

# EXHIBIT 24

Not Reported in F.Supp.2d, 2006 WL 5668246 (C.D.Cal.)  
(Cite as: **2006 WL 5668246 (C.D.Cal.)**)



Only the Westlaw citation is currently available.

United States District Court,  
C.D. California.

WYATT TECHNOLOGY CORP., a California corporation, Plaintiff/Counterdefendant,

v.

Tim SMITHSON, an individual; Ken Cunningham, an individual; Dynapro International Limited, a foreign corporation; Viscotek Corporation, a Texas corporation; Max Haney, an individual; and does 1 through 25, inclusive, Defendants/Counterclaimants.

**No. CV 05-1309 DT (RZx).**

Aug. 14, 2006.

[Frank Frisenda, Jr.](#), Frisenda Quinton and Nicholson, Los Angeles, CA, for Plaintiff/Counterdefendant.

[C. Vernon Lawson](#), The Matthews Firm, Houston, TX, [Carlo F. Van Den Bosch](#), Sheppard Mullin Richter & Hampton, Costa Mesa, CA, [Gary A. Clark](#), [Jeffrey Michael Blank](#), [Michelle M. Lavoie](#), Sheppard Mullin Richter & Hampton, Los Angeles, CA, [Barry H. Uhrman](#), Lewis Brisbois Bisgaard and Smith, Phoenix, AZ, for Defendants/Counterclaimants.

**ORDER GRANTING IN PART DEFENDANTS TIM SMITHSON, KEN CUNNINGHAM, DYNAPRO INTERNATIONAL LIMITED, VISCOTEK CORPORATION AND MAX HANEY'S MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT VISCOTEK'S AMENDED COUNTERCLAIM FOR MISAPPROPRIATION OF TRADE SECRETS; AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' SECOND, THIRD, FOURTH AND FIFTH AMENDED**

## COUNTERCLAIMS.

[DICKRAN TEVRIZIAN](#), Senior District Judge.

### I. *Background*

\*1 Plaintiff Wyatt Technology Corporation (“Plaintiff” or “Wyatt”) brings the following claims against Defendants Tim Smithson, Ken Cunningham, Dynapro International Limited, Viscotek Corporation and Max Haney (collectively “Defendants”): (1) false description of goods in violation of [15 U.S.C. § 1125\(a\)](#) (all defendants); (2) trademark infringement in violation of [15 U.S.C. § 1125\(a\)](#) (all defendants); (3) intentional interference with prospective economic advantage (all defendants); (4) tortious interference with contractual relations (all defendants); (5) misappropriation of trade secrets (Cunningham and Smithson); (6) violation of [Cal. Bus. & Prof.Code § 17202](#) (all defendants); (7) state dilution of trademark (all defendants); (8) unfair business practices pursuant to [Cal. Bus. & Prof. § 17200](#) (all defendants); (9) accounting (all defendants); (10) conversion (all defendants); and (11) civil conspiracy (all defendants).

Defendants have filed an Amended Counterclaim against Plaintiff for the following: (1) Declaratory relief; (2) Violation of the Computer Fraud and Abuse Act ([18 U.S.C. § 1030\(a\)\(2\)\(c\)](#)); (3) Violation of the Computer Fraud and Abuse Act ([18 U.S.C. § 1030\(a\)](#) (4)); (4) Violation of the Electronic Communications Act ([18 U.S.C. § 2701](#)); (5) Violation of the California Computer Data Access and Fraud Act ([Cal.Penal Code § 502](#)); and (6) Misappropriation of Trade Secrets ([Cal. Civ.Code § 3426 et seq.](#))

### A. *Factual Summary*

The following facts are found to be undisputed <sup>FN1</sup>  
:

**FN1.** Under Local Rule 56-3, “In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the “Statement of Genuine Issues” and (b) controverted by declaration or other written evidence filed in opposition to the motion. Defendants submitted a Statement of Uncontroverted Facts and Conclusions of Law in Support of their Motion for Summary Judgment. Wyatt submitted a Separate Statement of Genuine Issues in Opposition to Defendants’ Motion for Summary Judgment. However, in Wyatt’s Separate Statement, while Wyatt claimed that certain facts were disputed, it failed to show how each fact was controverted, and more importantly, it failed to cite with specificity its supporting evidence. Instead, Wyatt often referenced a list of exhibits with no specific page number. These exhibits ranged from entire deposition transcripts to complete written agreements. Further, if Wyatt listed only one exhibit, it did not specify the page number, or if it happened to list the page number(s), it was not apparent from a reading of that page(s) how the particular fact was controverted by that evidence. Such is improper in light of Ninth Circuit law. *Orr v. Bank of America NT & SA*, 285 F.3d 764, 775 (9th Cir.2002) (the trial court may in its discretion exclude evidence for a party’s failure to cite to page and line numbers); *see also Huey v. UPS, Inc.*, 165 F.3d 1084, 1085 (7th Cir.1999) (“[J]udges need not paw over the files without assistance from the parties.”). Wyatt repeatedly failed to clearly designate the location of supporting proof, and this Court cannot be expected to search the submitted evidence to find something which may advance Plaintiff’s position. In-

deed, in many instances, it appeared to this Court that Wyatt listed exhibits or page numbers just for the appearance of a disputed fact, when, in fact, no dispute exists.

Defendant Ken Cunningham (“Cunningham”) was employed as a DLS engineer with a United Kingdom subsidiary of Proterion Corporation (“Proterion”) until approximately August of 2004. Defendant Tim Smithson (“Smithson”) was employed with a United Kingdom subsidiary of Proterion until approximately August of 2004.

DLS, short for dynamic light scattering, is a means of measuring the size and distribution of particles in a liquid solution. Proterion’s DLS product was called the Dynapro. Proterion ceased operating in August of 2004 due to insufficient revenue. A New Jersey trustee was appointed to oversee the liquidation of Proterion’s assets. Several companies in the DLS field, including Plaintiff, Malvern Instruments Ltd. and ALV, placed bids on the Proterion assets. Cunningham and Smithson were creditors of Proterion and received formal creditor notices related to the Proterion liquidation proceedings.

