

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

PIERRY, INC.,
Plaintiff,
v.
THIRTY-ONE GIFTS, LLC,
Defendant.

Case No. 17-cv-03074-LB

ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF’S MOTION TO DISMISS AND (2) GRANTING DEFENDANT’S MOTION TO DISMISS

Re: ECF Nos. 53, 56

INTRODUCTION

The parties are the plaintiff/counter-defendant Pierry, Inc., which provides software solutions and support for companies,¹ and defendant/counter-claimant Thirty-One Gifts, which sells consumer goods directly to consumers and through appointed consultants who sell to consumers.² Pierry provided Thirty-One Gifts with a software platform and access to the Sales Force Marketing Cloud (“SFMC”) for customer data.³ The parties had a contract that governed their business arrangement: a “Master Services Agreement” (“MSA”) supplemented by two

¹ First Amend. Compl. (“FAC”) – ECF No. 51 at 2 (¶ 3). Citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents.
² First Amend. Counterclaims (“FACC”) – ECF No. 49 at 2 (¶ 4).
³ FAC – ECF No. 51 at 3 (¶ 8).

1 “Statements of Work.”⁴ After Pierry allegedly failed to send a significant portion of marketing
2 emails for an April 2017 sales event, Thirty-One Gifts terminated the contract by sending a formal
3 notice of Termination.⁵ Pierry demanded immediate payment of past-due invoices totaling
4 \$289,772.20,⁶ and Thirty-One Gifts refused to pay them on the ground that they were not the sums
5 due under the contract and instead were for extra work hours that Thirty-One Gifts did not
6 approve.⁷ Pierry then suspended Thirty-One Gifts’ access to the SFMC application and account,
7 which meant that Thirty-One Gifts could not communicate with its sales consultants and
8 customers or enroll new customers.⁸

9 Pierry and Thirty-One Gifts both claim a breach of the contract. Pierry’s claims are (1) breach
10 of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) declaratory
11 judgment.⁹ Thirty-One Gifts’ counterclaims are (1) breach of contract, (2) declaratory judgment,
12 (3) violation of California’s Computer Data Access and Fraud Act, Cal. Pen. Code § 502, (4)
13 conversion, (5) intentional interference with prospective economic advantage, and (6) violation of
14 California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200.¹⁰

15 Both parties filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). Pierry
16 moves to dismiss Thirty-One Gifts’ counterclaims three through six¹¹ Thirty-One Gifts moves to
17 dismiss Pierry’s second claim for breach of the implied covenant of good faith and fair dealing.¹²
18 The court grants Thirty-One Gifts’ motion, grants Pierry’s motion to dismiss the UCL claim, and
19 otherwise denies Pierry’s motion.

20 _____
21 ⁴ *Id.* at 2 (¶ 4); Master Service Agreement (“MSA”), Ex. 1 – ECF No. 51 at 10–16; 2016 Statement of
22 Work (“SOW”), Ex. 2 – ECF No. 51 at 18–19; 2017 SOW – ECF No. 51 at 21–22.

23 ⁵ FACC – ECF No. 49 at 10–14 (¶¶ 47–71).

24 ⁶ FAC – ECF No. 51 at 3 (¶ 9); FACC – ECF No. 14 (¶ 73).

25 ⁷ FACC – ECF No. 49 at 14 (¶ 75).

26 ⁸ *Id.* at 14–15 (¶¶ 77–83).

27 ⁹ *See generally* FAC – ECF No. 51.

28 ¹⁰ *See generally* FACC – ECF No. 49.

¹¹ The cover page to Pierry’s motion is styled a motion to dismiss “counts one, three, four, five and
six.” Mot. – ECF No. 56 at 1. The motion does not argue for dismissal of claim one, and Pierry
clarifies in its reply brief that it does not seek dismissal of claim one. Reply – ECF No. 63 at 4.

¹² Mot. – ECF No. 53 at 1.

1 **STATEMENT**

2 **1. The Parties**

3 Pierry provides software solutions and support to its clients in technology, finance, accounting,
4 engineering, and government industries.¹³ It resells SFMC software applications and licenses and
5 “advertises itself as one of the largest SFMC implementers, integrators, and consultants in the
6 world.”¹⁴

7 Thirty-One Gifts sells “consumer products,” both directly to consumers and through its
8 network of “tens of thousands of independent hostesses/consultants” who sell to consumers.¹⁵ Its
9 sales are “largely sourced and fulfilled online.”¹⁶ It relies on “its electronic platforms to advertise,
10 to communicate with its consultants and consumers, to receive orders, to confirm orders, and to
11 communicate regarding the shipping of products.”¹⁷ It “contracts with third-party vendors” for
12 online digital marketing and communications services.¹⁸ It contracted with C.Trac — a SFMC
13 application vendor — for its email and digital marketing services.¹⁹ In 2016, Pierry purchased
14 C.Trac, and as a result, Pierry became Thirty-One Gifts’ SFMC vendor.²⁰

15
16 **2. The Master Services Agreement (“MSA”)**

17 On September 1, 2016, Pierry and Thirty-One Gifts signed the MSA, which sets forth “the
18 general terms and conditions between the parties.”²¹ It defines the “services” that Pierry would
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22 ¹³ FAC – ECF No. 51 at 2 (¶ 3); MSA, Ex. 1 – ECF No. 51 at 10–16.

23 ¹⁴ FACC – ECF No. 49 at 4 (¶ 14).

24 ¹⁵ FAC – ECF No. 51 at 2 (¶¶ 4–5).

25 ¹⁶ *Id.* at 3 (¶ 8).

26 ¹⁷ *Id.*

27 ¹⁸ *Id.* (¶ 10).

28 ¹⁹ *Id.* (¶ 11).

²⁰ *Id.* (¶ 12).

²¹ FACC – ECF No. 51 at 4 (¶ 16).

