

**FILED**

**JUL 24 2014**

**SUPERIOR COURT - NEW LONDON  
JUDICIAL DISTRICT AT NEW LONDON**

Docket no. KNL-CV-12-6018984-S	:	CONNECTICUT SUPERIOR COURT
LBI, INCORPORATED, Plaintiff,	:	J.D. NEW LONDON
v.	:	AT NEW LONDON
JARED D. SPARKS, et al., Defendants	:	JULY 24, 2014

**MEMORANDUM OF DECISION ON  
MOTION OF DEFENDANTS TO STRIKE SECOND AMENDED COMPLAINT (#132)**

The plaintiff, LBI Incorporated,<sup>1</sup> filed the original, verified complaint in this suit on March 1, 2012, against two defendants, Jared Sparks and Jay Williams. Sparks and Williams are former employees of the plaintiff who went to work for Charles River Analytics, Inc. The original complaint included four counts against both Sparks and Williams. Those four counts respectively were and, though substantially amended, remain for breach of contract, breach of duty of loyalty, misappropriation of trade secrets, and interference with contractual relations. On December 6, 2012, the plaintiff moved to cite in Charles River Analytics, Inc. (CRA), as a defendant by way of a second amended complaint (complaint).<sup>2</sup> That motion was granted on April 9, 2013. In granting the motion to cite in CRA as a defendant, the court (*Zemetis, J.*) stated, “The defendants may raise the alleged prejudice arising out of their compliance with a consent decree filed in the federal district court action between the parties, wherein the defendants claim to have destroyed written records and/or computer data that may now be necessary to defend against the allegations of the current complaint, in subsequent motions

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<sup>1</sup> Although the caption of the initial complaint listed “LBI Corporation” as plaintiff, “LBI, Incorporated” was the name of the plaintiff until about March 23, 2012, when the comma was dropped from the caption of the defendants’ notice of removal to the United States District Court. “LBI Inc.” – which is used in the body of the second amended complaint – and “LBI” shall refer to the plaintiff.

<sup>2</sup> The complaint is both an amended complaint and a supplemental complaint. A supplemental complaint adds claims arising after the filing of the original complaint. *O’Neil v. Floyd Weeno Ponzi*, United States District Court, Docket No. 5:09-CV-983 (GTS) (N.D.N.Y. October 22, 2009).

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Decisions on 7/24/14*

addressing the substantive issues.” Judge Zemetis did not say that a motion to strike would be a proper vehicle for such a challenge.

The present motion to strike (#132) was filed by the defendants on October 15, 2013. The plaintiff’s opposing memorandum of law (#139) was filed on December 10, 2013. The defendants filed a reply brief (#141) on January 7, 2014, and a second reply brief (#146) on March 19, 2014, advising that U.S. District Judge Janet Hall denied the plaintiff’s motion to vacate the federal court judgment in the plaintiff’s favor and against Sparks, and attaching Judge Hall’s February 7, 2014 ruling. The motion to strike was argued on March 24, 2014.

#### DISCUSSION

As the defendants acknowledge, their claims as to the effect of prior rulings in this case take this motion to strike beyond the typical “failure to state a claim” grounds. The first and overarching question for the court is whether the boundaries of a motion to strike may be extended as the defendants claim is proper considering Practice Book § 1.8 (court rules to be liberally interpreted) and the unusual history of this case. The court is unpersuaded that there is a sound legal basis for such extension. Particularly in view of the number of exhibits offered on this motion, it is apparent that the motion is, in part, a motion for summary judgment. The defendants could have filed – and, absent settlement, probably will file – a motion for summary judgment. The court has certain discretion in recognizing, and ruling on, motions for what they really are. See *Wallenta v. Moscovitz*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-95-0052135 (July 17, 1998). However, the standards applicable to a motion for summary judgment are so different from those applicable to a motion to strike, and the unfairness to the plaintiff in treating the present motion as other than what it is would be so great, that the court will not vary from the law on motions to strike.

The question then becomes whether, as to each of the nine counts of the complaint, and as to each of the respective defendants’ claims in the present motion,<sup>3</sup> at least one of the grounds for

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<sup>3</sup> The present motion does not challenge counts one through four against Jay Williams.

a motion to strike, exists. Our rule of court, Practice Book § 10-39, provides,

“(a) A motion to strike shall be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint . . . or of any one or more counts thereof, to state a claim upon which relief can be granted; or (2) the legal sufficiency of any prayer for relief in any such complaint . . . or (3) the legal sufficiency of any such complaint . . . or any count thereof, because of the absence of any necessary party . . . .”

