

# Exhibit A

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United States District Court,  
C.D. California.  
MYSFACE, INC.  
v.  
THE GLOBE.COM, INC.  
No. CV 06-3391-RGK (JCx).

Feb. 27, 2007.

Ian C. Ballon, Wendy M. Mantell, Greenberg  
Traurig, Santa Monica, CA, for Myspace, Inc.

Andrew Baum, Jonathan Matkowsky, Darby and  
Darby, New York, NY, Thomas N. Fitzgibbon,  
Pfeiffer Thigpen and Fitzgibbon, Santa Monica,  
CA, for The Globe.Com, Inc.

R. GARY KLAUSNER, U.S. District Judge.

**Proceedings: (IN CHAMBERS) Plaintiff's Motion for Summary Adjudication of Counts 1, 3, and 4 of the Complaint (DE 36) and Defendant's Motion for Partial Summary Judgment (DE 32)**

**I. INTRODUCTION**

\*1 MySpace, Inc. ("Plaintiff" or "MySpace") filed the current action against The Globe.com, Inc. ("Defendant" or "TheGlobe"). Plaintiff's Complaint alleges: (1) Violations of the CAN-SPAM Act, 15 U.S.C. §§ 7701, et seq.; (2) Violations of the Lanham Act, 15 U.S.C. § 1051, et seq.; (3) Violations of California Business and Professions Code Section 17529.5 ("Section 17529.5"); (4) Trademark Infringement under California Business and Professions Code Section 14200, et seq.; (5) False Advertising under California Business and Professions Code Section 17500, et seq.; (6) Breach of Contract; (7) Breach of the Covenant of Good Faith and Fair Dealing; (8) Unfair Competition under California Business and Professions Code Section 17200,

et seq.; and (9) Common Law Unfair Competition.

Presently before this Court are cross-motions for partial summary judgment. Both Plaintiff and Defendant seek summary judgment as to Counts I (Violation of CAN-SPAM), III (Violation of Section 17529.5) and VI (Breach of Contract).

**II. FACTUAL BACKGROUND**

The following facts are alleged by the parties:

Plaintiff is an online social networking service that allows members to create personal profiles in order to find and communicate with other people. Members of MySpace have access to the MySpace.com website, the MySpace.com Internet Messaging service, and the MySpace.com Mail service, where users can send and receive electronic mail messages ("MySpace e-messages").

To become a MySpace member, a person must set up an account on MySpace.com by creating a profile. The profile includes the user's name, country, zip code, birth date, and gender. The user must also create a password and provide an alternate email address to which confirmations and notifications will be sent. To set up an account, the user must assent to the MySpace Terms of Service Contract ("TOS Contract") by checking a box agreeing to the terms of the TOS Contract, and inputting a verification code. The TOS Contract prohibits spamming, automated use of its system, use of MySpace's service for commercial endeavors, and promotion of information known to be false or misleading.

A MySpace member accesses his e-message account on the internet, at the MySpace.com website. To send a MySpace e-message, the user may either click on a link for "Mail," or go directly to the recipient's unique URL assigned to each individual account.

Defendant is a public company that provides inter-

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net-based communications services (“TGLO Products”). Defendant operates one or more websites under various domain names, including iglochat.com, tglophone.com, glotalk.com and digit-alvoiceglo.com.

Beginning January 2006, Defendant set up at least 95 identical or virtually identical “dummy” MySpace profiles, with corresponding e-message accounts. Defendant used these accounts to send almost 400,000 unsolicited commercial e-messages marketing TGLO Products to MySpace users via scripts.<sup>FN1</sup> On February 6, 2006, Plaintiff sent a cease and desist letter to Defendant, demanding that Defendant stop sending its commercial e-messages to MySpace members. Thereafter, Defendant ceased its transmission of e-messages. However, the transmissions later resumed and continued through May 2006.

FN1. A script is a computer programming language used to automate simple, repeated actions.

\*2 On June 1, 2006, Plaintiff filed the current action against Defendant. In its Complaint, Plaintiff alleges that Defendant's activities violated both federal and state statutory laws, as well as state common laws. By way of its action, Plaintiff seeks an order enjoining Defendants from the conduct giving rise to Plaintiff's claims. Plaintiff also seeks actual damages, liquidated damages, punitive damages, and attorney's fees and costs.

## II. JUDICIAL STANDARD

Summary judgment is proper only where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Upon such a showing, the Court may grant summary judgment as to “all or any part thereof.” Fed.R.Civ.P. 56(a), (b).

To prevail on a summary judgment motion, the moving party must show there are no triable issues of fact as to matters upon which it has the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the nonmoving party's case. *Id.* at 326.

To defeat a summary judgment, the non-moving party may not merely rely on its pleadings or on conclusory statements. Fed.R.Civ.P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir.1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *See Celotex Corp. v. Catrett*, 477 U.S. at 324.

## III. DISCUSSION

At issue in these cross-motions are Count 1 (Violation of CAN-SPAM), Count III (Violation of Section 17529.5) and Count VI (Breach of Contract).

According to Plaintiff, there is no triable issue as to the following alleged facts: Defendant obtained 95 or more MySpace e-message accounts to circumvent MySpace's daily mail limitations. To obtain these accounts, Defendant set up almost 100 separate email accounts at sites such as hotmail.com to fulfill MySpace's requirement of providing an alternate email address. Then, Defendant used false information to set up the MySpace accounts with deceptive display names, and purported to use them for personal purposes. In fact, the accounts were used to initiate (via a script) 399,481 unsolicited commercial email messages to MySpace.com users to promote its TGLO Products. Plaintiff asserts that, as a result of this conduct, partial summary judgment should be granted in its favor as to all

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three counts.

Defendant contends that: (1) Plaintiff has no standing under CAN-SPAM because it is not an ISP; (2) the messages sent over its private messaging system are not e-mail, and therefore neither CAN-SPAM nor Section 17529.5 apply; and (3) the TOS Contract, in general, is an unenforceable contract of adhesion, and the liquidated damages provision, specifically, is unenforceable because it is disproportionate to anticipated damages.

\*3 For the following reasons, the Court denies Defendant's Motion for Partial Summary Judgment, and grants in part, Plaintiff's Motion for Summary Adjudication.

#### A. *Claims Under CAN-SPAM*

CAN-SPAM regulates the manner in which unsolicited commercial emails may be transmitted. See 15 U.S.C. §§ 7701, et seq. The statute also makes unlawful certain conduct relating to such transmissions, including the transmission of false or misleading information, and obtaining email addresses through dictionary attacks.<sup>FN2</sup> 15 U.S.C. §§ 7704(a)-(d). Under CAN-SPAM, an Internet access service provider who is harmed by violations of Section 7704(a), (b) or (d) may seek to enjoin further violation by the defendant, or recover damages equal to the greater of: (1) actual monetary loss incurred by the internet access service provider or (2) statutory damages as provided by Section 7706(g)(3).

FN2. Dictionary attacks involve obtaining email addresses using an automated means that generates possible addresses by combining names, letter, or numbers into numerous permutation.

Plaintiff alleges that, based on its conduct, Defendant is liable for four separate violations under the statute:

(1) Section 7704(a)(1): transmission of commer-

cial email that contain false or misleading information, including header information;

(2) Section 7704(a)(2): pattern or practice of transmitting commercial email with deceptive subject headings;

(3) Section 7704(a)(5): pattern or practice of transmitting commercial email which omits identifier, opt-out and physical address information; and

(4) Section 7704(b)(1): using automated means, such as scripts, to generate commercial email to random recipients.

As discussed below, the Court finds no triable issue as to Defendant's violation of the following; three out of four provisions: Sections 7704(a)(1), 7704(a)(5) and 7704(b)(1)(A)(ii)

#### 1. *Plaintiff Has Standing Under CAN-SPAM*

As an initial matter, CAN-SPAM, which is primarily a criminal statute, authorizes a private right of action only to a "provider of Internet access service." 15 U.S.C. § 7706(g)(1). Defendant contends that Plaintiff is not a provider of Internet access service, and therefore, has no standing to sue Defendant under the statute.

##### a. *Plaintiff is an Internet Access Provider*

Under Section 7702(11), "Internet access service" has the meaning given that term in 47 U.S.C. § 231(e)(4) ("Section 231"). Section 231 defines "Internet access service" as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers."

The Ninth Circuit assumes that the legislative purpose of a statute is expressed by the ordinary meaning of the words used. *Leisnoi, Inc. v. Stratman*,

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154 F.3d 1062, 1066 (9th Cir.1998). The plain meaning of the statutory language is unambiguous; "Internet access provider" includes traditional Internet Service Providers ("ISPs"), any email provider, and even most website owners. See *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366, 373 (5th Cir.2005); see also *Hypertouch v. Kennedy Western*, 2006 WL 648688 at \*3 (N.D.Cal. Mar.8, 2006). Under this broad definition, Plaintiff is an "Internet access provider."

b. *MySpace E-Messages Are Electronic Mail*

\*4 Notwithstanding the broad definition given to "Internet access provider," CAN-SPAM provides a private right of action to only those Internet access providers who are adversely affected by Section 7704. Since Section 7704 regulates and prohibits conduct involving electronic mail ("electronic mail" or "email"), a private right of action under CAN-SPAM is confined to only those Internet access services that provide access to electronic mail.

CAN-SPAM defines "electronic mail message" as "a message sent to a unique electronic mail address." 15 U.S.C. § 7702(6). "Electronic mail address" is defined as "a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the 'local part') and a reference to an Internet domain (commonly referred to as the 'domain part'), whether or not displayed, to which an electronic mail message can be sent or delivered." 15 U.S.C. § 7702(5).

According to Plaintiff's evidence, the mail of each MySpace user resides at a unique URL, consisting of a string of characters that includes a reference to a user name or number, and the Internet destination, www.myspace.com. (Ballon Suppl. Decl., Exh.C.2, Whitcom Depo., 71:17-24; Ballon Decl., Tab 4, Wells Decl., ¶ 7.) This evidence shows that MySpace e-messages fall under CAN-SPAM's definition of electronic mail, and Defendant has failed to present any evidence disputing Plaintiff's

evidence.

However, Defendant maintains that MySpace e-messages do not constitute CAN-SPAM protected email because: (1) unlike email, MySpace e-messages have no real "route" because the messages always remain within the "walled garden" of MySpace; (2) MySpace e-messages are not email because they do not use simple mail transfer protocol ("SMTP"); and (3) unlike email addresses, MySpace e-message addresses have no domain part. Defendant's arguments are unavailing.

First, nowhere does the statute specify the requirements set forth by Defendant.<sup>FN3</sup> Moreover, argument as to these requirements are part and parcel of Defendant's position that only traditional ISPs have a right to sue under CAN-SPAM, as these requirements are typically associated with email service provided by traditional ISPs. As discussed above, the Court rejects this position. Furthermore, CAN-SPAM's Congressional findings indicates that exclusion of electronic messages that fall outside the ambit of Defendant's specifications would subvert the legislative intent. Regardless of who has a private right of action under the statute, the overarching intent of this legislation is to safeguard the convenience and efficiency of the electronic messaging system, and to curtail overburdening of the system's infrastructure. See 15 U.S.C. § 7701(a). Limiting protection to only electronic mail that falls within the narrows confines set forth by Defendant does little to promote the Congress's overarching intent in enacting CAN-SPAM.

FN3. While the statute references the phrase "domain part," it is clearly not a required element, but merely used to illustrate how an electronic mail address is commonly expressed.

\*5 Nonetheless, Plaintiff has introduced evidence showing: (1) its e-message system uses both a routing method and a domain part, and (2) some MySpace e-messages are transmitted using STMP. First, according to Plaintiff's evidence, every mes-

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sage must contain routing information letting MySpace servers know where to send that message. (Whitcom Decl., ¶ 4.) While the routing employed by MySpace may be less complex and elongated than those employed by ISPs, *any* routing necessarily implicates issues regarding volume of traffic and utilization of infrastructure-issues which CAN-SPAM seeks to address. Similar to an ISP, there is only a finite volume of mail that MySpace can handle without further investment in infrastructure. Second, Plaintiff's evidence shows that each user's mailbox includes a reference to, not only a user name, but also to myspace.com, the Internet domain or domain part. (Ballon Suppl. Decl., Exh.C.2, Whitcom Depo., 71:17-24; Ballon Decl., Tab 4, Wells Deck, ¶ 7.) Finally, Plaintiff's evidence shows that, while most MySpace e-messages are sent using Hypertext Transfer Protocol ("HTTP"), each time an HTTP message is sent by a MySpace user, a companion notification message is sent via SMTP to the recipient's alternative email address. (Whitcomb Deck., ¶ 5.) Additionally, MySpace users may send SMTP messages over the Internet from myspace.com when they invite someone who is not a MySpace member to join MySpace. (Whitcomb Decl. ¶ 6.) Defendant has not presented any evidence to dispute the evidence set forth above. Therefore, Defendant's argument fails, even under its improperly narrow interpretation of the statute.

Based on the foregoing, the Court finds that Plaintiff has standing to sue Defendant under CAN-SPAM because, as defined under CAN-SPAM, Plaintiff is an Internet access provider whose electronic messages qualify as electronic mail.

## 2. Violation of Section 7704(a)(1)

Section 7704(a)(1) prohibits the transmission of commercial email that contains false or misleading header information.<sup>FN4</sup> Under the statute, even if the header information is technically accurate, it is considered materially misleading if it includes an originating email address that was accessed through

false or fraudulent pretenses, for purposes of initiating the commercial email message. 15 U.S.C. § 7704(a)(1)(A).

FN4. "Header information" means "the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail message, and any other information that appears in the line identifying ... a person initiating the message." 15 U.S.C. § 7702(8).

According to Plaintiff's evidence, Defendant's employees created MySpace accounts using false identifying information, including fictitious email addresses and contact information. (Ballon Deck, Tab 8, Fowler Depo., 185:4-21; Ballon Decl., Tab 11, Nelson Depo.34:4-35:8, 37:16-19, Exh. 2.) Defendant's employees also set up MySpace accounts with the display names, "MySpace Phone," "Chick," and "Coppermine." (Ballon Decl., Tab 3, Kaleel Decl., ¶¶ 7 and 12, Exh. C; Ballon Decl., Tab 10, Mobley Depo., 37:23-38:10.) As indicated by this evidence, the accounts created by Defendant failed to identify the messages as originating from TheGlobe. Based on the plain language of Section 7704(a)(1), Plaintiff's evidence<sup>FN5</sup> establishes that Defendant violated this provision.

FN5. In its Opposition, Defendant argues that Section 7704(a)(1) only prohibits sending emails containing header information that makes the email appear to come from an address other than the one from which it actually came. Again, the Court finds Defendant's interpretation far too narrow and unsupported by the provision's plain language.

\*6 In opposition, Defendant argues that the accounts did, in fact, identify TheGlobe as the originator of the e-messages. To support its argument, Defendant has introduced evidence that a document was used to assist employees in creating MySpace accounts. According to this evidence, the document

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instructed the employees to use “tгло” in the first name and “phone” as the last name. (Elliot Decl., Exh. 13, Nelson Depo., 34:4-25.) This evidence is unavailing, as it fails to dispute Plaintiff's evidence or otherwise support its proposition. At most, the evidence indicates that, in addition to the false accounts described by Plaintiff's evidence, some of Defendant's other accounts may have had as their account identifiers the words “tгло” and “phone,” the product Defendant sought to market. Even so, this fact is irrelevant because Defendant has not offered any evidence showing that those words are readily associated with TheGlobe or its TGLO Products. As such, the Court finds no triable issue as to Defendant's violation of Section 7704(a)(1).

### 3. Violation of Section 7704(a)(2)

Section 7704(a)(2) prohibits a person from transmitting commercial email containing a subject heading that he or she knows would likely mislead the recipient about a material fact regarding the content or subject matter of the message. Under Section 7706(g)(1), a private right of action under Section 7704(a)(2) is available only when there is a pattern or practice that violates this provision.

It is undisputed that Defendant sent MySpace e-messages with the subject headings, “the new MySpace phone,” “the new phone for MySpace,” and “the new tгло phone for MySpace.” (Ballon Deck, Tab 8, Exh. 33; Ballon Deck, Tab 3, Kaleel Decl., ¶ 4; Ballon Deck, Tab 4, Wells Deck, ¶ 17.) The last heading does not violate the statute, as it references “tгло” in a way that accurately describes the content of the message and implies a product that is separate and distinct from MySpace. In contrast, the first two headings do violate the statute because they imply an affiliation with MySpace, likely misleading the recipient into believing that the marketed product is related to MySpace. In fact, it is undisputed that in late January 2006, an influential technology blogger on Zdnet.com inaccurately reported that MySpace had partnered with TheGlobe. (Ballon Decl., Tab 1, Exh. E; Ballon

Deck, Tab 15, Cespedes Depo., 52:1-17, 56:2-24.). Although Defendant was aware of this error, it never sought to correct the misinformation. (Ballon Decl., Tab 15, Cespedes Depo., 58:15-24.) Significantly, the undisputed evidence shows that the subject headings described above were attached to e-messages sent *after* Defendant learned of the blogger's inaccurate report. (Ballon Deck, Tab 15, Cespedes Depo., 51:17-52:1 -6.) As such, the Court finds that Defendant knew, or should have known, that its subject headings were misleading.

Defendant argues that Plaintiff fails to show a pattern or practice. As to this provision, the Court agrees. The undisputed evidence shows that Defendant's employees were provided written instructions on how to create MySpace accounts and what content to send through the messaging system. (Ballon Deck, Tab 11, Exh.2.) The instructions directed the employees to use “Call for FREE fast and easy” as the headline. (Ballon Deck, Tab 11, Exh. 2, D-00003909.) This subject heading is consistent with the email content, and does not violate Section 7704(a)(2). As discussed above, notwithstanding the written instructions, at least a portion of the 399,481 e-messages sent by Defendant contained deceptive subject headings that violated the statute. However, without further evidence as to the number of such e-messages sent by Defendant, it is impossible to determine whether Defendant's violation of this provision rose to the level of a pattern or practice. Therefore, a triable issue of fact exists as to whether the number of e-messages containing deceptive subject headings is substantial enough to constitute a pattern or practice.

### 4. Violation of Section 7704(a)(5)

\*7 Section 7704(a)(5) requires that unsolicited commercial emails contain: (1) clear notification that the message is an advertisement, (2) clear notice of the opportunity to decline receipt of further messages from the sender, and (3) a valid physical postal address for the sender. Again, under Section 7706(g)(1), a private right of action under Section

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7704(a)(5) is available only when the defendant has a pattern or practice of violating this provision.

It is undisputed that none of Defendant's 399,481 e-messages contained clear notice of the opportunity to decline receipt of further messages from the sender,<sup>FN6</sup> or a valid physical postal address for the sender. (Separate Statement of Uncontroverted Material Facts ("IMF"), ¶¶ 14 and 15; Defendant's Statement of Genuine Issues.) Therefore, Defendant clearly violated this statutory provision.

FN6. In its Statement of Genuine Issues, Defendant attempts to dispute this fact by stating that MySpace provides a mechanism for users to opt out of receiving further messages from a particular sender. However, this fact is irrelevant, as it fails to dispute Plaintiff's evidence and, in any case, fails to comport with the statutory requirement that clear notice of a recipient's ability to decline further messages be provided in the original email.

Again, Defendant argues that its activities do not constitute a pattern or practice, as prescribed by Section 7706(g)(1). However, as stated above, the following is undisputed: (1) Defendant's employees were given instructions on how to create a MySpace account, what information should be placed in the profiles, and what content to write in the messages (Ballon Deck, Tab 8, Exh. 33.); and (2) through its employees, Defendant created at least 95 MySpace accounts and sent 399,481 unsolicited commercial emails over a course of five months. (Ballon Deck, Tab 4, Wells Deck ¶ 8; Ballon Deck, Tab 11, Nelson Depo., 22:5-9; Ballon Decl., Tab 10, Mobley Depo., 10:12-11:2; Ballon Decl., Tab 8, Fowler Depo., 168:5-169:25.) This evidence shows that, rather than an isolated or accidental event, Defendant sent these e-messages in a regular and repeated fashion, as a part of Defendant's marketing practice. Since each one of the 399,481 messages violated Section 7704(a)(5), Plaintiff has shown that Defendant engaged in a pattern or practice of violating this provision. As

such, the Court finds no triable issue of fact as to Defendant's liability for violation of Section 7704(a)(5).

