Filed 3/3/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

K.C. MULTIMEDIA, INC., Plaintiff and Appellant, v. BANK OF AMERICA TECHNOLOGY & OPERATIONS, INC., et al., Defendants and Respondents.	H030494 (Santa Clara County Super. Ct. No. CV798875)

After a lengthy trial on appellant's civil claims for trade secret theft, the jury found for respondents. Appellant attacks the special verdicts, arguing that the jury erred as a matter of law in interpreting two contracts. Appellant also challenges the pretrial dismissal of three of its causes of action, which the trial court found statutorily preempted.

We shall affirm the judgment for respondents. In the unpublished portion of the opinion, we reject appellant's attack on the special verdicts, concluding that they are supported by the evidence and by the law. In the published portion of the opinion, we address and reject appellant's procedural and substantive challenges to the trial court's pretrial preemption ruling.

*Pursuant to California Rules of Court, rule 8.1105, this opinion is certified for publication, with the exception of Part I of the Discussion.

BACKGROUND

The parties to this appeal are plaintiff and appellant K.C. Multimedia, Inc. (KCM), and defendants and respondents Bank of America Technology & Operations (BATO), Bank of America National Association (BANA), and Bank of America Corporation (BA). This litigation arose out of a business relationship, in which appellant supplied technology services to respondents or related entities, including BA's predecessor, Bank of America National Savings & Trust Association (NTSA).

The Contracts

The parties entered two written contracts, one in 1998 and another in 2000. Contract documentation included appendices and work orders.

The Technology

Appellant developed prototypes for two banking applications: "Palm VII," which allowed bank customers to use a handheld wireless device to access their account information; and "Gating," which simplified customers' access to online banking services following a merger between Nations Bank and BA's predecessor, by allowing a "single sign-on" or "SSO." The software for both applications was derived from preexisting technology known as "Wirelessproxy," which had to be customized for respondents. Appellant claimed the two applications derived from Wirelessproxy source code "core technology" as a trade secret.[1]

[1] As described by appellant's counsel in closing argument: "The core technology was … in development for a number of years. And this core technology had many modules within it. The Palm VII used some of these modules in the wireless banking application. [¶] The Gating server application used some of the modules in that application. And among those that were used and selected for each there was some overlap." Prior to trial, appellant stated that it sought "relief for the Banks' theft of 'Wirelessproxy source code' " – which it defined as "code derived from the source code of Wirelessproxy which pertains to a specific business application, such as wireless

Pleadings; Pretrial Proceedings

This action was filed in June 2001. The sole named defendant in the original complaint was BATO, but allegations also were asserted against appellant's former employee, Allen Tam. The complaint asserted causes of action for (1) misappropriation of trade secrets; (2) conversion; (3) breach of contract; and (4) unjust enrichment. The complaint alleged that BATO misappropriated the technology used in the two banking applications. As characterized in appellant's trial brief, Tam "took the trade secrets to the Bank in exchange for its promise of employment." In its answer, BATO disputed those allegations.

The litigation generated an extensive pretrial procedural history, including multiple demurrers and complaint amendments, as well as several unsuccessful motions for summary adjudication or summary judgment.

By the time the case went to trial in February 2006, the operative pleading was appellant's fifth amended complaint. The named defendants were respondents BATO, BA, and BANA, plus appellant's former employee Allen Tam. The causes of action asserted in this pleading were: (1) trade secret misappropriation; (2) breach of confidence; (3) conversion; (4) breach of contract; (5) tortious interference with contract; and (6) unfair competition. The conversion claim involved a laptop computer; it was asserted against Tam alone. The other five causes of action were asserted against all defendants. Appellant's claims against Tam were stayed prior to trial because of his bankruptcy.

In February 2006, just prior to trial, the court heard a number of in limine motions. Immediately thereafter, the court took up an issue raised in respondents' trial brief, statutory preemption. After entertaining written and oral argument on the issue, the court

---

banking and Gating applications." In arguments to the jury, appellant referred to the two banking applications themselves as its trade secrets.

dismissed three causes of action of appellant's fifth amended complaint on the ground that they were preempted by California's Uniform Trade Secrets Act. (Civ. Code, § 3426 et seq.) This ruling eliminated appellant's second cause of action (for breach of confidence), its fifth cause of action (for interference with contract), and its sixth cause of action (for unfair competition). Appellant confirmed that it would dismiss its fourth cause of action for breach of contract, if it had not done so already. Thus, by the time of trial, appellant's sole remaining cause of action against respondents was its first cause of action, for trade secret misappropriation.

Jury Trial

The case was tried over the course of approximately eight weeks, from late February 2006 to late April 2006.

The trial was aptly described as "lengthy and complex" by respondents in their opposition to appellant's post-trial motion. As respondents further observed there: "More than 300 exhibits were received in evidence. Each side presented multiple experts. On some points, the evidence was sharply in conflict." As appellant observed in reply, "thousands of pages of testimony" were generated during trial. Respondents' witness list included more than three dozen names. Appellant's many witnesses included two of its principals, Sing Koo and Connie Chun, who each testified for several days.

Among the issues that appellant pressed at trial was its claim that Chun's signature on the 2000 contract had been forged. Both sides presented handwriting experts (forensic document examiners) to testify about this claim.

During trial, appellant sought leave to amend its complaint (1) to change "the identity of the contracting party to the December 1998 Agreement" from respondent BA to its predecessor NTSA, and (2) to reflect appellant's "position that the November 2000" Agreement was "not valid." Over respondents' objection, the court allowed the amendment. The matter thus reached the jury on appellant's sixth amended complaint, which was filed April 11, 2006. That pleading asserted a single cause of action against respondents for misappropriation of trade secrets.

On April 24 and 25, 2006, the parties delivered lengthy closing arguments to the jury.

On April 26, 2006, the court instructed the jury and deliberations began.

Verdict and Judgment

On April 27, 2006, the day after it began deliberating, the jury returned special verdicts for respondents. As reflected in the special verdicts, the jury found that appellant failed to "prove that it is more likely than not that it is the owner of trade secrets contained in the Palm VII wireless banking application" or "in the Gating server application[.]" The jury also found that appellant made its misappropriation claims in bad faith.

On May 9, 2006, the court entered judgment for respondents.

Post-Trial Proceedings

Appellant moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial. Respondents opposed the motion, and the court denied it in July 2006.

In August 2006, respondents moved for attorney fees. Appellant opposed the motion. The motion was heard and granted on September 29, 2006. On October 16, 2006, the court entered its formal order awarding respondents more than $1.1 million in fees and costs.

Appeals

On August 4, 2006, appellant filed this appeal from the judgment (H030494).

On December 18, 2006, appellant filed its companion appeal (H031026), which challenges the post-trial order awarding attorney fees.

We denied appellant’s motion to consolidate the appeals, but on our own motion we decided to consider the two appeals together for purposes of briefing, oral argument, and decision. Our decision in the companion appeal appears in a separate unpublished opinion, filed concurrently with this one.

CONTENTIONS

In this appeal, appellant presents a two-pronged attack on the judgment, targeting both the jury’s verdict and the court’s preemption ruling as contrary to law. Respondents dispute both points.

DISCUSSION

We address appellant’s attack on the special verdicts in the unpublished portion of the opinion, before turning to its arguments concerning the preemption ruling.

I. The Verdict

To establish the proper framework for our discussion of appellant’s challenge to the jury’s special verdict, we begin by describing the pertinent general principles that govern (1) special verdicts, (2) trade secrets, and (3) contract interpretation.

A. Legal Principles

1. Special Verdicts

a. Overview

“The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc., § 624.)

"Unlike a general verdict (which merely *implies* findings on all issues in favor of the plaintiff or defendant), a special verdict presents to the jury each ultimate fact in the case." (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855; accord, *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959.)

b. Appellate Review

Where the challenge to a special verdict presents questions of law, appellate review is de novo. That standard applies where, for example, "the issues presented deal solely with interpretation of a statute and application of statutory language to the undisputed facts." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284.) In such cases, the special "verdict's correctness must be analyzed as a matter of law." (*Id.* at p. 285.) The same is true when the form of the verdict is at issue. (See, e.g., *Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 366.) De novo review likewise is proper when a jury renders inconsistent special verdict findings. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678.)

Nevertheless, in a proper case, the reviewing court may examine the factual basis for the verdict, testing it for substantial evidence. (See, e.g., *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 543, disapproved on another point in *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 574, 580 [jury's special verdicts were not fatally inconsistent, where jurors' possible "conclusions would find support in the evidence" and where one "view of the evidence is also consistent with the jury's actual expression of its findings"].) " 'A verdict should be interpreted so as to uphold it and to give it the effect intended by the jury, as well as one consistent with the law and the evidence.' " (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1223, quoting 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 343, p. 343.)

2. Trade Secrets

"Under the UTSA, a prima facie claim for misappropriation of trade secrets requires the plaintiff to demonstrate: (1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1665.) "A plaintiff seeking relief for misappropriation of trade secrets 'must identify the trade secrets and carry the burden of showing that they exist.' " (*Imax Corp. v. Cinema Technologies, Inc.* (9th Cir. 1998) 152 F.3d 1161, 1164 [applying California law].)

