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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DOCMAGIC, INC.,
Plaintiff,
v.
ELLIE MAE, INC.,
Defendant.

No. C 09-04017 MHP

MEMORANDUM & ORDER

Re: Ellie Mae, Inc.’s Motion to Dismiss DocMagic, Inc.’s First Amended Complaint and DocMagic, Inc.’s Motion to Dismiss Ellie Mae, Inc.’s First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Counterclaims

Plaintiff DocMagic, Inc. (“DocMagic”), a corporation providing online loan document preparation services, brought this action against defendant Ellie Mae, Inc. (“Ellie Mae”), a corporation providing various types of software and services to mortgage professionals. DocMagic’s first amended complaint alleges that Ellie Mae unlawfully denied DocMagic access to Ellie Mae’s online transaction network, and used DocMagic’s proprietary information to create a competing document preparation service. On the basis of these allegations, DocMagic asserts thirteen claims for relief for antitrust violations, trademark infringement, copyright infringement, interference with contractual relationships, breach of contract, trade secret misappropriation and unfair competition. In response, Ellie Mae filed a first amended counterclaim alleging that DocMagic unlawfully accessed Ellie Mae’s computer system, and used Ellie Mae’s proprietary software to create a new program that permits DocMagic to interact directly with Ellie Mae customers without using Ellie Mae’s online transaction network. Ellie Mae asserts nine counterclaims, including copyright infringement, computer fraud, breach of contract, interference

United States District Court
For the Northern District of California

1 with contractual relationships and unfair competition. Before the court are the parties' cross-
2 motions to dismiss. Ellie Mae moves to dismiss DocMagic's complaint in its entirety, and
3 DocMagic moves to dismiss Ellie Mae's first through fifth and seventh through ninth counterclaims.
4 Having considered the parties' arguments and submissions, and for the reasons discussed below, the
5 court enters the following memorandum and order.

6
7 BACKGROUND

8 I. Loan preparation

9 A brief description of how loans are prepared electronically is necessary to understand the
10 factual background to this case. The process of loan preparation typically begins when a loan
11 originator, such as a mortgage broker or a lender, enters data about the prospective loan into a
12 computer program known as a loan origination system ("LOS"). Docket No. 38 (First Am. Compl.
13 ("Compl.)) ¶¶ 29-30. The advantage of using an LOS is that once the information has been entered
14 into the LOS, the LOS can provide that data in an electronic format to compatible computer
15 programs, making it unnecessary to engage in the time-consuming and error-prone process of
16 manually re-keying the loan information. *Id.* ¶ 30. Large lenders, like Bank of America and Wells
17 Fargo, develop their own proprietary LOSs. The rest of the market uses third-party LOSs, which are
18 produced by a number of different companies. *Id.* ¶¶ 102, 104.

19 Settlement service providers, or "vendors," can use the electronically-stored data in the LOS
20 to perform the various tasks necessary to actually prepare a loan. The services provided by these
21 vendors include, for example, document preparation services, appraisals, credit reports, fraud
22 reports, flood information and title and escrow services. *Id.* ¶¶ 20, 95. However, a vendor will only
23 be able to use the data in the LOS if the LOS and the vendor's own programs are compatible.

24 In order to connect a loan originator to a vendor and ensure that the loan originator's LOS is
25 compatible with the vendor's programs, corporations have set up online transaction networks. These
26 networks permit loan originators to find and hire vendors providing the services they need. *Id.* ¶ 20.
27 A network can also automatically convert the data in the loan originator's LOS into a format that the
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1 vendor can use. *Id.* ¶¶ 21-22. A single network can be used by many different LOSs made by
2 different software companies, *id.* ¶¶ 32-33, and can connect those LOSs to many different vendors.
3 Loan originators usually can join and use a network for free, whereas vendors typically pay a fee to
4 the network operator for every transaction the vendor completes over the network.

5 If a LOS and/or a vendor are not connected to a network, it is more difficult to achieve
6 compatibility between the LOS and the vendor’s programs. To achieve compatibility without using
7 a network, the LOS can be equipped with a software development kit (“SDK”), a program which
8 retrieves data that has been entered into the LOS and converts it into a format usable by the vendor.
9 *Id.* ¶ 67. The vendor can then provide an adapter program that will transfer the data from the SDK
10 into the vendor’s programs, thus creating a bridge from the LOS, to the SDK, to the adapter
11 program, to the vendor’s services. *Id.* ¶ 68.

12 II. DocMagic, Ellie Mae and their contractual agreements

13 Ellie Mae is a LOS developer, and the creator of a LOS called Encompass. Docket No. 35
14 (First Am. Counterclaim (“Counterclaim”)) ¶ 6. According to DocMagic, Ellie Mae’s share of the
15 third-party LOS market, defined below, is greater than 50%, and probably greater than 60%. Compl.
16 ¶ 105. Ellie Mae is also the owner and operator of ePASS, an online transaction network of the type
17 described above. *Id.* ¶ 20. According to DocMagic, Ellie Mae’s share of the network market, also
18 defined below, is as much as 60%. *Id.* ¶ 99. Ellie Mae also developed a SDK for Encompass, called
19 Encompass SDK, capable of making Encompass compatible with vendors who are not no on ePASS.
20 *Id.* ¶ 67.

21 DocMagic is a vendor providing loan document preparation services (“DPS”). *Id.* ¶ 15.

22 In November 2003, Ellie Mae and DocMagic entered into an agreement, known as the
23 “Bridge Agreement,” by which DocMagic became one of the vendors on ePASS. *Id.* ¶ 38; Docket
24 No. 44 (King Dec.), Exh. H (Electronic Bridge Agreement Between Ellie Mae and Participator
25 (“Bridge Agreement”)). In exchange for access to the network, DocMagic agreed to pay a fee of
26 between one and three dollars, depending on volume, per transaction that it made over ePASS.
27 Bridge Agreement, Exh. A § 2(b). DocMagic also agreed to provide Ellie Mae with proprietary
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1 information about DocMagic's document preparation program, so that Ellie Mae could connect
2 DocMagic's program to Ellie Mae's network and ensure compatibility between the LOSs accessing
3 ePASS and DocMagic's program. *Id.* § 1. The Bridge Agreement acknowledged that each party
4 would have access to the other's proprietary customer information, and provided that neither party
5 would disclose such proprietary information or use it for any purpose outside those contemplated by
6 the agreement. *Id.* § 10.4. The Bridge Agreement stated that it would automatically renew every
7 year, unless terminated upon notice given 120 days prior to the beginning of the next automatic
8 renewal. *Id.* § 9.2.

9 In September 2006, Ellie Mae and DocMagic also entered into a Reseller Agreement.
10 Compl. ¶ 41; King Dec., Exh. G (Reseller Agreement). Under the Reseller Agreement, Ellie Mae
11 became a non-exclusive reseller of certain DocMagic document preparation services, which Ellie
12 Mae was authorized to re-brand with Ellie Mae trademarks. Reseller Agreement § 1. The Reseller
13 Agreement also acknowledged that each party would disclose proprietary information to the other,
14 and required each party not to disclose the other's proprietary information, or use it outside of the
15 purposes of the agreement. *Id.* § 7.3. Like the Bridge Agreement, the Reseller Agreement
16 automatically renewed every year unless terminated upon notice given 120 days before the next
17 renewal date. *Id.* § 9.1. The Reseller Agreement also provided that if it was terminated without
18 cause, it would be followed by a sixty-day transition period during which the re-branded services
19 would remain available to Ellie Mae customers, and DocMagic would refrain from marketing its
20 services to Ellie Mae customers. *Id.* § 9.4(a).

21 On April 27, 2009, Ellie Mae sent DocMagic notice terminating the Reseller Agreement,
22 effective on August 30, 2009. King Dec., Exh. A. On April 28, 2009, DocMagic likewise sent Ellie
23 Mae notice terminating the Reseller Agreement, effective September 1, 2009. *Id.*, Exh. B. On May
24 21, 2009, Ellie Mae sent DocMagic notice terminating the Bridge Agreement, effective August 30,
25 2009. *Id.*, Exh. D.

26 The parties' characterization of why these contracts were terminated, and of the events that
27 followed, diverge dramatically. Under DocMagic's version of the story, Ellie Mae stole
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1 DocMagic’s document preparation software and used it to create a competing product. DocMagic
2 then alleges that Ellie Mae attempted to drive DocMagic out of the document preparation business
3 by denying DocMagic access to customers using the Encompass LOS, forcing DocMagic off ePASS
4 and forbidding Encompass users from connecting to DocMagic through the Encompass SDK. Ellie
5 Mae contends, on the other hand, that DocMagic refused to negotiate reasonable fees to be a part of
6 ePASS; rather than pay those reasonable fees, Ellie Mae alleges that DocMagic illegally accessed
7 and copied Ellie Mae’s software in order to write an adapter program that would connect DocMagic
8 to Encompass users for free.

9 III. DocMagic’s version of events

10 DocMagic begins by alleging that Ellie Mae purchased a DPS vendor called Online
11 Documents, and then used DocMagic’s proprietary information (to which Ellie Mae had access
12 under the Bridge and Reseller Agreements) in combination with Online Documents’ technology to
13 effectively copy DocMagic’s software and services. Compl. ¶¶ 48-50, 53-58. Specifically,
14 DocMagic claims that Ellie Mae’s new DPS, Ellie Mae Docs, intentionally copied the “structures,
15 workflows, and data . . . screens, terminology, and overall look and feel of the DocMagic software,”
16 *id.* ¶ 50, and in particular, the organization and presentation of the DocMagic document audit report,
17 including the use of the terms “WARNING” and “FATAL” to point out errors in the data provided,
18 *id.* ¶¶ 51-57, 170. According to DocMagic, Ellie Mae next terminated the Reseller Agreement so
19 that Ellie Mae could replace the re-branded DocMagic services, available to loan originators
20 accessing ePASS, with Ellie Mae’s own services. *Id.* ¶¶ 60-62. According to DocMagic, Ellie Mae
21 then terminated the Bridge Agreement so that DocMagic would not be able to access ePASS and
22 compete with Ellie Mae’s DPS available on ePASS. *Id.* DocMagic alleges that Ellie Mae’s stated
23 reason for terminating the Bridge Agreement, that the fees set by the Bridge Agreement were too
24 low, was a pretext for Ellie Mae’s anti-competitive larger plan of forcing DocMagic out of the
25 document preparation market. *Id.* ¶¶ 62-65. DocMagic finally alleges that having ejected
26 DocMagic from ePASS, Ellie Mae began preventing Encompass LOS users from accessing
27 DocMagic by means of the Encompass SDK. *Id.* ¶¶ 70-73. DocMagic had created an adapter
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1 program, DocMagic XL, that could transfer data from various LOSs' SDKs to DocMagic's
2 document preparation programs. *Id.* ¶ 68. This adapter program permitted users of Ellie Mae's
3 Encompass LOS who had also licensed the Encompass SDK to connect to DocMagic's DPS without
4 DocMagic being on ePASS. *Id.* ¶ 69. According to DocMagic, however, Ellie Mae used various
5 means to prevent Encompass users from connecting to DocMagic via the Encompass SDK,
6 including threatening litigation against Encompass users, refusing to license the SDK to customers
7 whom it believed would use the SDK to connect to DocMagic, persuading its customers not to use
8 DocMagic via the SDK, intentionally disabling certain features of the SDK and changing the SDK
9 license agreement. *Id.* ¶¶ 70-71. DocMagic alleges that based on this conduct, Ellie Mae "has been
10 able to obtain a market share of the [DPS m]arket at least equivalent to its LOS [m]arket [s]hare," or
11 about 60%. *Id.* ¶ 110; *see also id.* ¶ 105 (alleging that Ellie Mae's LOS market share is
12 approximately 60%).¹

