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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO DIVISION)

LYNCH MARKS, LLC,

Plaintiff,

v.

VERMONSTER, LLC,

Defendant.

VERMONSTER, LLC,

Counterclaimant,

v.

LYNCH MARKS, LLC,

Counterclaim-Defendant.

CASE NO. 05-5178 BZ

PLAINTIFF LYNCH MARKS, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT VERMONSTER, LLC'S MOTION TO DISMISS

Date: **July 19, 2006**
Time: **10:00 a.m.**
Judge: **Honorable Bernard Zimmerman**

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I. INTRODUCTION

The Defendant, VERMONSTER, LLC's ("Vermonster") Motion to Dismiss should be denied in its entirety. At the very first level of analysis, Vermonster's Motion to Dismiss is untimely and on that basis alone must be denied. Vermonster is not entitled to file a Motion to Dismiss pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6) after it has previously filed an Answer to Plaintiff LYNCH MARKS, LLC's ("Lynch Marks") Complaint in this action. Because of this reason alone, this Court should deny Vermonster's Motion to Dismiss as untimely.

Even assuming arguendo that the Court were inclined to consider Vermonster's Motion to Dismiss, the Court should still deny the Motion to Dismiss. In its motion, Vermonster alleges that Lynch Marks' Breach of Contract claim should fail because Lynch Marks has not alleged the existence of a binding contract. Vermonster alleges that Lynch Marks' claim for specific performance or restitution in the alternative should fail because California law does not compel specific performance of a personal services contract. Vermonster alleges that Lynch Marks claim for conversion is not recognized by California law. Vermonster alleges that Lynch Marks' claim for fraud in the inducement and the fraud components in its conversion claim and tortious interference claim also fail because the fraud allegations are vague and conclusory. Finally, Vermonster alleges that Lynch Marks' claim for intentional tortious interference with contract and prospective business advantage fails to state a claim because it fails to allege either a breach of contract, an interference with an existing business relationship and/or a prospective business relationship.

As mentioned above, Vermonster's motion to dismiss is untimely, a fatal flaw, thereby making it unnecessary for the court to address Vermonster's motion on the merits. However, even if the Court were to somehow overlook the untimeliness of the motion and examine the motion on its merits – or lack thereof - Vermonster's untimely Motion to Dismiss should still be denied in its entirety for the following reasons:

First, with regard to Vermonster's claim that the Breach of Contract claim should fail because Lynch Marks has not alleged the existence of a binding contract, Lynch Marks identifies the Term Sheet as the contractual agreement between the parties, and based on Vermonster's and Lynch Marks' actions, conduct and communications, the parties have treated the Term Sheet as the

binding contractual agreement between the parties

Second, with regard to Vermonster's claim that Lynch Marks' claim for Specific Performance Or Restitution In The Alternative fails because California law does not compel specific performance with personal services, the Term Sheet between Lynch Marks and Vermonster is (1) not a personal services contract, and (2) Lynch Marks is entitled to pursue a specific performance claim against Vermonster.

Third, with regard to Vermonster's claim that Lynch Marks conversion claim is not recognized by California law, Lynch Marks' Complaint sets forth a specific sum capable of identification and part of the property that has been converted by Vermonster is the original code for the PSIShip, Label Server and Invoice Server.

Fourth, with regard to Vermonster's claim that Lynch Marks' claim for Fraud In The Inducement and the fraud components of its Conversion claim and its Tortious Interference claim are unacceptably vague and conclusory, Lynch Marks' claim for Fraud In The Inducement sets forth the representations made by Vermonster with sufficient particularity, and Lynch Marks' claim that Vermonster's conduct was undertaken with malice in the Conversion claim and its Tortious Interference with Contract Claim have been are pled sufficiently.

Fifth, with regard to Vermonster's claim that Lynch Marks' claim for Tortious Interference with Contract and Prospective Business Advantage, Lynch Marks has pled sufficiently.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Whether Lynch Marks' Breach of Contract claim adequately pleads a claim upon which relief can be granted.

2. Whether Lynch Marks' Specific Performance Or Restitution In The Alternative claim is allowable under California law.

3. Whether Lynch Marks' Conversion claim is allowable under California law.

4. Whether Lynch Marks' claim for Fraud In The Inducement and the fraud components of its Conversion claim and Tortious Interference claim have been pled with sufficient particularity.

5. Whether Lynch Marks has adequately plead a claim for Tortious Interference with

Contract and Prospective Business Advantage.

III. FACTUAL BACKGROUND

Lynch Marks' Complaint contains six claims for relief, Declaratory Relief, Specific Performance or Restitution in the Alternative, Conversion, Fraud in the Inducement, and Intentional Interference with Contract and Prospective Business Advantage. In Vermonster's Motion to Dismiss, Vermonster is seeking the dismissal of five of the six claims in Lynch Marks' Complaint. The only claim that Vermonster is not seeking a dismissal of is the claim for Declaratory Relief.

