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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 GLAM AND GLITS NAIL DESIGN,  
12 INC., a California corporation,  
13 Plaintiff,  
14 v.  
15 #NOTPOLISH, INC., a California  
16 corporation; NHU XUAN LAI, an  
17 individual; and DOES 1 THROUGH 10,  
18 inclusive,  
19 Defendants.

Case No.: 21-cv-0052-GPC-DEB

**ORDER:**

**(1) GRANTING IN PART AND  
DENYING IN PART THE MOTIONS  
TO DISMISS; AND**

**(2) DENYING MOTION TO STRIKE**

**[ECF Nos. 26–28]**

**INTRODUCTION**

20 Before this Court are two Motions to Dismiss and a Motion to Strike, filed by  
21 Defendants #Notpolish, Inc. (“NotPolish”), and Nhu Xuan Lai (“Ms. Lai”). ECF Nos.  
22 26–28. Plaintiff Glam and Glits Nail Design, Inc. (“G&G”) filed Oppositions to each,  
23 and the Defendants filed their corresponding Replies. *See* ECF Nos. 30, 31, 34–36.  
24 Upon reviewing the moving documents and the case record, the Court **GRANTS in part**  
25 **and DENIES in part** the two Motions to Dismiss, and **DENIES** the Motion to Strike.  
26 G&G may amend the complaint to address any issues raised by the Court in this Order.  
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## **BACKGROUND**

### **I. Procedural History**

G&G filed the original Complaint on January 12, 2021. ECF No. 1. While NotPolish and Ms. Lai moved to dismiss the Complaint on March 11, 2021, ECF Nos. 18, 19, G&G filed its First Amended Complaint (“FAC”) on March 25, 2021, ECF No. 22, and the Court denied the two initial motions to dismiss as moot on March 31, 2021, ECF No. 25.

The FAC now alleges eleven causes of action: (1) misappropriation of trade secrets in violation of the federal Defend Trade Secrets Act; (2) misappropriation of trade secrets in violation of the California Uniform Trade Secrets Act; (3) defamation; (4) violation of the Computer Fraud and Abuse Act; (5) conversion; (6) trespass to chattels; (7) breach of the duty of loyalty; (8) tortious interference with actual economic relations; (9) tortious interference with prospective economic relations; (10) unfair competition; and (11) conspiracy. *See* ECF No. 22. Count Seven is directed only against Ms. Lai, whereas the other causes of action are against all Defendants.

On April 8, 2021, Ms. Lai filed a Motion to Dismiss and a Motion to Strike, ECF Nos. 26, 28, and NotPolish filed a Motion to Dismiss, ECF No. 27. Of note, whereas NotPolish moves to dismiss all causes of action alleged in the FAC, Ms. Lai’s Motion to Dismiss does not address Counts Three (defamation) and Eleven (conspiracy). Instead, Ms. Lai seeks to dispose of certain (but not all) defamation allegations via her Motion to Strike. On April 22, 2021, G&G filed a consolidated Opposition to the two Motions to Dismiss, and an Opposition to the Motion to Strike. ECF Nos. 30, 31. The Defendants filed their corresponding Replies on April 29, 2021. ECF Nos. 34–36.

On June 3, 2021, G&G and NotPolish provided Notices of Supplemental Authority, *see* ECF Nos. 38, 39, in which the Supreme Court decided on an issue affecting G&G’s allegations relating to the Computer Fraud and Abuse Act.

1 **II. Factual Allegations**

2 This lawsuit concerns a dispute between G&G, a nail care products manufacturer  
3 and vendor, versus NotPolish, a business competitor of G&G, and Ms. Lai, a former  
4 employee of G&G who later became an employee of NotPolish. The parties disagree on  
5 the motives behind G&G’s lawsuit and the nature of the allegations. *See, e.g.*, ECF No.  
6 28-1 at 1.<sup>1</sup> But at least for the purposes of adjudicating the Motions in front of this  
7 Court,<sup>2</sup> the alleged facts are as follows.

8 **A. G&G and Its Confidential Customer Information**

9 G&G started its business in 2007. Over the past 13 years, it cultivated customer  
10 relationships with numerous nail supply stores across the United States, many of which  
11 are owned and operated by Vietnamese Americans. *See* ECF No. 22 at 5. As part of  
12 managing customer relationships, G&G has developed what it refers to as the “Glam and  
13 Glits Confidential Customer Information” (“Information”), which includes: “customer  
14 lists, the non-public personal mobile numbers of each of the owners and operators of  
15 [G&G’s] customers and distributors, each customer’s account purchasing history, the  
16 pricing for each account, and an understanding of unique, customer-specific product  
17 preferences.” *See id.* ¶ 14. According to G&G, it would be nearly impossible to “reverse  
18 engineer” any of the Information, for the details are not generally known to the industry,  
19 nor has G&G disclosed the Information (or any part thereof) to the public. *See id.* at 6–8.

20 G&G has taken several measures to protect the secrecy of the Information. *See id.*  
21 ¶ 21. For example, G&G limits the disclosure of the Information to select employees.

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23 <sup>1</sup> References to specific page numbers in a document filed in this case correspond to the  
24 page numbers assigned by the Court’s Electronic Case Filing (“ECF”) system.

25 <sup>2</sup> As discussed *infra* pages 7–8 of this Order, at the motion to dismiss stage of the lawsuit,  
26 the Court assumes the factual allegations as true and construes all inferences from them  
27 in the light most favorable to Plaintiff G&G.

1 The employees who may access the Information must only use their company-issued  
2 iPhone that may only be synched to the company iCloud database. G&G also “requir[es]  
3 that all employees return all confidential and proprietary information and trade secrets  
4 upon termination of their employment; and requir[es] confidentiality from employees” on  
5 such confidential and proprietary information and trade secrets.

6 **B. Ms. Lai’s Access to the Confidential Customer Information**

7 One of the employees who had access to the Information was Ms. Lai. She was  
8 employed from November 2016 to July 2020 as part of G&G’s administrative team to  
9 maintain business relationships, sell products and process customer orders, expand the  
10 quantity and scope of products that customers purchased, and advise customers on the  
11 products offered by G&G. *See id.* ¶ 29. In spite of her lack of prior sales experience, Ms.  
12 Lai “was assigned a significant role in sales and customer relationship management,” due  
13 to her fluency in Vietnamese for customers who preferred to conduct business in  
14 Vietnamese. *See id.* ¶ 33.

15 Accordingly, G&G provided Ms. Lai with a company-issued iPhone, synched to  
16 the company iCloud database. *See id.* ¶ 35. The first time G&G provided the company  
17 iPhone was around November 2016. At that time, Ms. Lai agreed to: (1) maintain the  
18 Information in confidence and use it only for purposes of her employment with G&G, (2)  
19 not conduct any G&G business on any personal cellphone, and (3) conduct all work-  
20 related communications only on the company iPhone, all per the instructions provided by  
21 G&G. *See id.* at 11–12.

