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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

ADOBE SYSTEMS INCORPORATED,  
Plaintiff,  
v.  
MY CHOICE SOFTWARE, LLC, et al.,  
Defendants.

Case No. 14-cv-02150-BLF

**ORDER DENYING MOTION TO  
DISMISS; DENYING ALTERNATIVE  
MOTION FOR MORE DEFINITE  
STATEMENT; AND DENYING  
MOTION FOR TRANSFER**

[Re: ECF 24]

Plaintiff Adobe Systems, Inc. (“Adobe”) asserts trademark, copyright, and related claims against My Choice Software, LLC (“My Choice”) and two of its part-owners, Nathan Mumme (“Mumme”) and Daniel Parker (“Parker”) (collectively, “Defendants”), based upon their alleged sales of pirated, counterfeit, and otherwise unauthorized Adobe software products. Before the Court are (1) Defendants’ motion to dismiss the operative first amended complaint (“FAC”) under Federal Rule of Civil Procedure 12(b)(6); (2) Defendants’ alternative motion for more definite statement under Federal Rule of Civil Procedure 12(e); and (3) Defendants’ motion for transfer of venue to the Central District of California under 28 U.S.C. § 1404(a). The Court has considered the briefing and the oral argument presented at the hearing on November 13, 2014. For the reasons discussed below, the motion to dismiss is DENIED, the alternative motion for more definite statement is DENIED, and the motion for transfer is DENIED.

**I. BACKGROUND<sup>1</sup>**

Adobe is a corporation organized under the laws of Delaware with its principal place of business in San Jose, California. Adobe develops and distributes computer software. It has

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<sup>1</sup> The facts contained in the Background section are drawn from the FAC, the well-pled allegations of which are accepted as true for purposes of this motion.

1 gained significant common law trademark recognition of its ADOBE and ACROBAT marks, has  
2 obtained registrations for its ADOBE and ACROBAT marks from the United States Patent and  
3 Trademark Office, and has obtained registrations for copyrightable ADOBE ACROBAT software  
4 and other software from the United States Copyright Office.<sup>2</sup>

5 My Choice is a limited liability company organized under the laws of California with its  
6 principal place of business in Mission Viejo, California. My Choice was authorized to distribute  
7 Adobe’s software under certain terms pursuant to an “Adobe Partner Connection Program Reseller  
8 Agreement” (“Agreement”). See FAC Exh. C.<sup>3</sup> Adobe claims that My Choice breached the  
9 Agreement and infringed upon Adobe’s trademarks and copyrights by ordering Adobe software  
10 products from unauthorized distributors, selling licenses for counterfeit and/or unauthorized OEM  
11 software products, and selling electronic software downloads without a license. Adobe asserts the  
12 following claims against My Choice, Mumme, and Parker: (1) infringement of registered  
13 trademarks under 15 U.S.C. § 1114; (2) false designation of origin, false or misleading  
14 advertising, and unfair competition under 15 U.S.C. § 1125(a); (3) dilution under 15 U.S.C. §  
15 1125(c); (4) copyright infringement under 17 U.S.C. § 501(a); (5) unlawful, unfair, and fraudulent  
16 business practices under § 17200; and (6) breach of contract.

17 **II. MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT**

18 **A. Legal Standard**

19 **1. Motion to Dismiss**

20 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a  
21 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*  
22 *Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d  
23 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts  
24 as true all well-pled factual allegations and construes them in the light most favorable to the  
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26 <sup>2</sup> Non-exhaustive lists of Adobe’s trademark and copyright registrations are attached to the FAC  
27 as Exhibits A and B, respectively.

28 <sup>3</sup> Because the Agreement has been filed under seal, its terms are not discussed with specificity  
herein.