Wyatt placed a successful bid of \$410,000 on certain Proterion assets and executed a November 17, 2004 Asset Purchase Agreement (“APA”). The APA included certain physical assets, the website domain name proterion.com, Proterion’s software, and exclusive rights in customer databases. Wyatt did not physically inspect the tangible Proterion assets prior to November 17, 2004. Wyatt did not conduct independent due diligence with respect to the Proterion assets it purchased on November 17, 2004. Wyatt reviewed due diligence documents prepared by third party Biochrom. Biochrom did not purchase any Proterion assets.

\*2 Until its dissolution, Proterion owned an exclusive patent license from third party Defense Technologies Enterprises, Ltd. (“DTE”). The DTE patent licensed by Proterion ([U.S. Patent No. 4,975,237](#)) (the “DTE Patent”) concerns single mode fiber technology used in DLS instruments.

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In December of 2004, Defendant Viscotek Corporation (“Viscotek”) acquired from DTE the exclusive license to the DTE Patent. Wyatt did not acquire a license to the DTE Patent because Wyatt uses multi mode fiber technology for its DLS instruments.

For some time following its acquisition of the DTE Patent license, Viscotek published the following statement on its website: “Exclusive access to the patented [single mode fiber] technology means Viscotek is the only company who will be able to supply all the parts to repair these instruments.” Viscotek removed the above statement from its website, without admission of liability, in April of 2005.

After acquiring the Proterion assets, Wyatt attempted to hire Cunningham and Smithson. Wyatt did not offer Cunningham or Smithson guaranteed employment for more than six months.

In November 2004, Wyatt hired Robert Collins, who had been a VP of Product Management for Proterion in the United States.

Smithson founded Defendant Dynapro International Limited (“Dynapro Int'l”) to service existing DLS customers. Cunningham provided some freelance services to existing Dynapro users, at the request of Wyatt.

Smithson and Cunningham joined Viscotek Europe in December 2004. Viscotek Europe is located in the United Kingdom. Viscotek Europe hired Cunningham and Smithson in connection with the design and development of a DLS instrument using the patented single mode fiber technology.

Viscotek Europe began developing its new DLS instrument in December 2004. Viscotek Europe completed its first working DLS instrument in May 2005. Before it completed its own DLS instrument, Viscotek Europe used an existing DLS instrument, borrowed from DTE, as a sample regarding the functionality of DLS. Viscotek has not yet earned any profits from its DLS products.

Among the fixed assets that Wyatt bought from the Proterion liquidation was the personal computer once used by Cunningham while a Proterion employee. Cunningham on occasion used his Proterion work computer to access his email account at ken@screamingmadhouse.com. Cunningham has owned his domain screamingmadhouse.com name since 2002. Cunningham's personal email account on the screamingmadhouse.com domain requires a password for access. The ken@screamingmadhouse.com domain is hosted on a server located in the United Kingdom.

Wyatt used one of the Proterion computers to review copies of some of Cunningham's historical messages transmitted via the screamingmadhouse.com domain. One of the Proterion computers acquired by Wyatt contained information concerning the password for Cunningham's personal email account at ken@screamingmadhouse.com. In January of 2005, Wyatt used one of the Proterion computers to retrieve copies of ongoing messages from Cunningham's email account at ken@screamingmadhouse.com. Wyatt knew that it was accessing Cunningham's personal email account. It knew that it was retrieving copies of Cunningham's email messages from a server in Europe. It did not tell Cunningham that it was retrieving copies of his email messages on the screamingmadhouse.com account. Wyatt did not ask Cunningham for permission to retrieve copies of his email messages on the screamingmadhouse.com account. Viscotek and Cunningham were damaged in excess of \$5,000 as a result thereof. When Wyatt's IT Manager told Geoff Wyatt that the company was accessing Cunningham's personal account, Mr. Wyatt responded: “It doesn't matter.”

\*3 Wyatt changed the email retrieval settings on one of Proterion computers to check for new messages on Cunningham's email account once per minute. It changed the email retrieval settings on the Proterion computers to ensure it would not miss any incoming messages, should Cunningham access and delete them first.

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Wyatt used its access to the screamingmad-house.com account to retrieve a copy of a January 19, 2005 email from Jixiang Zhu to Cunningham, which had an attachment entitled visco.pdf. The January 19, 2005 email and visco.pdf file retrieved by Wyatt contains confidential information of Viscotek concerning its product development, which information is kept strictly private by Viscotek and not disclosed to third parties.

Wyatt used its access to the screamingmad-house.com account to retrieve a copy of a January 20, 2005 email from Paul Clarke to Cunningham and other Viscotek employees. The January 20, 2005 email retrieved by Wyatt contains a preliminary date sheet for what would become Viscotek's DLS product, which information is kept strictly private by Viscotek and not disclosed to third parties.

Wyatt used its access to the screamingmad-house.com account to retrieve a copy of the January 24, 2005 email from Smithson to Mr. Clarke and Cunningham, discussing a potential new customer, MicroSens. The identity of Viscotek's potential customers, including MicroSens, is kept strictly private by Viscotek and not disclosed to third parties.

Wyatt used its access to the screamingmad-house.com account to retrieve a copy of a January 25, 2005 email from Cunningham to Mr. Clarke discussing one of the company's vendors, South Bucks Metalwork in High Wycombe. The identity of Viscotek's vendors, to the extent they are not commonly known in the DLS industry (like South Bucks and Metalworks), is kept strictly private by Viscotek and not disclosed to third parties.

Wyatt's IT Manager thought that accessing Cunningham's personal email account might cause an increase in bandwidth to the account, and that Cunningham's Internet Service Provider ("ISP") might notice unusual activity on the account. The last email retrieved by Wyatt from Cunningham's account was from Cunningham's ISP, reporting that "[t]here was an increase in bandwidth" and

"[s]omeone might have hijacked [Cunningham's] account." Cunningham's ISP terminated access to Cunningham's account in January 2005 and alerted Cunningham of the unusual activity on his account.

Wyatt employee Robert Collins testified that the email messages retrieved from Cunningham's account showed that at the time of the messages, Viscotek "don't have a prototype working" and "[t]hey're promoting an instrument that's not fully available, and they are using a Dynapro to do it."

