



1 W DFA to use in its marketing business. Besides collecting  
2 some payments for this work, Techsavies would also receive a  
3 40% share of the revenues.

4 W DFA, however, contests Techsavies' interpretation of the  
5 parties' relationship. W DFA contends that it never agreed to  
6 partner with Techsavies, and instead hired Techsavies to be an  
7 independent contractor with the limited role of developing and  
8 maintaining the software. W DFA has moved for summary judgment  
9 on all six claims alleged by Techsavies. For the reasons  
10 explained below, this summary judgment motion is **DENIED** in its  
11 entirety because there is a genuine dispute about the material  
12 facts at issue.<sup>2</sup>

13 **A. LEGAL STANDARD FOR SUMMARY JUDGMENT**

14 The law concerning the standard for summary judgment is  
15 not novel. The Court discusses it here only because W DFA's  
16 position regarding this standard contributes to the misplaced  
17 arguments it makes in its summary judgment motion. The  
18 parties agree that summary judgment is only appropriate when  
19 there is no genuine dispute as to any material fact, and the  
20 moving party is entitled to judgment as a matter of law. Fed.  
21 R. Civ. P. 56. If a reasonable jury could return a verdict in  
22 favor of the nonmoving party, then a genuine issue of material  
23 fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
24 248 (1986). On a motion for summary judgment, the moving  
25 party has both the initial burden of production as well as the

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27 <sup>2</sup> At oral argument, counsel for both parties presented  
28 many facts that were not contained in the record. This Order  
disregards the testimony from counsel and is based on the  
properly submitted evidence in the parties' papers.

1 ultimate burden of persuasion that there is no genuine issue  
2 of material fact. Nissan Fire & Marine Ins. Co., Ltd. v.  
3 Fritz Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000).

4 W DFA misunderstands what happens once the moving party  
5 meets its initial burden. W DFA is correct that Techsavies,  
6 the plaintiff and nonmoving party, must then "present some  
7 evidence establishing each element of [its] claims on which  
8 [it] would bear the burden of proof a trial." Motion at 13  
9 (citing Smolen v. Deloitte, Haskins & Sells, 921 F.2d 959, 963  
10 (9th Cir. 1990)). Techsavies cannot defeat summary judgment  
11 by relying on conclusory statements or allegations in its  
12 complaint. Hernandez v. Spacelabs Med. Inc., 343 F.3d 1107,  
13 1112 (9th Cir. 2003). But W DFA is wrong when it argues that  
14 the requirement for "some evidence" is not met if Techsavies  
15 relies solely on self-serving deposition testimony. Reply at  
16 1; 14-15. It has "long [been] held that a plaintiff may  
17 defeat summary judgment with his or her own deposition." Paz  
18 v. Wauconda Healthcare & Rehab. Centre, LLC, 464 F.3d 659,  
19 664-65 (7th Cir. 2006); see also Celotex Corp. v. Catrett, 477  
20 U.S. 317, 324 (1986) (the nonmoving party is required "to go  
21 beyond the pleadings and by her own affidavits, or by the  
22 depositions, answers to interrogatories, and admissions on  
23 file, designate specific facts showing that there is a genuine  
24 issue for trial") (emphasis added and internal quotations  
25 omitted).

26 This rule permitting a party's own deposition testimony  
27 to defeat summary judgment recognizes that courts cannot make  
28 credibility determinations or weigh conflicting evidence at

1 the summary judgment stage. See T.W. Elec. Serv. v. Pacific  
2 Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir.  
3 1987) (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio  
4 Corp., 475 U.S. 574, 586 (1986)). These duties are reserved  
5 for the trier of fact. Id. Courts are instead required to  
6 believe the nonmoving party on summary judgment, and view the  
7 evidence in a light most favorable to that party. Id.

8 In arguing against Techsavies' use of self-serving  
9 deposition testimony, W DFA incorrectly relies on Kennedy v.  
10 Applause, Inc. 90 F.3d 1477 (9th Cir. 1996). In Kennedy, the  
11 plaintiff testified at her deposition that she was not totally  
12 disabled. Id. at 1481. This directly contradicted  
13 plaintiff's earlier representations on disability claim forms  
14 that she was totally disabled, as well as the medical evidence  
15 in the case. Id. Kennedy affirmed summary judgment in  
16 defendant's favor because the inconsistencies between  
17 plaintiff's deposition testimony and her other statements did  
18 not present "a sufficient disagreement to require submission  
19 to a jury." Id. Kennedy's limited holding,<sup>3</sup> however, does  
20 not help W DFA since it has not presented any evidence that  
21 Conner and Hajjoubi's deposition testimony directly  
22 contradicted their previous statements. See Jones v. Tozzi,  
23 2007 WL 433116 at \*11 (E.D. Cal. 2007).

