 million. Doc. 1-4 at 3. Ten percent of the fee ($1,100,000) was due on or before December 31, 2013, and it is undisputed that Yahoo made that payment. Doc. 1-4 at 3-4; Doc. 11 at 2. The remainder was due on or before February 15, 2014. Doc. 1-4 at 4.

On January 27, 2014, Yahoo gave written notice to SCA that it was cancelling the Contract. Doc. 1-4 at 4. The Contract allowed Yahoo to do so, but required that such notice be given at least fifteen minutes before tip off of the initial basketball game. Doc. 1-4 at 4. SCA asserts that, pursuant to the Contract, Yahoo was obligated to pay a cancellation fee of fifty percent of the agreed upon $11 million fee ($5.5 million, of which $1.1 million already had been paid). Doc. 1-4 at 4. Yahoo claims that it does not owe the fee, and SCA sued for breach of contract to recover the $4.4 million, plus interest, costs and attorneys' fees. Doc. 1-4 at 5.

On April 14, 2014, Yahoo filed an Amended Answer and Counterclaims, alleging breach of contract, negligent breach of contract, breach of covenant of confidentiality, breach of fiduciary duty, negligent misrepresentation, and misappropriation of trade secrets. Doc. 11. Yahoo asserts that SCA served as Yahoo's agent for the purposes of securing underwriting for the promotion and that, as such, was subject to Yahoo's Master Vendor Terms & Conditions ("MVTC") and the confidentiality provisions within the MVTC. Doc. 11 at 7. Yahoo further asserts that Berkshire Hathaway, one of the third parties with whom SCA had negotiated, announced its own contest in conjunction with Quicken Loans – the "Billion-Dollar Bracket Challenge" – that allegedly replicates distinct elements from the contest developed by Yahoo. Doc. 11 at 8. Yahoo alleges that SCA disclosed these details to Berkshire Hathaway without

taking proper precautions to ensure that the allegedly confidential information would not be compromised, and, as a result, Yahoo has suffered financial and reputational damages. Doc. 11 at 9. SCA now requests that the Court dismiss Yahoo's counterclaims, pursuant to Federal Rule of Civil Procedure 12(b)(6). Doc. 15.

II. Legal Standard & Analysis

A. 12(b)(6) Standard

Under Federal Rule of Civil Procedure 8(a), a complaint must contain "a short, plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Federal Rule 12(b)(6) provides for the dismissal of a complaint when a defendant shows that the plaintiff has failed to state a claim for which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual matter contained in the complaint must allege actual facts, not legal conclusions masquerading as facts. *Id.* ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" (quoting *Twombly*, 550 U.S. at 555)). Additionally, the factual allegations of a complaint must state a plausible claim for relief. *Id.* at 679. A complaint states a "plausible claim for relief" when the factual allegations contained therein infer actual misconduct on the part of the defendant, not a "mere possibility of misconduct." *Id.*; *see also Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986).

The Court's focus in a 12(b)(6) determination is not whether the plaintiff should prevail on the merits but rather whether the plaintiff has failed to state a claim. *Twombly*, 550 U.S. at

563 n.8 (holding "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder."); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (overruled on other grounds) (finding the standard for a 12(b)(6) motion is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

B. Analysis

a. Breach of Contract

SCA moves to dismiss Yahoo's breach of contract claim. Under Texas law, a breach of contract claim requires proof of four elements: (1) the existence of a valid contract, (2) plaintiff's performance of duties under the contract, (3) defendant's breach of the contract, and (4) damages to the plaintiff resulting from the breach. *Lewis v. Bank of Am. NA*, 343 F.3d 540, 544-45 (5th Cir. 2003). With regard to the first element, Yahoo asserts that the Contract incorporates the confidentiality provisions of the MVTC by reference. Doc. 11 at 10. Yahoo also alleges that, at all times relevant to its counterclaims, "SCA was bound by the confidentiality provisions contained in section 5 of the MVTC." Doc. 11 at 7, 10. Specifically, Yahoo alleges that SCA was bound by the MVTC confidentiality provisions pursuant to a Statement of Work contract entered into by Yahoo and SCA on December 19, 2011 ("SOW").[1] Doc. 24 at 10.

In terms of the second element, Yahoo alleges, in its Counterclaims, proof of performance of its duties under the Contract. Doc. 11 at 10. It is undisputed that Yahoo paid

[1] Yahoo mentions the SOW for the first time in its Response to SCA's Motion to Dismiss. However, SCA does not object to the Court considering the SOW in deciding the Motion to Dismiss. Doc. 27 at 3. Thus, the Court will consider the SOW, in addition to the Contract and MVTC, in making its determination.

SCA ten percent of the $11 million fee ($1.1 million) prior to December 31, 2013, as required by the Contract. Doc. 1-4 at 3-4; Doc. 11 at 2. As to the third element, Yahoo alleges that SCA breached the confidentiality clauses of both the Contract and the MVTC by disclosing confidential information to Berkshire Hathaway, without putting in place appropriate protections. Doc. 11 at 7-8, 10. Finally, Yahoo alleges that it was damaged both financially and in reputation as a result of SCA's breach. Doc. 11 at 9-10.

