

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TECHSAVIES, LLC,	)	
	)	
	)	No. C10-1213 BZ
Plaintiff(s),	)	
	)	
v.	)	ORDER GRANTING IN PART
	)	AND DENYING IN PART
WDFA MARKETING INC.,	)	PLAINTIFF'S MOTION FOR
	)	JUDGMENT ON THE PLEADINGS
	)	AND/OR SUMMARY JUDGMENT
	)	
Defendant(s).	)	
	)	
	)	
_____	)	

Plaintiff Techsavies has moved for judgment on the pleadings and/or summary judgment against defendant WDFA Marketing's affirmative defenses and counterclaims.<sup>1</sup> For the reasons explained below, **IT IS HEREBY ORDERED** that Techsavies' motion is **GRANTED IN PART AND DENIED IN PART**.

To the extent that Techsavies seeks judgment on the pleadings, the motion is **DENIED** as untimely. Issues about

<sup>1</sup> The parties have consented to the Court's jurisdiction for all proceedings, including entry of final judgment under 28 U.S.C. § 636(c).

1 whether W DFA adequately pled its affirmative defenses and  
2 counterclaims should have been raised well before the last day  
3 for dispositive motions. With only two months remaining  
4 before trial, W DFA's affirmative defenses and counterclaims  
5 will only be dismissed if there is no genuine dispute as to  
6 any material fact and summary judgment is appropriate. FRCP  
7 56(a).

8 Copyright Misuse Affirmative Defense

9 W DFA concedes that copyright misuse is not a defense  
10 against Techsavies' breach of contract claim. Opposition at  
11 8. It may, however, be a defense against copyright  
12 infringement.<sup>2</sup> Id. Accordingly, to the extent that W DFA  
13 asserts this defense against Techsavies' breach of contract  
14 claim, Techsavies' motion is **GRANTED**, and to the extent that  
15 W DFA asserts the defense against Techsavies' copyright  
16 infringement claim, it is **DENIED**.

17 Waiver and Estoppel Affirmative Defenses

18 W DFA argues that Techsavies waived its right to sue for  
19 copyright infringement when it granted W DFA an implied  
20 license to the Collateralizer. Opposition at 8. W DFA's  
21 estoppel defense is based on its detrimental reliance on  
22 Techsavies' false representation that W DFA would own or at  
23 least have permission to use the Collateralizer. Opposition  
24

---

25 <sup>2</sup> In its reply, Techsavies contends for the first time  
26 that W DFA's copyright misuse defense fails as a matter of law  
27 because it only applies when "plaintiffs commit antitrust  
28 violations or enter unduly restrictive copyright licensing  
agreements." Reply at 3. Because this was improperly raised  
for the first time in Techsavies' reply, I do not consider the  
argument. See U.S. v. Romm, 455 F.3d 990, 997 (9th Cir. 2006).

1 at 9. I have previously ruled that a genuine dispute remains  
2 regarding whether W DFA had an implied license.<sup>3</sup> See Docket  
3 No. 89. Thus, there is a triable issue regarding W DFA's  
4 waiver and estoppel defenses and Techsavies' motion with  
5 respect to these defenses is DENIED.

6 Joint Authorship Affirmative Defense

7 The last affirmative defense challenged by Techsavies is  
8 W DFA's assertion that it was the joint author of the  
9 Collateralizer and consequently cannot be held liable for  
10 copyright infringement. For W DFA to enjoy all the benefits  
11 of joint authorship, it must establish that it made an  
12 independently copyrightable contribution to the  
13 Collateralizer. Richlin v. Metro-Goldwyn-Mayer Pictures,  
14 Inc., 531 F.3d 962, 968 (9th Cir. 2008) (quotations and  
15 citations omitted). Techsavies argues that summary judgment  
16 is appropriate because there is no evidence that W DFA  
17 contributed any code that was actually incorporated into the  
18 Collateralizer.

