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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

FRED M. POWERS et al., Plaintiffs and Appellants, v. THE RUG BARN et al., Defendants and Respondents.	E033920 (Super.Ct.No. INC019331) **OPINION**

APPEAL from the Superior Court of Riverside County. Douglas P. Miller and Christopher J. Sheldon, Judges. Affirmed.

Schlecht, Shevlin & Shoenberger and Rick M. Stein for Plaintiffs and Appellants.

Best, Best & Krieger and G. Henry Welles for Defendants and Respondents.

Fred Powers and Earth Tapestries (plaintiffs) appeal from summary judgment in favor of the Rug Barn and Thantex Holdings, Inc. (Thantex; collectively, defendants) in this action for interference with contract and prospective economic advantage. We

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.A, C, D, E and F.

conclude summary judgment was proper on the ground that plaintiffs failed adequately to allege, and produce evidence of, independently wrongful conduct on the part of defendants.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Background Facts*

In June 1999, Powers and Suzanne DeVall entered into a written agreement to do business as a California general partnership under the name Tapestry Designs. The partnership later came to be known as Earth Tapestries and will be referred to by that name in this opinion.

The partnership agreement provided in relevant part as follows: The partnership would engage in the general business of providing consulting, design, and sales related to textiles and home furnishings and products. The partnership would continue until the partners decided to terminate it. Powers was to supply the initial capital for the partnership and be responsible for its day-to-day management. DeVall would devote her full time to the partnership, and all of her projects would be included in the partnership. Profits and losses would be divided equally between Powers and DeVall.

In the latter part of 1999, after forming Earth Tapestries, Powers and DeVall explored the possibility of doing business with the Rug Barn, a company involved in the textile trade, and/or its parent company, Thantex. Powers and DeVall met in New York with Ernie Ruddock, the general manager of the Rug Barn, and John Halberda, whom

according to plaintiffs was the president of Thantex and whom Powers understood was Ruddock's boss.

The Rug Barn initially expressed an interest in entering into a business arrangement with Earth Tapestries. In August 1999, however, Ruddock wrote to DeVall and Powers, stating, " . . . I think there are enough major differences in our perceptions of how to organize this business, that I am withdrawing at this time any interest in moving forward with this project until we can reach a better understanding of how this can work."

On or about December 10, 1999, DeVall accepted a job with the Rug Barn and/or Thantex. According to DeVall, she told Powers in November 1999 that she had been offered the job. According to Powers, however, DeVall first informed him of her employment on January 20, 2000.

In May 2000, Powers and DeVall entered into a letter agreement for final settlement of their respective claims and obligations (May 2000 agreement). Jeffrey Winkler, an attorney employed by the Rug Barn, assisted in preparing the agreement. The agreement called for DeVall to pay Powers $80,000 in four installments of $20,000 at 30-day intervals. Powers agreed to release any claims against DeVall or the Rug Barn or its affiliates and to wind up the affairs of Earth Tapestries.

DeVall paid about $40,000, but she did not pay the rest. According to DeVall, she did not pay the remaining money because Powers was unwilling or unable to provide documentation that the money was actually owed for debts of Earth Tapestries.

B. *Plaintiffs' Claims Against Defendants*

Plaintiffs filed this action in September 2000.[1] The operative complaint, the third amended (hereafter, complaint), alleged four causes of action against defendants which are at issue in this appeal: the third cause of action, for interference with contract; the fourth cause of action, for interference with prospective economic advantage; the fifth cause of action, for conspiracy; and the sixth cause of action, for declaratory relief. Those causes of action alleged in relevant part as follows:

1. *Third Cause of Action -- Interference with Contract*

The third cause of action alleged that, sometime after the discussions between plaintiffs and the Rug Barn, DeVall and defendants formed a new business venture to compete with Earth Tapestries. The new venture, eventually called Indika, essentially consisted of products and services initially intended by DeVall and Powers for use by Earth Tapestries. DeVall became an employee of Thantex on or about December 18, 1999, and in that capacity pursued business activities in competition with Earth Tapestries. DeVall kept her activities secret from Powers and induced plaintiffs to finance research and development and products for the benefit of Indika.

