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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DOCMAGIC, INC., a California corporation

No. 3:09-CV-4017-MHP

Plaintiff,

MEMORANDUM & ORDER

v.

ELLIE MAE, INC., a Delaware corporation,

**Re: Defendant’s Motion for Partial
Summary Judgment; Plaintiff’s Application
for a Temporary Restraining Order**

Defendant.

Plaintiff DocMagic, Inc. (“DocMagic”) brought this action against Ellie Mae, Inc. (“Ellie Mae”) alleging, *inter alia*, that Ellie Mae denied DocMagic access to Ellie Mae’s online transaction network and loan origination software (“LOS”) in order to monopolize the market for online loan document preparation services (“DPS”). Now before the court is: (1) Ellie Mae’s motion for summary judgment on the First (monopoly leveraging), Second (refusal to deal) and Third (denial of access to an essential facility) Claims for Relief in DocMagic’s Second Amended Complaint; and (2) DocMagic’s application for a temporary restraining order. Having considered the parties’ arguments and submissions, and for the reasons discussed below, the court enters the following memorandum and order.

1 BACKGROUND

2 As required in considering motions for summary judgment, the following facts are set forth
3 in terms most favorable to DocMagic, except where noted otherwise.

4 I. Loan preparation

5 Loan preparation typically begins when a loan originator, such as a mortgage broker or a
6 lender, enters data about the prospective loan into a computer program known as a LOS. Second
7 Am. Compl. (“SAC”) ¶¶ 29-30. The advantage of using an LOS is that once the information has
8 been entered into the LOS, the LOS can provide that data in an electronic format to compatible
9 computer programs, making it unnecessary to engage in the time-consuming and error-prone process
10 of manually re-keying the loan information. *Id.* ¶ 30. Large lenders, like Bank of America and
11 Wells Fargo, develop their own proprietary LOSs. Docket No. 113 (Iannitti Decl.) ¶ 3. The rest of
12 the market uses third-party LOSs, which are produced by a number of different companies. *Id.*

13 Settlement service providers, or “vendors,” can use the electronically-stored data in the LOS
14 to perform the various tasks necessary to actually prepare a loan. The services provided by these
15 vendors include, for example, DPS, appraisals, credit reports, fraud reports, flood information and
16 title and escrow services. *Id.* ¶ 4. However, a vendor will only be able to use the data in the LOS if
17 the LOS and the vendor’s own programs are compatible. In order to connect a loan originator to a
18 vendor and ensure that the loan originator’s LOS is compatible with the vendor’s programs,
19 corporations set up online transaction networks. These networks permit loan originators to find and
20 hire vendors providing the services they need. Docket No. 96 (Roof Decl.) ¶ 4. A network can also
21 automatically convert the data in the loan originator’s LOS into a format that the vendor can use.
22 SAC ¶¶ 21-22. Loan originators usually can join and use a network for free, whereas vendors
23 typically pay a fee to the network operator for every transaction the vendor completes over the
24 network. If a vendor is not connected to a network, it is more difficult to achieve compatibility
25 between the LOS and the vendor’s programs. *Id.* ¶¶ 21-26.

1 II. DocMagic, Ellie Mae and their contractual agreements

2 Ellie Mae is an LOS developer, and the creator of an LOS called Encompass. Roof Decl. ¶

3 3. According to DocMagic, Ellie Mae's share of the third-party LOS market is greater than 50%,
4 and probably greater than 60%. SAC ¶ 105. Ellie Mae contests these figures. Ellie Mae is also the
5 owner and operator of ePASS,¹ an online transaction network of the type described above. Roof
6 Decl. ¶ 3. ePass allows data already entered in a LOS to be seamlessly transferred to and used by
7 participating vendors. Iannitti Decl. ¶ 4. According to DocMagic, Ellie Mae's share of the network
8 market is as much as 60%. SAC ¶ 99.

9 DocMagic is a vendor providing DPS to mortgage lenders. Iannitti Decl. ¶ 2. Nearly all of
10 DocMagic's clients use an LOS to manage mortgage loan transactions. Ellie Mae's product,
11 Encompass, is the leading LOS product in the United States. *Id.* ¶ 3.

12 In November 2003, Ellie Mae and DocMagic entered into an Electronic Bridge Agreement
13 ("Bridge Agreement"). Docket No. 109 (Joint Statement of Undisputed Facts ("JSUF")) ¶ 1.
14 Pursuant to that agreement, DocMagic became a vendor on ePASS. *Id.* ¶ 2. In exchange for access
15 to the network, DocMagic agreed to pay a fee of \$1, \$2, or \$3 per transaction that it made over
16 ePASS, depending on the monthly volume of DocMagic's transactions. *Id.* ¶ 3. Effective
17 September 1, 2006, DocMagic and Ellie Mae amended the Bridge Agreement. *Id.* ¶ 4. The
18 amendment provided that the Bridge Agreement would automatically renew each year, except that it
19 could be terminated 90 days before the beginning of the next automatic renewal. Price terms were
20 also adjusted such that DocMagic agreed to pay a fee based on a sliding scale of \$1 or \$3 per
21 transaction, depending on the monthly volume of DocMagic's transactions. *Id.* In September 2006,
22 Ellie Mae and DocMagic also entered into a Reseller Agreement. Roof Decl. Exh. E. Under the
23 Reseller Agreement, Ellie Mae was permitted to "resell" DocMagic closing document services under
24 Ellie Mae's brand names. *Id.* ¶¶ 2.1, 2.6.