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25 \_\_\_\_\_  
26 <sup>3</sup> Kennedy's holding merely allows courts to disregard  
27 self-serving affidavits that are contradicted by plaintiffs'  
28 own prior statements and other types of undisputed evidence.  
See Jones v. Tozzi, 2007 WL 433116 at \*11 (E.D. Cal. 2007).  
Thus, "Kennedy is far from a blanket prohibition against  
considering all affidavits that are self-serving." Id.

1 **B. TECHSAVIES' CLAIMS AGAINST W DFA**

2 I. Breach of Contract Claim

3 W DFA's argument against Techsavies' breach of contract  
4 claim exemplifies how W DFA misapplies the summary judgment  
5 standard. Under California Civil Code § 1622, oral contracts  
6 are just as valid as written contracts. Nonetheless, W DFA  
7 contends that Techsavies "has no evidence of a final  
8 agreement" because "the only evidence that Techsavies has is  
9 the self-serving testimony of its own principals regarding a  
10 single oral discussion in October 2006." Motion at 23. As  
11 discussed above, Techsavies' own testimony is enough to raise  
12 a triable issue regarding whether an oral contract existed and  
13 was breached. W DFA also does not provide any authority that  
14 an oral agreement cannot be reached in a single discussion  
15 between the parties, as Techsavies claims transpired. Both  
16 Conner and Hajjoubi testified at their depositions that W DFA  
17 offered Techsavies a 60/40 respective split of revenues in  
18 exchange for Techsavies developing as well as maintaining the  
19 software, and both parties then agreed to these terms.<sup>4</sup>

20 Hajjoubi Depo. at 100-102, 110-12; Conner Depo. at 35-36, 45-  
21 46.

22 W DFA contends that the details of the alleged agreement  
23 are too vague to constitute all the essential terms of a  
24 finalized contract. Reply at 10. Hajjoubi's testimony,

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25  
26 <sup>4</sup> Conner and Hajjoubi's testimony regarding the  
27 proposed 60/40 split is not completely uncorroborated. In his  
28 declaration, Prasad admits that in his discussions with  
Techsavies he offered to pay it 40% of the license fees or  
other revenues from the sale of the software to new customers.  
Decl. of Prasad, ¶ 11.

1 however, explains that the terms of the agreement were final  
2 and "very simple." Hajjoubi Depo. at 100-02. Although  
3 Hajjoubi does not explain the contract terms articulately,  
4 viewing the evidence in a light most favorable to Techsavies,  
5 at this juncture, the Court cannot say that a reasonable jury  
6 could not conclude that the profits gained from the software's  
7 use would be split 60/40, and that the contract terms were  
8 clear enough for the parties to understand what each was  
9 required to do. Id. at 110-12. Techsavies' obligations were  
10 to develop and maintain the software under WDFAs directions,  
11 and WDFAs was responsible for then selling and managing the use  
12 of the software. Hajjoubi Depo. at 101; Conner Depo. at 46.  
13 While the parties did not address more specific details  
14 regarding the agreement, "it is not necessary that each term  
15 of an oral contract be spelled out in minute detail." Gold  
16 Seal Productions v. R. K. O. Radio Pictures, 134 Cal.App.2d  
17 843, 861 (1955).

18 Based on the above, this matter is the quintessential "he  
19 said, she said" dispute that is not appropriate for summary  
20 judgment. See Jones v. Tozzi, 2007 WL 433116 at \*11 (E.D.  
21 Cal. 2007). WDFAs points out that some of Techsavies' conduct  
22 after the agreement was supposedly reached shows that there  
23 was never a contract between the parties. But WDFAs will have  
24 the opportunity to present this evidence to the jury, which  
25 can properly evaluate the credibility of all witnesses and  
26 weigh the conflicting evidence — something that this Court  
27 cannot do — and determine whether an agreement was finalized  
28 between the parties. Because a reasonable juror might believe

1 Conner or Hajjoubi and find in Techsavies' favor, granting  
2 judgment as a matter of law is inappropriate. W DFA's motion  
3 on this claim is therefore denied.