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[1] The original complaint named only Powers as plaintiff and DeVall as defendant. Later, the complaint was amended to add Earth Tapestries as a plaintiff and the Rug Barn and Thantex as defendants. Powers eventually obtained a default judgment against DeVall. DeVall is not a party to this appeal.

The third cause of action further alleged that defendants knew of the partnership between Powers and DeVall and knew that Earth Tapestries was engaged in substantially the same business as the new venture between DeVall and defendants. Defendants made a conscious decision to lure DeVall away from Earth Tapestries and to induce her to breach the partnership agreement. The new venture effectively usurped the business of Earth Tapestries. Powers suffered damage in that, not knowing of the new venture, he continued to expend money and time on Earth Tapestries.

2. *Fourth Cause of Action -- Interference with Prospective Economic Advantage*

Plaintiffs' fourth cause of action incorporated the same background allegations as did the third cause of action, i.e., defendants' hiring of DeVall and their use of her services to compete with Earth Tapestries. The fourth cause of action additionally alleged that defendants knew Earth Tapestries enjoyed prospective economic relationships with retailers throughout the United States and intentionally disrupted those relationships by causing the potential customers to do business with Indika rather than Earth Tapestries. As a result, Earth Tapestries suffered monetary damages.

3. *Fifth Cause of Action -- Conspiracy*

Plaintiffs' fifth cause of action alleged the same underlying conduct as the third and fourth causes of action, i.e., defendants' interference with the partnership agreement and with Earth Tapestries's prospective economic relationships with third parties. The fifth cause of action additionally alleged that defendants and DeVall conspired to keep

their activities, and their use of designs and business plans developed by Earth Tapestries, secret from Powers.

4. *Sixth Cause of Action -- Declaratory Relief*

Plaintiffs' sixth cause of action alleged that a dispute existed between the parties as to the proper interpretation of the May 2000 agreement. Plaintiffs contended their release of their claims against defendants was conditioned on DeVall's payment of the full $80,000 to Powers. Defendants contended the release was effective without full performance by DeVall. Plaintiffs therefore sought a declaration of the parties' respective rights and obligations under the letter agreement.

C. *Summary Judgment Motions*

In October 2002, Powers moved for summary judgment against defendants on the third and sixth causes of action of the complaint. Later the same month, defendants filed a cross-motion for summary judgment on all causes of action asserted against them. Defendants argued that the May 2000 agreement operated to release any claims plaintiffs could have asserted against them. They also argued plaintiffs could not prove the necessary elements for a cause of action for interference with contract or prospective economic advantage.

The court denied Powers's motion and granted defendants' cross-motion. The court found a triable issue whether Powers intended to release his claims against defendants without full payment by DeVall of the $80,000. However, it ruled that plaintiffs had not established intentional acts on the part of defendants which were

designed to disrupt the partnership between Powers and DeVall, or that defendants' acts proximately caused damage to plaintiffs, both of which were necessary elements of plaintiffs' claim for interference with contract. The court further ruled that plaintiffs had not established the existence of prospective economic relationships with third parties, defendants' knowledge of the relationships, defendants' intent to disrupt the relationships, actual disruption, or resulting damage, all of which were necessary elements of plaintiffs' claim for interference with prospective economic advantage.

With respect to plaintiffs' claim for conspiracy, the court ruled plaintiffs had not established the formation or operation of a conspiracy, a wrongful act pursuant to the conspiracy, or resulting damage. Finally, the court ruled that because summary judgment in favor of defendants was proper as to all of plaintiffs' substantive tort claims, there was no present controversy whether such claims were released by the May 2000 agreement and therefore no basis for plaintiffs' remaining claim for declaratory relief.