25 On April 27, 2009, Ellie Mae sent DocMagic notice terminating the Reseller Agreement
26 JSUF ¶ 8; Roof Decl., Exh. F. On April 28, DocMagic likewise sent Ellie Mae notice terminating

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1 the Reseller Agreement. JSUF ¶ 9; Roof Decl., Exh. G. On May 21, Ellie Mae sent DocMagic
2 notice terminating the Bridge Agreement stating in relevant part:

3 “Ellie Mae, Inc. is providing the required 90 days’ notice to terminate our Electronic Bridge
4 Agreement...This termination will be effective on August 30, 2009, and on that
5 day...[DocMagic] will stop using the Electronic Bridge. We are taking this action because the
6 transaction fee amounts that you are currently paying are significantly discounted from our
normal fees. If you would like to discuss this, please let me know...Do not hesitate to contact
me if you have any questions or comments.”

7 Roof Decl., Exh. H.

8 The parties’ characterizations of why these contracts were terminated and the events that
9 followed diverge dramatically. Ellie Mae contends that it invited DocMagic to negotiate a revised
10 agreement with new transaction fees in the May 21 Bridge Agreement Termination letter. Roof
11 Decl. ¶ 11 (“If you would like to discuss this, please let me know”). Ellie Mae Senior Vice Present
12 Richard Roof states that Ellie Mae was willing to negotiate a new Bridge Agreement with DocMagic
13 in 2009. Roof Decl. ¶ 12. Ellie Mae argues that in entering the 2003 and 2006 Bridge Agreements
14 with DocMagic, Ellie Mae extended favorable price terms to DocMagic only in the context of the
15 parties’ “broader” relationships during the periods covered by these agreements, which included
16 Ellie Mae’s access to DocMagic’s DPS product under the Reseller Agreement. Roof Decl. ¶ 8.
17 Ellie Mae alleges that DocMagic, rather than renegotiating a reasonable fee, filed this lawsuit.

18 Under DocMagic’s version of the events, Ellie Mae attempted to drive DocMagic out of the
19 document preparation business so that it could monopolize the DPS market with its own product,
20 Ellie Mae Docs. DocMagic alleges that Ellie Mae denied it access to customers using the
21 Encompass LOS, forced DocMagic off ePASS and forbade Encompass users from connecting to
22 DocMagic through other means. SAC ¶ 4. DocMagic contends that Ellie Mae terminated the
23 Bridge Agreement without any warning or prior discussion, differentiating it from the manner in
24 which Ellie Mae previously conducted business with respect to ePASS. Iannitti Decl. ¶¶ 11-12.
25 According to DocMagic, whenever price-related issues arose in the parties’ prior business
26 relationship, Ellie Mae always contacted DocMagic to resolve these issues. *Id.* ¶ 11. Specifically,
27 when the parties renegotiated the original Bridge Agreement in 2006, Ellie Mae neither sent to
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1 DocMagic a termination letter nor threatened to terminate the Bridge Agreement. *Id.* DocMagic
2 further asserts that the May 21 Bridge Termination letter did not constitute an offer to remain on
3 ePass. *Id.*

4 DocMagic and Ellie Mae discussed the May 21 Bridge Termination letter during a June 5,
5 2009 telephone conversation. Iannitti Decl. ¶ 13. Ellie Mae alleges that it invited DocMagic to
6 negotiate by offering DocMagic CEO Don Iannitti the opportunity to remain on ePASS at the
7 prevailing standard price of \$6.00 per transaction for closing document vendors. Roof Decl. ¶¶ 12-
8 13. Ellie Mae claims DocMagic indicated that it would “get back” to Ellie Mae regarding Ellie
9 Mae’s alleged offer. *Id.*

10 On the other hand, DocMagic tells a different story. DocMagic claims that in the June 5
11 telephone conversation Ellie Mae neither expressed any interest in doing business with DocMagic,
12 nor extended an offer to do business. *Id.* ¶ 14. Ellie Mae only discussed their supposed “normal
13 fee” of \$6.00 per transaction in response to a question from DocMagic, and DocMagic understood
14 from the June 5 telephone conversation that Ellie Mae did not intend to allow DocMagic to remain
15 on ePASS regardless of price. *Id.* ¶¶ 15-17. Contrary to Ellie Mae’s assertion, DocMagic contends
16 that it never promised to “get back” to Roof because Ellie Mae had left DocMagic with the clear
17 understanding that Ellie Mae would not enter into a new Bridge Agreement at any price. Iannitti
18 Decl. ¶ 15. DocMagic also asserts that “confidential” internal Ellie Mae emails suggest that Ellie
19 Mae intended to terminate its long-standing relationship with DocMagic regardless of price. Docket
20 No. 112 (Sabri Decl.), Exh. E (filed under seal).

21 III. Post-termination events

22 After Ellie Mae terminated the Bridge and Reseller Agreements, DocMagic pursued
23 alternative means of providing document preparation services to Encompass users. In 2008,
24 DocMagic had introduced a program called DocMagic XL, which operated on the workstations of
25 DocMagic clients and allowed them to transfer data from LOS, including but not limited to
26 Encompass. Docket No. 61(Iannitti TRO Decl.) ¶ 8. DocMagic XL interacted with Encompass’
27 Software Development Kit (“SDK”)— an application suite that allows Ellie Mae customers to
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1 customize their Encompass experience—in order to pull mortgage data from Encompass. *Id.* In
2 August 2009, Ellie Mae blocked DocMagic XL from being able to interact with the SDK. *Id.* ¶ 10.
3 Also in August 2009, Ellie Mae combined the license agreements for the Encompass software and
4 the SDK to expressly prohibit customers from using the SDK in order to transfer data from
5 Encompass to third-parties without prior written approval. *See* Docket No. 72 (Roof TRO Decl.) ¶
6 27; Docket No. 74 (Corr TRO Decl.) ¶ 7 & Exh. A § 1.3.

7 In late August 2009, DocMagic developed another work-around. It used a customization
8 feature of the Encompass Banker SDK called “Input Form Builder” to create the “DocMagic Input
9 Form,” which would collect the relevant fields of the client’s data from Encompass and transfer that
10 data from the client’s computer to DocMagic. *Id.* ¶ 11; Docket No. 64 (Morford TRO Decl.) ¶ 2.
11 For approximately one year, there were no reported problems using DocMagic Input Form in
12 conjunction with Encompass, and as of August 2010, over 168,000 transactions had been processed
13 using the DocMagic Input Form. Morford TRO Decl. ¶ 3; Docket No. 62 (Garza TRO Decl.) ¶ 3.

