JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

WILLIAM SWOGER,

Plaintiff,

vs.

RARE COIN WHOLESALERS, STEVEN L. CONTURSI, DONALD KAGIN AND DOES 1–10 INCLUSIVE,

Defendants.

Case No.: SACV 09-00903-CJC(ANx)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff William Swoger ("Plaintiff") filed this action against Defendants Rare Coin Wholesalers, Steven L. Contursi, and Donald Kagin (collectively, "Defendants") on August 6, 2009. (Dkt. No. 1.) The case concerns a unique early-American coin, referred to as the "Punch on Breast Brasher Doubloon" (the "Coin"), which is the only known specimen of its kind. Plaintiff, who holds himself out as an expert in the field of

regulated American gold coins, purportedly discovered important information which would substantially increase the value of the Coin and offered to sell the information to Defendants, the Coin's then-owners. Plaintiff brought this case when Defendants failed to pay him for the information after he revealed it to them. In the operative First Amended Complaint ("FAC") filed on November 2, 2009, Plaintiff alleges causes of action for (1) quantum meruit, (2) fraud, (3) breach of contract, (4) constructive trust, and (5) misappropriation of trade secrets. (Dkt. No. 17 ["FAC"].) Defendants now move for summary judgment on the basis that Plaintiff cannot prevail on any of his claims because the information he shared with them was only a theory that did not establish what he promised it would and was otherwise based on widely-known, publicly disseminated information.[1] For the following reasons, Defendants' motion is **GRANTED**.

II. FACTUAL BACKGROUND

The case concerns a coin referred to as a "Brasher Doubloon." It is undisputed that Brasher Doubloons were minted in New York City by goldsmith and silversmith Ephraim Brasher in the late 1700's. (Dkt No. 98 [Affidavit of David McCarthy in Supp. of Defs.' Mot. ("McCarthy Aff.")] ¶ 2.) The Coin at issue here is the only known "Punch on Breast" Brasher Doubloon, so designated because it features the counterstamped initials "EB" on the breast of the eagle depicted on the coin, rather than on the eagle's wing like the handful of other "Punch on Wing" Brasher Doubloons. (*Id.*) The Punch on Breast Brasher Doubloon has been called "the single most important coin in American numismatics." (*Id.* ¶ 14; Exh. A at 11.) Defendants purchased the Coin at a January 2005 auction for $2.99 million and sold it in December 2011. (Dkt. No. 97 [Affidavit of Donald Kagin in Supp. of Defs.' Mot. ("Kagin Aff.")] ¶ 2.) In a subsequent sale the

[1] Alternatively, Defendants move for partial summary judgment on the ground that Plaintiff's information was not a trade secret. Because summary judgment is warranted on the basis discussed in this Order, the Court need not address the trade secret misappropriation issue.

same month, the Coin was sold for $7.395 million. (McCarthy Aff. Exh. G; Dkt. No. 100 [Declaration of William Swoger in Opp'n to Defs.' Mot. ("Swoger Decl.")] Exh. 1.)

Plaintiff alleges that he is a "renowned and respected expert in the field of 'regulated' American gold coins." (FAC ¶ 3.) He allegedly discovered through independent research that the Coin owned by Defendants, which they believe was coined in 1787, "was the earliest known legal tender coin of the United States of America." (FAC ¶ 2.) He believes that the Coin "was in fact the first United States Coin issued for circulation, and was issued at a later date [than Defendants believe] under authority of An Act of Congress." (FAC ¶ 5.)

In February 2009, Plaintiff approached Defendants and "indicated that he had specialized information which would increase the value of the coin substantially." (FAC ¶¶ 6, 10.) He offered to "prove that Defendants Kagin and Contursi's coin was indeed the first legal tender coin to be struck pursuant to an Act of Congress to circulate in the United States." (FAC ¶ 10.) He requested a fee of $500,000 to reveal this information, and was offered up to $250,000, depending on the nature of the information.[2] (FAC ¶ 6; Swoger Decl. ¶¶ 10–11; Kagin Aff. ¶ 3.) In April 2009, Plaintiff met with Defendant Kagin and his associate, David McCarthy. Defendants allegedly gave Plaintiff a gold coin valued at $35,000.00 as a "down payment." (FAC ¶ 7; Swoger Decl. ¶ 14.) Defendants ultimately failed to pay Plaintiff any additional sum for the information he revealed during the meeting, and required the return of the "down payment" coin. (FAC ¶ 16.) Plaintiff "believes the value of the coin has increased from the asking price in the range of five million dollars to a value of ten million dollars" because of his information. (FAC ¶ 9.)