22 Around October 2018, G&G provided Ms. Lai with a new company iPhone. *See*  
23 *id.* ¶ 42. According to the FAC, Ms. Lai copied what was in the former company iPhone  
24 and transferred it to the new company iPhone, thus still having access to the Information.  
25 *See id.* ¶ 44. However, she did not synch the new company iPhone to the company  
26 iCloud, and instead synched it to her personal iCloud account. *See id.* ¶ 45. This had two  
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1 effects. First, all the Information was now also saved to Ms. Lai’s personal iCloud  
2 storage. Second, new information Ms. Lai generated during her employment after  
3 October 2018 was not saved to the company iCloud, but to Ms. Lai’s personal iCloud  
4 instead. *See id.* at 12–13.

### 5 **C. Ms. Lai’s Job Switch to NotPolish**

6 G&G suspects that “as early as late-November or early December 2019,” while  
7 still employed by G&G, Ms. Lai “conceived and executed a plan” to redirect business to  
8 NotPolish, to which NotPolish “was aware of, agreed to, and/or assisted in” Ms. Lai’s  
9 plan. *See id.* ¶¶ 50, 51. In the FAC, G&G presents several supporting allegations. First,  
10 Ms. Lai and one of the co-owners of NotPolish knew each other since high school. *See*  
11 *id.* ¶¶ 54, 55. Second, while being angry about a “Secret Santa” game at the company  
12 gathering in December 2019, Ms. Lai allegedly said she could get a job at NotPolish  
13 “anytime,” or words to that effect. *See id.* ¶ 58. Third, allegedly Ms. Lai’s attitude  
14 during her employment changed around that time as well. Whereas in the past Ms. Lai  
15 generally sought to improve her performance upon a question or reprimand, starting  
16 around December 2019, on more than one occasion she did not apologize or try to fix her  
17 performance, simply asking “Am I fired?” *See id.* ¶ 59.

18 Ms. Lai’s employment with G&G ended on July 22, 2020.<sup>3</sup> According to G&G,  
19 Ms. Lai “tried to avoid” turning in the company iPhone when her employment ended, and  
20 a different employee secured the company iPhone instead. *See id.* at 15. And it was that  
21 day, upon receiving a text message from Ms. Lai, when G&G’s CEO first learned that  
22 Ms. Lai had not been complying with the company policy (including the iPhone-iCloud  
23 synch). *See id.* at 16. Ms. Lai’s text message demonstrated that she knew about the  
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26 <sup>3</sup> Paragraph 62 of the FAC states “2021,” but the case record and other parts of the FAC  
27 indicate that this is a typo. *See, e.g.*, ECF No. 22 at ¶ 29.

1 company's policy and her failure to comply with it, and that she was aware of such  
2 failure. *See id.* at 17. In sum, G&G alleges that Ms. Lai, by synching the company  
3 iPhone to her personal iCloud, took the Information with her upon leaving G&G.

#### 4 **D. NotPolish and Ms. Lai's "Campaign" Against G&G**

5 According to G&G, NotPolish and Ms. Lai soon after contacted "each and every"  
6 Vietnamese-speaking customer who appeared in the Information, and attempted to  
7 redirect their purchases from G&G to NotPolish. As supporting allegations, G&G  
8 references certain customers who reached out to G&G about Ms. Lai's "constant" and  
9 "repeated" calls, in which Ms. Lai could only have known the customers' direct numbers  
10 because they were contained in the Information. *See id.* at 18–19.

11 G&G also alleges that NotPolish and Ms. Lai "orally published defaming lies  
12 about Glam and Glits' CEO, falsely accusing him of using illegal drugs." *Id.* ¶ 79.  
13 According to G&G, a customer relayed the false statements she had been told by Ms. Lai.  
14 *Id.* ¶ 81. In addition, the Defendants spread "false and deceptive statements about the  
15 Glam and Glits workplace on social media, threatening potential witnesses, and  
16 interfering with Glam and Glits' relationships with its employees." *Id.* ¶ 82. In general,  
17 the FAC provided social media posts by Ms. Lai, which included statements such as  
18 "Calling CVS 7th times to schedule Covid testing cus people at work are getting  
19 infected," "snitches get stitches" (allegedly directed against G&G employees), and "they  
20 used to put me in the back cus they said I'm too Asian and the American looking one can  
21 take the front seats." *See id.* at 21–30. The FAC also provided social media posts in  
22 which Ms. Lai is allegedly referring to the G&G workplace as "prison." *See, e.g., id.* ¶  
23 98. In some of these social media posts, NotPolish's co-owner commented on them in  
24 support. *See, e.g., id.* ¶ 95.

25 The FAC states that as a result of the Defendants' actions, G&G's business  
26 opportunities, competitive edge, confidential and proprietary information and trade  
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1 secrets, and existing and potential relationships (with employees, customers, and other  
2 business associates) have been, and will continue to be, irreparably harmed. This is  
3 because while the value of the relationships are difficult to quantify, these relationships  
4 are cultivated over years, and once lost to a competitor, it takes significant time and  
5 resources to restore them. *See id.* at 30–31.

## 6 MOTION TO DISMISS

7 Assuming the factual non-legal conclusions in the FAC as true and making  
8 inferences most favorable to G&G, the party opposing the Motions to Dismiss, the Court  
9 concludes that most of G&G’s claims survive. While the Court **DISMISSES** Counts  
10 Four to Six and the related conspiracy claims, this Court also **GRANTS** an opportunity  
11 for G&G to amend its complaint so that it can cure the defects that the Court raised in this  
12 Order.

### 13 **I. Legal Standard**

14 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (“Rule  
15 12(b)(6)”) tests the sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th  
16 Cir. 2001). This is to make sure “that it is not unfair to require the opposing party to be  
17 subjected to the expense of discovery and continued litigation.” *Starr v. Baca*, 652 F.3d  
18 1202, 1216 (9th Cir. 2011). Dismissal under Rule 12(b)(6) is warranted if the complaint  
19 either lacks a cognizable legal theory, or lacks sufficient facts alleged to support a  
20 cognizable legal theory. *See Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d  
21 1035, 1041 (9th Cir. 2010) (citing *Navarro*, 250 F.3d at 732). While a plaintiff need not  
22 give “detailed factual allegations,” a plaintiff must plead sufficient facts that, if true,  
23 “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550  
24 U.S. 544, 545 (2007).

25 “To survive a motion to dismiss, a complaint must contain sufficient factual  
26 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*  
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1 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 547). A claim is  
2 facially plausible when the factual allegations permit “the court to draw the reasonable  
3 inference that the defendant is liable for the misconduct alleged.” *Id.* In other words,  
4 “the nonconclusory ‘factual content,’ and reasonable inferences from that content, must  
5 be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret*  
6 *Service*, 572 F.3d 962, 969 (9th Cir. 2009). Determining the plausibility of the claim for  
7 relief is a “context-specific task that requires the reviewing court to draw on its judicial  
8 experience and common sense.” *Iqbal*, 556 U.S. at 679.

9         In reviewing a Rule 12(b)(6) motion to dismiss, the court assumes the truth of all  
10 factual allegations and construes all inferences from them in the light most favorable to  
11 the non-moving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002). At the  
12 same time, legal conclusions need not be taken as true merely because they are in the  
13 form of factual allegations. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003).  
14 When ruling on the motion to dismiss, the court may consider the facts alleged in the  
15 complaint, documents attached to the complaint, documents relied upon but not attached  
16 to the complaint when authenticity is not contested, and matters of which the court takes  
17 judicial notice. *Lee v. Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001). Allegations  
18 based “upon information and belief” may also be considered if “the facts are peculiarly  
19 within the possession and control of the defendant or where the belief is based on factual  
20 information that makes the inference of culpability plausible.” *See Soo Park v.*  
21 *Thompson*, 851 F.3d 910, 928 (9th Cir. 2017) (citing *Arista Records, LLC v. Doe 3*, 604  
22 F.3d 110, 120 (2d Cir. 2010); *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995)).