#### 5. *Violation of Section 7704(b)(1)*

Section 7704(b) makes it an aggravated violation to initiate the transmission of commercial email that is unlawful under Section 7704(a) where "the electronic mail address of the recipient was obtained using an automated means that generates possible electronic mail addresses by combining names, letter or numbers into numerous permutation." 15 U.S.C. § 7704(b)(1)(A)(ii).

Plaintiff's evidence shows that Defendant randomly selected a range of MySpace ID numbers. Defendant then used a script to automatically generate a set of sequential IDs. Once these IDs were generated, the script automatically transmitted Defendant's messages to those IDs. (Ballon Decl., Tab 8, Fowler Depo., 54:14-57:11.) According to the evidence, some of the IDs correlated to MySpace profiles, and some did not. (Ballon Decl., Tab 8, Fowler Depo., 55:1-20.) A total of 399,481 messages were sent using this script. (Ballon Decl., Tab 8, Fowler Depo., 170:3-16.) Based on the evidence presented, Defendant violated Section 7704 (1)(A)(ii).

\*8 In opposition, Defendant argues that it did not violate the statutory provision because the script sent messages in sequence, rather than at random. Defendant further argues that the script sent the messages to a range of MySpace profiles by using a range of user IDs that had already been assigned by MySpace. Defendant's arguments are unavailing, as it is unclear how these distinctions change the fact that Defendant used "automated means that generates possible electronic mail addresses." As such, the Court finds no triable issue as to Defendant's violation of Section 7704(b)(1)(A)(ii).

#### **B. *Section 17529.5 Claim***



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Section 17529.5 prohibits email transmissions to or from California email addresses containing “falsified, misrepresented or forged header information” or a subject line that would likely “mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.” Section 17529.5 (a)(2) and (3). Under the statute, an electronic mail service provider<sup>FN7</sup> may bring an action against a person or entity that violates this section.

FN7. An “electronic mail service provider” is defined as “any person, including an Internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to end users of the electronic mail service the ability to send or receive electronic mail.” Section 17529.1(h).

It is undisputed that MySpace's servers, which house all MySpace.com e-message accounts, are located in California. (Ballon Decl., Tab 2, Boster Decl., ¶ 2.) Furthermore, it is undisputed that every time a user logs on to MySpace.com to send, review or reply to an e-message, he or she is doing so by accessing the California servers. (Kaleel Decl., ¶ 3.) Based on this evidence, as well as the evidence and analysis discussed in Section III.A. above, the Court finds no triable issues as to Defendant's liability for Plaintiff's Section 17529.5 claim.

### C. Breach of Contract Claim

To set up a MySpace account, a person must assent to the TOS Contract by checking a box agreeing to its terms. Plaintiff claims that, by setting up 95 accounts and sending its marketing e-messages through those accounts, Defendant breached the terms of the TOS Contract. Furthermore, due to modified terms of the TOS Contract, Plaintiff contends that Defendant must pay \$50 for each of its e-messages that were sent after March 17, 2006.

#### 1. Breach of the TOS Contract

It is undisputed that Defendant's e-messages were sent between January 2006 and May 2006. (Ballon Decl., Tab 8, Fowler Depo., 168:1-15,) During that time, the TOS Contract was modified three times. (Ballon Decl., Tab 2, Boster Decl., ¶¶ 3-6.) All four versions of the TOS Contract contain the following provision: MySpace is “for the personal use of Members only and may not be used in connection with any commercial endeavors except those that are specifically endorsed or approved by the management of MySpace.com. (Ballon Deck, Tab 2, Exhs. A-D.) Also, each version prohibits: (1) content that involves the transmission of ‘junk mail,’ ‘chain letters,’ or unsolicited mass mailing or ‘spamming;’ and (2) “any automated use of the system, such as using scripts to add friends.” *Id.*

\*9 Based on the evidence and analysis discussed in Section III.A above, the Court finds that Defendant used a script to transmit an unsolicited mass mailing to MySpace users for purposes of an unapproved commercial endeavor. This activity violates the terms of the TOS Contract.

Defendant argues that the TOS Contract, as a whole, is entirely unenforceable because every relevant version is a contract of adhesion, such that the terms are unconscionable. This argument is not well-taken.

The doctrine of unconscionability provides that a contract is unenforceable if it is both procedurally and substantively unconscionable. *A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 485-486, 186 Cal.Rptr. 114 (1982). Procedural unconscionability focuses on oppression and surprise due to unequal bargaining power.<sup>FN8</sup> *Trend Homes, Inc. v. Superior Court*, 131 Cal.App.4th 950, 957-58, 32 Cal.Rptr.3d 411 (2005). “Oppression” arises from the inequality of the parties' bargaining power and an absence of real negotiation or a meaningful choice on the weaker party's part. *Id.* at 958, 32 Cal.Rptr.3d 411. “Surprise” is found when “the terms to which the party supposedly agreed [are] hidden in a prolix printed form drafted by the party seeking to enforce them.” *Id.* (citations omitted). A

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contract is substantively unconscionable when its terms are so harsh, oppressive, or one-sided as to shock the conscience. *Id.* at 961, 32 Cal.Rptr.3d 411.

FN8. Folded into this analysis is the determination of whether the contract is adhesive. Procedural unconscionability is typically found where there is a contract of adhesion. While an alternative method of analysis calls for an initial determination of whether the contract at issue is adhesive, that determination, by itself, has no legal consequence for purposes of deciding whether a contract is enforceable. The true determining factor is whether the contract is unconscionable. *See Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165 (1981).

A review of the TOS Contract shows that it is, in fact, a standardized contract that gives the subscribing party only the opportunity to adhere to the contract or reject it. (*See* Ballon Deck, Tab 2, Exhs. A-D.) However, the facts indicate that Defendant had a reasonable alternative or meaningful choice in the matter, in that marketing through MySpace using the method employed was not its only choice. *See Freeman v. Wal-Mart Stores, Inc.*, 111 Cal.App.4th 660, 668-669, 3 Cal.Rptr.3d 860 (2003). In fact, Plaintiff's evidence shows that Defendant had, in fact, considered purchasing advertising space on the MySpace website. (Ballon Decl., Tab 10, Mobley Depo., 44:19-47:7.) Moreover, the Court finds that the contract is not written prolixly, particularly for an experienced, sophisticated business entity whose area of expertise involves Internet related technology. Even if the TOS contract was procedurally unconscionable, the terms, as a whole, are certainly not so harsh, oppressive, or one-sided as to shock the conscience.

In light of the above, the Court finds that Defendant breached the TOS Contract.

## 2. Liquidated Damages Provision

On March 17, 2006, Plaintiff modified the TOS Contract and included the following provision: "Prohibited activity includes ... advertising to, or solicitation of, any Member to buy or sell any products or services through the Services. If you breach this Agreement and send unsolicited bulk email, ... or other unsolicited communications of any kind ... As a reasonable estimation of such harm, you agree to pay MySpace.com \$50 for each such unsolicited email ... you send through the Services;..." *Id.*

\*10 Plaintiff asserts that, under this provision, Defendant is liable for liquidated damages in the amount of \$50 per message sent after March 17, 2006. Defendant argues that the \$50 liquidated damages clause is unenforceable because it is an impermissible contractual penalty. The Court disagrees.

California law provides that liquidated damages clauses are enforceable where: (1) damages from a breach would be impracticable or extremely difficult to determine with certainty; and (2) the amount represents a reasonable estimation of what such damages might be. *Utility Consumers' Action Network, Inc. v. AT & T Broadband of Southern California*, 135 Cal.App.4th 1023, 1029, 37 Cal.Rptr.3d 827 (2006). As stated above, the Court has found that Defendant breached the TOS Agreement by bulk transmission of unapproved, unsolicited commercial e-messages. The costs associated with this activity include not only infrastructure costs, such as additional bandwidth, and monitoring costs, they are also rife with large hidden costs. Such hidden costs include those associated with deterrence (legal fees, software, etc.), depletion of customer goodwill, and liability implications associated with the unlawfully advertised product. Therefore, the damages related to Defendant's breach are, in fact, impracticable or extremely difficult to determine. As to the amount of liquidated damages, CAN-SPAM sets statutory damages for unsolicited commercial emails at \$25-\$300 per message. Moreover,

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(Cite as: 2007 WL 1686966 (C.D.Cal.))

while the costs associated with spamming are difficult to definitively assess, the costs listed above are certainly large, and only the tip the iceberg. Therefore, the Court finds \$50 per message a reasonable estimation of Plaintiff's damages.

Defendant further argues that, even if the Court finds the liquidated provision enforceable, the provision should be applied only to those messages that were sent from accounts created after March 17, 2006. Plaintiff contends that, because the TOS contract specifically provides for modification of the agreement, the provision should apply to all messages sent after March 17, 2006, regardless of when the account was created. The Court agrees with Plaintiff.

All four versions of the TOS Contract specifically provide: "MySpace.com may modify this Agreement from time to time and such modification shall be effective upon posting by MySpace.com on the Website. *You agree to be bound to any changes to this Agreement when you use the Service after any such modification is posted.* (Ballon Decl., Tab 2, Exhs. A-D (emphasis added).) For the same reasons stated above, this contractual term is neither procedurally nor substantively unconscionable. Additionally, the Court notes that Defendant created all 95 MySpace accounts, both before and after March 17, 2006. Therefore, at the time it created its post-March 17 accounts, it knew, or should have known, that all messages, even those sent from pre-March 17 accounts, were subject to the liquidated damages provision. As such, the Court finds that the liquidated damages provision contained in the March 17, 2006 TOS Contract applies to all messages sent by Defendant after March 17, 2006.

#### **IV. EVIDENTIARY OBJECTIONS**

\*11 To the extent this Court has relied on evidence to which the parties object, those objections are overruled.

#### **V. CONCLUSION**

In light of the foregoing, Defendant's Motion for Partial Summary Judgment is **denied**, and Plaintiff's Motion for Partial Summary Judgment is **granted in part**. Specifically, the Court finds summary judgment in favor of Plaintiff as to the following:

- (1) Count I: Violation of 15 U.S.C. §§ 7704(a)(1), 7704(a)(5) and 7704(b)(1)(A)(ii);
- (2) Count III: Violation of Section 1729.5;
- (3) Count VI: Breach of Contract; and
- (4) Liquidated Damages of \$50 per e-message sent after March 17, 2006.

The Court finds a triable issue of fact as to Plaintiff's claim that Defendant violated 15 U.S.C. § 7704(a)(2).

#### **IT IS SO ORDERED.**

C.D.Cal.,2007.  
MySpace, Inc. v. The Globe.com, Inc.  
Not Reported in F.Supp.2d, 2007 WL 1686966  
(C.D.Cal.)

END OF DOCUMENT

# **Exhibit B**

Slip Copy, 2009 WL 3617789 (N.D.Cal.)  
 (Cite as: 2009 WL 3617789 (N.D.Cal.))



Only the Westlaw citation is currently available.

United States District Court, N.D. California,  
 San Jose Division.  
 FACEBOOK, INC., a Delaware Corporation,  
 Plaintiff,  
 v.  
 Sanford WALLACE, et al., Defendants.  
**No. C 09-798 JF (RS).**

Oct. 29, 2009.

David P. Chiappetta, Corrs Chambers Westgarth,  
 Melbourne, VIC, James Robert McCullagh, Joseph  
 Perry Cutler, Perkins Coie LLP, Seattle, WA, Pro  
 Hac, Vice, for Plaintiff.

Sanford Wallace, Las Vegas, NV, pro se.

Scott Shaw, Las Vegas, NV, pro se.

ORDER <sup>FN1</sup> GRANTING PLAINTIFF'S RE-  
 NEWED MOTION FOR DEFAULT JUDGMENT

FN1. This disposition is not designated for  
 publication in the official reports.

JEREMY FOGEL, District Judge.

\*1 Plaintiff Facebook, Inc. ("Facebook") seeks default judgment against Defendant Sanford Wallace ("Wallace"). Wallace did not oppose the motion or appear at the hearing on September 18, 2009. For the reasons discussed below, Facebook's motion for default judgment will be granted, although the Court will not award all of the statutory damages sought by Facebook.

## I. BACKGROUND

Facebook is a well-known social networking website with more than 175 million users. Facebook

users must register with the website and agree to Facebook's Terms of Use. Upon registration, users are given unique usernames and passwords to access their own user profiles as well as the profiles of their "friends." Users may send messages to each other through the Facebook website, either by e-mail or by postings made on a user's "wall." To maintain the integrity of its website, Facebook maintains strict policies against spam or any other form of unsolicited advertising. The Terms of Use prohibit any activity that would impair the operation of Facebook's website, including the use of data mining "bots" to gain access to users' login information, the posting of unsolicited advertising on the website or circulation of such advertising via e-mail, or any use of another person's account without Facebook's prior authorization.

Facebook alleges that Defendants Wallace, Adam Arzoomanian ("Arzoomanian"), and Scott Shaw ("Shaw") are registered Facebook users who are bound by the Terms of Use. Since November 2008, Defendants allegedly have engaged in a phishing and spamming scheme that has compromised the accounts of a substantial number of Facebook users. The scheme generally operates as follows: Defendants send out emails to multiple Facebook users. The emails appear to be legitimate messages and ask the recipients to click on a link to another website. That website is a phishing site designed to trick users into divulging their Facebook login information. Once users divulge the information, Defendants then use it to send spam to the friends of the users, and as the cycle repeats the number of compromised Facebook accounts increases rapidly. Facebook also alleges that certain spam messages redirect users to websites that pay Defendants for each user visit.

On February 24, 2009, Facebook filed this action against Wallace, Arzoomanian, and Shaw, asserting that their phishing and spamming activities violate (1) the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM

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Act”), 15 U.S.C. § 7701 *et seq.*; (2) the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.*; (3) Cal.Penal Code § 502; and (4) Cal. Bus. & Prof.Code § 22948.

On March 2, 2009, the Court issued a Temporary Restraining Order (“TRO”) enjoining Defendants from engaging in the alleged phishing and spamming activities. On March 24, 2009, the Court issued a preliminary injunction enjoining the alleged misconduct. Facebook subsequently obtained a Clerk's entry of default against Wallace and sought default judgment against him as well as contempt sanctions for violating the TRO and preliminary injunction issued in this case. The Court set those motions for hearing on June 12, 2009. On June 11, 2009, Facebook filed a status report notifying the Court that Wallace had filed a bankruptcy petition in the United States Bankruptcy Court for the District of Nevada. The Court conducted the hearing as scheduled on June 12. Shortly thereafter the Court issued an order staying the action in light of the automatic bankruptcy stay, and indicating that the Court had referred the matter to the United States Attorney's Office with a request that Wallace be prosecuted for criminal contempt. Order of July 7, 2009. The Court terminated without prejudice Facebook's motions for default judgment and criminal contempt.

\*2 On August 4, 2009, Facebook filed a status report informing the Court that Wallace's bankruptcy action had been dismissed and that the automatic bankruptcy stay no longer was in effect. On the same date, Facebook renewed its motion for default judgment, and set the motion for hearing on September 18, 2009.

Wallace did not file opposition to Facebook's renewed motion, although he received notice of the motion at his email address of record.<sup>FN2</sup> After reviewing Facebook's motion and supporting documents, as well as the entire record in this case, the Court concludes that the motion for default judgment is well-taken, although the Court will not award all of the statutory damages sought by Face-

book.

FN2. Wallace has not formally appeared in the action. On June 2, 2009, after the Clerk's entry of default, he did file an affidavit in opposition to Facebook's motion for contempt. It is unclear whether the filing of the affidavit constituted a sufficient informal appearance to entitle Wallace to notice of the motion for default judgment pursuant to Fed.R.Civ.P. 55(b)(2). The Court need not resolve that question because the docket reflects that Wallace registered his email address with the Court's Electronic Case Filing (“ECF”) system, and that the ECF system automatically served Wallace with the motion for default judgment when it was filed.

Facebook requests statutory damages for 14,214,753 violations of the CAN-SPAM Act at that statute's maximum of \$100 per violation, which would result in an award of \$1,421,475,300. *See* 15 U.S.C. § 7706(g)(3)(A) (permitting a maximum of \$100 per violation). Facebook also requests the maximum amount of aggravated damages available under the CAN-SPAM Act, which would result in a total award of \$4,264,425,900 under that act. *See* 15 U.S.C. § 7706(g) (3)(C) (permitting an award of treble damages upon certain findings).

In addition, Facebook requests \$1,082,500,000 in statutory damages for violations of Cal. Bus. & Prof.Code § 22948.2. *See* Cal. Bus. & Prof.Code § 22948.3(a)(1). Facebook requests that this award be trebled as well, which would result in a total award of \$3,247,500,000 under the statute. *See* Cal. Bus. & Prof.Code § 22948.3(c)(1).

Finally, Facebook requests that the Court enter a permanent injunction against Wallace, prohibiting him from accessing and abusing Facebook's services.<sup>FN3</sup>

FN3. Facebook has not sought such remedies against Arzooonian and Shaw; at the

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hearing, Facebook's counsel stated that Facebook will not be pursuing its claims against Arzoomanian and Shaw, and that the Court may close the file once default judgment is entered against Wallace.

## II. DISCUSSION

"A plaintiff may elect statutory damages 'regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant's profits[,] ... [and][i]f statutory damages are elected, '[t]he court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima.' " *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir.2001) (citations omitted) (discussing statutory damages provisions of the Copyright Act). However, a statutory damages award may violate the due process rights of a defendant "where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir.1992) (quoting *St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S.Ct. 71, 64 L.Ed. 139 (1919)).

The record demonstrates that Wallace willfully violated the statutes in question with blatant disregard for the rights of Facebook and the thousands of Facebook users whose accounts were compromised by his conduct. Moreover, the Court is convinced that Wallace willfully violated the TRO and preliminary injunction issued in this case, and for that reason referred the matter to the United States Attorney's Office with a request that Wallace be prosecuted for criminal contempt, as noted above. Nonetheless the Court is not persuaded that an award of statutory damages in excess of seven billion dollars is proportionate to Wallace's offenses. Without deciding whether such an award would violate Wallace's due process rights, the Court in the exercise of its discretion declines to award all of the

damages requested by Facebook. The Court instead will award statutory damages of \$50.00 per violation of the CAN-SPAM Act, which results in a total award of \$ 710,737,650 under that act. With respect to Cal. Bus. & Prof.Code § 22948.2, the Court believes that a good argument can be made that Facebook is entitled to only a single award under § 22948.3(a)(1), arising from a single course of conduct by Wallace. Accordingly, the Court will award the statutory maximum damages of \$500,000 for a single violation of § 22948.2. *See* § 22948.3(a)(1), (e). Thus the Court will impose statutory damages against Wallace in the total amount of \$711,237,650. Given the magnitude of this award, the Court declines to award treble damages.

\*3 Facebook's application for a permanent injunction is well-taken in light of Wallace's conduct.

## III. ORDER

Accordingly, for good cause shown,

(1) Facebook's application for default judgment is GRANTED; statutory damages of \$711,237,650 are awarded against Wallace, and Facebook's request for permanent injunctive relief is granted. The Court has signed Facebook's proposed default judgment and issued it contemporaneously with this Order.

(2) Facebook having stated on the record that it abandons its claims against the remaining defendants, Arzoomanian and Shaw, the Clerk of the Court is directed to CLOSE THE FILE.

N.D.Cal.,2009.  
 Facebook, Inc. v. Wallace  
 Slip Copy, 2009 WL 3617789 (N.D.Cal.)

END OF DOCUMENT

# **Exhibit C**



Not Reported in F.Supp.2d, 2009 WL 1076883 (E.D.Wis.)  
(Cite as: 2009 WL 1076883 (E.D.Wis.))

**H**

Only the Westlaw citation is currently available.

United States District Court,  
E.D. Wisconsin.  
DENTAL HEALTH PRODUCTS, INC., Plaintiff,  
v.  
Frank RINGO, Defendant.  
No. 08-C-1039.

April 20, 2009.

Bruce A. Olson, Davis & Kuelthau SC, Green Bay,  
WI, for Plaintiff.

Howard J. Fishman, John M. Riccione, Aronberg  
Goldgehn Davis & Garmisa, Chicago, IL, for De-  
fendant.

**DECISION AND ORDER**

WILLIAM C. GRIESBACH, District Judge.