4 II. Partnership Claim

5 California courts analyze claims for breach of  
6 partnership and breach of joint venture essentially in the  
7 same manner. Bank of Cal. v. Connolly, 36 Cal.App.3d 350, 364  
8 (1973); see also People v. Park, 87 Cal.App.3d 550, 564  
9 (1978). To establish its partnership claim, Techsavies must  
10 show that it reached an agreement with W DFA in which the  
11 parties had a joint interest in a common business undertaking,  
12 an understanding as to the sharing of profits and losses, and  
13 a right of joint control. Id.; see also Hupfeld v. Wadley, 89  
14 Cal.App.2d 171, 174 (1948) (plaintiff may obtain relief based  
15 on breach of a joint venture even though plaintiff's complaint  
16 alleged a partnership). As with contracts, in California a  
17 partnership or joint venture agreement does not need to be in  
18 writing to be binding. Weiner v. Fleischman, 54 Cal.3d 476,  
19 490 (1991). The question of whether "a partnership or joint  
20 venture exists is primarily a factual question to be  
21 determined by the trier of fact from the evidence and  
22 inferences to be drawn therefrom." Connolly, 36 Cal.App.3d.  
23 at 364.

24 The analysis of the partnership claim is similar to the  
25 analysis of the breach of contract claim. Both Conner and  
26 Hajjoubi testified that the parties entered into a partnership  
27 agreement to develop and sell the software that Prasad  
28 envisioned would lead to a profitable business. Hajjoubi

1 Depo. at 100-02; Conner Depo. at 45-46. The parties delegated  
2 the management and control of this venture so that Techsavies,  
3 working at the direction of WDFa, would develop and manage the  
4 software while WDFa would be responsible for selling the  
5 software and operating the marketing aspect of the business.  
6 Id. Such a delegation of responsibilities is acceptable under  
7 a partnership or joint venture agreement. See Scottsdale Ins.  
8 Co. v. Essex Ins. Co., 98 Cal.App.4th 86, 93 (2002); Holmes v.  
9 Lerner, 74 Cal.App.4th 442, 458 (1999) ("there is nothing  
10 unusual about a partnership in which one party supplies an  
11 idea which the other party brings into substantive form").

12 Conner and Hajjoubi also claim — and have so testified  
13 at depositions — that there was an understanding regarding  
14 the sharing of profits and losses with respect to the parties'  
15 common undertaking. Hajjoubi Depo. at 110-12; Conner Depo. at  
16 45-49. Viewing the submitted deposition testimony in a light  
17 most favorable to Techsavies, the profit sharing plan may be  
18 interpreted by a reasonable jury to be an agreement between  
19 the two parties to share the profits after certain expenses  
20 were accounted for.<sup>5</sup> See Hajjoubi Depo. at 110-12. As  
21 further proof that there is a genuine dispute regarding this  
22 issue, Prasad admits that he had discussions with Conner and

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23  
24 <sup>5</sup> WDFa contends that the alleged 60/40 profit sharing  
25 agreement, which it claims was illogical, vague, and never  
26 applied by the parties, does not constitute a valid agreement  
27 to share profits and losses. Motion at 21. But Techsavies  
28 only has to show there was an understanding that profits and  
losses would be shared, to which Conner and Hajjoubi have  
testified. The actual sharing of profits is not an  
indispensable element of a partnership, but evidence that may  
be considered when determining if a partnership exists.  
Holmes, 74 Cal.App.4th at 456-57.



1 Hajjoubi about Techsavies receiving 40% of the license fees or  
2 other revenues from the sale of the software to new customers.  
3 Decl. of Prasad, ¶ 11. As explained earlier, this Court is  
4 not persuaded by WDFa's argument that the evidence of the  
5 partnership agreement is not sufficient because it is only  
6 provided through Conner and Hajjoubi's self-serving deposition  
7 testimony. Reply at 14-15. Rather, the evidence introduced by  
8 Techsavies regarding the existence of a partnership raises a  
9 triable issue of fact that is proper for the jury to evaluate.  
10 Consequently, summary judgment is denied on this claim as  
11 well.

### 12 III. Copyright Claim

13 To prevail on its claim of copyright infringement,  
14 Techsavies must establish that it owned a copyright to the  
15 software, and WDFa infringed that copyright beyond the scope  
16 of any license it owned. See MAI Sys. Corp. v. Peak Computer,  
17 Inc., 991 F.2d 511, 517 (9th Cir. 1993). For the purposes of  
18 this motion, WDFa concedes that Techsavies owned a copyright  
19 to the software. Motion at 14. WDFa instead argues that it  
20 had an implied license<sup>6</sup> to use the software, including its  
21 source code,<sup>7</sup> in accordance with the Ninth Circuit's holding

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22  
23 <sup>6</sup> Although exclusive licenses must be in writing,  
24 nonexclusive licenses may be granted orally or by implication.  
Asset Marketing Sys., Inc., v. Gagnon, 542 F.3d 748, 754 (9th  
25 Cir. 2008).