3. Contract Interpretation

Appellant argues that respondents had no contractual rights to the underlying intellectual property. In asserting that argument, appellant invokes well-established rules for contract interpretation, which we summarize now.

a. Overview

The primary goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time of contracting. (Civ. Code, § 1636; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390.)

The parties' intent is to be inferred, if possible, solely from the language of the written contract. (Civ. Code, §§ 1638-1639; *Powerine Oil Co., Inc. v. Superior Court*, *supra*, 37 Cal.4th at p. 390.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practical, each clause helping to interpret the other." (Civ. Code, § 1641.)

"A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code, § 1647; see also, Code Civ. Proc., § 1860; *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1356-1357.) A court may consider the subsequent conduct of the parties in construing an ambiguous contract. (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851.) And as a last resort in interpretation, ambiguous terms may be construed against the party creating the uncertainty. (Civ. Code, § 1654.)

"Provided it supports a meaning to which the language is reasonably susceptible, extrinsic evidence is admissible to prove the parties' intent as to ambiguous terms in … [an] agreement." (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439.)

b. Appellate Review

When the interpretation of a written agreement is challenged on appeal, the standard of review depends on whether the trial court admitted conflicting extrinsic evidence to resolve any ambiguity in the contract. (*Roden v. Bergen Brunswig Corp.* (2003) 107 Cal.App.4th 620, 624-625.) If no conflicting parol evidence was admitted, the interpretation of the contract is a question of law, which we review de novo. (*Id.* at p. 625.) But if extrinsic evidence was admitted, and if that evidence is in conflict, we uphold a reasonable construction of the contract supported by substantial evidence. (*Ibid*.) The trial court's threshold determination of ambiguity is a question of law subject to our independent review. (*Ibid*.)

B. Application

With the foregoing legal principles in mind, we now turn to appellant's contention that the special verdicts are erroneous as a matter of law. As noted above, the jury found that appellant failed to "prove that it is more likely than not that it is the owner of trade secrets contained in the Palm VII wireless banking application" or "in the Gating server application[.]"

1. Contentions

According to appellant, the only "logical reading of the jury's finding" is that respondents had the contractual right to the programs, a reading that flies in the face of contract interpretation principles. Appellant urges us to review de novo that view of the jury's finding.

Addressing this argument, respondents take issue with the starting point of appellant's analysis. They complain that appellant "assumes, without explanation or foundation, that the only issue relevant to the jury's finding concerned ownership." In doing so, respondents assert, appellant "ignores the fundamental issue of whether there were any trade secrets in the first place." As respondents observe, ownership is just one element of appellant's trade secret claim. And as to that element, respondents say: "Substantial evidence supports the conclusion that KCM did not own the work it did for the Bank."

In reply, appellant rejects respondents' emphasis on "what the jury might have done if it had considered the other elements of KCM's trade secret claim," arguing instead that the proper focus is on "what the jury actually did – the jury decided that KCM did not 'own' a trade secret." And in appellant's view: "That question must be reviewed as a matter of law."

2. Review Standard

At the outset, for purposes of analysis, we accept appellant's construction of the special verdict, that the "jury must have concluded that the Bank had a license to use the programs under the 1998 and 2000 contracts." Under the circumstances of this case, however, we reject appellant's bid for de novo review of the verdict as so construed. Contrary to appellant's assertions, we are not faced here with "undisputed facts" such that the special "verdict's correctness must be analyzed as a matter of law." (*Trujillo v. North*

County Transit Dist., supra, 63 Cal.App.4th at pp. 284, 285.) In this case, the thrust of appellant's argument is that the verdict represents an unreasonable construction of the contracts. Appellant characterizes that issue as one of law. We reject that characterization.

As just explained, as a matter of substantive law, the review standard depends on whether the trial court admitted conflicting extrinsic evidence to resolve any ambiguity in the contract. (*Roden v. Bergen Brunswig Corp., supra,* 107 Cal.App.4th at pp. 624-625.) Where conflicting parol evidence was admitted, the interpretation of an ambiguous contract is tested for substantial evidence. (*Id.* at p. 625.)

Here, the record shows (a) factual disputes, (b) ambiguity in the contract, and (c) conflicting parol evidence.[2] Substantial evidence review thus is proper.

---

[2] The record on appeal consists of 40 volumes of appellant's appendix, 10 volumes of respondent's appendix, and two volumes of appellant's reply appendix, collectively totaling more than 14,000 pages, together with 36 volumes of reporter's transcript, and two requests for judicial notice.

Not only is the record on appeal voluminous, it is also difficult to navigate. There is no separately bound table of contents for respondents' appendix or for appellant's reply appendix. The parties did not see fit to include minute orders for the 25 trial days, thereby increasing the difficulty of locating particular witnesses' testimony. The master index of reporters' transcripts contains pagination errors, making it more difficult to locate pinpoint citations for testimony. Furthermore, on the record as presented, it is difficult to follow the documentary evidence presented at trial. The documents contained in the appendices are not identified with exhibit markers. (Cf. *Yield Dynamics, Inc. v. TEA Systems Corporation* (2007) 154 Cal.App.4th 547, 554, fn. 7.) The parties did not include the clerk's list of trial exhibits, nor did they point this court to the conference held outside the jury's presence on April 13, 2006, where they discussed the admission of documentary evidence proffered up to that point. Of that evidence, at least one document apparently was split into two exhibits, plaintiff's exhibits 31 and 137; each appears in a different volume of the appellant's appendix. In the April 13th conference, exhibit 31 was described as previously withdrawn, reoffered, and possibly duplicative. Plaintiff's exhibits and defendants' exhibits share the same numbering system, thereby increasing the challenge of matching witness testimony to trial exhibits.

The difficulties arising from the record are aggravated by deficiencies in the briefs. As pointed out in respondents' brief, appellant's opening brief "recites pages of *a. Factual Disputes*

As relevant to the issues on appeal, some of the factual disputes at trial concerned contractual claims bearing on ownership of the software. For example, the parties disputed whether discussions between their respective representatives about ownership of the technology modified or otherwise affected the 1998 contract. The parties also

---

'evidence' without citation to the record…." This is a violation of appellate rules. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) In its reply brief, appellant disputes respondents' claim that it failed to adequately support its arguments with citations to the record, but it nevertheless appends an attachment to its reply brief purporting to supply the missing citations. (Cf. *McGoldrick v. Porter-Cable Tools* (1973) 34 Cal.App.3d 885, 888 [record citations "tardily filed after oral argument and submission of this case"].) Unfortunately, even the attachment falls short of the mark. It is confusing, in part because it misstates the corresponding page numbers of the opening brief in places (e.g., attachment pages 4, 7, 16, 20). It is inadequate because it still fails to supply citations for some key points. The attachment states "need cite" at various places (e.g., pages 18, 19). And it entirely overlooks the need for citations in other places. Thus, for example, these statements in the opening brief remain unsupported by record citation: "Between March and May 2001, the Bank began its efforts to appropriate KCM's software." (Appellant's Opening Brief, page 9.) "Jackie Chen, a manager at the Bank, secretly negotiated a job offer with Allen Tam." (*Ibid.*) "Tam also stole Wirelessproxy XO source code. … Tam then transferred those codes to the Bank's servers." (*Ibid.*) "KCM then discovered that Tam had stolen its intellectual property and source code." (*Id.* at p. 10.) "Despite … knowledge [that Tam had been terminated for breach of KCM's company policy], the Bank still hired Tam." (*Ibid.*)

Furthermore, there are other defalcations in the opening brief. For one thing, appellant refers to evidence that the trial court excluded. Those references include statements (1) about Tam's interest in weapons and (2) about the amount of money that respondents paid for Tam's attorney fees. In pretrial rulings on the parties' motions in limine, the trial court excluded evidence on both points. The statements appear in appellant's factual summary, not in connection with any argument that the court erred in excluding the referenced evidence. (See Cal. Rules of Court, rule 8.204(a)(2)(C) [fact statements are "limited to matters in the record"].) In addition, appellant's recitation of the facts is impermissibly selective. (*Nwosu v. Uba*, at p. 1246; *Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 50; see Cal. Rules of Court, rule 8.204(a)(2)(C) [requiring a "summary of the significant facts"].) To the extent that these deficiencies impede our ability to assess appellant's arguments, we will treat those arguments as forfeited. (*Nwosu v. Uba*, at pp. 1246, 1247.)

disputed the existence of a contemporaneous addendum to the 2000 contract, in which appellant asserted its ownership of the technology.

b. Ambiguity

In pretrial proceedings, the court addressed the question of ambiguity in ruling on in limine motions. Respondents' third motion in limine sought to exclude "testimony that contradicts the terms of the 1998 and 2000 contract" based on integration clauses in the two documents. Appellant opposed the motion, arguing in its written response that because the contracts already had been found ambiguous in summary judgment hearings, parol evidence was admissible to aid in their construction. In denying the motion, the court explicitly found "that these agreements are ambiguous." The court therefore indicated that it would be "allowing parol evidence with reference to those agreements…."