1 provide as the “implementation, integration, consulting, and/or similar services described in a
2 Statement of Work. . . .”²²

3 Section 2 of the MSA governs fees and payments. Section 2.1 obligated Thirty-One Gifts to
4 “pay all fees specified in all Order Forms and/or SOWs executed under the MSA” and “reimburse
5 Pierry Software for all reasonable, pre-approved travel and pre-approved out-of-pocket expenses
6 incurred in connection with Pierry Software’s performance of Services.”²³ Section 2.2 governs
7 overdue payments:

8 [Thirty-One Gifts’] failure to timely pay any fees and expenses that are not the
9 subject of a good faith dispute of which [Thirty-One Gifts] notifies Pierry Software
10 in a detailed writing (“Undisputed Fees”) shall constitute a material breach of the
11 Agreement. If any amounts for which [Thirty-One Gifts] is responsible are
12 overdue, then Pierry Software may provide [Thirty-One Gifts] with written notice
13 of the same (a “Late Notice”). If [Thirty-One Gifts] fails to pay all overdue
14 amounts within 10 business days after [Thirty-One Gifts’] receipt of the Late
15 Notice, then Pierry Software may, in addition to any of its other rights or remedies,
16 suspend provision of Services until all overdue amounts are paid in full.²⁴

17 Section 3 addresses “proprietary rights.”

18 3.1 Pierry Software’s Intellectual Property. Subject to the limited rights expressly
19 granted hereunder, Pierry Software reserves all rights, title, and interest in and to
20 the Services, including all related patent, copyright, trademark and other
21 intellectual property rights. No rights are granted to [Thirty-One Gifts] hereunder
22 other than as expressly set forth herein.

23 4.2 [sic] [Thirty-One Gifts’] Intellectual Property. All content created by [Thirty-
24 One Gifts], or by Pierry Software for [Thirty-One Gifts], during performance of the
25 Services, including without limitation email templates, newsletters, distribution
26 lists, links, images, graphs and photos (the “Work Product”), shall be the sole and
27 exclusive property of [Thirty-One Gifts]. Pierry Software agrees that it will not use
28 the same Work Product created for [Thirty-One Gifts] under this Agreement for
another Pierry Software customer; provided, however, that nothing in the preceding
sentence shall be interpreted to preclude Pierry Software from using the same
functionality, format, code, design, concepts, workflows, integrations or other ideas
represented in the Work Product.²⁵

26 ²² Ex. 1, MSA – ECF No. 51 at 10.

27 ²³ *Id.* at 11.

28 ²⁴ *Id.*

²⁵ *Id.*

1 Section 5.2 contains Pierry’s “Software Warranties:” “Pierry Software represents and warrants
2 that the Services will be performed in a professional and workmanlike manner in accordance with
3 generally accepted industry standards.”²⁶

4 Section 7.1 limited either party’s liability in a lawsuit “arising out of or related to the
5 agreement:”

6 EXCEPT WITH RESPECT TO THE INDEMNIFICATION OBLIGATIONS SET
7 FORTH IN SECTION 7, IN NO EVENT SHALL EITHER PARTY’S LIABILITY
8 ARISING OUT OF OR RELATED TO THE AGREEMENT, WHETHER IN
9 CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY,
10 EXCEED THE AGGREGATE SUMS PAID BY [THIRTY-ONE GIFTS] IN THE
11 12 MONTHS PRECEDING THE INCIDENT GIVING RISE TO LIABILITY;
12 PROVIDED, HOWEVER, THAT IN NO EVENT SHALL [THIRTY-ONE
13 GIFTS] LIABILITY TO PIERRY SOFTWARE BE LESS THAN THE SUM OF
14 ALL OUTSTANDING FEES AND EXPENSES OWED BY [THIRTY-ONE
15 GIFTS] PLUS ALL INTEREST AND COLLECTION COSTS ASSOCIATED
16 THEREWITH. NOTWITHSTANDING THE FOREGOING, [THIRTY-ONE
17 GIFTS] EXCLUSIVE REMEDY, AND PIERRY SOFTWARE’S ENTIRE
18 LIABILITY, FOR ANY BREACH OF THE WARRANTIES IN SECTION 5.2 IS
19 LIMITED TO RE-PERFORMANCE OF THE SERVICES. IF PIERRY
20 SOFTWARE IS UNABLE TO RE-PERFORM THE SERVICES AS
21 WARRANTIED WITHIN 30 DAYS OF WRITTEN NOTICE OF BREACH,
22 [THIRTY-ONE GIFTS] SHALL BE ENTITLED TO RECOVER THE FEES
23 PAID TO PIERRY SOFTWARE FOR THE DEFICIENT SERVICES.²⁷

24 Section 7.2 of the MSA excludes consequential and related damages: “IN NO EVENT
25 SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY
26 INDIRECT, INCIDENTAL, PUNITIVE, CONSEQUENTIAL, EXEMPLARY, OR SPECIAL
27 DAMAGES OF ANY KIND OR NATURE HOWEVER CAUSED (INCLUDING BUT NOT
28 LIMITED TO LOST PROFITS AND LOSS OF GOODWILL), WHETHER IN CONTRACT,
TORT OR UNDER ANY THEORY OF LIABILITY, WHETHER OR NOT THE PARTY HAS
BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.”²⁸ The MSA provides for an
award of attorney’s fees and costs to the prevailing party in any lawsuit “arising out of or relating
to the [MSA] or its subject matter.”²⁹

26 *Id.* at 13.

27 *Id.* at 14 (CAPS in original).

28 *Id.* (CAPS in original).

29 *Id.* at 15 (§ 9.8).

1 Section 8 governs the term and termination of the contract: “This MSA commences on the
2 Effective Date and continues until the termination or expiration specified in all Order Forms
3 and/or of the terms specified in the SOWs”³⁰
4

5 **3. The September 1, 2016 Statement of Work**

6 At the same time that they signed the MSA, the parties signed a “Statement of Work,” which
7 contained this “Description of Services”:

8 New software configuration including landing page and email utilization, including
9 Pierry Software Account and direct 24/7/365 Salesforce Marketing Cloud
support.³¹

10 Under the Statement of Work, Thirty-One Gifts bought from Pierry, among other things, “the
11 SFMC Professional Edition software application and a User License for the software application.”
12 It also bought a “‘Private [Internet Protocol]/Dedicated [Internet Protocol]’ for hosting Thirty-One
13 Gifts’ account in the SFMC software.”³² The FACC explains:

14 That Internet Protocol and the address associated with it is critical. In email
15 communications, one of the greatest barriers to communicating is the “warming-
16 up” of an internet protocol address because a recipient email server has opportunity
17 to reject an incoming message. The warming-up period can last weeks or months
18 and consists of repeated pings on the recipient server until the recipient server
19 recognizes and accepts incoming messages. Thirty-One Gifts’ ownership of the
20 warmed-up Internet Protocol address associated with its SFMC account thus was
21 critical to the contract because Thirty-One Gifts would need use of that Internet
22 Protocol address if Thirty-One Gifts ever needed to migrate to a different digital
23 marketing vendor.

