

1 Gregory P. Goonan (Cal. Bar #119821)
The Affinity Law Group APC
 2 600 West Broadway, Suite 400
 San Diego, CA 92101
 3 Tel: 619-702-4335
 Fax: 619-243-0088

4 Attorneys for Plaintiff
 5 Marketing Information Masters, Inc.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Marketing Information Masters, Inc., a
 California corporation,

Plaintiff,

vs.

The Board of Trustees of the California State
 University System, a public entity acting
 through its subdivision San Diego State
 University; and Robert A. Rauch, an
 individual,

Defendants.

Case No. 06 CV 1682 JAH (JMA)

**PLAINTIFF’S MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 OPPOSITION TO MOTION TO DISMISS
 SECOND AMENDED COMPLAINT**

Date: June 6, 2008
 Time: 2:30 p.m.
 Court: 11 (Hon. John A. Houston)

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Fed. R. Civ. Proc. 8 11

1 Defendants Board of Trustees of the California State University System, acting through
2 and representing its subdivision San Diego State University (hereinafter “SDSU”) and the
3 individual defendant Robert Rauch bring this motion to seek dismissal of the second complaint of
4 plaintiff Marketing Information Masters, Inc. (“MIMI”). MIMI hereby respectfully submits this
5 memorandum of points and authorities in opposition to the motion to dismiss by SDSU and
6 Rauch.
7

8
9 **I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT**

10 As the Court is aware, on February 5, 2008, the Court entered an order (the “February 5
11 Order”) granting in part and denying in part a motion to dismiss brought by SDSU and Rauch
12 against MIMI’s first amended complaint. By the February 5 Order, the Court found that SDSU
13 and Rauch in his official capacity only were immune from all of MIMI’s claims pursuant to the
14 Eleventh Amendment to the United States Constitution. The Court further found that Rauch was
15 not entitled to Eleventh Amendment immunity against MIMI’s claims brought against him in his
16 individual capacity. Finally, by the February 5 Order, the Court gave MIMI leave to file a second
17 amended complaint to assert additional allegations to establish that its state law claims against
18 Rauch in his individual capacity were not preempted.

19 MIMI filed its second amended complaint (the complaint subject to the present motion) on
20 February 25, 2008. In preparing such complaint, counsel was faced with a dilemma. The Court’s
21 February 5 Order did not specify what form the second amended complaint should take, and
22 specifically did not address whether the allegations and claims against SDSU and Rauch in his
23 official capacity should remain as part of the second amended complaint or should be stricken
24 from the second amended complaint. Consequently, counsel for MIMI had to determine whether
25 the allegations against SDSU and Rauch in his individual capacity needed to be deleted as part of
26 the amendment of the complaint.

27 As explained further in the Declaration of Gregory P. Goonan submitted herewith in
28

1 support of this opposition and Defendants’ companion Rule 11 motion, MIMI’s counsel
2 researched the issue carefully and concluded (for the reasons discussed below) that the allegations
3 against SDSU and Rauch in his official capacity needed to remain in the second amended
4 complaint, Accordingly, the only changes that MIMI’s counsel made from the first amended
5 complaint to the second amended complaint was to include the additional allegations that establish
6 that MIMI’s state law claims are not preempted.

7 By the present motion, Defendants now move to dismiss the claims against SDSU and
8 Rauch in his official capacity because SDSU and Rauch (in his official capacity) because SDSU
9 and Rauch (in his official capacity) enjoy immunity from such claims. But the Court already has
10 found that SDSU and Rauch (in his official capacity) are immune from such claims. So the issue
11 of the immunity of SDSU and Rauch in his official capacity already has been resolved and the
12 present motion to dismiss based on such grounds is moot and should be denied.

13 Defendants also once again ask the Court to dismiss MIMI’s state law claims on
14 preemption grounds. As the Court explained at page 9 of the February 5 Order, a state law claim
15 like MIMI’s state claims here are not preempted if such claim contains “an element that is not
16 present in the Copyright Act which materially changes the cause of action” Here, MIMI has
17 added allegations in paragraphs 24, 58, 60, 61, 64, 68 71 and 72 that establish the required “extra
18 elements” necessary to avoid preemption. Accordingly, Defendants’ motion to dismiss MIMI’s
19 state law claims on preemption grounds also should be denied.