\*1 Plaintiff Dental Health Products, Inc., (“DHP”) filed this action against Defendant Frank Ringo (“Ringo”) for injunctive relief and damages based on claims of Misappropriation of Trade Secrets pursuant to Wisconsin Statutes § 134.90; Breach of Agency Duty; and violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. The case is currently before the Court on Ringo's Federal Rule of Civil Procedure 12(b)(3) motion to dismiss for improper venue or, alternatively, for transfer to the Northern District of Illinois pursuant to 28 U.S.C. § 1406(a). In the event venue is found to be proper, Ringo seeks dismissal of DHP's claims for Misappropriation of Trade Secrets and violation of the Computer Fraud and Abuse Act pursuant to Rule 12(b)(6) for failure to state a claim. Ringo has also filed a motion for a more definite statement regarding DHP's Breach of Agency Duty claim, pursuant to Rule 12(e). For the reasons that follow, all of Ringo's motions will be denied.

**FACTS**

At this stage of the proceedings, the Court must deem DHP's well-pleaded allegations as true, and draw all reasonable inferences in favor of DHP. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.2008). The facts of the case are therefore derived from the allegations in DHP's Complaint.

DHP is a Wisconsin corporation in the business of selling dental supplies and dental products to licensed dentists and dental practitioners throughout the United States. (Compl.¶ 7.) Ringo was employed by DHP as a field sales representative for the purpose of selling dental supplies and dental equipment from February 2002 until July 31, 2008. (*Id.* ¶¶ 5, 6.) DHP observed a decline in Ringo's sales volume, beginning several months prior to Ringo's resignation in July 2008. (*Id.* ¶ 7.) In July 2008, DHP discovered that Ringo was affiliated with another dental supply company. (*Id.* ¶ 8.) DHP also discovered that customers who had ordered from DHP in the past were placing orders with the other dental supply company while Ringo was still in DHP's employ. (*Id.* ¶ 10-11.)

During the time that Ringo was employed by DHP, he was furnished with a laptop computer to be used in accessing the DHP's password-protected computer network, which was hosted on computer servers located in New Franken, Wisconsin. (*Id.* ¶ 13.) Ringo had access through the laptop to, among other things, highly confidential information about customers, business practices of DHP as it related to its customers, negotiating strategies of customers, information as to product availability, and sales reports. (*Id.* ¶ 14.) This information was not available through any other source. (*Id.* ¶ 15.) Ringo was instructed by DHP to immediately return the laptop upon his resignation. (*Id.* ¶ 17.) DHP performed forensic tests upon the laptop after its return and discovered that Ringo had installed and used a Norton ghostwriting program on the laptop to copy the entire hard drive onto an external hard drive on

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multiple occasions. (*Id.* ¶¶ 18-26.) DHP alleges that Ringo used the information copied from the computer to fill customer supply orders from DHP's competitors. (*Id.* ¶ 27.) DHP alleges that Ringo has used the proprietary information to the benefit of Ringo's current employer and to the detriment of DHP. (*Id.* ¶ 29.)

## DISCUSSION

### I. Venue and Transfer

\*2 Ringo first seeks dismissal of the case for improper venue or, alternatively, transfer to the Northern District of Illinois pursuant to 28 U.S.C. § 1406(a). "When a defendant challenges venue, the plaintiff bears the burden of establishing that its chosen venue is proper." *Emjayco v. Morgan Stanley & Co.*, 901 F.Supp. 1397, 1400 (C.D.Ill.1995). Courts decide venue questions mainly on the basis of the pleadings. *Id.* When deciding a venue question, a court takes as true the allegations in the plaintiff's complaint unless controverted by the defendant's affidavits. *Id.* The court resolves any conflicts in the affidavits in the plaintiff's favor. *Id.* To defeat a motion to dismiss or transfer a case, the plaintiff must allege and establish facts which support venue in its chosen district. *See id.*

Venue is, in general, governed by 28 U.S.C. § 1391. Unless another statute provides otherwise, a civil action in which jurisdiction is not founded solely on diversity of citizenship, which is the case here, can be brought only in:

- (1) a judicial district where any defendant resides, if all defendants reside in the same State,
- (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b). Since Ringo does not reside in this district, venue would lie here only if "a substantial part of the events or omissions giving rise to the claim" occurred here, or "a substantial part of the property that is the subject of the action" is situated here.

Ringo argues that it is clear from DHP's complaint that he worked from a branch office located in Illinois and the only other states that were involved are Indiana and Iowa. He is alleged to have begun working for a dental supply company in Iowa and to have solicited business in Indiana, as well as Illinois. Although DHP's principal place of business is in Wisconsin and its computer server is located there, Ringo argues that the complaint contains no allegations of events or omissions in Wisconsin. Absent any allegation that a substantial part of the events or omissions giving rise to its claims occurred in the Eastern District of Wisconsin, Ringo argues that the case should either be dismissed or transferred to the Northern District of Illinois where it could have been brought originally.

Venue is clearly proper in the Eastern District of Wisconsin. Count II of DHP's complaint asserts a breach of agency duty claim against Ringo. The agency relationship alleged in the complaint arose by operation of an employment contract, and thus the claim is at least one of breach of contract, and may be tortious as well. *Burbank Grease Services, LLC v. Sokolowski*, 2006 WI 103, ¶ 42, 294 Wis.2d 274, 717 N.W.2d 781 ("A claim for the breach of an agent's duty of loyalty may sound both in tort and in contract."). In determining whether a substantial part of the events or omissions giving rise to the plaintiff's contract claim occurred or did not occur in a particular district, "the factors that the courts tend to focus on include: where the contract was negotiated or executed, where the contract was to be performed, and where the alleged breach occurred." Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice And Procedure: Jurisdiction 3d* § 3806.1, at 205-12 (2007). Moreover, "[i]n the electronic age, when face-

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to-face encounters are less common, the letters, facsimiles, e-mails, and telephone calls that are transmitted from, and received in, a district during the negotiation and execution of a contract often are deemed substantial events in the district for venue purposes." *Id.* at 212. Thus, in *Schomann Intern. Corp. v. Northern Wireless, Ltd.* 35 F.Supp.2d 205 (N.D.N.Y.1999), a substantial part of a New York telecommunication company's breach of contract action against a nonresident engineering firm was found to have occurred in the Northern District of New York where, even though the defendant was not in New York during either the negotiation or execution of the contract, the terms of contract required the defendant firm to maintain regular contact with company's New York office.

\*3 The facts here present an even stronger case for venue in this district. Ringo negotiated his employment contract in Wisconsin and signed all "new hire" documents at DHP's home office in this district. (Aff. of Dale Roberts ¶¶ 2, 3.) He executed a confidentiality agreement that contained a provision stating that all questions arising thereunder would be governed by Wisconsin law and submitting to jurisdiction and venue in Wisconsin as to any action arising in connection with the agreement. (*Id.* ¶ 4.) During the course of his employment, he had weekly, if not daily telephone and email communication with the home office in Wisconsin, and used the corporate computer systems for email, access to Sales Logix (a database of highly confidential information regarding DHP's customers and business, (Compl.¶ 14)) and to receive sales and productivity reports. (*Id.* ¶ 5.) Ringo received his regular paychecks from Wisconsin, attended mandatory quarterly managers meetings in Green Bay, along with annual sales recognition events and sales conferences. (*Id.* ¶¶ 7, 8.) He also reported to DHP's Wisconsin-based supervisory personnel, including its CEO, on a regular basis.

The trade secrets Ringo is alleged to have misappropriated in Count I of the complaint consist of DHP's confidential compilation of information con-

cerning its customers for dental products; its costs and margins for supplying dental products; the limitations on its ability to meet identified needs of existing and potential DHP customers; DHP's strategic plans, market research and discussions regarding the market for and business opportunities available for supplying new and existing dental products; and DHP's sales productivity and account information for other company sales representatives, all of which was stored on its server located in Wisconsin. It thus follows that the computer system Ringo is alleged to have accessed in violation of the Computer Fraud and Abuse Act as alleged in Count III of the complaint is also located in Wisconsin.

In *Argent Funds Group, LLC v. Schutt*, 2006 WL 2349464 (D. Conn. June 27, 2006), the Court discussed the question of venue for a claim arising under the Computer Fraud and Abuse Act in a case in which a former employee of a Connecticut financial services firm had allegedly accessed confidential and valuable fund and financial information remotely, downloaded that information to two laptop computers and two hard drives of a Dell desktop computer, and stole the laptops, the hard drives, and their associated software after being terminated from her position. The confidential information that was allegedly stolen was located on computer file servers at the firm's headquarters in Connecticut, and the former employee resided in Florida at the time. Despite the fact that the information obtained by the former employee was not used in Connecticut, the Court had no difficulty in concluding that a substantial part of the event giving rise to the claim occurred there:

\*4 the nature of Argent's claim is an injury arising from the alleged theft of confidential information, the computers, and the software that was originally installed on the computers. Substantial events material to the claim occurred in Connecticut; Schutt would not have been able to obtain the confidential information had the Connecticut file server never transferred the information to her via the internet. The Connecticut file

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servers thus played a central role in the events that gave rise to the claim, and were one of the means by which the defendant allegedly stole the confidential information.

*Id.* at \*2. Even if a substantial part of the events or omissions giving rise to the claim had not occurred in Connecticut, the Court concluded that venue would still be appropriate there under § 1391(b) because a substantial part of property that was the subject of the action was situated in Connecticut. “The intellectual property at issue in this case is Argent’s confidential business information, which is located on the file servers in Connecticut. Therefore, venue is appropriate in Connecticut either because the property at issue is located here, or because a substantial part of the events giving rise to the claim occurred in Connecticut.” *Id.*

The same reasoning applies in this case. The trade secrets alleged stolen by Ringo and the computers system in which they were stored and that he allegedly accessed in violation of the Computer Fraud and Abuse Act were located in Wisconsin. Moreover, the duty of loyalty to DHP that he is accused of breaching required ongoing communication and regular contact with his supervisors in Wisconsin. The alleged acts of disloyalty, at least to the extent that they took the form of deception and misrepresentation, constitute a substantial part of the events or omissions giving rise to DHP’s breach of agency duty claim. It thus follows that a substantial part of the events or omissions giving rise to DHP’s claims occurred in this district. Ringo’s motion to dismiss will therefore be denied. And since venue in this district is proper, it necessarily follows that his alternative motion to transfer venue to the Northern District of Illinois pursuant to 28 U.S.C. § 1406(a) must be denied also.

## II. Rule 12(b)(6) Motion To Dismiss Counts I and III.

A Rule 12(b)(6) motion to dismiss is used to test the legal sufficiency of a complaint. *Gibson v. City*

*of Chicago*, 910 F.2d 1510, 1520 (7th Cir.1990). Dismissal is granted only if the “plaintiff has failed to allege any set of facts upon which relief may be granted.” *Id.* In order to give a defendant fair notice of what the claim is, and the grounds upon which the claim rests, Fed.R.Civ.P. 8(a)(2) requires only a short and plain statement of a claim showing that the plaintiff is entitled to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim for relief does not need detailed factual allegations; however, the factual allegations must be enough to create a right to relief beyond the “speculative level.” *Id.* Plaintiff’s complaint meets this test.

### A. Misappropriation of Trade Secrets Claim

\*5 Count I of the complaint asserts a claim for misappropriation of trade secrets. To state a claim for misappropriation of trade secrets, a plaintiff must demonstrate that the material referred to in the complaint is a trade secret and that the trade secret was misappropriated. Wisconsin has codified the definition of a trade secret as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply: (1)[t]he information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use [;][and] (2)[t]he information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

Wis. Stat. § 134.90(1)(c); *Minuteman, Inc. v. Alexander*, 147 Wis.2d 842, 852, 434 N.W.2d 773, 777 (Wis.1989). In order to show that particular information was a trade secret, the plaintiff must show that its trade secret is valuable, not known to others who might profit from its use, and that the trade secret has been handled by means reasonably designed to maintain secrecy. *Idx Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581, 583 (7th Cir.2002).

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In addition, Wisconsin courts have held that a customer list may be considered a trade secret when identical or nearly identical products or services or both are sold to a small, fixed group of purchasers. *Nalco Chem. Co. v. Hydro Tech., Inc.*, 984 F.2d 801, 804 (7th Cir.1993); *Minuteman, Inc.*, 147 Wis.2d at 857, 434 N.W.2d at 779. When analyzing whether customer information is a trade secret, a court looks at whether the plaintiff took reasonable measures to protect the confidentiality of the information. *Maxpower Corp. v. Abraham*, 557 F.Supp.2d 955, 961 (W.D.Wis.2008). A court looks at, among other factors, whether the plaintiff had its employee sign a confidentiality agreement, whether the employee used the information for the benefit of the new employer, and whether the plaintiff made an attempt to insure that the employee no longer had access to the confidential information through the employee's laptop after the employee's resignation. *See id.*

Here, I am satisfied that DHP has alleged facts that show that the customer information could constitute a trade secret, and that the trade secret may have been misappropriated by Ringo. DHP took reasonable measures to protect the confidentiality of the information by having Ringo sign a confidentiality agreement (Compl.¶ 36). Additionally, DHP alleges that Ringo used the information for the benefit of his new employer. (Compl.¶¶ 29, 30, 33.) Also, DHP attempted to insure that Ringo no longer had access to the confidential information by requiring the immediate return of the laptop. (Compl.¶ 17.) In addition, DHP has alleged facts that show that the information is valuable and not generally known to others because the information is only found on DHP's computer network. (Compl.¶ 15.) Finally, DHP alleges that Ringo misappropriated the information by downloading the confidential information during the time Ringo was employed and after he gave notice of his resignation, but prior to returning the laptop. (Compl.¶¶ 17, 18-26.) These alleged facts are sufficient to support a claim of misappropriation of trade secrets under Wisconsin Statutes § 134.90(1)(c).

## **B. Violation of the Computer Fraud and Abuse Act Claim**

\*6 Count III of the complaint alleges a violation of the Computer Fraud and Abuse Act ("CFAA"). 18 U.S.C. § 1030 (2008). Although its complaint does not specify the provisions of the CFAA Ringo is alleged to have violated, DHP argues in its response to Ringo's motion to dismiss that the facts alleged in its complaint support claims under section 1030(a)(2)(C), (a)(4), (a)(5)(A)(i) and (B)(i). Section 1030(a)(2)(C) makes subject to criminal penalties one who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains ... information from any protected computer if the conduct involved interstate or foreign communication." Section 1030(a)(4) makes subject to such penalties one who "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period." And under section 1030(a)(5)(A)(i) and (B)(i), one who "knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer" and thereby causes "loss to 1 or more persons during any 1-year period ... aggregating at least \$5,000 in value" is subject to criminal penalties.

Although the CFAA is primarily a criminal statute, section 1030(g) authorizes a person who suffers damage or loss due to a violation of some other provision of the Act to bring a civil action for compensatory damages and injunctive or other equitable relief. As another court has recently noted, however, section 1030(g) is "put together in a somewhat confusing way." *Motorola, Inc. v. Lemko Corp.*, 2009 WL 383444, \*3 (N.D.Ill. Feb. 11, 2009). Section 1030(g) reads in pertinent part:

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Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B).

18 U.S.C. § 1030(g). This subsection has been construed to permit a civil action for damage or loss caused by a violation of any of the substantive provisions of the CFAA, as long as the conduct involved one or more of the factors set forth in section 1030(a)(5)(B)(i)-(v). *Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 115657 (5th Cir.2006); *Charles Schwab & Co., Inc. v. Carter*, 2005 WL 351929, \*3 (N.D.Ill. Feb. 11, 2005). "In short, a person suing under section 1030(g) must prove: (1) damage or loss (2) by reason of (3) a violation of some other provision of section 1030, and (4) conduct involving one of the factors set forth in section 1030(a)(5)(B)(i)-(v)." *Motorola*, 2009 WL 383444 at \*4. The factors set forth in section 1030(a)(5)(B)(i)-(v) describe various kinds of harm that must exist in order to bring a civil action. In this case, the only kind of harm alleged that would qualify is the harm set forth in section 1030(a)(5)(B)(i): "loss to 1 or more persons during any 1-year period .... aggregating at least \$5,000 in value." The question presented by Ringo's motion is whether DHP has stated a claim under any of the provisions it has cited.

#### 1. Violation of section 1030(a)(2)(C)

\*7 A person violates section 1030(a)(2)(C) if he or she "intentionally accesses a computer without authorization or exceeds authorized access and thereby obtains information ... from any protected computer if the conduct involved an interstate or foreign communication." 18 U.S.C. § 1030(a)(2)(C). The elements of a section 1030(a)(2)(C) violation thus include (1) intentional access of a computer, (2) without or in excess of authorization, (3)

whereby the defendant obtains information from the protected computer. *Motorola*, 2009 WL 383444 at \* 4.

Ringo contends that the complaint fails to state a claim under this section because it is clear from the allegations that Ringo was an employee of DHP and was authorized to access DHP's computer system. The term "exceeds authorization," as defined in the CFAA, means "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6). The term "without authorization," though not defined in the CFAA, has been interpreted by other courts to mean "conduct by outsiders who do not have permission to access the plaintiff's computer in the first place." (Def.'s Br. In Opp. Mot. S.J. at 7.) Based on these definitions, Ringo argues that DHP's claim under section 1030(a)(2) fails because it is clear from the complaint that he was employed by DHP and thus had access to the very information DHP claims he obtained without authorization.

In support of his argument, Ringo relies on several cases that have rejected CFAA claims by employer plaintiffs against employees who have used their computer access to misappropriate confidential information and then share it with a competitor. In *US Bioservices Corp. v. Lugo*, 595 F.Supp.2d 1189 (D.Kan.2009), for example, the plaintiff group of specialty pharmaceutical care providers who serviced the pharmaceutical needs of manufacturers, physicians, patients, and payors, sued former employees who allegedly obtained confidential information while still employed by the plaintiff and then disclosed the information to their new employer, a competitor of plaintiffs, who then used the information to interfere with plaintiffs' contractual and business relationships. *Id.* at 1190. Finding it clear from the complaint that the defendant employees had access to the computer in which the information was maintained as part of their employment at the time they obtained it, the district court dis-

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missed the CFAA claim on the ground that they had not acted without or in excess of that authorization. Ringo argues that the same reasoning applies here. Since he was authorized as part of his employment to access DHP computers and retrieve the information he is alleged to have obtained, DHP cannot state a claim under section 1030(a)(2).

The difficulty with Ringo's argument is that the cases upon which he relies conflict with binding Seventh Circuit precedent. In *Int'l Airport Ctrs., LLC v. Citrin*, 440 F.3d 418 (7th Cir.2006), the Seventh Circuit, applying agency principles, held that an employee's breach of his duty of loyalty to his employer terminates the agency relationship and with it the employee's authority to access the employer's computer system. *Id.* at 420-21. Thus, an employee who acquires an interest adverse to his employer and fails to disclose it loses his authority to obtain confidential information. *Id.* at 421. While *Citrin* has been criticized and rejected by other courts, *see, e.g., Shanrock Foods Co. v. Gast*, 535 F.Supp.2d 962, 964-65 (D.Ariz.2008), it is controlling here. DHP's allegation that Ringo breached his duty of loyalty by going to work for one of its competitors while remaining in its employ is therefore sufficient to state a section 1030(g) claim that he violated section 1030(a)(2) by his continued "usage, copying, downloading or removal of information." (Compl.¶ 53.) And because DHP has alleged that as a result of his obtaining access to information from its protected computer, Ringo caused DHP loss in excess of \$5,000, the complaint sufficiently alleges a civil claim against Ringo under that provision of the CFAA.

## 2. Violation of section 1030(a)(2)(4)

\*8 A person violates section 1030(a)(4) of the CFAA if he or she "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value...." 18 U.S.C. § 1030(a)(4). Ringo contends that "DHP has failed to

establish that Ringo accessed its computers without authorization or in excess of his authorized access." (Br. In Opp. at 9.) He further contends that "DHP has failed to allege any facts in support of its claim that Ringo acted with any intent to defraud." (*Id.*)

For the reasons already stated in connection with DHP's claim that Ringo's conduct violated section 1030(a)(2), the complaint sufficiently alleges that Ringo acted without or in excess of his authorization. As to Ringo's assertion that DHP has failed to allege facts in support of its claim that Ringo acted with intent to defraud, it is sufficient to note that at the pleading stage detailed factual allegations are not required. *George v. Smith*, 507 F.3d 605, 608 (7th Cir.2007) (noting that while plaintiffs "need not plead facts, .... they must give enough detail to illuminate the nature of the claim and allow defendants to respond"). While a violation of section 1030(a)(4) requires that the defendant act with intent to defraud, fraud *per se* is not an element. Thus, the particularity requirement of Rule 9(b) does not apply. *See* Fed.R.Civ.P. 9(b); *Motorola*, 2009 WL 383444 at \*3. Moreover, even if Rule 9(b) did apply, the complaint sets forth significant particularity regarding Ringo's alleged deception of DHP in using confidential information to compete against it even while continuing in DHP's employ. (Compl.¶¶ 13-33.) While it is true that DHP alleges Ringo's intent to defraud only generally, Rule 9(b) requires nothing more. Fed.R.Civ.P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); *see also C.H. Robinson Worldwide, Inc. v. Command Transportation, LLC*, No. 05 C 3401, 2005 WL 3077998, at \*4 (N.D.Ill.Nov.16, 2005) It thus follows that DHP's claim under section 1030(a)(4) survives as well.

