[Drafted by Mary F. Mock for
Client Law Firm]

Attorneys for Defendants MOJAVEWIFI.COM, a California Limited Liability Company, MATT VILLARREAL, AMANDA VILLARREAL, and MICHAEL VILLARREAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO, JOSHUA TREE DISTRICT

FLASHBYTE DIGITAL, L.L.C., a California Limited Liability Company, Plaintiff, vs. MOJAVEWIFI.COM, a California Limited Liability Company; MATT VILLARREAL, an individual; AMANDA VILLARREAL, an individual; MICHAEL VILLARREAL, an individual; PEPPER WAGNER; TILE & ART DEISGN WORKS BY PEPPER GALLERY; RICHARD DERIDDER; KENNETH JAYES; JOSHUA TREE LAKE RV AND CAMPGROUND, a California business entity of unknown type; WENDY COHEN, an individual; MARGE DOYLE, an individual; JACK KENNEDY, an individual; and DOES 1 through 200, inclusive, Defendants.	Case No. CIVMS 1100309 Complaint Filed: December 10, 2010 [Assigned to Hon. Judge Frank Gafkowski, DEPT. M-4] **NOTICE OF DEMURRER AND DEMURRER TO SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** [FILED CONCURRENTLY WITH NOTICE OF LODGING OF OUT-OF-STATE AUTHORITY] Date: Time: 8:30 a.m. Dept. M-4 Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on _____, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department M-4 of the above-entitled Court, located at 6527 White Feather Road, Joshua Tree, CA 92252, Defendants MOJAVEWIFI.COM, a Limited Liability Company ("MojaveWifi"), MATT VILLARREAL ("Matt V."), AMANDA VILLARREAL ("Amanda V."), and MICHAEL VILLARREAL ("Michael V.") (collectively "Defendants") will and hereby do demur to the Second Amended Complaint ("SAC") of Plaintiff FLASHBYTE

DIGITAL, L.L.C., a California Limited Liability Company ("Flashbyte" or "Plaintiff").

This Demurrer is made on the grounds that the Second through Eighth Causes of Action of the SAC fail to state facts sufficient to constitute causes of action against Defendants and/or are stated ambiguously and unintelligibly. California Code of Civil Procedure §§ 430.10(e), (f), (g).

This Demurrer is based upon this Notice, the attached Demurrer and Memorandum of Points and Authorities, all records, papers and pleadings on file in this action, such oral argument as the Court may consider at the hearing of this Demurrer, and any matters of which the Court may or must take judicial notice.

DATED: November __, 2011

By: _____

[Client Law Firm]
Attorney for Defendants MojaveWifi.com, Matt Villarreal, Amanda Villarreal, and Michael Villarreal

DEMURRER TO COMPLAINT

Defendants demur to the Second through Eighth Causes of Action of Plaintiff's Second Amended Complaint on the following grounds:

DEMURRER TO SECOND CAUSE OF ACTION

(For Conversion of Computer Network Data and Other Tangible property)

1. The Second Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

2. The Second Cause of Action is ambiguous and unintelligible and therefore subject to a special demurrer for uncertainty. *Code Civ. Proc.* § 430.10(f).

DEMURRER TO THIRD CAUSE OF ACTION

(For Sale of Stolen Intellectual and Tangible Property)

3. The Third Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

4. The Third Cause of Action is ambiguous and unintelligible and therefore subject to a special demurrer for uncertainty. *Code Civ. Proc.* § 430.10(f).

DEMURRER TO FOURTH CAUSE OF ACTION

(For Intentional interference with contractual relations / wrongful inducement to breach)

5. The Fourth Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

6. The Fourth Cause of Action is ambiguous and unintelligible and therefore subject to a special demurrer for uncertainty. *Code Civ. Proc.* § 430.10(f).

DEMURRER TO FIFTH CAUSE OF ACTION

(For Intentional interference with contractual relations / wrongful inducement to breach)

7. The Fifth Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

8. The Fifth Cause of Action is ambiguous and unintelligible and therefore subject to a special demurrer for uncertainty. *Code Civ. Proc.* § 430.10(f).