II

DISCUSSION

A. *Standard of Review*

A court reviewing a grant of summary judgment examines the record de novo and independently determines whether the decision is correct. In making its independent review of the evidence, the court first determines whether the moving party established facts negating the opponent's claims and justifying a judgment in favor of the moving party. If the moving party met that burden, the court determines whether the opposing

party demonstrated the existence of a triable, material factual issue. (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 392; *Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.)

A defendant moving for summary judgment may meet its burden of showing that a cause of action has no merit by showing that the plaintiff cannot establish at least one element of the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) The defendant may do so by showing that the plaintiff does not possess, and cannot reasonably obtain, evidence to establish the absent element. (*Id.* at p. 854.) Once the defendant has met that burden, the plaintiff must show that a triable issue of one or more material facts exists as to that cause of action. (*Id.* at p. 849.) There is a triable issue if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the plaintiff. (*Id.* at p. 850.)

B. *Interference with Contract*

The elements of the tort of interference with contract are (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the relationship; and (5) resulting damage. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55; *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

In most cases, the third element, acts by the defendant designed to disrupt the contract, does not require the plaintiff to show that the defendant's conduct was

"wrongful" apart from the fact that it caused the disruption of the contract. Rather, since "interference with an existing contract receives greater solicitude than does interference with prospective economic advantage," it is enough to show that the defendant's conduct was intentional and was known by the defendant to be substantially certain to disrupt the contract. (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th 26, 55.)

A different rule has been applied, however, in cases in which the disruptive conduct consisted of the defendant's hiring of the plaintiff's employees in order to compete with the plaintiff. The law generally recognizes that the defendant in such a case has "the right to conduct a business in competition with that of the plaintiff," as long as the means of competition "involve no more than recognized trade practices." (*Buxbom v. Smith* (1944) 23 Cal.2d 535, 546 (*Buxbom*).) Hiring a competitor's employees is a recognized trade practice. As the California Supreme Court stated in *Buxbom*, "it is not ordinarily a tort to hire the employees of another for use in the hirer's business. [Citations.]" (*Id.* at p. 547.)

Consequently, in order to prevail in such a case, the plaintiff must show the defendant used "unfair methods" which brought the case "outside the ordinary course of competition." (*Buxbom*, *supra*, 23 Cal.2d at p. 547.) The court in *Buxbom* found the plaintiff had satisfied this requirement by showing that the defendant had entered into a contract with him to induce him to build up his work force to perform the contract and then breached the contract without justification and hired the work force the plaintiff had built up in reliance on the contract. As the court explained: "Although defendant's

conduct may not have been tortious if he had merely broken the contract and subsequently decided to hire plaintiff's employees, an additional factor is present in this case. From the evidence the trial court could reasonably infer that the breach, at the time it was made, was intended as a means of facilitating defendant's hiring of plaintiff's employees. A breach of contract is a wrong and in itself actionable. It is also wrongful when intentionally utilized as the means of depriving plaintiff of his employees, and, in our opinion, constitutes an unfair method of interference with advantageous relations within the rule set forth above. It follows that said defendant was guilty of a tortious interference in the relationship between plaintiff and his employees. [Citations.]" (*Id.* at p. 548.)

Thus, the deciding factor in *Buxbom* was the fact that the defendant utilized independently actionable conduct -- the breach of the contract with the plaintiff -- to accomplish its appropriation of the plaintiff's employees. While hiring the plaintiff's employees was not by itself enough to support a claim for tortious interference, the use of unlawful means brought the case outside the usual rule of nonliability.

More recently, the court in *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409 (*GAB*) explained the policy reasons underlying the refusal of the courts to recognize liability for interference with contract based on hiring a competitor's employees, without some showing of independently actionable conduct. First, the court noted that "recognizing an employer's right to sue for intentional interference with its employment relationships would invite innumerable

lawsuits," because almost any voluntary job change by an employee could give rise to a charge that the new employer interfered with the existing employment relationship. (*Id.* at p. 427.)

Second, the *GAB* court stated that California has a "strong public policy supporting the mobility of employees." That policy would be thwarted by permitting a former employer to hold a new employer liable for interference based on the hiring of one of its employees. (*GAB*, *supra*, 83 Cal.App.4th at p. 427.)