[2] The parties disagree about the specific course of the negotiations, but this dispute is immaterial to the Court's inquiry.

At issue in this motion is whether Plaintiff's information actually proved, as he represented to Defendants, that the Coin was the first legal tender coin to be struck pursuant to a Congressional Act, specifically the February 9, 1793 Act entitled, "An Act regulating foreign Coins, and for other purposes" ("the 1793 Act" or "the Act"). (*See* FAC ¶ 14.) Section 1 of the 1793 Act states:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the first day of July next, foreign gold and silver coins shall pass current as money within the United States, and be a legal tender for the payment of all debts and demands, at the several and respective rates following, and not otherwise, viz: The gold coins of Great Britain and Portugal, of their present standard, at the rate of one hundred cents for every twenty-seven grains of the actual weight thereof; the gold coins of France, Spain and the dominions of Spain, of their present standard, at the rate of one hundred cents for every twenty-seven grains and two-fifths of a grain, of the actual weight thereof. Spanish milled dollars, at the rate of one hundred cents for each dollar, the actual weight whereof shall not be less than seventeen pennyweights and seven grains; and in proportion for the parts of a dollar. Crowns of France, at the rate of one hundred and ten cents for each crown, the actual weight whereof shall not be less than eighteen pennyweight and seventeen grains, and in proportion for the parts of a crown. But no foreign coin that may have been, or shall be issued subsequent to the first day of January, one thousand seven hundred and ninety-two, shall be a tender, as aforesaid, until samples thereof shall have been found, by assay, at the Mint of the United States, to be conformable to the respective standards required, and proclamation thereof shall have been made by the President of the United States.

2 Cong. Ch. 5, Feb. 9, 1793, 1 Stat. 300 § 1 (emphasis added). According to the values set forth above, a Spanish gold coin weighing 411 grains was assigned a value of $15.00. The Coin, which is recognized to have a face value of $15.00, (*see* Swoger Decl. ¶ 7), weighs 411.4 grains.[3] Because the Coin has approximately the same weight as a $15.00 Spanish gold coin and a different weight than the other Brasher Doubloons, Plaintiff concluded that the Coin was struck to conform to the 1793 Act's requirements. (*See* FAC ¶ 14.) The stated basis for Plaintiff's conclusion is that the weight of the Coin conformed to the 1793 Act, the Act stated that Spanish gold coins were legal tender, Brasher's gold coins were known to be struck from melted-down Spanish gold, and Brasher's gold coins were widely accepted as Spanish gold. (Swoger Decl. ¶ 30.)

Now, nearly four years after litigation began, Defendants bring their third motion for summary judgment or, in the alternative, partial summary judgment. In addition to arguing that Plaintiff cannot prevail on his trade secrets claim, Defendants argue that all of Plaintiff's claims fail as a matter of law. Specifically, Defendants assert that Plaintiff's information did not demonstrate that the coin was the earliest known legal tender coin in the United States issued under Congressional authority, because the 1793 Act authorizes only specifically enumerated foreign coins as legal tender.

III. LEGAL STANDARD

The Court may grant summary judgment on "each claim or defense — or the part of each claim or defense — on which summary judgment is sought." Fed. R. Civ. P. 56(a). Summary judgment is proper where the pleadings, the discovery and disclosure materials on file, and any affidavits show that "there is no genuine dispute as to any

[3] There is some inconsistency in the papers regarding the weight of the Coin. The FAC states it weighs "about 410 ½ grains," (FAC ¶ 14), while Defendant Kagin states that the Coin weighs 411.4 grains, (Kagin Aff. ¶ 5). As Plaintiff's declaration also states that the Coin weighs "about 411 ½ grains," (Swoger Decl. ¶ 13), the Court assumes the weight contained in the FAC is a typographical error.

material fact and the movant is entitled to judgment as a matter of law." *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 325. A factual issue is "genuine" when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" when its resolution might affect the outcome of the suit under the governing law, and is determined by looking to the substantive law. *Id.* "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 249.