## 23 **II. Discussion**

24         Most of G&G’s Causes of Action prevail because its 59-page FAC sufficiently  
25 establishes the factual predicates that could plausibly lead to the allegations that it makes.  
26 But certain Counts do not. The Court rejects Count Four because the Computer Fraud  
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1 and Abuse Act does not cover misappropriation of information that Ms. Lai had  
2 authorization to access. The Court also rejects Count Five and Six, because these  
3 common law claims are displaced by the statute. Finally, the Court rejects Count Eleven,  
4 a conspiracy claim, but only as it pertains to the other Counts that the Court rejected;  
5 conspiracy is not an independent civil wrong and requires an underlying wrongful act.

### 6 **A. Misappropriation of Trade Secrets (Counts One and Two)**

7 Both Defendants challenge G&G’s claims for misappropriation of trade secrets,  
8 under both federal law (the Defend Trade Secrets Act, 18 U.S.C. § 1836, *et seq.*) and  
9 state law (the California Uniform Trade Secrets Act, Cal. Civ. Code § 3426, *et seq.*). *See*  
10 ECF No. 26-1 at 7–8; ECF No. 27 at 16–22. “Courts have analyzed these [federal and  
11 state law] claims together because the elements are substantially similar.” *InteliClear,*  
12 *LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 657 (9th Cir. 2020). Specifically, G&G  
13 must prove that: (1) G&G possessed a trade secret; (2) the Defendant misappropriated the  
14 trade secret; and (3) the misappropriation caused or threatened damage to G&G. *See id.*  
15 at 657–58 (citing 18 U.S.C. § 1839(5)); *accord Silvaco Data Sys. v. Intel Corp.*, 184 Cal.  
16 App. 4th 210, 220 (2010) (citing Cal. Civ. Code §§ 3426.1 to 3426.3), *as modified on*  
17 *denial of reh’g* (May 27, 2010), *and disapproved of on other grounds by Kwikset Corp. v.*  
18 *Superior Ct.*, 51 Cal. 4th 310 (2011). NotPolish challenges all three elements, whereas  
19 Ms. Lai challenges the second element. At this stage of the lawsuit however, G&G  
20 alleged sufficient facts on all three elements, thus plausibly alleging that Defendants  
21 misappropriated trade secrets to incur damages.

#### 22 **1. Trade Secret**

23 “Trade secret” is defined as “information that ‘the owner thereof has taken  
24 reasonable measures to keep . . . secret’ and that ‘derives independent economic value,  
25 actual or potential, from not being generally known to . . . another person who can obtain  
26 economic value from the disclosure or use of the information.’” *Attia v. Google LLC*,

1 983 F.3d 420, 424 (9th Cir. 2020) (citing 18 U.S.C. § 1839(3)); *see also IntelIClear*, 978  
2 F.3d at 657 (discussing the three elements of trade secret as “(1) information, (2) that is  
3 valuable because it is unknown to others, and (3) that the owner has attempted to keep  
4 secret”); *cf.* Cal. Civ. Code § 3426.1(d). “To prove ownership of a trade secret, plaintiffs  
5 ‘must identify the trade secrets and carry the burden of showing they exist.’” *IntelIClear*,  
6 978 F.3d at 658 (citation omitted). Further, the subject matter of the trade secret must be  
7 described “with *sufficient particularity* to separate it from matters of general knowledge  
8 in the trade or of special knowledge of those persons . . . skilled in the trade.” *Id.*  
9 (alterations in original) (citation omitted).

10       Based on the standard above, the Information may qualify as a trade secret.  
11 Contrary to NotPolish’s characterizations of it, the Information is more than just a “client  
12 list.” It includes non-public personal cellphone numbers of the owners and operators of  
13 G&G’s customers and distributors who prefer conducting business in Vietnamese, the  
14 customers’ and distributors’ account purchasing histories, their corresponding pricing  
15 tiers, and their product and billing preferences. *See* ECF No. 22 at 5–6. These details  
16 cannot be found in any public domain, nor has G&G ever publicly disclosed them.  
17 Instead, the CEO of G&G himself compiled them over many years and took various  
18 measures to keep the Information exposed as little as possible. *See id.* at 6–9; *cf. Morlife,*  
19 *Inc. v. Perry*, 56 Cal. App. 4th 1514, 1521–22 (1997) (distinguishing “mere identities and  
20 locations of customers where anyone could easily identify the entities as potential  
21 customers” from “where the employer has expended time and effort identifying  
22 customers with particular needs or characteristics”). And it is easy to see how knowing  
23 private cellphone numbers of the owners/operators and their preferences to the most  
24 intricate detail would provide a competitive edge. *See, e.g.,* ECF No. 22 at ¶ 19.

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1                   **2. Misappropriation**

2                   The term “misappropriation” is defined in 18 U.S.C. § 1839(5) and captures a  
3 variety of conducts. Here, there are two separate conducts at issue: one committed by  
4 Ms. Lai, and the other by NotPolish. At the motion to dismiss stage of the lawsuit, the  
5 FAC alleged sufficient facts to establish a plausible claim of misappropriation for each  
6 Defendant’s conduct. The main problem with the Defendants’ arguments is that they rely  
7 on cherry-picked allegations. The FAC alleges far more than the select passages that the  
8 Defendants challenge. The FAC as a whole generates other plausible scenarios of  
9 misappropriation that passes the pleading standard yet also circumvents the Defendants’  
10 contestation of the facts.

11                   It is plausible that Ms. Lai “misappropriated” the trade secrets. Under Section  
12 1839(5)(B), misappropriation includes use of a trade secret without consent by a person  
13 who, at the time of the use, “knew or had reason to know that the knowledge of the trade  
14 secret was . . . acquired under circumstances giving rise to a duty to maintain the secrecy  
15 of the trade secret or limit the use of the trade secret.” *See id.* § 1839(5)(B)(ii). As  
16 alleged, Ms. Lai used a trade secret by contacting G&G’s Vietnamese-speaking  
17 customers via their personal cellphone numbers. *See* ECF No. 22 at 18. This was  
18 without G&G’s consent. And she knew or had reason to know that such Information was  
19 to be remained confidential under G&G’s company policy. *See id.* ¶¶ 21, 23, 24, 33–38.  
20 Therefore, Ms. Lai “misappropriated” the trade secret by using G&G’s Information  
21 without G&G’s consent even though she knew the Information was to be kept in secret.<sup>4</sup>  
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24 <sup>4</sup> The Court’s analysis also demonstrates that G&G need not rely on the term “improper  
25 means,” defined in Section 1839(6), to plausibly allege misappropriation against Ms. Lai.  
26 *See, e.g.*, 18 U.S.C. § 1839(5)(B)(ii)(II). Therefore, while Ms. Lai argues that she did not  
27 misappropriate the Information because she did not acquire it by or through “improper  
28 means,” this will not defeat Counts One and Two. Instead, the Court will discuss the

1 Actively using the Information (even after her employment with G&G was terminated) is  
2 “more than” mere possession of it. *Cf. Power Integrations, Inc. v. De Lara*, No. 20-cv-  
3 410-MMA (DEB), 2020 U.S. Dist. LEXIS 142851, at \*35 to \*36 (S.D. Cal. Aug. 10,  
4 2020) (discussing how “mere possession” of the trade secret is not enough).