26 <sup>7</sup> While both parties use the terms "software," "source  
27 code," and "website" interchangeably, there is a difference  
28 between the terms that is material to determining whether  
Techsavies granted WDFa an implied license. Techsavies  
registered two versions of the software, which it calls the  
"Collateralizer," with the United States Copyright Office. The  
copyrights specifically protect the software's source code that

1 in Asset Marketing Sys., Inc., v. Gagnon. 542 F.3d 748 (9th  
2 Cir. 2008).

3 Under the rule in Asset Marketing, W DFA can establish it  
4 had an implied license with respect to the copyrighted  
5 software if it shows that there is no genuine dispute of  
6 material fact regarding the following: (1) W DFA (the licensee)  
7 requested the creation of the software; (2) Techsavies (the  
8 licensor) created the software and delivered it to W DFA; and  
9 (3) Techsavies intended for W DFA to use, retain, and modify  
10 the software. Id. at 754-55. There is no dispute that W DFA  
11 asked Techsavies to create the software. Opposition at 10.  
12 Moreover, it is undisputed that the software Techsavies  
13 created was used to run W DFA's website www.project632.com.  
14 The parties, however, disagree on whether Techsavies delivered  
15 the software and intended for W DFA to have a license to use  
16 the software, particularly its source code.

17 In Asset Marketing, the Ninth Circuit held that the  
18 element of delivery was satisfied when the licensor stored the  
19 source code of the copyrighted work on the licensee's  
20 computers. 542 F.3d at 755-56. But this did not happen here  
21 — W DFA concedes that Techsavies has always maintained control  
22 of the source code on its own computers. Prasad Depo. at 75-  
23 76. Accordingly, under Ninth Circuit precedent, the delivery  
24 element for an implied license has not been met. W DFA,  
25 however, urges this Court to follow the holdings of other

26 \_\_\_\_\_  
27 is not available in the public domain. It is this protected  
28 source code that W DFA was not allowed to access — and not the  
public website — that is the basis of Techsavies' copyright  
infringement claim.

1 district courts. Reply at 4. There is dicta in these cases  
2 that the delivery element was satisfied when the website was  
3 launched. See Holtzbrinck Publ'n Holdings, L.P. v. Vyne  
4 Commc'ns, Inc., 2000 WL 502860 at \*4 (S.D.N.Y. 2000); Attig v.  
5 DRG, Inc., 2005 WL 730681 at \*5 (E.D.Pa. 2005). These cases,  
6 which are not from the Ninth Circuit, contain little analysis  
7 regarding delivery and are factually distinguishable.<sup>8</sup>  
8 Regardless, a ruling on this issue is not necessary for the  
9 purposes of this motion. This is because WDFa cannot  
10 establish the third element under the Asset Marketing test  
11 since there is a genuine dispute regarding whether Techsavies  
12 intended to grant WDFa an implied license to use the source  
13 code.

14 In evaluating this intent factor, the Court examines  
15 Techsavies' "objective intent at the time of the creation and  
16 delivery of the software as manifested by the parties'  
17 conduct." 542 F.3d at 756. Here, both Conner and Hajjoubi  
18 have submitted declarations that they never intended to grant  
19 an implied license to WDFa to use the source code. Decl. of  
20 Hajjoubi ¶¶ 4-5; Decl. of Conner ¶¶ 4-5. Conner and Hajjoubi  
21 corroborate their subjective intent by introducing objective

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22  
23 <sup>8</sup> In Holtzbrinck, the licensor had given the licensee  
24 password access to the licensor's computer which enabled the  
25 licensee to transfer the copyrighted material. 2000 WL 502860  
26 at \*2. Attig found that defendant had an implied license to  
27 use its own website, which included material that plaintiff  
28 developed and copyrighted while working on them. Here the  
issue is not whether WDFa had an implied license to use the  
website Techsavies created, but whether it had an implied  
license to use Techsavies' source code to create its own  
website. Had WDFa sued Techsavies for access to the website  
when Techsavies threatened to shut down the website, the result  
might have been different. 2005 WL 730681 at \*5.