13 IV. Ellie Mae's version of events

14 Ellie Mae's counterclaim tells a very different story. It begins by denying any wrongdoing in
15 the termination of the Bridge Agreement. Instead, Ellie Mae alleges that after sending the
16 termination notice to DocMagic, it attempted to renegotiate a new bridge agreement with DocMagic,
17 but was rebuffed. Counterclaim ¶ 18. Then, according to Ellie Mae, DocMagic devised an illegal
18 way for it to connect to Encompass customers for free, by bypassing ePASS. Ellie Mae alleges that
19 after the termination of the Bridge Agreement, DocMagic used log-in credentials and license keys
20 belonging to other Ellie Mae clients to obtain unauthorized access to Ellie Mae's computers
21 (specifically, the Encompass servers). *Id.* ¶¶ 19-20. Next, Ellie Mae alleges that DocMagic engaged
22 in unauthorized use of the Encompass and Encompass SDK software, including using the
23 Encompass SDK as a basis for creating the adapter program DocMagic XL. *Id.* ¶¶ 19-22. Ellie Mae
24 also claims that DocMagic encouraged Encompass licensees to use the Encompass SDK and
25 DocMagic XL to connect to DocMagic's DPS, in violation of the licensees' licenses, so that
26 DocMagic would not have to join ePASS and pay Ellie Mae a transaction fee. *Id.* ¶¶ 76-78.
27 Finally, Ellie Mae claims that DocMagic breached the Reseller Agreement by, *inter alia*, terminating
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1 for cause on a mere pretext to avoid the obligatory transition period; failing to notify Ellie Mae of
2 scheduled downtimes; misusing Ellie Mae’s proprietary information; and failing to properly update
3 and service the re-branded services. *Id.* ¶¶ 31-41, 85.

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5 LEGAL STANDARD

6 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a
7 defendant for failure to state a claim upon which relief can be granted against that defendant. A
8 motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.” *Navarro v. Block*,
9 250 F.3d 729, 732 (9th Cir. 2001). “Dismissal can be based on the lack of a cognizable legal theory
10 or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica*
11 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A motion to dismiss should be granted if a plaintiff
12 fails to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*
13 *Twombly*, 550 U.S. 544, 570 (2007). This “plausibility standard is not akin to a ‘probability
14 requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”
15 *Ashcroft v. Iqbal*, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at
16 556). “Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific
17 task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at
18 1950.

19 “[A]llegations of material fact are taken as true and construed in the light most favorable to
20 the nonmoving party.” *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The
21 court need not, however, accept as true pleadings that are no more than legal conclusions or the
22 “formulaic recitation of the elements of a cause of action.” *Iqbal*, 129 S. Ct. at 1949–50 (quoting
23 *Twombly*, 550 U.S. at 555); *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001);
24 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994). “[A] court may take
25 judicial notice of ‘matters of public record,’ ” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir.
26 2001) (quoting *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)), and may also
27 consider “documents whose contents are alleged in a complaint and whose authenticity no party
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1 questions, but which are not physically attached to the pleading” without converting a motion to
2 dismiss under Rule 12(b)(6) into a motion for summary judgment, *Branch v. Tunnell*, 14 F.3d 449,
3 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d
4 1119 (9th Cir. 2002). “The district court will not accept as true pleading allegations that are
5 contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or
6 incorporated in the pleading.” 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice &*
7 *Procedure* § 1363 (3d ed. 2004).

8
9 DISCUSSION

10 I. Ellie Mae’s motion to dismiss

11 Ellie Mae moves to dismiss all of the claims that DocMagic asserts in its complaint. The
12 court addresses each claim for relief in turn

13 A. First through fourth claims for relief: the antitrust claims

14 DocMagic’s first through fourth claims seek relief for alleged anticompetitive activities
15 engaged in by Ellie Mae in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. Section 2
16 provides that “[e]very person who shall monopolize, or attempt to monopolize, or combine or
17 conspire with any other person or persons, to monopolize any part of the trade or commerce among
18 the several States, or with foreign nations, shall be deemed guilty of a felony” 15 U.S.C. § 2.

19 A private right of action for violations of section 2 is provided in 15 U.S.C. section 15. In this case,
20 all four of DocMagic’s claims against Ellie Mae are for attempting to monopolize the DPS market.

21 An attempted monopolization claim requires showing three elements: (1) specific intent to
22 monopolize; (2) anticompetitive conduct; and (3) a dangerous probability that the defendant will
23 achieve monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

24 DocMagic’s first, third and fourth antitrust claims allege discrete types of anticompetitive
25 conduct. The first claim is for monopoly leveraging², based on DocMagic’s allegations that Ellie
26 Mae used monopoly power in the “upstream” markets for LOSs and loan preparation networks to
27 attempt to acquire monopoly power in the DPS market. The third claim is for refusal to deal³, based

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1 on DocMagic’s allegations that Ellie Mae refused to give DocMagic access to ePASS and prevented
2 Encompass users from connecting to DocMagic’s services. Finally, the fourth claim is for denial of
3 access to an essential facility⁴, based on Ellie Mae’s alleged exclusion of DocMagic from ePASS.

4 The allegations in the first, third and fourth claims render the second claim, for attempted
5 monopolization generally, entirely redundant. In DocMagic’s complaint, the second claim merely
6 incorporates the allegations in the first claim for relief. In addition, DocMagic has not identified any
7 theory of attempted monopolization, other than monopoly leveraging, refusal to deal and denial of
8 access to an essential facility, upon which the second claim could rest. The second claim for relief
9 therefore marshals no new factual allegations nor any new legal theories upon which DocMagic
10 could obtain relief. Federal Rule of Civil Procedure 12(f) permits the court to strike from a
11 complaint any “redundant . . . matter.” Fed. R. Civ. P 12(f). The second claim for relief meets that
12 standard. Accordingly, as a threshold matter, the second claim for relief, for attempted
13 monopolization, is dismissed without leave to amend.

14 The arguments for dismissal of the remaining three antitrust claims requires much lengthier
15 discussion. Ellie Mae raises four arguments for dismissal of DocMagic’s claims. Firstly, Ellie Mae
16 argues that DocMagic has not pled facts sufficient to establish the existence of an upstream network
17 market or a downstream DPS market. Secondly, Ellie Mae argues that even if such markets exist,
18 DocMagic has not pled facts showing that Ellie Mae has monopoly power in the LOS market or the
19 network market, or a dangerous probability of achieving monopoly power in the DPS market.
20 Thirdly, Ellie Mae argues that all of DocMagic’s antitrust claims depend on Ellie Mae’s refusal to
21 deal, and that Ellie Mae’s alleged conduct does not as a matter of law constitute a refusal to deal.
22 Fourthly, Ellie Mae argues that DocMagic lacks standing to bring any antitrust claims, because
23 DocMagic only alleges harm against itself and not against the market as a whole.

24 Contrary to Ellie Mae’s contentions, DocMagic has pled facts sufficient to establish the
25 existence of the alleged markets. DocMagic’s antitrust claims all falter, however, because of
26 DocMagic’s failure to plead facts showing that Ellie Mae has a dangerous probability of achieving
27 monopoly power in the DPS market. Because each of DocMagic’s remaining antitrust claims
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1 necessarily depends on Ellie Mae’s attempted monopolization of the DPS market, each requires
2 adequate allegations of a dangerous probability of monopoly power in the DPS market. Since
3 DocMagic’s complaint falls short in that regard, DocMagic’s first, third and fourth claims are
4 dismissed with leave to amend.

5 1. The alleged markets

6 In order to state an antitrust claim, a plaintiff must identify a relevant market within which
7 the defendant has market power. *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044
8 (9th Cir. 2008), *cert.denied*, 129 S. Ct. 2788 (2009). The relevant market need not be pled with
9 specificity. *Id.* at 1045. “An antitrust complaint therefore survives a Rule 12(b)(6) motion unless it
10 is apparent from the face of the complaint that the alleged market suffers a fatal legal defect. . . .
11 [T]he validity of the ‘relevant market’ is typically a factual element rather than a legal element”
12 *Id.*

13 In support of its claims, DocMagic alleges the existence of three relevant product markets:
14 the LOS market, the network market and the DPS market. Compl. ¶¶ 94-110. Ellie Mae raises three
15 arguments, none of which carry the day, for why DocMagic’s allegations identifying relevant
16 markets are insufficient.

17 Firstly, Ellie Mae contends that DocMagic has not sufficiently alleged the geographic scope
18 of any of the three markets. Geographic scope, covering the “area of effective competition,” is an
19 important factor in identifying the relevant market. *See Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059,
20 1063 (9th Cir. 2001). DocMagic has alleged that the geographic scope of each of these markets is
21 the United States, and has supported this allegation with further factual allegations. Compl. ¶ 94;
22 *see also id.* ¶¶ 18, 99, 105. Although DocMagic has also alleged that some DPS vendors do not
23 operate nationwide, *id.* ¶ 127, there is no contradiction between the existence of a national DPS
24 market and the simultaneous existence of local DPS markets that compete only at the regional level.
25 DocMagic’s allegations of geographic scope are therefore sufficient to survive Ellie Mae’s motion to
26 dismiss.

1 Secondly, Ellie Mae argues that DocMagic’s factual allegations are not sufficient to
2 plausibly show the existence of a market for networks. A product market consists of “commodities
3 reasonably interchangeable by consumers for the same purposes.” *United States v. E.I. du Pont de*
4 *Nemours & Co.*, 351 U.S. 377, 395 (1956). Ellie Mae asserts that DocMagic has not alleged that
5 reasonably interchangeable products compete within the network market. This argument rests
6 largely on Ellie Mae’s factual assertion that only Encompass users can access ePASS, so that ePASS
7 is not “reasonably interchangeable” with other networks. However, that assertion contradicts the
8 allegations in the complaint. Compl. ¶¶ 32-33; *see also id.* ¶ 98 (alleging the existence of other
9 competing networks). Likewise, Ellie Mae’s assertion that an adapter program such as DocMagic
10 XL is reasonably interchangeable with a network, and so should be included in the alleged market,
11 contradicts the complaint’s allegations that participation in the network provides benefits beyond
12 mere connectivity. *Id.* ¶¶ 23-27. Finally, Ellie Mae’s factual contentions about the available
13 network substitutes discussed in its SEC filing are not appropriate for resolution at the pleadings
14 stage. Taking all of the factual allegations in the complaint as true, as the court must on Ellie Mae’s
15 motion to dismiss, DocMagic has sufficiently pled the existence of a network market.

16 Thirdly, Ellie Mae suggests that DocMagic has failed to allege facts supporting the existence
17 of a DPS market. DocMagic alleges that the DPS market consists of “online document preparation
18 services to brokers and lenders using third-party LOS’s in conjunction with residential mortgage
19 transactions.” *Id.* ¶ 108. Under this definition, the alleged DPS market includes document
20 preparation services provided either to users of Ellie Mae’s Encompass LOS or to users of any other
21 third-party LOS. DocMagic’s factual allegations describe the alleged market, the product which this
22 market provides, and the competitors and customers in the market. *Id.* ¶¶ 15-18, 47-58, 94, 108-110,
23 126-31. These factual allegations are sufficient to plausibly support the existence of a market in
24 which reasonably interchangeable DPS vendors compete.