Smithson registered the domain names proteinsolutions.com and protein-solutions.com for a company called Protein Solutions, which he founded in 1993. The Protein Solutions company was acquired by Rheometric Scientific in 2003. Rheometric Scientific changed its name to Proterion Corporation in 2003.

\*4 In 2003, Proterion decided not to renew the registrations for the proteinsolutions.com domain names. Smithson registered the proteinsolutions.com and proterion.com names in his own name in 2003. On November 17, 2004, the proteinsolutions.com and protein-solutions.com domain names were not registered in the name of Proterion. On that date, these domain names were registered in the name of Tim Smithson. The November 17, 2004 Asset Purchase Agreement executed by Wyatt references the proterion.com domain name but not the protein-solutions.com or proteinsolutions.com domain names. The November 17, 2004 Asset Purchase Agreement executed by Wyatt does not reference any trademarks.

On January 18, 2005, the proteinsolutions.com and protein-solutions.com domain names were not registered in the name of Proterion. They were registered in the name of Tim Smithson. The January 18, 2005 Amended APA executed by Wyatt does not reference any domain names.

In the middle of 2005, Smithson assigned his registrations for the domain names proteinsolutions.com and proterion.com to Viscotek Europe.

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On November 29, 2004, Wyatt filed a federal intent-to-use trademark application for the mark DYNAPRO in connection with “electronic measurement systems, namely light scattering photometers.” On November 29, 2004, Wyatt filed a federal intent-to-use trademark application for the mark PROTEIN SOLUTIONS in connection with “electronic measurement systems, namely light scattering photometers and computer software, namely software used in connection with light scattering and refractive index detection, and data acquisition applications.”

Viscotek has never used the term DYNAPRO as a trademark to brand “electronic measurement systems, namely light scattering photometers.” Viscotek has never used the term PROTEIN SOLUTIONS as a trademark to brand “electronic measurement systems, namely light scattering photometers and computer software, namely software used in connection with light scattering and refractive index detection, and data acquisition applications.”

In December of 2004, Wyatt sent Viscotek Europe a demand letter concerning its use of the protein-solutions.com and protein-solutions.com domain names.

A January 18, 2005 Amended Asset Purchase Agreement executed by Wyatt purports to assign to Wyatt all trademark rights in the terms PROTERION, DYNAPRO and PROTEIN SOLUTIONS. On January 18, 2005, Cunningham and Smithson remained Proterion creditors but did not receive prior notice of the Amended Asset Purchase Agreement executed by Wyatt. No Wyatt competitors were afforded the opportunity to bid on the liquidated assets purportedly acquired through the Amended Asset Purchase Agreement.

Wyatt alleges that Defendants have misappropriated trade secrets in the Dynamics software that Wyatt allegedly acquired from Proterion. Defendants did not use any code from the Dynamics software in the development of a new DLS product.

Wyatt alleges that Defendants have misappropriated trade secrets in technical specifications for the Dynapro instrument, which Wyatt allegedly acquired from Proterion. Viscotek's DLS instrument has different technical specifications from those of the Dynapro instrument.

\*5 Wyatt alleges that Defendants have misappropriated trade secrets in specialty tools and fixtures identified in Exhibit 137, which Wyatt allegedly acquired from Proterion. Defendants do not possess the specialty tools and fixtures identified in Exhibit 137, which remained at the Proterion offices following its dissolution.

Wyatt alleges that Defendants have misappropriated trade secrets in the list of Dynapro users, which Wyatt allegedly acquired from Proterion. Smithson obtained a list of Dynapro users from third party, Marketing by Dave Dolak.

Wyatt alleges that Defendants have misappropriated trade secrets in the list of Dynapro component suppliers, which Wyatt allegedly acquired from Proterion. The Viscotek DLS and Dynapro only share the following component sources: (1) Alango as the source of Dynals software; (2) PerkinElmer for the photon counter; (3) Correlator.com for the correlator; and (4) OZ Optics for the laser. Alango publicly advertises the fact that Wyatt uses its commercial Dynals software. PerkinElmer is widely known in the DLS industry as a supplier of photon counters. Correlator.com is widely known in the DLS industry as a supplier of correlators. OZ Optics is widely known in the DLS Industry as a supplier of laser optics.

In April or May 2005, Smithson provided to Wyatt the following items Wyatt claimed had been converted: one laptop computer, one desktop computer, one optical power meter, one digital counter, hand tools (e.g., screwdrivers), one voltmeter, one demo unite 99-05, one MSXTC-056, and six antiquated and non-functional DynaPro instruments.

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### **B. Procedural History**

On February 22, 2005, Plaintiff filed the Complaint, and this action was assigned to Judge Byrne.

On April 15, 2005, Defendants filed a Motion to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim. Judge Byrne heard oral argument on June 13, 2005. At that time, Plaintiff voluntarily dismissed claims (4) tortious interference with contractual relations; (7) state trademark dilution; and (11) civil conspiracy.

On August 30, 2005, Judge Byrne issued an Order Denying Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Denying Defendants' Motion to Dismiss for Failure to State a Claim.

On October 4, 2005, Defendants filed an Answer to Complaint and Counterclaim.

On October 28, 2005, Plaintiff filed a Reply to Counterclaim.

On December 13, 2005, Judge Byrne issued an Order setting a Pre-trial Conference on June 19, 2006 and trial on June 27, 2006.

On January 24, 2006, this case was transferred to this Court.

On April 28, 2006, Defendants filed a Motion for Leave to File First Amended Counterclaim.

On May 22, 2006, this Court issued an Order Granting Defendants' Motion for Leave to File First Amended Counterclaim. This Court also set a discovery cut-off date of June 30, 2006 and continued the pre-trial conference date to August 7, 2006 and the trial date to October 17, 2006.

\*6 On May 25, 2006, Defendants filed the First Amended Counterclaim.

On June 22, 2006, Plaintiff and Counterdefendant filed its Answer to Amended Counterclaim.

On July 14, 2006, Defendants and Counter-

claimants filed a Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment, which is currently before this Court.

On July 19, 2005, Plaintiff filed a Motion for Summary Judgment on Defendants' Second, Third, Fourth and Fifth Counterclaims and a Motion for Summary Judgment on Defendant Viscotek's Amended Counterclaim for Misappropriation of Trade Secrets, which are also before this Court.