5 Of note, while Ms. Lai argues that her request to G&G’s CEO to “remove” her  
6 access to G&G’s Information evinces innocence, *see* ECF No. 26-1 at 8, this is not  
7 something the Court considered. Under the legal standard for a motion to dismiss, all  
8 inferences in the factual allegations are drawn in favor of the non-movant, G&G. To the  
9 extent that G&G presents an alternative interpretation of the said-facts, *see* ECF No. 22 at  
10 15–18, the Court lends credence to G&G’s version of the events.

11 It is also plausible that NotPolish “misappropriated” the trade secrets. Section  
12 1839(5)(A) states that misappropriation includes “acquisition of a trade secret of another  
13 by a person who knows or has reason to know that the trade secret was acquired by  
14 improper means.” 18 U.S.C. § 1839(5)(A). The term “improper means” includes  
15 “breach of a duty to maintain secrecy.” *Id.* § 1839(6)(A). Applying these two provisions  
16 to the allegations (and the related inferences most favorable to G&G), the following is  
17 plausible. First, NotPolish acquired the Information. After all, NotPolish hired Ms. Lai,  
18 and Ms. Lai was reaching out to private cellphone numbers to advance NotPolish’s sales.  
19 Second, NotPolish knew or had reason to know that the Information (such as Vietnamese  
20 American business owners’ private cellphone numbers and their tailored customer  
21 preferences) was acquired by a breach of duty to maintain the Information’s  
22 confidentiality. *See* ECF No. 22 at 11–13 (discussing company policy on the Information  
23 and the duty to insulate the company iPhone and iCloud from one’s personal phone and  
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26 term in greater detail when discussing the allegations against NotPolish, *infra* pages 12–  
27 13 of this Order.

1 iCloud, and further discussing Ms. Lai’s awareness of these details as she was instructed  
2 so). No part of the case record indicates that Ms. Lai was acting as a lone wolf. Instead,  
3 the FAC indicates that she was making solicitations in the capacity as NotPolish’s  
4 employee. *See id.* at 18–19. Thus, to the extent that NotPolish was supervising Ms. Lai’s  
5 handling of business administration, it is plausible that the nature of the Information  
6 (specifically, its confidentiality and Ms. Lai’s violation thereof) would have surfaced.

7 NotPolish primarily argues that G&G’s accusations are made upon information  
8 and belief, and that the three predicated allegations to form such information and belief  
9 are insufficient. *See* ECF No. 27 at 19–21. Here, NotPolish is referring to: (1) Ms. Lai’s  
10 relationship with NotPolish’s CEO that go back to high school, (2) the “Secret Santa”  
11 incident where allegedly Ms. Lai said that she could get a job at NotPolish “anytime,”  
12 and (3) NotPolish’s CEO commenting on Ms. Lai’s social media posts. *See id.* at 19–20.  
13 NotPolish views these incidents as tenuous to the cause of action, and wholly innocuous.

14 The Court disagrees with NotPolish’s construction of the FAC because the FAC  
15 alleges more than that to support G&G’s information and belief. *Cf. Soo Park*, 851 F.3d  
16 at 928 (permitting allegations on information and belief “where the belief is based on  
17 factual information that makes the inference of culpability plausible”). For example,  
18 G&G expressly mentions specific customers that informed G&G relating to Ms. Lai’s  
19 solicitations, and how she “pressured” them to purchase NotPolish products instead. *See*  
20 ECF No. 22 at ¶¶ 75, 76. Further, G&G alleges Ms. “Lai was expressly instructed (and  
21 agreed) to maintain the Glam and Glits Confidential Information in confidence and to use  
22 it only for purposes of her employment with Glam and Glits.” *See id.* ¶ 36. These two  
23 predicate allegations, alone, make the inference of culpability plausible.<sup>5</sup> With specific  
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25 <sup>5</sup> As to the three allegations that NotPolish challenges, the Court views them as providing  
26 context to the other allegations of breach. Important to keep in mind, the Court  
27 constructs the FAC as a whole, in which case the three allegations narrate a relationship  
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1 examples of an alleged breach, the pleading is distinguishable from NotPolish’s  
2 supporting cases of *Menzel v. Scholastic, Inc.*, No. 17-cv-05499-EMC, 2018 U.S. Dist.  
3 LEXIS 44833, at \*4 to \*5 (N.D. Cal. Mar. 19, 2018) (discussing how plaintiff “has not  
4 pointed to one concrete example of infringement”) and *Power Integrations*, 2020 U.S.  
5 Dist. LEXIS 142851, at \*35 to \*36 (requiring more than “mere possession”).

### 6 **3. Damages**

7 Finally, NotPolish asserts that G&G has failed to plead sufficient facts to  
8 demonstrate damages caused by the alleged misappropriation. *See* ECF No. 27 at 21–22.  
9 In its FAC, G&G has offered specific episodes of customers “complaining” about Ms.  
10 Lai calling their personal cellphones. *See, e.g.*, ECF No. 22 at ¶ 75. The FAC claims that  
11 after her separation from G&G, Ms. Lai contacted and “told” a G&G customer that  
12 G&G’s CEO abused illegal drugs which led the customer to insist that the co-owner of  
13 G&G supervise her account rather than the CEO. *Id.* ¶ 81. The FAC further elaborates  
14 that the Vietnamese American nail care supply market is a reputation-sensitive industry,  
15 in which appearances of mismanagement could have material, financial consequences.  
16 *See, e.g., id.* ¶ 25. In fact, the FAC discusses G&G losing at least one sale/customer  
17 because of the Defendants’ acts. *See, e.g., id.* ¶¶ 27, 202. Ultimately, G&G has alleged  
18 sufficient facts to plausibly claim that Ms. Lai and NotPolish’s misappropriation of  
19 Information “caused or threatened damage.”

### 20 **B. Defamation (Count Three)**

21 NotPolish also moves to dismiss G&G’s defamation claim. *See* ECF No. 27 at 22–  
22 23. Under California law, “[t]he elements of a defamation claim are (1) a publication that  
23

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24 between Ms. Lai and NotPolish’s CEO. The relationship dates back since high school,  
25 and was close enough for a job opportunity and even rapport outside of work. And given  
26 such relationship, it is plausible the CEO was aware of Ms. Lai’s role in G&G and her  
27 access to important industry knowledge, including G&G’s proprietary information.