## 3. Violation of section 1030(a)(5)

It is not enough for DHP to show it sustained a loss of income as a result of Ringo's alleged conduct in order to establish a violation of section 1030(a)(5). "In contrast to a claim under section 1030(g) based

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on violation of section 1030(a)(2) or (a)(4), a plaintiff seeking to recover via section 1030(a)(5) of the CFAA must allege, and ultimately prove, the defendant's conduct resulted in damage as the CFAA defines that term." *Motorola*, 2009 WL 383444, at \*7. Damage, as defined by the CFAA, "means any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(d)(8). Downloading confidential information would not seem to cause "damage" so defined.

\*9 The Seventh Circuit held in *International Airport Centers v. Citrin*, however, that an employer's allegation that its employee had installed a secure-erasure program on the employer's computer which deleted the employer's files, as well as other files that incriminated the employee himself, was sufficient to state a claim under section 1030(a)(5)(i) and (ii). 421 F.3d at 420. It made no difference, according to the Court, whether the erasure program was downloaded from the internet or copied from a floppy disc or CD inserted into a disc drive that was either inside the computer or attached to it by a wire. *Id.* at 419. Either method involved the transmission of a program intended to cause damage without authorization to a protected computer. *Id.*

It is not clear from the complaint in this case whether Ringo is alleged to have engaged in similar conduct. DHP alleges facts from which it could be inferred that he installed an "enterprise version of Norton Ghost software" on the laptop issued to him by DHP without DHP's authorization (Compl.¶¶ 18-26), but it is unclear if this software simply assisted the copying of the hard drive or also deleted files that incriminated Ringo. If the latter, *Citrin* suggests that his conduct would be actionable under section 1030(a)(5), as well as the other cited subsections of the CFAA. *Id.* at 421. Given my conclusion that DHP has sufficiently stated section 1030(g) claims for Ringo's alleged violations of section 1030(a)(2) and (a)(4), there is no need to proceed further at this pleading stage of the case. Accordingly, Ringo's motion to dismiss DHP's

claim under the CFAA will be denied.

### III. Motion for More Definite Statement

The purpose of Federal Rule of Civil Procedure 12(e) is to narrow issues, disclose the boundaries of the plaintiff's claims, and simplify and expedite proceedings. *Scarborough v. RWay Furniture Co.*, 105 F.R.D. 90, 91 (E.D.Wis.1985). However, "because of the many discovery procedures presently available to litigants in federal courts, district judges are admonished to exercise their discretion sparingly in ordering more definite statements." *Id.* A motion for a more definite statement must be denied where the complaint is not so vague or ambiguous as to make it unreasonable to use pre-trial devices to fill gaps in detail. *Id.* A Rule 12(e) motion is used when a complaint is unintelligible, and not for when a defendant just wants more detail. *Id.* Rule 12(e) motions are rarely granted and are disfavored by courts. *Id.* at 92.

Here, DHP has not drafted a complaint that is so vague or ambiguous as to preclude Ringo from formulating a responsive pleading. Although Ringo states in his motion that the breach of agency duty claim is "vaguely consistent with a cause of action for breach of fiduciary duty," in fact, the Complaint states outright that Ringo owed DHP certain fiduciary duties of agent to principal, and that Ringo breached those duties. (Compl.¶¶ 45-46.) The Complaint is not unintelligible, nor does it lack sufficient detail as to the claim. Under these circumstances, I conclude that the motion should be denied.

\*10 For the reasons given above, the motions (Doc. # 9) are **DENIED**. The Clerk is directed to set this matter on the Court's calendar for a Rule 16 scheduling conference. *See* Fed.R.Civ.P. 16(b).

### SO ORDERED.

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(E.D.Wis.)

END OF DOCUMENT

# **Exhibit D**

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 (Cite as: 2008 WL 5155720 (N.D.Ill.))

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Only the Westlaw citation is currently available.

United States District Court,  
 N.D. Illinois,  
 Eastern Division.

TEKSYSTEMS, INC., Plaintiff,

v.

MODIS, INC., Brian Pelligrini, Jason Lukas, and  
 Robert J. Ruf, Defendants.

**Civil Action No. 08 C 5476.**

Dec. 5, 2008.

Monica L. Thompson, Elizabeth Haney Bartels, Raj Niranjan Shah, Tomas M. Thompson, DLA Piper US LLP IL, Chicago, IL, for Plaintiff.

Michael J. Gray, Mark W. Demonte, Sara Paull Leitenberger, Jones Day (CH), Jeffrey L. Widman, Stephen J. Raab, Shaw, Gussis, Fishman, Rebecca J. Hanson, Chaw, Gussis, Fishman, Glantz, Wolfson, and Towbin, Chicago, IL, Jeffrey Pope Watson, Robert G. Riegel, Jr., Fowler White Boggs Banker, P.A., Jacksonville, FL, for Defendants.

**MEMORANDUM OPINION AND ORDER**

SUZANNE B. CONLON, District Judge.

\*1 TEKsystems, Inc. ("TEKsystems") sues its former employee Jason Lukas for breach of his employment agreement (Count II), misappropriation of trade secrets (Count IV), and violation of the Computer Fraud and Abuse Act ("CFAA"),<sup>FN1</sup> 18 U.S.C. § 1030(a) (2)(C) and (a)(4) (Count VI). TEKsystems alleges Lukas downloaded its trade secret and confidential client information onto an external hard drive after accepting a position with its competitor, Modis, Inc. ("Modis"), and provided the information to Modis. Lukas moves to dismiss the complaint for failure to state a claim. For the reasons set forth below, the motion is

denied.

FN1. The statute was amended effective September 26, 2008. The amendments are not applicable to this case.

**BACKGROUND**

The following allegations are derived from TEKsystems' complaint. TEKsystems and Modis compete in the field of information technology and communications consulting services and staffing. Both companies provide temporary and permanent staffing services to clients in various industries. TEKsystems developed and maintains business methods and sales strategies systems. It relies on confidential client databases that include information such as staffing preferences, previous staffing bids, a company's internal organizational information, and unique business practices or technical requirements.

Lukas worked for TEKsystems as a technical recruiter in its Detroit, Michigan office and then an account manager in its Downers Grove, Illinois office from February 2002 to August 2007. TEKsystems requires every person in these positions, without exception, to sign an employment agreement containing noncompete, nonsolicitation, and nondisclosure provisions. Compl. ¶¶ 20, 36, 40 and Ex. A. The agreement also requires employees to return all TEKsystems records and information when ceasing employment. Compl. ¶ 40 and Ex. A. TEKsystems alleges, upon information and belief, that Lukas signed this employment agreement when he was hired, but that it cannot locate a copy. Compl. ¶ 37.

TEKsystems alleges that on or about July 29, 2007, after accepting a position at Modis, but before notifying TEKsystems, Lukas attached a hard drive to his TEKsystems laptop computer and, on information and belief, downloaded TEKsystems' confidential and trade secret customer information. Compl.

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¶ 64. On August 3, 2007, Lukas announced his resignation and future employment with Modis in its Detroit office. Compl. ¶ 65.

At some point before the middle of November 2007, after Lukas started working for Modis, Modis' regional senior vice-president Jim Sweeney telephoned Tim Cebula, the managing director of Modis' Chicago office, and told him to expect a visit from Lukas. Compl. ¶ 66. Sweeney told Cebula that Lukas would bring Teksystems' information, and instructed Cebula to review the information with Lukas. Compl. ¶ 66. Defendant Brian Pelligrini, the managing director of Modis' Minneapolis, Minnesota office (and former TEKsystems manager), also advised Cebula that Lukas would be visiting the Modis Chicago office and bringing TEKsystems' client information. Compl. ¶ 67.

\*2 In approximately November 2007, Lukas met with Cebula, and downloaded a file called "Chicago Data" to Cebula's computer. Compl. ¶ 68. The data included confidential TEKsystems client information, client job order history, and detailed client technology spending information. Compl. ¶ 69. The information was everything a salesperson would need to start calling upon a new account. Compl. ¶ 71. Information from the Chicago Data file was later added to Modis' intranet system for tracking clients and candidates. Compl. ¶ 73.

## DISCUSSION

### I. Legal Standard

A motion to dismiss may challenge the complaint for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). In ruling on a Rule 12(b)(6) motion, all well-pleaded allegations are accepted as true and all reasonable inferences are drawn in plaintiff's favor. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.2008). The complaint need only provide a short and plain statement giving defendants fair notice of the nature and basis of the claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S.

544, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007); *Tamayo*, 526 F.3d at 1081; Fed.R.Civ.P. 8(a)(2). This requires more than labels and conclusions, or a formulaic recitation of the elements of a cause of action. *Bell Atlantic Corp.*, 127 S.Ct. at 1964-65. Factual allegations must be sufficient to state a claim to relief that is plausible on its face, rather than merely speculative. *Id.* at 1965, 1974; *Tamayo*, 526 F.3d at 1083.

### II. Sufficiency of Complaint

Lukas argues TEKsystems' complaint against him should be dismissed because it improperly pleads the factual predicate for all counts—that Lukas downloaded its client information and provided it to Modis—on information and belief. Compl. ¶ 64. Lukas argues allegations based exclusively on information and belief are improper unless the facts are inaccessible to the pleader, and there is a reasonable basis to suspect the facts are true. *See Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 684 (7th Cir.1992). According to Lukas, TEKsystems has the relevant information within its control, *i.e.*, the alleged download was from its own computer, and TEKsystems fails to plead the grounds for its suspicions.

Lukas mischaracterizes TEKsystems' complaint. TEKsystems alleges Lukas attached an external hard drive to his TEKsystems computer after accepting a job with Modis and downloaded TEKsystems' confidential customer information. Compl. ¶ 64. A few months later, Modis management apprised its Chicago office that Lukas would be arriving with TEKsystems' customer information. Compl. ¶¶ 66-67. Lukas visited the Modis Chicago office and downloaded a TEKsystems' customer information file to Modis' managing director's computer, which made its way to Modis' internal client and candidate tracking system. Compl. ¶¶ 68-69, 73.

The only allegation pled on information and belief was that Lukas downloaded the customer informa-

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tion. Compl. ¶ 64. TEKsystems argues it pleads this on information and belief because Lukas surreptitiously downloaded the information; there were no eyewitnesses. A reasonable inference may be drawn that Lukas, as an account manager, had opportunity to access and remove confidential information, particularly from his own laptop computer, without others being aware of his activities. *See Assurance Alliance, Inc. v. Gardner*, No. 93 C 2263, 1993 WL 243355, at \*2 (N.D.Ill. June 30, 1993) (Kocoras, J.) (an information and belief allegation that company president removed confidential files stated a claim). TEKsystems sufficiently pleads a reasonable basis for its breach of employment agreement (Count II), misappropriation of trade secrets (Count IV), and violation of CFAA (Count VI) counts against Lukas.

### III. Breach of Employment Agreement

\*3 Lukas argues TEKsystems fails to state a breach of employment agreement claim (Count II) because it alleges the existence of Lukas' employment agreement on information and belief. Lukas argues this is improper because the existence of his purported employment agreement is information within TEKsystems' own knowledge, citing *Oil Express Nat'l. Inc. v. Burgstone*, No. 96 C 4816, 1996 WL 666698 (N.D.Ill. Nov.14, 1996) (Kocoras, J.), and *HWB, Inc. v. Braner, Inc.*, No. 92 C 5900, 1993 WL 389346 (N.D.Ill. Sept.30, 1993) (Nordberg, J.). Both cases involved tortious interference with contractual relations claims. The heightened pleading standard for fraud was applied, requiring that a claim made upon information and belief also contain allegations of the facts upon which the information and belief rests. *Oil Express Nat'l.*, 1996 WL 666698, at \*6-7; *HWB*, 1993 WL 389346, at \*2. In *Oil Express Nat'l.*, Oil Express sued its franchisee, alleging, on information and belief that the franchisee induced other franchisees to breach their Oil Express contracts. 1996 WL 666698, at \*6-7. Pleading this allegation on information and belief was held improper because whether a franchisee breached an Oil Express contract was a matter

within the personal knowledge of Oil Express. *Id.* at 8.

In *HWB*, HWB produced turret head slitters (steel coil processing equipment), and held multiple patents in the field. 1993 WL 389346, at \*1. HWB entered into a exclusive licensing agreement with Repco Metal Center Machine, Inc., subject only to similar agreements with Terico Engineering and Durmech Engineering for their use of the patents in Asia and Europe. *Id.* HWB alleged Repco marketed the turret head slitters in Japan, which induced Terico to breach its licensing agreement. HWB pled the breach of agreement upon information and belief. *Id.* This was held improper because HWB would have known better than anyone whether Terico breached its agreement. *Id.* at 2.

TEKsystems does not allege tortious interference with contractual relations against Lukas, and the rationale of these cases does not apply here. TEKsystems identifies the basis for its belief that Lukas executed an employment agreement. TEKsystems alleges every technical recruiter and account manager like Lukas is required to sign an employment agreement-no exceptions. Compl. ¶ 36. TEKsystems describes the standard agreement's terms, including its noncompete, nonsolicitation, and nondisclosure provisions, and attaches a copy executed by defendant Pelligrini as an exhibit to the complaint. Compl. ¶¶ 26-31 and Ex. A. TEKsystems alleges, upon information and belief, that Lukas signed this employment agreement when he was hired, but that TEKsystems cannot locate a copy. Compl. ¶ 37. These allegations do not amount to a mere hunch as Lukas contends. A reasonable inference may be drawn that Lukas executed TEKsystems' employment agreement.

Moreover, a plaintiff is not required to attach the contract to a breach of contract complaint. *See Murphy v. White Hen Pan try Co.*, 691 F.2d 350, 352-53 (7th Cir.1982) (complaint must reference agreement between the parties to allege breach of contract claim); *U.S. Data Corp. v. Realsource, Inc.*, No. 08 C 1092, 2008 WL 4369766, at \*6

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(N.D.Ill. Sept.22, 2008) (Manning, J.) (allegation of existence and content of contract sufficient to state a claim). Thus, in *Parks v. Female Health Care Ass'n, Inc.*, No. 96 C 7133, 1997 WL 285870, at \*5 (N.D.Ill. May 23, 1997) (Anderson, J.) (unsigned agreement attached to a complaint was sufficient to withstand a motion to dismiss). Dismissal would be premature because the plaintiff would not have the benefit of obtaining the fully executed copy of the contract through discovery. *Id.*

\*4 TEKsystems alleges Lukas executed the employment agreement it requires every employee in Lukas' position to sign. TEKsystems describes the agreement, and attaches the standard agreement as an exhibit to its complaint. Dismissal of the breach of employment agreement claim (Count II) is unwarranted.

#### IV. CFAA Violation

##### A. Improper Access

Lukas argues TEKsystems fails to state a CFAA claim (Count VI) because it has not alleged improper access to a protected computer. Lukas states he was still working for TEKsystems, and authorized to view the customer information at the time of his alleged wrongdoing. According to Lukas, he could not have violated the CFAA, §§ 1030(a)(2)(C) and (a)(4), requiring lack of computer authorization. Specifically, § 1030(a)(2)(C) provides that a person violates the CFAA by intentionally accessing a computer *without authorization*, or exceeding Ms authorized access, and thereby obtaining information from a protected computer. 18 U.S.C. § 1030(a)(2)(C). A violation of § 1030(a)(4) occurs when a person knowingly and with the intent to defraud accesses a protected computer *without authorization*, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains something of value. 18 U.S.C. § 1030(a)(4). Lukas' theory is that he had authorization to access the information on his company computer.

Lukas relies upon district court cases from other jurisdictions. *See, e.g., Black & Decker, Inc. v. Smith*, 568 F.Supp.2d 929 (W.D.Tenn.2008); *Shamrock Foods Co. v. Gast*, 535 F.Supp.2d 962 (D.Ariz.2008); *Diamond Power Intern., Inc. v. Davidson*, 540 F.Supp.2d 1322 (N.D.Ga.2007). These cases stand for the proposition that the CFAA was not intended to apply to employees who misappropriate confidential information from computers for which they had authorized access at the time. These cases are not binding, and conflict with Seventh Circuit precedent. *Int'l Airport Ctrs., LLC v. Citrin*, 440 F.3d 418 (7th Cir.2006).

In *Citrin*, the employer alleged its former employee permanently deleted, through an erasure software program, incriminating and company information from his company computer after he decided to quit and go into business for himself. Dismissal of the claim was reversed. *Id.* at 421. As alleged, the employee in *Citrin* violated § 1030(a)(5)(A)(ii) of the CFAA, another provision of CFAA containing the "without authorization" language. Section 1030(a)(5)(A)(ii) provides that a person violates the statute by intentionally accessing a protected computer *without authorization*, and thereby recklessly causes damage. 18 U.S.C. § 1030(a)(5)(A)(ii). When he destroyed the company files, the employee breached his duty of loyalty, and consequently terminated his agency relationship. Unless otherwise agreed, an agent's authority terminates if, without knowledge of the principal, he acquires adverse interests or seriously breaches the duty of loyalty. *Id.* at 421 (citing RESTATEMENT (SECOND) OF AGENCY § 112). The agency relationship was the basis for authority to access the company computer. *Id.* at 420-21.

\*5 TEKsystems alleges Lukas downloaded its confidential information after accepting a position with its competitor Modis, but before notifying TEKsystems. Compl. ¶¶ 64-65. His agency relationship with TEKsystems terminated at this point, and he no longer was authorized to access the information under the CFAA. Under *Citrin*, Count VI suffi-

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ciently alleges Lukas accessed TEKsystems' computer without authorization.

### B. Damage

Lukas argues TEKsystems fails to state a CFAA claim (Count VI) because TEKsystems alleges mere loss from Lukas' alleged conduct, not loss *and* damage as required by the statute. The CFAA defines damage as any impairment to the integrity or availability of data, a program, a system, or information. 18 U.S.C. § 1030(e)(8). Loss is defined as any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, restoring the system or information to its prior condition, and lost revenue, cost incurred, or other consequential damages incurred because of service interruption. 18 U.S.C. § 1030(e)(11).

Section 1030(g) unambiguously provides that a civil action may be maintained for damage *or* loss. 18 U.S.C. § 1030(g). See *Charles Schwab & Co., Inc. v. Carter*, No. 04 C 7071, 2005 WL 351929, at \*3 (N.D.Ill. Feb.11, 2005) (St.Eve, J.) (holding the CFAA provides a civil cause of action). Damage is expressly required in specific subsections of the CFAA. See, e.g., 18 U.S.C. § 1030(a)(5)(A)(I) (prohibiting knowingly causing the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causing *damage* without authorization to a protected computer). The word is not included in §§ 1030(a)(2)(C) or (a)(4)-the provisions Lukas is alleged to have violated. If the language of a statute is plain and unambiguous, then the inquiry ends there, and it must be applied to the facts of the case. See *United States v. Jones*. 372 F.3d 910, 913 n. 2 (7th Cir.2004). Under the plain language of CFAA, a damage pleading is not required to state claims under §§ 1030(a)(2) (C) or (a)(4). TEKsystems pleads that Lukas' purported violation of the CFAA caused it loss exceeding \$5,000 for the cost of a computer forensic investigation into Lukas' conduct. Compl. ¶ 149. TEKsystems sufficiently alleges loss, and is not required to

plead damage to state its CFAA claim (Count VI).

### C. Heightened Pleading Standard

Lukas asserts TEKsystems § 1030(a)(4) claim (Count VI) must be pled with particularity under Rule 9(b)'s heightened pleading standard for fraud because this statutory provision requires an intent to defraud. This argument ignores Rule 9(b)'s provision that malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. Fed.R.Civ.P. 9(b). TEKsystems is not required to meet a heightened pleading standard to state a § 1030(a) (4) claim. See *C.H. Robinson Worldwide, Inc. v. Command Transportation, LLC*, No. 05 C 3401, 2005 WL 3077998, at \*4 (N.D.Ill. Nov.16, 2005) (St.Eve, J.) (rejecting identical argument). Count VI stands.