19 W DFA, however, has presented some evidence to the  
20 contrary. Jason Hilton, a managing partner at W DFA,  
21 testified that, at Techsavies' repeated requests, he sent  
22 HTML code to Techsavies so that it could begin the coding  
23 process, distinguishing this case from S.O.S. Inc. v. Payday,  
24 Inc. 886 F.2d 1081 (9th Cir. 1989). Hilton Declaration at  
25

---

26 <sup>3</sup> Techsavies' reply does not argue that W DFA has failed  
27 to present evidence to support these affirmative defenses.  
28 Instead, Techsavies only takes issue with the way these  
defenses were pled. As explained earlier, such a motion for  
judgment on the pleadings is untimely.

1 ¶¶ 6, 7. At the hearing, Techsavies did not dispute that  
2 this could constitute an independently copyrightable  
3 contribution. On summary judgment, I am required to view  
4 this evidence in a light most favorable to the nonmoving  
5 party, including making reasonable inferences, and I cannot  
6 weigh conflicting evidence or make credibility  
7 determinations.<sup>4</sup> See T.W. Elec. Serv. v. Pacific Elec.  
8 Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir.  
9 1987) (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith  
10 Radio Corp., 475 U.S. 574, 586 (1986)). Applying this  
11 standard, I find that a reasonable juror could conclude that  
12 WDFa provided Techsavies with the requested HTML code and it  
13 was incorporated into the Collateralizer.<sup>5</sup> Techsavies'  
14 motion challenging WDFa's joint authorship defense is  
15 therefore **DENIED**.

16 Breach of Contract Counterclaim

17 WDFa's counterclaim alleges the parties orally agreed  
18 that Techsavies would be hired to help WDFa develop and  
19 maintain a website that WDFa would own. See Docket No. 8 at  
20

---

21 <sup>4</sup> To the extent that Raj Prasad's deposition testimony  
22 contradicts Hilton's testimony or is inconsistent with Prasad's  
23 declaration or his deposition corrections, these are  
24 credibility issues that are proper for the jury to determine.  
25 Viewing all of WDFa's testimony in the light most favorable to  
it, there are disputed issues of fact regarding WDFa's  
contribution to the Collateralizer which need to be determined  
by the jury.

26 <sup>5</sup> Hilton testified that WDFa exercised complete control  
27 over the development of the website, including providing  
28 specific instructions regarding the changes that needed to be  
made. Hilton Declaration at ¶ 4. A reasonable inference based  
on this evidence and the other evidence submitted by WDFa is  
that its HTML code was incorporated into the Collateralizer.

1 ¶ 21. W DFA claims that Techsavies breached this agreement  
2 when it later disputed W DFA's ownership of the Collateralizer  
3 and demanded exorbitant fees for its continued performance.  
4 Id. at ¶ 25. Techsavies argues that the Copyright Act's  
5 statute of frauds, which requires that all agreements  
6 transferring ownership of copyrights be in writing, bars the  
7 alleged oral agreement for Techsavies to transfer the  
8 Collateralizer to W DFA. Motion at 9 (citing 17 U.S.C. §  
9 204(a) and Valente-Kritzer Video v. Pinckney, 881 F.2d 772,  
10 774-75 (9th Cir. 1989)).

11 Techsavies' argument is misplaced. W DFA is not alleging  
12 that it entered into an agreement for Techsavies to transfer  
13 the copyright to the Collateralizer to W DFA. Rather, W DFA  
14 has presented evidence that before Techsavies copyrighted the  
15 Collateralizer, Techsavies breached its agreement to create  
16 software that W DFA would own. Because this is not a dispute  
17 about an oral agreement to transfer a copyrighted work, the  
18 Copyright Act's statute of frauds does not apply.