### **II. Discussion**

#### **A. Standard**

Under the Federal Rules of Civil Procedure, summary judgment is proper only where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” [Fed.R.Civ.P. 56\(c\)](#). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *See id.*; [Fed.R.Civ.P. 56\(e\)](#).

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *See Anderson*, 477 U.S. at 250-51, 106 S.Ct. at 2511. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S.

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574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists no longer precludes the use of summary judgment. See *Harper v. Wallingford*, 877 F.2d 728 (9th Cir.1989); *California Architectural Building Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.1987).

If the moving party seeks summary judgment on a claim or defense on which it bears the burden of proof at trial, it must satisfy its burden by showing affirmative, admissible evidence.

Unauthenticated documents cannot be considered on a motion for summary judgment. See *Hal Roach Studios v. Richard Feiner and Co.*, 896 F.2d 1542, 1550 (9th Cir.1990).

On a motion for summary judgment, admissible declarations or affidavits must be based on personal knowledge, must set forth facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the facts at issue. See *Fed.R.Civ.P. 56(e)*. Declarations on “information and belief” are inappropriate to demonstrate a genuine issue of fact. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989).

## B. Analysis <sup>FN2</sup>

**FN2.** Wyatt filed a Request for Judicial Notice and a Second Request for Judicial Notice. A court must take judicial notice if a party requests it and supplies the court with the requisite information. *Fed.R.Evid. 201(d)*. This Court may take judicial notice of its own records, and documents that are public records and capable of accurate and ready confirmation by sources that cannot reasonably be questioned. See *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir.1980) (“In particular, a court may take judicial notice of its own records in other cases, as well as the records of an inferior

court in other cases.”) As such, this Court grants Wyatt's Requests for Judicial Notice.

\*7 Defendants move for summary judgment against Wyatt on all of Defendants' amended counterclaims and all of Wyatt's claims. Wyatt moves for summary judgment against Defendants on Defendants' Second, Third, Fourth, Fifth and Sixth Amended Counterclaims.

### 1. Defendants' Second and Third Amended Counterclaims under the Federal Computer Fraud and Abuse Act

In the Second and Third Amended Counterclaims, Defendants allege that Wyatt's unauthorized access to Cunningham's personal email account constitutes violations of the Federal Computer Fraud and Abuse Act.

With respect to the Second Amended Counterclaim, the Federal Computer Fraud and Abuse Act provides a civil cause of action against any person who intentionally accesses a computer without authorization or who exceeds authorized access and obtains protected information. 18 U.S.C. § 1030(a)(2)(C). The conduct must involve loss to one or more individuals during any one-year period exceeding \$5,000 in value. *Id.* at § 1030(a)(5)(B)(i), (g). For violations under 18 U.S.C. § 1030(a)(5)(B)(i), economic damages are recoverable. *Id.* at § 1030(a)(5)(B)(g).

In seeking summary judgment on the Second Amended Counterclaim, Defendants argue that Wyatt has admitted to wiretapping Mr. Cunningham's personal email account, and it has admitted that it did not obtain Cunningham's authorization to access his private and confidential communications. This Court agrees with Defendants that the undisputed facts establish a violation of the above section of the Federal Computer Fraud and Abuse Act. Cunningham's personal email server is a protected computer (see 18 U.S.C. § 1030(e)) and is used in



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interstate and foreign communication and commerce. Wyatt intentionally accessed Cunningham's private emails without authorization and obtained protected information.

In its defense, Wyatt first argues that each Defendant, other than Cunningham, lacks standing to assert these claims. However, Wyatt is not totally correct. As a corporation, Viscotek has standing to sue Wyatt for damages stemming from Wyatt's violation of the Federal Computer Fraud and Abuse Act, as the statute criminalizes computer crime that damages individuals and corporations alike. *United States v. Middleton*, 231 F.3d 1207, 1210-12 (9th Cir.2000) (holding the term "individual" as used in the statute that defines "damage" as any impairment that causes loss aggregating at least \$5,000 to one or more individuals is broad enough to include corporations). With respect to the other defendants-Dynapro, Smithson and Haney, Defendants implicitly recognize that there is no standing as they fail to allege, or provide support for, any damages suffered by these defendants.

Next, Wyatt argues its "good faith reliance" on the defense set forth in 18 U.S.C. § 2707(e)-statutory authorization and activity necessarily incident to protection of its rights and property. However, Wyatt fails to identify the statute it relies on for authorization. Further, it fails to proffer an explanation or authority as to how Cunningham's personal email account is Wyatt's "property."

\*8 With respect to the Third Amended Counterclaim, the Federal Computer Fraud and Abuse Act prohibits "knowingly and with intent to defraud, access [ing] a protected computer without authorization, or exceed[ing] authorized access, and by means of such conduct further[ing] the intended fraud and obtain [ing] anything of value ...." 18 U.S.C. § 1030(a)(4). In support of this claim, Defendants contend that Wyatt has admitted it accessed a protected computer without authorization and that Wyatt did so knowingly and with the intent to defraud, and as a result, Wyatt furthered the intended fraud and obtained things of value. As with

the Second Amended Counterclaim, the undisputed facts support Defendants' Third Amended Counterclaim.

Again, in response, Wyatt asserts that Defendants cannot establish an "intent to defraud." However, Wyatt fails to provide any evidence or support for this argument. As Defendants point out, the Computer Fraud and Abuse Act's use of "fraud" in this context simply means "wrongdoing" and not proof of the common law elements of fraud. *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.*, 119 F.Supp.2d 1121, 1125-26 (E.D.Wash.2000) (citing *United States v. Czubinski*, 106 F.3d 1069, 1078 (1st Cir.1997)). Fraud is "simply wronging one in his property rights by dishonest methods or schemes." *Id.*

As set forth above, Wyatt has admitted engaging in the requisite conduct and "wrongdoing." While Wyatt knew its conduct was wrong, it continued to engage in accessing Cunningham's personal communication. In fact, when Wyatt's IT manager informed Geoff Wyatt that the company was accessing Cunningham's personal account, Mr. Wyatt responded, "It doesn't matter." (Jimenez Depo. at 28-29.) Wyatt even changed the email retrieval settings to check for new incoming messages on Cunningham's account.