### CONCLUSION

\*6 Lukas' motion to dismiss the complaint is denied. TEKsystems sufficiently pleads that Lukas downloaded its client information and provided it to Modis (Counts II, IV, and VI). TEKsystems sufficiently pleads the existence of Lukas' employment agreement (Count II). TEKsystems states a CFAA claim (Count VI) because Lukas' access to TEKsystems' computer after he allegedly accepted employment with Modis and decided to download TEKsystems' confidential client information was unauthorized. TEKsystems is not required to plead damage to state its §§ 1030(a)(2)(C) and (a)(4) claim (Count VI). TEKsystems need not meet a heightened pleading standard to state a § 1030(a)(4) claim (Count VI).

N.D.Ill.,2008.

TEKsystems, Inc. v. Modis, Inc.

Not Reported in F.Supp.2d, 2008 WL 5155720 (N.D.Ill.)

END OF DOCUMENT

# **Exhibit E**



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 (Cite as: 2008 WL 819011 (S.D.Tex.))

**H**

Only the Westlaw citation is currently available.

United States District Court,  
 S.D. Texas,  
 Victoria Division.  
 JOE N. PRATT INSURANCE, Plaintiff,  
 v.  
 Donna Easley DOANE, et al., Defendants.  
**Civil Action No. V-07-07.**

March 20, 2008.

Jerome A. Brown, Brown & Associates, Victoria,  
 TX, for Plaintiff.

John W. Griffin, Jr., Marek Griffin & Knaupp, Vic-  
 toria, TX, G. Mark Jodon, Littler Mendelson, Allan  
 Huddleston Neighbors, IV, Littler Mendelson PC,  
 Houston, TX, for Defendants.

**MEMORANDUM OPINION & ORDER**

JOHN D. RAINEY, District Judge.

\*1 Pending before the Court are defendants Trinity Universal Insurance Company,<sup>FN1</sup> Kerry Lott and Jim Strahan's (collectively, "Trinity Defendants") 12(b)(6) Motion to Dismiss Plaintiff's First Amended Original Complaint for Failure to State a Claim Upon Which Relief Can be Granted (Dkt. No. 24) and defendants Donna Easley Doane d/b/a Easley Insurance Agency, Judy Turner, Donald Easley and Margaret Easley's (collectively, "Easley Defendants") Motion to Dismiss Amended Complaint (Dkt. No. 25). Having considered the motions, responses, replies, record and the relevant law, the Court finds that the motions should be granted in part and denied in part.

FN1. Plaintiff has substituted Trinity Universal Insurance Company for Unitrin, Inc. See Dkt. No. 17 ¶ 3.

**Background and Procedural History**

This case arises out of the alleged theft and/or misuse of Plaintiff Joe N. Pratt Insurance's ("Pratt" or "Plaintiff") financial and business information. Pratt claims the Easley Defendants, several of whom are former Pratt employees, stole and/or conspired to steal Plaintiff's proprietary information to compete with Pratt for its customers while establishing a competing insurance agency, the Easley Insurance Agency ("Easley Insurance Agency"). Pratt alleges the Easley Defendants shared the proprietary information with the Trinity Defendants, who, in turn, used the information to provide underwriting for the Easley Defendants' clients, many of whom were former Pratt customers. Plaintiff also maintains the Easley Defendants fraudulently misled Plaintiff's customers into switching their insurance agent from Pratt to representatives of the Easley Insurance Agency.

More specifically, Plaintiff alleges Donna Easley Doane ("Doane"), a former Pratt employee who started the Easley Insurance Agency, copied thousands of Plaintiff's documents containing confidential customer information as she left Pratt's employment. Doane purportedly used the information contained in the copied documents to issue quotes and eventually acquire many of Pratt's former clients. Plaintiff claims the Trinity Defendants knew of, encouraged and assisted Doane's actions. Plaintiff contends co-defendants Donald and Margaret Easley (the "Easleys") aided and abetted Doane's tortious conduct by allowing her to store the copied documents at their house.

Plaintiff further maintains Judy Turner ("Turner"), a former Pratt employee who now works for the Easley Insurance Agency, surreptitiously collected Agent of Record forms<sup>FN2</sup> from Pratt customers while she was employed by Plaintiff. Pratt claims Turner, as part of a conspiracy permeating the Easley Defendants' actions, misled Plaintiff's customers and sent fraudulent Agent of Record forms to

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companies who provided insurance to Pratt's customers.

FN2. Agent of Record forms are documents signed by the insured authorizing an insurer to change the insured's account to a different agent. See Dkt. No. 17 ¶ 40; see also *Walter v. United Farm Family Mutual Ins. Co.*, No. IP02-0822-C-T/K, 2004 WL 1629549, at \*4 (S.D.Ind. April 7, 2004).

Based on the foregoing, Pratt filed its Original Complaint ("Plaintiff's Original Complaint") (Dkt. No. 1) on January 12, 2007, bringing numerous claims against the Trinity Defendants and the Easley Defendants (collectively, "Defendants"). The Defendants timely moved pursuant to FED R. CIV. P. 12 to dismiss all claims raised against them in Plaintiff's Original Complaint. See Dkt. No. 11; Dkt. No. 14. While the motions to dismiss were pending, Pratt filed its First Amended Original Complaint ("Plaintiff's Amended Complaint") (Dkt. No. 17) reasserting the claims raised in Plaintiff's Original Complaint and adding a claim under the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, *et seq.* In an April 4, 2007 Order (Dkt. No. 20), the Court held that the Defendants' motions to dismiss should be denied as moot due to Plaintiff's Amended Complaint, which appeared to re-plead at least some of the claims underlying the then-pending motions.

\*2 Plaintiff's Amended Complaint brings the following claims against both the Trinity and Easley Defendants: (1) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962 *et seq.*; (2) violations of the CFAA; (3) misappropriation of trade secrets; (4) violations of the Texas Theft Liability Act ("TTLA"), TEX. CIV. PRAC. & REM.CODE § 134.001, (5) breach of fiduciary duty; and (6) tortious interference with contract and prospective contract. Plaintiff's Amended Complaint also brings a breach of contract action against Turner and alleges the Trinity Defendants are liable based on agency, aiding and abetting, ratification, vicarious liability and con-

spiracy grounds. Defendants seek dismissal of Pratt's claims as discussed below.

### Standard of Review

Rule 12(b)(6) provides that a party may move to dismiss an action for "failure to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). When considering a Rule 12(b)(6) motion, a court must accept the plaintiff's allegations as true and draw all reasonable inferences in the plaintiff's favor. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *United States v. Gaubert*, 499 U.S. 315, 327, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). The court may not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts. See *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir.1999) (citing *St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 279 (5th Cir.1991)); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir.1996). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); see also *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Bonner v. Henderson*, 147 F.3d 457, 459 (5th Cir.1998) (quoting *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir.1994) (citation omitted)). Dismissal can be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. See *Frith v. Guardian Life Ins. Co. of Am.*, 9 F.Supp.2d 734, 737-38 (S.D.Tex.1998).

Motions to dismiss for failure to state a claim are viewed with disfavor and rarely granted. *Doss v. South Cent. Bell Tel. Co.*, 834 F.2d 421, 424 (5th Cir.1987) (citing *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir.1982)). The function of a complaint under the Federal Rules is to give the defendant fair

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notice of plaintiff's claim and the grounds upon which plaintiff relies. *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). When presented with a Rule 12(b) (6) motion to dismiss, the district court must examine the complaint to determine if the allegations provide for relief on any possible theory. *Id.*

### Discussion

#### A. Failure to State a Claim Under RICO

\*3 Congress enacted RICO in 1970 to combat organized crime through both criminal prosecutions and private suits. *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F.Supp. 995, 1000 (S.D.Tex.1995) ; 18 U.S.C. § 1961 *et seq.* RICO's "legislative history forcefully supports the view that [its] major purpose ... is to address the infiltration of legitimate business by organized crime." *United States v. Turkette*, 452 U.S. 576, 591, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). Section 1964(c) of RICO provides plaintiffs a private cause of action:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c).

"RICO claims under § 1962 have three common elements: '(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise.'" *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir.2007) (quoting *Word of Faith Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir.1996)). The second element—a "pattern of racketeering activity"—consists of two components: (1) predicate acts (the racketeering activity) and (2) a pattern of such acts. *In re Burzynski*, 989 F.2d 733, 742 (5th Cir.1993). A "pattern of such acts"

requires a plaintiff to plead both: (1) the predicate acts are related to each other and (2) they either constitute or threaten long-term criminal activity. *Id.*; see also *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir.2000). A plaintiff must also plead sufficient facts to comprise a violation of the substantive RICO subsections, §§ 1962(a)-(d), the plaintiff accuses a defendant of violating. *Abraham*, 480 F.3d at 355.

#### 1. Failure to Allege Defendants Committed Predicate Acts or Engaged in a "Pattern of Racketeering Activity"

Pratt alleges the Defendants violated 18 U.S.C. § 1962(a), (b), (c) and (d). The Defendants seek dismissal of Pratt's RICO claims on the basis that Plaintiff has not sufficiently alleged a "pattern of racketeering."

A pattern of racketeering within the meaning of section 1962 "requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). RICO refers to the requisite "acts of racketeering activity" as "predicate acts." See *FMC Int'l A.G. v. ABB Lummus Global, Inc.*, No. Civ. A. H-04-3896, 2006 WL 213948, at \* 4 (S.D.Tex. Jan.25, 2006) (citing *Burzynski*, 989 F.2d at 742 (5th Cir.1993)). Predicate acts for RICO violations are delineated in 18 U.S.C. § 1961(1), and include, for purposes of this case, mail fraud and wire fraud. "Any act that does not fall within the purview of RICO's definition of predicate offenses is not a 'racketeering activity' " for the purposes of a RICO violation. *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F.Supp. 995, 1001-02 (S.D.Tex.1995). When bringing claims under RICO based on the predicate acts of mail or wire fraud, the underlying predicate acts must be plead with particularity pursuant to FED. R. CIV. P. 9(b). See *Williams v. WMX Techs.*, 112 F.3d 175, 178 (5th Cir.1997). When determining whether a fraud claim should be dismissed for lack of particularity, "the Rule 9(b) standards require a party to plead with specificity as to the statements (or omissions) considered to be fraudulent, the speaker,

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when and why the statements were made, and *an explanation as to why they are fraudulent.*" *Plotkin v. IP Access Inc.*, 407 F.3d 690, 696 (5th Cir.2005) (citing *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 412 (5th Cir.2001)) (emphasis added).

\*4 In Plaintiff's Amended Complaint, Pratt alleges the predicate acts of mail fraud, 18 U.S.C. § 1941, and wire fraud, 18 U.S.C. § 1343. Dkt. No. 17 ¶¶ 65-68, 89-90. Mail fraud consists of: (1) a scheme to defraud by means of false or fraudulent representation, (2) interstate or intrastate use of the mails to execute the scheme, (3) the use of the mail by the defendant connected with the scheme, and (4) actual injury to the plaintiff. 18 U.S.C. § 1941; *Burzynski*, 989 F.2d at 742. The elements of a wire fraud claim under 18 U.S.C. § 1343 are similar to those for a mail fraud claim except the use of the wire must be interstate. 18 U.S.C. § 1943; *Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir.1988). To invoke mail or wire fraud, a plaintiff must articulate some "false or fraudulent misrepresentation." See *In re MasterCard Intern. Inc.*, 313 F.3d 257, 263 (5th Cir.2002) (citing *Burzynski*, 989 F.2d at 742).

The Defendants argue Pratt fails to allege the predicate acts of mail and wire fraud because Plaintiff simply does not identify a false or fraudulent misrepresentation attributable to the Defendants. The allegations of mail and wire fraud as found in Plaintiff's Amended Complaint are as follows:

65. On August 15, 2005, Ms. Turner resigned from her employment with Plaintiff, promptly joined [the Easley Insurance Agency], and began contacting Plaintiff's customers in violation of the confidentiality and noncompetition provision of the Producer Agreement between Ms. Turner and Plaintiff. During the next several weeks, Ms. Turner sent letters to customers of Plaintiff stating that "upon renewal, [Progressive Insurance Company] ("Progressive") will be transferring your auto policy to my new location ..." This statement is a deliberate misrepresentation of the fact that, unbeknownst to the customers, Ms. Turner had actually submitted Agent of Record

letters to the insurer transferring the policy to "her new location" at Easley Insurance Agency.

66. Upon information and belief, between August 15, 2005 and September 8, 2005, Ms. Turner sent numerous letters through the U.S. Postal Service and/or changed Agent of Records for numerous customers of Plaintiff...

67. Many of the [ ] customers were individuals whose insurance was written through Progressive. Agent of Record forms obtained during Ms. Turner's employment with Plaintiff were submitted for the following customers ... These Agent of Record forms were submitted via a website named ForAgentsOnly.com, a secure website for agents of Progressive located at <http://www.foragentsonly.com>. This website was registered by Progressive, whose address is 6300 Wilson Mills Road, Mayfield Village, Ohio, 44143. The internet provider location is Cleveland, Ohio.

68. In the letters to the customers, Ms. Turner omitted to explain that the insurance was being transferred because Ms. Turner had submitted fraudulent Agent of Record letters. Upon information and belief, these letters were sent through the United States Postal Service.

\*5 Dkt. No. 17 ¶¶ 65-68.

Although Pratt contends Turner submitted "fraudulent" Agent of Record letters and "deliberately misled" its customers, Pratt fails to allege any facts indicating the Agent of Record forms or the statements made in Turner's letters were false and/or misleading. In Pratt's recitation of the facts underlying its Amended Complaint, it concedes that, while employed at Pratt, Turner sent many Pratt customers Agent of Record forms. See Dkt. No. 17 ¶ 40. Pratt claims Turner sent these forms to Pratt customers with the instruction that they sign the document but leave the name of the new agent blank. *Id.* According to Plaintiff's Amended Complaint, this would allow Turner to move the custom-

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ers to a new agency in the event she found herself no longer employed by Pratt. *Id.* It appears that by signing the Agent of Record forms and leaving the name of the new agent blank, the Pratt customers were aware Turner could switch their insurance agent or agency at any time. Notably, Pratt does not bring forth a single factual allegation supporting the conclusion that Turner obtained the Agent of Record forms in a fraudulent manner or by a false or fraudulent misrepresentation. In other words, nothing in Plaintiff's Amended Complaint indicates Pratt's former customers were somehow fraudulently induced into signing the Agent of Record forms. To the extent Plaintiff attempts to make such a claim, it either simply does not exist or Plaintiff has not plead such an allegation with the particularity required under FED. R. CIV. P. 9(b).

Pratt's mail fraud claims focus predominantly on Turner's letters to Pratt's clients regarding transferring their policies to her new location. *See* Dkt. No. 17 ¶ 65. In a somewhat confusing argument, Pratt claims that a fraud was committed because “[i]t was not the insurer or the insured submitting the Agent of Record letter, rather it was the Easley Defendants (through Turner).” Dkt. No. 27 at p. 6. As the Court understands its argument, Pratt essentially claims that Turner, on behalf of the Easley Defendants, fraudulently misled Pratt's customers by informing them Progressive would be transferring their policies to the Easley Insurance Agency rather than relaying to the customers a statement the Court presumes Pratt would have preferred, that Turner would be submitting previously signed Agent of Record forms to transfer their policies to the Easley Insurance Agency. The statement used by Turner, and complained of by Pratt, however, is neither fraudulent nor misleading. To the contrary, it appears Turner's statement that Progressive “will be transferring your auto policy to my new location” is wholly accurate and not “deliberately vague” as Pratt seems to claim. Dkt. No. 17 ¶ 65; Dkt. No. 27 at p. 6. The facts as provided by Pratt indicate Plaintiff's customers chose Turner as their insurance agent, and after she left Pratt's employ-

ment, she informed the customers their insurance carrier would honor their agent selection and transfer their policies accordingly.

\*6 Even construing the facts in Plaintiff's favor, the Court fails to see how Turner's statements or Progressive's transferring of policies provide any support for Pratt's claim a defendant made a false or fraudulent misrepresentation via mail. Although Turner's actions may constitute *some* business tort, her communications did not include a fraudulent misrepresentation, or at least one sufficiently plead in accordance with the particularity required by FED. R. CIV. P. 9(b), and thus do not lay a foundation for mail fraud. As stated above, to properly put forward a claim of mail fraud, a plaintiff must bring forth at least an allegation of some false representation and must explain not only the who, what and when of the allegedly fraudulent communication, but also *why* such communication was fraudulent. *See In re MasterCard Intern. Inc.*, 313 F.3d 257, 263 (5th Cir.2002) (noting that a “particularly compelling” reason to dismiss a RICO claim is because the plaintiff does not “show that the Defendants made a false or fraudulent misrepresentation”); *Telephonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139 (5th Cir.1992) (finding that portions of a RICO claim were not alleged because “[t]he complaint gives some specifics about communications through the mails or on the telephone, but generally fails to specify the content of any misrepresentation”); *Toms v. Pizzo*, 4 F.Supp.2d 178, 184 (W.D.N.Y.1998) (dismissing on a 12(b)(6) motion a RICO claim based on fraud because “there is no suggestion that any false statements were made in the communications”); *see also Plotkin v. IP Access Inc.*, 407 F.3d 690, 696 (5th Cir.2005) (laying out the requirements for pleadings of fraud under Rule 9(b)). Certainly, no company likes to see its customers taken away by a competitor, but that does not transform the communications between Turner and Pratt's former clients into mail fraud. *See Toms*, 4 F.Supp.2d at 184.

Pratt's claims of wire fraud are based on similar

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reasoning. Pratt contends the Easley Defendants submitted “fraudulent” Agent of Record forms to Progressive Insurance Company via its agent-only website. Dkt. No. 17 ¶¶ 67-68. As stated above, based on Plaintiff’s own recitation of the facts, it appears the Pratt customers knowingly and willingly signed the Agent of Record forms and left the name of the agent blank. It appears Pratt’s customers were willing to allow Turner to switch them to a new agency in the event she was no longer working at Pratt. In other words, Pratt alleges no facts in support of its contention the Agent of Record forms were fraudulent. Therefore, the Court finds no wire fraud has been alleged. Because the Court finds Pratt failed to assert predicate acts to support its RICO action, its RICO claim should be dismissed.

## 2. Failure to Allege Reliance

Assuming, *arguendo*, the Court were to find Pratt’s allegations indicated fraud, the Defendants contend Plaintiff’s Amended Complaint still fails because it does not establish any reliance upon the supposed misrepresentations. Civil RICO claims “require[ ] a causal connection between the predicate mail or wire fraud and a plaintiff’s injury that includes ‘but for’ and ‘proximate’ causation.” *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 558 (5th Cir.2000).

\*7 Pratt argues the Fifth Circuit’s decision in *Procter & Gamble Company v. Amway Corporation*, 242 F.3d 539 (5th Cir.2001), relieves it of having to plead reliance in the RICO context when there is a “fraud directed at the customers.” See Dkt. No. 27 at pp. 5-6. To be clear, Pratt does not claim the Defendants overlooked or misconstrued some pleading of reliance in Plaintiff’s Amended Complaint; rather, Pratt claims that, pursuant to *Procter & Gamble*, it does not have to plead reliance at all. *Id.* However, Pratt reads *Procter & Gamble* too broadly. In *Procter & Gamble*, the Fifth Circuit considered whether the district court correctly dismissed pursuant to Rule 12(b)(6) Procter & Gambles’ civil RICO claim against Am-

way for spreading false rumors Procter & Gamble had significant links to Satanism. *Procter & Gamble*, 242 F.3d at 564. The district court dismissed Procter & Gamble’s RICO action because it did not claim to have relied on any of the misrepresentations Amway allegedly made via mail and wire. *Id.* In deciding the issue, the Fifth Circuit first observed “[i]n civil RICO claims in which fraud is alleged as a predicate act, reliance on the fraud must be shown.” *Id.* (citing *Summit Props.*, 214 F.3d at 560-62). The court then went on to recognize a narrow exception to the rule that a plaintiff must plead its own reliance to support a RICO claim. *Id.* at 564-65. The court acknowledged when the underlying allegation is that a competitor lured a plaintiff’s customers away by a fraud aimed at its customers, a plaintiff may not have to show *its own* reliance. *Id.* The court noted this exception, however, does not relieve a plaintiff from the requirement it allege *its customers* relied on some misrepresentation by the defendant. *Id.*; see also *Sandwich Chef of Tex., Inc. v. Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205, 222 (5th Cir.2003) (noting the Fifth Circuit’s *Procter & Gamble* decision hinged on the fact the plaintiff’s customers relied on the alleged misrepresentation).