Where the movant will bear the burden of proof on an issue at trial, the movant "must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). In contrast, where the nonmovant will have the burden of proof on an issue at trial, the moving party may discharge its burden of production by either (1) negating an essential element of the opposing party's claim or defense, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–60 (1970), or (2) showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 325. Once this burden is met, the party resisting the motion must set forth, by affidavit, or as otherwise provided under Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. A party opposing summary judgment must support its assertion that a material fact is genuinely disputed by (i) citing to materials in the record, (ii) showing the moving party's materials are inadequate to establish an absence of genuine dispute, or (iii) showing that the moving party lacks admissible evidence to support its factual position. Fed. R. Civ. P. 56(c)(1)(A)–(B). The opposing party may also object to the material cited by the movant on the basis that it "cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). But the opposing party must show more than the "mere existence of a scintilla of evidence"; rather, "there must be

evidence on which the jury could reasonably find for the [opposing party]." *Anderson*, 477 U.S. at 252.

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the nonmoving party, and draw all justifiable inferences in its favor. *Id.*; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The court does not make credibility determinations, nor does it weigh conflicting evidence. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992). But conclusory and speculative testimony in affidavits and moving papers is insufficient to raise triable issues of fact and defeat summary judgment. *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). "If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g).

IV. ANALYSIS

In this case, each of Plaintiff's causes of action depends on the threshold question of law whether he actually provided Defendants with information which had value because it "prove[d] that Defendants Kagin and Contursi's coin was indeed the first legal tender coin to be struck pursuant to an Act of Congress to circulate in the United States."[4]

[4] In order to recover for quantum meruit, Plaintiff must show that the services he provided had value to Defendants and benefitted them. *See Palmer v. Gregg*, 65 Cal. 2d 657, 660 (1967) ("The measure of recovery in quantum meruit is the reasonable value of the services rendered, provided they were of direct benefit to the defendant."); *Maglica v. Maglica*, 66 Cal. App. 4th 442, 450 (1998) ("The idea that one must be *benefited* by the goods and services bestowed is thus integral to recovery in quantum meruit; hence courts have always required that the plaintiff have bestowed some benefit on the defendant as a prerequisite to recovery." (emphasis in original)). In order to establish a claim for fraud, he must establish that he suffered damages as a result of Defendants' misrepresentation that they would pay him for his information. *See Service by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1819

(FAC ¶ 10.) Specifically, Defendants ask the Court to determine whether the Coin was struck pursuant to the 1793 Act as Plaintiff alleges in the FAC. (*See* FAC ¶ 14.) Defendants argue that the 1793 Act, which expressly authorizes as legal tender specific foreign coins, does not cover the Coin. This Court agrees. The 1793 Act is entitled "An Act regulating foreign Coins, and for other purposes." 2 Cong. Ch. 5, Feb. 9, 1793, 1 Stat. 300. The text of the 1793 Act states that certain "foreign gold and silver coins shall pass current as money within the United States, and be a legal tender for the payment of all debts and demands." *Id.* § 1. The 1793 Act sets forth the specific currency to which it applies, and the respective values of those coins. The Act concerns the gold coins of Great Britain and Portugal, the gold coins of France, Spain, and the dominions of Spain, Spanish milled dollars, and Crowns of France. *Id.* The plain language of the statute forecloses Plaintiff's theory that the Coin was legal tender pursuant to the Act, even if Brasher did coin it in conformance with the Act's weight standards and even if it was made from melted-down Spanish gold. The undisputed evidence shows that the Coin was privately struck in New York by an American goldsmith, and is thus not within the scope of the 1793 Act. The 1793 Act does not mention domestic coins, much less sanction them as legal tender.