Finally, as to both claims under the Federal Computer Fraud and Abuse Act, Wyatt contends that Defendants cannot meet the requirement of loss exceeding \$5,000 in value. However, again, Wyatt fails to present any controverting evidence. As such, it remains uncontroverted that Cunningham and Viscotek suffered economic damages in excess of the statutory minimum. (Cunningham Decl., ¶ 20.) Defendants investigated and remedied damage as a result of the unlawful access to the computer system, as well as incurred expenses in restoring and maintaining the effects the violation had on their business. *Creative Computing v. Getloaded.com LLC*, 386 F.3d 930, 935 (9th Cir.2004) (defining "economic damages" as including when a party's money or property are impaired in value or

lost, or when money must be spent to restore or maintain some aspect of the business affected by a violation).

Thus, this Court concludes as a matter of law that Defendants Cunningham and Viscotek are entitled to summary judgment with respect to the Second and Third Amended Counterclaims under the Federal Computer Fraud and Abuse Act.

## 2. Defendants' Fourth Amended Counterclaim under the Stored Communications Act

\*9 In the Fourth Amended Counterclaim, Defendants allege that Wyatt violated the Stored Communications Act by accessing Cunningham's personal email account. The Stored Communications Act, 18 U.S.C. § 2701 et seq., bars unauthorized disclosure of electronic communication in storage at a communications facility. *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072-73 (9th Cir.2004). The Act provides a cause of action against anyone who “intentionally access without authorization a facility through which an electronic communication service is provided ... and thereby obtains, alters, or prevents authorized access to wire or electronic communication while it is in electronic storage.” 18 U.S.C. §§ 2701(a)(1), 2707(a). Actual damages are recoverable for violations of the Stored Communications Act, including any profits made by the violator as a result of the violation. 18 U.S.C. § 2707(c). Punitive damages may be recovered if the violation was willful or intentional. *Id.* In the case of a successful action to enforce liability, courts may award the litigation costs and attorneys' fees. *Id.*

In support of this claim, Defendants contend that Wyatt has admitted it accessed Cunningham's personal email on a private foreign server, that it monitored such personal email account and that it did not obtain Cunningham's authorization to do so. It further contends that through its illegal conduct, Wyatt obtained unlawful access to Viscotek's trade secrets. Again, the undisputed facts support this counterclaim, and Wyatt does not dispute these

facts. Instead, Wyatt seeks to rely on certain defenses.

In response, Wyatt contends that its actions fall under statutory exceptions. First, it claims an exemption as an entity providing communication service since Wyatt is the owner of the computer service. *See* 18 U.S.C. § 2511(3). However, other than this bald assertion, Wyatt presents no evidence that it is an internet service provider or a provider of wire or electronic communication services. *See* 18 U.S.C. § 2510(3) (defining “electronic communication service” as “any service which provides to users thereof the ability to send or receive wire or electronic communications”). Indeed, it is clear that Wyatt does not provide “an electronic communication service to the public.”

Next, Wyatt contends that, as an employer, it was entitled to monitor the communication of its employee, Cunningham, pursuant to 18 U.S.C. § 2511(2)(a). However, the uncontroverted evidence demonstrates Cunningham was never an employee of Wyatt. (Cunningham Decl. ¶¶ 11-13.) Wyatt also argues that it is entitled to a complete defense because it is the owner of the computers and has the right to protect its property and abate nuisance. However, Wyatt has not raised any facts to show that it ever owned and had authorization to access Cunningham's personal email account on a private foreign server.

Finally, Wyatt asserts a defense under 18 U.S.C. § 2511(2)(d): It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or any State.

\*10 18 U.S.C. § 2511(2)(d). Under this statute, then, Wyatt must show that it was a party to the

communication or that one of the parties to the communication had given prior consent to the interception. Wyatt has not done so, and in fact, the evidence shows that Wyatt has admitted it had not obtained Cunningham's permission to access the electronic communication.

Thus, this Court concludes that Wyatt's defenses fail as a matter of law. Consequently, Defendants Cunningham and Viscotek<sup>FN3</sup> are entitled to summary judgment with respect to their Fourth Amended Counterclaim under the Stored Communications Act.

**FN3.** Wyatt again asserts the lack of standing/ damages of each Defendant as an argument. For the same reasons discussed above with respect to Counterclaims 2 and 3, this Court agrees with this argument.

### **3. Defendants' Fifth Amended Counterclaim under the California Computer Data Access and Fraud Act**

In the Fifth Amended Counterclaim, Defendants allege that Wyatt's unauthorized access of Cunningham's personal email account violated the California Computer Data Access and Fraud Act. The California Penal Code proscribes unauthorized access to computer systems, networks, and services and prohibits individuals from, inter alia, altering, damaging, taking, or destroying computer data, software, and programs. [Cal.Penal Code § 502, et seq.](#) An aggrieved party may bring a civil action against the violator for injunctive relief and/or compensatory damages, which shall include any expenditure reasonably and necessarily incurred to verify that a computer system, network, program, or data was not altered, damaged or deleted by the unauthorized access. *Id.* at § 502(e)(1). Punitive damages are recoverable for willful violations. *Id.* at § 502(e)(4). In addition, courts may award prevailing parties their reasonable attorneys' fees. *Id.* at § 502(e)(2).

As explained above, the undisputed facts establish that Wyatt accessed Cunningham's personal email on a private foreign server, that it monitored such personal email account and that it did not have Cunningham's authority to do so.

Again, Wyatt asserts that it has not violated this Act because the Act does not apply to employer access of an employee's computer or a person acting within the scope of employment. *See Cal.Penal Code § 502(h)*. However, as noted above, the uncontroverted evidence demonstrates that Cunningham was never an employee of Wyatt. Wyatt further contends that it is entitled to access and use the computer as an owner and that it has the right to protect its property and abate a nuisance, pursuant to [California Civil Code § 3502](#). However, Wyatt has admitted it never owned and never had authorized access to Cunningham's personal email account on a private foreign server. With respect to abatement, Wyatt has failed to provide any evidence to demonstrate the existence of a nuisance, which is an essential element for an abatement claim.