24 The Statement of Work “separately defined certain services relating to the purchased
25 software application, license, and IP, including configuring a website landing page and
26 email utilization statistics.”³³ It included an “ongoing support retainer” of 125 hours per
27 month for six months and gave Thirty-One Gifts the “option of reassessing the total
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25 ³⁰ *Id.* at 14 (§ 8.1). The term in the September 1, 2016 Statement of Work was September 18, 2016 to
26 September 17, 2018; Thirty-One Gifts could renew for an additional three-month term with 30 days’
notice before the expiration date. Ex. 2, SOW – ECF No. 51 at 18.

27 ³¹ FACC – ECF No. 49 at 5 (¶¶ 25–26); Ex. 2, SOW – ECF No. 51 at 18.

28 ³² FACC – ECF No. 49 at 5 (¶ 26).

³³ *Id.* (¶ 27).

1 number of monthly hours needed after 6 months.”³⁴ If Thirty-One Gifts “chooses to
2 maintain the number of hours through the remaining 6 months of the retainer contract,” the
3 parties “will discuss reducing the hourly rate for the remainder of the contract year.”³⁵
4

5 **4. The February 2, 2017 Statement of Work**

6 On February 2, 2017, the parties signed a second Statement of Work to upgrade the “software
7 product and license from the SFMC Professional Edition to the SMFC Corporate Edition.”³⁶ “The
8 2017 SOW additionally contemplated that Thirty-One Gifts was purchasing a ‘MobilePush’
9 product and that Pierry would implement functionality.”³⁷

10 The SOW “contemplated Pierry’s monitoring of potential overages relating to Pierry’s
11 prospective forecasting of any such overages for discussion with Thirty One Gifts.”³⁸ It set forth
12 quarterly payments for the upgrade, with a term beginning on February 1, 2017 through January
13 31, 2019. “Invoicing for quarterly payments was set for a net 30 payment schedule. Thus, an
14 invoice for May 1, 2017 was due to be paid on May 31, 2017.”³⁹

15 The SOW specifies that “The client [Thirty-One Gifts] owns the application, all related code,
16 and maintenance.”⁴⁰ According to Thirty-One Gifts, its “ownership of the SFMC application was
17 critical because that application controlled all of the data that Thirty-One Gifts was temporarily
18 providing to Pierry to perform email marketing services. Although Thirty-One Gifts owned the
19 application, Thirty-One Gifts relied on Pierry to operate the application – that was the purpose of
20 entering into the MSAs and the SOWs.”⁴¹ “Unbeknownst to Thirty-One Gifts, Pierry also retained
21 a “lock” on the application. Thirty-One Gifts never authorized Pierry to lock the application
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23 ³⁴ *Id.* at 6 (¶ 28).

24 ³⁵ *Id.*

25 ³⁶ *Id.* (¶ 30).

26 ³⁷ *Id.* (¶ 31).

27 ³⁸ *Id.* (¶ 32); Ex. 3, SOW – ECF No. 51 at 22 (§§ e, f).

28 ³⁹ FACC – ECF No. 49 at 6 (¶ 33); Ex. 3, SOW – ECF No. 51 at 21.

⁴⁰ FACC – ECF No. 49 at 6 (¶ 34); Ex. 3, SOW – ECF No. 51 at 21.

⁴¹ FACC – ECF No. 49 at 6 (¶ 34).

1 against Thirty-One Gifts’ use.”⁴² The MSA and the two SOWs do “not reflect any agreement that
2 Pierry could charge for, or that Thirty-One Gifts is responsible to pay for, additional hours Pierry
3 spent to implement its obligations under the MSA, the 2015 SOW, and/or the 2017 SOW.”⁴³
4

5 **5. March 2017: Pierry Closes its Cleveland Office**

6 Representatives at Pierry’s (formerly C.Trac’s) Cleveland, Ohio office handled the work for
7 Thirty-One Gifts from September 2016 to March 2017.⁴⁴ Thirty-One Gifts “helped train those
8 representatives in the business of digital marketing in the direct selling context.”⁴⁵ In late March
9 2017, Pierry closed the Cleveland office and did not notify Thirty-One Gifts, which discovered the
10 closure after leaving “numerous urgent messages with the Cleveland office” in late March with no
11 response.⁴⁶ On information and belief, Thirty-One Gifts alleges that Pierry terminated the
12 representatives who handled Thirty-One Gifts’ account and assigned “new representatives who
13 were located on or near the West Coast and had little to no knowledge of the Thirty-One Gifts
14 account.”⁴⁷

15 “After the reassignment of personnel, Pierry’s performance of the MSA and the SOWs
16 materially and dramatically worsened.”⁴⁸ The new representatives did not understand the
17 account.⁴⁹ Thirty-One Gifts consultants paid a subscription fee for weekly activity reports from
18 Pierry, but after the Cleveland office closed, Pierry “struggled to send” the reports.⁵⁰ Thirty-One
19 Gifts suspended the report service to its consultants “due to the confusion caused by Pierry’s
20 incorrect reporting.”⁵¹ Problems arose “relating to other email messages that Pierry was required
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22 ⁴² *Id.* at 7 (¶ 35).

23 ⁴³ *Id.* at 5 (¶ 26).

24 ⁴⁴ *Id.* at 7 (¶ 37).

25 ⁴⁵ *Id.* (¶ 38).

26 ⁴⁶ *Id.* (¶ 39).

27 ⁴⁷ *Id.* (¶ 40).

28 ⁴⁸ *Id.* (¶ 41).

⁴⁹ *Id.*

⁵⁰ *Id.* at 8 (¶ 44).

1 to send to Thirty-One Gifts’ distributions list,” and “weeks would pass and deadlines would be
2 missed before Pierry responded.”⁵²

3 Thirty-One Gifts asked Pierry to send its personnel to Thirty-One Gifts’ office so that Thirty-
4 One Gifts could educate the personnel on its business model and products and explain how the
5 Pierry/C.Trac Cleveland-office personnel previously handled the account.⁵³ It also asked for phone
6 or videoconference training sessions.⁵⁴ Pierry ignored or refused the requests.⁵⁵

7 Thirty-One Gifts specifies 20 instances (“a sampling”) of “Pierry’s recognition of its repeated
8 mistakes and ongoing apologies” in March and April 2017.⁵⁶

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10 **6. April 2017: Thirty-One Gifts’ Flash Sale**

11 Thirty-One Gifts holds “flash sales” twice a year for its consultants and customers.⁵⁷ The flash
12 sales “last a relatively short duration and are based on a ‘while supplies lasts’ model where most
13 sales occur on the first day.”⁵⁸ These sales “reflect some of Thirty-One Gifts’ highest sales volume
14 days each year.”⁵⁹ Thirty-One Gifts’ “traditional strategy” was to open the flash sale first to
15 consultants and “best” customers, and then later to the master list of customers, thus “segmenting
16 and sequencing the lists.”⁶⁰

17 Thirty-One Gifts set a flash sale to begin on April 26, 2017 at 6:00 a.m.⁶¹ Pierry’s “failures
18 since closing its Cleveland office” eroded Thirty-One Gifts’ confidence that Pierry could

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21 ⁵¹ *Id.* (¶ 44).