For purposes of a motion to strike, the court takes the facts to be those alleged in the complaint, or count, construed in favor of its legal sufficiency. See *New London County Mutual Ins. Co. v. Nantes*, 303 Conn. 737, 747, 36 A.3d 224 (2012); see also *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240, 252-53, 990 A.2d 206 (2010) (necessarily implied allegations are accepted as true; complaint is construed broadly and realistically). “Each pleading shall contain a plain and concise statement of the material facts on which the pleader relies . . . .” Practice Book § 10-1; see also *Santorso v. Bristol Hospital*, supra, 308 Conn. 349 (motion to strike must be denied where provable facts alleged in the complaint support a cause of action). As a rule, a court does not strike parts of counts. See *Ames v. East Brook F, LLC*, Superior Court, judicial district of New London, Docket No. CV-13-6016325-S (December 17, 2013). That a pleading is internally inconsistent does not make it defective. See *Vidiaki, LLC v. Just Breakfast and Things!!! LLC*, 133 Conn. App. 1, 24, 33 A.3d 848 (2012). A motion to strike does not admit legal conclusions or the correctness of opinions. *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997).

In general, apart from the fact that Judge Zemetis approved the complaint as the vehicle to cite in CRA as a defendant, the court finds no legal basis for accepting the defendants’ claim that late filing of claims is a ground for a motion to strike. To accept that claim would be to add “the late filing of a count” to Practice Book § 10-39 (a). Not even Practice Book § 1-8 (liberal interpretation of rules) allows the court to do that.

The court agrees with the plaintiff that the validity and effect – past or present – of neither the federal court judgment against defendant Sparks nor his stipulation with the plaintiff which

resulted in that judgment is a ground for striking any of the counts in the complaint. That is because, essentially, the allegations of the complaint do not show the validity and the effect of either the judgment or the stipulation, let alone so clearly as to reveal, as a matter of law, the insufficiency of any of the nine counts of that complaint. The fact that Judge Hall said – and assuming Judge Hall *found* – that Sparks “is no longer in the litigation” is a fact outside the complaint and not a basis in Practice Book § 10-39 for the present motion. The court is not unsympathetic to Sparks’s argument that it is inefficient to leave him in this action, at least as to the four counts extant when Judge Hall entered the injunction and judgment by stipulation.<sup>4</sup> However, neither Practice Book § 1-8 nor any other authority permits the court to adopt Sparks’s interpretation of § 10-39, which is, essentially, that the court can disregard the letter of that rule and strike the first four counts against Sparks – even all the counts against Sparks – because of things which are defenses, not defects of pleading.

Accord and satisfaction, res judicata and collateral estoppel – all claims which may be important in this case – are not grounds for a motion to strike. *Trumbull v. Palmer*, Superior Court, judicial district of Fairfield, Docket No. CV-05-5004063 (August 24, 2007); see Practice Book § 10-50 (res judicata and accord and satisfaction are defenses); see also *Carnese v. Middleton*, 27 Conn. App. 530, 537, 608 A.2d 700 (1992) (collateral estoppel must be pleaded as a defense). If the stipulation between Sparks and the plaintiff which was accepted by the federal court had included a general release by the plaintiff or Sparks, that would of course have strengthened Sparks’s position. There is no claim in this case that such a release was promised or given. However, even if such a release had been given, release is only a defense; Practice Book § 10-50; unless it is alleged in the complaint or count in such a way that the pleading is legally insufficient.

Turning to the specific counts attacked by the defendants’ motion, the court begins by pointing out that each count after count one incorporates all of the plaintiff’s allegations that

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<sup>4</sup> At oral argument on the present motion, Sparks’s attorney said Sparks complied with the federal court judgment, left the employment of CRA and moved away.

precede it. Each count, therefore, includes each of the following allegations (among others) describing the defendants' duties and actions:

¶ 15. "LBI and CRA signed a non-disclosure agreement on May 4, 2010, by which each agreed not to use the other's confidential information other than for the purpose of collaborating under ONR's [Office of Naval Research] UCCI [Unmanned Cooperative Cueing and Intervention] program [and] not to copy or reverse engineer the others' confidential information."

¶ 18. "CRA entered into a conspiracy with . . . Sparks and Williams, to transfer confidential information from LBI to CRA . . . ."

¶ 20 (a). "CRA agreed to indemnify and hold [Sparks and Williams] harmless for their breaches of their employment agreements with LBI.

¶ 20 (b). "CRA, Sparks and Williams agreed that they should all conceal all evidence of their conspiracy . . . ."

¶ 21. "[T]he defendants devised a scheme to remove LBI's secret, confidential and proprietary information and documents and to make it available to them at CRA. Sparks and Williams opened 'Drop Box' accounts and, over a period of several months, downloaded LBI's confidential information and documents into their Drop Box accounts . . . . Upon leaving their employment with LBI, they were then able to compete with LBI at CRA by accessing this confidential, secret and proprietary information from their Dropbox accounts."