Thus, based on the above, Defendants Cunningham and Viscotek have established their Fifth Amended Counterclaim as a matter of law and are entitled to summary judgment accordingly.

### **4. Defendants' request for attorneys' fees and punitive damages under the above wiretapping statutes**

\*11 Defendants seek their attorneys' fees and punitive damages under the aforementioned wiretapping statutes.<sup>FN4</sup> They claim they have incurred \$184,538.50 in attorneys' fees following their March 2006 discovery of Plaintiff's wiretapping. They also request that the Court triple this award to \$553,615.50 by adding punitive damages to punish Wyatt.

**FN4.** "Defendants" in this subsection will refer to Defendants Cunningham and Viscotek only, as these are the 2 defendants

who are granted summary judgment, as explained herein.

As set forth above, Defendants are entitled to an award of attorneys' fees under the applicable statutes. In support of their request, Defendants submit the Declaration of Carlo Van den Bosch. In opposition, Wyatt fails to respond to Defendants' request for attorneys' fees. While this Court concludes that Defendants are entitled to attorneys' fees, this Court cannot presently set the amount pursuant to *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir.1975). Defendants submit their billing statements; however, Defendants fail to discuss the hourly rates of the attorneys, and the billing statements lack any billing entries or description of the hours billed. This Court notes that the amount sought by Defendants appears reasonable, but without the requisite information, this Court cannot make such a determination. Therefore, Defendants are ordered to submit the necessary documents responsive to this discussion, along with a Proposed Order Regarding Attorneys' Fees, within 14 days of the date of this Order, and this Court will set the amount of attorneys' fees thereafter.

With respect to punitive damages, this Court agrees that under the applicable statutes, Defendants are entitled to such damages given Wyatt's ongoing and knowing interception of Cunningham's personal email. Furthermore, Wyatt has failed to proffer any justification for, or denial of, its actions. Therefore, this Court awards Defendants Cunningham and Viscotek punitive damages in the amount of \$100,000.00.<sup>FN5</sup>

**FN5.** Defendants also request terminating sanctions pursuant to each of the wiretapping; statutes which Defendants claim "provides the Court considerable discretion in tailoring appropriate remedies." They argue that because of the unapologetic demeanor of Plaintiff's principals as well as Plaintiff's apparent use of this litigation as a competitive hammer over a smaller company, the appropriate remedy is the dis-

missal, with prejudice, of Plaintiff's claims against them. This Court declines to grant terminating sanctions, and in any event, as set forth below, this Court concludes that summary judgment is warranted.

### **5. Defendants' Sixth Amended Counterclaim for trade secret misappropriation**

In their Sixth Amended Counterclaim, Defendants assert a claim under the Uniform Trade Secrets Act, alleging that Wyatt misappropriated Defendants' trade secrets.

The Uniform Trade Secrets Act authorizes injunctions against actual or threatened misappropriation of trade secrets. *Cal. Civ.Code* § 3426, et seq. Misappropriation is defined as the acquisition of a trade secret of another by someone "who knows or has reason to know the trade secret was acquired by improper means." *Id.* at § 3426.1. A party misappropriates a trade secret when it used improper means to acquire knowledge of the trade secret and discloses or uses it without express or implied consent. *Id.*

Defendants argue that the emails Wyatt did produce show that Wyatt accessed communications showing details of Viscotek's design progress, concerning its vendors and customers, and concerning the technical specifications for Viscotek's DLS instrument. More specifically, they provide the following:

Wyatt accessed a January 19, 2005 email from Jixiang Zhu to Cunningham, with an attachment entitled visco.pdf. This file contains proprietary and confidential details of Viscotek's product development.

\*12 Wyatt accessed a January 20, 2005 email from Paul Clarke (Viscotek Europe's Managing Director) to Cunningham and other Viscotek employees disclosed the preliminary data sheet for what would become Viscotek's DLS product.

Wyatt also accessed a January 24, 2005 email from

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Smithson to Clarke and Cunningham, discussing a potential new customer, MicroSens.

Wyatt accessed a January 25, 2005 email from Cunningham to Clarke discussing one of the company's vendors, South Bucks Metalwork in High Wycombe.

The above facts are not disputed by Wyatt. Instead, in opposition, Wyatt argues that Viscotek's president and sole designee under [Federal Rule of Civil Procedure 30\(b\)\(6\)](#) testified he was not aware of any evidence to support Defendants' trade secret allegations. Wyatt also argues that Viscotek suppressed documents relating to its misappropriation. In reply, Defendants assert that both of these arguments are red herrings. This Court agrees with Defendants.

Wyatt fails to controvert the evidence establishing that it intercepted Viscotek's trade secrets relating to its DLS instrument by improper means and without Viscotek's consent. With respect to Viscotek's designee's deposition, Defendants state that Wyatt produced, for the first time, some of the Cunningham emails (those listed above) at the mediation in March 2006, and that thereafter, Wyatt produced more emails but pursuant to an "attorneys' eyes only" designation. As such, this Court agrees with Defendants that under these circumstances, the corporate designee would not have known about the content of the intercepted emails. With respect to Wyatt's "suppression of evidence" allegation, Wyatt has in its possession all of the emails it claims Viscotek failed to produce. It has refused to provide the remainder unless Cunningham waives his privacy rights. (Sirias Decl., Exh. 5.) <sup>FN6</sup> As such, Wyatt's asserted arguments fail as a matter of law.

<sup>FN6</sup>. Wyatt also argues that "Viscotek is estopped to deny its corporate form and separate existence from Viscotek Europe." Other than this argument, though, Wyatt fails to explain its application or relevance to the issue presented.

Based on the undisputed facts, this Court concludes that all Defendants are entitled to summary judgment with respect to their Sixth Amended Counterclaim for trade secret misappropriation.

## 6. Wyatt's Fifth Claim for Misappropriation of Trade Secrets

In its Complaint, Wyatt brings a claim for trade secret misappropriation against Defendants. It alleges that Defendants misappropriated technical trade secrets inherent in (1) the DLS software that Wyatt acquired from Proterion, called the Dynamics software, (2) undefined technical specifications from the Dynapro instrument, and/or (3) specialty tools and fixtures used in the development of DLS instruments. It also alleges that Defendants misappropriated non-technical trade secrets inherent in (1) the list of Dynapro users and (2) a list of Dynapro component suppliers.