Lynch Marks is the owner and marketer of a software package called "PSIShip" which has been and continues to be offered to businesses, primarily professional service firms, including law firms, to assist with the shipper vendor and billing needs. PSIShip includes two core components called "Label Server" and "Invoice Server." Lynch Marks owns all of the intellectual property rights in PSIShip, Label Server and Invoice Server, including but not limited to all copyright, patent, trademark, design and trade secret rights.

The Lynch Marks software package allows businesses to seamlessly create and track shipments (via Label Server), as well as integrate the billing of shipments made on behalf of a professional service organization back to the client (via the Invoice Server). For example, if a professional service organization, such as a law firm, sent a FedEx a package to another entity, such as a court, on behalf of the professional service organization's client, the Lynch Marks software would allow a secretary to easily create the shipping label, to pre-validate a client/matter number and timekeeper code, and then by processing electronic invoices from FedEx, the Lynch Marks software would allow the professional services organization to turn around and seamlessly integrate that FedEx charge onto the next bill to the client.

From approximately 2002 until November of 2005,Vermonster served as the developer, debugger and primary supporter of the Lynch Marks software packages, operating on the instructions of, in conjunction with, and at the direction of Lynch Marks. Vermonster would utilize funds which Lynch Marks provided for software development, debugging, upgrades and/or support. During that time frame, Vermonster provided software development, installation and technical

support for the end users of Lynch Marks software and received in excess of $500,000 in compensation from Lynch Marks for those services.

On March 11, 2003, Vermonster and Lynch Marks sought to memorialize their agreements, obligations and responsibilities vis a vis one another. Vermonster and Lynch Marks both signed a "Term Sheet" which set forth the material terms of the parties' contractual relationship and their respective duties toward each other. A true and correct copy of that Term Sheet is attached as Exhibit A to Lynch Marks Federal District Court Complaint, a copy of which is attached to the Request for Judicial Notice as Exhibit A.

Notwithstanding the name of the Agreement and the contemplation of a potential further agreement, there is ample language indicating the parties' intent that the Term Sheet set forth binding obligations between the parties. Some examples of the parties' intent that the Term Sheet created legal rights and obligations on behalf of the parties are as follows: In the Term Sheet it states that (1) "The final agreement ***may*** be negotiated between Vermonster and a new entity created by Lynch Marks…; " (2) "This Term Sheet **shall expire** upon the earlier of: (i) the signing of a definitive agreement…;" (3) "The parties contemplate that **if and when** the definitive agreement is finalized…;" and, perhaps most significantly, (4) "[Either party] has **the right to terminate this Agreement** for convenience upon 90 days notice other than [that party's] breach of contract." [Emphasis added.] During all relevant times (including prior to and after any potential contractual termination date), the parties both treated and agreed among themselves to treat the "Term Sheet" as the binding agreement between the parties, referred to the Term Sheet as the basis for future payments and obligations, requested and received payments without objection made pursuant to the Term Sheet and never gave any notice, let alone 90 days written notice, of any termination, for convenience or otherwise.

The parties have in fact - through their actions, conduct and communications - treated the Term Sheet as the written contractual agreement between the parties setting forth the material terms of their contractual relationship, including: Lynch Marks' obligations with regard to payments to Vermonster; Vermonster's obligations with regard to software code development and support duties to Lynch Marks and its clients; and the intellectual property ownership rights for any and all

software developed out of this relationship. It must not be forgotten that the hundreds of thousands in fees, including 15% royalties, Vermonster has received from Lynch Marks (and for which Vermonster claims still to be owed pursuant to its counter-claim) all are likewise based on the assertion of a valid contractual right. And the alleged source of that alleged contractual right is indeed the Term Sheet which Vermonster now seeks to challenge - and claims by way of this motion to dismiss – as non-binding.

Consistent with the fact that the parties had long since agreed to be bound by the March 11, 2003 Term Sheet, on or about August of 2005, Lynch Marks and Vermonster executed an "Assignment of Intellectual Property Rights" which made clear that Lynch Marks owned all of the intellectual property rights to Lynch Marks software packages (such as PSIShip, Label Server and Invoice Server), including without limitation, all copyright, patent, design and trade secret rights. This included any and all subsequent upgrades, versions, sub-releases and derivative works of the software, as well as any client lists which Vermonster was given access to as part of its installation or debugging duties. A true and correct copy of the Assignment of Intellectual Property Rights is attached as Exhibit B to the Complaint filed by Lynch Marks. In addition to the parties' execution of the Assignment of Intellectual Property Rights, the parties consistently affirmed and ratified the existence of the Term Sheet through their conduct and communications during the period of time after the execution of the Term Sheet. See Complaint at ¶36.