DEMURRER TO SIXTH CAUSE OF ACTION

(For Intentional Interference With Prospective Economic Advantage)

9. The Sixth Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

10. The Sixth Cause of Action is ambiguous and unintelligible and therefore subject to a special demurrer for uncertainty. *Code Civ. Proc.* § 430.10(f).

DEMURRER TO SEVENTH CAUSE OF ACTION

(For Unfair Competition)

11. The Seventh Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

12. The Seventh Cause of Action is ambiguous and unintelligible and therefore subject to a special demurrer for uncertainty. *Code Civ. Proc.* § 430.10(f).

DEMURRER TO EIGHTH CAUSE OF ACTION

(For Defamation)

13. The Eighth Cause of Action fails to state facts sufficient to constitute a cause of action. *Code Civ. Proc.* § 430.10(e).

14. The Eighth Cause of Action is ambiguous and unintelligible and therefore subject to a special demurrer for uncertainty. *Code Civ. Proc.* § 430.10(f).

DATED: November __, 2011

By: _____

[Client Law Firm]
Attorney for Defendants MojaveWifi.com, Matt Villarreal, Amanda Villarreal, and Michael Villarreal

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff, an Internet service provider operating in High Desert cities such as Yucca Valley and 29 Palms, brought this action against multiple defendants who it alleges are competing unfairly against it using misappropriated trade secrets. MojaveWifi.com is the business formed by one of Plaintiff's former contractors, Matt Villarreal ("Matt V."). Matt V. worked as an independent contractor for Plaintiff from about April 2007 to August 2008. Defendant Amanda Villarreal ("Amanda V.") is Matt's wife and Defendant Michael Villarreal ("Michael V.") is Matt's father. MojaveWifi, Matt V., Amanda V., and Michael V. (collectively "Defendants") are the only named defendants who have been served so far. In its Second Amended Complaint ("SAC"), Plaintiff also added a slew of MojaveWifi.com's customers as defendants. These new defendants have not yet been served.

The SAC contains eight causes of action, as follows: (1) Misappropriation of trade secrets; (2) Conversion of computer network data and other tangible property; (3) Sale of stolen intellectual and tangible property; (4) Intentional interference with contractual relations / wrongful inducement to breach; (5) Intentional interference with contractual relations / wrongful inducement to breach; (6) Intentional interference with prospective economic advantage; (7) Unfair competition; and (8) Defamation. The second cause of action runs against Michael V.; all other causes of action run against all Defendants.

II. LEGAL STANDARD ON DEMURRER

Pursuant to Code of Civil Procedure § 430.10: "The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action and/or (f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible. Mere "recitals, references to, or allegations of material facts, which are left to surmise are subject to special Demurrer for uncertainty." *Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537. A complaint that fails to state the date or time of the facts averred to is uncertain and subject

to demurrer on that ground. *Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 634 (*disapproved on other grounds in Stockton v. Sup. Ct.* (2007) 42 Cal. 4th 730.)

For purposes of a demurrer, all allegations of the complaint are deemed to be true. *Moore v. Conliffe* (1994) 7 Cal.4th 634, 638. A demurrer should be sustained without leave to amend if the conduct complained of is not actionable as a matter of law. *See*, *e.g.*, *Droz v. Pacific National Insurance Co.* (1982) 138 Cal.App.3d 181, 187 (affirming grant of demurrer without leave to amend where "the allegations of the complaint impose no liability under substantive law").

III. THE SECOND CLAIM FOR CONVERSION OF COMPUTER NETWORK DATA AND OTHER TANGIBLE PROPERTY FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED AND IS UNCERTAIN BECAUSE IT LACKS THE REQUIRED SPECIFICITY

A. Plaintiff Fails to Allege the Existence of A Property Right

The essential factual elements of conversion are that: (1) plaintiff owned, possessed or had a right to possess an item of personal property; (2) that defendant intentionally and substantially interfered with that property by taking possession of it, preventing plaintiff's access to it, destroying it, or refusing to return it after plaintiff demanded its return; (3) plaintiff did not consent; plaintiff was harmed; and defendant's conduct was a substantial factor in causing plaintiff's harm. CACI 2100.