22 ⁵² *Id.* (¶ 45).

23 ⁵³ *Id.* (¶ 42).

24 ⁵⁴ *Id.* (¶ 43).

25 ⁵⁵ *Id.* (¶¶ 42–43).

26 ⁵⁶ *Id.* (¶ 43).

27 ⁵⁷ *Id.* at 10 (¶ 47).

28 ⁵⁸ *Id.*

⁵⁹ *Id.* at 11 (¶ 49).

⁶⁰ *Id.* (¶¶ 51, 53).

⁶¹ *Id.* at 11 (¶ 50).

1 differentiate between its different customer lists because Pierry had on previously occasions “sent
2 emails to incorrect distribution lists,” “sent test emails that were accurate but then changed the
3 substantive emails when distributed,” and “sent emails to Thirty-One Gifts’ distribution lists
4 without Thirty-One Gifts’ approval.”⁶²

5 Because of these alleged problems with Pierry’s ability to send emails, for the April 26 flash
6 sale, Thirty-One Gifts asked Pierry to send emails only to its master customer list (instead of
7 “segmenting and sequencing the lists”).⁶³ Thirty-One Gifts asked Pierry to send test emails to the
8 master customer list to confirm its preparation for April flash-sale.⁶⁴ As of April 24, 2017, “Pierry
9 was still unable to produce an accurate test email:” the test emails had incorrect URL addresses
10 and hyperlinks.⁶⁵ Thirty-One Gifts wrote to Pierry, saying that they had to turn the situation
11 around so that the parties could “have confidence” in the contemplated marketing-email send.⁶⁶
12 Pierry’s next tests emails on April 25 failed too; they again had incorrect URL addresses and
13 hyperlinks.⁶⁷ Thirty-One Gifts devoted “substantial extra time and attention” at “substantial extra
14 cost” to ensure that Pierry would send the correct emails, but on the date of the flash sale, “Pierry
15 failed nonetheless.”⁶⁸

16 In the early morning on April 26, Pierry told Thirty-One Gifts that “the initial email sends
17 were all successful.”⁶⁹ But over the next hours, the “purchasing activity from the flash sale was far
18 below forecasts and previous flash sales.”⁷⁰ “Thirty-One Gifts investigated and discovered that
19 Pierry had only sent approximately 750,000 of the approximately 5 million emails that it was
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⁶² *Id.* (¶ 52).

23 ⁶³ *Id.* (¶ 53).

24 ⁶⁴ *Id.* at 12 (¶ 55).

25 ⁶⁵ *Id.* (¶ 56).

26 ⁶⁶ *Id.* (¶ 57).

27 ⁶⁷ *Id.* (¶ 58).

28 ⁶⁸ *Id.* (¶ 59–60).

⁶⁹ *Id.* (¶ 61).

⁷⁰ *Id.* (¶ 62).

1 supposed to send.⁷¹ Thirty-One Gifts informed Pierry of the “mistake.”⁷² By 11:52 a.m. ET, Pierry
2 responded, “you are absolutely correct that the [list Pierry used] is not inclusive of all Customers.
3 We sincerely apologize for the misstep, and are working to correct this right away. We expect to
4 have remaining emails deployed by 12:30 pm EST, at the latest, pending your approval.”⁷³ By
5 3:40 p.m. ET (ten hours after the target time to send the emails), Pierry allegedly sent emails to
6 only fifty percent of the distribution list.⁷⁴

7 As a result, Thirty-One Gifts claims, it lost at least \$2.2 million of revenue.⁷⁵

8
9 **7. May 2017: Thirty-One Gifts Terminates the Contract**

10 On May 12, 2017, Thirty-One Gifts sent Pierry a “Formal Notice of Termination” that it was
11 terminating the contract and its business relationship immediately and that it would not pay
12 Pierry’s invoices for April or May 2017.⁷⁶

13 Thirty-One Gifts is terminating the Agreement and its business relationship with
14 Pierry. Pursuant to §2.2 of the Agreement, this letter gives formal Notice that
15 Thirty-One Gifts will not pay any Pierry invoices for April or May of this year due
16 to Pierry’s wholesale failure to perform its contractual obligations during those
17 months, resulting in exponentially more monetary harm to Thirty-One Gifts than
18 the value of any invoices from Pierry.⁷⁷

19 The notice reviewed Pierry’s alleged breaches of the contracts, including its deficiencies regarding
20 the April 26 sale, and it also stated that Pierry had charged Thirty-One Gifts overage charges
21 without approval:

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⁷¹ *Id.* (¶ 63).

⁷² *Id.*

⁷³ *Id.* at 12–13 (¶ 64). The order’s usage of “ET” and “EST” tracks the FACC’s nomenclature.

⁷⁴ *Id.* at 13 (¶ 66).

⁷⁵ *Id.* (¶ 69).

⁷⁶ *Id.* (¶ 71); Letter, Ex. A – ECF No. 52 at 2–4.

⁷⁷ Letter, Ex. A – ECF No. 52 at 3.