20

21 **II. ARGUMENT**

22 A. Defendants’ Request To Dismiss The Claims Against SDSU And Rauch In His
23 Official Capacity Should Be Denied As Moot

24 MIMI and its counsel want to make one thing clear at the outset: they fully understand and
25 do not dispute that the Court by the February 5 Order already has decided that SDSU and Rauch in
26 his official capacity enjoy immunity from MIMI’s copyright infringement and state law claims
27 here. Consequently, that issue does not need to be addressed or decided again by this motion.

28 But the fact that SDSU and Rauch in his official capacity are immune from MIMI’s claims

1 does not answer the question whether MIMI was obligated to delete from the second amended
2 complaint all of the allegations against SDSU and Rauch in his official capacity. Contrary to
3 Defendants’ unseemly rhetoric, MIMI did not “shamelessly” include such allegations in the
4 second amended complaint just for the fun of it. On the contrary, MIMI kept such allegations in
5 its second amended complaint after careful research and analysis of the case law and the common
6 sense of the situation by its counsel.

7 As outlined above, the Court’s February 5 Order posed a dilemma because it did not
8 expressly state whether or not the allegations about SDSU and Rauch in his official capacity
9 should remain in or be deleted from MIMI’s second amended complaint. As the Court can see
10 from the present motion and the companion Rule 11 motion, Defendants feel strongly that all such
11 allegations should have been deleted.¹ The problem for Defendants, however, is that its argument
12 finds no support in the case law or in common sense.²

13 Upon receipt of the Court’s February 5 Order, MIMI’s counsel determined that MIMI
14 would file a second amended complaint to add additional allegations to demonstrate that MIMI’s
15 state law claims were not preempted. As explained in the Goonan Declaration, MIMI’s counsel

16 ¹ It should be noted that the allegations in paragraphs 1 through 44 of the second amended
17 complaint all would have been included in the second amended complaint even if MIMI had
18 determined to delete its claims against SDSU and Rauch in his official capacity because such
19 allegations are necessary to provide the background facts for MIMI’s claims against Rauch in his
20 individual capacity. Indeed, the only changes that would have been made from MIMI’s first
21 amended complaint to MIMI’s second amended complaint, even if MIMI had determined to delete
22 its claims against SDSU and Rauch officially, would have been to change the word “Defendants”
23 to “Rauch;” eliminate the reference to wrongdoing by SDSU in paragraphs 12, 24, 36, 37, and 38;
24 delete paragraphs 18 and 19; and delete the reference to Rauch in his official capacity in paragraph
25 21. Given such minor changes, MIMI submits it is hard to take seriously Defendants’ argument
26 that its attack on the second amended complaint is not a textbook example of a “form over
27 substance” argument.

28 ² Indeed, as set forth in the Goonan Declaration and as discussed in MIMI’s opposition to
Defendants’ Rule 11 motion, MIMI’s counsel asked Defendants’ counsel to provide case authority
that specifically held that MIMI was obligated to delete the allegations against SDSU and Rauch
in his official capacity because of the Court’s immunity ruling. While defense counsel cited some
general cases (which also are cited in Defendants’ present motion and Rule 11 motion) which
provided that a plaintiff could not re-file in another action claims that had already been dismissed,
such cases really were of no help because they did not address the issue raised here – whether
claims had to be deleted from an amended pleading because of an immunity ruling. Critically,
defense counsel was not able to cite a single case that dealt with the specific situation presented
here. One would think there would be some case law right on point if the issue was as clear as
Defendants seem to think it is.

1 identified that there was an issue whether the claims against SDSU and Rauch should be kept in
2 the second amended complaint or should be deleted. As explained in the Goonan Declaration,
3 MIMI's counsel carefully researched the issue but surprisingly could not locate any case law on
4 point. So MIMI's counsel was forced to decide the correct course of action based on analysis of
5 general principles of pleading.

6 The law has long been settled that an amended pleading replaces and supersedes the prior
7 pleading that is amended by the amended pleading. As the Ninth Circuit explained in its recent
8 decision in *Ogansalu v. Nair*, 2008 WL 187050 (9th Cir. 2008), "an amended pleading supersedes
9 the original pleading such that 'after amendment the original pleading no longer performs any
10 function and is treated thereafter as nonexistent' (citing and quoting *Ferdik v. Bonzelet*, 963 F.2d
11 1258, 1262 (9th Cir. 1992);" *see also Bullen v. De Bretteville*, 239 F.2d 824 (9th Cir. 1956)
12 (accord).] An important corollary of this principle is that all causes of action in an original
13 complaint that are not alleged in an amended complaint are deemed waived. [*See, e.g., King v.*
14 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).] Another important corollary of these concepts is the
15 familiar rule that there can be only one judgment in a case.