Illustrations of the parties' ratification of the existence of the Term Sheet as the contractual agreement between the parties can be shown through a simple review of sample documents contemporaneously prepared and kept in the regular course of business by both Vermonster and Lynch Marks.[1]

On January 11, 2004, exactly ten months after the execution of the Term Sheet, and approximately nine months after the April 15, 2003 "termination date" of the Term Sheet, Mr. Sean Roche of Vermonster delivered an accounting to Mr. Peter Marks of Lynch Marks. In response to Mr. Roche's accounting, Mr. Peter Marks prepared an e-mail dated January 12, 2004 requesting that

[1] These business records documents are attached to the accompanying Declaration of James W. Lucey as Exhibit A, B and C and are documents that were produced as part of Lynch Marks' Initial Disclosures in this action.

a check in the amount of $24,885.00 be prepared and made payable to Vermonster. The check was for "Covered Balances" which were owed through December 31, 2003. The term "Covered Balances" is a term that existed only because of, was introduced in, and was first defined in the Term Sheet between Lynch Marks and Vermonster that was executed on March 11, 2003. See Term Sheet, paragraph 3.

In addition to this reference to the Term Sheet, Mr. Marks' January 12, 2004 e-mail also references that the check satisfies the "***contractual obligation*** of Lynch Marks ***to pay a minimum of $70,000 against covered balances by January 15, 2004***." See Term Sheet at paragraph 3(c). From what contractual document could such a contractual obligation possibly have come? Why of course, the source of this contractual obligation is the Term Sheet of March 11, 2003. In paragraph 3(c) of the Term Sheet, which is entitled "Covered Products Balance Term," there is a reference to the $70,000 payment to be made by Lynch Marks to Vermonster by January 15, 2004. [Attached as Exhibit A to the accompanying declaration of James W. Lucey is the January 11, 2004 accounting prepared by Mr. Sean Roche and the January 12, 2004 e-mail from Peter Marks to Jim Meyer, Mr. Sean Roche and others.] Mr. Marks January 12, 2004 e-mail and $70,000 payment reference matches up to the terms of the Term Sheet in at least 4 specific ways: (1) the reference to the contractual obligation of Lynch Marks; (2) the minimum payment of exactly $70,000; (3) the fact that the $70,000 payment was against the 'covered balances'; and (4) the fact that this $70,000 payment against the covered balance had to be paid and was in fact paid by on or before January 15, 2004. In point of fact, Lynch Marks' $70,000 check was tendered to Vermonster prior to January 15, 2004 and was happily cashed without any objection or issue.

In July of 2004, Lynch Marks delivered to Sean Roche of Vermonster a letter along with Lynch Marks' check in the amount of $68,587.88. The date of both the letter and the check was July 13, 2004. [A true and exact copy of the letter and check is attached as Exhibit B to the accompanying Declaration of James W. Lucey.] In the letter from Peter Marks sent to Sean Roche, Mr. Marks specifically stated "Per our discussion today, enclosed is a check for $68,587.88 for the outstanding Covered Balance per our Term Sheet dated 3/11/2003." In the letter, Mr. Marks goes on to state that the check has been calculated based on Mr. Roche's spread sheet that was previously

provided to Mr. Peter Marks at the beginning of the year with adjustments for amounts paid per the Term Sheet. The check in the amount of $68,587.88 was received by Vermonster and deposited – again without any objection or issue - into Vermonster's account. Unequivocally, as of March of 2003, January of 2004, July of 2004 and thereafter, Lynch Marks and Vermonster's contractual relationship was defined and controlled by the terms of the Term Sheet dated March 11, 2003.

Perhaps the most telling example of Lynch Marks and Vermonster both acknowledging that all parties were operating under and bound by the terms of the March 11, 2003 Term Sheet is the October 22, 2003 e-mail from Sean Roche to Peter Marks. In Mr. Roche's October 22, 2003 e-mail, he states "We'll build UPS under the **incumbent arrangement (25/25/50)**." [Emphasis added.] Mr. Roche's specific statement on behalf of Vermonster to the incumbent arrangement and the "25/25/50" formula is a direct reference from the Term Sheet, more specifically to paragraph 3(b) of the Term Sheet which is entitled "Anticipated Enhancements Price." In that subsection, the Term Sheet Agreement specifically states in pertinent part:

> "Unless otherwise negotiated, the initial payment for an Anticipated Enhancement will be 25% of the quoted cost of the Anticipated Enhancement at the commencement of work, 25% of the quoted cost upon the acceptance of the Anticipated Enhancement. The balance of 50% will be added to the Covered Product's Balance."

Mr. Roche's reference to the "**25/25/50**" formula in the "**incumbent arrangement**" is a direct reference to the terms of the Term Sheet Agreement. [Attached as Exhibit C to the accompanying Declaration of James W. Lucey is a true and exact copy of the October 22, 2003 e-mail from Sean Roche to Peter Marks.] The March 11, 2003 Term Sheet is unequivocally the "incumbent agreement" and the source for the "25/25/50" formula.

The documents identified as Exhibits A, B and C in the accompanying Declaration of James W. Lucey are only examples of the communications and conduct between the parties after the Term Sheet was entered into on March 11, 2003, which evidence the parties' continuous adherence to the terms of the Term Sheet and that the parties' contractual relationship was controlled by the Term Sheet from the time the Term Sheet was executed on March 11, 2003 through the end of the business relationship between Lynch Marks and Vermonster in November of 2005.