14 On August 24, 2010, however, a DocMagic client reported to DocMagic technical support
15 that when it tried to use DocMagic Input Form with an upgraded version of Encompass Banker, it
16 received an error message indicating that use of the form was not permitted within Encompass.
17 Garza TRO Decl. ¶ 4. DocMagic spent nearly a month working with its clients to regain access to
18 Encompass, which it eventually did by removing all internal references to DocMagic from the
19 DocMagic Input Form. *Id.* ¶ 5-6. Only a few days later on October 2, 2010, however, DocMagic
20 was informed that its client again was receiving an error message in Encompass prohibiting use of
21 the revised form. *Id.* ¶ 7. DocMagic has been unable to develop a further solution. *Id.* As of
22 October 8, 2010, DocMagic has identified six clients who have been unable to use the DocMagic
23 Input Form to access their data in Encompass and accordingly use DocMagic’s services. *Id.* ¶¶ 7-13.
24 DocMagic claims that its inability to access client data through Encompass (1) threatens the viability
25 of its business, (2) harms its reputation as a timely, trustworthy provider of document preparation
26 services, and (3) interferes with its clients’ ability to close loans and put a roof over their families’
27 heads. Iannitti TRO Decl. ¶¶ 16-19.

1 IV. Procedural History

2 On August 28, 2009, DocMagic filed this action alleging five claims for relief for antitrust
3 violations, unfair competition, interference with contractual relationships, and interference with
4 prospective economic advantage. Docket No. 1 (Complaint) ¶¶ 31-63. On October 6, 2009, Ellie
5 Mae filed a Counterclaim alleging five claims for relief for copyright infringement, violation of the
6 Comprehensive Computer Data Access and Fraud Act, intentional interference with contractual
7 relationships, breach of contract, and unfair competition. Docket No. 13 (Counterclaim) ¶¶ 25-60.
8 On May 5, 2010, DocMagic filed an Amended Complaint asserting nine additional claims for relief.
9 Docket No. 38 (First Amended Complaint) ¶¶ 111-252. Ellie Mae filed an Amended Counterclaim
10 on April 26, 2010, alleging four additional claims for relief. Docket No. 34 (First Amended
11 Counterclaim) ¶¶ 44-104.

12 On October 8, 2010, DocMagic filed an application for a Temporary Restraining Order
13 (“TRO”) which would require Ellie Mae to reverse its measures to prevent the use of the DocMagic
14 Input Form, allow Encompass users to transfer data to DocMagic and otherwise cease interfering
15 with Ellie Mae clients’ use of DocMagic services. Docket No. 59. As the bases for the TRO,
16 DocMagic argued that it was likely to succeed on its Ninth Claim for Relief for Interference with
17 Prospective Economic Advantage and on its Thirteenth Claim for Relief under California Business
18 and Professions Code Section 17200. On October 12, 2010, this court dismissed six of DocMagic’s
19 claims with leave to amend, two of DocMagic’s claims without leave to amend, and five of Ellie
20 Mae’s counterclaims with leave to amend. *See* Docket No. 66; *DocMagic, Inc. v. Ellie Mae, Inc.*, —
21 F. Supp. 2d —, 2010 WL 3987495 (N.D. Cal. Oct. 12, 2010) (Patel, J.). The court dismissed the
22 Ninth and Thirteenth Claims for Relief without prejudice, and the TRO hearing was vacated. *See*
23 Docket Nos. 66, 76. On October 22, 2010, DocMagic filed a Second Amended Complaint. *See*
24 Docket Nos. 78, 89. Ellie Mae filed its Answer and Second Amended Counterclaims on November
25 5, 2010. Docket Nos. 91, 92. Ellie Mae now moves for summary judgment on the First (monopoly
26 leveraging), Second (refusal to deal) and Third (denial of access to an essential facility) Claims for
27 Relief in DocMagic’s Second Amended Complaint. After further briefing a hearing on the TRO was
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1 reset for February 28, 2011 at the same time as the hearing on Ellie Mae’s motion for partial
2 summary judgment.

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4 LEGAL STANDARD

5 I. Summary Judgment

6 Summary judgment may be granted only when, drawing all inferences and resolving all
7 doubts in favor of the non-moving party, there are no genuine issues of material fact and the moving
8 party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see generally Anderson v.*
9 *Liberty Lobby, Inc.*, 477 U.S. 242, 247-55 (1986). A fact is “material” if it may affect the outcome
10 of the proceedings, and an issue of material fact is “genuine” if the evidence is such that a
11 reasonable jury could return a verdict for the non-moving party. *Id.* at 248. The court may not make
12 credibility determinations. *Id.* at 255. The moving party bears the burden of identifying those
13 portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of
14 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Once the moving party meets its initial
15 burden, the non-moving party must go beyond the pleadings and, by its own affidavits or discovery,
16 set forth specific facts showing that there is a genuine issue for trial. Fed R. Civ. P. 56(e); *see*
17 *Anderson*, 477 U.S. at 250.

18 II. TRO/Preliminary Injunction

19 A plaintiff seeking a TRO or a preliminary injunction “must establish that he is likely to
20 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
21 that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*
22 *v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008); *see Stuhlberg Int’l Sales Co.*
23 *v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that the TRO and preliminary
24 analyses are “substantially identical”). A TRO is an “extraordinary remedy that may only be
25 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 129 S. Ct. at 376.