1 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the  
2 Court need not “accept as true allegations that contradict matters properly subject to judicial  
3 notice” or “allegations that are merely conclusory, unwarranted deductions of fact, or  
4 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)  
5 (internal quotation marks and citations omitted). While a complaint need not contain detailed  
6 factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to  
7 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
8 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the  
9 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

10 **2. Motion for More Definite Statement**

11 Under Federal Rule of Civil Procedure 12(e), “[a] party may move for a more definite  
12 statement of a pleading to which a responsive pleading is allowed but which is so vague or  
13 ambiguous that the party cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e).  
14 “However, motions for a more definite statement are disfavored, and ordinarily restricted to  
15 situations where a pleading suffers from unintelligibility rather than want of detail.” *I.R. ex rel.*  
16 *Nava v. City of Fresno*, No. 1:12-CV-00558 AWI GSA, 2012 WL 3879974, at \*1 (E.D. Cal. Sept.  
17 6, 2012) (internal quotation marks and citations omitted). A Rule 12(e) motion must be denied “if  
18 the complaint is specific enough to notify defendant of the substance of the claim being asserted,”  
19 or “if the detail sought by a motion for a more definite statement is obtainable through the  
20 discovery process.” *Id.*

21 **B. Discussion**

22 **1. Trademarks and Copyrights are Adequately Identified**

23 Defendants argue that Claims 1-4, Adobe’s trademark and copyright claims, “fail[] to  
24 identify the trademarks or copyrights that Defendants purportedly infringed upon.” Mot. at 3,  
25 ECF 24-1. The Court disagrees. The FAC alleges that on October 9, 2013, Adobe’s investigator  
26 paid \$97.41 to buy a purported “Adobe Acrobat X Standard - PC – OEM Download” from  
27 mychoicesoftware.com. FAC ¶ 36, ECF 17. The investigator was provided with installation  
28 instructions and a serial number to activate the download. *Id.* ¶ 37. The FAC alleges that the

1 serial number was an “unauthorized OEM product not for resale” and thus that the sale violated  
2 Adobe’s rights in its “A,” “ADOBE,” and “ACROBAT” word and design trademarks. *Id.* ¶ 38.  
3 The FAC identifies, by registration number, twenty-nine specific trademarks and one copyright  
4 allegedly violated by the sale of the download to the investigator. *Id.* When Adobe conducted  
5 further investigation regarding Defendants, it discovered facts leading it to believe that  
6 Defendants’ primary business is selling pirated and otherwise unauthorized downloads of Adobe’s  
7 products and, indeed, that Defendants entered into the Agreement with Adobe to give its activities  
8 the appearance of legitimacy. *Id.* ¶¶ 39-41.

9 The FAC describes several ways in which Defendants allegedly obtain pirated and  
10 otherwise unauthorized versions of Adobe’s software for resale to Defendants’ customers. For  
11 example, it is alleged that Defendants illegally copy trial versions of Adobe’s software and then  
12 resell those trial versions as fully functioning versions to My Choice customers. *Id.* ¶¶ 42-46.  
13 Defendants also allegedly sell OEM software directly to customers in violation of the Agreement,  
14 which provides that the software is to be provided only in bundled sales with new purchases of  
15 specific hardware. *Id.* ¶ 47. In addition, Defendants allegedly sell EDU products, which are to be  
16 provided only to certain qualifying customers, to any customers who request them. *Id.* ¶ 48. The  
17 FAC alleges, on information and belief, that in addition to the trademarks and copyrights  
18 identified in paragraph 38, Defendants’ may have infringed Adobe’s rights in other trademarks  
19 and copyrights, including those listed in Exhibits A and B to the FAC. *Id.* ¶ 38.

20 These allegations are more than adequate. Defendants’ argument that Adobe has identified  
21 too many trademarks and copyrights is unpersuasive. This case is wholly distinguishable from  
22 *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1148 (S.D. Cal. 2005), relied upon by  
23 Defendants, in which the court found inadequate an allegation that “at least one unidentified  
24 photograph” out of a pool of 1,800 photographs had “been copyrighted by an unidentified ‘NAVY  
25 SEAL ONE.’” Here, Adobe has provided the registration numbers of twenty-nine trademarks and  
26 one copyright that Adobe contends were infringed by Defendants’ sale of a particular download to  
27 Adobe’s investigator. To the extent that Defendants contend that not all of the identified  
28 registration numbers actually relate to the downloaded Acrobat X product purchased by the