25 2. Market power

26 As well as identifying a relevant market, a plaintiff bringing antitrust claims must allege that
27 the defendant has market power within that market. *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*,

1 532 F.3d 963, 972 (9th Cir. 2008); *Newcal*, 513 F.3d at 1044. “Market power is the ability to raise
2 price profitability by restricting output”; when a party has sufficient market power to exclude
3 competition or control prices, that party possesses monopoly power. IIB Phillip E. Areeda et al.,
4 *Antitrust Law* ¶ 501 (2007) (hereinafter Areeda). Market power need not be pled with specificity,
5 and whether a defendant actually possesses market power is a factual question. *Newcal*, 513 F.3d at
6 1045, 1051. A plaintiff can show market power directly, by establishing that the defendant, by
7 actually reducing its own output, raised market prices; or indirectly, by showing that the defendant
8 has a dominant share of the market, that there are significant barriers to entry into that market, and
9 that existing competitors cannot increase their production in the short run. *Rebel Oil Co. v. Atl.*
10 *Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995).⁵ To bring a claim for attempted monopolization,
11 like those asserted by DocMagic, a plaintiff must show a “dangerous probability” that the defendant
12 will achieve monopoly power. *See Spectrum Sports*, 506 U.S. at 456 (stating the elements of a claim
13 for attempted monopolization). DocMagic does not allege that Ellie Mae has actually reduced
14 output in order to raise prices in any of the three markets. Instead, it has attempted to allege facts
15 sufficient to support an indirect inference that Ellie Mae possesses market power in the LOS,
16 network and DPS markets.

17 DocMagic has provided sufficient factual allegations describing Ellie Mae’s position in the
18 LOS and network markets to plausibly conclude that Ellie Mae has market power in both markets.
19 Compl. ¶¶ 99, 105-07, 113-14, 143-44. Ellie Mae argues that DocMagic’s allegations are
20 insufficient, because DocMagic has not alleged that Ellie Mae actually controlled prices or excluded
21 competitors in the LOS and network markets. With respect to the LOS market, DocMagic has in
22 fact alleged actual exclusion of competitors. *Id.* ¶ 114 (“Ellie Mae has imposed restrictions on its
23 LOS customers that essentially lock them into the Encompass environment, thereby excluding
24 legitimate competition from LOS companies . . .”). In any event, DocMagic is not required to
25 show actual price control or competitor exclusion; it need only plausibly allege facts showing
26 monopoly power over the market, not the exercise of that power. *See Rebel Oil*, 51 F.3d at 1434
27 (holding that market power may be demonstrated either by showing exercise of that power, or
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1 circumstantially by showing the structure of the market). DocMagic has done so by alleging facts
2 showing that Ellie Mae has a significant market share in the LOS and network markets, that there are
3 high barriers to entry for both markets, and that competitors cannot effectively increase their output
4 to return the market to an efficient price level. *See* Compl. ¶¶ 98-101, 105-107, 113-115.

5 According to the facts alleged in the complaint, Ellie Mae had a significant market share in
6 both the LOS and network markets. *See, e.g., id.* ¶ 105 (alleging Ellie Mae has a greater than 50%,
7 and likely greater than 60%, market share in the LOS market); *id.* ¶ 99 (alleging Ellie Mae has a
8 60% market share in the network market). Ellie Mae’s arguments to the contrary inappropriately
9 dispute facts alleged in the complaint.

10 Furthermore, DocMagic has alleged facts showing that there are high barriers to entry in
11 each of these markets, and that competitors could not effectively make up for an increase in Ellie
12 Mae’s prices by increasing their own output. With respect to the LOS market, DocMagic has
13 alleged that there are high barriers to switching LOS providers. *Id.* ¶ 107. This both provides a
14 barrier to entry, since new competitors in the LOS market will be unable to attract business that is
15 “locked in” to old LOS providers, and indicates that Ellie Mae’s competitors cannot effectively
16 increase production to compensate for a rise in Ellie Mae’s prices, since customers will be unable to
17 take advantage of any increased supply of LOS services provided by Ellie Mae’s competitors. *Cf.*
18 *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 476 (1992) (noting that high switching
19 costs can force “locked-in” consumers to tolerate supracompetitive prices rather than changing
20 providers).

21 With respect to the network market, DocMagic has alleged that the “network effect” creates
22 a high barrier to entry into the market. “In markets characterized by network effects, one product or
23 standard tends towards dominance, because ‘the utility that a user derives from consumption of the
24 good increases with the number of other agents consuming the good.’ ” *United States v. Microsoft*
25 *Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001) (quoting Michael L. Katz & Carl Shapiro, *Network*
26 *Externalities, Competition, and Compatibility*, 75 Am. Econ. Rev. 424, 424 (1985)). “For example,
27 ‘[a]n individual consumer’s demand to use (and hence her benefit from) the telephone network . . .

1 increases with the number of other users on the network whom she can call or from whom she can
2 receive calls.’ ” *Id.* (quoting Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in*
3 *Network Industries*, 68 U. Chi. L. Rev. 1, 8 (2001)). Where the network effect is sufficiently strong,
4 it can function as a barrier to entry into a market. *Id.* at 83-84. DocMagic alleges that the network
5 market is characterized by the network effect and that the success of ePASS, largely due to the
6 network effect, has created a barrier to entry into the network market. Compl. ¶¶ 100-01. Taken
7 altogether, DocMagic’s factual allegations are sufficient to support its allegation that Ellie Mae has
8 monopoly power in the network and LOS markets.

9 DocMagic’s factual allegations are not, however, adequate to show a dangerous probability
10 that Ellie Mae will attain monopoly power in the DPS market, as the DPS market is defined by
11 DocMagic, because DocMagic has not provided plausible allegations that there are any barriers to
12 entry into the DPS market. As alleged, the DPS market consists of all online document preparation
13 services provided to users of third-party LOSs. *Id.* ¶ 108. DocMagic has alleged that Ellie Mae has
14 been able to obtain a market share of 60% in this market. *Id.* ¶ 110. DocMagic also contends that
15 there are barriers to entry into the DPS market, based on its allegations that Ellie Mae has prevented
16 Encompass users from connecting to DocMagic or any other DPS provider that is not a vendor on
17 ePASS. *Id.* ¶¶ 70-72, 149-50. However, the contractual and technical limitations that Ellie Mae has
18 placed on Encompass users’ choice of DPS vendors have not created a barrier to entry into the DPS
19 market as a whole. Rather, DocMagic’s allegations show only that there is a barrier to entry for the
20 submarket consisting of document preparation services *provided to Encompass users*. See *L.A. Land*
21 *Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993) (defining barriers to entry); *cf.*
22 *Newcal*, 513 F.3d at 1045 (recognizing the difference between a market and an economically distinct
23 submarket); *United States v. Syufy Enters.*, 903 F.2d 659, 666-67 (9th Cir. 1990) (describing
24 structural barriers to market entry that prevent any new competitors from joining the market).
25 Unlike in the LOS market, where it is difficult for new LOS vendors to reach any existing customers
26 because they are all “locked in” to their current LOSs, and unlike in the network market, where the
27 network effect makes it difficult to establish a competing new network, there is nothing (at least
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1 according to DocMagic’s complaint) to prevent new DPS vendors from competitively entering the
2 market. A new DPS vendor wishing to enter the DPS market but excluded from ePASS can sell its
3 product to any customers except those who are also Encompass users. Therefore, while DocMagic’s
4 allegations may be sufficient to show a dangerous probability that Ellie Mae will attain (or perhaps
5 already has) monopoly power in the submarket consisting of document preparation services
6 provided to Encompass users, the complaint does not plausibly aver a dangerous probability of
7 monopoly power over the DPS market as a whole.⁶ *See Syufy*, 903 F.2d at 664 & n.6.

8 For instance, if Ellie Mae raised the price of Ellie Mae Docs, the allegations show that
9 Encompass users might be forced to pay this higher price (since Ellie Mae has prevented Encompass
10 users from connecting to DPS vendors not on ePASS, Compl. ¶ 72, Ellie Mae can prevent new DPS
11 vendors from joining ePASS, *id.* ¶ 119, and the other DPS vendors on ePASS do not provide
12 effective competition to Ellie Mae Docs, *id.* ¶ 127). Nevertheless, the price of document preparation
13 services would remain exactly the same for the alleged 40% of third-party LOS users who do not use
14 Encompass. If Ellie Mae attempted to offer its services at an artificially high price to these users,
15 that offer would be rejected and the market price would not change. Moreover, DPS vendors
16 catering to non-Encompass users would not be able to mimic Ellie Mae’s artificially high prices,
17 raising the price for the market as a whole, because they would be undercut by increased production
18 from their competitors or from new entrants into the market.

19 It is possible that the control which Ellie Mae allegedly exercises over current Encompass
20 users’ choice of DPS vendor could constitute a barrier to entry into the market as a whole. *See*
21 *generally Areeda* ¶ 421f (explaining how inadequate access to customers in the market may
22 constitute barrier to entry). Likewise, it is possible that there are other barriers to entry into the DPS
23 market beyond those alleged in the complaint, and that these other barriers make the 40% of the DPS
24 market not controlled by Ellie Mae as inefficient as the 60% of the market which is controlled by
25 Ellie Mae. However, DocMagic has not at present alleged facts plausibly supporting either of these
26 two conclusions.

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Because DocMagic has failed to allege facts showing a dangerous probability that Ellie Mae will acquire monopoly power in the DPS market, Ellie Mae’s motion to dismiss DocMagic’s first, third and fourth claims for relief is granted; those claims are dismissed with leave to amend.

1 B. Fifth claim for relief: trade dress and trademark claims

2 DocMagic’s fifth claim for relief alleges that Ellie Mae violated section 43(a) of the Lanham
3 Act, 15 U.S.C. § 1125(a), by designing its document preparation services (Ellie Mae Docs) to create
4 audit reports that infringe on DocMagic’s trade dress and trademarks. In order to state a trade dress
5 infringement claim, DocMagic must allege facts showing that: “(1) the trade dress is inherently
6 distinctive or has acquired distinctiveness through secondary meaning; (2) there is a likelihood that
7 the public will be confused by the infringing use; and (3) the trade dress is non-functional.” *Stephen*
8 *W. Boney, Inc. v. Boney Servs., Inc.*, 127 F.3d 821, 828 (9th Cir. 1997). DocMagic alleges that its
9 trade dress in the audit report consisted of a “3-column table-like list without internal borders, with
10 field names on the left, a message describing the deficiency in the middle and space for additional
11 details on the right.” Compl. ¶ 55. The field names DocMagic allegedly utilized were the word
12 “FATAL,” in red, followed by a description of the deficiency in red, and the word “WARNING,” in
13 yellow, followed by a description of the (less-vital) deficiency in black. *Id.* ¶¶ 54, 167. DocMagic
14 further alleges that it possesses trademarks in the words “FATAL” and “WARNING” as they appear
15 in DocMagic’s audit reports. *Id.* ¶ 51. According to DocMagic, Ellie Mae has copied this trade
16 dress and these trademarks in their entirety, except that the word “WARNING” in Ellie Mae’s audit
17 report appears in black rather than yellow. Finally, DocMagic avers that by organizing the audit
18 reports in Ellie Mae Docs in a manner identical to DocMagic’s trade dress, Ellie Mae’s conduct is
19 “likely to lead to confusion as to the source of Ellie Mae’s document preparation services.” *Id.* ¶ 57.
20 Ellie Mae suggests that DocMagic’s allegations are insufficient to satisfy any of the three elements
21 of a Lanham Act violation. To the contrary, the complaint contains allegations of trademark and
22 trade dress infringement that are sufficient, albeit barely, under Rule 8(a).