16 As explained in the Goonan Declaration, based on the foregoing well-settled pleading
17 concepts, counsel for MIMI determined that it was necessary and appropriate for MIMI to include
18 the allegations and claims against SDSU and Rauch in his official capacity in the second amended
19 complaint. MIMI's counsel reached this conclusion for several reasons. First, given the foregoing
20 authorities, it cannot be disputed that MIMI's second amended complaint replaced and superseded
21 its first amended complaint, thereby rendering the first amended complaint "nonexistent."

22 But more importantly, it was MIMI's analysis that filing a second amended complaint
23 without the allegations and claims against SDSU and Rauch in his official capacity would result in
24 a waiver of MIMI's claims against SDSU and Rauch in his official capacity. While MIMI
25 understands and accepts that the Court has found that SDSU and Rauch officially are immune
26 from MIMI's claims, MIMI does not want to waive such claims. Indeed, MIMI ultimately may
27 seek review of the Court's immunity ruling by the Ninth Circuit, and accordingly was concerned
28 that such appellate review might be adversely impacted or rendered impossible is MIMI did not

1 include its allegations and claims against SDSU and Rauch in its second amended complaint,
2 thereby waiving such claims.

3 And finally, as noted, only one final judgment can be rendered in this case. MIMI was
4 concerned that judgment could not be entered in favor of SDSU and Rauch in his official capacity
5 if MIMI did not include its claims against SDSU and Rauch in his official capacity in the second
6 amended complaint. Stated another way, given that MIMI's second amended complaint
7 superseded the first amended complaint and the first amended complaint became a nullity for
8 pleading and judgment purposes, it is not possible in this action for one judgment to be rendered
9 on the second amended complaint on MIMI's claims against Rauch individually, and a separate
10 judgment in favor of SDSU and Rauch in his official capacity on the first amended complaint.
11 MIMI did not have this concern out of any altruistic motive – instead, MIMI's concern about
12 having judgment properly entered in favor of SDSU and Rauch in his official capacity was
13 motivated by a concern that such a judgment is required to allow for appellate review of the
14 Court's immunity ruling.

15 As explained in the Goonan Declaration, MIMI's counsel tested his conclusions as
16 explained above against common sense to make sure his conclusions were grounded in reality. In
17 undertaking such analysis, MIMI's counsel considered two other scenarios that might have
18 occurred in this case. Under one scenario, MIMI could have decided not to file an amended
19 complaint to address the preemption issues, but rather just to proceed on its copyright
20 infringement claim against Rauch individually. Under another scenario, the Court might have
21 decided that that SDSU and Rauch in his official capacity were immune, but that MIMI's state law
22 claims were not preempted.

23 The critical point about both of the foregoing scenarios is that the first amended complaint
24 would have stood as the operative pleading in this case. In such case, the first amended complaint
25 would have contained and retained all of the allegations and claims against SDSU and Rauch in
26 his official capacity that now are in dispute by this motion.

27 Certainly, under either of these scenarios, MIMI would not have had any obligation to file
28 an amended complaint which deleted all allegations against SDSU and Rauch in his official

1 capacity just because the Court found them immune. Instead, the allegations and claims against
2 SDSU and Rauch in his official capacity would remain a part of the operative pleading but neither
3 SDSU nor Rauch in his official capacity would be required to file an answer to such claims. On
4 the contrary, only Rauch in his individual capacity would be required to file an answer to the
5 operative complaint. The filing of the second amended complaint is the functional equivalent of
6 the two scenarios discussed above.

7 MIMI submits the foregoing analysis shows clearly why MIMI did not do anything
8 improper in retaining the allegations and claims against SDSU and Rauch in his official capacity
9 in the second amended complaint notwithstanding the Court’s immunity ruling. Indeed, the
10 foregoing analysis makes crystal clear that Defendants’ request to dismiss the claims against
11 SDSU and Rauch individually is an unfortunate yet textbook example of an argument that elevates
12 form over substance.