1 is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or  
2 causes special damage.” *Med. Marijuana, Inc. v. ProjectCBD.com*, 46 Cal. App. 5th 869,  
3 888 (2020) (alteration in original) (citation omitted). The Court focuses its inquiry on  
4 NotPolish’s conduct because the Motion to Dismiss only seeks to remove NotPolish from  
5 the defamation claim.<sup>6</sup>

6 Here, NotPolish’s arguments boil down to the fact that it was Ms. Lai who made  
7 the defamatory statements, not NotPolish. This is unconvincing since Ms. Lai has been  
8 an employee of NotPolish. See ECF No. 22 at ¶ 4. Setting aside the issue of conspiracy,  
9 NotPolish could still be liable as Ms. Lai’s supervisor under the doctrine of respondent  
10 superior. See *Kelly v. Gen. Tel. Co.*, 136 Cal. App. 3d 278, 284 (1982); see also *Zoellner*  
11 *v. City of Arcata*, No. 18-CV-04471-EMC, 2021 WL 1531169, at \*8 (N.D. Cal. Apr. 19,  
12 2021) (citing *Rivera v. Nat’l R.R. Passenger Corp.*, 331 F.3d 1074, 1080 (9th Cir. 2003)).

13 Independent from the liability stemming from NotPolish’s supervisory capacity  
14 over Ms. Lai, the Court views one of NotPolish’s social media comments as a sufficient  
15 basis to support the defamation claim. NotPolish’s comment “Love this [heart emoji]”  
16 was a direct response to Ms. Lai’s post “When they told me I can’t be on camera because  
17 I’m too Fobby, Too Asian, make us look too cheap cheap..... look at your girl now.  
18 Notpolish #makingmillions #notPolish.” See ECF No. 22 at 28. At minimum, NotPolish  
19 affirmed and validated Ms. Lai’s statement. To the extent that Ms. Lai’s statement could  
20 be considered defamatory (because it could be accusing G&G of racially/culturally  
21 discriminatory practices), a statement affirming such could be defamatory as well.  
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24 <sup>6</sup> In challenging G&G’s defamation claims, Ms. Lai filed a Motion to Strike instead, but  
25 the Motion is limited to certain parts of the defamation claim, and not all. Compare ECF  
26 No. 28 at 1 (requesting the Court to strike paragraphs 82–100, 139, and 140), with ECF  
27 No. 22 at 36–39 (discussing the Third Cause of Action from paragraphs 136 to 153). The  
28 Court discusses the Motion to Strike in further detail *infra* pages 25–27 of this Order.

1 On NotPolish’s one-line assertions on G&G’s supposed failure to establish injury  
2 and damages, *see* ECF No. 27 at 23; ECF No. 34 at 7, the FAC sufficiently pled the issue,  
3 for reasons similar to this Order’s discussion *supra* page 14.

#### 4 C. Computer Fraud and Abuse Act (Count Four)

5 Next, Defendants Ms. Lai and NotPolish move to dismiss G&G’s Fourth Cause of  
6 Action which is grounded in the Computer Fraud and Abuse Act (“CFAA”). *See* ECF  
7 No. 26-1 at 6–7; ECF No. 27 at 23–26. A person is liable under the CFAA if the person,  
8 among other things, “intentionally accesses a computer without authorization or exceeds  
9 authorized access, and thereby obtains . . . information from any protected computer.”  
10 *See* 18 U.S.C. § 1030(a)(2). At the same time, “CFAA is best understood as an anti-  
11 intrusion statute and not as a ‘misappropriation statute,’” for “[t]he CFAA was enacted to  
12 prevent intentional intrusion onto someone else’s computer—specifically, computer  
13 hacking.” *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 1000 (9th Cir. 2019) (citing  
14 *United States v. Nosal* (“*Nosal I*”), 676 F.3d 854, 857–58 (9th Cir. 2012)).

15 Specifically, the CFAA identifies two different ways a defendant could be liable,  
16 but Ninth Circuit precedents make clear that the facts in this case are outside of the  
17 statute’s scope. First, a person could access a computer “without authorization.” *See* 18  
18 U.S.C. § 1030(a)(2). This violation occurs “when the person has not received permission  
19 to use the computer for any purpose (such as when a hacker accesses someone’s  
20 computer without any permission), or when the employer has rescinded permission to  
21 access the computer and the defendant uses the computer anyway.” *Facebook, Inc. v.*  
22 *Power Ventures, Inc.*, 844 F.3d 1058, 1066 (9th Cir. 2016) (citing *LVRC Holdings LLC v.*  
23 *Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009)), *cert. denied*, 138 S. Ct. 313 (2017); *see*  
24 *also United States v. Nosal* (“*Nosal II*”), 844 F.3d 1024, 1029 (9th Cir. 2016), *cert.*  
25 *denied*, 138 S. Ct. 314 (2017). The “without authorization” prong is inapplicable to the  
26 facts because Ms. Lai had authorization to “access” the company iPhone and iCloud as a  
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1 G&G employee. *Cf. Brekka*, 581 F.3d at 1135 (deciding that employee emailing  
2 documents from his work computer to himself and his wife was not access “without  
3 authorization” since he “was given permission to use [the employer’s] computer”).

4 Second, a person could “exceed[] authorized access,” 18 U.S.C. § 1030(a)(2),  
5 which is defined as “to access a computer with authorization and to use such access to  
6 obtain or alter information in the computer that the accesser is not entitled so to obtain or  
7 alter,” *id.* § 1030(e)(6). But most importantly, the Ninth Circuit does not read the statute  
8 to penalize “any unauthorized use of information obtained from a computer,” and limits  
9 this provision to “inside hackers (individuals whose initial access to a computer is  
10 authorized but who access unauthorized information or files).” *Nosal I*, 676 F.3d at 858–  
11 59 (emphasis removed). The Ninth Circuit has consistently held that “the plain language  
12 of the CFAA ‘target[s] the unauthorized procurement or alteration of information, not its  
13 misuse or misappropriation.’” *Id.* at 863 (alteration in original) (citations omitted); *see*  
14 *also Nosal II*, 844 F.3d at 1034 (“Because [defendants] had authority to access the  
15 company computers, we affirmed the district court’s dismissal of the CFAA counts  
16 related to the period when the [defendants] were still employed at [their firm].”). Here,  
17 the “synching” of the Information occurred when Ms. Lai indeed had the authorization to  
18 obtain and access the Information as a G&G employee, thus she did not “exceed  
19 authorized access.” Whether Ms. Lai ultimately misappropriated the Information she was  
20 authorized access to is a separate question outside CFAA’s scope.

21 As the Defendants point out, *see* ECF No. 34 at 7; ECF No. 36 at 7, G&G  
22 concedes the lack of a valid CFAA claim under Ninth Circuit law, for all of G&G’s brief  
23 focused on how deciding based on these precedents was “premature” due to a pending  
24 Supreme Court case resolving an apparent circuit split between the Ninth and Eleventh  
25 Circuit. *See* ECF No. 31 at 15–18. Further, G&G informs the Court that *hiQ Labs, Inc.*,

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1 938 F.3d 985, the most recent case pertaining to the “without authorization” prong, is  
2 awaiting a decision on a petition for certiorari.

3 The Supreme Court has spoken. It reversed and remanded the Eleventh Circuit  
4 decision that served the basis for G&G’s claim for untimeliness. *Van Buren v. United*  
5 *States*, -- S. Ct. --, No. 19-783, 2021 WL 2229206, at \*3 (U.S. June 3, 2021). In fact, the  
6 Supreme Court affirmed the Ninth Circuit’s reasoning. According to the Supreme Court,  
7 the CFAA was designed to protect computers from “outside hackers” (the “without  
8 authorization” prong) and “inside hackers” (the “exceeds authorized access” prong).  
9 *Compare id.* at \*9, *with Nosal I*, 676 F.3d at 858. And an expansive interpretation akin to  
10 what G&G presents “criminalizes every violation of a computer-use policy.” *Compare*  
11 *Van Buren*, 2021 WL 2229206, at \*11, *with Nosal I*, 676 F.3d at 859–60.