IV. LEGAL ARGUMENT

A. Legal Standard Applicable To Motion To Dismiss

Under Federal Rule of Civil Procedure, Rule 12(b)(6), the Court analyzes the legal sufficiency of the claim or claims in the Complaint. It is often stated that a Rule 12(b)(6) dismissal is proper only where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory;" Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

In resolving a Rule 12(b)(6) motion, the Court ***must***: (1) construe the Complaint in the light most favorable to the plaintiff; (2) accept all well-placed facts and allegations as true; and (3) determine whether plaintiff can prove ***any*** set of facts to support a claim that would merit relief. Cahill v. Liberty Mutual Insurance Company, 80 F.3d 336, 337-338 (9th Cir. 1996). In addition, the Court ***must*** assume that all general allegations "embrace whatever specific facts might be necessary to support them." Peloza v. Capistrano Unified School District, 37 F.3d 517, 521 (9th Cir. 1994), Cert. denied, 515 U.S. 1173, 115 S.CT. 2640, 132 L.Ed. 2nd. 878 (1995). Even if the Court decides to grant a motion to dismiss, either in whole or in part, it must then consider whether to grant leave to amend.[2] In that circumstance, the Ninth Circuit has repeatedly held that a district court should grant leave to amend, even if no request to amend pleading was made, unless it determines that the pleading could not possibly be cured by the allegations of other facts. Lopez v. Smith, 203 F.3d 1122, 1127 and 1130 (9th Cir. 2000); DOE v. United States, 58 F.3d. 494, 497 (9th Cir. 1995).

B. Lynch Marks Has Alleged Facts Sufficient To State A Cognizable Claim For Breach of Contract.

Vermonster's main argument in its Motion to Dismiss is that Lynch Marks' Claim for Breach of Contract fails because Lynch Marks cannot plead the existence of a contract between Lynch Marks and Vermonster. Vermonster's motion to dismiss argument based upon the pleadings must be rejected. Vermonster can attempt to make that specious argument all it wants in the trial of

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[2] While Lynch Marks' original Complaint properly alleges facts sufficient to state all six claims for relief against Vermonster, to the extent that the Court for some reason feels otherwise with regard to any given claim, Lynch Marks provisionally and respectfully requests the Court grant leave to amend for any such claim.

this matter and its closing arguments. However, at the pleading stage, a binding written contract has in fact properly been pled.

In its Complaint at Paragraph 9, Lynch Marks identifies the March 11, 2003 Term Sheet Agreement as the contractual agreement which sets forth the material terms of the parties contractual relationship. At Paragraph 36 of its Complaint, Lynch Marks states that the Term Sheet Agreement was executed by the parties on March 11, 2003 and that the parties have at all material times treated the Term Sheet Agreement as the binding, contractual agreement between the parties. In Paragraph 36 of its Complaint, Lynch Marks also states that the parties affirmed the March 11, 2003 Term Sheet Agreement as the binding contractual relationship between the parties. This is in fact what has been pled. It is not appropriate for Vermonster, pursuant to this untimely motion to dismiss, to seek to prove or disprove at the pleading stage the existence of this contractual relationship or the breach thereof. These will be fact issues for the jury to decide upon trial and full presentation of all facts However, some of that evidence will and does include the parties' affirmation of the Term Sheet as discussed above and as set forth in Exhibits A, B and C to the accompanying Declaration of James W. Lucey.

As written, the Term Sheet Agreement indicates that it sets forth the "principal terms," pertains to "Covered Products" and makes clear that this includes products Vermonster has already developed for Lynch Marks as well as anticipated enhancements. The Term Sheet also provides that "This Agreement shall be for the purchase and sale of the Covered Products." The Term Sheet also states, in part, that ***this Term Sheet*** will ***expire*** upon the earlier of the (1) signing of a definitive agreement, or (2) when written notice from either party pursuant to the Term Sheet was given, or (3) on April 15, 2003.[3]

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[3] At the outset, if there was no contemplation by the parties of ***any*** rights or obligations arising from the Term Sheet, then the question naturally follows as to why then there was a contemplated mechanism or timing for the "expiration" of the Term Sheet. Also, it should not be forgotten or overlooked by the Court that Vermonster itself has a Counter-claim wherein Vermonster alleges essentially the same contractual obligations and rights as the basis for ***Vermonster's*** own claim for Breach of Contract wherein Vermonster repeatedly claims it is entitled to monies and 15% royalties pursuant to "the terms of the agreement between the parties." It was not until the Term Sheet came into existence that Vermonster had a basis for a claim of 15% royalties. This only highlights the disingenuity of Vermonster's present position and motion to dismiss.

It is undisputed that no further 'definitive agreement' was ever executed by the parties. It is undisputed that neither party ever gave the other party written notice of its intention to terminate the Term Sheet Agreement. And just as clearly, the parties chose to completely ignore and waive any supposed expiration of the Term Sheet Agreement as of April 15, 2003. In particular, see Exhibit "C" to the Declaration of Jim Lucey, the October 22, 2003 e-mail from Sean Roche of Vermonster to Peter Marks of Lynch Marks.