13 The bottom line here is that the Court already has found that SDSU and Rauch in his
14 official capacity enjoy immunity against MIMI’s claims. Nevertheless, for the reasons discussed
15 above, it was necessary and appropriate for MIMI to retain the allegations and claims against
16 SDSU and Rauch in his official capacity in the second amended complaint.³ However, because of
17 the Court’s prior immunity ruling, it is not necessary for the Court to again find that SDSU and
18 Rauch in his official capacity are immune. Simply put, Defendants’ request for dismissal of
19 MIMI’s claims against SDSU and Rauch in his official capacity is moot and should be denied.⁴

20 ³ The notion articulated at pages 4 through 5 of Defendants’ memorandum in support of this
21 motion that the second amended complaint supposedly does not provide Rauch in his individual
22 capacity with “fair notice and the ability to draft a cogent answer” is, with all respect, so
23 nonsensical that it borders on the absurd. There are only four causes of action in the second
24 amended complaint, and it is clear from the allegations of the second amended complaint (as well
25 as the Court’s February 5 Order) that all four causes of action have been asserted against Rauch in
26 his individual capacity. The second amended complaint is no different than any other complaint in
a multiple defendant case. Rauch’s obligation is to respond to those allegations that he reasonably
determines set forth the claims against him individually (which are all of the allegations in the
second amended complaint). Under such circumstances, it strains credibility (to be charitable) for
Rauch to assert that he cannot understand the complaint or the claims against him, or formulate a
“cogent” answer.

27 ⁴ The cases cited at page 3 of Defendants’ memorandum in support of this motion have no
28 application in this case and do not compel a different result. None of the cited cases deal with the
specific situation presented here, which involves whether claims subject to immunity need to be

1 B. Rauch's Request To Dismiss MIMI's State Law Claims Should
2 Be Denied Because The State Law Claims Are Not Preempted

3 As noted above, the Court correctly explained at page 9 of the February 5 Order that state
4 law claims like MIMI's state claims here are not preempted if such claims contain "an element
5 that is not present in the Copyright Act which materially changes the cause of action . . . (citing
6 Balboa v. Trans Global, 218 Cal. App. 3d 1327 (1990) ." Here, MIMI has asserted claims for
7 conversion, misappropriation of trade secrets, and unfair business practices under California law
8 against Rauch in his individual capacity. As discussed below, the allegations in support of each of
9 these claims establish the "extra element" necessary to avoid preemption, so Rauch's request to
10 dismiss MIMI's state law claims on preemption grounds should be denied.

11 1. Conversion: MIMI's conversion claim is based on the Ninth Circuit decision in G.S.
12 Rasmussen & Assoc. v. Kalita Flying Service, Inc., 958 F.2d 896 (9th Cir. 1992). At page 12 of the
13 February 5 Order, the Court explained that it believed that MIMI's conversion claim was
14 preempted by the Copyright Act because MIMI's conversion claim was seeking damages for
15 Rauch's improper use of MIMI's property, not the return of such property. However, in its
16 decision in G.S. Rasmussen, the Ninth Circuit expressly held that a conversion claim under state
17 law based upon the defendant's use of the plaintiff's tangible materials and intangible ideas as a
18 shortcut to obtain financial and other benefits was not preempted by the Copyright Act. [G.S.
19 Rasmussen, 958 F.2d at 904.]

20 The facts in G.S. Rasmussen are similar to those here. In that case, the defendant
21 improperly misappropriated and used the plaintiff's written materials and intangible
22 methodologies to obtain an FAA airworthiness certificate for an airplane that was modified in a
23 particular way. Based on such facts, the Ninth Circuit found that the plaintiff's claim for
24 conversion damages based upon the improper use by the defendant of the plaintiff's materials was
25

26 deleted from an amended pleading. On the contrary, all of the cited cases deal with a situation
27 where a court has dismissed claims and the plaintiff then sought to assert the dismissed claims in a
28 new and separate action. That clearly is not the situation here, so the cases relied upon by
Defendants at page 3 of their memorandum are inapposite.

1 not preempted. [*Id.*]

2 Likewise, in this case MIMI alleges that Rauch used MIMI’s tangible and intangible
3 materials and things to conduct the 2004 economic impact study for the Holiday Bowl as well as
4 to be able to obtain the benefit of being hired to conduct other economic impact studies and
5 surveys. [See Second Amended Complaint ¶¶ 60-64.] In accordance with the Ninth Circuit
6 decision in *G.S. Rasmussen*, such a claim is not preempted by the Copyright Act. Accordingly,
7 Rauch’s request to dismiss MIMI’s conversion claim should be denied.