SCA contends that Yahoo's counterclaim for breach of the Contract fails as a matter of law because the Contract was not yet in effect at the time of the alleged disclosure of confidential information. Doc. 27 at 2-3. However, Yahoo does not assert in its Counterclaims when exactly the alleged disclosure took place. All Yahoo asserts is that it brought the concept of the promotion to SCA in August 2013, that the parties entered into the Contract on December 27, 2013, and that Berkshire Hathaway announced its own contest on January 21, 2014. Doc. 11 at 7-8. Thus, the Court does not find this argument persuasive.

SCA further argues that Yahoo's counterclaim for breach of the MVTC fails as a matter of law because the SOW only bound SCA to the MVTC for the purposes of that single statement of work contract, which dealt with the 2012 NCAA Men's Basketball Tournament (whereas the promotion at issue in this case was tied to the 2014 tournament), not for the purposes of all transactions between the parties. Doc. 27 at 3. Additionally, SCA contends that the SOW expired pursuant to its terms on April 2, 2012, and that, consequently, the contract Yahoo claims operated to bind SCA to the MVTC was no longer in effect by the time SCA allegedly disclosed Yahoo's confidential information. Doc. 27 at 3.

Yahoo, on the other hand, argues that the SOW was "a precursor" to the promotion at issue in this case and that the signatories of the SOW were both later involved in the promotion-

related negotiations that took place in 2013. Doc. 24 at 10-11. Further, Yahoo contends that the terms of the MVTC commence on an SOW's start date – here, December 19, 2011 – and remain in effect for 12 months and automatically renew for successive 12-month periods unless it is terminated. Doc. 24 at 11. To terminate the MVTC, a vendor is required to provide Yahoo written notice of its intent not to renew at least 90 days prior to the end of the then-current term. Doc. 24 at 11. Because SCA did not provide Yahoo with written notice of nonrenewal of the MVTC or discuss with Yahoo a desire to terminate the MVTC, Yahoo alleges that SCA was still bound by the MVTC throughout all of 2013, supposedly when the improper disclosure of the allegedly confidential information took place. Doc. 24 at 11.

When deciding on this Rule 12(b)(6) motion to dismiss, the Court's focus is not whether Yahoo should prevail on the merits but rather whether Yahoo has failed to state a claim. *Twombly*, 550 U.S. at 563 n.8. The Court is required to accept Yahoo's factual allegations as true and to view them in the light most favorable to Yahoo. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205-06 (5th Cir. 2007). As such, and for the reasons considered above, the Court finds that Yahoo has sufficiently pled its breach of contract cause of action to state a plausible claim for relief.

SCA argues that, alternatively, Yahoo's breach of contract claim should be dismissed because the concept behind the promotion was neither confidential information nor a trade secret. Doc. 16 at 12; Doc. 27 at 4. The Court agrees with Yahoo that the question of whether the concept was confidential information or a trade secret should not be decided on a motion to dismiss. Consequently, the Court does not make a determination on this issue at this stage of the litigation.

b. Negligent Breach of Contract

SCA argues that Yahoo's counterclaim for negligent breach of contract should be dismissed because there is no negligent breach of contract cause of action in Texas and because, regardless of whether Texas law recognizes a negligent breach of contract claim, the economic loss doctrine bars Yahoo from making the claim. Doc. 16 at 16-17. "Under Texas law, the economic loss rule 'generally precludes recovery in tort for economic losses resulting from the failure of a party to perform under a contract.'" *O'Leary v. JPMorgan Chase Bank N.A.*, 13-cv-4484, 2014 U.S. Dist. LEXIS 52725, at *13 (N.D. Tex. Mar. 20, 2014), *adopted*, 2014 U.S. Dist. LEXIS 52324 (N.D. Tex. Apr. 15, 2014) (quoting *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex. 2007)). Consequently, "tort damages are generally not recoverable if the defendant's conduct 'would give rise to liability only because it breaches the parties' agreement.'" *Id.* (quoting *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991)). Tort damages are recoverable only if the defendant's conduct "would give rise to liability independent of the fact that a contract exists between the parties." *Id.* "In determining whether a tort claim is merely a repackaged breach of contract claim, a court must consider: 1) whether the claim is for breach of duty created by contract, as opposed to a duty imposed by law; and 2) whether the injury is only the economic loss to the subject of the contract itself." *Id.* (citations omitted).