Indeed, in finding reliance was appropriately averred, the *Procter & Gamble* court reasoned because the plaintiff’s *customers* relied on the defendant’s fraudulent statement, the crucial element of reliance-and thus causation-was sufficiently asserted. *Id.* *Procter & Gamble* thus merely stands for the proposition that even though a plaintiff need not itself rely on the alleged fraud, when a fraud is directed at a plaintiff’s customers, the customers must do so. *Id.*; see also *Summit Props.*, 214 F.3d at 560-62 (recognizing “a plaintiff [ ] may not need to show reliance when a competitor lured the plaintiff’s customers away by fraud directed at the plaintiff’s customers,” while also observing some reliance requirement “is a commonsense liability limitation” when a party seeks RICO damages for injuries resulting from fraud).

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Pratt has failed to allege or bring forth any factual allegations supporting the notion its customers relied on the supposed fraudulent misrepresentations discussed above. The Defendants' motions to dismiss Pratt's RICO claims for failure to state a claim should therefore be granted.<sup>FN3</sup> Accordingly, Pratt's RICO claims are dismissed.

FN3. Because Pratt's RICO claims clearly fail to state a claim upon which relief can be granted on the grounds discussed above, Defendants' various attempts to establish other infirmities in Pratt's RICO action need not be addressed.

#### B. Failure to State a Claim Under the CFAA

\*8 The CFAA provides for criminal and civil prosecution of various fraudulent and damaging activities related to the use of computers. *See Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 1156 (5th Cir.2006); 18 U.S.C. § 1030(a)(1)-(7). A party may bring a civil suit for damages arising from violations of the CFAA pursuant to 18 U.S.C. § 1030(g). *See Roehrs*, 470 F.3d at 1156-57. To bring a civil action under 1030(g), a plaintiff must show a violation of one of the CFAA's substantive provisions, as set forth in section 1030(a), and allege the existence of at least one of the five numbered clauses of subsection 1030(a)(5)(B). *Id.*

Section 1030(a)(4) authorizes civil suit of a defendant who "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period." 18 U.S.C. § 1030(a)(4). Section 1030(a)(5)(B)(i) punishes a defendant who causes "loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting

from a related course of conduct affecting 1 or more other protected computers) aggregating at least \$5,000 in value." 18 U.S.C. § 1030(a)(5)(B)(i).

Although Pratt does not specify the provisions of the CFAA upon which it relies, Plaintiff's CFAA claims appear to be brought pursuant to section 1030(a)(4). *See* Dkt. No. 17 ¶¶ 97-98 (paraphrasing 18 U.S.C. § 1030(a)(4)). Pratt claims "one or more [defendants] accessed one or more of Plaintiff's computers without authorization or exceeding any authorization granted and knowingly and with intent to defraud, thereby obtained information and/or things of value." Dkt. No. 17 ¶ 97; 18 U.S.C. § 1030(a)(4). Plaintiff also maintains the supposed violations resulted in a loss in excess of \$5,000. Dkt. No. 17 ¶¶ 80, 98.

#### 1. The Easley Defendants

The Easley Defendants do not directly challenge Pratt's claims under the CFAA. In a footnote, the Easley Defendants merely contend Pratt's CFAA claims do not constitute a predicate offense for Plaintiff's RICO charges. *See* Dkt. No. 25 at p. 11 n. 4. It does not appear Pratt attempts to assert its CFAA claims as a predicate for its RICO allegations. As discussed above, Plaintiff bases its RICO claims of the predicate offenses of mail and wire fraud. The Court notes, however, if Pratt were to attempt to use its CFAA claims as a predicate for its RICO allegation, Plaintiff would fail. Predicate acts for RICO violations are delineated in 18 U.S.C. § 1961(1), and, as noted above, "any act that does not fall within the purview of RICO's definition of predicate offenses" will not suffice as a predicate for RICO liability. *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F.Supp. 995, 1001-02 (S.D.Tex.1995). CFAA violations are not provided for in section 1961(1)'s list of predicate offenses and thus are an inadequate basis on which to rest a RICO claim. 18 U.S.C. § 1961(1).

\*9 In the same footnote, Easley Defendants briefly

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maintain Pratt failed to satisfy the pleading requirements of FED R. CIV. P. 9(b). *Id.* (merely claiming Pratt's pleading "on its face, does not comply with Rule 9, and should be dismissed"). Easley Defendants provide no support for their argument Rule 9(b) applies to Pratt's CFAA allegations. Other courts, however, have found causes of action asserted under 18 U.S.C. § 1030(a)(4) are sufficiently plead if a plaintiff alleges that a defendant "participated in dishonest methods to obtain the plaintiff's secret information." *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F.Supp.2d 1121, 1126 (W.D.Wash.2000); *see also P.C. of Yonkers, Inc. v. Celebrations! The Party & Seasonal Superstore, L.L.C.*, Civ. A. No. 04-4554(JAG), 2007 WL 708978, at \*4 (D.N.J.Mar.5, 2007) (observing that "[d]espite the fact that the CFAA contains the term 'fraud,' Rule 9(b)'s heightened pleading standard does not apply to claims made under the statute") (collecting cases).

Pratt has sufficiently alleged its CFAA claims. Plaintiff provides numerous factual allegations regarding the Easley Defendant's knowing and intentional access to and unauthorized use of Pratt's computers and electronic files. *See, e.g.*, Dkt. No. 17 ¶ 36 (Pratt shared confidential financial and business information with the Easley Defendants); Dkt. No. 17 ¶ 51-53 (Doane copied thousands of Plaintiff's documents and transmitted proprietary information by email to her family members); Dkt. No. 17 ¶ 64 (the Easley Defendants took numerous files from Pratt's offices). Pratt also alleges the Easley Defendants' conduct furthered their fraudulent scheme and obtained information with a value of over \$5,000. Dkt. No. 17 ¶ 57 (the Easley Defendants utilized confidential information taken from Pratt's files in creating quotes for Plaintiff's customers); Dkt. No. 17 ¶ 69 (the Easley Defendants obtained a business advantage from their use of information stemming from access and unauthorized use of Pratt's computers and electronic files); Dkt. No. 17 ¶¶ 80, 98 (the alleged violations resulted in a loss to Pratt in excess of \$5,000). Thus, to the ex-

tent the Easley Defendants challenge Pratt's CFAA claims, the claims survive the Easley Defendants' motion to dismiss and the motion is hereby denied.

## 2. The Trinity Defendants

The Trinity Defendants seek dismissal of Pratt's CFAA claims on the basis they had no physical contact with Plaintiff's computers and only received Pratt's supposed proprietary information. Essentially, the Trinity Defendants argue the mere receipt of information from a protected computer is not equivalent to obtaining "access" to that computer under the CFAA.

Pratt responds by arguing its claims against the Trinity Defendants under the CFAA are not limited to the Trinity Defendants' direct violation of the statute's provisions. *See* Dkt. No. 28 at p. 10. Plaintiff contends its allegations the Trinity Defendants "aided and abetted" and/or "conspired with" the Easley Defendants support its CFAA claims against the Trinity Defendants.<sup>FN4</sup> *Id.*

FN4. Plaintiff's Amended Complaint does not with perfect clarity allege its aiding and abetting and conspiracy theories as they concern its CFAA claims. *See* Dkt. No. 17 ¶¶ 96-99. Plaintiff brings general allegations of aiding and abetting and conspiracy in paragraphs 15 through 28. *See, e.g.*, Dkt. No. 17 ¶ 17 (the Trinity Defendants "aided and abetted Doane in her misappropriation and subsequent use of Plaintiff's proprietary information and trade secrets, providing assistance and encouragement."). Plaintiff's Count Two regarding its CFAA claims does not explicitly assert its aiding and abetting or conspiracy charges and only reincorporates the factual allegations contained in paragraphs 29 through 82. *See* Dkt. No. 17 ¶¶ 96-99. However, Pratt's earlier allegations of aiding and abetting and conspiracy and its Response to the Trinity Defendants' Amended



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Motion to Dismiss (Dkt. No. 28) make clear its allegations of agency, aiding and abetting, ratification, vicarious liability and conspiracy are meant to apply to Plaintiff's counts as later alleged. *See* Dkt. No. 28 at p. 10; *see also Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Massingill v. Nicholson*, 496 F.3d 382, 386 (5th Cir.2007) (observing that courts review complaints "with an eye towards our liberal notice pleading standard").

As Courts often note, the function of a complaint under the Federal Rules is merely to give a defendant fair notice of a plaintiff's claim and the grounds upon which a plaintiff relies. *See, e.g., Doss v. South Cent. Bell Tel. Co.*, 834 F.2d 421, 424 (5th Cir.1987) (citing *Conley*, 355 U.S. at 47). Here, the Court finds Plaintiff's Amended Complaint provided the Trinity Defendants with fair notice Pratt contends they are liable under aiding and abetting and/or conspiracy theories as to each count Pratt brings.

**\*10** To aid and abet in a civil context, a defendant must have knowledge of the primary actor's tortious conduct and substantially assist in bringing the conduct to fruition. *Morin v. Trupin*, 711 F.Supp. 97, 112 (S.D.N.Y.1989) (identifying the elements of aiding and abetting as (1) existence of some primary tortious conduct, (2) the aider and abettor having knowledge of that tortious conduct, and (3) the aider and abettor providing substantial assistance to achieve the tortious conduct). Having already alleged a primary tort of a CFAA violation against the Easley Defendants, Pratt further claims the Trinity Defendants knew the Easley Defendants wrongfully accessed Plaintiff's customer information, provided assistance and encouragement to the Easley Defendants in their unlawful acquisition of the information and ultimately used the information to write policies for the Easley Defendants and its

customers. *See, e.g.,* Dkt. No. 17 ¶¶ 17, 24-28 (the Trinity Defendants aided and abetted the Easley Defendants and, together, were members of a conspiracy against Plaintiff); Dkt. No. 17 ¶¶ 42, 45 (the Trinity Defendants were aware Doane was a former Pratt employee); Dkt. No. 17 ¶ 49 (the Trinity Defendants were active participants in the alleged theft and misuse of Plaintiff's information); Dkt. No. 17 ¶¶ 58-61 (the Trinity Defendants used the information to write insurance policies). Pratt's Amended Complaint thus properly asserts a claim for aiding and abetting the Easley Defendants' purported violation of the CFAA.

To establish a claim for civil conspiracy, a Plaintiff must show that (1) two or more persons; (2) have an objective to be accomplished; (3) came to a meeting of the minds on the objective or course of action; (4) committed one or more unlawful, overt acts; and (5) damages ensued as a result. *Meineke Discount Muffler v. Jaynes*, 999 F.2d 120, 124 (5th Cir.1993). Although Pratt's Amended Complaint is not a model of clarity, it is reasonable to infer based on the allegations cited above the Trinity Defendants and Easley Defendants had a "meeting of the minds" as to the Easley Defendants' actions. *See* Dkt. No. 17 ¶¶ 17, 24-28, 42, 45, 49 & 58-61. Accepting as true all Plaintiff's assertions of fact and drawing all reasonable inferences from the facts in Pratt's favor-as the Court must do-Plaintiff asserts sufficient factual allegations to establish a claim for civil conspiracy. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *United States v. Gaubert*, 499 U.S. 315, 327, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991); *see also id.*

Thus, Pratt has set forth facts sufficient to support its theories the Trinity Defendants aided and abetted and/or conspired with the Easley Defendants to violate the CFAA.<sup>FN5</sup> The Trinity Defendants' motion to dismiss Plaintiff's CFAA claim is accordingly denied.

FN5. The Trinity Defendants devote the fi-

nal section of their Motion to Dismiss (Dkt. No. 24) to the contention they are not vicariously liable for the alleged acts of Easley Defendants. Dkt. No. 24 at p. 25-26. Trinity Defendants' arguments in this section, however, are limited to the claim the Easley Defendants were not acting as agents of the Trinity Defendants. Because they fail to address Pratt's claims the Trinity Defendants aided and abetted and/or conspired with the Easley Defendants to commit tortious acts against Pratt, the Court need not address the issue of agency.

### C. Failure to State a Misappropriation of Trade Secrets Claim

#### 1. The Easley Defendants

\*11 Like the Easley Defendants' arguments regarding Pratt's CFAA claims, the Easley Defendants appear to contend Pratt's misappropriation of trade secrets claims do not satisfy the heightened pleading requirements of FED R. CIV. P. 9(b). *See* Dkt. No. 25 at p. 11 ("Even the allegation of theft of trade secrets does not disclose precisely what Plaintiff alleges that the Easley Defendants converted, and when, and how it was used to harm Plaintiff, and what damage Plaintiff allegedly suffered"). Theft of trade secrets claims, however, need not comply with the pleading requirements provided by Rule 9(b). *See* FED. R. CIV. P. 9(b).

"To state a claim for trade secret misappropriation under Texas law, a plaintiff must (1) establish that a trade secret existed; (2) demonstrate that the trade secret was acquired by the defendant through a breach of a confidential relationship or discovered by improper means; and (3) show that the defendant used the trade secret without authorization from the plaintiff." *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 149-50 (5th Cir.2004). With the elements of a claim for trade secret misappropriation in mind, Pratt easily satisfies its pleading require-

ments regarding its theft of trade secrets claim against the Easley Defendants. At numerous times in its Amended Complaint, Plaintiff claims the Easley Defendants wrongfully and without authorization copied documents containing proprietary, confidential information and used that information when competing for Pratt's customers. *See, e.g.*, Dkt. No. 17 ¶ 36 (Pratt shared confidential financial and business information with Easley Defendants); Dkt. No. 17 ¶¶ 51-54 (the Easley Defendants, without permission, copied and removed from Pratt's offices over 3,500 pages of Plaintiff's documents in preparation to begin a competing insurance agency); Dkt. No. 17 ¶ 57 (the Easley Defendants used the information contained in the copied documents to contact Pratt's customers in an effort to persuade them to switch insurance agencies). The Court finds Plaintiff sufficiently alleged its theft of trade secrets claim as to the Easley Defendants. Thus, to the extent the Easley Defendants challenge Pratt's pleading of its misappropriation of trade secrets claim, their motion to dismiss is denied.

#### 2. The Trinity Defendants

The Trinity Defendants again argue Pratt has failed to allege sufficient facts to establish they Trinity Defendants themselves misappropriated Plaintiff's trade secrets. However, as with Pratt's CFAA claim, Plaintiff does not rest its misappropriation allegations on the Trinity Defendants' direct theft of trade secrets. Rather, Pratt contends the Trinity Defendants aided and abetted and/or conspired with the Easley Defendants to carry out the tortious conduct. The Court need not repeat the elements of civil aiding and abetting and conspiracy or regurgitate the facts set forth in Pratt's allegation to find Pratt sufficiently alleged the Trinity Defendants aided and abetted and/or conspired with the Easley Defendants to misappropriate Plaintiff's trade secrets. *See* Dkt. No. 17 ¶¶ 17, 24-28, 42, 45, 49 & 58-61 (alleging the Trinity Defendants aided and abetted and conspired with the Easley Defendants to carry out tortious conduct against Pratt). The Trinity De-

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Defendants' motion to dismiss Plaintiff's misappropriation of trade secrets claim is hereby denied.

#### D. Failure to State a Claim Under the TTLA

\*12 Pratt maintains Defendants violated the TTLA, TEX. CIV. PRAC. & REM.CODE § 134.001, by unlawfully appropriating Plaintiff's property as described in the Texas Penal Code § 31.03. See Dkt. No. 17 ¶ 110. Texas Penal Code § 31.03 provides that an individual commits theft "if he unlawfully appropriates property with *intent to deprive* the owner of property." TEX. PEN.CODE § 31.03(a) (emphasis added).

The Defendants suggest Pratt failed to assert a claim upon which relief can be granted because, under the facts alleged, Pratt was never deprived of its property. Defendants specifically contend they cannot be liable for having unlawfully appropriated Plaintiff's business and financial documents because Pratt merely alleges they copied, or aided and abetted and/or conspired to copy, Plaintiff's records and thus did not "deprive" Plaintiff of any of its property within the meaning of the Texas Penal Code's section 31.01(2).

Texas Penal Code section 31.01(2) defines "deprive" as follows:

- (A) to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner;
- (B) to restore property only upon payment of reward or other compensation; or
- (C) to dispose of property in a manner that makes recovery of the property by the owner unlikely.

TEX. PEN.CODE § 31.01(2).

At least one Texas court has dealt with an issue nearly identical to that which the Defendants raise.

In *Falcone v. State*, 682 S.W.2d 418 (Tex.App.-Houston [1st] 1984, no pet.), the court, in reviewing a criminal conviction, considered whether the taking of copies of another's documents containing trade secrets amounted to an offense under section 31.03(a). 682 S.W.2d at 420. In that case, a criminal defendant copied numerous documents belonging to his employer, took the copies with him as he left the company's employment and used the information provided within to compete with his former employer. *Id.* at 419-20. Analyzing the term "deprive" as defined in section 31.01, the *Falcone* court reasoned because the criminal defendant did not intend to (1) withhold the *original documents*, (2) hold the *original documents* for ransom or (3) dispose of the *original documents* in a way that made their recovery unlikely, the defendant could not be found guilty under the Texas Penal Code's section 31.03(a). *Id.* at 420. The *Falcone* court hinged this portion of its opinion on the fact the defendant only took possession of *copies* of his employer's documents. *Id.* ("the prints possessed by the [defendant] were not his [employer's] original drawings, *but were merely copies* ... [the employer] still had every original drawing in his master file") (emphasis added). Thus, by definition, the defendant did not "deprive" his employer of any property as defined by section 31.01(2), because the employer's property—the original documents—had never been taken. *Id.* The *Falcone* court went on to find the defendant was improperly convicted under Texas' general theft statute and should have been charged under the theft of trade secrets provision of the Texas Penal Code, TEX. PEN.CODE § 31.05. *Id.* at 421.

\*13 Like the *Falcone* court, this Court finds no allegations the Defendants permanently withheld, held for ransom or unlawfully disposed of Pratt's documents. The Defendants simply did not "deprive" Plaintiff of its property within the meaning of section 31.03(a) and 31.01(2). In other words, the taking of copies of Pratt's files does not implicate the Penal Code's section 31.03(a) as a matter of law. *Falcone*, 682 S.W.2d at 420; *see also*

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*Mohammed v. State*, No. 05-98-00945-CR, 2001 WL 710436, at \*3 (Tex.App.-Dallas June 26, 2001, no pet.) (recognizing trade secrets are not property that can be deprived under section 31.03(a)). Accordingly, no relief can be granted under the TTLA for a violation of § 31.03(a) of the Texas Penal Code.

The Defendants' actions may have constituted an offense under the Texas theft of trade secrets statute, TEX. PEN.CODE §§ 31.05(b) (2)-(3). Indeed, in Plaintiff's Original Complaint, it brought its TTLA claim through the Defendants' supposed violation of section 31.05. *See* Dkt. No. 1 ¶ 84. However, in response to the Easley Defendants' first Motion to Dismiss (Dkt. No. 11), Pratt apparently conceded the information contained within its copied documents does not fall within the definition of a "trade secret" under the Texas theft of trade secrets law. *See* Dkt. No. 18 at p. 12 ("the Easley Defendants have correctly objected that Plaintiff's proprietary information does not fall within the definition of 'trade secrets' under [section 31.05]"). It may be the case the Defendants' actions simply do not constitute a criminal offense for theft of trade secrets or otherwise-as defined in the Texas Penal Code. However, this question is not before the Court. The Court need only determine whether Pratt's claims are cognizable under Texas Penal Code's section 31.03(a). Answering this question in the negative, the Defendants' motions to dismiss on the grounds Plaintiff failed to state a claim under the TTLA are granted. Pratt's claims under the TTLA shall be dismissed. <sup>FN6</sup>

FN6. The Easley Defendants seem to presume their alleged TTLA violations could give rise to RICO liability. *See* Dkt. No. 25 at p. 5-6. Violations of Texas Penal Code section 31.03, however, are not predicate acts as identified in RICO's section 1961(1). *See* 18 U.S.C. § 1961(1); *see also Pan American Maritime Inc. v. Esco Marine Inc.*, No. C.A. B-04-188, 2005 WL 1155149, at \*5 (S.D.Tex. May 10, 2005)

(observing "Courts have consistently held that 'acts that constitute theft under state law are not predicate acts for racketeering activity' ") (collecting cases). Thus, even if the Court were to allow Pratt's claims under the TTLA to proceed, they would not serve as a basis for the Defendants' RICO liability.