In seeking summary judgment with respect to this claim, Defendants contend that Plaintiff has failed to identify the trade secret with reasonable particularity. They further argue that the undisputed facts establish that Defendants did not misappropriate any alleged trade secrets. This Court agrees with Defendants.

\*13 It is undisputed that Defendants did not use any code from the Dynamics software in the development of a new DLS product. (Cunningham Decl., ¶ 16; Smithson Decl., ¶ 14; Collins Depo. at 126.) It is undisputed that Viscotek's DLS instrument has different technical specifications from those of the Dynapro instrument. (Trainoff Dep. at 35; Cunningham Decl., ¶ 13; Smithson Decl., ¶ 11.) It is undisputed that Defendants do not possess the specialty tools and fixtures identified in Exhibit 137, which remained at the Proterion offices following its dissolution. (Cunningham Decl., ¶ 15; Smithson Decl., ¶ 13.) It is undisputed that Smithson obtained a 2003 list of Dynapro users from a third party, Marketing By Dave Dolak. (Smithson Decl., ¶ 10.) Finally, it is undisputed that the Viscotek DLS and



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Dynapro only share the following component sources: (1) Alango as the source of Dynals software; (2) PerkinElmer for the photon counter; (3) Correlator.com for the correlator; and (4) OZ Optics for the laser. (Cunningham Decl., ¶ 17; Smithson Decl., ¶ 15.) Alango publicly advertises the fact that Wyatt uses its commercial Dynals software. (Cunningham Decl., ¶ 18.) PerkinElmer is widely known in the DLS industry as a supplier of photon counters. (Cunningham Decl., ¶ 19; Smithson Decl., ¶ 16; Collins Depo. at 120.) Correlator.com is widely known in the DLS industry as a supplier of correlators. (Cunningham Decl., ¶ 19; Smithson Decl., ¶ 16; Collins Depo. at 104.) OZ Optics is widely known in the DLS Industry as a supplier of laser optics. (Cunningham Decl., ¶ 19; Smithson Decl., ¶ 16; Collins Depo. at 116.)

These undisputed facts are fatal to Wyatt's misappropriation claim. The uncontroverted evidence demonstrates that any information received by Viscotek was either in the public domain or received by a third party. Wyatt fails to offer any facts which create a genuine issue of material fact. As a result, this Court concludes that Defendants are entitled to summary judgment with respect to Wyatt's trade secret (fifth) claim.

## 7. Wyatt's First and Second Claims under the Lanham Act

Wyatt asserts claims for trademark infringement and false representation under the "unfair competition" prong of the Lanham Act, 15 U.S.C. § 1125(a). In support, it alleges: (1) Defendants' possession of the proteinsolutions.com domain names constitutes infringement of its purported rights in the mark PROTEIN SOLUTIONS; (2) Defendants' use of the terms PROTEIN SOLUTIONS and DYNAPRO on sales literature and brochures infringes upon its trademark rights; and (3) the following statement posted on Viscotek's website is deceptive: "Exclusive access to the patented technology means that Viscotek is the only company who will be able to supply all the parts to repair

these instruments."

### a. The domain name

First, as Defendants point out, to the extent that Wyatt's infringement claims concern Internet domain names, they should have been asserted under the Anticybersquatting Consumer Protection Act of the Lanham Act, 15 U.S.C. § 1125(d), which traditionally governs such matters. Under the ACPA, Wyatt would have to prove "bad faith" on the part of Defendants, and Wyatt has made no such showing. *See* 15 U.S.C. § 1125(d)(1)(A). In any event, an infringement claim requires that the defendant use the domain name as a mark "in commerce"-i.e., as a brand. 15 U.S.C. § 1125(a) (1). Here, Wyatt fails to produce evidence that Viscotek has used the terms "Protein Solutions" or "DynaPro" to brand any products. Furthermore, the evidence shows that Proterion did not own the proteinsolutions.com domain name when Wyatt bought the assets. (P. Wyatt Depo. at 156.) Instead, the name was registered by Smithson. (Smithson Decl., ¶ 5.)

### b. Sales literature and brochures

\*14 Wyatt complains about Viscotek's statement of its use of patented technology that was "formerly used by Protein Solutions in its range of successful DynaPro DLS Instruments." As Defendants respond, such use constitutes "nominative" fair use of Wyatt's purported trademarks. *See New Kids on the Block v. News America Pub., Inc.*, 971 F.2d 302, 308 (9th Cir.1992). Wyatt also complains about Viscotek's statement that it will offer support and repair services to existing customers who have old Protein Solutions instruments. However, Wyatt has failed to show that such statement is not true. Indeed, such statement also constitutes a "nominative" fair use of the purported trademarks.

### c. The website statement

As set forth above, Wyatt also bases its Lanham

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Act claim on the following statement which it claims is misrepresented by Defendants: “Exclusive access to the patented technology means that Viscotek is the only company who will be able to supply all the parts to repair these instruments.”

A claim under the Lanham Act for false advertising requires proof that: (1) the advertisement is literally false or (2) although the advertisement is literally true, it is likely to deceive or confuse consumers. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir.1997). Defendants argue that because this statement is literally true, Wyatt must actually prove that consumers perceive this statement as representing Wyatt is not permitted to sell or service DLS products. In response, however, Wyatt offers no evidence of any consumer's perception. Furthermore, Wyatt has failed to controvert the fact that the statement has been removed from Viscotek's website since April 2005.

Finally, this Court notes that Wyatt's opposition to the challenge to its Lanham Act claims consists mainly of a recitation of the law and arguments. The only evidence it relies on are 4 exhibits (see Exhibits 21-24 attached to Frisenda Declaration); however, these exhibits fail to provide the requisite evidence discussed above to sustain the Lanham Act claims as a matter of law. Defendants are therefore entitled to summary judgment as to the Lanham Act (first and second) claims.