1 Pierry would not be charging any overages to Thirty-One Gifts in light of Pierry’s
breaches of the Agreement (which breaches only worsened later in the month).⁷⁸

2 The notice “recognize[d] § 7.1 of the Agreement” (the provision that limits liability, *see supra*),
3 but asserted that section 7.1’s thirty-day-notice-and-cure provision “is inoperative when the
4 breached performance is incapable of re-performance within thirty days — plainly a biannual flash
5 sale is incapable of re-performance thirty days later.”⁷⁹

6 “Pierry responded by demanding that, unless Thirty-One Gifts pays Pierry \$280,772.20 by
7 May 19, 2017, Pierry was going to lock out Thirty-One Gifts from the SFMC software application
8 that Thirty-One Gifts owned and lock out Thirty-One Gifts from recovering its property related to
9 the account.”⁸⁰ Thirty-One Gifts did not make the payment and disputes that it owed it under the
10 MSA or the SOWs because the amounts were attributable to extra work hours.⁸¹ On May 19,
11 2017, Pierry locked Thirty-One Gifts out of the SFMC software application and account, allegedly
12 on the ground that it could suspend service for lack of payment.⁸²

13 As a result, Thirty-One Gifts could not conduct its business: it could not communicate with its
14 sales consultants and its customers; it could not advertise sales and promotions; and it could not
15 address customer-service issues.⁸³

16 “The tens of thousands of consultants were also harmed” and could not communicate with
17 their customers effectively or raise issues with Thirty-One Gifts.⁸⁴ Pierry harmed them further “by
18 failing to implement email services for which the consultants paid a subscription fee.”⁸⁵

19 Pierry also “harmed the public at large. The consuming public could not communicate
20 effectively” with Thirty-One Gifts and “could not communicate effectively with their chosen
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23 ⁷⁸ *Id.*

24 ⁷⁹ FACC – ECF No. 49 at 14 (¶ 72); Letter, Ex. A – ECF No. 52 at 3.

25 ⁸⁰ FACC – ECF No. 49 at 14 (¶ 73); *see* FAC – ECF No. 51 at 3 (¶ 9).

26 ⁸¹ FACC – ECF No. 49 at 14 (¶¶ 74–75).

27 ⁸² *Id.* at 14–15 (¶ 77).

28 ⁸³ *Id.* at 15 (¶ 78).

⁸⁴ *Id.* (¶ 79).

⁸⁵ *Id.*

1 consultants regarding purchases, sales, and customer services.”⁸⁶ Thirty-One Gifts could not
2 communicate with customers to inform them of monthly specials and to follow up regarding
3 sales.⁸⁷ It was blocked from confirming enrollment of new consultants.⁸⁸

4 Thirty-One Gifts tried to resolve the dispute with Pierry and asked Pierry to “return its
5 property (most critically the Internet Protocol address, message content, and customer lists.”⁸⁹
6 “Pierry responded by insisting upon full payment of the un-owed \$289,772.20 in exchange for
7 releasing the lock on Thirty-One Gifts’ account.”⁹⁰

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9 **8. The Lawsuit**

10 In May 2017, Pierry sued Thirty-One Gifts for (1) breach of contract, (2) breach of the implied
11 covenant of good faith and fair dealing, and (3) declaratory relief.⁹¹ Thirty-One Gifts
12 counterclaimed for (1) breach of contract, (2) declaratory judgment, (3) violation of California’s
13 Computer Data Access and Fraud Act, Cal. Pen. Code § 502, (4) conversion, (5) intentional
14 interference with prospective economic advantage, and (6) violation of California’s UCL, Cal.
15 Bus. & Prof. Code § 17200.⁹² The parties each filed motions to dismiss under Federal Rule of
16 Civil Procedure 12(b)(6). Thirty-One Gifts moved to dismiss Pierry’s second claim for breach of
17 the implied covenant of good faith and fair dealing,⁹³ and Pierry moved to dismiss all
18 counterclaims except for the claim for declaratory judgment; it also moved to dismiss any claim
19 for damages that exceeded the limitation of liability in the MSA.⁹⁴

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22 ⁸⁶ *Id.* (¶ 80).

23 ⁸⁷ *Id.* (¶ 81).

24 ⁸⁸ *Id.* (¶ 82).

25 ⁸⁹ *Id.* (¶ 84).

26 ⁹⁰ FAC – ECF No. 51 at 2 (¶ 5).

27 ⁹¹ Compl. – ECF No. 1 at 4–6 (¶¶ 13–28).

28 ⁹² Answer and Counterclaims – ECF No. 8.

⁹³ Mot. – ECF No. 7.

⁹⁴ Mot. – ECF No. 15.

1 The case previously was assigned to a different judge. She dismissed the claim and
2 counterclaim for breach of the implied covenant of good faith and fair dealing because the claims
3 duplicated the parties’ breach-of-contract claims.⁹⁵ She dismissed Thirty-One Gifts’ breach-of-
4 contract counterclaim “[t]o the extent the breach of contract claim is based on Pierry’s failure to
5 perform services as defined in the MSA” because Thirty-One Gifts failed to plead “compliance
6 with the condition precedent of providing notice and opportunity to cure in compliance with MSA
7 §§ 5.2 and 7.1.”⁹⁶ She let the claim stand to the extent that it challenged Pierry’s failure to return
8 Thirty-One Gifts’ property, its blocking of Thirty-One Gifts’ access to its property (including the
9 SFMC application), and Pierry’s demand for monies that it was not entitled to under the contract.⁹⁷
10 She dismissed the UCL claim.⁹⁸ She otherwise denied Pierry’s motion to dismiss the other
11 counterclaims.⁹⁹ The dismissal was with leave to amend.¹⁰⁰

12

13 **9. The Amended Complaint and Counterclaims**

14 Pierry filed an amended complaint with three claims: (1) breach of contract; (2) breach of
15 implied covenant of good faith and fair dealing; and (3) a claim for a declaratory judgment that
16 Thirty-One Gifts owes it immediate payment of the past-due amount.¹⁰¹

17 Thirty-One Gifts asserts six amended counterclaims: (1) breach of contract; (2) declaratory
18 judgment; (3) violation of California’s Computer Data Access and Fraud Act, Cal. Pen. Code §
19 502; (4) conversion; (5) intentional interference with prospective economic advantage; and (6)
20 violation of California’s UCL, Cal. Bus. & Prof. Code § 17200. Thirty-One Gifts moves to
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24 ⁹⁵ Order – ECF No. 35 at 11, 18.

25 ⁹⁶ *Id.* at 11.

26 ⁹⁷ *Id.*

27 ⁹⁸ *Id.* at 14–15.

28 ⁹⁹ *Id.* at 14.

¹⁰⁰ *Id.* at 18.

¹⁰¹ FAC – ECF No. 51 at 4–8 (¶¶ 12–29).

1 dismiss Pierry’s claim for breach of the implied covenant of good faith and fair dealing.¹⁰² Pierry
2 moves to dismiss Thirty-One Gifts’ counterclaims three through six.¹⁰³

3
4 **ANALYSIS**

5 A complaint must contain a “short and plain statement of the claim showing that the pleader is
6 entitled to relief” to give the defendant “fair notice” of what the claims are and the grounds upon
7 which they rest. *See* Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
8 A complaint does not need detailed factual allegations, but “a plaintiff’s obligation to provide the
9 ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
10 recitation of the elements of a cause of action will not do. Factual allegations must be enough to
11 raise a claim for relief above the speculative level” *Id.* (internal citations omitted).