## E. Failure to State a Claim for Breach of Fiduciary Duty

### 1. The Easley Defendants

The Easley Defendants next contend Plaintiff failed to state a claim for breach of fiduciary duty. To establish a breach of fiduciary duty claim, a plaintiff must show: (1) a fiduciary relationship existed between the plaintiff and defendant; (2) the defendant breached his fiduciary duty to the plaintiff; and (3) the defendant's breach caused an injury to the plaintiff or benefit to the defendant. *OAIC Commercial Assets, L.L.C. v. Stonegate Village, L.P.*, 234 S.W.3d 726, 743 (Tex.App.-Dallas 2007, no pet.). The Easley Defendants provide little in support of their contention Plaintiff's breach of fiduciary duty claim should be dismissed. Without citation to any authority, the Easley Defendants merely maintain Pratt's Amended Complaint "woefully fails to describe any specific 'proprietary information' " and "does not allege how such information was used to damage Plaintiff, or describe in any way specific damages from any such breach." Dkt. No. 25 at p. 12.

\*14 As an initial matter, no party disputes the existence of a fiduciary relationship between the Easley Defendants and Pratt. Pratt's Amended Complaint, moreover, goes into more than sufficient detail in describing the fiduciary relationship between the Easley Defendants and Pratt, the information taken in breach of such fiduciary relationship, how such information was used and the damages resulting from the alleged fiduciary breach. *See, e.g.*, Dkt. No. 17 ¶¶ 36, 48, 51-53, 57-61, 65-69, 80 &

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118-121 (describing at length the relationship between Pratt and Easley Defendants, the information contained in the copied documents and how the information was purportedly taken and used to harm Plaintiff). The Easley Defendants' motion to dismiss on the basis Plaintiff fails to state a claim for breach of fiduciary duty is hereby denied.

## 2. The Trinity Defendants

The Trinity Defendants also argue Pratt failed to state a claim for breach of fiduciary duty. The parties agree a "third party [who] knowingly participates in the breach of fiduciary duty" may be liable as a joint tortfeasor with the fiduciary. *Baty v. Protech Ins. Agency*, 63 S.W.3d 841, 863 (Tex.App.-Houston [14th Dist.] 2001, pet. denied). The Trinity Defendants maintain Pratt failed to assert sufficient factual allegations to support its claim.

As the Court discussed in the context of Pratt's allegations of aiding and abetting and conspiracy liability, Pratt sufficiently alleged facts supporting the conclusion the Trinity Defendants knew of and were actively involved in the Easley Defendants' actions. See Dkt. No. 17 ¶¶ 17, 24-28, 42, 45, 49 & 58-61 (providing factual allegations the Trinity Defendants were third parties who knowingly participated in the Easley Defendants' tortious conduct against Pratt). The Court has little trouble allowing Pratt's claims for breach of fiduciary duty to go forward. The Trinity Defendants' motion to dismiss Plaintiff's breach of fiduciary duty claim is thus denied.

## F. Failure to State a Breach of Contract Claim

The Easley Defendants also contest Pratt's claims Turner breached a contract with Plaintiff. To bring a breach of contract action, a plaintiff must establish the following elements: (1) a valid enforceable contract existed; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the defendant's breach was the

cause of plaintiff's injury. *Doss v. Homecomings Fin. Network, Inc.*, 210 S.W.3d 706, 713 (Tex.App.-Corpus Christi 2006, pet. dismissed). The Easley Defendants' arguments in support of its motion to dismiss Pratt's breach of contract claim against Turner mirror their contentions aimed at Plaintiff's breach of fiduciary duty claim. Specifically, the Easley Defendants argue "the Amended Complaint does not in any way describe what was allegedly taken, nor show how it was used, or how Plaintiff has been damaged." Dkt. No. 25 at p. 12. The Easley Defendants do not contest a contract was in place between Turner and Pratt, Plaintiff performed, the contract was breached or Turner's actions caused Plaintiff harm.

\*15 However, independently, the Court again finds Pratt's allegations sufficient. Turner was allegedly bound by confidentiality and noncompetition provisions of a Producer Agreement between herself and Plaintiff. Dkt. No. 17 ¶ 65. Pratt claims Turner breached the agreement by contacting numerous customers after leaving Plaintiff's employment. Dkt. No. 17 ¶¶ 65-78. Finally, Pratt alleges Turner's breach caused it harm. Dkt. No. 17 ¶¶ 80-82. The Easley Defendants' motion to dismiss Plaintiff's breach of contract claim against Turner is hereby denied.

## G. Failure to State a Claim for Tortious Interference with Contract and Prospective Contract

### 1. The Easley Defendants

The Easley Defendants do not directly contest Plaintiff's claims they tortiously interfered with Pratt's contracts and/or prospective contracts. However, for the sake of completeness and to lay a foundation for the Trinity Defendants' motion to dismiss Plaintiff's claims of tortious interference with contract, the Court will address the issues.

The elements a plaintiff must establish to claim tortious interference with contract are: (1) a contract subject to interference exists; (2) the alleged act of

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interference was willful and intentional; (3) the willful and intentional act proximately caused damage; and (4) actual damage or loss occurred. *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex.1997). Pratt alleges numerous contracts between itself and its clients existed subject to interference. Dkt. No. 17 ¶¶ 57, 59-61, 65-67 & 80. Plaintiff also claims the Easley Defendants willfully and intentionally interfered with such contracts by wrongfully acquiring and using confidential business and financial information. Dkt. No. 17 ¶¶ 51-54, 57 & 65-78. Plaintiff finally claims the Easley Defendants' actions caused harm to Pratt in the form of lost customers and thus profits. Dkt. No. 17 ¶¶ 61, 80-82. Therefore, Pratt fully alleged a claim for tortious interference with contract.

The elements required to claim tortious interference with prospective contract are: (1) a reasonable probability the parties would have entered into a contractual relationship; (2) an "independently tortious or unlawful" act by the defendant preventing the relationship from occurring; (3) the defendant performed such act with a conscious desire to prevent the relationship from occurring, or it knew the interference was certain or substantially certain to occur as a result of the defendant's conduct; and (4) the plaintiff suffered actual harm or damage as a result of the defendant's interference. *Ash v. Hack Branch Distrib. Co.*, 54 S.W.3d 401, 413 (Tex.App.-Waco 2001, pet. denied). The allegations cited above equally serve to substantiate a claim for tortious interference with prospective contract as Pratt alleges a reasonable probability exists it would have renewed the contracts with its customers leading to a continual stream of revenue that has since been interrupted by the Easley Defendants' alleged misconduct. Dkt. No. 17 ¶¶ 79-80, 129. Plaintiff therefore sufficiently alleged a claim for tortious interference with prospective contract.

## 2. The Trinity Defendants

\*16 Having established Pratt asserted claims against the Easley Defendants for tortious interfer-

ence with contract and prospective contract, the Trinity Defendants argue Plaintiff's claims against them should again be dismissed because Pratt failed to allege facts sufficient to establish the Trinity Defendants can be held liable for the underlying torts. Pratt, however, again replies the Trinity Defendants may be held liable on a theory the Defendants conspired to commit the underlying tort. As mentioned numerous times above, it is reasonable to infer from Plaintiff's Amended Complaint the Trinity Defendants and the Easley Defendants had a "meeting of the minds" as to the Easley Defendants' tortious actions. *See* Dkt. No. 17 ¶¶ 15-28, 42, 45, 49 & 58-61. Thus, Pratt alleged a claim upon which relief can be granted: namely, that the Trinity Defendants conspired with the Easley Defendants to tortiously interfere with contract and prospective contract. The Trinity Defendants' motion to dismiss Plaintiff's claim for tortious interference with contract and prospective contract is therefore denied.

## CONCLUSION

The Court finds as follows:

1. Defendants' motions to dismiss as to Plaintiff's RICO claims are GRANTED.
2. Defendants' motions to dismiss as to Plaintiff's CFAA claims are DENIED.
3. Defendants' motions to dismiss as to Plaintiff's misappropriation of trade secrets claims are DENIED.
4. Defendants' motions to dismiss as to Plaintiff's claims under the TTLA are GRANTED.
5. Defendants' motions to dismiss as to Plaintiff's breach of fiduciary duty claims are DENIED.
6. Easley Defendants' motion to dismiss as to Plaintiff's breach of contract claim against Turner is DENIED.
7. Defendants' motions to dismiss as to Plaintiff's

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claims for tortious interference with contract and  
tortious interference with prospective contract are  
DENIED.

It is so ORDERED.

S.D.Tex.,2008.

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# **Exhibit F**



Slip Copy, 2010 WL 4569889 (N.D.Cal.), 51 Communications Reg. (P&F) 1118  
 (Cite as: 2010 WL 4569889 (N.D.Cal.))

**C**

Only the Westlaw citation is currently available.

United States District Court, N.D. California,  
 Oakland Division.  
 Rebecca SWIFT, on Behalf of Herself and All Others Similarly Situated, Plaintiff,  
 v.  
 ZYNGA GAME NETWORK, INC., et al., Defendants.  
 No. C 09-05443 SBA.  
 Dkts. No. 18, 23.  
 Nov. 3, 2010.

Stuart C. Talley, Curtis Brooks Cutter, John R. Parker, Jr., William Alter Kershaw, Kershaw, Cutter & Ratinoff, LLP, Ian James Barlow, Mark John Tamblyn, Wexler Wallace, LLP, Sacramento, CA, Benjamin G. Edelman, Attorney of the Law, Cambridge, MA, for Plaintiff.

Richard L. Seabolt, Duane Morris, LLP, San Francisco, CA, Gail E. Lees, Susan Ashlie Beringer, Palo Alto, CA, Gibson, Dunn & Crutcher, LLP, Los Angeles, CA, for Defendants.

**ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS FIRST AMENDED COMPLAINT SAUNDRA BROWN ARMSTRONG, District Judge.**

\*1 The parties are presently before the Court on Defendant Zynga Game Network, Inc.'s Motion to Dismiss First Amended Complaint (Dkt.18), and Defendants Adknowledge, Inc. and KITN Media USA, Inc.'s Motion to Dismiss First Amended Class Action Complaint and Motion to Strike Class Action Allegations (Dkt.23).<sup>FN1</sup> Having read and considered the papers filed in connection with these matters and being fully informed, the Court hereby DENIES the motions for the reasons set forth below. The Court, in its discretion, finds these matters suitable for resolution without oral argument. *See* Fed.R. Civ.P. 78(b).

<sup>FN1</sup> Defendants Adknowledge, Inc. and KITN Media USA, Inc. are referred to collectively herein as "Adknowledge."

**I. BACKGROUND****A. PLAINTIFF'S ALLEGATIONS**

Defendant Zynga Game Network, Inc. ("Zynga") develops games that members of social networking websites, such as Facebook and MySpace, can play on those websites. Dkt. 13, FAC ¶ 1. For example, FarmVille is a game that is promoted and made available through Facebook's site. *Id.* ¶ 12. The game presents a "virtual world" where players can start and manage their own virtual farms. *Id.* Users are allowed to play the Zynga games free of charge. *Id.* ¶ 2. Zynga generates revenue from the games by selling virtual currency to players within the games. *Id.* Each game is designed to be more enjoyable for users that have acquired increasing amounts of virtual currency. *Id.* ¶ 4. Players can use their virtual currency to obtain more in-game goods and services, unlock new levels of the game, gain competitive advantage over other players, or otherwise make the game more enjoyable. *Id.*

Virtual currency can be acquired when players slowly "earn" it by accomplishing various tasks in the game. *Id.* Additionally, users can purchase virtual currency directly from Zynga by using a credit or debit card. *Id.* ¶ 34. Zynga provides another way for users to acquire virtual currency: through "special offer" transactions that Zynga and Adknowledge (collectively, "Defendants") have created and developed to be integrated within each of Zynga's game applications. *Id.* ¶ 6. Through these transactions, Zynga provides users in-game virtual currency in exchange for users' participation in special offers provided by Zynga and its business partners, including Adknowledge. *Id.* These special offers are generally referred to in the industry as "lead generators." *Id.* ¶ 7.

Zynga partners with an offer aggregator, such as Adknowledge, to create and develop the interfaces within Zynga's games that allow Zynga game users to select a special offer in exchange for virtual currency. *Id.* ¶ 8. Once the user has completed the special offer presented by Defendants and another Zynga business partner (such as the provider of "wiki toolbar," "IQ Test," "Video Professor," or "GreenTea Purity"), the Zynga business partner pays Defendants for the lead generation, and Zynga remits to the user a certain amount of virtual currency. *Id.* The special offers created and developed by Defendants allegedly are misleading and often result in users subscribing to goods or services that they do not want or need. *Id.* ¶ 34. The Complaint also alleges that consumers who attempt to cancel services or obtain refunds are then met with roadblocks designed to thwart cancellation and/or refunds. *Id.*

\*2 For example, one of the special offers that has often appeared within various Zynga games is an online "IQ test." *Id.* ¶ 13. The offer indicates that the user can earn additional virtual currency by obtaining a certain score on an online IQ test. *Id.* To take the test, the user must provide his or her cell phone number, and is informed that the results of the test will be sent to the user via text message. *Id.* However, the user is unaware that, by providing his or her cell phone number, he or she has unwittingly subscribed to a Short Message Service ("SMS") subscription and will be billed on a monthly basis through his or her cell phone bill. *Id.* Users who discover the charge on their phone bills are then met with hurdles as they attempt to cancel the service and/or obtain a refund. *Id.*

Plaintiff alleges that most, if not all, of the special offers within Zynga game applications have been "scams," which is the reason all special offers were apparently removed from Zynga games in November 2009, and only a handful of special offers are now available within Zynga games as of February 2010. *Id.* ¶ 33. According to Plaintiff, Zynga claims that it has eliminated special offers

that are misleading to consumers. *Id.*

Plaintiff Rebecca Swift ("Plaintiff") alleges that she has used various Zynga game applications within Facebook, including FarmVille, Mafia Wars, YoVille!, and Roller Coaster Kingdom. *Id.* ¶ 36. In each of these applications, Zynga has attempted to induce Plaintiff to earn virtual currency by participating in special offers with Zynga business partners, including Adknowledge. *Id.* Plaintiff alleges that in or around April 2009, she provided her cell phone number to a business partner of Defendants, through a special offer created and developed by Zynga and Adknowledge, in order to be texted a "code" that she could use to redeem for "YoCash." *Id.* ¶ 37. YoCash is virtual currency within Zynga's YoVille! game. *Id.* Plaintiff was not informed that providing her cell phone number would result in charges to her cell phone bill. *Id.* Plaintiff alleges that "Defendants' misleading implementation of the special offer was a substantial factor in Plaintiff's decision to provide her cell phone number and enter into the transaction." *Id.* On April 16, 2009, and three times afterwards, \$9.99 was charged to Plaintiff's cell phone bill without her knowledge or consent. *Id.* Plaintiff further alleges that all or part of these charges were obtained by Defendants. *Id.*

Moreover, on June 14, 2009, Plaintiff participated in a special offer-created and developed by Zynga and Adknowledge-for a "risk-free Green Tea Purity Trial" while playing the game YoVille!. *Id.* ¶ 38. The special offer indicated that Plaintiff could earn virtual YoCash if she participated in a "risk free trial" for a green tea herbal supplement. *Id.* The offer indicated that Plaintiff could cancel the trial anytime within fifteen days of her initial order. *Id.* To participate in the program, Plaintiff provided her debit card number and was charged \$5.95 for shipping and handling. *Id.* Plaintiff sent an email to Defendants' business partner, the apparent manufacturer of the supplements, asking to cancel her "Green Tea Purity Trial" on June 24, 2009, ten days after entering the fifteen-day "risk free trial," and after she received, mailed from China, a package of

30 green tea pills and three tea bags. *Id.* ¶ 39. On July 4, 2009, an unknown entity named “Support Green Tea” emailed Plaintiff, informing her that she would be charged \$79.95, despite Plaintiff’s prior request to cancel her trial offer. *Id.* ¶ 40. Plaintiff was unsuccessful at any further attempts to contact “Support Green Tea” via telephone. *Id.* On July 6, 2009, Plaintiff’s bank account was charged \$79.95, as well as a \$2.38 “foreign transaction fee.” *Id.* On July 20, 2009, Plaintiff’s bank account was charged \$85.90, as well as another \$2.38 foreign transaction fee. *Id.* Sometime afterwards, she received, again mailed from China, a package of 30 green tea pills and three tea bags. *Id.*

## B. PROCEDURAL BACKGROUND

\*3 Plaintiff filed this putative class action on November 17, 2009. On February 10, 2010, Plaintiff filed a First Amended Complaint (“FAC”), bringing the following claims: (1) violation of the Unfair Competition Law (Cal. Bus. Prof.Code § 17200, et seq.) (“UCL”); (2) violation of the Consumers Legal Remedies Act (Cal. Civ.Code § 1770, et seq.) (“CLRA”); and (3) unjust enrichment. Plaintiff brings this action on behalf of a class of “[a]ll persons in the United States who from November 2005 to January 31, 2009 acquired or accumulated virtual currency or other virtual goods and services within a Zynga game application as part of an integrated special offer transaction presented through that application, and who was charged money as a result thereof.” FAC ¶ 42.

Now, Zynga and Adknowledge have separately moved to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6), on the grounds that: Plaintiff’s claims are barred by the Communications Decency Act of 1996 (“CDA”); and Plaintiff’s claims sound in fraud but are not plead with the requisite particularity. Moreover, Adknowledge moves to dismiss Plaintiff’s claim for unjust enrichment as being an unavailable claim under California law, and moves to strike Plaintiff’s class allegations under Federal Rule of Civil Procedure 12(f).  
 FN2

FN2. Both sides have submitted requests for judicial notice in connection with their briefing. Specifically, Zynga has submitted a Request for Judicial Notice in Support of Zynga Game Network, Inc.’s Motion to Dismiss, asking the Court to take judicial notice of the full copy of an article quoted in the FAC. Dkt. 19. Likewise, Plaintiff has submitted a Request for Judicial Notice in Opposition to Zynga Game Network’s and KITN Media USA’s Motions to Dismiss, asking the Court to take judicial notice of a video clip, website, and picture contained in a website, which are referenced by, but not attached to, the FAC. Dkt. 29. No party has opposed these requests or disputed the authenticity of the exhibits. Therefore, Zynga’s and Plaintiff’s requests (Dkts. 19 and 29) are GRANTED. *See Branch v. Tunnel*, 14 F.3d 449, 456 (9th Cir.1994) (“[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss”) *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir.2002).

## II. LEGAL STANDARD

A Rule 12(b)(6) dismissal for failure to state a claim can be based on either: (1) the lack of a cognizable legal theory; or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.1990). The plaintiff’s factual allegations “must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In considering a Rule 12(b)(6) motion, the court is to “accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899-900 (9th

Cir.2007). For a complaint to be dismissed because the allegations give rise to an affirmative defense, “the defense clearly must appear on the face of the pleading.” *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1219 (9th Cir.1990). “If a complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.” *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir.1986).

### III. ANALYSIS

#### A. DEFENDANTS' ASSERTIONS OF CDA IMMUNITY

Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties: “No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c); *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir.2008) (“Roommates.Com”).<sup>FN3</sup> This grant of immunity does not apply if the interactive computer service provider is also an “information content provider,” which is defined as someone who is “responsible, in whole or in part, for the creation or development of” the offending content. 47 U.S.C. § 230(f)(3) (emphasis added).

FN3. Section 230 defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.” *Id.*, § 230(f)(2).

\*4 In passing Section 230, Congress sought to allow interactive computer services “to perform some editing on user-generated content without thereby becoming liable for all defamatory or other-

wise unlawful messages that they didn't edit or delete.” *Roommates.Com*, 521 F.3d at 1163. “In other words, Congress sought to immunize the removal of user-generated content, not the creation of content ....” *Id.* As noted by the Ninth Circuit, “[i]ndeed, the section is titled ‘Protection for ‘good samaritan’ blocking and screening of offensive material’ ... the substance of section 203(c) can and should be interpreted consistent with its caption.” *Id.* The Ninth Circuit has further held that “close cases” must be resolved in favor of immunity. *Id.* at 1174.