23 Firstly, DocMagic has adequately alleged that its trade dress in the format of its audit reports
24 have “acquired distinctiveness through secondary meaning.”⁷ *Boney*, 127 F.3d at 828. DocMagic
25 alleges that its use of this trade dress was long-standing and exclusive, that it has been used
26 consistently on DocMagic’s audit reports, and that users of the re-branded services knew that those
27 services were being provided by DocMagic based on this trade dress. Compl. ¶¶ 53-55. These facts,
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1 particularly the last one, raise a plausible inference that consumers generally viewed the alleged
2 trade dress as primarily identifying DocMagic as the source of the product, rather than merely
3 identifying the product itself. *See Samara Bros.*, 529 U.S. at 211.

4 Secondly, DocMagic’s complaint contains factual allegations from which the court can infer
5 a likelihood of confusion. Ellie Mae attacks DocMagic’s confusion allegations on two separate
6 grounds. To begin with, Ellie Mae suggests that as a factual matter, there is no likelihood of public
7 confusion between Ellie Mae Docs and DocMagic because the products are dissimilar in appearance.
8 To support this contention, Ellie Mae submitted two screenshots of DocMagic computer audit
9 reports. The screenshots, and therefore Ellie Mae’s arguments founded upon them, are not
10 admissible to support Ellie Mae’s motion to dismiss. “[A] district court ruling on a motion to
11 dismiss may consider a document the authenticity of which is not contested, and upon which the
12 plaintiff’s complaint necessarily relies.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).
13 However, DocMagic contends that its complaint relies on a different version of its audit report than
14 that submitted by Ellie Mae. Since DocMagic’s claim does not necessarily rely on the versions of
15 the audit reports submitted by Ellie Mae, they are inadmissible. The court cannot decide at this
16 stage the factual question of whether DocMagic’s audit reports actually appeared as they are
17 described in the complaint; therefore, Ellie Mae’s argument provides no basis for dismissing this
18 claim.

19 Next, Ellie Mae contends that even if the court refuses to admit the screenshots submitted by
20 Ellie Mae, DocMagic has not adequately alleged consumer confusion. Such is not the case.
21 DocMagic has alleged that Ellie Mae’s audit report is nearly indistinguishable from its own, that
22 Ellie Mae intentionally copies DocMagic’s trade dress, and that it is offered to consumers who
23 previously used DocMagic’s products and who associate the trade dress in question with
24 DocMagic’s products. Compl. ¶¶ 57, 170. These facts are sufficient to raise a plausible inference of
25 consumer confusion, either as to the source of the document preparation services or as to the
26 affiliation of DocMagic with Ellie Mae’s services. *See Cairns v. Franklin Mint Co.*, 292 F.3d 1139,
27 1149-50 (recognizing that consumer confusion may arise over the origin or endorsement of
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1 products). Ellie Mae argues, however, that consumer confusion is unlikely since the report is only
2 created after the consumer has been exposed to other source-identifying information clearly showing
3 who will create the report. The question of whether other source-identifying information will dispel
4 consumer confusion created by the similar trade dress is a factual one that the court cannot resolve at
5 this stage, and so provides no basis for dismissing DocMagic’s claim.

6 Finally, DocMagic has also alleged sufficient facts to support a barely plausible inference
7 that its claimed trade dress is nonfunctional. “A product feature is functional and cannot serve as a
8 trademark if the product feature is essential to the use or purpose of the article or if it affects the cost
9 or quality of the article, that is, if exclusive use of the feature would put competitors at a significant,
10 non-reputation-related disadvantage.” *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165
11 (1995) (internal quotation marks omitted). Although DocMagic may have great difficulty proving
12 that the features it alleges as its trade dress could be denied to other competitors without putting
13 them at a non-reputation-related disadvantage, the question of whether DocMagic’s trade dress is
14 functional or nonfunctional is a factual one that cannot be resolved on a motion to dismiss. *See*
15 *Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1258 (9th Cir. 2001); *Axis Imex, Inc. v.*
16 *Sunset Bay Rattan, Inc.*, No. C 08-3931 RS, 2009 WL 55178, at *3 (N.D. Cal. Jan. 7, 2009)
17 (Seeborg, Mag. J.). Construing DocMagic’s complaint liberally, it has alleged facts showing that
18 competitors would not need the features of its audit report which it identifies as its trade dress in
19 order to compete without disadvantage. Compl. ¶ 56 (“[T]he information to be displayed in the
20 audit report could be selected, arranged, and presented in any number of ways Indeed, the audit
21 report format had been used by no one else in the field until Ellie Mae decided to replicate
22 DocMagic’s software in 2009.”).

23 As another basis for its Lanham Act claim, DocMagic argues that it holds a trademark in the
24 words “WARNING” and “FATAL” as used on its audit reports. As described above, the court is
25 skeptical of DocMagic’s ability to adduce evidence proving that it holds a protectable trademark in
26 these words, particularly in showing that these words are inherently distinctive or have acquired
27 secondary meaning, and that they are not functional.⁸ *See Talking Rain Beverage Co. Inc. v. S.*
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1 *Beach Beverage Co.*, 349 F.3d 601, 603 (9th Cir. 2003) (requiring showing of distinctiveness and
2 nonfunctionality for successful trademark claims). However, given the factual allegations described
3 above, it is plausible that DocMagic possesses a protectable interest in these alleged marks, and that
4 Ellie Mae’s actions constitute trademark infringement. *See* Compl. ¶¶ 51-57, 166-170. These
5 questions are best resolved on summary judgment. Accordingly, Ellie Mae’s motion to dismiss
6 DocMagic’s fifth claim for relief is denied.

7 C. Sixth claim for relief: false advertising

8 DocMagic’s sixth claim for relief alleges that Ellie Mae committed false advertising in
9 violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), by sending a letter to its
10 customers stating that Ellie Mae’s document preparation service, in contrast to DocMagic’s service,
11 would provide “greater automation, safeguards and control to help you easily stay compliant now.”
12 Compl. ¶ 79. In order to state a claim for false advertising, a plaintiff must allege facts showing
13 each of the following five elements:

- 14 (1) a false statement of fact by the defendant in a commercial advertisement about its
15 own or another’s product; (2) the statement actually deceived or has the tendency to
16 deceive a substantial segment of its audience; (3) the deception is material, in that it is
17 likely to influence the purchasing decision; (4) the defendant caused its false
statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be
injured as a result of the false statement, either by direct diversion of sales from itself
to defendant or by a lessening of the goodwill associated with its products.

18 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

19 Ellie Mae argues that DocMagic has not alleged sufficient facts to plausibly support any of
20 these five elements. A quick examination of the complaint indicates that DocMagic has failed to
21 adequately allege even the first element of the claim. The alleged misrepresentation constitutes non-
22 actionable puffery. Puffery consists of statements that are “extremely unlikely to induce consumer
23 reliance.” *Newcal*, 513 F.3d at 1038. “Ultimately, the difference between a statement of fact and
24 mere puffery rests in the specificity or generality of the claim. . . . Thus, a statement that is
25 quantifiable, that makes a claim as to the ‘specific or absolute characteristics of a product,’ may be
26 an actionable statement of fact while a general, subjective claim about a product is non-actionable
27 puffery.” *Id.* (quoting *Cook, Perkiss, & Liehe v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246
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1 (9th Cir. 1990)). The claims that Ellie Mae’s program will provide “greater automation, safeguards
2 and control” and will “help you easily stay compliant now” are neither quantifiable, nor claims as to
3 the specific or absolute characteristics of its product. *Cf. id.* at 1053 (finding that the “general
4 assertion that IKON provides its customers with low costs and with flexibility” is “classic puffery”);
5 *Cook*, 911 F.2d at 246 (holding that general assertions of superiority, such as claiming comparable
6 services at lower rates, are “not . . . the kind of detailed or specific factual assertions that are
7 necessary to state a false advertising cause of action”). Because the alleged misrepresentations are
8 not actionable as a matter of law and do not come close to stating a claim for false advertising, Ellie
9 Mae’s motion to dismiss DocMagic’s sixth claim is granted, and the claim is dismissed without
10 leave to amend.

11 D. Seventh claim for relief: copyright infringement

12 DocMagic’s seventh claim is for copyright infringement, based on Ellie Mae’s alleged
13 copying of various elements in DocMagic’s audit reports to create Ellie Mae’s own audit reports.
14 Specifically, DocMagic alleges that the following elements in its audit reports constitute protectable
15 expression and were copied by Ellie Mae: “(1) the selection of deficiencies and field names; (2) the
16 arrangement of deficiencies into two groups with specific field names; and (3) the arrangement and
17 display of field names and deficiencies in a color-coded format.” Compl. ¶ 184-185.

18 Except under certain exceptions not relevant here, 17 U.S.C. section 411(a) requires that “no
19 civil action for infringement of the copyright in any United States work shall be instituted until
20 preregistration or registration of the copyright claim shall have been made in accordance with this
21 title.” Pursuant to this registration requirement, a party may bring a suit for copyright infringement
22 once the Copyright Office receives a complete application for copyright on the allegedly infringed
23 materials. *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 615-16, 621 (9th Cir. 2010).
24 The registration requirement is not jurisdictional, but it is a necessary element of a copyright
25 infringement claim. *Reed Elsevier, Inc. v. Muchnick*, ___ U.S. ___, ___, 130 S. Ct. 1237, 1237
26 (2010); *Cosmetic Ideas*, 606 F.3d at 615. DocMagic alleges that it “has complied with Title 17 of
27 the United States Code and is in the process of registering the . . . copyright [on its audit reports]
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1 with the United States Copyright Office.” Compl. ¶ 187. An allegation that DocMagic “is in the
2 process of registering” the copyright does not plausibly support the inference that the registration
3 had already been made at the time this suit was filed. At the hearing on this matter, DocMagic
4 admitted that it had not submitted a copyright application prior to the filing of its complaint; post-
5 hearing submissions from DocMagic confirmed this state of affairs. *See* Docket No. 58 (Letter from
6 DocMagic’s counsel, attaching a copyright Certificate of Registration dated June 11, 2010).
7 Because allegations to support this element of DocMagic’s claim are lacking, Ellie Mae’s motion to
8 dismiss DocMagic’s seventh claim for relief is granted, and the claim is dismissed with leave to
9 amend. However, any amendment to this claim for relief will not relate back.

10 E. Eighth claim for relief: intentional interference with contractual relations

11 DocMagic’s eighth claim is for intentional interference with contractual relations, based on
12 Ellie Mae’s alleged actions to disrupt and destroy DocMagic’s relationships with its customers.
13 However, DocMagic appears to misunderstand the nature of this tort. The tort of intentional
14 interference with contractual relations under California law is what is known as “inducement of
15 breach of contract” in other jurisdictions. *See* 5 Witkin, *Summary of California Law* § 731. It
16 requires the following five elements:

- 17 1. The existence of a valid contract between the plaintiff and a third party;
- 18 2. The defendant’s knowledge of that contract;
- 19 3. The defendant’s intentional acts designed to induce a breach or disruption of the
20 contractual relationship;
- 21 4. Actual breach or disruption of the contractual relationship; and
- 22 5. Resulting damage.

23 *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1148 (2004). Here, DocMagic does not allege any facts
24 plausibly showing that Ellie Mae’s actions caused the breach or disruption of any existing contracts
25 which DocMagic and its customers were in the process of fulfilling at the time Ellie Mae’s actions
26 were taken. *See* Compl. ¶¶ 15-18, 38 (indicating that DocMagic’s interactions with customers
27 consisted of discrete transactions, rather than long-term contracts). Because DocMagic’s allegations
28 do not show that DocMagic had existing *contracts*—as opposed to mere economic relations—that

1 were breached or disrupted as the result of Ellie Mae’s actions, Ellie Mae’s motion to dismiss the
2 eighth claim for relief is granted, and this claim is dismissed with leave to amend.