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1 DISCUSSION

2 I. Summary Judgment

3 Ellie Mae moves for summary judgment on DocMagic’s First (monopoly leveraging),
4 Second (refusal to deal) and Third (denial of access to an essential facility) Claims for Relief. Ellie
5 Mae argues that there is no genuine dispute that it offered DocMagic access to ePass at a higher, yet
6 reasonable rate and therefore that it did not refuse to deal with DocMagic. It is undisputed that the
7 First, Second and Third Claims for Relief fundamentally depend on whether Ellie Mae refused to
8 deal with DocMagic by refusing to renegotiate the Bridge Agreement. DocMagic’s own pleadings
9 predicate its Sherman Act claims on a purported refusal to deal. SAC ¶ 119 (stating Ellie Mae
10 “refus[ed] to deal” with DocMagic as part of First Claim for Relief); ¶ 143 (stating Ellie Mae
11 “refused to deal with DocMagic to permit it access to the ePASS Network” as part of the Second
12 Claim for Relief); ¶¶ 155, 160 (referring to “Ellie Mae’s anticompetitive refusal to allow DocMagic
13 access to customers via the ePASS Network” and Ellie Mae’s decision to deny “DocMagic access
14 to... the ePASS Network” as part of the Third Claim for Relief); *See also* Docket No. 79
15 (DocMagic’s Proposed Jury Instructions) at 3 (claim of denial of an essential facility requires proof
16 that Ellie Mae refused to grant DocMagic reasonable access to the ePASS network), 4 (DocMagic
17 must prove that “Ellie Mae refused to deal with DocMagic” to prove the Second Claim for Relief).

18 A cognizable refusal to deal for purposes of antitrust law, however, need not be “outright.”
19 An “offer to deal with a competitor only on unreasonable terms and conditions can amount to a
20 practical refusal to deal.” *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir.
21 2004). A practical refusal to deal requires that a party make an offer on such unreasonable terms
22 that it amounts to no offer at all. *Id.* A mere change in price generally is not a practical refusal to
23 deal. *Id.* at 1126. Further, there is no practical refusal to deal where the price structure in question
24 was in place prior to any alleged competition, and where it reflects the standard price that the
25 defendant charges in the marketplace. *Id.* at 1133-34.

26 Businesses are generally free to choose the parties with whom they will deal, as well as the
27 prices, terms, and conditions of that dealing. *United States v. Colgate & Co.*, 250 U.S. 300, 307
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1 (1919). However, in limited circumstances a firm’s unilateral refusal to deal with its rivals can give
2 rise to antitrust liability. *Verizon Comm’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S.
3 398, 408 (2004) (refusal to cooperate with rivals can, in “some circumstances,” constitute
4 anticompetitive conduct in violation of the Sherman Act); *see also Aspen Skiing Co. v. Aspen*
5 *Highlands Skiing Corp.*, 472 U.S. 585, 608-611 (1985). For example, in *Aspen Skiing* the defendant
6 owned three of four Aspen skiing areas, while the plaintiff owned the fourth skiing area. For many
7 years the plaintiff and defendant had cooperated in the issuance of a joint, multiple-day, all-area ski
8 ticket. *Id.* at 593-94. After demanding a greater share of the proceeds, the defendant canceled the
9 joint ticket. The plaintiff, concerned that skiers would bypass its mountain absent a joint offering,
10 unsuccessfully pursued various measures to recreate the joint ticket. *Id.* Highlighting that the
11 defendant sought to reduce competition over the long run by harming its smaller competitor, the
12 Supreme Court found that the defendant violated the Sherman Act, § 2. *Id.* at 608. The Court found
13 determinative the fact that defendant “refused to sell [the plaintiff] any lift tickets, either at the tour
14 operator’s discount or at retail,” despite that plaintiff pursued a plethora of “desperate measures” in
15 an attempt to deal with the defendant. *Id.* at 593-94.

16 A. Refusal to Deal

17 The court first considers whether Ellie Mae refused to deal with DocMagic in 2009. Ellie
18 Mae asserts that it is entitled to summary judgment for three reasons: (i) DocMagic repeatedly
19 admitted that Ellie Mae offered it the opportunity to remain on ePass,² (ii) DocMagic never
20 requested terms for a new agreement, and (iii) Ellie Mae actually extended an offer to DocMagic to
21 remain on ePass if DocMagic agreed to pay \$6.00 per transaction. The record, however, does not
22 indisputably support any of these contentions.

23 Firstly, Ellie Mae contends that DocMagic admitted on several occasions that Ellie Mae
24 made an offer for DocMagic to remain on ePass at the price of \$6.00 per transaction. Docket No. 30
25 (Submission Regarding Antitrust Claims) at 2, n.5; Docket No. 36 (Case Management Conference,
26 April 19, 2010) at 25; SAC ¶ 63. For a statement to qualify as a judicial admission, it must be
27 deliberate, clear, and unequivocal. *See Heritage Bank v. Redcom Laboratories, Inc.*, 250 F.3d 319,
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1 329 (5th Cir. 2001); *State Farm Mut. Auto. Ins. Co. v. Worthington*, 405 F.2d 683 (8th Cir. 1968);
2 Wright & Graham, *Federal Practice and Procedure* § 7026 (2000). Here, the record does not
3 clearly and unequivocally establish DocMagic’s admission that Ellie Mae extended an offer to
4 remain on ePass. *See* Iannitti Decl. ¶¶ 14 (“Roof, through his manner, tone, very carefully chosen
5 words, and long periods of silence clearly indicated to me that Ellie Mae had no interest in
6 permitting DocMagic on ePass, regardless of price”), 16 (“Roof never made an offer whatsoever,
7 either during the June 5 [telephone conversation] or at any other time”). Statements contained in
8 DocMagic’s Submission Regarding Antitrust Claims (“Ellie Mae offered DocMagic access to its
9 Encompass customers for a toll fee...increase of between 100% and 600%”), Second Amended
10 Complaint (Ellie Mae “suggest[ed] that the relationship could perhaps be salvaged if DocMagic paid
11 more money”), and Case Management Conference do not amount to an unequivocal admission that
12 Ellie Mae extended an offer. Submission Regarding Antitrust Claims at 2; SAC ¶ 63. Federal Rule
13 of Civil Procedure 8(e)(2) permits a pleader who is in doubt as to which of two statements of fact is
14 true to plead them alternatively or hypothetically, regardless of consistency. *See Oki American, Inc.*
15 *v. Microtech International, Inc.*, 872 F.2d 312, 314 (9th Cir. 1989). Construing the pleadings and
16 subsequently developed record in a light most favorable to DocMagic, these statements were not
17 unequivocal admissions of Ellie Mae’s offer, but rather efforts to develop an alternative theory that if
18 Ellie Mae did in fact extend an offer, this offer was mere pretext amounting to a practical refusal to
19 deal. Accordingly, to the extent that DocMagic’s statements and evidence do not represent
20 unequivocal admissions, Ellie Mae is not entitled to summary judgment on the basis that DocMagic
21 has admitted the existence of an offer to renegotiate.