12 To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which
13 when accepted as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
14 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility
15 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that
16 the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a
17 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
18 unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557). “Where a complaint pleads facts that are
19 merely consistent with a defendant’s liability, it stops short of the line between possibility and
20 plausibility of ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation
21 marks omitted).

22 If a court dismisses a complaint, it should give leave to amend unless the “the pleading could
23 not possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe, Inc. v. N. Cal.*
24 *Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

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¹⁰² Mot. – ECF No. 53.

28 ¹⁰³ Mot. – ECF No. 56.

1 **1. Thirty-One Gifts’ Motion to Dismiss**

2 Thirty-One Gifts moves to dismiss Pierry’s claim for breach of the implied covenant of good
3 faith and fair dealing on the ground that it duplicates the breach-of-contract claim.¹⁰⁴ The court
4 dismisses the claim.

5 California law implies a covenant of good faith and fair dealing in every contract. *Carma*
6 *Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 371 (1992). “The obligations
7 imposed by the covenant of good faith and fair dealing are not those set out in the term of the
8 contract itself, but rather are obligations imposed by law governing the manner in which the
9 contractual obligations must be discharged-fairly and in good faith.” *Dunkel v. eBay, Inc.*, No.
10 5:12-CV-01452-EJD, 2013 WL 415584, at *9 (N.D. Cal. Jan. 31, 2013) (quoting *Koehrer v. Sup.*
11 *Ct.*, 181 Cal. App. 3d 1155, 1169 (1986)). “However, the contours of any party’s duty under the
12 covenant, as well as any conduct prohibited by the covenant, are determined by the purposes and
13 terms of the contract at issue.” *Id.* (citing *Inter-Mark USA, Inc. v. Intuit, Inc.*, No. 07-CV-04178-
14 JCS, 2008 WL 552482, at *7 (N.D. Cal. Feb. 27, 2008) (quoting *Commercial Union Assurance*
15 *Cos. v. Safeway Stores, Inc.*, 26 Cal. 3d 912, 918 (1980) and *Carma Developers*, 2 Cal. 4th at
16 373)). Thus, “[i]n order to state a claim for breach of an implied covenant of good faith and fair
17 dealing, the specific contractual obligation from which the imposed covenant of good faith and
18 fair dealing arose must be alleged.” *InterMark USA*, 2008 WL 552482 at *6. A plaintiff also must
19 show “that the conduct of the defendant, whether or not it also constitutes a breach of a consensual
20 contract term, demonstrates a failure or refusal to discharge contractual responsibilities.” *Careau*
21 *& Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990).

22 “If the allegations in a breach of implied covenant claim do not go beyond the statement of a
23 mere contract breach and, relying on the same alleged acts, simply seek the same damages or other
24 relief already claimed in a companion contract cause of action, they may be disregarded as
25 superfluous as no additional claim is actually stated.” *Malcolm v. JP Morgan Chase Bank, N.A.*,

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¹⁰⁴ Motion – ECF No. 53 at 2.

1 No. 09-CV-4496-JF (PVT), 2010 WL 934252, at *6 (N.D. Cal. Mar. 15, 2010) (quoting *Schulken*
2 *v. Wash. Mut. Bank*, No. 09-CV-02708-JW, 2009 WL 4173525 (N.D. Cal. Nov. 19, 2009)).

3 In its amended complaint, Pierry adds new allegations to support its claim of a breach of the
4 covenant of good faith and fair dealing. The core allegation is that Thirty-One Gifts needed to
5 cooperate and dedicate ongoing technical support and other resources in order for Pierry to
6 perform under the contract.¹⁰⁵ Pierry points to specific contract provisions that “implicitly require
7 [Thirty-One Gifts’] good faith cooperation and support.”¹⁰⁶ An example is that Pierry provided
8 consulting services, which required Thirty-One Gifts’ active involvement. Another is that the
9 creation of content (by Pierry or Thirty-One Gifts) required Thirty-One Gifts to provide content
10 and allow effective access.¹⁰⁷

11 The allegations that support the contract and breach-of-implied-covenant claims are the same:
12 (1) Thirty-One Gifts did not pay Pierry for contractual work; and (2) Thirty-One Gifts did not
13 dedicate on-site technical support or other resources to Pierry.¹⁰⁸ The claim for breach of the
14 implied covenant of good faith and fair dealing is superfluous. *Careau*, 222 Cal. App. 3d at 1394.

15 Pierry nonetheless contends that it alleged sufficiently the contract provisions that required
16 Thirty-One Gifts’ good-faith cooperation and support and that it specified “implied obligations not
17 stated in the contract” that Thirty-One Gifts did not satisfy.¹⁰⁹ This does not change the court’s
18 conclusion. Pierry relies on the contract and does not plead “facts that show that the on-site
19 support and resources are separate obligations not stated in the contract.”¹¹⁰ The court thus
20 dismisses the claim for breach of the implied covenant of good faith and fair dealing because it
21 duplicates the contract claim.¹¹¹

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23 ¹⁰⁵ FAC – ECF No. 51 at 5 (¶ 21).

24 ¹⁰⁶ *Id.*

25 ¹⁰⁷ *Id.*

26 ¹⁰⁸ FAC – ECF No. 51 (¶¶ 16, 21–22).

27 ¹⁰⁹ Opp. – ECF No. 61 at 12, 15.

28 ¹¹⁰ Order – ECF No. 35 at 9.

¹¹¹ The court finds the issue suitable for determination at the pleadings stage (as opposed to summary judgment). *See, e.g., Landucci v. State Farm Ins. Co.*, 65 F. Supp. 3d 694, 715–17 (N.D. Cal. 2014); *Paed v. Wells Fargo Bank, N.A.*, No. C-15-01980, 2015 WL 4089983, at *4–*5 (N.D. Cal. July 6,

1 **2. Pierry’s Motion to Dismiss**

2 Pierry moves to dismiss the following counterclaims (numbered as they are in the counter-
3 complaint): (3) violation of California’s Computer Data Access and Fraud Act, Cal. Pen. Code §
4 502; (4) conversion; (5) intentional interference with prospective economic advantage; and (6)
5 violation of California’s UCL, Cal. Bus. & Prof. Code § 17200. It also moves to dismiss Thirty-
6 One Gifts’ claims for any damages that exceed the liability limitation and special damages
7 exclusion in the MSA.¹¹²

8 **2.1 California Comprehensive Computer Data Access and Fraud Act**

9 Thirty-One Gifts alleges that Pierry violated the California Comprehensive Computer Data
10 Access and Fraud Act, Cal. Penal Code § 502, by preventing Thirty-One Gifts from using its
11 data.¹¹³ Pierry moves to dismiss on the ground that Thirty-One Gifts did not plead an unlawful
12 taking or causation.¹¹⁴ The court holds that Thirty-One Gifts pleads a plausible claim.