3 F. Ninth claim for relief: intentional interference with prospective economic advantage

4 DocMagic’s ninth claim for relief is for intentional interference with prospective economic
5 advantage (IIPEA), based on its allegations that Ellie Mae acted to cut DocMagic off from access to
6 customers with which DocMagic had ongoing business relations. An IIPEA claim requires the
7 following elements:

- 8 1. An economic relationship between the plaintiff and some third party, with the
9 probability of future economic benefit to the plaintiff;
- 10 2. The defendant’s knowledge of the relationship;
- 11 3. Intentional acts on the part of the defendant designed to disrupt the relationship;
- 12 4. Actual disruption of the relationship; and
- 13 5. Economic harm to the plaintiff proximately caused by the acts of the defendant.

14 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003). In addition, the
15 intentional acts alleged as the third element must have been “wrongful by some legal measure other
16 than the fact of interference itself.” *Id.* (quoting *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11
17 Cal. 4th 376, 393 (1995)); *see also Korea Supply*, 29 Cal. 4th at 1158-59 (“The tort of intentional
18 interference with prospective economic advantage is not intended to punish individuals or
19 commercial entities for their choice of commercial relationships or their pursuit of commercial
20 objectives, unless their interference amounts to independently actionable conduct.”).

21 DocMagic alleges generally that it had existing economic relationships with third
22 parties—Encompass LOS and ePASS users—that gave it the prospect of future economic
23 benefits—additional agreements to prepare loan documents for loan originators or lenders using a
24 third-party LOS. *See* Compl. ¶¶ 15-18, 192-204. That said, DocMagic does not identify any
25 particular relationship that was disrupted because of Ellie Mae’s actions. At this stage and given the
26 nature of the harm alleged by DocMagic, DocMagic need not specify every single economic
27 relationship with which Ellie Mae interfered. *Twombly*, 550 U.S. at 570 (“[W]e do not require
28 heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible

1 on its face.”). However, in order to provide Ellie Mae with sufficient information to answer the
2 complaint, DocMagic must, for at least one actual relationship, plead facts sufficient to satisfy all of
3 the elements of an IIPEA claim. Because such allegations are missing from the complaint, Ellie
4 Mae’s motion to dismiss DocMagic’s ninth claim for relief is granted, and this claim is dismissed
5 with leave to amend.

6 G. Tenth and eleventh claims for relief: breach of contract claims

7 DocMagic’s tenth and eleventh claims are for breach of contract, based on Ellie Mae’s
8 alleged breach of the Reseller Agreement and Bridge Agreement respectively. Specifically,
9 DocMagic claims Ellie Mae breached these agreements by misappropriating and misusing
10 proprietary information, including both technology and customer information, that DocMagic
11 provided to Ellie Mae pursuant to these agreements. To assert a claim for relief for breach of
12 contract, a plaintiff must plead: (1) the existence of the contract, (2) the plaintiff’s performance or
13 excuse for non-performance, (3) the defendant’s breach of the contract, and (4) the resulting
14 damages to the plaintiff. *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal. App.
15 4th 1375, 1391 n.6 (2004). DocMagic has adequately pled each of these elements in its complaint
16 with respect to each contract, and supported them with factual allegations. *See* Compl. ¶¶ 39-42, 45,
17 47-49, 58, 74-80, 205-26. Contrary to Ellie Mae’s contention, DocMagic has not only pled that Ellie
18 Mae had access to DocMagic’s proprietary information, but also that Ellie Mae actually
19 misappropriated and misused it. *Id.* ¶¶ 58, 76, 86, 92, 211, 222. DocMagic is not required to plead
20 with specificity the precise proprietary information that Ellie Mae misappropriated and misused.
21 *Twombly*, 550 U.S. at 570 (holding that heightened fact pleading of specifics not required).
22 Likewise, DocMagic’s factual allegations are sufficient to make plausible the inference that Ellie
23 Mae actually breached the contract. *See* Compl. ¶¶ 74-77 (alleging that Ellie Mae used DocMagic’s
24 proprietary customer information to contact DocMagic’s customers); *id.* ¶¶ 47-50 (alleging that Ellie
25 Mae used DocMagic’s proprietary software information to create Ellie Mae Docs). Ellie Mae’s
26 motion to dismiss the tenth and eleventh claims for relief is therefore denied.

1 H. Twelfth claim for relief: trade secret misappropriation

2 DocMagic’s twelfth claim for relief, for trade secret misappropriation, is also based on Ellie
3 Mae’s alleged misappropriation and misuse of the proprietary information that DocMagic provided
4 to Ellie Mae under the Reseller Agreement and Bridge Agreement. In California, a trade secret
5 misappropriation claim has “two primary elements: (1) the existence of a trade secret, and (2)
6 misappropriation of the trade secret.” *AccuImage Diagnostics Corp v. Terarecon, Inc.*, 260 F. Supp.
7 2d 941, 950 (N.D. Cal. 2003) (Patel, J.) (citing Cal. Civ. Code § 3426.1(b)). DocMagic’s allegations
8 are sufficient to support each of those elements. As discussed above, DocMagic need not plead with
9 specificity what particular proprietary information was misappropriated by Ellie Mae; the
10 description of the proprietary information given in the complaint is sufficient to satisfy Rule 8(a).
11 *See* Compl. ¶¶ 228-232; *Twombly*, 550 U.S. at 570; *see also StonCor Grp., Inc. v. Campton*, No.
12 C05-1225JLR, 2006 WL 314336, at *5 (W.D. Wash. Feb. 7, 2006) (finding alleged misappropriation
13 of “proprietary and confidential information concerning . . . sales and marketing strategies, pricing
14 and pricing policies, and customer lists and installers” sufficient to state a claim). DocMagic’s
15 factual allegations are also sufficient to support a plausible inference of misappropriation. Compl.
16 ¶¶ 47-50, 57-58 (technical information); *id.* ¶¶ 74-78 (customer information). Likewise, DocMagic
17 alleges facts supporting Ellie Mae’s actual misuse of its proprietary trade secret information, in
18 creating Ellie Mae Docs and in soliciting DocMagic’s customers. *Id.*

19 Ellie Mae’s argument that it already had independent access to all of the customers in
20 question, and so that it is implausible to infer that Ellie Mae misappropriated DocMagic’s customer
21 information, ignores DocMagic’s allegation that the customer information which it had compiled
22 was only obtained and made usable at significant expense. *Id.* ¶ 231. Given the alleged difficulty
23 of independently obtaining the customer information at issue, it becomes plausible that Ellie Mae
24 would misappropriate DocMagic’s compiled customer information rather than preparing its own.
25 The alleged difficulty of obtaining customer information distinguishes this case from *Metro Traffic*
26 *Control, Inc. v. Shadow Traffic Network*, 22 Cal. App. 4th 853, 863 (1994), on which Ellie Mae
27 relies. In that case, only a single customer was at issue, and the evidence presented showed that the
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1 customer had independently given the alleged misappropriator all of the alleged trade secret
2 information that it had provided to the plaintiff. In this case, by contrast, DocMagic’s customer
3 information allegedly relates to a relatively wide client base, and it is too early a stage in the
4 litigation for any evidence to show whether Ellie Mae compiled the information independently
5 rather than by misappropriating it. Furthermore, DocMagic’s allegations that Ellie Mae specifically
6 tailored Ellie Mae Docs to DocMagic’s customers, and could not have done so without using
7 DocMagic’s proprietary information, support the inference that Ellie Mae used DocMagic’s
8 proprietary information rather than gathering its own. *See* Compl. ¶¶ 49, 74. Since DocMagic
9 alleges facts plausibly supporting its claim for trade secret misappropriation, Ellie Mae’s motion to
10 dismiss the twelfth claim for relief is denied.

11 I. Thirteenth claim for relief: unfair competition

12 DocMagic’s thirteenth claim for relief is brought under California’s Unfair Competition Law
13 (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*, alleging that all of Ellie Mae’s acts described in
14 the complaint constituted unfair competition within the meaning of that statute. Section 17200
15 prohibits “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or
16 misleading advertising” Cal. Bus. & Prof. Code § 17200. Because section 17200 is written in
17 the disjunctive, “a business act or practice need only meet one of the three criteria—unlawful, unfair,
18 or fraudulent—to be considered unfair competition under the UCL.” *Daro v. Superior Court*, 151
19 Cal. App. 4th 1079, 1093 (2007). In its complaint, DocMagic alleges that Ellie Mae’s conduct
20 violated both the unlawful and unfair prongs of the UCL.

21 “Under its ‘unlawful’ prong, the UCL borrows violations of other laws . . . and makes those
22 unlawful practices actionable under the UCL.” *See Berryman v. Merit Prop. Mgmt.*, 152 Cal. App.
23 4th 1544, 1554 (2007) (internal quotation marks and citation omitted; alteration in original). “Thus,
24 a violation of another law is a predicate for stating a cause of action under the UCL’s unlawful
25 prong.” *Id.*; *see Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 717-18 (2001)
26 (holding the unlawful prong forbids “anything that can be properly called a business practice and
27 that at the same time is forbidden by law”). Here, as is discussed above, DocMagic has plausibly
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1 alleged that Ellie Mae committed trademark and trade dress violations, and misappropriated and
2 misused its trade secrets. These actions may serve as the basis for an unfair competition claim under
3 section 17200. *See Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944
4 F.2d 1446, 1457 (9th Cir. 1991) (trademark); *Imax Corp. v. Cinema Tech., Inc.*, 152 F.3d 1161, 1169
5 (9th Cir. 1998) (trade secret misappropriation). DocMagic also argues that its unfair competition
6 claim can be based on Ellie Mae’s breach of the Reseller Agreement and Bridge Agreement. A
7 breach of contract may only form the basis of a section 17200 claim if that breach itself is “unlawful,
8 unfair, or fraudulent.” *Puentes v. Wells Fargo Home Mortg., Inc.*, 160 Cal. App. 4th 638, 645
9 (2008). As is discussed above, DocMagic alleges that Ellie Mae breached its contracts by
10 misappropriating and misusing DocMagic’s proprietary information, Compl. ¶¶ 211, 222. The
11 breach of contract claims are thus coterminous with the trade secret misappropriation claim in the
12 basis which they provide for DocMagic’s unfair competition claim.

13 DocMagic has not plead facts sufficient to state a claim for a violation of the UCL’s unfair
14 prong. The California Supreme Court has defined an “unfair” business act or practice as “conduct
15 that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those
16 laws because its effects are comparable to or the same as a violation of the law, or otherwise
17 significantly threatens or harms competition.” *Cel-Tech*, 20 Cal. 4th at 187. On its face, the
18 California definition of “unfair” competition appears to embrace conduct that might not violate the
19 Sherman Act. That said, the Ninth Circuit has held, albeit in an unpublished opinion, that “[w]here .
20 . . the same conduct is alleged to support both a plaintiff’s federal antitrust claims and state-law
21 unfair competition claim, a finding that the conduct is not an antitrust violation precludes a finding
22 of unfair competition.” *LiveUniverse, Inc. v. MySpace, Inc.*, 304 Fed. Appx. 554, 557 (9th Cir.
23 2008) (citing *Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261, 1270 (C.D. Cal. 2000); *Chavez v.*
24 *Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001)). As described above, DocMagic has not alleged
25 facts showing that Ellie Mae’s conduct violated the Sherman Act by posing a dangerous threat of
26 monopoly in the DPS market. As a result, any claims DocMagic might be asserting under the
27 UCL’s unfair prong necessarily fail as well. Accordingly, Ellie Mae’s motion to dismiss the
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1 thirteenth claim for relief is granted in part and denied in part; all of DocMagic’s claim under the
2 UCL’s unfair prong is dismissed with leave to amend.