(1996) ("[I]n order to recover for fraud, as in any other tort, the plaintiff must plead and prove the 'detriment proximately caused' by the defendant's tortious conduct."). But if his information did not establish what he held it out to prove, he has not been harmed and "[d]eception without resulting loss is not actionable fraud." *Id.* Plaintiff cannot prevail on his breach of contract claim unless he establishes that he performed under the contract by giving Defendants information proving that the Coin was the first legal tender coin struck pursuant to an Act of Congress. *See Consolidated World Investments, Inc. v. Lido Preferred Ltd.*, 9 Cal. App. 4th 373, 380 (1992) ("It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance."). Plaintiff's claim for constructive trust, which is actually a remedy and not an independent cause of action at all, also requires that Plaintiff gave Defendants the information he promised because "one cannot be held to be a constructive trustee of something he had not acquired." *Zumbrun v. University of Southern California*, 25 Cal. App. 3d 1, 14 (1972); *see Batt v. City and County of San Francisco*, 155 Cal. App. 4th 65, 82 (2007), *overruled in part on unrelated grounds by McWilliams v. City of Long Beach*, 56 Cal. 4th 613 (2013) ("A constructive trust is 'not an independent cause action but merely a type of remedy'."). Finally, misappropriation of a trade secret requires that the information be secret and have "independent economic value." *See* Cal. Civ. Code § 3426.1(d).

Notwithstanding the plain language of the 1793 Act, Plaintiff argues that there are at least two issues of material fact for the jury to decide regarding the 1793 Act and its applicability to the Coin. (Pl.'s Opp'n to Defs.' Mot. ["Pl.'s Opp'n"] at 10.) He contends that the first issue "is whether the Brasher Doubloons are [sic] made to conform to the Act which is the reason why the weight changed," and that the second issue is whether Brasher Doubloons "were in fact treated as Spanish gold under the Act of 1793 by the public." (*Id.*) Neither of these issues is material. "[C]ongress is vested with the exclusive exercise of the . . . power of coining money and regulating the value of domestic and foreign coin." *The Legal Tender Cases*, 110 U.S. 421, 448 (1884); *see Sears v. Dewing*, 96 Mass. 413, 415 (1867), *rev'd on other grounds*, 78 U.S. 379 (1870) ("The power to coin money and to regulate the value thereof and of foreign coin is universally held to be a prerogative of sovereignty, and is conferred by the Constitution upon the congress of the United States."). Any intent Brasher had that the Coin comply with the weight standard of the 1793 Act is irrelevant to whether it was actually legal tender because the unambiguous language of the 1793 Act authorizes only certain foreign coins as legal tender and the domestically-struck Brasher Doubloon is not one of those coins. How Brasher Doubloons were treated "at least in the eyes of the general public and those who actually used the coins in circulation," (Pl.'s Opp'n at 10), is similarly irrelevant and immaterial to the Court's statutory analysis because whether the Coin is legal tender is dependent on whether Congress authorized it as such, not on the general public's perceptions.[5] In short, Plaintiff's purportedly secret information was a flawed theory which does not establish that the Coin was "the first United States Coin issued for circulation, and was issued . . . under authority of An Act of Congress" or was otherwise "the earliest known legal tender coin of the United States of America." (FAC ¶¶ 4, 5.)

[5] Plaintiff provides only speculation and no law to support his theory that the Coin was "legal tender because Spanish gold and silver coinage was legal tender and Brasher's coins were universally well-known as being made from melted down 'Spanish gold' coins and circulated as such." (Swoger Decl. ¶ 25.) The 1793 Act does not discuss coins struck domestically from melted-down foreign coins, and Plaintiff provides no evidence that Congress authorized such coins as legal tender.

In opposition to Defendants' motion, Plaintiff attempts to distance himself from the allegations in his FAC. He now asserts that "[l]egal tender is not an issue in this lawsuit," (Pl.'s Opp'n at 6), that the Coin was merely struck "in compliance" with the 1793 Act because the Act did not "prohibit any party from coining gold coins made from melted Spanish colonial gold coin," (Pl.'s Opp'n at 5), and that "[t]he issue at trial is not whether the Coinage Act of 1793 specifically applied to this coin but whether this coin was manufactured in order to comply with that weight standard," (Pl.'s Opp'n at 10). These arguments are unconvincing and contrary to the FAC and the issues that have arisen throughout this litigation. The FAC explicitly alleges that Plaintiff offered Defendants information to establish that the Coin was the "earliest known legal tender coin of the United States of America," (FAC ¶ 4), and that it was issued "under authority of an Act of Congress," (FAC ¶ 5), not merely in compliance with or to conform to the weight standards of the 1793 Act. The Court will not allow Plaintiff to recast his facts and legal theories at this point in order to defeat summary judgment.