13 The Act prohibits an individual from knowingly accessing or using data without permission in
14 various ways:

15 (c) Except as provided in subdivision (h), any person who commits any of the following
16 acts is guilty of a public offense:

17 (1) Knowingly accesses and without permission alters, damages, deletes, destroys,
18 or otherwise uses any data, computer, computer system, or computer network in
19 order to either (A) devise or execute any scheme or artifice to defraud, deceive, or
20 extort, or (B) wrongfully control or obtain money, property, or data.

21 (2) Knowingly accesses and without permission takes, copies, or makes use of any
22 data from a computer, computer system, or computer network, or takes or copies
23 any supporting documentation, whether existing or residing internal or external to a
24 computer, computer system, or computer network.

25 (3) Knowingly and without permission uses or causes to be used computer services.

25 2015); *Williams v. Gyruus ACMI, LP*, No. 14-cv-805, 2015 WL 154733, at *3–*4 (N.D. Cal. Jan. 12,
26 2015); *Lamke v. Sunstate Equipment Co., LLC*, 387 F. Supp. 2d 1044, 1047–48 (N.D. Cal. 2004);
27 *Bilodeau v. McAfee, Inc.*, No. 12-cv-4589, 2013 WL 3200658, at *13 (N.D. Cal. June 24, 2013).

28 ¹¹² Mot. – ECF No. 50.

¹¹³ FACC – ECF No. 49 at 21–22 (¶¶ 107–11).

¹¹⁴ Mot. – ECF No. 56 at 9–11.

1 (4) Knowingly accesses and without permission adds, alters, damages, deletes, or
2 destroys any data, computer software, or computer programs which reside or exist
internal or external to a computer, computer system, or computer network.

3 (5) Knowingly and without permission disrupts or causes the disruption of
4 computer services or denies or causes the denial of computer services to an
authorized user of a computer, computer system, or computer network.

5 * * *

6 (7) Knowingly and without permission accesses or causes to be accessed any
7 computer, computer system, or computer network.

8 Cal. Penal Code § 502(c)(1)–(5), (7). An individual acts “without permission” when he
9 “circumvents technical or code-based barriers in place to restrict or bar a user’s access.” *Facebook*
10 *v. Power Ventures, Inc.*, 844 F. Supp. 2d 1025, 1036 (N.D. Cal. 2012). Anyone “who suffers
11 damage or loss by reason of a violation” may bring a private action for damages and equitable
12 relief. Cal. Penal Code § 502(e)(1).

13 Pierry moves to dismiss the claim on the grounds that (1) the contract authorized it to suspend
14 access, (2) Thirty-One Gifts did not allege causation sufficiently, and (3) Thirty-One Gifts did not
15 allege an “actual use or taking” that establishes a violation of the statute.¹¹⁵ The court follows as
16 persuasive the earlier judge’s order on this issue and holds that Thirty-One Gifts plausibly pleads a
17 claim under section 502.

18 First, suspension of service is a remedy under MSA § 2.2 only for non-payment of an
19 undisputed debt, and this debt was disputed: Thirty-One Gifts asserts that the disputed fees were
20 for extra hours that Pierry worked that were not covered by the contract. Also, Thirty-One Gifts
21 alleges more than suspension of services: it alleges that Pierry locked it out of its sales platform
22 and prevented it from conducting its online business.¹¹⁶ This plausibly alleges causation and harm.

23 In addition, Thirty-One Gifts pleads a use or taking. The Act prohibits a person who “without
24 permission, takes, copies, or makes use of” data on a computer. Cal. Penal Code § 502(c)(2). This
25 “includes logging into a database with a valid password and subsequently taking, copying, or
26 using the information in the database improperly.” *United States v. Christensen*, 828 F.3d 763, 789

27 ¹¹⁵ Mot. – ECF No. 56 at 9–11.

28 ¹¹⁶ Order – ECF No. 35 at 12.

1 (9th Cir. 2015). Subsection 502(c)(5) makes anyone liable who “[k]nowingly and without
2 permission disrupts or causes the disruption of computer services or denies or causes denial of
3 computer services to an authorized user of a computer, computer system, or computer network.”
4 This includes locking an individual out of an account without authorization. *NovelPoster v.*
5 *Javitch Canfield Group*, 140 F. Supp. 3d 954, 967 (N.D. Cal. 2014); see *People v. Childs*, 220 Cal.
6 App. 4th 1079, 1089 (2014) (city engineer violated the Act when he disrupted the customer’s
7 access to the city’s fiber-optic network). Thirty-One Gifts’ allegations are therefore sufficient to
8 state a claim under the Act.

9 **2.2 Conversion**

10 Pierry argues that because the MSA allowed it to suspend service, Thirty-One Gifts cannot
11 plead a claim for conversion.¹¹⁷

12 “[A]ny act of dominion wrongfully exerted over the personal property of another inconsistent
13 with the owner’s rights thereto constitutes conversion.” *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d
14 590, 601 (9th Cir. 2010) (quoting *McCafferty v. Gilbank*, 249 Cal. App. 2d 569, 576 (1967)). To
15 prove conversion, a plaintiff must establish: (1) “ownership of or right to possess the property in
16 question at the time of the conversion, (2) that the defendant disposed of the plaintiff’s property
17 rights or converted the property by a wrongful act, and (3) damages.” *Swingless Golf Club Corp.*
18 *v. Taylor*, 732 F. Supp. 2d 899, 910 (N.D. Cal. 2010) (citing *Oakdale Village Grp. v. Fong*, 43
19 Cal. App. 4th 539, 544 (1996)).

20 As discussed in the last section, Thirty-One Gifts alleged that Pierry prevented it from using its
21 sales platform and data. This plausibly pleads a claim for conversion.