Finally, the *GAB* court found "something inherently suspect about a tort that, at bottom, concerns an employee's voluntary departure from employment." While the court cautioned that it did not want to condone "unfair or unlawful conduct among employers," such conduct could be redressed through the tort of unfair competition. Therefore, the court declined "to recognize an employer's right to sue for intentional interference with the employment relationship" based on the hiring of an employee by a competitor. (*GAB*, *supra*, 83 Cal.App.4th at p. 428.)

Here, plaintiffs contend they raised a triable issue sufficient to avoid summary judgment on their claim for interference with contract by showing that defendants took intentional steps to disrupt the partnership agreement by hiring DeVall. But, as just explained, merely hiring a competitor's employee is not actionable interference with contract. There was no evidence that defendants engaged in any independently actionable conduct, such as the breach of a separate contract in *Buxbom*, that would overcome the usual rule of nonliability.

In support of their cross-motion for summary judgment, defendants submitted excerpts from the deposition of DeVall, taken by counsel for plaintiffs in October and December of 2001. DeVall testified that shortly after entering into the partnership with Powers, she became concerned that Earth Tapestries was not adequately capitalized. She was alarmed when Powers asked her to use her own air miles to buy tickets for the trip to New York to meet with defendants and when he said he was not able to get a hotel room for himself and asked to stay in her room. DeVall told Powers early in their relationship that "under capitalization would be really ridiculous because under capitalization is the beginning of your demise."

DeVall further testified that, after the meeting in New York, the Rug Barn proposed an arrangement under which the Rug Barn would be the exclusive manufacturer for a possible undeveloped collection of materials to be developed, marketed, and sold by Earth Tapestries. According to DeVall, Powers wanted the Rug Barn to provide an enormous amount of money up front, probably more than $1 million, and a commission of 20 percent instead of 10 percent. Without DeVall's knowledge or consent, Powers communicated his proposal to the Rug Barn. Powers's proposal was "360" from anything that the Rug Barn had intended, and in DeVall's opinion the request for $1 million was "really very premature," since the program had not yet been developed. The Rug Barn did not respond to the proposal because, DeVall later learned, Ruddock was "irate" when he received it.

DeVall additionally testified she had initially proposed to the Rug Barn that both she and Powers work for the Rug Barn, but the Rug Barn decided it was not possible to include Powers. DeVall felt she and Powers had irreconcilable differences and that adequate funding was not available for Earth Tapestries. Accordingly, there was no way to continue the Earth Tapestries program. DeVall therefore told Powers that she was dissolving the partnership, and she went to work for the Rug Barn.

This testimony, which was not rebutted, established that DeVall's employment with defendants came about because of her doubts about Earth Tapestries's economic viability, her dissatisfaction with Powers for making what she thought was an unrealistic proposal to the Rug Barn without consulting her, and her conclusion that irreconcilable differences existed between herself and Powers. There was no suggestion that defendants engaged in independently actionable conduct to accomplish their hiring of DeVall. Given DeVall's feelings of dissatisfaction, termination of the Powers-DeVall partnership would have been inevitable even without any involvement on the part of defendants.

It appears that the court in granting summary judgment did not consider DeVall's deposition testimony. Plaintiffs objected to the use of the testimony on the ground of hearsay, arguing that the testimony could only be presented by way of a declaration. After hearing argument on the matter, the court stated it was going to sustain the objection.

The court cited Code of Civil Procedure section 2025 (section 2025). That section provides that a deposition may be used "[a]t the trial or any other hearing in the

action . . . [¶] . . . for the purpose of contradicting or impeaching the testimony of the deponent as a witness . . . ." (*Id.*, subd. (u)(1).) It further provides that an adverse party may use the deposition of a party "for any purpose . . . ." (*Id.*, subd. (u)(2).) Finally, it provides that any party may use the deposition of any person for any purpose if the court finds that any of various circumstances exist which would prevent the party from compelling the witness to testify at trial. (*Id.*, subd. (u)(3).) Included in these circumstances is a catch-all provision which permits the use of deposition testimony where "[e]xceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court." (*Id.*, subd. (u)(3)(C).)