3 * * * * *

4 In summary, Ellie Mae’s motion to dismiss is GRANTED in part and DENIED in part.
5 DocMagic’s first (monopoly leveraging), third (refusal to deal), fourth (denial of access to essential
6 facility), seventh (copyright infringement), eighth (intentional interference with contractual
7 relationship), and ninth (IIPEA) claims for relief are dismissed with leave to amend. DocMagic’s
8 second (attempted monopolization) and sixth (false advertising) claims for relief are dismissed with
9 prejudice. DocMagic’s thirteenth claim for relief (UCL) is dismissed with leave to amend to the
10 extent it is predicated on a violation of the UCL’s unfair prong. In all other respects, Ellie Mae’s
11 motion to dismiss is denied.

12
13 II. DocMagic’s motion to dismiss

14 DocMagic moves to dismiss Ellie Mae’s first through fifth and seventh through ninth
15 counterclaims. (DocMagic does not move to dismiss Ellie Mae’s sixth counterclaim, which alleges
16 that DocMagic breached the Reseller Agreement.) The court addresses each counterclaim in turn.

17 A. First counterclaim for relief: copyright infringement

18 Ellie Mae’s first counterclaim alleges that DocMagic directly infringed Ellie Mae’s copyright
19 on the Encompass LOS and the Encompass SDK software, by copying, using and distributing the
20 Encompass software and SDK without Ellie Mae’s consent. Counterclaim ¶ 47; *see also id.* ¶¶ 19-
21 24. The same counterclaim also alleges that DocMagic contributorily infringed Ellie Mae’s
22 copyrights on the same software by knowingly inducing others to engage in similarly unauthorized
23 copying and use. *Id.* ¶ 48; *see also id.* ¶¶ 21-26.

24 “To establish copyright infringement, the holder of the copyright must prove both valid
25 ownership of the copyright and infringement of that copyright by the alleged infringer.” *Entm’t*
26 *Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997).
27 Infringement may consist of any violation of the copyright-holder’s exclusive rights guaranteed by
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1 the Copyright Act, 17 U.S.C. § 101 *et seq.*, including the right to reproduce—that is, copy—and
2 distribute the work. 17 U.S.C. § 106; *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).
3 DocMagic does not contest that Ellie Mae possessed a copyright in the Encompass software or the
4 Encompass SDK. Instead, DocMagic contends that Ellie Mae has not properly alleged infringement
5 of Ellie Mae’s exclusive copyright, because it has not pled facts showing that its work was “copied”
6 within the meaning of the Copyright Act.

7 DocMagic argues firstly that Ellie Mae’s allegations of direct infringement are too vague,
8 due to the counterclaim’s repeated use of the term “and/or” to refer to alternative acts. While the
9 use of “and/or” in pleadings is not encouraged, especially in the wake of *Twombly* and *Iqbal*, Ellie
10 Mae’s allegations nevertheless satisfy Federal Rule of Civil Procedure 8(a). Ellie Mae plainly
11 alleges that once DocMagic was lawfully denied access to the ePASS network and Encompass users,
12 DocMagic sought alternative mechanisms for connecting with Encompass users. As part of their
13 conduct, Ellie Mae alleges that DocMagic used Encompass and the Encompass SDK without
14 authorization and copied the Encompass SDK without authorization, actions which constitute
15 copyright infringement. Specifically, the counterclaim alleges that DocMagic “illegally obtained
16 unauthorized access to, and used, the Encompass software, including the SDK,” Counterclaim ¶ 19;
17 that DocMagic “reverse engineered, duplicated, modified, and/or otherwise used the SDK . . .
18 without Ellie Mae’s authorization, to create software [i.e., DocMagic XL],” *id.* ¶ 21; and that
19 “DocMagic XL . . . uses, duplicates, incorporates, and/or invokes Ellie Mae’s Encompass SDK,” *id.*
20 ¶¶ 22. These allegations contain “enough facts to state a claim to relief that is plausible on its face,”
21 *Twombly*, 550 U.S. at 570, and give DocMagic sufficient notice to prepare its defense.

22 Notwithstanding DocMagic’s protestations to the contrary, unauthorized use of a copyrighted
23 computer program constitutes copyright infringement. In order to use a software program on a
24 computer, the program must be copied from a storage device, such as a hard disk, into the
25 computer’s random access memory (“RAM”). The Ninth Circuit has held that loading the program
26 into the computer’s RAM constitutes an act of “copying” for the purposes of copyright law. *MAI*
27 *Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993). DocMagic’s assertion that its
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1 alleged “use” of the copyrighted software cannot serve as the basis of a copyright claim rests
2 erroneously on *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079 (9th Cir. 2005). In *Altera*, the court
3 found that a state law tort claim was not preempted by federal copyright law, because “the
4 unauthorized use of *the software’s end-product* is not within the rights protected by the federal
5 Copyright Act.” *Id.* at 1090 (emphasis added). The unauthorized use of a software’s end-product is,
6 however, legally and factually distinct from the unauthorized use of the software itself. As Ellie
7 Mae’s counterclaim alleges unauthorized use of copyrighted software, not unauthorized use of a
8 copyrighted software’s end-product, its allegations related to use state a claim for direct copyright
9 infringement.⁹

10 Ellie Mae’s claims of contributory infringement also state a claim upon which relief can be
11 granted. “The three elements required to prove a [party] liable under the theory of contributory
12 copyright infringement are: (1) direct infringement by a primary infringer, (2) knowledge of the
13 infringement, and (3) material contribution to the infringement.” *See Metro-Goldwyn-Mayer*
14 *Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir. 2004), *reversed on other grounds*, 545
15 U.S. 913 (2005) (citing *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)). By alleging that
16 DocMagic provided the DocMagic XL program to Encompass licensees, and “instructed Encompass
17 licensees to use the DocMagic XL [program] in conjunction with Encompass and the [Encompass]
18 SDK, without Ellie Mae’s consent or authorization and in direct violation of the SDK license terms,”
19 Counterclaim ¶¶ 24-25, Ellie Mae satisfies all three of the elements of contributory infringement.
20 *See Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007).

21 In its motion, DocMagic argues that Ellie Mae has only alleged that DocMagic instructed
22 third parties to engage in unauthorized use of Ellie Mae’s software, and not that any third parties did
23 so. Such is not the case; Ellie Mae has sufficiently alleged that third parties, with DocMagic’s
24 encouragement, engaged in actual use and copying of copyrighted material. *See* Counterclaim ¶¶
25 22-26, 48 (“DocMagic has . . . knowingly induced, caused, and/or materially contributed to the
26 unauthorized copying, distribution, and/or use . . . of the Encompass software and SDK by
27 DocMagic XL . . . users.”).

1 Additionally, DocMagic argues that Ellie Mae’s licensees’ alleged unauthorized use of
2 Encompass and the Encompass SDK is not copyright infringement (and so cannot support a claim of
3 contributory infringement). However, as discussed above, the unauthorized loading of a software
4 program onto the RAM of a computer constitutes an act of copying, and thus of copyright
5 infringement. *MAI*, 991 F.2d at 518. Insofar as Ellie Mae has alleged that the DocMagic XL
6 program is itself a copy of the Encompass SDK, *see* Counterclaim ¶¶ 21-22, the licensees’ act of
7 loading the DocMagic XL program onto their computers allegedly created a new, unauthorized copy
8 of the Encompass SDK. This alleged infringement by the licensees is sufficient to support a claim
9 of contributory infringement against DocMagic. Furthermore, Ellie Mae’s allegation that DocMagic
10 induced Ellie Mae’s licensees to “use” Encompass and the Encompass SDK outside the scope of the
11 respective licenses by encouraging the licensees to use DocMagic XL, also states a claim for relief.
12 *See* Counterclaim ¶ 25 (“[D]ocMagic has instructed Encompass licensees to use the DocMagic XL
13 Technology in conjunction with Encompass and the SDK . . . in direct violation of the SDK license
14 terms in order to connect directly to DocMagic.”). Exceeding the scope of a license granted by a
15 copyright holder constitutes copyright infringement, *see LGS Architects, Inc. v. Concordia Homes of*
16 *Nev.*, 434 F.3d 1150, 1156 (9th Cir. 2006); thus, to the extent that DocMagic XL provided
17 Encompass and Encompass SDK users with a means for exceeding the scope of their licenses and
18 DocMagic knowingly encouraged them to do so, DocMagic engaged in contributory copyright
19 infringement. Therefore, DocMagic’s motion to dismiss the first counterclaim is denied.

20 B. Second counterclaim for relief: Computer Fraud and Abuse Act

21 Ellie Mae’s second counterclaim alleges that DocMagic violated the Computer Fraud and
22 Abuse Act (“CFAA”), 18 U.S.C. § 1030, by accessing Ellie Mae’s protected computers without
23 authorization and taking Ellie Mae’s proprietary information. DocMagic in response argues firstly
24 that Ellie Mae has not pled facts showing that Ellie Mae has a private right of action under the
25 CFAA, and secondly that Ellie Mae has not pled facts establishing all of the elements of a violation
26 of the CFAA.

1 The CFAA establishes that a civil action may be brought by “[a]ny person who suffers
2 damage or loss by reason of a violation of this section . . . [but] only if the conduct [complained of]
3 involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(I).”
4 18 U.S.C. § 1030(g). Subclause (I) of subsection (c)(4)(A)(i)(I), the only subclause relevant to this
5 case, covers conduct resulting in “loss to 1 or more persons during any 1-year period . . . aggregating
6 at least \$5,000 in value.” *Id.* § 1030(c)(4)(A)(i)(I). The statute defines “loss” as “any reasonable
7 cost to any victim, including the cost of responding to an offense, conducting a damage assessment,
8 and restoring the data, program, system, or information to its condition prior to the offense, and any
9 revenue lost, cost incurred, or other consequential damages incurred because of interruption of
10 service.” 18 U.S.C. § 1030(e)(11). Ellie Mae’s counterclaim contains only a single, generalized
11 allegation related to loss from conduct that violated the CFAA: that “Ellie Mae has suffered
12 damages and loss . . . including, without limitation, harm to Ellie Mae’s data and/or computer(s) and
13 other losses and damages in an amount to be proven at trial, but in any event, over \$5000 aggregated
14 over a one-year period.” Counterclaim ¶ 59.

15 Such an allegation is insufficient to satisfy the CFAA’s loss requirement for at least two
16 reasons. To begin with, the averment verges on the type of conclusory, “formulaic recitation of the
17 elements of a cause of action,” that *Iqbal* and *Twombly* require a court to disregard. *Iqbal*, 129 S. Ct.
18 at 1949–50 (quoting *Twombly*, 550 U.S. at 555). More importantly, even if the court were to
19 consider the allegation, paragraph 59 fails to plead facts sufficient to meet the CFAA’s requirement
20 for a private cause of action. In the counterclaim, Ellie Mae alleges that it suffered “*damages and*
21 *loss . . . over \$5000 aggregated over a one-year period.*” Counterclaim ¶ 59 (emphasis added). The
22 statute, however, requires that an entity suffer a “loss . . . during any 1-year period . . . aggregating at
23 least \$5,000 in value.” 18 U.S.C § 1030(c)(4)(A)(i)(I). Because it is impossible to determine from
24 Ellie Mae’s counterclaim whether its loss, as loss is defined by the CFAA, standing alone and
25 excluding damages, would aggregate to more than \$5000 in a given year, Ellie Mae’s counterclaim
26 fails to adequately plead facts necessary to support a cause of action under the CFAA. Accordingly,
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1 DocMagic’s motion to dismiss the second counterclaim for relief is granted, and the counterclaim is
2 dismissed with leave to amend.