1 investigator, that is a factual challenge to the FAC that is not appropriately raised in the context of  
2 a Rule 12(b)(6) motion. Moreover, Defendants have not demonstrated any impropriety in  
3 Adobe’s inclusion of appendices listing trademark and copyright registration numbers that it  
4 believes Defendants may have infringed in *other* transactions. The inclusion of those appendices  
5 does not render any less definite Adobe’s allegations regarding the download purchased by its  
6 investigator, and it puts Defendants on notice that Adobe will be seeking information during  
7 discovery regarding what Adobe believes to be extremely egregious and widespread infringement  
8 of its rights by Defendants. Adobe has described several methods by which it believes Defendants  
9 have obtained and improperly resold Adobe software products. The fact that the precise scope of  
10 Defendants’ misconduct (if any) remains to be fleshed out in discovery does not render the FAC  
11 inadequate.

12 Accordingly, Defendants’ motion to dismiss and alternative motion for a more definite  
13 statement based upon Adobe’s asserted failure to identify the relevant trademarks and copyrights  
14 are DENIED.

15 **2. Breach of the Agreement is Adequately Alleged**

16 Defendants argue that Claims 5-6, for violation of California’s UCL and breach of  
17 contract, respectively, “fail[] to define the nature of the breach giving rise to the purported unfair  
18 business practices in which Defendant allegedly engaged.” Mot. at 4, ECF 24-1. As an initial  
19 matter, it is unclear why Defendants believe that a failure to allege breach of contract would be  
20 dispositive of Adobe’s UCL claim. In order to state a claim for relief under the UCL, Adobe must  
21 allege facts showing that Defendants engaged in an “unlawful, unfair or fraudulent business act or  
22 practice.” Cal. Bus. & Prof. Code § 17200. “Because the statute is written in the disjunctive, it is  
23 violated where a defendant’s act or practice violates any of the foregoing prongs.” *Davis v. HSBC*  
24 *Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012). Adobe adequately has alleged claims of  
25 unlawful conduct under the Lanham Act and the Copyright Act, as discussed above, and thus it  
26 has alleged a violation of the UCL. Moreover, although the FAC does not identify the specific  
27 sections of the Agreement breached by Defendants’ conduct, the FAC identifies that conduct with  
28 specificity. *See* FAC ¶¶ 35-48. Even a cursory review of the Agreement makes clear that

1 Defendants’ alleged piracy and otherwise unauthorized distribution of Adobe’s software  
2 constitutes breach. Defendants’ contentions that they cannot understand the nature of Adobe’s  
3 contract claim is not persuasive.

4 Accordingly, Defendants’ motion to dismiss and alternative motion for a more definite  
5 statement based upon Adobe’s asserted failure to identify the nature of the alleged breach of  
6 contract are DENIED.

7 **3. Allegations of Alter Ego are Sufficient**

8 Defendants argue that the FAC “fails to offer any facts to establish personal liability for the  
9 Individual Defendants, Nathan Mumme and Daniel Parker.” Mot. at 7, ECF 24-1. While the FAC  
10 does not use the phrase “alter ego,” that clearly is the basis upon which Adobe asserts liability  
11 against Mumme and Parker. Under California law,<sup>4</sup> alter ego liability is recognized “where two  
12 conditions are met: First, where there is such a unity of interest and ownership that the  
13 individuality, or separateness, of the said person and corporation has ceased; and, second, where  
14 adherence to the fiction of the separate existence of the corporation would . . . sanction a fraud or  
15 promote injustice.” *In re Schwarzkopf*, 626 F.3d 1032, 1038 (9th Cir. 2010) (internal quotation  
16 marks and citation omitted). “A member of a limited liability company shall be subject to liability  
17 under the common law governing alter ego liability.” Cal. Corp. Code § 17703.04(b). The FAC  
18 alleges that Mumme and Parker are part-owners and officers of My Choice, and that they  
19 personally directed the software piracy alleged in this case. FAC ¶¶ 7, 9, 43, 49. The FAC also  
20 alleges that My Choice is undercapitalized, does not have sufficient funding to meet its liabilities,  
21 and “has failed to observe corporate formalities required by law.”<sup>5</sup> *Id.* ¶¶ 3-5. While these  
22 allegations certainly could be more robust, they give fair notice to Mumme and Parker with  
23 respect to Adobe’s theory of liability against them.