Having independently reviewed the two contracts in light of the record, we agree with the trial court's threshold determination of ambiguity. (*Roden v. Bergen Brunswig Corp.*, *supra*, 107 Cal.App.4th at p. 625.)

c. Parol Evidence

Moreover, we observe, appellant was the proponent of parol evidence and it urged the jury's consideration of that evidence.[3] In addition, appellant requested jury instructions covering contract interpretation. Thus, appellant itself urged the need for

[3] At a side-bar conference during trial to discuss respondents' objection to testimony about oral discussions concerning the 1998 contract, appellant's trial attorney characterized the objection as "simply a rehash of the same arguments that have been made from day one by [counsel] that there should be no oral or parol evidence modifying the term of a contract he contends is an integrated document. [¶] We have established it contains ambiguities. We also established the testimony is admissible to explain the terms, to also explain the understanding at the time of formation." And at another conference outside the jury's presence during trial "concerning the subject of parol evidence," appellant's counsel acknowledged the jury's role in deciding the factual issues surrounding disputed parol evidence.

jury resolution of disputed parol evidence at trial. Its contrary position on appeal rings hollow.

d. Conclusion

Under substantive contract law principles, the foregoing circumstances call for substantial evidence review. Since the trial court admitted disputed extrinsic evidence bearing on the contracts' meaning, we must uphold the jury's reasonable construction if it enjoys evidentiary support. (*Roden v. Bergen Brunswig Corp.*, *supra*, 107 Cal.App.4th at p. 625; see *Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1489 [construction of ambiguous contractual provisions presents fact question]; Evid. Code, § 312, subd. (a) [jury as trier of fact questions].) Because deference to the fact-finder is compelled as a matter of substantive law, we apply the substantial review standard despite the fact that the judgment in this case rests on a special verdict. Even so, mindful of that procedural posture, we shall not infer any additional factual findings in favor of the judgment beyond those contained in the verdict. (See *Trujillo v. North County Transit Dist.*, *supra*, 63 Cal.App.4th at p. 285.)

2. Elements of the Trade Secret Claim

In the trial court, the parties disputed all of the elements of appellant's trade secret claim: (1) the existence of trade secrets and their ownership; (2) misappropriation; and (3) damages. (See *Sargent Fletcher, Inc. v. Able Corp.*, *supra*, 110 Cal.App.4th at p. 1665.)

In this court, appellant focuses its arguments on ownership of the software under the contracts – albeit with a reference to respondents' claimed misappropriation – saying: "No reasonable reading of the two contracts … gave the Bank the right to acquire Wirelessproxy by theft." On the other hand, appellant acknowledges: "The Bank could not be liable for misappropriation of trade secrets if it had a right – a license – to use the secrets."

As noted above, respondents answer appellant's specific appellate argument concerning ownership, defending the verdict and judgment on the ground that the record contains substantial evidence that appellant "did not own the work it did for the Bank." But they also cast a broader net, arguing that the special verdict could also mean that the jury was not convinced that the work qualified as a trade secret, another required element of the claim.

To resolve appellant's contention, we need address only the dispute over ownership of the technology. As we explain in the next section, we agree with respondents that substantial evidence supports the jury's apparent finding that appellant failed to prove that it owned the software.

3. Analysis

At trial, respondents asserted ownership of the software under their contracts with appellant, while appellant disputed that assertion. The parties maintain those positions here. As noted above, there were two written contracts plus related instruments. The first contract is dated December 9, 1998. It was followed by four appendices and at least two work orders. The second contract is dated November 13, 2000.

Before analyzing the two contracts individually, we first address appellant's belated appellate contention that respondents were not signatories or assignees and thus could not enforce the contracts.

a. Respondents' Status as Contracting Parties

In its reply brief, appellant points out: "There is no single 'the Bank,' but several Bank entities." Appellant further observes that its 1998 contract was with BA's predecessor, NTSA, not with any of the three respondents on appeal, while its 2000 contract was with BATO alone, not with the other two respondents. Appellant then claims that respondents failed to prove their entitlement to rely on the contracts, saying: "Assignment was a hard-fought issue at trial." Moreover, appellant asserts: "The idea that agreements were assigned to BATO, BANA and BA[] violates the clear language of the agreements." Appellant thus argues that "the three Bank entities" were not "entitled to invoke the protections of the 1998 and 2000 contracts – specifically, those clauses that supposedly gave them the right to use KCM's trade secrets."

Based on our reading of the assignment clauses and the contracts' references to affiliates, we might question the validity of this argument. In any event, we need not address this argument on the merits, since appellant has forfeited it by failing to raise the contention in its opening brief. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685.)

b. The 1998 Contract

The 1998 contract is entitled "Agreement to Provide Personnel." The parties to the 1998 contract are appellant, called "Supplier" in the agreement, and BA's predecessor, NTSA, identified as "Bank." As provided in section 1(d) of the contract, "Specific job assignments and related hourly rates and terms shall be described on 'Appendix A's' to this Agreement. More than one Appendix A may be attached." Four such appendices were introduced at trial, executed between January and August 1999.

Provisions relating to the nature and scope of the services to be performed

Appellant asserts that "the scope of the work was narrow." Quoting section 1(b) of the 1998 contract, appellant contends that the work was limited to " 'assignments at Bank premises.' " In appellant's view: "The meaning was clear – the contract applied to work at a building or office the Bank owned or leased. The clear language of the 1998 agreement allowed for no other interpretation." Appellant further urges: "The Bank had a license to programs KCM used in its work under the contract, but the 'work' was clearly limited to work 'at Bank premises.' Such work never took place. KCM did all of its work under the 1998 contract at its own offices."

We do not find the 1998 contract susceptible of such a narrow reading. Section 1(b), on which appellant relies, nominally applies only to the performance of "general data processing" services. Section 1(b) thus contains appellant's agreement to "provide personnel with skill, knowledge and experience in general data processing … to perform assignments at Bank premises." The very next provision, section 1(c), makes no mention of respondents' premises; it concerns "individuals with unique knowledge, skills and/or experience" of the type more relevant here.[4] Moreover, as respondents' witness Walter Huyser testified, Koo "preferred to work out of his office" rather than on-site, and "the bank made an exception for KCM to accommodate Mr. Koo's preference."

Considering the language of section 1(c), plus the nature of the services as reflected in the associated contract documents, as well as Huyser's testimony, the jury could reasonably reject appellant's proffered interpretation of the scope of the contract.

Provisions relating to ownership of the software

The 1998 contract includes section 1(f), which provides in part: "Bank will not pay for any tools, licenses, software, supplies (except office supplies used on Bank's premises) or other goods that Supplier or any of its employees may need or choose to use to perform their duties, except as specifically listed in the Appendix A, in a Purchase Order issued for the goods or as otherwise agreed in writing. As additional consideration for this Agreement, any such goods shall become the property of Bank when used…. Any intellectual property which Supplier's employees use in their work must be property of Supplier or used under a valid license…. By using such intellectual property in the work, Supplier and its employees … grant Bank a non-exclusive, world-wide license to

---

[4] The fourth "Appendix A" – for Sing Koo's services – specifically indicates that a unique skill set is involved. Work order 7706 – also for Koo – identifies the highest available skill level, "expert."

use … such intellectual property for a period of 75 years" from the contract's effective date.

In testimony concerning that provision, appellant's president Connie Chun acknowledged that "intellectual property of KCM … [¶] was used by KCM to carry out the contract…." In light of that evidence, the jury could conclude that respondents had a license to use the Wirelessproxy technology.

The 1998 contract also contains section 7(a), which states: "Bank shall have ownership of all materials and ideas embodied therein resulting from services rendered pursuant to this Agreement, including … all software which is written to satisfy or comply with Bank's needs…."

The evidence shows that appellant developed software applications for respondents. According to Chun's prior deposition testimony, which was read into the record at trial, KCM "was contracted to build the first banking wireless applications on the Palm VII for Bank of America." That written contract was entered in October 1998. In Chun's words: "It is a consulting contract to build the banking applications for Bank of America." The documentary evidence confirms that testimony. Under "Scope of Services," each Appendix A to the 1998 contract identifies "Applications Development" as one of the subject activities. That evidence supports a determination that respondents owned the ideas embodied in the Palm VII software application.

Section 7(b) provides: "Within five business days after the parties execute an Appendix A, Supplier shall disclose to Bank, in writing and in full detail, any and all proprietary rights of any nature which Supplier asserts it holds relating to the work defined in Appendix A. Supplier's failure to disclose any such proprietary rights constitutes a waiver of any such right and a waiver to claim any ownership therein against Bank."

The parties disputed whether appellant asserted its claims to the technology by making the disclosure required under section 7(b). Appellant offered a memorandum dated October 26, 1998. That memorandum proposed adapting “the Wirelessproxy model and library services” that had “been in use[] … by KCM since 1996.” According to trial testimony by Chun, delivery of that memorandum in December 1998 was intended to forestall any “misunderstanding on the ownership of the proxy SSL or any items from KCM.” But a trier of fact could reasonably conclude that the memorandum fails to satisfy the requirement of section 7(b) to “disclose … in full detail, any and all proprietary rights of any nature which Supplier asserts it holds relating to the work defined in Appendix A” – particularly since no Appendix A was issued until 1999. And as respondents’ attorney asserted in closing arguments, that memorandum “was the only document” that KCM claimed as disclosure under section 7(b) of the 1998 contract. The record supports that assertion: Chun admitted that there was no “nondisclosure agreement” in connection with the 1998 contract, because “no source code, no IP of KCM was ever intended to be transferred to Bank of America….”

In sum, on this record, and considering the 1998 contract as a whole, a reasonable jury could reach any of these conclusions: (1) under section 1(f), respondents owned “a non-exclusive, world-wide license to use” the technology claimed by KCM as a trade secret; (2) alternatively, under that same provision, the technology had “become the property of Bank” outright; (3) pursuant to section 7(a), respondents owned the technology since it came about “from services rendered” under the contract; (4) appellant made no disclosure of its proprietary rights in the technology, as required by section 7(b), with the consequence that appellant’s ownership claims were waived. The trial evidence and substantive principles of contract law thus support the jury’s verdict that appellant failed to prove its ownership of trade secrets.

c. The 2000 Contract

The 2000 contract is entitled "Technical Contract Labor Services Agreement." The parties to that contract are appellant, identified in the agreement as "Supplier," and BATO. Section 4.1 provides in relevant part: "The Services to be provided by Contract Personnel shall include applicable contract programming, computer services, or other skills required for a position described in a Work Order in the form as set forth in SCHEDULE A, Work Order."

Effectiveness of the contract

According to appellant: "Undisputed evidence at trial proved that the Bank never issued any 'SCHEDULE A's' or work orders under the language of this section [4.1]. Under the plain meaning of its terms, the 2000 contract never was executed and never came into force. It never applied to KCM or its intellectual property."

We disagree.

For one thing, as respondents point out, that argument flies in the face of appellant's longstanding position in this litigation affirming the 2000 contract. Appellant sued for breach of that contract in the first five iterations of its complaint. (See *Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 385 [superseded pleading may be offered for impeachment purposes]; *Hills Trans. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 710-711 [court may take judicial notice of all prior pleadings, even if unverified].) Appellant also sought summary adjudication of its contract claim, though it later withdrew that part of the motion. In support of that motion, appellant submitted the declaration of one of its principals, Sing Koo, who referred to the contract and attached a copy of it. That declaration was admitted at trial. In trial testimony, Koo acknowledged this earlier statement in his declaration, made under penalty of perjury: "On November 11, 2000, KCM and Bank of America Technology & Operations, Inc. entered into a contract entitled Technical Contract Labor

Services Agreement." Koo also admitted sending a May 2001 e-mail to BATO's Huyser about "ending [his] professional services contract with the Bank."

For another thing, beyond appellant's prior reliance on the 2000 contract, other provisions of that agreement undermine appellant's contention that its validity depends on a Schedule A. For example, section 4.5 addresses schedules and work orders, providing in pertinent part: "All instruments, such as Work Orders, acknowledgments, invoices, schedules and the like used in conjunction with this Agreement ('Instruments') shall be for the sole purpose of defining quantities, process and describing Services or products to be provided hereunder, and to this extent only are incorporated as part of this Agreement." That limitation severely undercuts appellant's argument that the 2000 contract could not be effective without schedules or work orders, particularly given the parties' ongoing business relationship.

Furthermore, section 9.0 of the 2000 contract provides for payment from invoices. The record contains evidence that appellant billed and was paid for work performed under the 2000 contract, having invoiced substantial amounts in 2000 and 2001. From this evidence of payment, the jury could infer that the 2000 contract was in force. (Cf. *Hamilton v. Pacific Elec. Ry. Co.* (1939) 12 Cal.2d 598, 602 [inference may "be founded either upon a fact that has been 'legally proved', or upon 'a deduction from that fact' "].)

Ambiguity

As appellant points out, section 30.0 of the 2000 contract addresses the parties' rights in the work product. That section employs the term "consultant" instead of using the word "supplier," which appears throughout the rest of the agreement. Appellant seizes on this discrepancy, asserting: "On their face, the licensing clauses of the 2000 contract are clear – they do not apply to KCM, which is a 'supplier.' At best, the licensing terms are contradictory and thus ambiguous. That ambiguity must be construed against the Bank as the drafter of the contract and in KCM's favor."

At the outset, we reject appellant's claim that it is "clear" that the disputed clause does not apply to it. Section 1.0 of the contract, entitled "Definitions," includes no definition either for "supplier" or for "consultant." (Cf. *Powerine Oil Co., Inc. v. Superior Court, supra,* 37 Cal.4th at p. 390 [undefined term does not render a contract ambiguous].) However, as reflected both on the face sheet of the 2000 contract and in section 1.6, there are only two contracting parties: BATO as hirer and appellant – identified as "Supplier" – as the entity hired to provide services and work product under the contract. At most, then, use of the term "consultant" rather than "supplier" in section 30.0 creates an ambiguity.

To the extent that the introduction of the term "consultant" creates any ambiguity, the jury could resolve it by reference to the parties' entire relationship, as extensively described in the trial evidence. (See Civ. Code, § 1647; *Wolf v. Superior Court, supra,* 114 Cal.App.4th at p. 1356 [circumstances at contract formation]; *Southern Cal. Edison Co. v. Superior Court, supra,* 37 Cal.App.4th at p. 851 [contracting parties' subsequent conduct].) In that relationship, appellant provided services and work product to the bank as an independent contractor. Section 15.0 of the 2000 contract confirms the relationship between the parties as one of independent contractors. As reflected in prior deposition testimony by appellant's president Chun, introduced at trial, KCM referred to its employees – or at least its former employee Allen Tam – as a "consultant" vis-à-vis the bank. And as Chun's prior deposition testimony further reflects, KCM's 1998 contract with the bank was "a consulting contract."

Nor are we persuaded by appellant's assertion of the rule that any ambiguity must be construed against respondents. For one thing, as a factual matter, the parties expressly waived that rule in section 28.9 of the 2000 contract. For another thing, as a legal principle, construction against the drafter is employed only as a last resort in contract interpretation. (Civ. Code, § 1654.) This record does not present a "last resort" situation.

As just explained, the jury had evidence of the parties' relationship to help construe the contract. Moreover, as stated above: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practical, each clause helping to interpret the other." (Civ. Code, § 1641; *Powerine Oil Co., Inc. v. Superior Court, supra,* 37 Cal.4th at p. 391.) Here, section 30.0 is not the only provision in the 2000 contract that is relevant to the disputed question of ownership of the intellectual property. As we explain next, other provisions in the 2000 contract also bear on that issue.

Provisions relating to ownership of the software

Section 3.0 of the contract is entitled "Termination." Section 3.5 provides: "All original materials including inventions, discoveries or improvements, in any form or medium, including system design, programs, card decks, tapes, listings, other documentation originated and prepared for Bank of America for any project shall belong to BATO and shall be surrendered to BATO during or at the end of the project."

Section 18.0 of the 2000 contract relates to confidentiality. Section 18.1 defines confidential information to include "all proprietary information, data, trade secrets, business information and other information of any kind whatsoever" disclosed or obtained "in connection with the negotiation and performance" of the contract. Section 18.4 addresses "any Services furnished by Supplier (or plan, design or specification for producing the same)" and "specifically designed, developed or modified by Supplier for Bank of America at its request and expense…." Among other things, that section requires appellant to "return all copies of documentation for such Services … upon Bank of America's request or upon termination or expiration of this Agreement." More broadly, the next provision, section 18.5, requires appellant to return "all Confidential Information" in its possession.

As with the 1998 contract, there was extensive evidence that the disputed technology was developed for the Bank. For example, in the context of a question about "options that the bank had in early 2001 to acquire the source code it would need in order to maintain the applications that were running at that time," respondents' witness Huyser was asked whether the Bank had given "any consideration of licensing, any of the software that KCM or Mr. Koo's companies had?" In response, Huyser testified: "There was no consideration in licensing code because we believed … we owned all that code. We had – that was our code." In addition, Chun acknowledged in prior deposition testimony that appellant was hired "to build the banking applications" for respondents. There was also substantial evidence that respondents paid for the technology. Thus, under section 18.4, as technology "specifically designed, developed or modified by Supplier for Bank of America at its request and expense," it became confidential information belonging to respondents.

Section 30.0, whose interpretation we discussed above, is entitled "Rights in Work Product." It provides in pertinent part: "BATO or its designated Affiliate will own exclusively all Work Product. Consultant hereby assigns to BATO or its designated Affiliate all of Consultant's right, title and interest (including copyrights, patents and patent applications) in the Work Product, whether or not they are 'works made for hire.' … BATO acknowledges Consultant's and its licensors' claims of proprietary rights in pre-existing works of authorship and other intellectual property Consultant uses in its work pursuant to this Agreement. BATO does not claim any right not expressly granted by this Agreement in such works or intellectual property, which shall not be Work Product, even if incorporated with Work Product in the Product Consultant delivers to Bank of America."

Citing section 30.0, appellant asserts: "Under the clear meaning of this language, KCM retained the rights to the intellectual property it developed before it began working for the Bank under the 2000 contract, even if elements of that property were incorporated into work KCM did for the Bank."

Respondents disagree, asserting that they own the rights to the intellectual property, given the existence of "substantial evidence that KCM developed the Palm VII and Gating applications pursuant to the 1998 Contract and the 2000 Contract." As noted above, that evidence includes trial testimony from respondents' witness Huyser and prior deposition testimony from appellant's president Chun. In addition, the jury could draw an inference in respondents' favor from evidence that appellant made no ownership claim to the Gating application in April 2001, when its contractual relationship with respondents was coming to an end. There is also evidence that appellant billed respondents in June 2001 for winding down the "development environment" for both Palm VII and Gating. This evidence of the contracting parties' subsequent conduct can assist in construing the contract. (*Southern Cal. Edison Co. v. Superior Court, supra,* 37 Cal.App.4th at p. 851.)

Moreover, as respondents also observe, "the jury was free to disbelieve" the contrary evidence offered by appellant. As respondents correctly assert: "Such disbelief was not arbitrary; it was a natural consequence of KCM's false forgery claim, and the many other issues on which KCM's principals were impeached." (See Evid. Code, § 780; *Dillard v. McKnight* (1949) 34 Cal.2d 209, 223; *Hamilton v. Abadjian* (1947) 30 Cal.2d 49, 53.)

In sum, on this record, and considering the 2000 contract as a whole, a reasonable jury could conclude that the subject technology had been developed for respondents, who paid for it and thus owned it.

4. Conclusion

Here, the challenged special verdicts are consistent with the evidence, as discussed above. They are also consistent with the substantive law governing contract interpretation.

As respondents aptly observed in their opposition to appellant's post-trial motion: "KCM was given a full and fair opportunity to present its position on the meaning and effect of the contracts. From opening statement through argument, KCM contended that the ownership and licensing provisions of the written agreements, and the job descriptions in the work orders, did not apply. But the jury concluded otherwise, as it had every right to do under the totality of the evidence." As respondents further observed there: "There was no miscarriage of justice here. The jury was asked to interpret several contracts. The jury was asked to decide whether another contract was genuine, or a forgery. The jury was asked to evaluate the weight and force of hundreds of documents. And the jury was also asked to evaluate the credibility of almost two dozen witnesses, including the principals of KCM, Ms. Chun and Mr. Koo. The jury's decision on Questions 1 and 6 was well within the boundaries of the evidence presented, including the impeachment evidence." We agree.

In sum, the jury verdicts rendered here are supported by the evidence and by the law; we find no basis for reversing them.

II. The Preemption Ruling

In its second line of attack on the judgment, appellant asserts error in the pretrial dismissal of three causes of action of its fifth amended complaint: the second cause of action, for breach of confidence; the fifth cause of action, for interference with contract; and the sixth cause of action, for unfair competition. As noted above, the trial court concluded that those three causes of action were preempted by California's Uniform Trade Secrets Act. (Civ. Code, § 3426 et seq.) Appellant challenges the preemption ruling on both procedural and substantive grounds.

A. Appellant's Procedural Challenges

The preemption issue was first raised below in respondents' trial brief. After motions in limine and before the jury was impaneled, the court addressed the question on its own motion, first giving appellant a chance to respond orally and in writing.

Appellant takes issue with the procedure employed, asserting two related claims of error. First, appellant challenges the pretrial procedure employed by the court as "improper." According to appellant: "If the trial court was using the motion in limine procedure to rule on the preemption procedure, it was in error. A motion in limine can only ask a court to admit or bar the admission of evidence." Second, appellant contends that the court ruled "prematurely," having acted without first hearing its evidence.

In response to appellant's procedural arguments, respondents assert forfeiture and lack of prejudice.

Addressing each of appellant's procedural claims in turn, we conclude (1) appellant forfeited its challenge to the propriety of the pretrial procedure by failing to object below, and (2) appellant failed to demonstrate that its related claim of prematurity constitutes prejudicial error.

1. The Objection Was Forfeited

"In order to preserve an issue for appeal, a party ordinarily must raise the objection in the trial court." (*In re S.C.* (2006) 138 Cal.App.4th 396, 406.) "The party also must cite to the record showing exactly where the objection was made." (*Ibid.*) As the California Supreme Court recently reaffirmed, "a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*Ibid.*)

In its opening brief, appellant asserts that its trial counsel “objected to the ad hoc procedure. He pointed out that the court could reach the merits of an issue only through a demurrer or motion for summary judgment.” Appellant offers no citation to the record to support that assertion, however, and our review of the record discloses no express objection. In its reply brief, appellant maintains that its “trial counsel did not agree to the procedure; he was forced into it.” In support of that argument, appellant cites a portion of the transcript of the hearing held on Friday, February 24, 2006. But the cited excerpt reflects only this comment by counsel: “First, because this is akin to a motion to dismiss or a nonsuit or a motion for summary judgment, it’s not properly briefed. We have not submitted any kind of a responsive brief. This did not come up in a motion in limine. It comes up as a sort of a musing in a trial brief.” After hearing limited oral argument from appellant’s counsel on the merits of the issue, the court offered him “an opportunity to brief.” The court asked him to submit “something in writing” by the following Monday. Appellant’s counsel voiced no objection to that proposal. As requested by the court, he submitted written opposition to the preemption arguments that had been advanced by respondents in their trial brief. Appellant’s written submission asserts that “a finding of preemption at this stage of the case is premature.” But it contains no objection to the hearing procedure itself. Nor did counsel orally interpose any such objection at the post-briefing hearing held on Tuesday, February 28, 2006.

In sum, this record demonstrates that appellant accepted the procedure without objection.

Appellant offers this further contention in its reply brief: “Even if [counsel] did acquiesce to the process, it was only because it was clear the trial court would overrule any objection to the procedure.”

We reject that contention. “Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237.) But this is not such a case. Having read the transcript of the two hearings, we cannot agree that an objection would have been futile.

Nor are we persuaded by appellant's claim that it "did not invite the error or somehow mislead the trial court into believing it accepted the court's decision." In making that claim, appellant relies on *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202. That case does not assist appellant. As the court said there: "Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error." (*Id.* at p. 212.) "But the doctrine does not apply when a party, *while making the appropriate objections*, acquiesces in a judicial determination." (*Ibid.*, italics added.) Here, as explained above, appellant did not interpose any objections. Appellant also relies on *Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383. Plainly, however, that case is inapposite. *Norgart* involved the plaintiffs' pro forma consent to judgment to expedite an appeal, given with the understanding that they retained their right to be heard. (*Id.* at p. 402.) This case bears no procedural similarity to *Norgart*.

Ultimately, the question here is not whether appellant invited error, but whether it forfeited its claim by failing to object below. (See generally Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 8:245, p. 8-161 [discussing invited error doctrine]; *id.* ¶ 8:249, p. 8-164 [discussing waiver].) As explained above, because appellant failed to object, it forfeited its procedural challenge.

Finally, appellant argues against forfeiture on the ground that an "intervening change in the law" validated his argument. (See, e.g., *Palmer v. Shawback* (1993) 17 Cal.App.4th 296, 300.) Appellant asserts that just such a change resulted from a recent decision of this court, *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582. We do not share appellant's view. In *Amtower*, this court criticized the increasingly frequent "use of in limine motions as substitutes for summary adjudication motions, motions for judgment on the pleadings, or other dispositive motions authorized by statute." (*Id.* at p. 1588.) This court published the *Amtower* opinion "to express our concerns surrounding the proliferation of such short-cut procedures." (*Ibid*.) There, this court observed: "The better practice in nearly every case is to afford the litigant the protections provided by trial or by the statutory processes." (*Ibid.*; see *id*. at pp. 1593-1595.) Nevertheless, this court continued, "although we would have preferred that the statute of limitations issue be decided by a proper summary adjudication motion or motion for nonsuit, the trial court's unorthodox procedure does not warrant reversal because plaintiff could not have prevailed under any circumstances." (*Id*. at p. 1588; see *id.* at pp. 1596-1597.) Given that holding, *Amtower* cannot be read as a blanket prohibition on the use of in limine proceedings to decide dispositive issues. Moreover, while it represents an important statement of this court's views, *Amtower* did not break new ground. (See, e.g., *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 333 ["we caution against the wholesale disposition of a case through rulings on motions in limine"].) Thus, contrary to appellant's assertion, *Amtower* does not constitute an intervening change in the law.

In sum, appellant's procedural challenge is forfeited. None of appellant's arguments persuades us to reach the merits of its claim that the trial court employed an "improper procedure" in ruling on the preemption question. In any event, as we next explain, the challenged procedure resulted in no reversible error.

2. Any Error Was Harmless

In its second (and related) procedural challenge, appellant asserts that the trial court's ruling on preemption was premature, since no evidence had been presented at that point. As noted above, in written opposition submitted to the trial court, appellant asserted that "a finding of preemption at this stage of the case is premature." Appellant then explained: "The parties dispute whether the confidential information constitutes trade secrets. Until such time as that issue has been determined, the issue of preemption will not be ripe for determination." Appellant renews that argument here.

Respondents disagree, asserting: "The trial court had all the necessary information, and it gave KCM full opportunity to brief and argue." In defense of the procedure used, respondents also cite the trial court's inherent authority. We start our analysis of this point there.

"A court has inherent equity, supervisory and administrative powers, as well as inherent power to control litigation and conserve judicial resources." (*Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 284; accord, *Amtower v. Photon Dynamics, Inc., supra*, 158 Cal.App.4th at p. 1595.) Use of a motion in limine to test whether a complaint states a cause of action "falls within these powers…." (*Lucas v. County of Los Angeles*, at p. 285.)

"In limine motions are designed to facilitate the management of a case, generally by deciding difficult evidentiary issues in advance of trial." (*Amtower v. Photon Dynamics, Inc., supra*, 158 Cal.App.4th at p. 1593.) As case law recognizes, however, motions in limine also can function as "an objection to any and all evidence on the grounds [the] pleadings [are] fatally defective" for failure "to state a cause of action." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 27.) In such cases, the in limine motion "operate[s] as a general demurrer to [the] complaints or a motion for judgment on the pleadings." (*Ibid.*; see *Amtower v. Photon Dynamics, Inc.*, at p. 1593.) "Alternatively," where such motions are granted "at the outset of trial with reference to evidence already produced in discovery, they may be viewed as the functional equivalent of an order sustaining a demurrer to the evidence, or nonsuit." (*Edwards v. Centex Real Estate Corp.* at p. 27.) "A motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case." (*Id.* at pp. 27-28.)

On appeal from the trial court's determination that the allegations of a pleading do not support relief, review is de novo. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 122 [demurrer].) In such cases, "all inferences and conflicts in the evidence must be viewed most favorably to the nonmoving party." (*Amtower v. Photon Dynamics, Inc.*, *supra*, 158 Cal.App.4th at p. 1595.) But "we cannot reverse the judgment of dismissal based on … alleged [procedural] error … unless we are convinced that that ruling resulted in a miscarriage of justice…." (*People v. Edward D. Jones & Co.* (2007) 154 Cal.App.4th 627, 634; see Cal. Const., art. VI, § 13.)

In this case, appellant has not shown error, much less prejudice.

When the trial court made its ruling on February 28, 2006, it was armed with a great deal of information derived from the long history of the case, including appellant's prior pleadings and other submissions. As respondents told the court at the hearing that day: "The plaintiff has consistently and vehemently contended in prior pleadings in this court that the second and fifth causes of action arise from the same facts as the first cause of action. … So the argument about prematurity might have – certainly would have more force absent the representations" previously made by appellant. To support that assertion, respondents presented the court with appellant's opposition to respondents' demurrer to the fourth amended complaint. Respondents observed that the arguments raised by appellant there "were persuasive in fending off the demurrer on statute of limitations grounds." Respondents also presented the court with a copy of the May 2004 order overruling their demurrer. Respondents' counsel then stated: "So as to the notion that this is somehow premature, I think we have more than an ample record based on the express representations of the plaintiff that this is – these tort claims arise from the same operative facts; namely, misappropriation of trade secrets." Respondents also directed the court's attention to specific allegations in the fifth amended complaint, arguing that the gist of those allegations was trade secret misappropriation.

In making its ruling, the court said this: "As I consider this issue, I'm looking and considering the history of this case, as well." The court specifically mentioned appellant's trial brief, its fifth amended complaint, and "the memorandum prepared in connection with the demurrer to the fourth amended complaint." The court continued: "So the conclusion I come to after considering everything, not just the documents presented to me today, but the arguments of counsel, everything I've heard is that causes of action 2, 5 and 6 are causes of action based on misappropriation of trade secrets. That is the gist of those causes of action…."

Considering the extensive record before the court, we are not convinced that the court acted prematurely in disposing of appellant's tort claims in pretrial proceedings. To the contrary, it appears that the court acted within its inherent authority. (*Lucas v. County of Los Angeles, supra,* 47 Cal.App.4th at pp. 284-285.)

In any event, even assuming error, appellant has failed to demonstrate prejudice. "In other words, even if [appellant is] right in [its] assertion of procedural error, we cannot reverse the judgment unless [appellant is] also correct on the substantive issue of preemption." (*People v. Edward D. Jones & Co*., *supra,* 154 Cal.App.4th at p. 634 [discussing federal securities law preemption].) And as we explain next, the court properly decided the preemption issue presented in this case.

B. Appellant's Substantive Claim

In addressing appellant's substantive challenge to the trial court's preemption ruling, we begin by describing the general principles that underpin the statutory preemption doctrine. We then apply those principles to the case before us.

1. Legal Principles

a. Statutory Preemption in General

"The general rule is that statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject or, in other words, to 'occupy the field.' " (*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285.) " '[G]eneral and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter.' " (*Ibid.*; accord, *Pacific Scene, Inc. v. Penasquitos, Inc.* (1988) 46 Cal.3d 407, 411.)

b. California Uniform Trade Secrets Act

The California Uniform Trade Secrets Act (CUTSA) is codified in sections 3426 through 3426.11 of the Civil Code.[5] (See generally, *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 874; 13 Witkin, Summary of Cal. Law (10th ed., 2005) Equity, §§ 86-92, pp. 382-390; *id.*, 2008 Supp., pp. 54-56.) CUTSA has been characterized as having a "comprehensive structure and breadth…." (*AccuImage Diagnostics Corp v. Terarecon, Inc.* (N.D.Cal., 2003) 260 F.Supp.2d 941, 953.) "Here, the eleven provisions of the UTSA set forth: the definition of 'misappropriation' and 'trade secret,' injunctive relief for actual or threatened misappropriation, damages, attorney fees, methods for preserving the secrecy of trade secrets, the limitations period, the effect of the title on other statutes or remedies, statutory construction, severability, the application of title to acts occurring prior to the statutory date, and the application of official proceedings privilege to disclosure of trade secret information." (*Ibid.)* That breadth suggests a legislative intent to preempt the common law. (*Ibid.*; *I. E. Associates*

[5] Further unspecified statutory references are to the Civil Code.

v. Safeco Title Ins. Co., supra, 39 Cal.3d at p. 285.) At least as to common law trade secret misappropriation claims, "UTSA occupies the field in California." (*AccuImage Diagnostics Corp v. Terarecon, Inc.*, at p. 954.)

CUTSA includes a specific provision concerning preemption. That provision, section 3426.7, reads in pertinent part as follows: "(a) Except as otherwise expressly provided, this title does not supersede any statute relating to misappropriation of a trade secret, or any statute otherwise regulating trade secrets. [¶] (b) This title does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon misappropriation of a trade secret, or (3) criminal remedies, whether or not based upon misappropriation of a trade secret." Section 3426.7 thus "expressly allows contractual and criminal remedies, whether or not based on trade secret misappropriation." (Trade Secrets Practice in California (Cont.Ed.Bar 2d ed. 2008) Litigation Issues § 11.35, p. 430, citing § 3426.7.) "At the same time, §3426.7 implicitly preempts alternative civil remedies based on trade secret misappropriation." (*Ibid*.)

As reflected in case law decided under the California statute, the determination of whether a claim is based on trade secret misappropriation is largely factual. (See, e.g., *Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc.* (D.Del., 2004) 318 F.Supp.2d 216, 220 [applying California law]; *Digital Envoy, Inc. v. Google, Inc.* (N.D.Cal., 2005) 370 F.Supp.2d 1025, 1035.)

In *Callaway*, for example, claims by the cross-complainant for conversion and unjust enrichment were preempted, where they were "based entirely on the same factual allegations that form the basis of its trade secrets claim." (*Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc., supra,* 318 F.Supp.2d at p. 220.) Similarly, because the cross-complainant could "not show that its negligence claim [was] 'supported by facts unrelated to the misappropriation of the trade secret,' [citation] its negligence claim" was also preempted. (*Id.* at p. 221.)

In *Digital Envoy*, the court determined "that California's statute, as persuasively interpreted in *Callaway*, preempts Digital's claims for unfair competition and unjust enrichment since those claims are based on the same nucleus of facts as the misappropriation of trade secrets claim for relief." (*Digital Envoy, Inc. v. Google, Inc., supra*, 370 F.Supp.2d at p. 1035.)

c. Relevance of UTSA Authority from Other Jurisdictions

Section 3426.8 provides: "This title shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this title among states enacting it." In light of this provision, case law from other jurisdictions interpreting uniform statutory provisions similar to California's may be relevant. (See, e.g., *Coulter Corp. v. Leinert* (E.D.Mo., 1994) 869 F.Supp. 732, 734; *Smithfield Ham and Products Co., Inc. v. Portion Pac, Inc.* (E.D.Va., 1995) 905 F.Supp. 346, 348; but see, *Burbank Grease Services, LLC v. Sokolowski* (Wis., 2006) 294 Wis.2d 274, 298 ["cases from other jurisdictions cannot substitute for our construction of the relevant Wisconsin Statute"].) "In order to promote consistency in the uniform laws, California courts ordinarily adopt the construction given a uniform code section by other jurisdictions, unless the construction is manifestly erroneous." (*Estate of Reeves* (1991) 233 Cal.App.3d 651, 657.)

Notably, however, the specific provision of California law at issue here (section 3426.7) differs from the corresponding provision in the uniform act (section 7). The relevant differences appear in subdivision (a) of each provision.[6]

---

[6] Subdivision (a) of section 7 of the uniform act provides: "Except as provided in subsection (b), this [Act] displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret." (14 West's U. Laws Ann., U. Trade Secrets Act, § 7, subd. (a).) By contrast, California's cognate

For purposes of our analysis here, the key difference between the California statute and the uniform act's provision is that the latter "displaces conflicting" law. (14 West's U. Laws Ann., U. Trade Secrets Act, § 7, subd. (a).) Among the states adopting the uniform version are Colorado, Minnesota, and Wisconsin. (See 14 West's U. Laws Ann., U. Trade Secrets Act, § 7, Action in Adopting Jurisdictions, pp. 652-654; *Powell Products, Inc. v. Marks* (D.Colo., 1996) 948 F.Supp. 1469, 1474 [quoting Colorado's statute]; *Micro Display Systems, Inc. v. Axtel, Inc.* (D.Minn.,1988) 699 F.Supp. 202, 204 [quoting Minnesota's statute]; *Burbank Grease Services, LLC v. Sokolowski, supra,* 294 Wis.2d at p. 288 [quoting Wisconsin's statute].) As adopted in Minnesota, this provision means: "Only that law which conflicts with the MUTSA is displaced." (*Micro Display Systems, Inc. v. Axtel, Inc.*, at p. 205; accord, *Cardiac Pacemakers, Inc. v. Aspen II Holding Co., Inc.* (D.Minn., 2006) 413 F.Supp.2d 1016, 1024.) "Under this displacement provision, courts will allow plaintiffs to maintain separate causes of action 'to the extent that causes of action have "more" to their factual allegations than the mere misuse or misappropriation of trade secrets.' " (*Cardiac Pacemakers, Inc. v. Aspen II Holding Co., Inc.*, at p. 1024, quoting *Micro Display Systems, Inc., v. Axtel, Inc.* at p. 205.) The same is true under Colorado law: "the UTSA only preempts common law claims that 'conflict' with its provisions." (*Powell Products, Inc. v. Marks*, at p. 1474.)

California has rejected that particular provision of the uniform act in favor of an entirely different one. (§ 3426.7, subd. (a).) "Typically, when a Legislature models a statute after a uniform act, but does not adopt the particular language of that act, courts conclude the deviation was deliberate and that the policy of the uniform act was rejected." (*Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251,

---

provision reads as follows: "Except as otherwise expressly provided, this title does not supersede any statute relating to misappropriation of a trade secret, or any statute otherwise regulating trade secrets." (§ 3426.7, subd. (a).)

258.) Thus, to the extent that other states' statutes conform to the uniform version of section 7, subdivision (a), which California has rejected, decisions interpreting that provision are not persuasive in construing California's unique statute.

2. Analysis

With those principles in mind, we turn to appellant's substantive challenge to the preemption ruling. We resolve that challenge using a two-step approach. First, we construe California's statute. Next, we apply it to the operative pleading here.

a. Construction of Section 3426.7

When charged with interpreting a statute, "our task is to determine afresh the intent of the Legislature by construing in context the language of the statute. In determining such intent, we begin with the language of the statute itself. That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning. If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 358, internal quotation marks and citations omitted; see also, e.g., *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 625.) Statutory interpretation presents a question of law for our independent review. (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1008.)

Based in part on statutory language, appellant argues for a "narrow interpretation of preemption."[7] In appellant's view, "the California version of the UTSA does not

---

[7] According to appellant: "Two views exist on UTSA preemption. The first, the broad view, holds that a cause of action is preempted if it is based on the same set of facts as the trade secrets claim." Appellant cites two federal cases applying California law as emblematic of that view: *Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc.*, *supra*, 318 F.Supp.2d 216, and *Digital Envoy, Inc. v. Google, Inc.*, *supra*, 370 F.Supp.2d 1025. Appellant continues: "The second view, the narrow interpretation of preemption,

contain language that suggests broad preemption." In support of that assertion, appellant first cites section 3426.7, subdivision (a), arguing that it "does not spell out what is preempted, but sets out what is not[.]" Appellant makes a similar argument based on the language of subdivision (b), asserting that it "lists more exceptions to preemption but does not say what is preempted[.]"

We reject that argument.

In the first place, we share the broad view that CUTSA's "comprehensive structure and breadth" suggests a legislative intent to occupy the field. (*AccuImage Diagnostics Corp v. Terarecon, Inc., supra,* 260 F.Supp.2d at p. 953.) Among other things, CUTSA defines key terms, provides various forms of relief, spells out methods for preserving the secrecy of trade secrets, and sets forth the limitations period. (*Ibid.*) "The stated purpose of the UTSA is to provide 'unitary definitions of trade secret and trade secret misappropriation, and a single statute of limitations for the various property, quasi-contractual, and violation of fiduciary relationship theories of noncontractual liability utilized at common law. The Uniform Act also codifies the results of the better reasoned cases concerning the remedies for trade secret misappropriation.' " (*American Credit Indemnity Co. v. Sacks* (1989) 213 Cal.App.3d 622, 630, quoting Comrs. Prefatory Note to Uniform Trade Secrets Act, 14 West's U. Laws Ann. (1980) Trade Secrets 537, 538.)

Furthermore, and more narrowly, the proper focus in this case is on the language of subdivision (b)(2) of section 3426.7, which reads: "(b) This title does not affect … (2)

---

holds that a common law cause of action can be based on the same nucleus of facts as the trade secrets claim, so long as it alleges new facts, different injuries and damages, or a different theory of liability." In support of that view, appellant offers federal cases applying Colorado, Minnesota, and Wisconsin law: *Powell Products, Inc. v. Marks, supra,* 948 F.Supp. 1469; *Micro Display Systems, Inc. v. Axtel, Inc., supra,* 699 F.Supp. 202; and *Burbank Grease Services, LLC v. Sokolowski, supra,* 294 Wis.2d 274.

other civil remedies that are not based upon misappropriation of a trade secret…." It is that specific language that requires analysis and application here.

As has been aptly observed of section 3426.7, subdivision (b): "This provision would appear to be rendered meaningless if, in fact, claims which are based on trade secret misappropriation are not preempted by the state's statutory scheme." (*Digital Envoy, Inc. v. Google, Inc., supra*, 370 F.Supp.2d at p. 1035.) Additionally, the pertinent statutory language – "based upon misappropriation" – strongly suggests a factual inquiry, one that examines the conduct alleged in the claim. (See *AccuImage Diagnostics Corp v. Terarecon, Inc., supra*, 260 F.Supp.2d at pp. 953, 954 [determining preemption by examining "the conduct at issue"]; accord, *Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc., supra*, 318 F.Supp.2d at p. 219.)

Nor do appellant's other arguments persuade us to a different conclusion. Appellant asserts that California courts generally do not favor preemption. But its proffered case authority is inapposite. The *Smith* case concerns federal preemption. (*Smith v. Wells Fargo Bank* (2005) 135 Cal.App.4th 1463, 1475.) The *Linear* case concerns federal jurisdiction over patent and copyright claims. (*Linear Technology Corp. v. Applied Materials, Inc., supra*, 152 Cal.App.4th at p. 123; see also, e.g., *Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal.App.3d 1327, 1342 [court should analyze "each theory to determine whether it contains the necessary qualitatively different extra element distinguishing it from copyright protection"].) These California cases thus do not address the specific preemption question presented here – statutory preemption of common law. That being so, they offer no reasoned basis for allowing common law claims to go forward whenever they seek "something more" than trade secret relief. And as explained above, the UTSA cases from other jurisdictions that employ a "something more" test are based on a displacement provision that California did not adopt. (See, e.g., *Cardiac Pacemakers, Inc. v. Aspen II Holding Co., Inc*., *supra*, 413 F.Supp.2d at p. 1024

[Minnesota law]; *Micro Display Systems, Inc. v. Axtel, Inc., supra*, 699 F.Supp. at p. 205 [Minnesota law]; *Powell Products, Inc. v. Marks, supra,* 948 F.Supp. at p. 1474 [Colorado law].)

In sum, we agree with the federal cases applying California law, which hold that section 3426.7, subdivision (b), preempts common law claims that are "based on the same nucleus of facts as the misappropriation of trade secrets claim for relief." (*Digital Envoy, Inc. v. Google, Inc., supra,* 370 F.Supp.2d at p. 1035.) Depending on the particular facts pleaded, the statute can operate to preempt the specific common claims asserted here: breach of confidence, interference with contract, and unfair competition. As we explain next, that is the case here.

b. Application to Appellant's Fifth Amended Complaint

"Construction of a complaint presents a legal question for our independent review." (*Balboa Ins. Co. v. Trans Global Equities, supra,* 218 Cal.App.3d at p. 1343; see also, e.g., *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) In undertaking our review, "we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context, and ignoring erroneous or confusing labels if the complaint pleads facts which would entitle the plaintiff to relief." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 385.) We focus on "the actual gravamen of [the] complaint" in construing it. (*Id.* at p. 387.)