3 C. Third counterclaim for relief: Comprehensive Computer Data Access and Fraud Act

4 Ellie Mae’s third counterclaim, seeks relief under the California Comprehensive Computer
5 Data Access and Fraud Act (“CCDAFA”), Cal. Penal Code § 502(e). The CCDAFA is similar to the
6 CFAA, but prohibits a wider range of conduct. *See* Cal. Penal Code § 502(c)(1)-(9). Furthermore, it
7 contains no loss requirement in order to support a private right of action. Ellie Mae asserts that
8 DocMagic engaged in four of the nine types of conduct prohibited by the CCDAFA: (1)
9 “[k]nowingly access[ing] and without permission . . . us[ing] any data, . . . computer system, or
10 computer network in order to . . . wrongfully control or obtain money, property, or data,” *id.* §
11 502(c)(1); (2) “[k]nowingly access[ing] and without permission . . . us[ing] . . . any data from a
12 computer, computer system, or computer network, or tak[ing] or cop[y]ing any supporting
13 documentation, whether existing or residing internal or external to a computer, computer system, or
14 computer network,” *id.* § 502(c)(2); (3) “[k]nowingly and without permission provid[ing] . . . a
15 means of accessing a computer, computer system, or computer network” in violation of the
16 CCDAFA, *id.* § 502(c)(6); and (4) “[k]nowingly and without permission access[ing] any computer,
17 computer system, or computer network,” *id.* § 502(c)(7).

18 DocMagic contends that, for two reasons, the counterclaim fails to state a claim under any of
19 these provisions. First, DocMagic asserts that Ellie Mae has not made any factual allegations from
20 which it could be inferred that DocMagic engaged in prohibited conduct with the requisite intent.
21 Each of the provisions at issue requires that a plaintiff plead and prove that the defendant, in
22 accessing or inducing access to a computer, acted knowingly. Contrary to DocMagic’s
23 characterization of the counterclaim, Ellie Mae adequately alleges that DocMagic acted intentionally
24 and knowingly. Ellie Mae avers that DocMagic’s unauthorized access was “systematic” and
25 “repeated,” and involved the use of other parties’ license keys and “pre-textual” log-in credentials.
26 Counterclaim ¶ 20; *see Iqbal*, 129 S. Ct. at 1952 (2009) (holding that factual allegations can permit
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1 inference of wrongful intent). Ellie Mae’s allegations are therefore sufficient to satisfy the scienter
2 element of its claims under the CFAA.

3 Next, DocMagic argues that using a third-parties’ log-in credentials, with the third-parties’
4 consent, to access DocMagic’s servers and remove information from the servers, does not, as a
5 matter of law, state a claim for relief. *See* Counterclaim ¶ 20. Again, DocMagic is mistaken.
6 “Penal Code section 502 prohibits knowing access, followed by unauthorized (i.e., ‘without
7 permission’) taking, copying, or use of data,” including where the access is by means of a third-
8 parties’, voluntarily-provided log-in credentials. *Facebook, Inc. v. ConnectU LLC*, 489 F. Supp. 2d
9 1087, 1091 (N.D. Cal. 2007) (Seeborg, Mag. J.); *see* Cal. Penal Code § 502(c)(2).¹⁰ That is exactly
10 the type of conduct described in Ellie Mae’s counterclaim. Accordingly, DocMagic’s motion to
11 dismiss the third counterclaim for relief is denied.

12 D. Fourth counterclaim for relief: breach of the Bridge Agreement

13 Ellie Mae’s fourth counterclaim seeks relief for DocMagic’s alleged breach of the Bridge
14 Agreement. Specifically, Ellie Mae alleges that DocMagic breached Section 1 of the Bridge
15 Agreement, which forbade DocMagic from reverse engineering, duplicating, or modifying the
16 ePASS technology to which DocMagic had access under the Bridge Agreement; and that DocMagic
17 breached Section 10.4, which forbade each party from using or disclosing any proprietary
18 information obtained under the Bridge Agreement. Counterclaim ¶¶ 13, 15-16, 21-22, 68-69; Bridge
19 Agreement at 2, 9.

20 DocMagic argues briefly that Ellie Mae has alleged no facts showing that Section 1 was
21 breached. However, Ellie Mae has alleged that DocMagic “has reverse engineered, duplicated,
22 modified, and/or otherwise used . . . Ellie Mae Proprietary Information, without Ellie Mae’s
23 authorization, to create software [the DocMagic XL program].” Counterclaim ¶ 21. Ellie Mae
24 defines “Ellie Mae Proprietary Information” in its counterclaim as “certain confidential or
25 proprietary information” that it provided DocMagic “[i]n connection with the . . . Bridge Agreement
26 . . . to facilitate DocMagic’s connectivity with Ellie Mae’s licensees through the ePASS technology
27 embedded in the Encompass software.” *Id.* ¶ 13. These allegations are sufficient to state a claim
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1 that DocMagic violated the Bridge Agreement by reverse engineering, duplicating, or modifying the
2 ePASS technology in order to create DocMagic XL. While the court agrees with DocMagic that this
3 claim could have been more clearly explained in the counterclaim, Ellie Mae’s pleadings are not so
4 deficient as to violate Rule 8(a).

5 DocMagic argues in more detail that Ellie Mae has failed to state a claim for breach of
6 section 10.4 of the Bridge Agreement, because Ellie Mae has not alleged that DocMagic used
7 information “obtained in connection with” the Bridge Agreement outside the purposes of the
8 agreement. Instead, DocMagic asserts, Ellie Mae has only alleged that DocMagic used information
9 obtained from third parties, such as the Ellie Mae’s licensees’ license keys and log-in credentials.
10 However, DocMagic misunderstands Ellie Mae’s counterclaim. As noted above, Ellie Mae has
11 defined “Ellie Mae Proprietary Information” in the counterclaim to include information provided to
12 DocMagic under the Bridge Agreement. *Id.* ¶ 13. Ellie Mae alleges that DocMagic “retained its
13 access to Encompass users through the unauthorized and illegal access of Ellie Mae Proprietary
14 Information, including the Encompass SDK.”¹¹ *Id.* ¶ 68. Likewise, Ellie Mae alleges that
15 DocMagic used this proprietary information to create the DocMagic XL software. *Id.* ¶ 21. Ellie
16 Mae has thus sufficiently alleged that DocMagic breached Section 10.4 of the Bridge Agreement, by
17 using proprietary information acquired under the agreement for purposes not contemplated by the
18 agreement. Accordingly, DocMagic’s motion to dismiss the fourth counterclaim for relief, breach of
19 the bridge agreement, is denied.

20 E. Fifth counterclaim for relief: inducement of breach of contract

21 Ellie Mae’s fifth counterclaim is for inducement of breach of contract, based on its
22 allegations that DocMagic encouraged and instructed Encompass licensees to breach the terms of
23 their licenses with Ellie Mae. *Id.* ¶¶ 77-79. The elements of a claim for inducement of breach of
24 contract, which are identical to the elements for intentional interference with contractual
25 relationships, are discussed above. DocMagic has moved to dismiss the fifth counterclaim on the
26 grounds that Ellie Mae has not alleged facts sufficient to support any of the elements.

1 Under *Iqbal* and *Twombly*, Ellie Mae need not identify each and every party that DocMagic
2 induced into breaching contracts with Ellie Mae. But what Ellie Mae has done—identify a group of
3 entities, Encompass licensees (i.e., entities that had entered into the Encompass Software License
4 Agreement and the Encompass SDK license Agreement), who entered into contracts with Ellie Mae
5 that were breached as a result of DocMagic’s conduct—is not sufficient at the pleading stage.
6 Counterclaim ¶¶ 73-77. As with DocMagic’s IIPEA claim for relief, in order to provide DocMagic
7 with sufficient information to answer the complaint, Ellie Mae must, for at least one actual
8 contractual relationship, plead facts sufficient to satisfy all of the elements of an inducement of
9 breach of contract claim. Because such allegations are missing from the complaint, DocMagic’s
10 motion to dismiss the fifth counterclaim is granted, and the counterclaim is dismissed with leave to
11 amend.

12 F. Seventh counterclaim for relief: intentional interference with contractual relationships

13 Ellie Mae’s seventh counterclaim is for intentional interference with contractual
14 relationships. *Id.* ¶¶ 89-94. Although elements required to prove this claim and the inducement of
15 breach of contract are identical, *see 5 Witkin, Summary of California Law* § 731, the conduct that
16 Ellie Mae alleges DocMagic engaged in differs in the fifth and seventh counterclaims.

17 In its seventh counterclaim for relief, Ellie Mae alleges that DocMagic interfered with
18 contracts between Ellie Mae and Encompass licensees for Ellie Mae to provide the licensees with
19 document preparation services. Specifically, Ellie Mae alleges that it had “contractual relationships
20 with various Ellie Mae Clients . . . for access to closing document preparation software through
21 Encompass.” Counterclaim ¶ 89. Ellie Mae also avers that “DocMagic, knowing of Ellie Mae’s
22 contractual relationships with the Ellie Mae Clients, intended to and did disrupt the contractual
23 relationship between Ellie Mae and the Ellie Mae Clients by promoting and inducing the direct
24 access to DocMagic Products by the Ellie Mae Clients in lieu of accessing Rebranded [DocMagic]
25 products from Ellie Mae.” *Id.* ¶ 91. This claim, however, contains a fatal defect; it fails to include
26 an allegation that contracts for document preparation services, as opposed to the possibility of
27 contracts for document preparation, existed between Ellie Mae and Encompass users. As alleged,
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1 the Encompass and Encompass SDK license agreements precluded Encompass users from using
2 document preparation services other than Ellie Mae’s re-branded DocMagic service or those on the
3 ePASS network. But nowhere has Ellie Mae alleged that Encompass users were required to
4 purchase any document preparation services. Ellie Mae alleges only that “Ellie Mae has entered into
5 valid contractual relationships with various Ellie Mae Clients . . . for *access* to closing document
6 preparation software.” *Id.* ¶ 89 (emphasis added). The access to closing document preparation
7 software is not a contractual provision that could be breached by the Ellie Mae clients; the access is
8 a right or privilege, not a duty or obligation. The only inference that can be drawn from the
9 counterclaim is that it was necessary for Encompass users to enter into a separate contract with a
10 loan document preparation service provider, either Ellie Mae or another loan document service
11 provider on the ePASS network, in order to have loan documents prepared. And only if DocMagic
12 induced Ellie Mae clients to breach that second contract could this distinct claim for intentional
13 interference with a contractual relationship stand. Because the counterclaim fails to allege that such
14 contracts actually existed or were breached due to DocMagic’s conduct, DocMagic’s motion to
15 dismiss the seventh counterclaim for relief is granted, and the counterclaim is dismissed with leave
16 to amend.

17 G. Eighth counterclaim for relief: intentional interference with prospective economic
18 advantage

19 Ellie Mae’s eighth counterclaim is for intentional interference with prospective economic
20 advantage (“IIPEA”), based on DocMagic’s actions in creating the DocMagic XL program and
21 soliciting Ellie Mae’s customers to use DocMagic’s services (via the DocMagic XL adapter) rather
22 than Ellie Mae’s. *Id.* ¶¶ 96-98; *see also* Docket No. 54 (Ellie Mae Opp’n) at 18. The elements of an
23 IIPEA claim are discussed above.