1 evidence of their conduct that suggests they did not intend to  
2 grant an implied license. They presented evidence that  
3 Techsavies always maintained exclusive control over the  
4 software's source code, and never permitted WDFFA to have any  
5 access to the code. Prasad Depo. at 75-76. Prasad admits  
6 that Techsavies was so adamant about maintaining sole control  
7 of the source code that it required WDFFA to provide images of  
8 changes that needed to be made to the software, and Techsavies  
9 would then alter the source code from these images. Prasad  
10 Depo. at 79-83.

11 Not permitting WDFFA to have any access to the source code  
12 evidenced Techsavies' intent to deny WDFFA a license to the  
13 source code. WDFFA admits that in 2009 it hired computer  
14 programmers to write a new version of the software source code  
15 so WDFFA may have full access to it. Decl. of Prasad, ¶ 26.  
16 Based on these undisputed facts, this Court cannot find as a  
17 matter of law that Techsavies intended to grant WDFFA an  
18 implied license to the software and its source code. Even if  
19 this Court found that there was an implied license, a genuine  
20 dispute remains regarding whether WDFFA exceeded the scope of  
21 this license by hiring programmers to gain full control of the  
22 copyrighted source code. Summary judgment is therefore denied  
23 with respect to Techsavies' copyright infringement claim.

#### 24 IV. Remaining Claims

25 WDFFA also moved for summary judgment on Techsavies'  
26 remaining claims: (1) violation of California Business &  
27 Professions Code § 17200 (Section 17200); (2) promissory  
28 estoppel; and (3) unjust enrichment. Techsavies opposition

1 persuasively argued against this part of WDFFA's motion, and  
2 WDFFA did not address Techsavies' arguments or these claims in  
3 its reply. This Court therefore finds that judgment as a  
4 matter of law is inappropriate for these three claims.

5 Techsavies' Section 17200 claim alleges that WDFFA's  
6 conduct in breaching the contract between the two parties also  
7 independently violated Section 17200's ban on unfair,  
8 unlawful, or deceptive business practices. Because this Court  
9 does not grant WDFFA summary judgment on the contract claim,  
10 Techsavies' Section 17200 claim also withstands summary  
11 judgment. See Sybersound Records, Inc. v. UAV Corp., 517 F.3d  
12 1138, 1152 (9th Cir. 2008) ("breach of a contract may form the  
13 predicate for a Section 17200 claim, provided it also  
14 constitutes conduct that is unlawful, or unfair, or  
15 fraudulent").

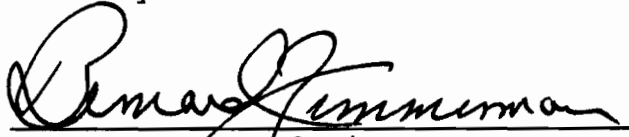
16 Summary judgment is also inappropriate for Techsavies'  
17 promissory estoppel claim. Techsavies pleads this claim as an  
18 alternative theory of liability in case the jury finds that  
19 there was no contract between the parties. This is  
20 permissible. See MZ Ventures, LLC v. Mitsubishi Motor Sales  
21 of Am., Inc., 1999 WL 33597219 at \*11 (C.D. Cal. 1999).

22 Lastly, WDFFA contends that Techsavies already received  
23 more than \$450,000 for its services and is consequently not  
24 the victim of any injustice to warrant an unjust enrichment  
25 claim. Motion at 25. There is, however, a genuine dispute  
26 regarding whether WDFFA was unjustly enriched considering the  
27 evidence introduced by Techsavies that it spent between 7,800  
28 to 9,610 hours working on the software and should have been

1 paid between \$2.3 to \$2.9 million for this work. Opposition  
2 at Ex. 14. Conner and Hajjoubi also testified that much of  
3 the amount it billed WDFB was for maintenance. Hajjoubi Depo.  
4 at 82-83. Accordingly, summary judgment is **DENIED** on this  
5 claim as well.

6 For the foregoing reasons, defendant's summary judgment  
7 motion is **DENIED** in its entirety.

8 Dated: February 10, 2011

9   
10 Bernard Zimmerman  
11 United States Magistrate Judge  
12  
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14 G:\BZALL\BZCASES\TECHSAVIES V. WDFB MKTG\ORDER DENYING DEFENDANT'S SUMMARY  
15 JUDGMENT MOTION.FINAL VERSION AFTER HEARING(1).wpd  
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