22 Second, Ellie Mae claims that there can be no refusal to deal because DocMagic never
23 requested terms for a new agreement. DocMagic cannot proceed on a refusal to deal theory if it
24 made no efforts to renegotiate the Bridge Agreement. *See Aspen Skiing*, 472 U.S. at 592-93;
25 *Verizon*, 540 U.S. at 409; *Cleary v. Nat’l Distillers and Chem Corp.*, 505 F.2d 695, 697 (9th
26 Cir.1974) (“[P]laintiff can have no relief when his failure to obtain a desired product is attributable
27 to his own failure to make a request”). However, Ellie Mae’s assertion that DocMagic failed to
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1 make “anything resembling” a request to remain on ePass is contradicted by the record. Docket No.
2 119 (Reply) at 1. A trier of fact could reasonably conclude from the evidence presented by
3 Docmagic that DocMagic made at least two attempts to remain on ePass: (i) after receiving the May
4 21 Bridge Termination letter, DocMagic initiated contact with Ellie Mae by scheduling the June 5
5 telephone conversation, and (ii) during this conversation DocMagic requested that Ellie Mae inform
6 DocMagic of Ellie Mae’s “normal fees” referenced in the May 21 Bridge Termination letter. Iannitti
7 Decl. ¶¶ 13, 15.

8 Third, Ellie Mae argues that it extended an offer to DocMagic. Ellie Mae contends that it
9 invited DocMagic to negotiate a revised Bridge Agreement with new transaction fees in the May 21
10 Bridge Termination letter by stating: “If you [DocMagic] would like to discuss this, please let me
11 know.” Roof Decl. ¶ 11. Ellie Mae further alleges that it repeated its invitation to negotiate with
12 DocMagic by making an offer during the June 5 telephone conversation between Roof and Iannitti.
13 *Id.* ¶ 12. According to Ellie Mae, Roof offered DocMagic the opportunity to remain on ePass if
14 DocMagic agreed to pay \$6.00 per transaction. *Id.* ¶ 14. Although DocMagic allegedly indicated
15 that it would get back to Ellie Mae regarding the offer, DocMagic never again communicated with
16 Ellie Mae to negotiate fees for a new Bridge Agreement. *Id.*

17 DocMagic, however, tells a different story. DocMagic points out that the Bridge Agreement
18 was terminated without warning or prior discussion, differentiating it from the manner in which Ellie
19 Mae had conducted business with respect to ePass in the past. Iannitti Decl. ¶¶ 11-12. During the
20 parties’ past relationship, pricing issues were not addressed via mail, but rather were negotiated by
21 telephone or in person. *Id.* ¶ 12. Although Ellie Mae wrote in the May 21 Bridge Termination letter
22 that its reason for terminating the Bridge Agreement was that DocMagic was paying fees that were
23 “significantly discounted from our normal fees,” nothing in the parties’ communications explicitly
24 indicates that Ellie Mae simply sought a higher fee in exchange for allowing DocMagic to remain on
25 ePass. Iannitti Decl. ¶¶ 11-15. A trier of fact could reasonably infer from this evidence that had
26 Ellie Mae simply sought a higher fee in exchange for allowing DocMagic to remain on ePass, it
27 would have explicitly stated so in the May 21 Bridge Termination letter.

1 Concerning the June 5 telephone conversation, Ellie Mae fails to allege that it made an offer
2 to DocMagic. Roof Decl. ¶ 13-14. DocMagic points out that Ellie Mae discussed its \$6.00 per
3 transaction “standard price” only in response to a direct inquiry from DocMagic. Roof himself
4 states that he only informed DocMagic that Ellie Mae’s standard price was \$6.00 per transaction for
5 closing documents in “response to an inquiry from Mr. Iannitti.” *Id.* ¶ 13. DocMagic describes the
6 conversation as “strained” and “uncomfortable.” Iannitti Decl. ¶ 14. DocMagic also claims that
7 Roof revealed his unwillingness to negotiate a new Bridge Agreement by stating early in the June 5
8 telephone conversation something to the effect of: “clearly this relationship has run its course.” *Id.*
9 Moreover, DocMagic points to internal Ellie Mae documents that create a reasonable inference that
10 Ellie Mae intended to terminate its long-standing relationship with DocMagic regardless of price.
11 Sabri Decl., Exh. E (filed under seal).

12 DocMagic correctly asserts that whether or not Ellie Mae refused to deal with DocMagic
13 beginning in 2009 is a material fact in genuine dispute. Resolving the conflicting accounts of the
14 June 5 telephone conversation and the events leading up to it requires weighing the relative
15 credibility of Roof and Iannitti, an inappropriate endeavor on a motion for summary judgment.
16 Reasonable inferences that can be drawn from the evidence presented by DocMagic are: (i) Ellie
17 Mae had no intention of negotiating a new Bridge Agreement with DocMagic, and (ii) had Ellie Mae
18 actually extended an offer to DocMagic, it would have stated so explicitly. To win summary
19 judgment, Ellie Mae must “eliminate any vestige of contrary material fact.” *Autodesk, Inc. v.*
20 *Dassault Systemes Solid Works Corp*, 685 F. Supp. 2d 1001, 1007 (N.D. Cal. 2009). Ellie Mae is
21 unable to meet its burden at this juncture.