12 Regarding the certiorari petition on *hiQ Labs*, the Court agrees with the Defendants  
13 that the issue in front of this Court is categorically different from what may eventually be  
14 in front of the Supreme Court. *See, e.g.*, Petition for a Writ of Certiorari, *LinkedIn Corp.*  
15 *v. hiQ Labs, Inc.*, No. 19-1116 (U.S. Mar. 9, 2020). But more importantly, a potential  
16 Supreme Court decision on the matter has never been an adequate basis for this Court to  
17 withhold a decision on the Motions to Dismiss. “[O]nce a federal circuit court issues a  
18 decision, the district courts within that circuit are bound to follow it and have no authority  
19 to await a ruling by the Supreme Court before applying the circuit court’s decision as  
20 binding authority.” *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (quoting  
21 *Yong v. INS*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000)).

#### 22 **D. Statutory Displacement (Counts Five to Ten)**

23 Defendants Ms. Lai and NotPolish also argue that Counts Five to Ten (conversion,  
24 trespass to chattels, breach of the duty of loyalty, tortious interference with actual and  
25 prospective economic interference, and unfair competition) should be displaced by the

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1 California Uniform Trade Secrets Act (“CUTSA”).<sup>7</sup> See ECF No. 26-1 at 4–6; ECF No.  
2 27 at 26–30. The Court agrees with the Defendants that CUTSA displaces the claims of  
3 conversion and trespass to chattels (Counts Five and Six), for these allegations are no  
4 more than restating a misappropriation of a trade secret and/or confidential information.  
5 However, Counts Seven to Ten involve more than a misappropriation claim. Therefore,  
6 the Court declines to dismiss these claims under the theory of CUTSA displacement.

### 7 **1. Applicability of CUTSA**

8 CUTSA provides various remedies for the misappropriation of trade secrets. See,  
9 e.g., Cal. Civ. Code §§ 3426.2 to 3426.4. Further, the savings clause in Section 3426.7 of  
10 CUTSA expressly preserves certain laws, such as “any statute relating to  
11 misappropriation of a trade secret, or any statute otherwise regulating trade secrets,” or  
12 “other civil remedies that are not based upon misappropriation of a trade secret.” Courts  
13 in California read CUTSA’s “comprehensive structure and breadth,” combined with its  
14 express savings clause, to mean that “CUTSA provides the exclusive civil remedy for  
15 conduct falling within its terms, so as to supersede other civil remedies ‘based upon  
16 misappropriation of a trade secret.’” See *Angelica Textile Servs., Inc. v. Park*, 220 Cal.  
17 App. 4th 495, 505 (2013) (citing *K.C. Multimedia, Inc. v. Bank of America Tech. &*  
18 *Operations, Inc.*, 171 Cal. App. 4th 939, 954 (2009)), as modified (Oct. 29, 2013), as  
19 modified on denial of reh’g (Nov. 7, 2013); *Silvaco Data Sys. v. Intel Corp.*, 184 Cal.  
20 App. 4th 210, 236 (2010), as modified on denial of reh’g (May 27, 2010), disapproved on  
21 other grounds by *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310 (2011).

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22  
23  
24 <sup>7</sup> The parties refer to “preemption” instead of displacement. Case law indicates that the  
25 latter is the more appropriate term. See, e.g., *Angelica Textile Servs., Inc. v. Park*, 220  
26 Cal. App. 4th 495, 498 n.1 (2013), as modified (Oct. 29, 2013), as modified on denial of  
27 reh’g (Nov. 7, 2013); accord *Erhart v. BofI Holding, Inc.*, -- F. Supp. 3d --, No. 15-CV-  
02287-BAS-NLS, 2020 WL 1550207, at \*36 n.24 (S.D. Cal. Mar. 31, 2020).

1 Courts have identified two circumstances where CUTSA displaces certain claims.  
2 “First, CUTSA displaces claims that are ‘based on the same nucleus of facts as the  
3 misappropriation of trade secrets claim for relief.’” *Erhart v. BofI Holding, Inc.*, -- F.  
4 Supp. 3d --, No. 15-CV-02287-BAS-NLS, 2020 WL 1550207, at \*36 (S.D. Cal. Mar. 31,  
5 2020) (quoting *K.C. Multimedia*, 171 Cal. App. 4th at 958). In other words, “CUTSA  
6 displaces tort claims where they ‘do not genuinely allege ‘alternative legal theories’ but  
7 are a transparent attempt to evade the strictures of CUTSA by restating a trade secrets  
8 claim as something else.” *Id.* (citing *Silvaco*, 184 Cal. App. 4th at 240; *K.C.*  
9 *Multimedia*, 171 Cal. App. 4th at 960–62).

10 “Second, CUTSA displaces ‘all claims premised on the wrongful taking and use of  
11 confidential business and proprietary information, even if that information does not meet  
12 the statutory definition of a trade secret.’” *Id.* at \*37 (citations omitted). To put it  
13 differently, if the entire basis for the claim is information “not . . . generally known to the  
14 public,” the claim is considered “sufficiently close to a trade secret claim.” And the fact  
15 that the information may ultimately fall short of a “trade secret” under CUTSA does not  
16 mean the claim survives CUTSA displacement. *See id.* Courts have extended this  
17 second circumstance as being under CUTSA’s purview because the “prime purpose” of  
18 CUTSA “was to sweep away the adopting states’ bewildering web of rules and rationales  
19 and replace it with a uniform set of principles for determining when one is—and is not—  
20 liable for acquiring, disclosing, or using ‘information . . . of value.’” *See id.* (citing  
21 *Silvaco*, 184 Cal. App. 4th at 239 n.22).

22 The Court disagrees with G&G’s position that the entire displacement issue should  
23 be preserved for summary judgment or trial. G&G primarily relies on two non-published  
24 opinions, *Amron Int’l Diving Supply, Inc. v. Hydrolinx Diving Commun., Inc.*, No. 11-  
25 CV-1890-H (JMA), 2011 U.S. Dist. LEXIS 122420, at \*1 (S.D. Cal. Oct. 21, 2011), and  
26 *DJO Glob., Inc. v. Glader*, No. 3:16-cv-02208-CAB (NLS), 2016 U.S. Dist. LEXIS

1 197005, at \*1 (S.D. Cal. Dec. 22, 2016). To start, *DJO* discusses the preservation issue  
2 in passing, and was decided based on the fact that the complaint alleged more than the  
3 misappropriation of trade secrets or non-public information. *See* 2016 U.S. Dist. LEXIS  
4 197005, at \*16 to \*20. Similarly, *Amron* declined to dismiss the claims because the  
5 complaint made allegations external to trade secret misappropriation. *See* 2011 U.S. Dist.  
6 LEXIS 122420, at \*27. While *Amron* observes that determining whether information  
7 constitutes a trade secret is more appropriate for summary judgment, this only pertains to  
8 the first circumstance of CUTSA displacement. Recent developments in case law  
9 indicate that the second circumstance, i.e., non-public information that may not  
10 ultimately qualify as a trade secret, can also serve as a basis for displacement. *See, e.g.,*  
11 *Erhart*, 2020 WL 1550207, at \*37 (collecting cases). Indeed, plenty of cases have  
12 rejected various causes of action at the motion to dismiss stage under either of the two  
13 circumstances. *See, e.g., Yeiser Rsch. & Dev. LLC v. Teknor Apex Co.*, 281 F. Supp. 3d  
14 1021, 1050–51 (S.D. Cal. 2017); *MedImpact Healthcare Sys., Inc. v. IQVIA Inc.*, No.  
15 19CV1865-GPC(LL), 2020 WL 5064253, at \*16 to \*21 (S.D. Cal. Aug. 27, 2020).