The court was correct that defendants did not propose to use DeVall's deposition testimony for any of the purposes expressly authorized by section 2025, subdivision (u). Defendants were not attempting to contradict or impeach DeVall's testimony as a witness, she was not an adverse party since she was employed by defendants, and there was no showing she could not be compelled to testify in person. But we believe that, although section 2025, subdivision (u) states that its provisions apply at trial "or at any other hearing in the action," the Legislature did not intend to limit the use of depositions in summary judgment proceedings to the situations in which their use is expressly authorized in section 2025, subdivision (u).

As a general matter, it is clear that deposition testimony may properly be used to support a summary judgment motion. Code of Civil Procedure section 437c provides

generally that a motion for summary judgment "shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (*Id.*, subd. (b)(1).) Thus, "[a] defendant moving for summary judgment may establish that an essential element of the plaintiff's cause of action is absent by reliance on . . . the testimony of witnesses at noticed depositions." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1375; accord, *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162.)[2]

The provisions of section 2025, subdivision (u), setting forth the situations in which depositions may be used as evidence, are appropriate in the context of a trial, where evidence from witnesses is ordinarily expected to be presented through live testimony. Thus, section 2025, subdivision (u) generally limits the use of deposition testimony to situations in which the deponent will be available for live testimony at trial (e.g., impeachment or use of a deposition of a party by an adverse party) or in which live testimony cannot be presented due to circumstances beyond the proffering party's control. These limitations reflect section 2025, subdivision (u)'s preference for

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[2] In *Barnes v. Blue Haven Pools* (1969) 1 Cal.App.3d 123, superseded on another point as stated in *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th 826, 855, fn. 25, the defendant supported its motion for summary judgment with, among other items, "[e]xcerpts from the deposition of a vice president of the defendant." (*Barnes,* at p. 125.) There was no indication that the vice-president was unavailable as a witness or otherwise qualified as one whose deposition testimony could be used under section 2025, subdivision (u). The Court of Appeal gave no indication that it found any impropriety in the use of the deposition excerpts, though it did not expressly approve their use either.

"presenting the testimony of witnesses orally in open court" where possible. (§ 2025, subd. (u)(3)(C).)

In law and motion proceedings, however, a party normally *cannot* present live testimony. California Rules of Court, rule 323(a) provides: "Evidence received at a law and motion hearing must be by declaration, affidavit, or request for judicial notice without testimony or cross-examination, except as allowed in the court's discretion for good cause shown." Reading rule 323(a)'s prohibition on live testimony in conjunction with Code of Civil Procedure section 437c, subdivision (b)(1)'s general authorization of the use of depositions in support of summary judgment motions leads to the conclusion that deposition testimony is intended to be used in lieu of live testimony in summary judgment proceedings and therefore should be permitted in any situation in which the testimony would be admissible if it were presented live. It simply would make no sense to apply the restrictions in section 2025, subdivision (u), which are designed to require a party to use live testimony in lieu of deposition testimony where reasonably possible, to a situation in which a party is expressly prohibited from using live testimony.

Moreover, plaintiff's argument that defendants should have obtained a declaration from DeVall instead of relying on her deposition testimony makes no sense either. It has long been recognized that depositions, since they offer an opportunity for cross-examination, produce much more reliable testimony than do declarations. In fact, depositions are considered so much more reliable than declarations that in cases of conflict between the two, deposition testimony must be credited and declaration

testimony disregarded. (See, e.g., *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22; *Schiff v. Prados* (2001) 92 Cal.App.4th 692, 705.)