24 Defendants’ motion to dismiss the claims against Mumme and Parker is DENIED.

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26 <sup>4</sup> “In determining whether alter ego liability applies, we apply the law of the forum state.” *In re*  
*Schwarzkopf*, 626 F.3d 1032, 1037 (9th Cir. 2010).

27 <sup>5</sup> The Court construes Adobe’s allegation that My Choice has not observed “corporate” formalities  
28 to be an allegation that My Choice has not observed the legal formalities attendant upon its  
formation as a limited liability company.

1       **III. MOTION FOR TRANSFER**

2           Defendants request that the Court transfer this action to the Central District of California.  
3       “For the convenience of parties and witnesses, in the interest of justice, a district court may  
4       transfer any civil action to any other district or division where it might have been brought or to  
5       any district or division to which all parties have consented.” 28 U.S.C. § 1404(a). The action  
6       could have been brought in the Central District, because My Choice’s headquarters are located  
7       there, meaning that the alleged pirating of Adobe’s software presumably occurred there. *See* 28  
8       U.S.C. § 1391(b)(2) (providing that a civil action may be brought in “a judicial district in which a  
9       substantial part of the events or omissions giving rise to the claim occurred”).

10           “A motion to transfer venue under § 1404(a) requires the court to weigh multiple factors in  
11       its determination whether transfer is appropriate in a particular case.” *Jones v. GNC Franchising,*  
12       *Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). “For example, the court may consider: (1) the location  
13       where the relevant agreements were negotiated and executed, (2) the state that is most familiar  
14       with the governing law, (3) the plaintiff’s choice of forum, (4) the respective parties’ contacts with  
15       the forum, (5) the contacts relating to the plaintiff’s cause of action in the chosen forum, (6) the  
16       differences in the costs of litigation in the two forums, (7) the availability of compulsory process  
17       to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of  
18       proof.” *Id.* at 498-99. Of particular note here, “the presence of a forum selection clause is a  
19       ‘significant factor’ in the court’s § 1404(a) analysis.” *Id.* at 499. The public policy of the forum  
20       state, if any, also is a significant factor. *Id.*

21           In the present case, the Agreement between Adobe and My Choice contains a forum  
22       selection clause specifying state or federal courts located in Santa Clara County. That clause must  
23       be given significant weight. Mumme and Parker argue that they were not signatories to the  
24       Agreement, and thus cannot be bound by the forum selection clause. However, if Mumme and  
25       Parker indeed are alter egos of My Choice, they properly are bound by the forum selection clause.

26           Even putting aside the forum selection clause, Defendants have not made the necessary  
27       “strong showing of inconvenience to warrant upsetting the plaintiff’s choice of forum.” *Decker*  
28       *Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). While Defendants

1 assert in their briefs that the Central District would be more convenient for them and “witnesses,”  
2 they have not submitted any declarations identifying said witnesses or otherwise supporting their  
3 conclusory assertion. Moreover, Defendants’ motion ignores the fact that Adobe’s chosen forum  
4 is only a short flight or drive away from the proposed forum. Defendants assert that key evidence  
5 is located in the Central District but, again, they do not submit a declaration in support of that  
6 assertion. Given Defendants’ failure to demonstrate why the Court should not honor the forum  
7 selection clause and Adobe’s choice of forum, the Court need not address the remaining *Jones*  
8 factors. The Court notes, however, that Defendants have not demonstrated that any of those  
9 factors favor transfer.

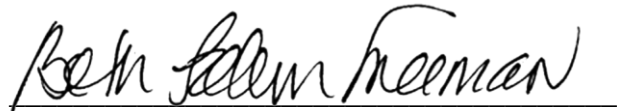
10 Accordingly, the motion to transfer venue is DENIED.

11 **IV. ORDER**

12 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 13 (1) The motion to dismiss is DENIED;
- 14 (2) The alternative motion for more definite statement is DENIED; and
- 15 (3) The motion to transfer is DENIED;

16  
17 Dated: November 14, 2014



BETH LABSON FREEMAN  
United States District Judge