22 B. Practical refusal to deal

23 Even assuming arguendo that Ellie Mae extended an offer to DocMagic to remain on ePass if
24 it agreed to pay \$6.00 per transaction, there is a material dispute as to whether there was a practical
25 refusal to deal. Ellie Mae is not entitled to summary judgment if there is a genuine issue of material
26 fact as to whether the terms of any renegotiation were so unreasonable as to constitute a practical
27 refusal to deal.

1 Ellie Mae contends that there was no practical refusal to deal because \$6.00 per transaction is
2 the standard price paid by DocMagic’s competitors. Roof Decl. ¶ 13. Ellie Mae’s official
3 “Transaction Fees” price list supports this contention. Roof Decl., Exh. I. Ellie Mae asserts that it
4 has been offering, and competitors to DocMagic have been accepting, the \$6.00 per transaction rate
5 since at least 2007. Roof Decl. ¶ 17. Of the nine independent DPS vendors on ePass, seven are
6 paying at least \$6.00 per transaction. *Id.* ¶ 20. Of the two DPS vendors paying less than \$6.00 per
7 transaction, one pays a monthly lump sum minimum and the other is subject to a complex pricing
8 structure. *Id.* ¶ 22. Ellie Mae claims that since 2007, there have been no exceptions to the standard
9 \$6.00 rate. Ellie Mae supports its version of the events by pointing out that it was not until
10 DocMagic’s First Amended Complaint was filed in May 2010 that DocMagic first asserted that Ellie
11 Mae’s offer to renegotiate the Bridge Agreement was pretextual. Docket No. 38 (First Amended
12 Complaint) ¶¶ 61-65.

13 DocMagic counters that even if Ellie Mae did extend an offer allowing DocMagic to remain
14 on ePass, \$6.00 per transaction is not the standard rate for DPS vendors providing services similar to
15 DocMagic’s services. Sabri Decl. ¶¶ 3-6, Exhs. A-D; Iannitti Decl. ¶¶ 24-25. Firstly, according to
16 DocMagic, many of the vendors supposedly paying \$6.00 are not competitors of DocMagic, making
17 any price comparison irrelevant. Iannitti Decl. ¶ 24. Of the nine DPS vendors on ePass mentioned
18 above, four are Texas-based law firms that provide DPS in connection with their legal work. Roof
19 Decl. ¶ 20; Sabri Decl. ¶¶ 3-6, Exhs. A-D. DocMagic further contends that the majority of these
20 nine vendors, including Accurate Document Services, CoreLogic Document Services, and ProClose,
21 have extremely low volume and do not compete with DocMagic, making a price comparison
22 inappropriate. Iannitti Decl. ¶ 24. Secondly, DocMagic points to at least one vendor that has
23 entered into a new or amended Bridge Agreements since 2007 for a fee of less than \$6.00 per
24 transaction. Roof Decl., Exh G (filed under seal) (vendor pays \$0.50 for initial disclosures).
25 Thirdly, DocMagic points out that two of its potential competitors remaining on ePass pay less than
26 \$6.00 per transaction: one pays \$1.41 each for all ePass transactions, and the other pays \$0.50 for
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1 initial disclosures, allegedly a significant category of DPS transactions. Roof Decl. Exh. E (filed
2 under seal), Exh. G (filed under seal).

3 As a trier of fact could reasonably infer that \$6.00 is not the price currently offered to and
4 paid by companies situated similarly to DocMagic, there is a material dispute as to whether Ellie
5 Mae's alleged \$6.00 offer constitutes a practical refusal deal. Accordingly, Ellie Mae's motion for
6 summary judgment on the First, Second, and Third Claims for Relief in DocMagic's Second
7 Amended Complaint must be denied. This is not to say that the evidence in this case
8 overwhelmingly points towards liability for Ellie Mae, but the record as currently developed raises
9 at least a reasonable inference in DocMagic's favor as to the existence of a refusal to deal.

10 II. TRO/Preliminary Injunction

11 DocMagic argues that it is entitled to a TRO because it is likely to succeed on the merits of
12 its claims for Interference with Prospective Economic Advantage ("IPEA") and for Unfair
13 Competition under Cal. Bus. & Prof. Code § 17200, *et seq.* Although DocMagic might ultimately be
14 able to persuade the trier of fact that it is entitled to relief under one or both of these claims, the
15 court is unable to conclude at this juncture that DocMagic has made the requisite "clear showing"
16 that such success is likely. *See Winter*, 129 S. Ct. at 376.

17 A. IPEA Claim

18 In order to establish a claim for Interference with Prospective Economic Advantage,
19 DocMagic must show the following elements:

- 20 1. An economic relationship between the plaintiff and some third party, with the
21 probability of future economic benefit to the plaintiff;
- 22 2. The defendant's knowledge of the relationship;
- 23 3. Intentional acts on the part of the defendant designed to disrupt the relationship;
- 24 4. Actual disruption of the relationship; and
- 25 5. Economic harm to the plaintiff proximately caused by the acts of the defendant.

26 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003). In addition, the
27 intentional acts alleged as the third element must have been "wrongful by some legal measure other
28 than the fact of interference itself." *Id.* (quoting *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11

1 Cal. 4th 376, 393 (1995)); *see also Korea Supply*, 29 Cal. 4th at 1158-59 (“The tort of intentional
2 interference with prospective economic advantage is not intended to punish individuals or
3 commercial entities for their choice of commercial relationships or their pursuit of commercial
4 objectives, unless their interference amounts to independently actionable conduct.”).