## 16 **2. Conversion and Trespass to Chattels (Counts Five and Six)**

17 With the above standard in mind, the Court concludes that CUTSA displaces  
18 G&G’s claims of conversion and trespass to chattels. G&G appears to be mindful of the  
19 potential CUTSA displacement concern and alleges that “Defendants wrongfully took  
20 non-trade secret intangible personal property, including text messages, voicemail  
21 messages, and emails, and other information generated by Defendant Lai while she was  
22 working for Plaintiff.” ECF No. 31 at 20; *see also* ECF No. 22 at ¶¶ 167, 186. While  
23 these allegations may avoid the first circumstance for displacement, they do not avoid the  
24 second circumstance for displacement. The fact that G&G considers these “intangible  
25 digital assets” as proprietary proves their exclusive—therefore, *non-public*—nature. *See*  
26 ECF No. 22 at 42–48 (considering the intangible digital assets to be “for purposes” of  
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1 G&G’s business, subject to G&G’s “exclusive control,” and “confidential”). And to the  
2 extent that G&G considers such assets to be of value and not available to the public,  
3 CUTSA sweeps in, as indicated by recent case law. *See, e.g., Erhart*, 2020 WL 1550207,  
4 at \*37; *Silvaco*, 184 Cal. App. 4th at 239 n.22.

5 G&G attempts to argue that *SunPower Corp. v. SolarCity Corp.*, No. 12-CV-  
6 00694-LHK, 2012 U.S. Dist. LEXIS 176284, at \*28 (N.D. Cal. Dec. 11, 2012), a case  
7 that the Defendants also rely on, supports G&G’s position. *SunPower* reasoned that  
8 CUTSA does not displace a non-trade secret proprietary information if: (1) the  
9 information was made property by some provision of positive law on grounds that are  
10 qualitatively different from the grounds upon which the trade secrets are considered  
11 property; or (2) the wrongdoing is materially distinct from the wrongdoing alleged in the  
12 CUTSA claim. It is unclear how the allegations of the intangible digital assets satisfy  
13 either, let alone “both,” ECF No. 31 at 21. The first *SunPower* condition is not met  
14 because the intangible digital assets are not “qualitatively different.” As discussed in the  
15 preceding paragraph, these assets derive their value based on its non-public, exclusive  
16 nature. The second *SunPower* condition is not met because the conduct alleged is not  
17 “materially distinct.” The CUTSA claim, conversion claim, and trespass to chattels claim  
18 are all grounded in Defendants “taking” an information that is exclusive and valuable.

19 And while G&G portrays CUTSA displacement as a “Hobbesian choice,” this  
20 framing begs the question of what rightful cause of action G&G had to begin with.  
21 According to the applicable case law, G&G never had the right to a conversion or  
22 trespass to chattels cause of action because they are not materially distinguishable from a  
23 CUTSA claim. Ultimately G&G presents a false choice on the issue.

### 24 **3. The Other Claims (Counts Seven to Ten)**

25 In contrast, CUTSA does not displace G&G’s claims concerning: the breach of the  
26 duty of loyalty, tortious interference with actual and prospective economic relations, and  
27

1 unfair competition. In these causes of action, more is alleged than the usurpation of a  
2 valuable information. As G&G points out, these claims are grounded in “defamation,  
3 other false and misleading statements regarding Glam and Glits’ work environment, and  
4 threats of violence against employees who cooperate with Glam and Glits against  
5 Defendants.” See ECF No. 31 at 21. While the Defendants view these conducts as part  
6 of a broad stroke of misbehavior that G&G complains about, such a characterization is  
7 too broad. As one example, Ms. Lai’s social media post on “snitches get stitches” is  
8 wholly independent from her access to the Information and/or the intangible digital  
9 assets. Similarly, the alleged social media “campaign” did not hinge on, nor require, the  
10 Information or intangible digital assets. As such, the alleged conduct is “materially  
11 distinct” from the typical misappropriation of valuable information claims.

#### 12 **E. Conspiracy (Count Eleven)**

13 Finally, NotPolish (but not Ms. Lai) seeks to dismiss G&G’s conspiracy claim.  
14 Quintessential to a conspiracy claim is “the existence of an agreement” to commit a  
15 wrongful act. See *Wasco Prod., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 990–91 (9th  
16 Cir. 2006). NotPolish seeks dismissal for two reasons. First, there is no independent  
17 civil wrong of conspiracy, and to the extent that all of G&G’s other claims fail as a matter  
18 of law, the conspiracy claim falls too. Second, G&G failed to provide sufficient facts to  
19 support its conclusion on the “meeting of the minds.” See ECF No. 27 at 15–16.

20 As seen above, some Causes of Action have survived the Defendants’ Motions to  
21 Dismiss, while some have not. Accordingly, the Court agrees with NotPolish’s first  
22 reason as to the three dismissed claims. See *Liberty City Movie, LLC v. U.S. Bank, N.A.*,  
23 824 F. App’x 505, 508 (9th Cir. 2020) (citing *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1062  
24 (2006)) (“[A] civil conspiracy does not give rise to a cause of action unless an  
25 independent civil wrong has been committed.”).

26 ///

1 As to NotPolish’s second reason, the Court disagrees. G&G has presented  
2 sufficient facts that the Court could infer an agreement to commit the wrongs relating to  
3 the surviving claims. As an initial observation, courts may infer civil conspiracy from  
4 circumstantial evidence of the defendant’s conduct. *See, e.g., AccuImage Diagnostics*  
5 *Corp v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 952 (N.D. Cal. 2003) (citing *Dimidowich*  
6 *v. Bell & Howell*, 803 F.2d 1473, 1479 (9th Cir. 1986)); *accord Cardigan Mountain Sch.*  
7 *v. New Hampshire Ins. Co.*, 787 F.3d 82, 87–88 (1st Cir. 2015); *ABB Turbo Sys. AG v.*  
8 *Turbousa, Inc.*, 774 F.3d 979, 988 (Fed. Cir. 2014) (recognizing that certain facts, such as  
9 a guilty mens rea, “may be distinctively in the defendant’s possession, requiring that the  
10 threshold standard of plausibility be applied to more circumstantial evidence”); *cf. Rivera*  
11 *v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 903 (9th Cir. 2013) (citing Fed. R. Civ. P.  
12 9(b)) (discussing how “conditions of a person’s mind may be alleged generally”).