#### 1. The Face of the FAC Does Not Indicate that Zynga Is Entitled to CDA Immunity

Zynga argues that Plaintiff's claims are barred by the CDA because they treat Zynga as a publisher or speaker, and seek to hold Zynga liable for the content of third parties. In her opposition, Plaintiff does not dispute that Zynga is an “interactive computer service provider.” However, Plaintiff argues that the CDA does not encompass her claims because Zynga is an “information content provider” not entitled to immunity. Specifically, Plaintiff alleges that Zynga has both created and developed the allegedly deceptive “special offers” at issue.

The Ninth Circuit's decision *Roommates.Com* is instructive. There, the defendant operated a website that attempted to match individuals looking for roommates with individuals seeking housing. *Roommates.Com*, 521 F.3d at 1161-1162. To accomplish this, the website required users to state their preferences for the gender, family status, and sexual orientation of prospective roommates. *Id.* Various fair housing groups sued Roommates.com, alleging that its business violated the federal Fair Housing Act by allowing members to assert discriminatory preferences for housing. *Id.* at 1162. The question before the court was whether the website was entitled to immunity under the CDA even though the allegedly discriminatory content originated from third parties. *Id.* at 1165. The Ninth Circuit, in an en banc decision, found that CDA immunity did not apply because the website was an

“information content provider.” *Id.*

In reaching its decision, the Ninth Circuit interpreted “development” of content as “referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.” *Id.* at 1168. In other words, an interactive computer service provider “helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.” *Id.* Applying that interpretation, the Ninth Circuit observed that the portion of the Roommate.com profile “that is alleged to be unlawful is provided by subscribers in response to Roommate’s questions, which they cannot refuse to answer if they want to use defendant’s services.” *Id.* at 1166. “By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.” *Id.* The court also distinguished between a website that merely provides “neutral tools” that may be utilized by third parties to post unlawful content, and a website that “both elicits the allegedly illegal conduct and makes aggressive use of it in conducting its business.” *Id.* at 1171-1172.

\*5 Applying *Rommates.Com* here, the Court cannot determine at this juncture, based on the pleadings, whether Zynga is entitled to immunity under the CDA. Rather, the FAC alleges facts, which, if proven, could support the conclusion that Zynga is responsible, in whole or in part, for creating or developing the special offers at issue. Fundamentally, Plaintiff alleges that the special offers are desirable to users because they provide free virtual currency to be used in Zynga games. FAC ¶¶ 6, 8. In turn, Zynga is alleged to encourage acquisition of the virtual currency by designing their games to become more enjoyable as users obtain more virtual currency. *Id.* ¶¶ 3, 5. As noted by Plaintiff in her opposition, the lure of virtual currency is the most

important “content” within the special offer because, without it, it is unlikely any user would ever participate in the offers. Additionally, Plaintiff alleges that Zynga is responsible for the design, layout, and format of the special offers, and the special offers appear directly within Zynga’s games. *Id.* ¶¶ 12, 13, 33, 36, 37. Moreover, Plaintiff has alleged Zynga’s “material contribution” to the alleged unlawful activity by asserting that Zynga designed its games to intentionally create the demand for the virtual currency offered in those games, and then used this demand to lure consumers into the allegedly fraudulent transactions. *Id.* ¶¶ 4-6, 8-9.

Zynga’s reliance on *Goddard v. Google*, 640 F.Supp.2d 1193 (N.D.Cal.2009) is misplaced. In *Goddard*, the district court, on a motion to dismiss, found that Google was entitled to CDA immunity in connection with fraudulent advertisements appearing on its search engine. *Id.* at 1199. There, Google allowed companies that sold cell phone ring tones to post allegedly misleading ads on Google’s search engine. *Id.* at 1194. The ring tone advertisements would only appear when certain keywords were entered into the search engine by consumers. *Id.* at 1197. The advertisers could select which keywords they wanted to associate with their advertisements, and Google provided them with a keyword suggestion tool to help them identify possible keywords. *Id.* The only contribution to the ads that Plaintiff could point to was Google’s keyword suggestion tool. *Id.* Plaintiff alleged that by allowing advertisers to utilize this tool, Google had been transformed into an “information content provider” that was not entitled to CDA immunity. *Id.*

The district court determined that Google could not be held responsible for merely publishing the fraudulent advertisements on its search engine. *Id.* at 1198. Relying on *Rommates.Com*, the court found that Google did not “materially contribute to” or “enhance” the false advertising at issue. *Id.* The court reasoned that since Google provided a “neutral” tool that merely “suggested” key words that could be used by advertisers, those suggestions

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did not constitute a sufficient contribution to the ads to bring Google within the definition of a “content provider.” *Id.*

\*6 Here, Plaintiff alleges an entirely different scenario. Specifically, Plaintiff has not alleged that Zynga is a “neutral” website that merely allows third parties to post advertisements. Instead, Plaintiff asserts that Zynga is a direct participant in the fraudulent transactions that are the subject of this case, as outlined above. Therefore, at this stage, Zynga's motion to dismiss based on CDA immunity is denied.

## 2. The Face of the FAC Does Not Indicate that Adknowledge Is Entitled to CDA Immunity

Adknowledge argues that Plaintiff's claims are barred by the CDA because Adknowledge is an “online intermediary that merely ‘presents’ third-party advertisements from its Internet ‘interface’ to end users.” Dkt. 23, Def.'s Mot. 8. However, it is unclear from Plaintiff's allegations whether Adknowledge is an “interactive computer service provider,” as that term is defined by the CDA. It is also unclear whether Adknowledge falls under the “information content provider” exception to CDA immunity. Indeed, whether Adknowledge qualifies for immunity under the CDA is a fact-based inquiry. As alleged, Adknowledge is described simply as an “aggregator” that solicits advertisements from third parties and then facilitates transactions between those parties and Zynga. FAC ¶¶ 6-8. Given the limited nature of a Rule 12(b)(6) challenge, the Court cannot determine, at this stage, whether Adknowledge is entitled to CDA immunity. It would be improper to resolve this issue on the pleadings and the limited record presented. Adknowledge's motion to dismiss based on CDA immunity is denied. *See e.g., Perfect 10, Inc. v. Google, Inc.*, 2008 WL 4217837, \*8 (C.D.Cal.2008) (“preemption under the CDA is an affirmative defense that is not proper to raise in a Rule 12(b)(6) motion”) (citing *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir.2003) (immunity under 47 U.S.C. § 230(c) is an affirmative defense that a

plaintiff is not required to plead around)).

## B. PLAINTIFF HAS ADEQUATELY PLEAD HER CLAIMS UNDER RULE 9(b)

Defendants argue that Plaintiff's claims “sound in fraud,” and therefore should be dismissed for failing to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Rule 9(b) requires that, when fraud is alleged, “a party must state with particularity the circumstances constituting fraud ....” Fed.R.Civ.P. 9(b). The circumstances must “be specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge and not just deny that they have done anything wrong.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir.2009) (internal citations omitted). “Averments of fraud must be accompanied by ‘the who, what, when, where, and how’ of the misconduct charged.” *Id.* A party alleging fraud must “set forth more than the neutral facts necessary to identify the transaction.” *Id.* “Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word ‘fraud’ is not used).” *Id.*

\*7 “While fraud is not a necessary element of a claim under the CLRA and UCL, a plaintiff may nonetheless allege that the defendant engaged in fraudulent conduct.” *Id.* at 1125. A plaintiff may allege a unified course of fraudulent conduct and rely on that course of conduct as the basis of that claim. *Id.* “In that event, the claim is said to be ‘grounded in fraud’ or to ‘sound in fraud,’ and the pleading ... as a whole must satisfy the particularity requirement of Rule 9(b).” *Id.* In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, “identify the role of each defendant in the alleged fraudulent scheme.” *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir.2007) (internal brackets and citation omitted).

Here, Plaintiff admits that her allegations “sound in fraud.” Dkt. 27, Pl.'s Opp. at 21. However, Plaintiff argues that, under the UCL, she “is merely required to plead the elements of a UCL

claim which only requires proof that a defendant has engaged in a business practice that is 'likely to deceive the public.' " *Id.* Plaintiff's reliance on *Gruen v. EdFund*, 2009 WL 2136785 (N.D.Cal.2009) in support of that contention is misplaced. In *Gruen*, the plaintiff's UCL claim was not based on fraud; rather, the plaintiff alleged representations that were "likely," but not intended, to deceive. *Id.* at \*5. The *Gruen* court specifically found that the plaintiff did not allege "an overarching fraudulent scheme to defraud Plaintiff or the public," and, therefore, the court held that the fraud pleading standard did not apply. *Id.* Instead, the plaintiff needed only to show that the practice was "likely to deceive the public." *Id.* In this case, Plaintiff's claims are predicated on Defendants' "fraudulent scheme," wherein Defendants intentionally "conspired" in attempts to "mislead" users into clicking on special offers that Defendants knew were "false and misleading." FAC ¶¶ 1, 30, 16, 33; see also *id.* ¶ 14 (the special offers "developed and created by Defendants" "have repeatedly mislead and defrauded users of Zynga games"). Accordingly, Plaintiff's claims must be analyzed under the requirements of Rule 9(b).<sup>FN4</sup>

FN4. "To determine if the elements of fraud have been pleaded to state a cause of action we look to state law.... The elements of a cause of action for fraud in California are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Kearns*, 567 F.3d at 1126 (internal citation and quotation omitted).

### 1. Allegations Against Zynga

In this case, Plaintiff has satisfied Rule 9(b) with her allegations against Zynga because she has alleged the "who, what, when, where, and how" of Defendants' fraudulent scheme to incorporate "sham" offers into Zynga's online games, and Zynga's specific role in that fraudulent scheme.

Specifically, Plaintiff has explained "when" the fraudulent conduct was committed by alleging that she incurred charges on April 16, 2009 after receiving a texted "code" that could be used for virtual currency. FAC ¶ 37. In addition, Plaintiff indicates that she participated in a "risk-free Green Tea Purity Trial" special offer on June 14, 2009, asked to cancel her order for green tea supplements on June 24, 2009, was emailed regarding charges for the product on July 4, 2009, and was charged for the product on July 6, 2009 and July 20, 2009. *Id.* ¶¶ 38-40. Moreover, Plaintiff has explained "where" the fraudulent conduct occurred by describing the specific games and websites in which the allegedly deceptive and misleading special offers appeared. Plaintiff alleges that the special offers are incorporated into game applications such as Mafia Wars, FarmVille, and YoVille! that users play on social networking websites such as Facebook and MySpace. *Id.* ¶¶ 1, 3-4, 8-9, 12-14, 16-17, 25, 31, 33, 36-38, 40-41, 45, 54.

\*8 Plaintiff has also sufficiently alleged the "who" as being Defendants, and has sufficiently alleged Zynga's role in the fraudulent scheme. In particular, Plaintiff repeatedly alleges that Zynga and Adknowledge provided, funded, created, and developed the allegedly deceptive and misleading special offers. *Id.* ¶¶ 6, 7, 8. Plaintiff has also states that special offers created, designed, funded and promoted by Defendants interfaced with games created by Zynga. *Id.* ¶¶ 6-9, 11-15.

Furthermore, Plaintiff has adequately plead the "what" and the "how" of Defendants' alleged fraudulent scheme. Plaintiff describes the misleading and deceptive special offer transactions in detail, including the specific misrepresentations or omissions upon which she and other putative class members relied. *Id.* ¶¶ 8, 9, 12, 13, 34, 35, 36-41. For instance, Plaintiff alleges that each of the special offers in which she participated failed to disclose that she would incur charges for her participation, that she would be charged repeatedly and, in the case of the Green Tea offer, that she would encounter diffi-

culties in attempting to cancel. *Id.* ¶¶ 36-41. Also, Plaintiff includes in her FAC a link to a video where the allegedly fraudulent special offers are depicted in detail. *Id.* ¶ 14; *see also* Dkt. 29, Pl.'s RJN, Ex. 1. Plaintiff alleges that Zynga knew its advertisements were false by quoting Zynga's CEO, who is alleged to have admitted that the special offers were "designed to mislead consumers and generate increasing revenues for its business." FAC ¶ 16.

Zynga relies on *Kearns* in support of its argument that these allegations are not sufficient to satisfy Rule 9(b). There, the plaintiff filed a class action suit, alleging that Ford Motor Company and its dealerships acted illegally to increase sales of their Certified Pre-Owned ("CPO") vehicles. *Kearns*, 567 F.3d at 1122. The plaintiff alleged that defendants made false and misleading statements regarding the safety and reliability of its CPO vehicles in their sales materials. *Id.* at 1123. The Ninth Circuit affirmed the district court's dismissal of the plaintiff's UCL and CLRA claims for failing to comply with Rule 9(b). Specifically, the court found that the plaintiff failed to allege "the particular circumstances surrounding" the misrepresentations, in that he failed to specify what the sales materials actually stated, and he failed to explain when he was exposed to those materials and what materials he actually relied upon. *Id.* at 1126. That is not the case here. As indicated above, Plaintiff has sufficiently alleged the particular circumstances of Defendants' fraudulent scheme.

## 2. Allegations Against Adknowledge

Separate from Zynga's challenge to the "who, what, when, where, and how" of Plaintiff's fraud allegations, Adknowledge argues that Plaintiff has failed to satisfy Rule 9(b) because she does not specifically allege any wrongful or fraudulent conduct attributable to Adknowledge and fails to differentiate among defendants.

\*9 Where a plaintiff has asserted claims based on fraudulent conduct against multiple defendants, the plaintiff is required to identify the role of each

defendant in the alleged fraudulent scheme. *Swartz*, 476 F.3d at 765. However, Rule 9(b) does not require the plaintiff to "identify false statements made by each and every defendant." *Id.* at 764. Moreover, "[p]articipation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result." *Id.*

Here, Plaintiff asserts sufficient factual allegations against Adknowledge concerning its particular role in the alleged scheme. In particular, Plaintiff alleges that Adknowledge-in its specific and distinct role as an offer aggregator-was responsible for helping users participate in the special offers and aggregating the offers that appeared within Zynga's games. FAC ¶ 8. Plaintiff further alleges that Adknowledge and Zynga acted in concert to develop and create the interface that encouraged Plaintiff and putative class members into accepting the special offers. *Id.* Furthermore, Plaintiff states that Adknowledge was paid by another business partner, such as the providers of "wiki toolbar," "IQ test," "Video Professor" or "Green Tea Purity," based on the leads generated by the special offers, and that Adknowledge functioned as a "buffer" to shield Zynga from liability for offers that Defendants knew were false and misleading. *Id.* ¶¶ 8-10.

Based on the factual allegations describing Adknowledge's role in this fraudulent scheme, Plaintiff asserts, on information and belief, that Adknowledge participated in the creation and development of the special offers to which she was exposed in April and June 2009, failed to inform the Plaintiff that she would incur repeated charges if she participated in those offers, and received a portion of the funds obtained from the Plaintiff. *Id.* at ¶¶ 37-41.

In sum, Plaintiff has sufficiently identified, at the pleading stage, Adknowledge's role in the alleged fraudulent scheme.

## C. PLAINTIFF'S UNJUST ENRICHMENT



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#### CLAIM

Adknowledge separately argues that Plaintiff's claim for Unjust Enrichment (Third Claim) should be dismissed because unjust enrichment is not a recognized cause of action in California, but rather is only a legal remedy. In her unjust enrichment claim, Plaintiff alleges that Defendants have knowingly and voluntarily been enriched by their unlawful conduct, that it would be inequitable for Defendants to retain their ill-gotten gains, and that Plaintiff and the class are entitled restitution in the amount of Defendants' ill-gotten gains. FAC ¶¶ 69-73.

Formally, "there is no cause of action in California for unjust enrichment." *Melchior v. New Line Prods., Inc.*, 106 Cal.App.4th 779, 793, 131 Cal.Rptr.2d 347 (2003). However, a "court may look past the formal label of a claim for 'unjust enrichment' if the allegations state a claim which allows for the type of recovery supported by the principle of unjust enrichment." *Miletak v. Allstate Ins. Co.*, 2010 WL 809579 (N.D.Cal.2010) (citing *McBride v. Boughton*, 123 Cal.App.4th 379, 387, 20 Cal.Rptr.3d 115 (2004)). For instance, in *Miletak*, the court declined to dismiss the plaintiff's unjust enrichment claim, finding that while the unjust enrichment claim cannot stand alone as an independent cause of action, the plaintiff could seek relief based on an unjust enrichment theory in relation to his UCL claim. *Id.* \* 8 (further finding that "Plaintiff may establish an unjust enrichment claim by proving that (1) the Defendants received a benefit (2) that it unjustly retained."). Applying those principles here, Plaintiff's UCL claim, at the pleading stage, could support a claim for unjust enrichment; therefore, Adknowledge's motion to dismiss Plaintiff's unjust enrichment claim is denied.

#### D. MOTION TO STRIKE CLASS ALLEGATIONS

\*10 As a final matter, Adknowledge argues that Plaintiff has failed to allege an ascertainable class (as required by Federal Rule of Civil Procedure Rule 23), and therefore the Court should strike

Plaintiff's class action allegations under Rule 12(f), which allows a court to strike "any redundant, immaterial, impertinent, or scandalous matter" from a complaint. Fed.R.Civ.P. 12(f). However, the Ninth Circuit has indicated that Rule 12(f) is not the proper vehicle for dismissing portions of a complaint when the Rule 12(f) challenge is really an attempt to have portions of the complaint dismissed; such a challenge is better suited for a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment. *Whittlestone, Inc. v. Handi-Craft Co.*, --- F.3d ----, 2010 WL 3222417, \* 4 (9th Cir. August 17, 2010) ("Were we to read Rule 12(f) in a manner that allowed litigants to use it as a means to dismiss some or all of a pleading ... we would be creating redundancies within the Federal Rules of Civil Procedure, because a Rule 12(b)(6) motion (or a motion for summary judgment at a later stage in the proceedings) already serves such a purpose."). Accordingly, Adknowledge's motion to strike Plaintiff's class allegations is denied.

#### IV. CONCLUSION

For the above stated reasons.

#### IT IS HEREBY ORDERED THAT:

1. Defendant Zynga Game Network, Inc.'s Motion to Dismiss First Amended Complaint is DENIED.
2. Defendants Adknowledge, Inc. and KITN Media USA, Inc.'s Motion to Dismiss First Amended Class Action Complaint and Motion to Strike Class Action Allegations is DENIED.
3. A telephonic Case Management Conference is scheduled in this matter for **February 10, 2011 at 3:30 p.m.** The parties shall meet and confer prior to the conference and shall prepare a joint Case Management Conference Statement which shall be filed no later than ten (10) days prior to the Case Management Conference that complies with the Standing Order for All Judges of the Northern District of California and the Standing Order of this Court. Plaintiff shall be responsible for filing the

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statement as well as for arranging the conference call. All parties shall be on the line and shall call (510) 637-3559 at the above indicated date and time.

4. This Order terminates Dockets 18 and 23.

IT IS SO ORDERED.

N.D.Cal.,2010.

Swift v. Zynga Game Network, Inc.

Slip Copy, 2010 WL 4569889 (N.D.Cal.), 51 Communications Reg. (P&F) 1118

END OF DOCUMENT

# **Exhibit G**

## Ewbank, Laura T. (Perkins Coie)

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**From:** Ewbank, Laura T. (Perkins Coie)  
**Sent:** Wednesday, October 27, 2010 4:54 PM  
**To:** John LeRoy  
**Subject:** Facebook v. MaxBounty

Dear John,

As I confirmed in our phone call today, Facebook is willing to provide you with a two-week extension on your Answer, which makes MaxBounty's Answer due on or before November 24, 2010. I have also attached a copy of the service package for and proof of service on MaxBounty, as you requested.

We would also like to take this opportunity to remind you of MaxBounty's obligation to preserve any and all documents potentially related to the claims and facts raised in the complaint. As we explained in the cover letter enclosed with the summons and complaint, this includes all categories of electronically-stored and hard copy information. In particular and without limitation, MaxBounty's preservation obligation includes all documents and electronically stored information of all current and former employees of MaxBounty that have had any involvement with any official or unofficial Facebook advertising departments, groups, initiatives, or communications with MaxBounty affiliates regarding Facebook advertising, including but not limited to Adam Harrison.

Please contact me with any questions.

Thank you,  
Laura



MaxBounty Service Package.pdf



MaxBounty - Proof of Service.p...

**Laura Ewbank** | Perkins Coie LLP

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