5 Solely for purposes of this motion, Ellie Mae does not argue that the first, second, fourth or
6 fifth elements are not likely to be satisfied. *See* Docket No. 69 (Opp.) at 13. Instead, it argues that
7 DocMagic has not sufficiently shown that Ellie Mae has committed any wrongful act that would
8 serve as a predicate to the third element of the IPEA claim.

9 DocMagic first theory of a wrongful act is that “Ellie Mae’s exercise of improper dominion
10 over Loan Data constitutes conversion under California law.” Docket No. 59 (Mot.) at 11. “A
11 conversion occurs where the defendant wrongfully exercises dominion over the property of another.
12 To establish conversion, a plaintiff must show (1) his ownership of or right to possess the property at
13 the time of the conversion, (2) that the defendant disposed of the plaintiff’s property rights or
14 converted the property by a wrongful act, and (3) damages.” *Bank of New York v. Fremont Gen.*
15 *Corp.*, 523 F.3d 902, 914 (9th Cir. 2008) (citations omitted). DocMagic does not argue that it had
16 “dominion” over customer loan data or that it held any possessory interest in that data. Instead, it
17 argues that it has been harmed as a result of Ellie Mae’ conversion of loan data owned by third-party
18 Encompass users.

19 DocMagic’s conversion theory is unpersuasive for two reasons. Firstly, DocMagic has not
20 provided evidence sufficient to demonstrate that its customers have forfeited “dominion” over their
21 loan data. Although Encompass users may not use the SDK to transmit data from Encompass to
22 third-party vendors, Ellie Mae asserts that Encompass users have “unfettered access” to the data they
23 input, that customers are able to extract and transmit data from Encompass using a publicly available
24 DU file format, and that—at least for users that host Encompass software on their own servers—loan
25 data remains on the users’ servers. Corr TRO Decl. ¶¶ 4, 13, 14. According to Ellie Mae,
26 Encompass users still retain access to and control of their loan data notwithstanding their inability to
27 convey that data to DocMagic via the SDK. *Compare with FMC Corp. v. Capital Cities/ABC, Inc.*,

1 915 F.2d 300, 304 (7th Cir. 1990) (finding a valid conversion claim under California law where the
2 defendant's retention of the only known copies of the plaintiff's documents deprived the plaintiff of
3 the use of its own business information). At the motion hearing, DocMagic disputed these
4 characterizations, but counsel's arguments appear at least somewhat inconsistent with the materials
5 it submitted with its TRO application. Given the conflicting accounts of how Encompass both stores
6 customer information and blocks the DocMagic Input Form, the court cannot conclude that DM has
7 met its burden to show the loss of full dominion over loan data.

8 Secondly, the Encompass/SDK license expressly prohibits the use of SDK to transmit data
9 from Encompass to third-parties, and customers must assent to the terms of the license before
10 entering data into Encompass. DocMagic cannot establish a claim for conversion where the
11 customers in question contractually consented to the alleged deprivation of property. *Bank of New*
12 *York*, 523 F.3d at 914 ("A plaintiff in a conversion action must also prove that it did not consent to
13 the defendant's exercise of dominion.") (collecting cases). At the motion hearing, DocMagic again
14 presented arguments regarding the applicability of the SDK license to the Input Form Builder that
15 seem inconsistent with the parties' submissions. Ultimately, however, DocMagic has done little
16 more than sketch out an argument for conversion of loan data. At this juncture, the court cannot
17 conclude that DocMagic is likely to succeed on this theory.

18 DocMagic's second theory of wrongful act is that Ellie Mae has violated Section 2 of the
19 Sherman Act. Although, for the reasons explained above, the court denies Ellie Mae's motion for
20 partial summary judgment on DocMagic's Sherman Act claims, DocMagic has not presented
21 sufficient evidence to establish its ultimate likelihood of success on these claims. There remains a
22 material factual dispute regarding whether Ellie Mae ever offered to renegotiate the Bridge
23 Agreement at a fair market price, but DocMagic's evidence of the alleged refusal to deal nonetheless
24 remains relatively sparse and circumstantial. Summary judgment may be inappropriate at this
25 juncture, but the extraordinary remedy of a TRO/preliminary injunction is similarly inappropriate in
26 the absence of a clear showing of entitlement.

1 Apart from the question of whether Ellie Mae offered to renegotiate with DocMagic, Ellie
2 Mae has come forward with relevant market statistics that cast significant doubt on the viability of
3 DocMagic’s Sherman Act claims. Firstly, despite DocMagic’s allegations that Ellie Mae is a
4 monopolist in the LOS market, a 2010 study by Access Mortgage Research & Consulting, Inc.
5 indicates that only about 35% of loan originators use Encompass. *See* Corr TRO Decl. Exh. B at 2,
6 26. This share is generally insufficient to indirectly raise an inference of market power. *See Forro*
7 *Precision, Inc. v. Int’l Bus. Machs. Corp.*, 673 F.2d 1045, 1059 (9th Cir. 1982) (“In the absence of
8 further information about the market, a 35% market share . . . provides little or no support to a claim
9 of market power.”). Moreover, this share is substantially lower than the 60% share that was alleged
10 in the First Amended Complaint and that supported the court’s conclusion that DocMagic had
11 plausibly alleged market power in the LOS and network markets. *See DocMagic*, 2010 WL
12 3987495, at *8. The particular characteristics of these markets—namely, high barriers to entry and
13 network effects—might be sufficient to establish the requisite degree of market power, but Ellie
14 Mae’s market share contentions, if true, make it significantly less likely that DocMagic will prevail
15 on its monopolization theories.

16 DocMagic has not shown a likelihood of success on its IPEA claim.³

17 B. Section 17200 Claim

18 Section 17200 prohibits “any unlawful, unfair or fraudulent business act or practice . . .”
19 Cal. Bus. & Prof. Code § 17200. Because section 17200 is written in the disjunctive, “a business act
20 or practice need only meet one of the three criteria—unlawful, unfair, or fraudulent—to be
21 considered unfair competition under the UCL.” *Daro v. Superior Court*, 151 Cal. App. 4th 1079,
22 1093 (2007). DocMagic argues that it is likely to succeed under the unlawful and unfair prongs.