¶ 22. "[CRA] conspired with Sparks, Williams and the ONR Contract Administrator to [have LBI pack and deliver the physical assets on which LBI was working and which CRA needed to appropriate the benefits and revenues from ONR Contract 0397] to what [LBI] believed was a site designated by the [U.S. Navy] for inspection. . . . After LBI departed . . . the conspirators, including the defendants . . . transported [the equipment] to a site [controlled by CRA]."

¶ 23. "[Then] Williams went to work for CRA exclusively at that site, doing essentially the same work he had done at LBI, with essentially the same equipment he had used at LBI. Sparks also went to work for CRA . . . performing extensively the same services he had performed at LBI."

¶ 24. "[T]he defendants persuaded the ONR contract administrator to expand the scope of

CRA's Contract 0405 to include work that was previously performed by LBI . . . including Sparks and Williams, under Contract 0397.”

Considering the principle that the complaint, and each of its counts, are to be construed, where possible, in favor of its sufficiency; *New London County Mutual Ins. Co. v. Nantes*, supra, 303 Conn. 747; these allegations are sufficient to allege the essential elements of counts one (breach of contract), two (breach of duty of loyalty), three (misappropriation of trade secrets), four and five (interference with business/contractual relations), six (computer offenses pursuant to General Statutes § 52-570b, § 53a-251 (b) (1) and § 53a-251 (e)), and unfair, unscrupulous and/or deceptive trade practices proscribed, and made actionable, by the Connecticut Unfair Trade Practices Act, especially when viewed with the supplemental – and cumulatively incorporated – allegations of those counts. To refer to one of the defendants' points, the plaintiff's right to relief under the facts alleged is not merely speculative. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In particular, the alleged facts are enough to show loss from the alleged scheme or conspiracy, including from the unauthorized access to, or misuse of data from, LBI's computers or computer system.

As to count six, for abuse of process, the alleged use of a judicial process – here, the removal of this case to federal court – for an improper purpose is only actionable if that improper purpose is the primary purpose for employing the judicial process. *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P.*, 260 Conn. 766, 772-73, 802 A.2d 44 (2002); *Cadle Co. v. D'Addario*, 131 Conn. App. 223, 236-37, 26 A.3d 682 (2011). The defendants argue that the plaintiff fails to plead facts to support its allegation that the defendants' removal of this case was for “the ulterior and improper purpose to delay and/or impede plaintiff's efforts to seek a preliminary injunction,” let alone facts showing such improper purpose was the defendants' primary purpose. If the test were the former, the principle of construing the pleading in favor of sufficiency would save this count. However, the court finds that count six does fail to

allege facts showing that the defendants' removal<sup>5</sup> of this case was primarily for an improper purpose. For that reason, the allegations of count six are not legally sufficient.<sup>6</sup>

Turning to count seven, for civil conspiracy, the defendants claim there is no such cause of action for the reasons stated in *Batiste v. Soundview Medical Associate, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-06-5001278 (March 25, 2008). "The Connecticut Supreme Court has stated the elements of a civil action for conspiracy as: (1) a combination between two or more persons, (2) to do a criminal or wrongful act or a lawful act by criminal or unlawful means, (3) an act done by one or more of the conspirators pursuant to the scheme and in furtherance of the object, (4) which act results in damages to the plaintiff. . . . Thus, the action is for damages caused by an act in furtherance of a conspiracy not by the conspiracy itself. . . . A claim of civil conspiracy is insufficient unless it is based on some underlying cause of action. . . . A cause of action may lie for the damage resulting from the conspiratorial behavior, such as fraud, but not for the conspiracy itself. . . . No damages are awarded based on conspiracy apart from the damages assessable for the resulting cause of action. . . . Therefore, civil conspiracy ought not be alleged in a separate count independent from the underlying cause of action, such as for assault, fraud, etc. because it is merely a method of committing the underlying cause of

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<sup>5</sup> Paragraph 88 in count seven alleges that, "after the District Court issued a preliminary injunction, the defendants changed their position about [federal subject matter] jurisdiction and claimed during the subsequent appeal that [such] jurisdiction did not exist. This argument was made with the ulterior and improper purpose to delay and/or undermine the enforcement of the . . . injunction . . ." The mere making, or changing, of a claim in court may hurt a party's credibility, but it is not misuse of a judicial process for purposes of an abuse of process action. See *Mozzochi v. Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987).

<sup>6</sup> The defendants' other grounds for striking count six are without merit. The claim that a count is frivolous in general – or here because the removal to federal court was reasonably based on the plaintiff's claims, because the plaintiff did not object to removal, or because the remand was due to the plaintiff's change in its claims about the ONR contract – is not a ground for striking a sufficiently pleaded count. That the plaintiff has already, before U.S. District Judge Janet Hall, "made and lost this exact argument" is not a basis for the present motion. Res judicata and collateral estoppel are defenses, not grounds for a motion to strike. Compare Practice Book § 10-50 with § 10-39.

action.” (Citations omitted; internal quotation marks omitted.) *Id.* (civil conspiracy count stricken).