Here, Yahoo's negligent breach of contract claim is derived wholly from SCA's alleged obligations under the Contract and MVTC. In its counterclaim, Yahoo does not allege a duty imposed by law. *See* Doc. 11 at 10-11. In fact, the only duty that Yahoo alleges SCA owed is the "duty of care arising from the MVTC and the Contract." Doc. 11 at 10. Further, the only injury Yahoo alleges is the economic loss to its promotion of the bracket contest, which is the

subject of the Contract. Doc. 11 at 11. For these reasons, the Court dismisses Yahoo's negligent breach of contract claim.

c. Breach of Covenant of Confidentiality

SCA argues that Yahoo's counterclaim for breach of covenant of confidentiality is merely a restated breach of contract claim. Doc. 16 at 18. The Court agrees. Yahoo maintains that an express contractual provision is not necessary to establish a covenant of confidentiality. Doc. 24 at 26 (citing *Hollomon v. O. Mustad & Sons (USA), Inc.*, 196 F. Supp. 2d 450, 459 (E.D. Tex. 2002)). This may be true. However, Yahoo's claim is premised entirely on confidentiality provisions purportedly included in the MVTC and the Contract. Doc. 11 at 11-12. Specifically, Yahoo alleges that the confidential relationship giving rise to the breach of covenant of confidentiality claim was "established by the MVTC and the Contract." Doc. 11 at 12. Accordingly, the Court finds Yahoo's counterclaim for breach of covenant of confidentiality duplicative of its counterclaim for breach of contract and therefore grants SCA's request to dismiss the claim.

d. Breach of Fiduciary Duty

The elements of a claim for breach of fiduciary duty are: "(1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant." *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007). SCA argues that Yahoo has failed to plead sufficient facts to establish that a fiduciary relationship existed between the two parties. Doc. 16 at 20; Doc. 27 at 8. Yahoo responds by asserting that SCA owed Yahoo a fiduciary duty as a result of its role as Yahoo's insurance agent. Doc. 24 at 27. The Court does not find this argument persuasive. Yahoo further maintains that, "while the

MVTC negates any agency between the parties in regard to contractual claims between the parties, the parties' actions create an agency relationship above and beyond the terms of the MVTC and any of the contracts between the parties." Doc. 24 at 28. Specifically, Yahoo contends that a principal-agent fiduciary relationship was created between SCA and Yahoo in August 2013 when Yahoo requested SCA to pursue underwriting for the promotional contest. Doc. 24 at 28. The Court finds that, accepting Yahoo's facts as true, Yahoo has pled sufficient facts relative to its breach of fiduciary duty claim to survive a motion to dismiss.

e. Negligent Misrepresentation

To properly plead a claim for negligent misrepresentation, a plaintiff must allege facts sufficient to show that:

> (1) the representation is made by a defendant in the course of his business or in a transaction in which the defendant has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered a pecuniary loss by justifiably relying on the representation.

O'Leary, 2014 U.S. Dist. LEXIS 52725, at *10. Further, "the misrepresentation must be one of existing fact, not a promise of future conduct." *Id.* (quotation omitted). Significantly, "[a] promise to do or refrain from doing an act in the future is not actionable because it does not contain an existing fact." *Id.* at *11. Here, Yahoo bases its negligent misrepresentation claim on SCA's alleged promise to refrain from disclosing certain information in the future: "SCA assured Yahoo that SCA would maintain confidentiality of Yahoo's trade secrets and confidential information." Doc. 11 at 13. This allegation, even if accepted as true, does not properly plead a claim for negligent misrepresentation because it involves a promise to refrain from future action. Accordingly, the Court dismisses Yahoo's counterclaim for negligent misrepresentation.

f. Misappropriation of Trade Secrets

To properly plead a misappropriation of trade secrets claim, a plaintiff must prove that 1) the plaintiff owned a trade secret, 2) the defendant misappropriated the trade secret, and 3) the misappropriation caused injury. *See* Tex. Civ. Prac. & Rem. Code § 134A.002-004. The Texas Uniform Trade Secrets Act ("TUTSA") took effect on September 1, 2013 and displaces the common law action for misappropriation of trade secrets for all misappropriations occurring before that date. *Id.* § 134A.007. Yahoo alleges that it pled misappropriation of trade secrets under common law, as opposed to TUTSA, because "the alleged misrepresentation likely took place before September 1, 2013." Doc. 24 at 30. Notwithstanding the fact that this statement conflicts with other assertions made by Yahoo in its briefings, the Court finds that Yahoo has sufficiently pled its counterclaim for misappropriation of trade secrets. Specifically, Yahoo has pled sufficient facts, accepted as true and viewed in the light most favorable to Yahoo, to state a plausible claim to relief. As discussed previously, the Court does not decide whether the bracket contest is a trade secret and leaves this determination for a later stage of the litigation. Therefore, the Court denies SCA's request to dismiss Yahoo's counterclaim for misappropriation of trade secrets.

III. Conclusion

For the foregoing reasons, the Court GRANTS the Motion to Dismiss Counter-Plaintiff's negligent breach of contract, breach of covenant of confidentiality, and negligent misrepresentation claims and DENIES the Motion to Dismiss the Counter-Plaintiff's breach of contract, breach of fiduciary duty, and misappropriation of trade secrets claims.

IT IS SO ORDERED.

Signed this 11th day of August, 2014.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE