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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN CASSESE et al,

Plaintiffs and Appellants,

v.

FOX BROADCASTING COMPANY et al,

Defendants and Respondents.

B217655

(Los Angeles County
Super. Ct. No. BC353893)

APPEAL from An order of the Superior Court of Los Angeles County, James R. Dunn, Judge. Affirmed in part, and reversed in part.

Law Office of James W. Spertus, James W. Spertus and Ezra D. Landes for
Plaintiffs and Appellants.

Pryor Cashman, Michael J. Niborski, James A. Janowitz, Tom J. Ferber and Nia
J.C. Castelly for Defendants and Respondents.

INTRODUCTION

The trial court sustained defendants' demurrer to plaintiffs' second amended complaint without leave to amend, and then entered an order of dismissal. Plaintiffs appeal.

Plaintiffs contend that defendants 19 Entertainment, Inc. (19 Entertainment), Dick Clark Productions (DCP) and Fox Broadcasting Company (Fox) misappropriated their concept for the television series entitled "So You Think You Can Dance?" Their second amended complaint set forth causes of action for breach of implied contract, breach of confidence, unfair competition, and unjust enrichment.

We shall conclude, for reasons we shall explain, that the trial court erroneously sustained the demurrer to plaintiffs' breach of implied contract cause of action against 19 Entertainment and DCP, but correctly sustained the demurrer to all of plaintiffs' causes of action against Fox and their breach of confidence, unfair competition, and unjust enrichment causes of action against 19 Entertainment and DCP.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Complaint*

This action began on June 14, 2006, when plaintiffs¹ filed their complaint against Martin Erlichman Associates, Inc. (MEA), 19 Entertainment, DCP, and Fox. 19 Entertainment, DCP and Fox shall be referred to collectively as "defendants," while MEA shall be referred to separately.

The complaint alleged that plaintiffs were the creators of a business venture concept for a dance-themed competitive reality television series entitled "So You Think You Can Dance?" It set forth six causes of action arising from MEA's and defendants' alleged conduct relating to plaintiffs' concept.

¹ The initial plaintiffs were John Cassese, Mark Wolfe, Maria LaMangra and Brian Nelson. Wolfe and LaMangra are no longer plaintiffs and are not appellants.

2. *The First Amended Complaint*

MEA and defendants filed separate demurrers to the complaint. However, on September 7, 2006, one day prior to the hearing on the demurrers, plaintiffs filed their first amended complaint.

The following is a summary of the allegations in the first amended complaint. Plaintiff Cassese is a dance instructor who “has taught countless celebrities to dance and has appeared and been featured on film, television (including Fox News and other Fox shows), to choreograph, teach, perform and promote dancing.” Plaintiff Nelson “is a professional competitive ballroom dancer, has instructed celebrities, and has been featured on television and on music videos.”

In May 2003, plaintiffs registered the “So You Think You Can Dance?” concept with the Writers Guild of America (WGA). The concept, as registered, included the following elements:

- “a. 60 minute ‘reality’ television show;
- “b. contestants are recruited from various cities across the nation, with the final competition to occur in Los Angeles, California;
- “c. the contestant dancers are challenged with a grueling schedule and by randomly pairing the contestants with strangers who are experienced dancers as partners and requiring the contestants to dance in styles with which they may be unfamiliar;
- “d. professional dancers instruct contestants on various dances [sic] styles in preparation for the competition performances;
- “e. a panel of judges evaluates performances by the contestants;
- “f. the competition uses an elimination-style format, with contestants eliminated over time and only the final remaining contestants receiving the cash prize;
- “g. the television show involved non-competition scenes including contestant practices with the professional dancers, dancers given their challenges (e.g. dancers asked to dance Salsa that week); and interviews and ‘real life’ scenes with contestants (background, are they anxious, mad, and how they bonded with their co-contestants and partners);

“h. the final competitions are before a live audience; and

“i. the final stages of the competition involve elaborate costume and set design to highlight the young, diverse, edgy nature and visual excitement of the show.”

Plaintiffs disclosed the concept to Martin Erlichman. Pursuant to an implied contract, Erlichman agreed to act as plaintiffs’ agent on behalf of MEA for the purpose of pitching the concept to Creative Artists Agency, LLC (CAA) and others. Erlichman understood that plaintiffs would be entitled to receive compensation for use of their concept and credit “for their participation in creating, writing, producing and starring as judges and choreographers for” the concept. Erlichman also understood that he would disclose the concept only under circumstances which required third parties to keep the concept confidential. In September 2003, Erlichman confirmed that the concept had been “successfully placed” with CAA and that CAA wanted permission to hold on to the physical document embodying the concept.

In July 2005, Fox aired for the first time the television series entitled “So You Think You Can Dance?” The series included nearly identical elements of plaintiffs’ concept, as registered with WGA. DCP and 19 Entertainment produced the series. Fox falsely stated on its website and elsewhere that DCP, 19 Entertainment, Simon Fuller, and Nigel Lythgoe created the “So You Think You Can Dance?” concept.

Based on the foregoing allegations, the first amended complaint set forth seven causes of action: (1) breach of implied-in-fact contract against MEA; (2) breach of confidentiality against MEA; (3) breach of fiduciary duty against MEA; (4) breach of implied-in-fact contract against defendants; (5) unfair competition against defendants; (6) false advertising against defendants; and (7) accounting against MEA and defendants.

3. *The Demurrers to the First Amended Complaint*

MEA and defendants filed demurrers to the first amended complaint. On December 12, 2006, the trial court sustained defendants’ demurrer without leave to amend as to plaintiffs’ breach of implied-in-fact contract and breach of confidentiality causes of action, but overruled MEA’s demurrer to plaintiffs’ breach of fiduciary duty and accounting causes of action.

With respect to the breach of the implied-in-fact contract cause of action against MEA, the trial court stated that plaintiffs “do not allege any facts showing that Erlichman [of MEA] accepted the terms of the contract; the allegation that [MEA] understood the terms of the contract is insufficient. The fact that Erlichman asked for permission to give the written Concept to CAA indicates that Erlichman understood that he was to shop the Concept but does not indicate that he agreed to the detailed disclosure terms enumerated in the [first amended complaint.]”

On February 2, 2007, plaintiffs dismissed with prejudice the action against MEA. The trial court subsequently entered an order dismissing plaintiffs’ action against defendants, which plaintiffs appealed on March 14, 2007.

4. *The CAA Action*

While the appeal was pending, on June 21, 2007, plaintiffs filed a complaint against CAA for breach of implied contract and breach of confidence in *Cassese v. Creative Artists Agency, LLC* (Super. Ct. Los Angeles County, 2007, No. BC373097) (the CAA Action).² On August 27, 2007, the superior court sustained CAA’s demurrer to plaintiffs’ breach of implied contract cause of action without leave to amend, but overruled CAA’s demurrer to plaintiffs’ breach of confidence cause of action. In reaching its decision, the court stated that as a result of the trial court’s order sustaining MEA’s demurrer in this action, plaintiffs in the CAA Action were collaterally estopped

² The complaint in the CAA Action alleged that CAA acted as *plaintiffs’* agent. By contrast, as we shall explain, plaintiffs alleged in their second amended complaint in this action that CAA acted as *defendants’* agent. Defendants argue that this allegation is a sham in light of the allegations in the complaint in the CAA Action. However, in his deposition in the CAA Action, plaintiff Brian Nelson admitted under oath that he was never a client of CAA. At oral argument before this court, plaintiffs’ counsel argued that while the allegations in the complaint in the CAA Action might have been inartfully drafted, plaintiffs did not assert a position in the CAA Action that was inconsistent with the position that they take in this action, namely that CAA was *defendants’* agent. At this stage in the proceedings, we accept plaintiffs’ explanation and reject defendants’ argument that plaintiffs’ allegations in the second amended complaint are sham.

from claiming that CAA entered into an implied-in-fact agreement with them through MEA.

5. *Cassese I*

In October 2008, we issued an opinion in *John Cassese et al. v. Fox Broadcasting Company et al.* (Oct. 17, 2008, B197572) [nonpub.opn.] (*Cassese I*). In that opinion we held that the trial court correctly sustained defendants' demurrer to the first amended complaint. However, we also held that the trial court should have granted plaintiffs leave to amend the first amended complaint. We thus reversed the trial court's order of dismissal. In the discussion below, we shall review *Cassese I* in detail.

6. *The Second Amended Complaint*

After remand, plaintiffs filed the second amended complaint (sometimes referred to as the SAC) on January 15, 2009. In addition to asserting the same core allegations as the first amended complaint, this pleading stated the following.

In July 2003, the creators of the "So You Think You Can Dance?" treatment (plaintiffs and two other individuals) presented a copy of the treatment to Martin Erlichman of MEA. Mr. Erlichman informed the creators that "he wanted to submit the treatment to CAA on the creators' behalf." Mr. Erlichman knew that if "So You Think You Can Dance?" were produced, plaintiffs expected to be compensated and expected to be involved in the production of the series.³

CAA "knew that if material was being submitted by Mr. Erlichman that it was only being submitted because the individuals on whose behalf Mr. Erlichman was submitting expected compensation in the event the submission were ever to be produced. CAA knows, when it receives a solicited submission that has been registered with the WGA, that the person or persons submitting it expects to be compensated in the event the

³ By contrast to the first amended complaint, plaintiffs did not allege in the second amended complaint that they had an *implied contract* with MEA. Instead, they simply alleged that they entered into an "agency agreement" with MEA's owner, Mr. Erlichman, and that Mr. Erlichman had both express and implied authority to enter into a contract on plaintiffs' behalf.

submitted material is ever produced. CAA is aware that it is not the custom and practice within the entertainment industry for someone to submit WGA registered material to an agency without an understanding that he or she will be compensated in the event the material is produced.”

On September 8, 2003, Mr. Erlichman informed plaintiffs that he had submitted the treatment to CAA. As of that date, plaintiffs and CAA “had entered into an implied-in-fact contract, which Mr. Erlichman in his capacity as Plaintiffs’ agent, had entered into on Plaintiffs’ behalf. Under the terms of this contract, the valuable property created by Plaintiffs was placed with CAA for the purpose of CAA and its principals having the opportunity to determine if Plaintiffs’ ‘So You Think You Can Dance?’ treatment was material that CAA and its principals wished to sell and/or produce. CAA knew that it would be a breach of the implied-in-fact contract to use the treatment in any unauthorized manner, which included selling and producing the without Plaintiffs’ authorization [and] without compensating Plaintiffs.”

Subsequently, CAA disclosed plaintiffs’ treatment to its principals, 19 Entertainment and DCP. Nigel Lythgoe of 19 Entertainment, in turn, created a treatment for a show based on plaintiffs’ treatment, and then pitched the show to Fox.⁴

On November 15, 2004, a second formal pitch meeting at Fox’s offices took place. The meeting was arranged by CAA. Employees of 19 Entertainment, CAA and Fox were present. At the meeting, Lythgoe pitched the ideas that were contained in plaintiffs’ treatment, which were copied into Lythgoe’s treatment. Fox agreed to purchase the show.

In July 2005, Fox began broadcasting the reality television show “So You Think You Can Dance.” Although the show had many similarities with plaintiffs’ treatment, plaintiffs were never given credit for creating the show and were never compensated for the use of their treatment.

⁴ At one point, Lythgoe gave a physical copy of plaintiffs’ treatment to Mike Darnell of Fox.

After discovering that defendants produced a show that was based on plaintiffs' treatment, plaintiffs learned that CAA was 19 Entertainment's and DCP's agent. Plaintiffs also discovered that 19 Entertainment and DCP were Fox's agents. 19 Entertainment, DCP, and Fox were also "partners in a partnership agreement. The scope of this partnership agreement included, but was not limited to, the ongoing development, production and broadcast of the realty television show that came to be known as 'So You Think You Can Dance.' "

Based on these allegations, the second amended complaint set forth causes of action for (1) breach of implied-in-fact contract, (2) breach of confidence, (3) unfair business practices, and (4) unjust enrichment.

7. *Defendants' Demurrer to the Second Amended Complaint*

On April 1, 2009, defendants filed a demurrer to the second amended complaint. On July 8, 2009, the trial court sustained the demurrer without leave to amend. An order of dismissal was entered on July 27, 2009. Plaintiffs appeal that order.⁵

CONTENTIONS

Plaintiffs contend that the trial court should have overruled defendants' demurrer to the second amended complaint. At a minimum, plaintiffs argue, the trial court should have granted them leave to amend their pleading.

DISCUSSION

1. *Standard of Review*

We review the second amended complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*)). We also assume all of the facts alleged in the second amended complaint are true and make all reasonable inferences from those facts in favor of plaintiffs. (*Miklosy v. Regents of University of*

⁵ Plaintiffs' notice of appeal states that plaintiffs are appealing from the order sustaining defendants' demurrer, which is not appealable. (*Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 520.) In the interests of justice, we shall deem the notice of appeal effective on July 27, 2009—the date the order of dismissal was entered. (Cal. Rules of Court, rule 8.104(e).)

California (2008) 44 Cal.4th 876, 883; *Kruss v. Booth* (2010) 185 Cal.App.4th 699, 714.) “However, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact.” (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102.) “Where, as here, a demurrer is to an amended complaint, we may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making ‘ ‘ ‘contradictory averments, in a superseding, amended pleading.’ ’ ’ ” (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.)

2. *Plaintiffs’ Breach of Implied Contract Cause of Action*

a. *Desny v. Wilder*

As we explained in *Cassese I*: “An idea for a film or television series is generally not regarded as property. (*Desny v. Wilder* (1956) 46 Cal.2d 715, 731 (*Desny*)). It is the expression of the idea (e.g., a script) that qualifies for copyright protection. (*Id.* at 732-733.) The act of disclosing an unprotected idea for a film or television series, however, may serve as consideration for an implied contract. (*Id.* at p. 729.)

“In *Desny*, our Supreme Court stated the circumstances under which an unprotected idea for a film could serve as the basis for an implied contract. The court balanced the interests of producers with the interests of the creators of ideas for films. ‘[W]e are not oblivious,’ the court stated, ‘of the hazards with which producers . . . are confronted through the unsolicited submission of numerous scripts on the public domain materials. . . .’ (*Id.* at p. 734.) The Court also recognized that producers did not have carte blanche to misappropriate ideas offered for sale, because the law ‘is dedicated to the proposition that for every wrong there is a remedy[.]’ (*Ibid.*)

“ ‘The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit; this is true even through the conveyance has been made with the hope or expectation that some obligation will ensue.’ (*Desny v. Wilder, supra*, 46 Cal.2d at p. 739.) However, if an idea purveyor clearly conditions an offer to disclose an idea on the offeree’s obligation to pay for it, and the offeree voluntarily accepts the disclosure knowing the condition on which it is tendered, the law will imply a promise to pay for an idea. (*Ibid.*)

“ [F]or an implied-in-fact contract, one must show: [1] that he or she prepared the work; [2] that he or she disclosed the work to the offeree for sale; [3] under all circumstances attending disclosure it can be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered (i.e., the offeree must have the opportunity to reject the attempted disclosure if the conditions were unacceptable); and [4] the reasonable value of the work.’ (*Faris v. Enberg* (1979) 97 Cal.App.3d 309, 318, citing *Desny, supra*, 46 Cal.2d at p. 744.)” (*Cassese I, supra*, [at pp. 6-7].)

b. *Cassese I*

In *Cassese I*, we held that the trial court correctly sustained defendants’ demurrer because there were two defects in the first amended complaint relating to the third element of a *Desny* breach of implied contract claim. (*Cassese I, supra*, [at pp. 2, 7].) We described the defects as follows: “First, plaintiffs do not allege that they disclosed their concept to defendants or defendants’ agent. Although plaintiffs allege that they disclosed their concept to CAA, they do not allege that CAA was Fox’s agent. Plaintiffs also do not clearly and unequivocally allege that CAA was the agent of 19 Entertainment, Inc. and Dick Clark Productions. Rather, plaintiffs allege that 19 Entertainment, Inc., Dick Clark Productions, Simon Fuller, Nigel Lythgoe ‘or some of them’ were represented by CAA. This could mean CAA represented Fuller and Lythgoe or one of them, but did not represent Dick Clark Productions and 19 Entertainment, Inc. Such equivocal allegations subject the first amended complaint to general demurrer. (See *O’Hare v. Marine Electric Co.* (1964) 229 Cal.App.2d 33, 35, 37 [allegation that defendant was ‘ “an officer and/or director and/or shareholder” ’ was not a direct allegation that defendant was either a director or shareholder].)

“The second defect is that plaintiffs do not clearly and unequivocally allege that defendants *knew* the conditions on which plaintiffs tendered their concept. Instead, plaintiffs allege that 19 Entertainment, Inc. and Dick Clark Productions ‘*knew or should have known* that Plaintiffs would not have disclosed their original concept “So You Think You Can Dance?” without the expectation that Plaintiffs would receive both credit and

compensation.’ (Italics added.) Likewise, plaintiffs allege that Fox ‘knew *or should have known*’ that 19 Entertainment, Inc. and Dick Clark Productions ‘did not create the “So You Think You Can Dance” original concept’ and that ‘Plaintiffs would not have disclosed their original concept “So You Think You Can Dance?” without the expectation that Plaintiffs would receive both credit and compensation[.]’ (Italics added.)” (*Cassese I, supra*, [at pp. 7-8].)

We held that in light of representations made by plaintiffs’ counsel, there was a reasonable possibility that these defects could be cured by further amendment. (*Cassese I, supra*, [at pp. 10-12].) Accordingly, we reversed the trial court’s order of dismissal. (*Id.* [at p. 13].)

c. *The Second Amended Complaint Cured the Defects in the First Amended Complaint With Respect to 19 Entertainment and DCP*

The second amended complaint clearly and unequivocally alleged that CAA was the agent of 19 Entertainment and DCP with the authority to enter into contracts on behalf of 19 Entertainment and DCP relating to television projects. (SAC, ¶ 49(b), (c).) Thus the first defect in the first amended complaint was cured with respect to those defendants.

The second amended complaint also alleged that CAA knew that if plaintiffs disclosed their treatment to CAA and CAA’s clients used the treatment, plaintiffs expected to be compensated. For example, the second amended complaint stated: “Plaintiffs and CAA both knew that, under the terms of the implied-in-fact contract, any use of the ‘So You Think You Can Dance?’ treatment that excluded Plaintiffs from benefiting from the treatment was an unauthorized use of the treatment and a breach of the implied-in-fact contract.” (SAC, ¶ 20.) Viewing the second amended complaint in a light most favorable to plaintiffs, as we must, plaintiffs sufficiently alleged that CAA knew of the conditions under which the treatment was tendered within the meaning of the third element of *Desny*. Because an agent’s knowledge is imputed to the agent’s principal (see Civil Code § 2332; 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 150, p. 195), CAA’s knowledge of the terms of plaintiffs’

disclosure of the treatment was imputed to 19 Entertainment and DCP. Accordingly, the second defect in the first amended complaint was cured by the second amended complaint.

Defendants argue that plaintiffs may not impute CAA's knowledge to 19 Entertainment and DCP by merely alleging that they were among its many clients. In particular, defendants contend that in *Cassese I*, “[t]his Court noted that Appellants’ counsel had acknowledged the necessity of alleging not just that CAA ‘represented’ Respondents in some general capacity, but that they needed to specifically allege that CAA was Respondents’ agent ‘with respect to the issue of disclosure of the concept [*i.e.*, Treatment].” (Underscore added.) This is simply not true. Plaintiffs’ counsel never acknowledged any such alleged “necessity.” (See *Cassese I, supra*, [at p. 10].) In any case, we hold that the allegations in the second amended complaint regarding CAA’s representation of 19 Entertainment and DCP were sufficient.

Defendants also argue that the second amended complaint failed to allege that 19 Entertainment and DCP “used CAA to procure” the concept. This argument is based on a statement we made in *Cassese I*. There, we stated: “Under *Desny*, if defendants used CAA to procure the concept for ‘So You Think You Can Dance?,’ then CAA’s knowledge of the conditions on which plaintiffs tendered their concept would be imputed to defendants (*Desny, supra*, 46 Cal.2d at p. 727), and defendants would be bound by CAA’s voluntary acceptance of the concept. (*Id.* at p. 745.)” (*Cassese I, supra*, [at p. 11].) By making this statement, we did not establish a requirement separate from the third element of *Desny*. Rather, we simply noted that in *Desny*, the agents of defendant Paramount had authority to negotiate contracts for the procurement of material offered for sale.

Here, the second amended complaint alleged that CAA had such authority. For example, the second amended complaint stated that the agency-principal relationship between CAA on the one hand, and 19 Entertainment and DCP on the other, “included, but was not limited to, the handling of matters relating to procuring materials for the development, creation, sale, contract negotiation and production of television projects

and those projects' ancillary projects.” (SAC, ¶ 49(b)(c).) If we assume that this allegation is true, as we must, then CAA had the requisite authority to negotiate the alleged implied contract between plaintiffs and 19 Entertainment and DCP.

Defendants argue that the second amended complaint is deficient because it did not allege facts regarding the conditions “preceding and attending” plaintiffs’ disclosure of the treatment indicating that CAA voluntarily accepted the treatment. This argument is based on a statement in the *Desny* case. There, the Supreme Court stated:

“[A]ssuming legality of consideration, the idea purveyor cannot prevail in an action to recover compensation for an abstract idea unless (a) before or after disclosure he has obtained an express promise to pay, or (b) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as ‘implied’ or ‘implied-in-fact.’ ” (*Desny, supra*, 46 Cal.2d at p. 738.)

In the present case, the second amended complaint alleged sufficient facts about the circumstances surrounding plaintiffs’ disclosure of the treatment (through MEA) to CAA to support the allegation that CAA’s acceptance of the treatment formed an implied contract between plaintiffs on the one hand, and 19 Entertainment and DCP on the other. The second amended complaint alleged, inter alia, that plaintiffs registered their treatment with the WGA, and that the WGA “recommends that authors register their creative works as ‘preventative measures against plagiarism or unauthorized use of an author’s material’ ”; that plaintiffs wanted Mr. Erlichman, a well-known, experienced, and successful producer, agent and manager, to pitch the treatment because he “had a comprehensive understanding of the customs and practices of the entertainment industry, which include compensating creators for their work”; that Mr. Erlichman informed plaintiffs that he wanted to submit the treatment to CAA, one of the most prominent and successful talent agencies in the world; that CAA does not accept any unsolicited submissions of treatments and that when it accepts a treatment following a query from an agent, manager, attorney, personal representative or the like, “the submission is considered ‘solicited’ by CAA”; that CAA accepted plaintiffs’ treatment in light of Mr.

Erlichman's stature in the entertainment industry and his long-standing business relationship with CAA; that after CAA accepted the treatment from Mr. Erlichman, it asked if it could retain it "for a while"; that plaintiffs' names and biographies and the WGA registration number appear on the treatment CAA received; that CAA "is aware that it is not the custom and practice within the entertainment industry for someone to submit WGA registered material to an agency without an understanding that he or she will be compensated in the event the material is produced"; and that CAA had express authority to enter into contracts on behalf of 19 Entertainment and DCP for the receipt of new material submissions.

Under these circumstances, a reasonable person could conclude that when CAA accepted plaintiffs' treatment from MEA, it knew that MEA was not merely giving CAA a gift on behalf of plaintiffs. Rather, a reasonable person could conclude that CAA understood that if it accepted the treatment, it did so with the promise that its clients would compensate plaintiffs for the use of it.

Further, contrary to defendants' assertion, nothing in the second amended complaint indicates that CAA did not have an opportunity to reject the treatment. Indeed, the facts alleged indicate that the treatment was not merely one of countless unsolicited documents talent agencies such as CAA receive from people with no reputation or standing in the industry. Rather, the treatment was pitched by Mr. Erlichman, a well-known and prominent person in the industry, with long-standing ties to CAA. CAA could have simply handed the treatment back to Mr. Erlichman. But it did not do that. Instead, it allegedly asked for permission to keep the treatment, presumably so that it could have additional time to ascertain whether it could be used. CAA thus had an opportunity to reject the submission, but it did not do so.

Finally, defendants assert a collateral estoppel argument based on the trial court's orders sustaining MEA's demurrer to the first amended complaint and dismissing MEA. Defendants contend that in its ruling sustaining MEA's demurrer, the trial court determined that there was not an implied agreement between MEA and plaintiffs regarding the conditions attached to disclosing the treatment. Without such an implied

agreement, defendants contend, plaintiffs cannot assert a breach of implied contract cause of action against defendants. We reject this argument. The breach of implied contract cause of action in the SAC does not depend on any “implied” agreement between MEA and plaintiffs. Rather, the SAC simply alleged that Mr. Erlichman of MEA acted as plaintiffs’ agent, and further specifically alleged that Mr. Erlichman informed CAA of the conditions attached to the disclosure of the treatment. Accordingly, the trial court’s ruling on the issue of whether plaintiffs and MEA had an implied agreement does not collaterally estop plaintiffs from asserting a breach of implied contract cause of action against 19 Entertainment and DCP.⁶

In sum, the second amended complaint alleged sufficient facts to state a breach of implied contract cause of action against 19 Entertainment and DCP pursuant to *Desny*. The trial court thus erroneously sustained the demurer of those defendants to plaintiffs’ breach of implied contract cause of action.

d. *The Second Amended Complaint Did Not Cure the Defects in the First Amended Complaint With Respect to Fox*

The second amended complaint did *not* allege that CAA was Fox’s agent. CAA’s knowledge of the terms of plaintiffs’ disclosure of their treatment thus cannot be imputed to Fox. Moreover, CAA was the only party to communicate with plaintiffs through plaintiffs’ agent, Mr. Erlichman, regarding a proposed contract for the sale of “So You Think You Can Dance?” Because Fox and plaintiffs, and their respective agents, did not have communications with each other, Fox and plaintiffs did not come to a mutual understanding regarding the terms of plaintiffs’ alleged disclosure of their treatment to Fox. Accordingly, plaintiffs and Fox did not enter into an implied *Desny* contract.

⁶ Plaintiffs argue that the trial court’s order sustaining MEA’s demurrer was not a final judgment on the merits, and thus cannot be the basis for collateral estoppel. Because we reject defendants’ collateral estoppel argument on other grounds, we do not reach this issue.

The second amended complaint alleged, in conclusionary fashion, that 19 Entertainment and DCP were either Fox's "agents" or "partners." However, the second amended complaint also specifically alleged that CAA pitched the show "So You Think You Can Dance?" to Fox on behalf of 19 Entertainment and DCP, and that Fox stated that it wished to "purchase the show" from 19 Entertainment and DCP at a pitch meeting arranged by CAA. Thus, for purposes of negotiating a contract regarding the concept for "So You Think You Can Dance?," 19 Entertainment and DCP were not acting as Fox's agents or partners; they were on the other side of the transaction.

Even assuming that 19 Entertainment and DCP were Fox's agents for purposes of negotiating a contract regarding the "So You Think You Can Dance?" concept, we cannot impute CAA's knowledge of the terms upon which plaintiffs agreed to disclose their treatment to Fox. Plaintiffs have not cited, and we have not found, any authority to support the proposition that the knowledge of an agent (CAA) of an agent (19th Entertainment and DCP) is imputed to a principal (Fox). Fox was simply too far removed from plaintiffs to have entered into an implied contract with them.

Plaintiffs argue that Fox "ratified" 19 Entertainment's and DCP's conduct, and that "[a] principal is liable when it ratifies an originally unauthorized tort." However, plaintiffs are confusing liability for tortious conduct with the formation of a contract. Whether Fox can be held liable for a "tort" committed by 19 Entertainment and DCP is irrelevant to whether Fox entered into an implied contract with plaintiffs.

Finally, plaintiffs rely on the allegation in the second amended complaint that an employee of Fox was in physical possession of plaintiffs' treatment. Plaintiffs do not, however, explain how Fox's possession of the treatment created an implied contract between plaintiffs and Fox. There is no allegation in the second amended complaint that Fox, or any of its agents, agreed to accept plaintiffs' treatment on the condition that they would pay plaintiffs if they used it. Without such an agreement, plaintiffs and Fox did not form a *Desny* implied contract.

3. *Plaintiffs' Breach of Confidence Cause of Action*

“An actionable breach of confidence will arise when an idea, whether or not protectable, is offered to another *in confidence*, and is voluntarily received by the offeree *in confidence* with the understanding that *it is not to be disclosed to others*, and it is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror’s permission.” (*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal.App.3d 455, 462, italics added.) A cause of action for breach of confidence “arises whenever an idea, offered and received in confidence, is later disclosed without permission.” (*Davies v. Krasna* (1975) 14 Cal.3d 502, 510.) This cause of action is not limited to fiduciary relationships, “but could exist in any number of situations, such as principal and agent, partners, joint venturers, and in a buyer/seller relationship where a trade secret is disclosed in the course of confidential negotiations on the price to be paid for the secret.” (*Faris v. Enberg, supra*, 97 Cal.App.3d at p. 321.)

Here, as we discussed *ante*, the second amended complaint did not allege that plaintiffs had any direct communications with defendants. Rather, the SAC alleged that through their agent, Mr. Erlichman of MEA, plaintiffs communicated with CAA and disclosed their treatment to CAA. However, the SAC did not allege that plaintiffs disclosed their treatment to CAA *in confidence*, i.e. with the understanding that it was not to be disclosed to others. Further, the first amended complaint, which we may consider in reviewing the SAC (*Berg & Berg Enterprises, LLC v. Boyle, supra*, 178 Cal.App.4th at p. 1034), alleged that MEA agreed to “encourage and work with CAA to ‘shop’ ” plaintiffs’ treatment “to prevalent companies in the television industry including, but not limit to,” Fox. The SAC thus did not state facts sufficient to constitute a cause of action for breach of confidence.