23 Under its “unlawful” prong, the UCL borrows violations of other laws . . . and makes those
24 unlawful practices actionable under the UCL.” *See Berryman v. Merit Prop. Mgmt.*, 152 Cal. App.
25 4th 1544, 1554 (2007) (internal quotation marks and citation omitted; alteration in original).
26 “Virtually any law—federal, state or local—can serve as a predicate for an action under [Section
27 17200].” *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1360 (2010); *see Smith v. State Farm*
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1 *Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 717-18 (2001) (holding the unlawful prong forbids
2 “anything that can be properly called a business practice and that at the same time is forbidden by
3 law”). As predicates for the unlawful prong, DocMagic reasserts the IPEA and Sherman Act
4 violations discussed above. Because it has failed to establish a likelihood of success as to those
5 predicate violations, it has not shown a likelihood of success under Section 17200’s unlawful prong.

6 An “unfair” business act or practice under Section 17200 is “conduct that threatens an
7 incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its
8 effects are comparable to or the same as violations of the law, or otherwise significantly threatens or
9 harms competition.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163,
10 187 (1999). As this court concluded in its October 12, 2010 order, “where the same conduct is
11 alleged to support both a plaintiff’s federal antitrust claims and state-law unfair competition claim, a
12 finding that the conduct is not an antitrust violation precludes a finding of unfair competition.”
13 *DocMagic*, 2010 WL 3987495, at *16 (collecting cases). DocMagic has not established a likelihood
14 of success on its antitrust claims, as explained above, and it therefore follows that it has not
15 established a likelihood of success under the unfair prong of Section 17200.

16 Although Ellie Mae has effectively prevented DocMagic from accessing loan data in
17 Encompass via customers’ licensed SDK software, such an exclusion does not, without more, violate
18 the letter or spirit of antitrust laws or significantly threaten to harm competition in the market for
19 document preparation services. *See Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1032 (9th Cir.
20 1989) (“To maintain a successful antitrust action, [the plaintiff] must show that the alleged
21 conspiracy among the appellees did more than injure him; he must prove an injury to the
22 competition in the relevant market.”) (citations omitted). DocMagic has not demonstrated, beyond
23 speculative allegation, that any other document preparation service has been excluded from the
24 market—whether that market consists of all loan document preparation or the submarket of
25 Encompass-originated loans. It has provided examples of DocMagic customers being
26 inconvenienced by Ellie Mae’s blocking of the DocMagic Input Form, *see* Garza TRO Decl. ¶¶ 8-
27 13; Iannitti TRO Decl. ¶¶ 14-19, but it has not demonstrated that these customers were unable to go
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1 to a competitor (besides Ellie Mae Docs) and receive equivalent document preparation services at a
2 reasonably equivalent price. The court has no doubt that DocMagic has been injured as a result of
3 Ellie Mae’s efforts to block transfers of data from Encompass. It cannot, however, comfortably
4 attribute such injury to Ellie Mae’s monopolistic efforts as opposed to either DocMagic’s refusal to
5 negotiate a reasonable license fee and/or its strategic decision to focus on Encompass users while
6 cultivating its customer base. DocMagic has not shown a likelihood of success under the unfair
7 prong of Section 17200.

8 C. Remaining TRO/Preliminary Injunction Factors

9 Having unsuccessfully demonstrated a likelihood of success on the merits of its IPEA or
10 Section 17200 claims, DocMagic has not established that it is entitled to provisional injunctive
11 relief. The remaining factors do not so clearly tip in DocMagic’s favor so as to convince the court
12 that the exercise of its equitable powers is nonetheless appropriate. Although DocMagic may suffer
13 substantial, and perhaps irreparable, harm as a result of its inability to transfer data from Encompass,
14 the court is not prepared to grant DocMagic the free, unfettered access to Encompass data it
15 requests. Ellie Mae has indicated that its inability to block unauthorized third-party access to
16 Encompass creates security risks that are unacceptable both to it and to its customers. Corr TRO
17 Decl. ¶¶ 29-31, 33-34, 36-37. Moreover, given DocMagic’s inability to establish a likelihood of
18 success on the merits at this time, the record before the court creates a reasonable inference that
19 DocMagic’s injuries are a result of its refusal to pay a reasonable license fee and its subsequent
20 unsuccessful efforts at circumventing Encompass security measures. DocMagic has already
21 benefitted from an entire year’s worth of free access to Encompass data through the DocMagic Input
22 Form, allowing it to process documents for 168,000 Encompass-originated loans while incurring
23 lower costs. It is certainly conceivable, therefore, that a TRO/preliminary injunction would provide
24 a profitable windfall and/or an undeserved competitive advantage for DocMagic.

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CONCLUSION

For the foregoing reasons, Ellie Mae’s motion for summary judgment on the First, Second, and Third Claims For Relief in DocMagic’s Second Amended Complaint is DENIED. DocMagic’s Application for a TRO is also DENIED.

IT IS SO ORDERED.

Dated: March 10, 2011



MARILYN HALL PATEL
United States District Court Judge
Northern District of California

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ENDNOTES

1. ePass has been operated since 2000 under various names and is today called the which is now called the “Ellie Mae Network.”
2. Ellie Mae did not present this claim in its Motion for summary judgment, but rather raised this argument for the first time in its Reply. *See* Docket No. 119 at 4.
3. DocMagic also alleges that “Ellie Mae is [] interfering with its clients’ contracts and their relationship with their customers, and may also be in breach of Ellie Mae’s contracts with its own clients and/or breaching the implied covenant of good faith and fair [sic] dealing.” Docket No. 59 at 11-12. DocMagic in no way elaborates further on this allegation, let alone cites to supporting evidence.