19 Techsavies' motion on W DFA's breach of contract claim is  
20 therefore **DENIED**.

#### 21 Fraud Counterclaim

22 Techsavies argues that W DFA has no evidence to support  
23 its counterclaim for fraud. W DFA, however, has submitted  
24 testimony that supports its claim that Techsavies falsely  
25 represented that it would implement and support W DFA's  
26 website from which it can be inferred that Techsavies' true  
27 intention was to claim that it owned the website's source  
28 code. See Prasad Declaration at ¶¶ 9, 10, 24, 30. Because

1 this raises a triable issue on the fraud claim, Techsavies'  
2 motion is **DENIED**.<sup>6</sup>

3 Intentional Interference with Business Relations Counterclaim

4 Techsavies' last challenge is directed at WDFAs third  
5 claim for interference with business relations. The issue  
6 regarding this claim is the scope of WDFAs allegations and  
7 whether there is any evidence, including evidence of damages,  
8 to support these allegations. The title given to this  
9 alleged tort is immaterial.<sup>7</sup>

10 WDFAs has presented evidence that Techsavies was aware  
11 that WDFAs had a business relationship with MetroPCS and that  
12 Techsavies interfered with and damaged this relationship when  
13 it withheld computerized data that WDFAs needed to provide its  
14 services to MetroPCS and its franchisees. Hilton Declaration  
15 at ¶ 16. This conduct affected WDFAs future contracts with  
16 MetroPCS as well. Id. Hilton also outlined other damages  
17 incurred by WDFAs due to Techsavies' actions, including  
18 increased expenses and lost sales. See id. at ¶¶ 15-16.  
19 Because the above evidence raises a triable issue  
20 regarding this claim, summary judgment is inappropriate  
21 and Techsavies' motion is **DENIED**.<sup>8</sup>

---

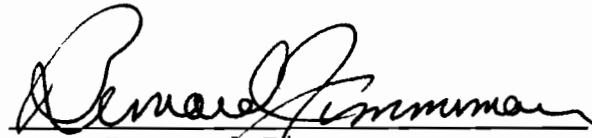
22  
23 <sup>6</sup> In its reply, Techsavies does not argue that WDFAs  
24 fraud claim is not supported by the evidence and instead only  
25 contends that the fraud counterclaim is improperly pled. Reply  
26 at 12.

27 <sup>7</sup> During the hearing, WDFAs clarified that it is not  
28 suing Techsavies interfering with its relations with its  
franchisees.

<sup>8</sup> Techsavies argues that the tort of intentional  
interference with prospective economic relations requires that  
WDFAs prove Techsavies' conduct was "wrongful by some legal

1 For the foregoing reasons, Techsavies' motion is **GRANTED**  
2 **IN PART** and **DENIED IN PART**.<sup>9</sup>

3 Dated: March 17, 2011

4   
5 Bernard Zimmerman  
6 United States Magistrate Judge

7 G:\BZALL\BZCASES\TECHSAVIES V. W DFA MKTG\ORDER RE PLAINTIFF'S MOTION FOR SJ AND JUDGMENT ON  
8 PLEADINGS.3.BZ VERSION(AFTER HEARING).wpd

9  
10  
11  
12  
13  
14  
15  
16  
17  
18

19 \_\_\_\_\_  
20 measure other than the fact of interference itself." Reply at  
21 14. Techsavies contends that since it owned the  
22 Collateralizer, it had the right to control its use, including  
23 choosing not to provide the computerized data to W DFA. Id.  
24 This argument misses the mark. W DFA alleges that it and not  
25 Techsavies is the proper owner of the Collateralizer.  
26 Accordingly, Techsavies' decision to withhold the computerized  
27 data — which it allegedly did not own — would constitute  
28 wrongful conduct.

25 <sup>9</sup> W DFA moved to strike Techsavies' interrogatory  
26 responses submitted in connection with Techsavies' reply (Lin  
27 Declaration, Ex. 21) because they were signed by counsel rather  
28 than Techsavies. Docket No. 106. Because this ruling does not  
rely on Techsavies' interrogatory responses, W DFA's motion to  
strike is **DENIED AS MOOT**. But see Schwarzer, Tashima &  
Wagstaffe, Rutter Group Prac. Guide: Fed. Civ. Pro. Before  
Trial, ¶¶ 11:1770-71 (The Rutter Group 2009).