What has been pled in the Complaint is that the parties through their actions, conduct, words and documents in 2003, 2004 and 2005 treated the March 11, 2003 Term Sheet as the binding contractual agreement between the parties. Vermonster may ultimately choose to or attempt to dispute this fact during the trial of this matter. If so, proof on both sides of this issue will be put to the fact finder. But, unequivocally, Lynch Marks has adequately pled the contractual relationship between the parties which provides the basis for the breach of contract claims against Vermonster.

As is set forth in the documents which are attached as Exhibits A, B, and C to the accompanying Declaration of James W. Lucey, both parties affirmed that the Term Sheet was not only the contractual agreement, but also that the Term Sheet was the document that contained all of the essential material terms of the agreement between the parties. Declaration of James W. Lucey at Paragraphs 2-5 and Exhibits A, B, and C.

Vermonster argues in its Motion to Dismiss that the Term Sheet Agreement is not a contract. Vermonster argues that the Term Sheet Agreement was not intended to be binding and that a further formal written contract was contemplated. In support of its argument, Vermonster cites Harris v. Rudin, Richman & Appel (1999) 74 Cal.App.4th 299. In point of fact, that case supports Lynch Marks' position and undermines the argument made by Vermonster. The court in Harris held that "Whether a writing constitutes a final agreement or merely an agreement to make an agreement depends primarily upon the intention of the parties. In the absence of ambiguity this must be determined by a construction of the instrument taken as a whole." Harris, supra at 307.

The court in Harris also states that where the writing at issue (herein the "Term Sheet Agreement") shows no more than an intent to further reduce the informal writing to a more formal one, the failure to follow it with a more formal writing did not negate the existence of the prior

contract. Harris, supra at 307 citing Smissaert v. Chiodo (1958) 163 Cal.App.2d 827. In Smissaert, the Court held that "where all of the essential terms of an agreement are definitely agreed upon in the writing there is a binding contract even though there is an intention that formal writing will be executed later." Smissaert, supra at 830.

In this case, the intent of the parties both prior to and after the execution of the Term Sheet Agreement as set forth above, makes it clear the Term Sheet Agreement was at all material times treated as the binding, written, contractual agreement between the parties. The parties' intent and subsequent conduct does not support Vermonster's contention that Vermonster and Lynch Marks were merely agreeing to make an agreement when they executed the Term Sheet Agreement. The parties, at all material times, treated their Term Sheet Agreement as their contract.

The court in Harris found that in reviewing a demurrer, the court's function was simply to determine whether the Complaint alleged facts sufficient to constitute a cause of action. In Harris, the Court found that the Complaint alleged facts sufficient to constitute a cause of action for breach of contract because the agreement contained all of the essential terms between the parties. Harris, supra, at 308.

In Smissaert, the Court held that the essential terms were not contained in the alleged written agreement and therefore that the agreement was not intended by the parties to be an expression of the meeting of their minds but was one step in negotiations which ultimately failed. Smissaert, supra, at 830.

In this case, the Term Sheet was attached to the Complaint and incorporated therein. The Term Sheet contained all of the essential terms between the parties. Just as in Harris, this Court, when reviewing the Motion to Dismiss should simply determine whether the Complaint alleged facts sufficient to constitute a cause of action. In the same manner, this Court should find that the Complaint alleges facts sufficient to constitute a claim for breach of contract.

Vermonster's contention that the subsequent communications and conduct, whether oral or in writing, must contain supplemental essential terms missing from the Term Sheet is off base. The Terms Sheet contains material terms of the contractual agreement between Lynch Marks and Vermonster. The documents attached to the accompanying Declaration of James W. Lucey as

Exhibits A, B, and C do not add essential terms to the parties' contractual relationship. They only serve as examples of the parties' affirmation that the Term Sheet was the contractual agreement between the parties. The content of the documents attached as Exhibit A, B and C evidence the parties' conduct, custom and practice with regard to the effect of the Term Sheet after the execution of the March 11, 2003 Term Sheet.

Lynch Marks not only pled in its Complaint at Paragraphs 9 and 36 that the Term Sheet was the contractual agreement that binded the parties in this case, but also pled at Paragraphs 15 – 17 and 40 – 42 that Vermonster breached the Term Sheet. Lynch Marks has alleged the existence of a binding contract in its Complaint.

Vermonster's allegation in its Motion to Dismiss that the Statute of Frauds (Civil Code Section 1624) applies in this case and therefore that any agreement between the parties must be in writing fails for two reasons. First and foremost, the Term Sheet is the written agreement. That is the end of that. Second, because the Term Sheet allows either party to terminate the Term Sheet upon ninety (90) days written notice for any reason, the Term Sheet can be fully performed within one year from the execution of the Term Sheet. See Request for Judicial Notice, Exhibit A.