24 The conduct at issue in the eighth counterclaim for relief is similar to, albeit slightly more
25 expansive than, that alleged in the seventh counterclaim for relief. Ellie Mae alleges that it had
26 “valid and existing business relationships with the Ellie Mae Clients,” Counterclaim ¶ 96, and has
27 defined “Ellie Mae Clients” as the Encompass users who had access to Ellie Mae’s re-branded
28 document preparation services, *id.* ¶ 29. Ellie Mae further avers that DocMagic was aware of the

1 relationships, acted to and actually did disrupt the relationships, thereby causing Ellie Mae damages.
2 *Id.* ¶ 97-101.

3 As with DocMagic’s IIPEA claim, Ellie Mae’s cause of action must be dismissed for failure
4 to identify at least one specific, ongoing business relationship that was disrupted by DocMagic. The
5 generalized reference to Encompass users is too broad to provide DocMagic with sufficient
6 information to answer the counterclaim. Accordingly, DocMagic’s motion to dismiss the eighth
7 counterclaim for relief is granted, and the counterclaim is dismissed with leave to amend. In
8 amending the counterclaim, Ellie Mae must, for at least one actual relationship, plead facts sufficient
9 to satisfy all of the elements of an IIPEA claim.

10 H. Ninth counterclaim for relief: unfair competition

11 Ellie Mae’s ninth counterclaim alleges that DocMagic’s conduct, as described throughout the
12 counterclaim, constitutes unfair competition in violation of California’s Unfair Competition Law,
13 Cal. Bus. & Prof. Code § 17200 *et seq.* From the counterclaim itself, which simply “realleges and
14 incorporates by reference all previous paragraphs of its Counterclaim . . . ,” Counterclaim ¶ 102, it is
15 difficult to discern under which prong of the UCL Ellie Mae seeks to ground its claim. At the
16 hearing on this motion, however, Ellie Mae explained that it was pursuing a UCL claim under only
17 the unfair prong. As is discussed above an “unfair” business act or practice is “conduct that
18 threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those
19 laws because its effects are comparable to or the same as a violation of the law, or otherwise
20 significantly threatens or harms competition.” *Cel-Tech*, 20 Cal. 4th at 187.

21 Even at the pleading stage, Ellie Mae’s counterclaim, which does not identify a single
22 specific instance of unfair competition by DocMagic, is too vague and conclusory to support a viable
23 cause of action. At the hearing, Ellie Mae indicated, in a general manner, that DocMagic’s actions
24 have allowed it to acquire an advantage over other DPS providers. Not only is the purported
25 “advantage” not specified in the counterclaim, but the counterclaim makes no attempt to explain
26 how that “advantage” was accomplished by means of conduct that violated or threatened a violation
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1 of an antitrust law. Accordingly, DocMagic’s motion to dismiss the ninth counterclaim is granted,
2 and the counterclaim is dismissed with leave to amend.

3 * * * * *

4 In summary, DocMagic’s motion to dismiss Ellie Mae’s first through fifth and seventh
5 through ninth counterclaims for relief is GRANTED in part and DENIED in part. The second
6 (CFAA), fifth (inducement of breach of contract), seventh (intentional interference with contractual
7 relationship), eighth (intentional interference with contractual relationship) and ninth (IIPEA)
8 counterclaims are dismissed with leave to amend. In all other respects, DocMagic’s motion is
9 denied.

10
11 CONCLUSION

12 Ellie Mae’s motion to dismiss is GRANTED in part and DENIED in part. DocMagic’s first
13 (monopoly leveraging), third (refusal to deal), fourth (denial of access to essential facility), seventh
14 (copyright infringement), eighth (intentional interference with contractual relationship), and ninth
15 (IIPEA) claims for relief are dismissed with leave to amend. DocMagic’s second (attempted
16 monopolization) and sixth (false advertising) claims for relief are dismissed without leave to amend.
17 DocMagic’s thirteenth claim for relief (UCL) is dismissed with leave to amend to the extent it is
18 predicated on a violation of the UCL’s unfair prong. In all other respects, Ellie Mae’s motion to
19 dismiss is denied.

20 DocMagic’s motion to dismiss Ellie Mae’s first through fifth and seventh through ninth
21 counterclaims for relief is GRANTED in part and DENIED in part. The second (CFAA), fifth
22 (inducement of breach of contract), seventh (intentional interference with contractual relationship),
23 eighth (intentional interference with contractual relationship) and ninth (IIPEA) counterclaims are
24 dismissed with leave to amend. In all other respects, DocMagic’s motion is denied.

25 * * * * *

26 In conclusion, the court observes that the parties have done little to efficiently and effectively
27 manage this case. Good lawyering does not require pleading every cause of action that may even
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1 remotely appear possible. Rather, it requires careful analysis and selectivity. To assist in this
2 endeavor the parties shall submit with their amended complaint proposed jury instructions necessary
3 to each claim the party asserts.

4
5 IT IS SO ORDERED.

6 Dated: 10/12/2010

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9 MARILYN HALL PATEL
10 United States District Court Judge
11 Northern District of California
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ENDNOTES

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2 1. Elsewhere in the complaint, DocMagic alleges only that Ellie Mae is *able* to obtain a market share
3 of over 50%, but not that it has already done so. Compl. ¶¶ 127-28. Construing the complaint liberally,
4 the court assumes that DocMagic is alleging that Ellie Mae currently possesses a 60% market share in
5 the DPS market.

6
7 2. Monopoly leveraging constitutes the use of monopoly power in one market to acquire, or attempt to
8 acquire, monopoly power in a related product market. *Image Technical Servs., Inc. v. Eastman Kodak*
9 *Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997).

10
11 3. In general, a company has the right to deal or not to deal with another party at its own discretion.
12 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). However, that
13 right is not absolute; a company may not refuse to deal in circumstances where “a refusal to cooperate
14 with rivals [would] constitute anticompetitive conduct and violate [15 U.S.C.] § 2.” *Id.* The Ninth
15 Circuit has pointed out three factors which can indicate to a court that a particular refusal to deal was
16 anticompetitive: the unilateral termination of a voluntary and profitable course of dealing, a refusal to
17 sell to a competitor at the same price offered to non-competitors, and the refusal to sell products to a
18 competitor that are being offered at retail to other customers. *MetroNet Servs. Corp. v. Qwest Corp.*,
19 383 F.3d 1124, 1132-34 (9th Cir. 2004). A refusal to deal need not be absolute in order to be actionable.
20 “An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical
21 refusal to deal.” *Id.* at 1132.

22
23 4. “A company which has monopoly power over an essential facility may not refuse to make the facility
24 available to others when there is no legitimate business reason for the refusal. The wrong perpetrated
25 by that misuse of the facility is that a monopolist ‘can extend monopoly power from one state of
26 production to another, and from one market to another.’ ” *City of Anaheim v. S. Cal. Edison Co.*, 955
27 F.2d 1373, 1379 (9th Cir. 1992) (quoting *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081,
28 1132 (7th Cir. 1983)); accord *MetroNet*, 383 F.3d at 1128-29.

For a facility to be essential, it must be otherwise unavailable, and impossible to reasonably or
practically replicate. *MetroNet*, 383 F.3d at 1129-30. Furthermore, “[a] facility that is controlled by
a single firm will be considered ‘essential’ only if control of the facility carries with it the power to
eliminate competition in the downstream market.” *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d
536, 544 (9th Cir. 1991) (emphasis original).

5. The three factors necessary for showing indirectly that a defendant possesses market power
demonstrate that the market will not function efficiently if the defendant raises its prices. In an efficient
market, when a large producer sets artificially high prices, consumers will switch from that producer
to other producers who sell at efficient prices. The demand of these switching consumers is met either
by increased production from other producers already in the market or by new competing producers
entering the market. In either case, the price in the market does not rise or does so only briefly—the
large producer charging a price above the market price simply loses business. However, if either of the
mechanisms for meeting the increased demand is unavailable, then consumers will be unable to switch
away from the large producer, and so will be forced to pay the large producer’s artificially high prices.
In this situation, the large producer has monopoly power, because it can control the market price of its
goods. *See generally* Areeda ¶ 501.

6. The court expresses no opinion as to whether the submarket consisting of document preparation
services provided to Encompass users or ePASS users could constitute a properly defined submarket,
within which Ellie Mae has non-contractually-acquired market power, for the purposes of an antitrust
claim. *See Newcal*, 513 F.3d at 1045-51.

1 7. Because DocMagic is alleging trade dress in its product design, rather than product packaging, it is
2 not permitted, as a matter of law, to allege that its trade dress is inherently distinctive; to satisfy the first
3 element of a trade dress claim it must allege secondary meaning. *See Wal-Mart Stores, Inc. v. Samara*
4 *Bros., Inc.*, 529 U.S. 205, 212-214, 216 (2000).

5 8. It should also be noted that in a post-hearing submission, DocMagic admitted it does not hold a
6 registered trademark in either of the words, nor has it applied for one.

7 9. To the extent that Ellie Mae relies on the allegations in Counterclaim ¶ 20 to support its claim of
8 direct copyright infringement, DocMagic properly notes that Ellie Mae has failed to identify which
9 “confidential materials” are at issue, and whether Ellie Mae holds a copyright in the unidentified
10 “confidential materials.” In paragraphs 26 and 27, the only copyrights that Ellie Mae asserts that
11 DocMagic infringed are the copyrights for Encompass and the Encompass SDK. To the extent the
12 counterclaim could be read to allege that DocMagic infringed any other copyrights, those allegations
13 are stricken.

14 10. The cases upon which DocMagic relies to argue the opposite position, cases which arise under the
15 CFAA, not the CCDAFA, are readily distinguishable. In *AtPac, Inc. v. Aptitude Solutions, Inc.*, No.
16 CIV. 2:10294 WBS KJM, 2010 WL 1779901 (E.D. Cal. Apr. 29, 2010), and *SecureInfo Corp. v. Telos*
17 *Corp.*, 387 F. Supp. 2d 593 (E.D. Va. 2005), the plaintiffs brought suit against the defendants when the
18 defendants accessed computers belonging to third parties, with the third parties’ authorization, and
19 viewed plaintiffs’ proprietary information stored on the third parties’ computers. *See AtPac*, 2010 WL
20 1779901, at *6; *SecureInfo*, 387 F. Supp. 2d at 608-09. Ellie Mae, however, alleges that DocMagic
21 accessed Ellie Mae’s own computers, not merely that DocMagic obtained Ellie Mae’s proprietary
22 information by accessing a third-party’s computers. *See Counterclaim ¶ 20*. This allegation states a
23 claim under the CCDAFA. *See AtPac*, 2010 WL 1779901, at *6 (holding that CFAA claim may lie
24 where the defendant “uses subterfuge—like using user names and passwords that do not belong to it—to
25 gain access to plaintiff’s protected materials *on plaintiff’s own website, computer, or servers*”)
26 (emphasis added); *State Analysis, Inc. v. Am. Fin. Servs. Ass’n*, 621 F. Supp. 2d 309, 316 (E.D. Va.
27 2009). Ellie Mae need not also allege that DocMagic lacked the permission of those third parties to use
28 the third parties’ license keys or passwords.

11. The court notes that paragraph 68 of Ellie Mae’s counterclaim indicates that the Encompass SDK
was included in the Ellie Mae Proprietary Information provided to DocMagic under the Bridge
Agreement, whereas paragraph 14 of the counterclaim indicates that DocMagic was not given an
Encompass SDK license key. The court assumes, as it must, that both of these allegations are true.