Further, even assuming that Plaintiff's information did show that the Coin was the first coin struck in America "to comply" with the standards of the 1793 Act, this information did not have value to Defendants, confer a benefit on them, or cause Plaintiff damage when Defendants failed to pay him. All of the information Plaintiff provided, outside of his theory that the 1793 Act covered the Coin, was already known to Defendants or was otherwise publicly available. First, the details of the 1793 Act, including its weight standards, are set forth in a reference publication entitled *America's Foreign Coins*, a copy of which was owned by Defendant Kagin and which Kagin brought to the meeting with Plaintiff. (McCarthy Aff. Exh. F; Kagin Aff. ¶ 4.) Second, the weight of the Coin was known to Defendants because it was included in the auction listing through which Defendants purchased the Coin, and because Defendant Kagin, having studied and owned Brasher Doubloons, knew its weight. (McCarthy Aff. Exh. A at 12; Kagin Aff. ¶ 6.) Third, the fact that Brasher Doubloons and Spanish Doubloons

had the same or similar weights and the theory that Brasher's coins were thus intended to circulate as legal money were well-known to Defendants years before their meeting with Plaintiff in April 2009. In fact, Mr. Swoger wrote an article in *Coin World* in 1991 advancing the theory that Brasher's coins were intended for circulation. (McCarthy Aff. Exh. B.) Further, Heritage Numismatic Auctions, Inc.'s 2005 catalog discussed the theory that Brasher intended to circulate Brasher Doubloons. Its listing for a "Punch on Wing" Brasher Doubloon, offered as part of a collection along with the Coin purchased by Defendants, states: "In support of the theory that these coins were, in fact, intended to represent gold coinage issue is the weight . . . which is virtually identical to that of Spanish Doubloons in circulation at the time . . . . Of all the theories created to explain the existence of the Brasher Doubloon, the coinage theory seems to be the most credible." (McCarthy Aff. Exh. A at 2.) David McCarthy, an associate of Defendants who attended the meeting with Plaintiff, wrote an article published in 2008 and re-published in 2009 discussing Brasher Doubloons and Plaintiff's scholarship:

> In 1991 numismatist Bill Swoger published an article exploring the possibility that the doubloons were intended to circulate as legal money in the United States. He traced the doubloons' origins in the context of the regulation of foreign gold coins in North America during the 18th century . . . . While examining a chart issued by the Bank of New York in 1784, Swoger found that a Spanish Doubloon would have been valued at $15, after being regulated from an issue weight of 417.25 grains (roughly 17.38 pennyweights) down to 17 pennyweights — the exact weight of Brasher's doubloons . . . . Swoger's discovery suggested that the coins would have circulated as money in the early United States. According to this line of thinking, the Brasher doubloon was the nation's first gold coin.

(McCarthy Aff. Exh. E at 3.) Mr. McCarthy further detailed an exchange of letters between Alexander Hamilton, acting in his capacity as Secretary of Treasury, and William Seton, the cashier of the Bank of New York. Mr. McCarthy commented that "[t]his letter confirms that Ephraim Brasher's coins did, in fact, circulate in the United States . . . the newly discovered evidence confirms that the Brasher doubloon was our first gold coin, demonstrating that it was intended to circulate throughout the country in the 1780's and 90's." (*Id.* at 4.) This documentary evidence, in addition to similar evidence presented by Defendants, (*see* McCarthy Aff. Exhs. C, D), shows that Defendants were aware of the existence of the 1793 Act, the weight of the Coin, that the weight of Brasher Doubloons was identical to that of Spanish Doubloons, and that Brasher Doubloons were likely intended to circulate as money. Defendant cannot recover under any of his causes of action simply for repeating information which was already well-known to Defendants at the time of the meeting in April 2009.[6]

V. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is **GRANTED**.

DATED: June 25, 2013

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

[6] Plaintiff denies that Defendants were aware of the 1793 Act and that the Coin conformed to its weight standards: "Plaintiff denies. Neither Kagin nor McCarthy appeared to be well aware of the Coinage Act of February 9, 1793 prior to their meeting with Plaintiff. In fact they seemed rather surprised by the fact that the Bushnell (their) specimen's weight conformed to that particular act." (Dkt. No. 101 [Pl's Statement of Genuine Disputes] ¶¶ 11, 13.) But bare denials are insufficient to create a genuine issue of material fact.