Accordingly, we conclude the court should have considered the deposition testimony. Because our review of this matter is de novo, we can independently consider admissible evidence even though the trial court did not consider it. (*Tchorbadjian v. Western Home Ins. Co.* (1995) 39 Cal.App.4th 1211, 1217 [court reviewing summary judgment must consider all evidence presented "except where objections are properly sustained"]; see also *Gatton v. A.P. Green Services*, Inc. (1998) 64 Cal.App.4th 688, 692 [court independently reviews admissibility of a deposition in summary judgment proceedings].) Having considered DeVall's testimony, we conclude defendants met their burden of showing that plaintiffs could not establish an essential element of their claim for interference with contract, namely, independently actionable conduct by defendants in connection with their employment of DeVall. Consequently, the court correctly granted summary judgment on that claim.

C. *Interference with prospective economic advantage*

The elements of the tort of interference with prospective economic advantage are: (1) the existence of an economic relationship with a third party that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts by the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the

plaintiff proximately caused by the acts of the defendant. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1164-1165.)

Significantly, however, "the act of interference with prospective economic advantage is not tortious in and of itself . . . ." (*Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th 1134, 1159.) Therefore, to satisfy the third element, intentionally wrongful acts by the defendant, the plaintiff "must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393.)

A plaintiff cannot satisfy the wrongfulness requirement merely by showing that the defendant intended to disrupt the plaintiff's prospective economic relationships. "An act is not independently wrongful merely because defendant acted with an improper motive." (*Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th 1134, 1158.) Instead, an act is only independently wrongful "if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. [Citations.]" (*Id.* at p. 1159, fn. omitted.)

Plaintiffs in this case alleged the existence of economic relationships with retailers, defendants' knowledge of the relationships, defendants' intentional disruption of the relationships, and resulting economic harm to plaintiffs. However, plaintiffs failed to allege conduct on the part of defendants that was "wrongful by some legal measure

other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, *supra*, 11 Cal.4th 376, 393.) The fourth cause of action of the complaint alleged that in carrying on their new business venture with DeVall in competition with Earth Tapestries, defendants offered "products and services initially intended by DeVall and Powers for the Partnership's use." But there was no allegation that the products and services were protected intellectual property or were otherwise proprietary to Earth Tapestries, so that their use by defendants would constitute conduct "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1159, fn. omitted.) Nor were there any other facts alleged to show that defendants' conduct was wrongful by some measure other than the fact that it interfered with plaintiffs' prospective relationships.

Because plaintiffs failed adequately to allege an essential element of their claim, defendants were not required to show a lack of evidentiary support for the claim to obtain summary judgment. "Where a complaint does not state a cognizable claim, it is not necessary to proceed to the second step, since a defendant has no obligation to present evidence to negate a legally inadequate claim. . . . '"Thus, if the reviewing court finds the complaint fails to state facts sufficient to constitute a cause of action as a matter of law, it need not reach the question whether plaintiff's opposition to the summary judgment motion raises a triable issue of fact."' [Citation.]" (*Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 638-639.)

Moreover, even if plaintiffs had alleged independently wrongful on the part of defendants, it was evident from the record that plaintiffs could not raise a triable issue as to that element. Powers submitted a declaration stating that in November 1999 Earth Tapestries was actively pursuing clientele and was in active discussions with a number of potential institutional and individual clients. From seeing advertisements and the Indika Web site, Powers knew DeVall and the Rug Barn were attempting to sell the same designs that Earth Tapestries had developed and were pursuing the same clientele. Powers also knew from invoices produced during discovery that DeVall and the Rug Barn were using the same vendors Earth Tapestries had used.

Again, however, there was no claim that the designs were protected intellectual property of Earth Tapestries, or that the identities of the clients and vendors constituted trade secrets so that merely dealing with them might constitute independently actionable conduct. Absent such facts, there was no basis for concluding defendants' competitive activities amounted to actionable interference. The court therefore properly granted summary judgment on the fourth cause of action.

D. *Conspiracy*

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.]" (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) "Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by

the commission of an actual tort. '"A civil conspiracy, however atrocious, does not per se give rise to a cause of action unless a civil wrong has been committed resulting in damage."' [Citation.]" (*Id.* at p. 511.)