Plaintiffs rely on their allegation in the SAC that 19 Entertainment and DCP used plaintiffs’ treatment in an “unauthorized manner,” namely selling it to Fox without paying plaintiffs. (SAC, ¶ 75.) However, CAA’s alleged agreement to have its clients pay plaintiffs for the use of the treatment is not the same thing as an agreement to keep the treatment in confidence. Because the SAC did not allege that defendants agreed to

keep the treatment in confidence, it did not state a cause of action for breach of confidence.

4. *Plaintiffs' Unfair Competition Cause of Action*

Plaintiffs' third cause of action is for "unfair business practices" pursuant to Business and Professions Code section 17200 (section 17200). Section 17200 refers to "unfair competition." We thus shall refer to this claim as an unfair competition claim.

A plaintiff has standing to pursue an unfair competition claim only if he or she "has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204; *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.) In other words, a plaintiff does not have standing to pursue an unfair competition claim unless he or she is eligible for restitution. (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 817; *Citizens of Humanity, LLC v. Costco Wholesale Corp.* (2009) 171 Cal.App.4th 1, 22.)

Restitution allows a plaintiff "to recover money or property in which he or she has a vested interest." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149.) " 'Compensation for a lost business opportunity is a measure of damages and not restitution to the alleged victims.' " (*Id.* at p. 1151.)

Here, plaintiffs do not seek recovery of any money they paid defendants or property they gave them. Rather, plaintiffs allege that defendants "benefited through their unfair business practice by acquiring property that is worth an amount to be proven at trial that is in excess of five-hundred million dollars (\$500,000,000)." (SAC, ¶ 86.) This is a claim for damages, not restitution. Plaintiffs thus do not have standing to pursue an unfair competition claim.

5. *Plaintiffs' Unjust Enrichment Cause of Action*

The second amended complaint purports to state a cause of action for unjust enrichment. However, "there is no cause of action in California for unjust enrichment. 'The phrase "Unjust Enrichment" does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so.' [Citation.] Unjust enrichment is ' "a general principle, underlying various legal

doctrines and remedies,” rather than a remedy itself. [Citation.] It is synonymous with restitution. [Citation.]” (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793; accord *Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911.)

Here, the second amended complaint does not state any underlying cause of action against Fox. Further, plaintiffs are not eligible for restitution against 19 Entertainment and DCP because they did not pay those defendants any money or give them any property. Accordingly, the trial court correctly sustained defendants’ demurrer to the fourth cause of action in the SAC because plaintiffs are not entitled to recover restitution under the principle of unjust enrichment.

6. *We Do Not Reach Defendants’ Preemption Argument*

Defendants contend that plaintiffs’ breach of confidence and unfair competition causes of action are preempted by the Copyright Act. We do not reach this issue because we hold that the demurrer to those causes of action was correctly sustained for different reasons.

7. *Plaintiffs Have Not Met Their Burden of Showing That There is a Reasonable Possibility That They Can Cure the Defects in Their Second Amended Complaint By Amendment*

“When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. The plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] The plaintiff may make this showing for the first time on appeal.” (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.)

“To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ [Citation.] The assertion of an abstract right to amend does not satisfy this burden.” (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.) The plaintiff must clearly and specifically state “the legal basis for amendment, i.e., the elements of the cause of action,” as well as the “factual allegations that sufficiently state all required elements of that cause of action.” (*Ibid.*)

Plaintiffs have not met their burden of showing that there is a reasonable possibility of amendment because they have not specified how they would cure the defects in the second amended complaint with respect to the causes of action against Fox or with respect to their causes of action for breach of confidence, unfair competition, or unjust enrichment against 19 Entertainment and DCP. The trial court thus correctly sustained defendants' demurrer to those causes of action without leave to amend.

DISPOSITION

The order of dismissal is affirmed with respect to Fox and with respect to the breach of confidence, unfair competition, and unjust enrichment causes of action against 19 Entertainment and DCP. The order of dismissal is reversed with respect to the breach of implied contract cause of action against 19 Entertainment and DCP. No costs are awarded on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.