13 Of course, certain parts of the FAC are wholly conclusory, and the Court will not  
14 consider such statements to decide on G&G’s conspiracy claims. *See, e.g.*, ECF No. 22  
15 at ¶ 234 (“Defendants had a meeting of the minds on this object or course of action and  
16 committed one or more overt acts to further the object or course of action.”). But not all  
17 of G&G’s allegations are legal conclusions, and these non-conclusory allegations  
18 plausibly support a conspiracy related to the surviving claims. *Cf. Kendall v. Visa U.S.A.,*  
19 *Inc.*, 518 F.3d 1042, 1048–49 (9th Cir. 2008) (requiring more than a “rational, legal  
20 business behavior by the defendants” and focusing on “who, did what, to whom (or with  
21 whom), where, and when?”). G&G claims that NotPolish knew or had reason to know  
22 that proprietary information relating to Vietnamese American business owners’ private  
23 cellphone numbers and their tailored customer preferences was acquired by Ms. Lai and  
24 used on behalf of NotPolish in breach of her duty to maintain the Information’s  
25 confidentiality. *See, e.g.*, ECF No. 22 at 13–15. Further, G&G alleges that Ms. Lai and  
26 NotPolish “together” made advances to G&G’s Vietnamese-speaking customers. *See id.*

¶ 73; *see also* ECF No. 31 at 8 (discussing how Ms. Lai reached out to the customers “on behalf of” NotPolish). These facts are bolstered by the prior relationship Ms. Lai and NotPolish’s CEO had (further explained *supra* note 5). In addition, NotPolish posted a comment that affirmed Ms. Lai’s statements which could potentially be considered defamatory against G&G, as discussed *supra* page 15. At this stage, the pleading satisfies Rule 12(b)(6).

### III. Leave to Amend

Ultimately, the Court has dismissed Counts Four to Six, and the Count of conspiracy over Counts Four to Six. The Court dismisses these Causes of Action without prejudice because an amendment could potentially cure the defects. *Cf. Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (“Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment.”); Fed. R. Civ. P. 15(a) (“The court should freely give leave when justice so requires.”).

### MOTION TO STRIKE

Independent from the Motions to Dismiss, Ms. Lai filed a Motion to Strike. Specifically, Ms. Lai requests the Court to strike paragraphs 82 to 100, 139, and 140 in the FAC. *See* ECF No. 28 at 1. These passages are primarily Ms. Lai’s social media posts, including screenshots thereof.

A court may strike from a pleading “any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . .” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (citation omitted). However, such motions “are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic.” *Gaines v. AT&T Mobility*

1 *Servs.*, LLC, 424 F. Supp. 3d 1004, 1014 (S.D. Cal. 2019) (quoting *Neilson v. Union*  
2 *Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003)), *appeal dismissed*, No.  
3 19-56473, 2020 WL 7586969 (9th Cir. Nov. 20, 2020). As such, they “are generally not  
4 granted unless it is clear that the matter sought to be stricken could have no possible  
5 bearing on the subject matter of the litigation.” *Id.* (quoting *Griffin v. Gomez*, No. C 98-  
6 21038 JW (NJV), 2010 WL 4704448, at \*4 (N.D. Cal. Nov. 12, 2010)). *See generally* 5C  
7 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382 (3d ed.,  
8 updated April 2021) (discussing how courts deny such motions unless there is “no  
9 possible relation” to the subject matter and there may be “significant prejudice” to any  
10 party, and how “[a]ny doubt . . . should be resolved in favor of the non-moving party”).

11 Ms. Lai fails to overcome this high burden of persuasion. The social media posts  
12 are at the crux of G&G’s claims such as defamation, tortious interference with actual and  
13 prospective economic interference, and unfair competition. Some are offered to support  
14 the alleged threats made by Ms. Lai to other G&G employees. *See, e.g.*, ECF No. 22 at  
15 ¶¶ 87, 89. Others are alleged publications of false and defamatory facts, such as: (1) a  
16 work environment that treats employees poorly, *see, e.g.*, ECF No. 22 at ¶¶ 83, 85, 92,  
17 93, 98 (“#toxicworkenvironment,” “prison,” “put us through hell”), (2) disregard for  
18 employee safety during times of COVID-19, *see, e.g., id.* ¶ 84, and (3) racially and  
19 culturally discriminatory workplace practices,<sup>8</sup> *see, e.g., id.* ¶¶ 94–96. Finally, the social  
20 media posts by NotPolish’s CEO, *see, e.g., id.* ¶¶ 95, 100, may evince NotPolish’s role in  
21 the entire act, such as misappropriation of trade secrets, defamation, or conspiracy of any  
22 of the causes of action. Ms. Lai may consider many of these statements to be opinions  
23 (such as its reference to “prison”), but Ms. Lai’s own conception of whether the social  
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26 <sup>8</sup> While Ms. Lai argues that the references to “they” in these social media posts are  
27 ambiguous, *see* ECF No. 28-1 at 5–6, ambiguity favors G&G and not the Defendants.

1 media posts are matters of opinion versus fact does not persuade the Court to strike the  
2 posts.

3 Ms. Lai relatedly avers that including the images in the FAC is not necessary. But  
4 ultimately the same images will likely resurface as evidentiary exhibits to resolve  
5 many—if not all—of G&G’s claims. For example, to affirm that Ms. Lai (or NotPolish)  
6 made certain statements against G&G on social media, G&G will likely need to present  
7 the images that contain the statements, which will be a matter of public record.

8 Given the potential significance of these social media posts, the Court also  
9 concludes that the social media posts do not “significantly prejudice” any of the parties.  
10 Ms. Lai fails to establish how the inclusion of the posts are “solely to embarrass” her,  
11 ECF No. 28-1, or how the inclusion is “cruelly derogatory,” *Righthaven LLC v.*  
12 *Democratic Underground, LLC*, 791 F. Supp. 2d 968, 977 (D. Nev. 2011) (defining  
13 “scandalous” in Federal Rule of Civil Procedure 12(f)). After all, these *social media* (i.e.,  
14 presented to the public) posts are creations by Ms. Lai herself, and she uploaded them  
15 with *some* public audience in mind.

16 As such, the Court **DENIES** Ms. Lai’s Motion to Strike. Of note, both Ms. Lai  
17 and NotPolish present the possibility of filing a subsequent motion to strike pursuant to  
18 California’s anti-SLAPP (“Strategic Lawsuit Against Public Participation”) statute. *See*  
19 ECF No. 27 at 7 n.1; ECF No. 28-1 at 4 n.1. Because the issue is mentioned in passing  
20 with minimal briefing, the Court is not in position to decide on the issue. The Court will  
21 assess the validity of such motions upon filing and the corresponding briefs thereof.

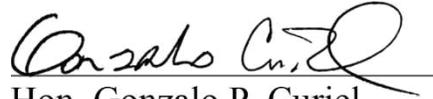
## 22 **CONCLUSION**

23 For the reasons discussed above, the two Motions to Dismiss are **GRANTED in**  
24 **part and DENIED in part**, and the Motion to Strike is **DENIED**. Specifically, the  
25 Court **DISMISSES without prejudice** Counts Four to Six, and Count Eleven but only as  
26 it is predicated on Counts Four to Six. Within thirty (30) days of the filing of this Order,  
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28

1 Plaintiff may file a second amended complaint that is limited to curing any deficiencies  
2 raised in this Order.

3 **IT IS SO ORDERED.**

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5 Dated: June 4, 2021

6   
7 Hon. Gonzalo P. Curiel  
8 United States District Judge  
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