The plaintiff argues that *Batiste* does not apply because, in this case, count eight is not independent from other counts of the complaint which are tortious in nature. Indeed, all prior counts are incorporated in count eight.

Although “there is . . . no independent claim of civil conspiracy . . . [t]he action is for damages caused by *acts committed pursuant to a formed conspiracy* rather than by the conspiracy itself . . . . Thus, to state a cause of action, a claim of civil conspiracy must be joined with an allegation of a substantive tort. . . . [T]he essence of a civil conspiracy . . . [is] two or more persons acting together to achieve a shared goal that results in injury to another. . . . Thus, the purpose of a civil conspiracy claim is to impose civil liability for damages on those who agree to join in a tortfeasor’s conduct and, thereby, become liable for the ensuing damage, simply by virtue of their agreement to engage in the wrongdoing. Implicit in this purpose, and in the principle that there must be an underlying tort for the viability of a civil conspiracy claim, is the notion that the coconspirator be liable for the damages flowing from the underlying tortious conduct to which the coconspirator agreed.” (Citations omitted; internal quotation marks omitted.) *Macomber v. Travelers Property & Casualty Corp.*, 277 Conn. 617, 635-36, 894 A.2d 240 (2006).

All the counts of the complaint preceding count eight are incorporated in it. Count one, against Sparks and Williams, is for breach of contract, not a tort. Improper interference with business/contractual relations is tortious in nature; *Epstein v. Carrier*, 12 Conn. App. 691, 699, 533 A.2d 1221 (1987); but all three defendants are alleged in counts four (Sparks and Williams) and five (CRA) to be liable for that tort. Counts two (breach of duty of loyalty), three (misappropriation of trade secrets) and six (computer offenses) are all tortious in nature. *Gardner Heights Health Care v. Korvlyshun*, 117 Conn. App. 745, 747, 982 A.2d 186 (2009); *Legal Service Plans v. Heneghan*, Superior Court, judicial district of New Haven, Docket No. 299448 (August 3, 1990). CRA is not a named defendant in those counts. Therefore, the practical effect

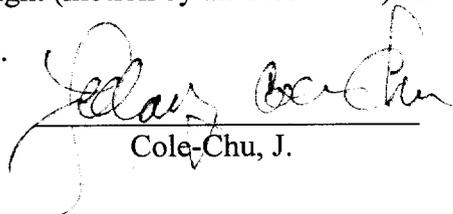
of count eight is to seek to hold CRA liable for the torts alleged in counts two, three and six to have been committed by Sparks and Williams. This is a proper use of a civil conspiracy claim under *Macomber v. Travelers Property & Casualty Corp.*, supra, 277 Conn. 635-36. The motion to strike is denied as to count eight.

Count nine claims CRA violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a, et seq. “It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – in other words, it is within at least the penumbra of some common law, statutory, or other established concept of fairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness.” (Internal quotation marks omitted.) *Harris v. Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 350, 994 A.2d 153 (2010). The plaintiff may avoid the requirements of the “cigarette rule” by pleading facts sufficient to establish the defendant’s deceptive trade practices. See *Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 82-83, 873 A.2d 929 (2005); see also *Independence Ins. Service Corp. v. Hartford Life Ins. Co.*, United States District Court, Docket No. 3:04CV1512 (JCH) (D. Conn. March 31, 2006).

Not every breach of contract constitutes a violation of CUTPA. *Hudson United Bank v. Cinnamon Ridge Corp.*, 81 Conn. App. 557, 571, 845 A.2d 417 (2004). However, the allegations of the complaint, taken together in this final count, depict a conspiracy of the defendants, coordinated and funded (including the indemnification of Sparks and Williams) by CRA, to do something more, and something worse in the eyes of the law, than to compete openly with the plaintiff – with which CRA had a cooperation agreement concerning at least one substantial ONR project, Contract 0397. CRA is alleged to have taken numerous secret or deceptive actions to take for itself, and from the plaintiff, a substantially greater portion of the

Office of Naval Research work and two key employees, enhancing CRA's capacity to the damage of the plaintiff's capacity, despite contracts that would prevent all that – contracts which were known to CRA – all the while pretending to the plaintiff that it would not do such things. Count nine states facts constituting a claim under CUTPA.

For the foregoing reasons, the defendants' motion to strike the plaintiff's second amended complaint is granted as to count seven, for abuse of process, and denied as to counts one through four (motion by defendant Sparks only), five (motion by defendant Charles River Analytics, Inc., only), six (motion by defendants Sparks and Williams), eight (motion by all defendants) and nine (motion by defendant Charles River Analytics, Inc., only).



Cole-Chu, J.