Vermonster also alleges that according to California law, a party bringing a breach of contract claim must allege performance and that Lynch Marks has not done so in its Complaint. In Paragraphs 40 and 41 of Lynch Marks' Complaint, Lynch Marks' performance under the Term Sheet is alleged. In the Term Sheet, Lynch Marks is required to provide payment to Vermonster for a number of different types of tasks to be performed by Vermonster. Lynch Marks provided payment to Vermonster pursuant to the Term Sheet throughout the period of time that the Term Sheet was in effect. Lynch Marks' performance is alleged in Lynch Marks' Complaint. Lynch Marks is not required to allege in its Complaint every act that it performed under the Term Sheet.

C. Lynch Marks Has Alleged Facts Sufficient To State A Cognizable Claim For Specific Performance or Restitution in the Alternative

In its Motion, Vermonster claims that in Lynch Marks' Complaint, Lynch Marks requests that this Court enter an Order requiring Vermonster to provide personal services. Based on this premise, Vermonster argues that California law does not allow a claim for specific performance of a

personal services contract. Vermonster cites California Civil Code Section 3390 and Motown Record Corp. v. Brocker, (1984) 160 Cal.App.3d 123 as its authority.

Vermonster's argument fails for two reasons. First, the Term Sheet is not a personal services contract. Second, Lynch Marks has performed pursuant to the Term Sheet through its payment of monies in excess of $500,000 to Vermonster. Because of this, Vermonster has already received the performance from Lynch Marks that Vermonster was promised pursuant to the Term Sheet. Because of this, under the doctrine of Mutuality of Remedies, Lynch Marks is entitled to Vermonster's performance under the terms of the Term Sheet. Because Lynch Marks has performed under the terms of the Term Sheet through its payment of monies as required by the Term Sheet, Lynch Marks is entitled to make the claim for specific performance in its Complaint.

The Term Sheet entered into between Lynch Marks and Vermonster is not a personal services contract. It does not require the obligation of either party to render personal service to the other party. Civil Code Section 3390 states that an obligation to render personal service in a contract and/or an obligation to employ another in personal service are obligations that cannot be specifically enforced. There is no requirement in the Term Sheet for the rendering of personal service by any party to the other party. The Term Sheet is not a personal services contract.

Even assuming arguendo that this Court were inclined for some reason to construe the Term Sheet as a personal services contract, a personal services contract has the ability to be enforced via a specific performance claim if there is a mutuality of remedies between the parties. It is elementary that mutuality of remedy is an indispensable prerequisite to the specific performance of a contract. The remedy must be mutual, as well as the obligation, and when the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other. Poultry Produce v. Barlow (1922) 180 Cal. 278, 287.

In this case, Vermonster has the mutual remedy to compel Lynch Marks to perform under the terms of the Term Sheet, just as Lynch Marks has the right to seek performance by Vermonster of its obligations in the Term Sheet. The cases cited by Vermonster in its Motion to Dismiss relate only to fact patterns where there is no mutuality of remedies between the parties. Specifically, the cases found that because of the lack of mutuality of remedy, equity will not enforce a specific

performance of a contract when the party asking it to be enforced cannot, from the nature of the obligation assumed, be compelled to perform on his part. Poultry Producers, Etc. v. Barlow (1922) 189 Cal. 278.

In this case, Lynch Marks has performed its obligations in the Term Sheet through the payment of an amount in excess of $500,000. Vermonster has not performed its obligations under the Term Sheet. Lynch Marks' claim for specific performance requests that the Court order performance under the terms of the Term Sheet.

The Term Sheet contains a provision at paragraph 7 of the Term Sheet relating to termination for convenience. Pursuant to paragraph 7 of the Term Sheet, both parties have the right to provide ninety (90) days written notice of their election to terminate the Term Sheet. Because of this provision, Vermonster's argument in its Motion to Dismiss that if specific performance is allowed, then Vermonster's obligations to perform under the Term Sheet may extend over a long period of time and call for a succession of acts which cannot be performed in one transaction is meritless and should not be considered by the Court. Vermonster would only have to provide the ninety (90) day written notice to terminate the Term Sheet as set forth in Paragraph 7 of the Term Sheet.

Vermonster's final argument relating to Lynch Marks' claim for Specific Performance is that the contract at issue does not contain terms which are sufficiently certain to make the precise act which is to be done clearly ascertainable. The Term Sheet is clear on its face as to the requirements and obligations of both Lynch Marks and Vermonster. In determining whether the material factors in a contract are sufficiently certain for specific performance, the modern trend of the law favors carrying out the parties' intention through the enforcement of contracts and disfavors them being unenforceable because of uncertainty. The defense of uncertainty has validity only when the uncertainty or incompleteness of a contract prevents the Court from knowing what to enforce. Blackburn v. Charnley (2004) 117 Cal.App.4th 758, 766.