22 **2.3 Intentional Interference with Economic Advantage**

23 Pierry argues that because the MSA allowed it to suspend service, Thirty-One Gifts cannot
24 plead a claim for intentional interference with prospective economic advantage.¹¹⁸

27 ¹¹⁷ FACC – ECF No. 49 at 22–23 (¶ 117).

28 ¹¹⁸ Mot. – ECF No. 56 at 15.

1 “In order to succeed on a claim for intentional interference with prospective economic
2 advantage, a plaintiff must prove: (1) it had an economic relationship with a third party containing
3 the probability of a future economic benefit; (2) defendant had knowledge of this relationship; (3)
4 defendant committed intentional and unjustified acts designed to disrupt the relationship; (4)
5 actual disruption of the relationship; and (5) resulting damages.” *Sidense Corp. v. Kilopass Techn.*
6 *Inc.*, No. C 11-04112-SI, 2012 WL 3545289, at *13 (N.D. Cal. Aug. 16, 2012). The plaintiff must
7 allege that the defendant performed an act that is “wrongful ‘by some measure beyond the fact of
8 the interference itself.’” *CRST Van Expedited, Inc. v. Werner Enters. Inc.*, 479 F.3d 1099, 1105
9 (9th Cir. 2007).

10 By alleging that Pierry denied it access to its sales platform, and otherwise pleading facts
11 establishing the elements of a claim for intentional interference with prospective economic
12 advantage, Thirty-One Gifts states a claim.

13 **2.4 California’s UCL, Cal. Bus. & Prof. Code § 17200 et seq.**

14 The previously assigned judge dismissed the UCL claim because this case is at core about a
15 contract dispute between sophisticated parties. “The UCL may be used to vindicate the rights of
16 individual consumers who are parties to a contract, but it is not generally appropriate for resolving
17 sophisticated business finance issues.”¹¹⁹ The earlier assigned judge dismissed the claim with
18 leave to amend to add fact allegations about harm to the general public.¹²⁰ Because the allegations
19 supporting the amended complaint do not cure the deficiencies identified in the earlier judge’s
20 order dismissing the claim, the court dismisses the claim.

21 “[W]here a UCL action is based on contracts not involving either the public in general or
22 individual consumers who are parties to the contracts, a corporate plaintiff may not rely on the
23 UCL for the relief it seeks.” *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115,
24 135 (2007); *see also Rosenbluth Int’l, Inc. v. Super. Ct.*, 101 Cal. App. 4th 1073, 1077 (2002)
25 (“[A] UCL action based on a contract is not appropriate where the public in general is not harmed
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27 ¹¹⁹ Order – ECF No. 34 at 14 (citation omitted).

28 ¹²⁰ *Id.* at 15–16.

1 by the defendant’s alleged unlawful practices.”); *ILWU-PMA Welfare Plan Bd. of Trustees v.*
 2 *Connecticut General Life Ins. Co.*, No. C-02965-WHA, 2015 WL 9300519, at *12 (N.D. Cal. Dec.
 3 22, 2015) (dismissing a UCL claim because it arose “solely from defendants’ performance of their
 4 respective contracts, and no individual consumers joined those contracts as parties”). The “central
 5 issue . . . is whether the public at large, or consumers generally, are affected by the alleged
 6 unlawful business practice of defendants. The relative size of the plaintiff companies and whether
 7 or not there is a contract for the plaintiffs to rely upon is secondary to the analysis of whether, as a
 8 result of the alleged unfair or fraudulent business practice, consumers are adversely affected.” *In*
 9 *re Webkinz Antitrust Litigation*, 695 F. Supp. 2d 987, 998–99 (N.D. Cal. 2010).

10 Thirty-One Gifts argues that its UCL claim “is based on misconduct independent of a contract
 11 between the parties,”¹²¹ but the dispute remains about a contract negotiated by sophisticated
 12 entities. The court follows as persuasive the earlier judge’s opinion and concludes that Thirty-One
 13 Gifts’ new allegations about harm to the public and its consultants do not establish injury covered
 14 by the UCL. (The court can distinguish *Circle Click Media*, which involved misleading and
 15 deceptive acts and plaintiffs who were not uniformly sophisticated. *See Circle Click Media LLC v.*
 16 *Regus Mgmt. Grp.*, 2015 WL 6638929, at *1–*2 (N.D. Cal. Oct. 30, 2015)). The court thus
 17 dismisses the claim.

18 **2.5 Contractual Limitations on Damages**

19 Pierry moves to dismiss Thirty-One Gifts’ counterclaims for damages that exceed the liability
 20 limitation and special-damages exclusion in the MSA.¹²² The court denies the motion.

21 Contractual liability limitations are subject to California Civil Code section 1668, which
 22 declares contrary to the policy of the law “contracts which have for their object, directly or
 23 indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person
 24 or property of another, or violation of law, whether willful or negligent.” Under California law,
 25 “contractual clauses seeking to limit liability will be strictly construed and any ambiguities
 26

27 ¹²¹ Opp. – ECF No. 60 at 16. The contract provisions are excerpted in the Statement.

28 ¹²² Mot. – ECF No. 56 at 17–18.

1 resolved against the party seeking to limit its liability.” *Rodman v. Safeway Inc.*, 125 F. Supp. 3d
2 922, 928 (N.D. Cal. 2015) (citations omitted).

3 The court follows the earlier judge’s order as persuasive and holds that the MSA provisions
4 that limit damages may apply to some conduct (such as damages based on services) but do not
5 apply to damages based on willful injuries or violations of the Penal Code.¹²³

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CONCLUSION

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The court grants Thirty-One Gifts’ motion to dismiss, grants Pierry’s motion to dismiss the
UCL claim, and otherwise denies Pierry’s motion. Given the earlier trial judge’s dismissal with
leave to amend, the court’s dismissals are without leave to amend. The parties have made their
best efforts, and they did not cure the deficiencies that the previous judge identified. That means
that the claims going forward are as follows. Pierry’s claims: (1) breach of contract and (3)
declaratory relief. Thirty-One Gifts’ counterclaims: (1) breach of contract; (2) declaratory
judgment; (3) violation of California’s Computer Data Access and Fraud Act, Cal. Pen. Code
§ 502; (4) conversion; and (5) intentional interference with prospective economic advantage.

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This disposes of ECF Nos. 53 and 56.

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IT IS SO ORDERED.

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Dated: April 5, 2018

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LAUREL BEELER
United States Magistrate Judge

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¹²³ Order – ECF No. 35 at 17.