8 2. Misappropriation of Trade Secrets: At page 12 of the February 5 Order, the Court
9 explained that MIMI’s state law claim for misappropriation of trade secrets as alleged in MIMI’s
10 first amended complaint was preempted because the first amended complaint did not contain any
11 allegation that Rauch disclosed MIMI’s confidential information. MIMI’s second amended
12 complaint specifically addresses the issue raised by the Court – paragraph 72 expressly alleges that
13 Rauch disclosed MIMI’s confidential and proprietary information to multiple third persons and
14 entities, and in doing so violated the confidentiality and secrecy that protected MIMI’s materials.
15 Such allegations establish the “extra element” necessary to avoid preemption so Rauch’s request
16 to dismiss MIMI’s misappropriation claim should be denied.⁵

17 3. Unfair Business Practices: MIMI’s unfair business practices claim is brought pursuant
18 to Section 17200 of the California Business & Professions Code. The coverage of Section 17200
19 is “sweeping, embracing anything that can properly be called a business practice and that at the
20 same time is forbidden by law . . . It governs anti-competitive business practices as well as injuries

21 _____
22 ⁵ Rauch argues at page 9 of Defendants’ memorandum that the misappropriation claim is
23 preempted because MIMI supposedly has not alleged that Rauch had a duty to maintain the
24 confidentiality of MIMI’s materials. Such argument is nothing but a hypertechnical pleading
25 argument that is contrary to the notice pleading requirements embodied in Rule 8 of the Federal
26 Rules of Civil Procedure. MIMI submits that any fair reading of paragraphs 68 through 73 of the
27 second amended complaint will result in the conclusion that such allegations are sufficient to put
28 Rauch on notice that MIMI is alleging that Rauch had a duty to maintain the secrecy of MIMI’s
materials. After all, if Rauch did not have such duty, MIMI’s allegations that Rauch violated the
confidentiality and secrecy of MIMI’s materials by disclosing them would not make much sense.
However, to the extent the Court is persuaded by Rauch’s argument, MIMI requests leave to file
an amended complaint for the simple purpose of adding one additional allegation that Rauch had a
duty to maintain the secrecy of MIMI’s materials.

1 to consumers, and has as a major purpose the preservation of fair business competition.” [*Cel-*
2 *Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999).]

3 Here, the allegations of the second amended complaint establish a claim for violation of
4 Section 17200 by Rauch in his individual capacity. For the same reasons as have been discussed
5 in connection with the conversion and misappropriation of trade secrets claims, MIMI’s Business
6 & Professions Code section 17200 claim is not preempted.

7

8 **III. CONCLUSION**

9 For the reasons discussed herein, MIMI respectfully submits that further amendment of its
10 complaint is not required. Instead, MIMI asks the Court to deny Defendants’ motion to dismiss
11 and order Rauch in his individual capacity to file an answer to MIMI’s second complaint within
12 20 days.

13 If the Court determines that MIMI needs to specifically allege as part of its
14 misappropriation claim that Rauch had a duty not to disclose MIMI’s confidential and proprietary
15 information, MIMI requests leave to file an amended complaint to include such allegation. If such
16 amendment is required, MIMI requests clarification and guidance from the Court whether the
17 allegations and claims against SDSU and Rauch in his official capacity should be retained in the
18 amended complaint (as MIMI believes is necessary and appropriate for the reasons discussed
19 herein) or deleted from the amended complaint (as argued by Defendants).

20

21

22 DATED: May 5, 2008

THE AFFINITY LAW GROUP APC

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By: /s/ Gregory P. Goonan
Gregory P. Goonan
Attorneys for Plaintiff
Marketing Information Masters, Inc.
E-Mail: ggoonan@affinity-law.com

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Certificate of Service

The undersigned hereby certifies that on this 5th day of May 2008, a true and accurate copy of the attached document was electronically filed with the Court, to be served by operation of the Court's electronic filing system, upon the following:

Jonathan S. Pink, Esq.
Lewis Brisbois Bisgaard & Smith LLP
650 Town Center Drive, Suite 1400
Costa Mesa, CA 92626
Attorneys for Defendants

/s/ Gregory P. Goonan