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D. Lynch Marks Has Alleged Facts Sufficient To State A Cognizable Claim For Conversion

In Vermonster's Motion to Dismiss, Vermonster alleges that California law does not recognize a claim for the Conversion of money at issue in a contract dispute. Vermonster states that while California law does not recognize a conversion claim for money generally, money that is of a "specific sum capable of identification" can be the subject of an action for Conversion. Vermonster's Motion to Dismiss at page 14:8-18.

In this case, the Conversion claim brought by Lynch Marks against Vermonster states at paragraph 48 that Vermonster has possession of monies in excess of $75,000 which was delivered by Lynch Marks to Vermonster for goods and services either not delivered, or not delivered in full timely and in an appropriate and viable manner. It also states that Vermonster has failed to turn over the original code of PS|Ship, Label Server and Invoice Server. Finally, it states that Vermonster has wrongfully retained and converted the original code and the money from Lynch Marks.

The identification of the money in the amount of $75,000 is sufficient to satisfy the requirements that a "specific sum capable of identification" be identified in a Conversion claim. IN addition, the wrongful taking of the original code for PS|Ship, Label Server and Invoice Server is another component part of the Conversion claim brought by Lynch Marks against Vermonster. Based on the allegations made in paragraph 48 of its Complaint, Lynch Marks has alleged a claim for Conversion which is cognizable under California law, specifically under Farmers Insurance Exchange v. Zerin (1997) 53 Cal.App.4th 445, 452.

In Vermonster's Motion to Dismiss, Vermonster also alleges that California law does not recognize a conversion action for intangible property. In essence, Vermonster is claiming that the original code that Lynch Marks is alleging that Vermonster converted is "intangible property," and therefore California law does not recognize the conversion claim for that property.

In the case of Miles, Inc. v. Scripps Clinic & Research Found. 810 F.Supp. 1091 (S.D. Cal. 1993), the Court found that the "property" at issue was the intangible right to commercialize the cell line, not the actual cell line itself. In this case, the "property" that Lynch Marks is claiming at issue

was the original software code provided to Vermonster from Lynch Marks. According to the Assignment of Intellectual Property Rights executed by Lynch Marks and Vermonster in August 2005, Lynch Marks is the owner of all rights to the original software code for PSIShip, Label Server and Invoice Server. That "property" is not an "intangible property" as that term is defined in Miles, Inc. The "property" herein is "tangible property." The tangible property is the original code for PSIShip, Label Server and Invoice Server.

Lynch Marks claim for conversion in its Complaint is a cognizable claim and allowable under California law. Vermonster's Motion to Dismiss Lynch Marks' claim for conversion should be denied.

E. Lynch Marks' Claim For Fraud In The Inducement In Its Complaint Has Been Pled With Sufficient Particularity Under Federal Rule Of Civil Procedure 9(b)

Lynch Marks' claim for Fraud In The Inducement identifies the representations made by Vermonster to Lynch Marks which representations induced Lynch Marks to execute the Term Sheet with Vermonster. The representations made by Vermonster were that Vermonster would create a viable and working package of software for Lynch Marks' ownership in return for payment of significant monies from Lynch Marks to Vermonster, (Complaint, ¶52) and that Vermonster would provide support to the end user clients of Lynch Marks in exchange for the payment of significant monies from Lynch Marks to Vermonster, (Complaint, ¶53). The representations set forth paragraphs 52 and 53 of Lynch Marks' Complaint state that officials of Vermonster made representations to officials of Lynch Marks prior to the execution of the Term Sheet. The manner in which the representations were made were both verbal and written. In paragraphs 52 and 53, it states that when the representations were made by Vermonster to Lynch Marks, that Vermonster was actually unable or unwilling to create the final working package of software and provide support to the end user clients of Lynch Marks.

The requirement to plead facts such as time, place, persons, statements and explanations for why the statements are misleading are included in paragraphs 52 and 53 of Lynch Marks'

Complaint. Vermonster's motion to dismiss the Fraud in the Inducement claim should be denied.[4]

F. Lynch Marks' Claim For Punitive Damages In Its Conversion Claim and Tortious Interference With A Contract And Prospective Business Advantage Have Been Pled Sufficiently

Paragraph 50 of Lynch Marks' Complaint alleges that Vermonster's conduct in converting Lynch Marks property was done maliciously, willfully, with conscious disregard for Lynch Marks' rights and with the intent to defraud. Accordingly, Lynch Marks has properly requested an award of punitive damages under California Civil Code § 3294. In the case of In Re Glenfed, Inc. Securities Exchange , 42 F.3d 1541 (9th Cir. 1994), the case which Vermonster cited as authority for its argument that Lynch Marks had not properly pled its Fraud claim in its Conversion claim and in its Tortious Interference With Contract and Prospective Business Advantage, the Court states:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. *Malice, intent, knowledge and other condition of mind of a person may be averred generally.*" (Emphasis added.)