Here, plaintiffs' conspiracy claim was based on defendants' alleged interference with contract and prospective economic advantage. We have previously determined that the claims for interference with contract and prospective economic advantage were substantively lacking in merit due to plaintiffs' failure to plead and prove essential elements of those claims. Accordingly, there was no underlying tortious conduct on which to base a conspiracy claim, and the court properly granted summary judgment as to that claim.

E. *Declaratory Relief*

Plaintiffs acknowledged during oral argument in the trial court that if their claims against defendants were substantively lacking in merit, the issue of whether the May 2000 agreement operated to release those claims was moot, leaving no controversy for adjudication pursuant to plaintiffs' declaratory relief claim. As we have found no substantive merit to plaintiffs' claims, the court properly granted summary judgment on the declaratory relief claim on the ground of mootness.

F. *Motion to Augment Record; Request for Judicial Notice*

Plaintiffs attempted to introduce in opposition to defendants' cross-motion for summary judgment a November 23, 1999, memorandum from Rug Barn general manager Ernie Ruddock to John Halberda, president of Thantex. The memorandum stated in part:

"For the past several months, we have been working with Suzanne Devall [*sic*] on the organic program. . . . [¶] Up to this point, Suzanne has been backed by Fred Powers, whom we both met in New York. They had a partnership agreement, but at this point they lack the funds to continue the product development work necessary until the sales start rolling in. It is in our best interests to bring Suzanne into the Rug Barn as director of the organics division, and capitalize on her talent and marketing connections to get the organic program off the ground. This insures that we have control of the marketing and design and that everything done for the Rug Barn belongs to the Rug Barn."

Plaintiffs submitted the memorandum as an exhibit to a declaration of their counsel, who stated: "In the course of discovery in this action, we obtained a copy of the internal Memorandum dated November 23, 1999, a copy of which is attached as Exhibit A hereto. In response to Request for Admissions, to admit the genuineness of documents, both defendants, the Rug Barn and Thantex Holdings, Inc. have 'admitted' the genuineness."

The court excluded the memorandum on the grounds that it was not authenticated and there was no foundation for admitting it under the hearsay exception for admissions of a party because the employment position of its author was not sufficiently identified. The court also ruled that, even if the memorandum were admissible, it would not create a triable issue sufficient to avoid summary judgment.

After this appeal was filed, plaintiffs moved to augment the record to include defendants' responses to plaintiffs' requests for admissions, to establish that defendants

had admitted the genuineness of the November 23, 1999, memorandum. Plaintiffs also requested that this court take judicial notice of the memorandum as a record of a court, on the basis that plaintiffs had attempted to introduce the memorandum in the trial court.

We find it proper to consider the memorandum, as it was presented to the trial court even though that court refused to admit it into evidence. The California Rules of Court provide that, if designated by a party, the clerk's transcript on appeal must contain "any exhibit admitted in evidence, refused, or lodged . . . ." (Cal. Rules of Court, rule 5(b)(3)(B); see also *People v. Osband* (1996) 13 Cal.4th 622, 663.) Thus, it is proper, at least, to augment the record to include the memorandum as a refused exhibit.

However, we find it unnecessary to determine whether the refusal to admit the memorandum was error, because we agree with the trial court that even if the memorandum had been admitted, it would not have raised a triable issue. The memorandum established that defendants were aware of the partnership between Powers and DeVall and wanted to hire DeVall to advance their own efforts to enter the industry in which Powers and DeVall had planned to do business via Earth Tapestries. But it failed to supply the essential element that was lacking from plaintiffs' interference claims, i.e., evidence of conduct by defendants that was actionable independently of the interference. The memorandum did not show that defendants utilized unfair business practices in hiring DeVall and using her expertise to advance their industry position. As discussed *ante*, it is not unlawful merely to hire a competitor's employees for the purpose of competing with the former employer. Since the memorandum would not have been

sufficient to prevent summary judgment, the failure to admit it, even if error, was not prejudicial.

III

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

WARD
J.