In this case, the complaint as a whole rests on factual allegations of trade secret misappropriation. (Cf. *Advanced Modular Sputtering, Inc. v. Superior Court* (2005) 132 Cal.App.4th 826, 835 [for purposes of discovery commencement, "every cause of action is factually dependent on the misappropriation allegation"]; see *id.* at p. 831 [the complaint there asserted causes of action based on plaintiff's confidentiality agreements with its former employees, misappropriation of trade secrets, unfair competition, unfair business practices, interference with prospective economic advantage, conversion, unjust enrichment, and declaratory relief].) Appellant effectively conceded as much earlier in the litigation, in its opposition to a demurrer to the fourth amended complaint.[8] That concession was warranted. "A fair reading" of appellant's fifth amended complaint thus "compels the conclusion that each and every cause of action hinges upon the factual allegation that [defendants] misappropriated [appellant's] trade secrets." (*Id.* at p. 834.) That includes the causes of action for breach of confidence, interference with contract, and unfair competition.

Breach of confidence

"Because an action for breach of confidence may involve a trade secret, there would appear to be considerable overlap between a cause of action for breach of confidence and an action for trade secret misappropriation under the Uniform Trade Secrets Act." (3 Matthew Bender, California Torts (2006), § 40.57[1], p. 40-118.6, fns. omitted.) "As yet, it is not clear to what extent, if any, a statutory cause of action for trade secret misappropriation supersedes a cause of action for breach of confidence." (*Ibid*.) However, one unpublished federal case applying California law "has found preemption under CC §3426.7 when the same facts supported both claims of

---

[8] As relevant here, the demurrer addressed the second and fifth causes of action. As stated in the trial court's formal ruling, filed in May 2004, BA demurred to the second cause of action, for breach of confidence, "on the ground that the face of the complaint discloses that the claim is barred by the applicable statute of limitations, which is two years pursuant to C.C.P. § 339(1)." The court noted appellant's responsive contention "that the allegations upon which the new causes of action are predicated are the same operative facts as the original complaint, namely that Tam wrongfully took possession of Plaintiff's confidential proprietary information and disclosed the same to BA/BATO." The court accepted appellant's position, concluding that "the underpinning of all of the relevant causes of action is the improper taking and misappropriation of trade secrets by and between BA/BATO and Tam." The court reached the same conclusion as to the fifth cause of action, for tortious interference with contract. It observed: "The issues raised and arguments asserted in support of and opposition to BA's demurrer to the fifth cause of action are identical to those asserted in connection with the demurrer to the second cause of action. Thus, the same outcome should follow."

misappropriation and breach of the duty of confidence." (Trade Secrets Practice in California, *supra*, Litigation Issues § 11.37, p. 432.) Employing that same fact-driven approach here, we focus on the factual predicate for the claim and we reach the same result.

In its second cause of action for breach of confidence, appellant alleged that its former employee, defendant Allen Tam, owed it "a duty of confidence as to confidential information accessed during the course and scope of his employment, both under the common law and the Employment Agreement he entered into with plaintiff." Appellant further alleged that Tam "breached his duty of confidence to plaintiff by disclosing trade secrets in connection with proprietary technology and processes for wirelessproxy products" to respondents. As against respondents BA and BATO, appellant asserted that they "aided and abetted" Tam in committing that breach of duty "and gave substantial assistance or encouragement for him to so act."

As reflected in the pleading itself, the conduct at the heart of this claim is the asserted disclosure of trade secrets by Tam to respondents. Legally, disclosure of trade secrets without consent constitutes misappropriation. (§ 3426.1, subd. (b)(2).) Factually, that same conduct underpins appellant's first cause of action, for trade secret misappropriation. Appellant's claim for breach of confidence thus is "based on the same nucleus of facts" as the trade secret misappropriation claim. (*Digital Envoy, Inc. v. Google, Inc., supra,* 370 F.Supp.2d at p. 1035.) As a result, it is preempted. (*Ibid.*)

Interference with contract

Like its breach of confidence claim, appellant's fifth cause of action for tortious interference with contract rests on the same legal and factual basis as its trade secret misappropriation claim.

In this cause of action, appellant alleged that respondents BA and BATO "engaged in intentional acts designed to induce a breach or disruption of plaintiff's contractual relationship" with Allen Tam by "helping" and "encouraging" him "to misappropriate KCM's wirelessproxy trade secrets and then by luring Tam to become an employee of BA/BATO." Appellant further alleged that its "contractual relationship with Tam was disrupted and breached because Tam misappropriated KCM's wirelessproxy trade secrets and accepted employment with BA/BATO."

As before, the gravamen of the wrongful conduct asserted here is the misappropriation of trade secrets. Legally, that conduct falls within the statutory definition of "improper means" of acquiring a trade secret, which "includes … breach or inducement of a breach of a duty to maintain secrecy…." (§ 3426.1, subd. (a).) Factually, the conduct derives from "the same nucleus of facts" as the trade secrets claim, and it is therefore preempted. (*Digital Envoy, Inc. v. Google, Inc., supra*, 370 F.Supp.2d at p. 1035.)

Unfair competition

"California recognizes claims for both common law unfair competition and statutory unfair competition." (Trade Secrets Practice in California, *supra,* § 11.49, p. 452, citing *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254.) "A claim for common law or even statutory unfair competition may be preempted under CC[] §3426.7 if it relies on the same facts as the misappropriation claim." (Trade Secrets Practice in California, at p. 450, citing *AccuImage Diagnostics Corp v. Terarecon, Inc., supra,* 260 F.Supp.2d at p. 955.) "Courts and commentators frequently analyze separately unfair competition and trade secrets protection." (*Balboa Ins. Co. v. Trans Global Equities, supra*, 218 Cal.App.3d at p. 1341.) "Nevertheless, at bottom, trade secret protection is itself but a branch of unfair competition law." (*Ibid.*)

California's statutory unfair competition law permits claims for "unlawful, unfair or fraudulent" business practices. (Bus. & Prof. Code, § 17200; *Feitelberg v. Credit Suisse First Boston, LLC*, *supra*, 134 Cal.App.4th at p. 1009.) "A business practice is unlawful ‘if it is forbidden by any law....’ ” (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827.) “A business practice, however, may be unfair or fraudulent in violation of the UCL even if the practice does not violate any law.” (*Ibid.*)

Here, the sixth cause of action of appellant’s fifth amended complaint alleged statutory unfair competition. Appellant claimed: “Defendants have engaged in the following unlawful, unfair, oppressive, and immoral business acts and practices: [¶] a) Misappropriation of trade secrets under Civil Code § 3426.1(b); [¶] b) Conspiracy to misappropriate trade secrets; and [¶] c) Injury to the public by hindrance of the creative and innovative process of KCM, and other like businesses with whom they contact.” Appellant further alleged: “In addition, defendants’ practices are unlawful, unfair, oppressive, and immoral because they knowingly misappropriated KCM’s wirelessproxy trade secrets with the knowledge that KCM had expended considerable effort and expense, and had taken risks, to develop its wirelessproxy trade secrets.” In a similar vein, appellant asserted: “Defendants wrongfully took, and intended to wrongfully take, KCM’s trade secrets to improve the operations of defendants’ computer systems and thereby profit from the increased efficiencies and other benefits that KCM’s trade secrets provide.” In addition, “on behalf of the general public,” appellant sought an injunction “requiring defendants to immediately cease such acts of unfair competition and enjoining defendants from continuing to misappropriate and benefit from KCM’s trade secrets.”

As with the other causes of action, appellant’s statutory unfair competition claim rests squarely on its factual allegations of trade secret misappropriation. As a legal basis for its unfair competition claim, appellant asserts a violation of CUTSA. As a factual basis for its claim, appellant alleges the same conduct that gives rise to trade secrets claim. (*Digital Envoy, Inc. v. Google, Inc., supra,* 370 F.Supp.2d at p. 1035.) That being so, this claim is also preempted.

For all these reasons, we reject appellant's substantive challenge to the preemption ruling.

SUMMARY OF CONCLUSIONS

I. We find no basis for reversal in appellant's challenge to the special jury verdicts. The verdicts enjoy both factual and legal support.

II. We reject appellant's challenges to the preemption ruling, both procedural and substantive. To the extent that it preserved its procedural claims, appellant failed to show prejudicial error. As for appellant's substantive challenge to the ruling, we interpret the California statute as preempting claims based on the same nucleus of facts as trade secret misappropriation. Applying that construction to the operative pleading here, we agree with the trial court's conclusion that appellant's claims for breach of confidence, interference with contract, and statutory unfair competition are all preempted by CUTSA.

DISPOSITION

The judgment is affirmed.

____

McAdams, J.

WE CONCUR:

____

Mihara, Acting P.J.

____

Duffy, J.

Trial Court:	Santa Clara County Superior Court Superior Court No. CV798875
Trial Judge:	Honorable Kevin J. Murphy
Attorney for Appellant:	Law Offices of Richard L. Antognini Richard L. Antognini Downey Brand Michael J. Thomas
Attorney for Respondents:	Law Offices of Allen Ruby Allen Ruby