The court in In Re: Glenfed, Inc. found that "the second sentence of Rule 9(b) is very clear: malice intent, knowledge and other conditions of mind may be averred generally." The Court In Re: Glenfed, Inc. went on to state that when alleging malice, fraudulent intent, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

In paragraphs 50 and 64 of Lynch Marks' Complaint, Lynch Marks is alleging malice, fraudulent intent, knowledge or other condition of Vermonster's state of mind and intent. In this instance, it is sufficient to allege the act was done with malice, fraudulent intent and knowledge without setting out the circumstances from which the same is to be inferred. In Re Glenfed, Inc. Securities Litigation, 42 F.3d 1541, 1545, (9th Cir. 1994). Lynch Marks' allegations in § 50 and 54 of its Complaint for fraud have been pled sufficiently and Vermonster's request to dismiss the

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[4]Assuming arguendo that the Court were to embrace Vermonster's strained argument, Lynch Marks would again provisionally and respectfully request that the Court allow leave to amend with regard to any such claim.

allegations from Lynch Marks' Complaint should be denied.

G. Lynch Marks Has Sufficiently Pled A Claim For Tortious Interference With Contract And Prospective Business Advantage In Its Complaint

Lynch Marks' claim for Intentional Tortious Interference with Contract and Prospective Business Advantage sets forth at paragraph 60 that Vermonster is and was aware that Lynch Marks had and has an ongoing business relationship, if not contractual agreement, with its customers, including the law firm of Bingham McCutchen. Paragraph 61 of the Complaint states that Vermonster was aware that the list of customers using the PS|Ship product is and was Lynch Mark's sole and exclusive property that was only provided to Vermonster so that Vermonster could perform its client support duties to Lynch Marks' clients. Paragraphs 60 and 61 allege the existence of a valid business relationship between Lynch Marks and Bingham McCutchen and others which Vermonster was providing client support duties to.

Paragraph 62 of the Complaint sets forth Vermonster's knowledge of the existence of the valid business relationship. Paragraph 62 also alleges that Vermonster has interfered with Lynch Marks' valid business relationship, not only with Lynch Marks' existing customers, including Bingham McCutchen, but also with prospective customers.

In order to properly plead an Intentional Tortious Interference With Contract and Prospective Business Advantage, the defendant must know of the business relationship and must intend to interfere with that business relationship. Pacific Gas & Electric Company v. Bear Stearns & Company (1990) 50 Cal.3d 1118. There is no requirement that a contract entered into between Lynch Marks and a third party be breached to properly allege a claim for intentional interference with contract and prospective business advantage. If the plaintiff's performance has intentionally been made more burdensome or more expensive by the defendant's actions, the cost that the plaintiff incurs in order to obtain performance by the third party has increased, and the net benefit from the third party's performance has been correspondingly diminished. Witkin Summary of Law, California 10th Ed. Torts, Section 737.

The elements set forth in the case of Pacific Gas & Electric Company v. Bear Stearns & Company (1990) 50 Cal.3d 1118 for a claim for tortious interference with contract are instructive on

the issue of whether or not an actual breach of a contract with a third party must be alleged in a claim for tortious interference with contract. In Pacific Gas & Electric Company, the court held that the elements which a plaintiff needs to plead to state a cause of action for intentional interference with contractual relations are:

(1) A valid contract between plaintiff and a third party;

(2) Defendant's knowledge of this contract;

(3) Defendant's intentional act designed to induce a breach or disruption of the contractual relations;

(4) Actual breach *or disruption of the contractual relationship*; and

(5) Resulting damage. [Emphasis Added.]

The court in Pacific Gas & Electric Company acknowledges that the breach of a third party contract is not required to allege a claim for tortious interference with contract and prospective business advantage. Pacific Gas & Electric Company (1990) 50 Cal.3d 1118, 1126.

With regard to the intentional tortious interference with the prospective economic advantage claims, the tort protects the same interests in stable economic relationships as does the tort of interference with the contract, though interference with prospective advantage does not require proof of a legally binding contract. Id.

In Paragraphs 60 and 61 of the Complaint, Lynch Marks alleges that Vermonster was aware that Lynch Marks had and has an ongoing relationship, if not contractual agreements, with many of it's customers, including the law firm of Bingham McCutchen, and that Vermonster was aware that the list of customers using the PSIShip product was Lynch Marks' sole property, which list was provided to Vermonster only so that Vermonster could perform its support duties to Lynch Marks' customers and potential customers. Lynch Marks has sufficiently pled its claim for Intentional Tortious Interference With Contract and Prospective Business Advantage in its Complaint. Vermonster's Motion to Dismiss Lynch Marks' Intentional Tortious Interference With Contract and Prospective Business Advantage claim should be denied.

V. CONCLUSION

For all the reasons stated above, including the fact that the Motion to Dismiss filed by

Vermonster is untimely, and for the reasons stated above in opposition to Vermonster's Motion to Dismiss, Lynch Marks' claim for Breach of Contract, Specific Performance or Restitution in the Alternative, Conversion, Fraud in the Inducement, and Intentional Tortious Interference With Contract and Prospective Business Advantage, Vermonster's Motion to Dismiss should be denied.

Dated: June 26, 2006

Respectfully submitted,

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