#### 8. Wyatt's Tenth Claim for conversion

Defendants seek summary judgment with respect to Wyatt's Tenth Claim for conversion. An action for conversion properly lies where there is a wrongful exercise of dominion over the property of another. *Burlesci v. Petersen*, 68 Cal.App.4th 1062, 1065, 80 Cal.Rptr.2d 704 (1998). To establish a claim for conversion, a plaintiff must demonstrate: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. *Id.* at 1066, 80 Cal.Rptr.2d 704.

Defendants argue that this claim fails because Wyatt does not identify an asset it lawfully acquired that was converted. With respect to the domain names, Defendants argue that they never belonged to Wyatt.

\*15 This Court concludes that Wyatt has failed to offer any facts in support of its conversion claim. Instead, the undisputed facts establish that Smithson provided to Wyatt the items which Wyatt claimed had been converted. (Smithson Decl., ¶ 17.) Furthermore, undisputed facts show that the domain names belong to Smithson, as they always have. (Smithson Decl., ¶ 5.) As such, Wyatt's conversion claim fails as a matter of law because it does not identify an asset it lawfully acquired that was converted. Defendants are therefore entitled to summary judgment with respect to this (tenth) claim.

#### 9. Wyatt's Sixth and Eighth Claims under the California Business and Professions Code

Wyatt asserts a claim of unfair competition and unfair business practices pursuant to the [California Business and Professions Code § 17200, et seq.](#) Defendants seek summary judgment as to these claims and contend that these claims fail with the Lanham Act claims.

State common law claims of unfair competition and actions pursuant to the [California Business and Professions Code § 17200](#) are “substantially congruent” to claims made under the Lanham Act. *Cleary v. News Corp.*, 30 F.3d 1255, 1262-63 (9th Cir.1994). As both parties acknowledge, under both types of claims, the test is whether the public is likely to be deceived or confused by the similarity of the marks. *Id.*

Wyatt baldly asserts that “Defendants are passing off their products as those of Wyatt in a manner likely to cause consumer confusion.” However, as explained above, Wyatt fails to support this assertion with any evidence. Thus, for the same reasons

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explained above with respect to the Lanham Act claims, this Court concludes that Defendants are entitled to summary judgment with respect to these (sixth and eighth) claims.

#### **10. Wyatt's Third and Ninth Claims for intentional interference with prospective economic advantage and accounting**

In order to sustain its claim for interference with prospective economic advantage, Wyatt must prove that: (1) an economic relationship existed between Wyatt and a third party, containing a probable future economic benefit; (2) Defendants knew of this economic relationship; (3) Defendants intentionally engaged in conduct designed to interfere with or disrupt the relationship; (4) Defendants actually disrupted the relationship; and (5) Wyatt suffered damages as a result. *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825, 830 (9th Cir.2001). The claim requires an independent wrongful act by Defendants. *Korea Supply Company v. Lockheed Martin Corporation*, 29 Cal.4th 1134, 1158, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003). As for Wyatt's accounting claim, there must be "a relationship between the parties or other circumstances that require an accounting in equity" and "that an unknown balance is due that cannot be ascertained without an accounting, the means of which are within the knowledge of the defendant." California Forms of Pleading and Practice, Chapter 7 (Matthew Bender 2004).

\*16 In seeking summary judgment, Defendants argue that Wyatt has failed to allege, or present evidence of, the requisite factors. This Court agrees with Defendants.

As a matter of law, this Court concludes that Wyatt's prospective economic advantage claim fails. Wyatt presents no evidence of an economic relationship between Wyatt and a third party, containing a probable future economic benefit of which Defendants had knowledge, that Defendants actually disrupted the relationship, and that Wyatt

suffered damages. See *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825, 830 (9th Cir.2001) (discussing requisite elements of proof of a claim for prospective economic advantage). Similarly, Wyatt's accounting claim fails as a matter of law. Wyatt has not alleged a relationship between itself and each separate Defendant that would justify an accounting, or any duty owed by any of Defendants to Wyatt. Thus, Defendants are entitled to summary judgment with respect to these (third and ninth) claims.

#### **11. Dismissal of Max Haney**

Defendants ask this Court to dismiss Max Haney, President of Viscotek, from the action because there is no evidence to support alter ego liability. They state that Haney has never directed Viscotek to use any information Wyatt alleges constitutes a trade secret in this litigation. (Haney Decl., ¶ 4.)

In order for Haney to be individually liable for any of the claims asserted against Viscotek, the burden of proof lies with Wyatt to demonstrate the corporate entity was disregarded. *Autmotriz Del Golfo De California S.A. de C.V. v. Resnick*, 47 Cal.2d 792, 296-97 (1957). Here, Wyatt summarily states that "Haney advised and consented to Viscotek's trademark infringement." However, it offers no evidence with respect to alter ego liability.<sup>FN7</sup> As such, this Court concludes that dismissal of Haney is warranted as to all claims.

FN7. Furthermore, Defendants are entitled to summary judgment with respect to the trademark infringement claims.

### **III. Conclusion**

Accordingly, this Court hereby:

**Grants in Part** Defendants' Motion for Summary Judgment as follows:

**Granted** as to the Second, Third, Fourth and



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Fifth Amended Counterclaims in favor of Defendants Cunningham and Viscotek only;

Attorneys' fees are awarded in an amount to be determined;

Punitive damages are awarded in the amount of \$100,000.00;

**Granted** as to the First and Sixth Amended Counterclaims in favor of all Defendants;

**Granted** as to Wyatt's First, Second, Third, Fifth, Sixth, Eighth, Ninth and Tenth Claims in favor of all Defendants; and

**Granted** as to Max Haney as to all claims.

**Denies** Plaintiff's Motion for Summary Judgment on Defendant Viscotek's Sixth Amended Counterclaim for Misappropriation of Trade Secrets; and

**Denies** Plaintiff's Motion for Summary Judgment on Defendants' Second, Third, Fourth and Fifth Amended Counterclaims.

As noted above, Plaintiff voluntarily had dismissed the Fourth, Seventh and Eleventh Claims. As such, based on the determinations herein, judgment in favor of Defendants on all remaining claims and all counterclaims is warranted. Defendants are ordered to prepare and lodge Proposed Findings of Fact and Conclusions of Law and a Proposed Judgment in accordance with this Order.

**\*17 IT IS SO ORDERED.**

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