Here, the core allegations of Plaintiff's conversion claim are that:

- Beginning around Dec 15, 2009 Defendants "appropriated or used and controlled computer network data belonging to Plaintiff containing undisclosed locations of Plaintiff's customers and relay points, as well as actual cables, mounts, and other tangible property used for installations of equipment by Plaintiff…." SAC, ¶ 37.
- "took data from Plaintiff's computer system…." SAC, ¶ 39.
- "disrupted Plaintiff's computer services…." SAC, ¶ 40.

Paragraphs 37 and 39 refer to "computer network data" and "data from Plaintiff's computer system." However, a claim for conversion requires the existence of a property right, and

"**information is not property** unless some law makes it so." *Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 239 (*disapproved of on other grounds by Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 335) (emphasis added); 5 Witkin, *Cal.Proc.* (2005) Torts § 702 (conversion requires interference with tangible property). Information that is not otherwise made property by some provision of positive law, such as trade secrets law, belongs to no one and cannot be converted or stolen. *Silvaco Data Systems*, *supra*, 184 Cal.App.4th at 239. Plaintiff also alleges that Defendants "disrupted" Plaintiff's computer services. SAC, ¶ 40, but this allegation does not state any of the essential factual elements of conversion.

Thus, Plaintiff fails to state a claim for relief for conversion because any computer data or information alleged to have been converted does not concern a property right. Furthermore, as Plaintiff alleges a claim for misappropriation of trade secrets, and as the facts supporting its trade secret claim also support its conversion claim, the conversion claim is preempted by the California Uniform Trade Secrets Act ("CUTSA").

B. The Second Cause of Action for Conversion Is Preempted by the California Uniform Trade Secrets Act ("CUTSA")

CUTSA is codified in sections 3426 through 3426.11 of the Civil Code. The statute's purpose was to "sweep away the adopting states' bewildering web of rules and rationales and replace it with a uniform set of principles for determining when one is—and is not—liable for acquiring, disclosing, or using 'information … of value.'" *Silvaco Data Systems*, *supra*, 184 Cal.App.4th at 239. CUTSA defines trade secret to mean "information…that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Id.* at 220.

California courts and federal courts construing California law have held that common law claims based on the same nucleus of facts as a misappropriation of trade secrets claim are

preempted[1] by CUTSA. *K.C. Multimedia, Inc. v. Bank of America Tech. & Operations, Inc.* (2009) 171 Cal.App.4th 939; *Callaway Golf Co. v. Dunlop Slazenger Group Am., Inc.* (D. Del. 2004) 318 F.Supp.2d 216.

For example, in *Callaway Golf Co. v. Dunlop Slazenger Group Am., Inc.* (D. Del. 2004) 318 F.Supp.2d 216, the plaintiff had alleged that defendant misappropriated "processes and formulas contained in…laboratory notebooks." *Id.* at 220. The District Court for Delaware interpreted California law to hold that CUTSA preempted conversion and unjust enrichment claims that were "based entirely on the same factual allegations that form the basis of its trade secrets claim." *Id.* at 219-20.

Courts have now recognized that CUTSA has a "comprehensive structure and breadth…" (*Acculmage Diagnostics Corp. v. Terarecon, Inc.* (N.D. Cal. 2003) 260 F.Supp.2d 941, 953) and "occupies the field in California." *Callaway Golf Co.*, *supra*, 318 F.Supp.2d at 219. CUTSA specifically addresses preemption at section 3426.7, which states: "(a) Except as otherwise expressly provided, this title does not supersede any statute relating to misappropriation of a trade secret, or any statute otherwise regulating trade secrets. (b) This title does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon misappropriation of a trade secret, or (3) criminal remedies, whether or not based upon misappropriation of a trade secret." That is, CUTSA does not affect contractual remedies, other civil remedies that are not based upon misappropriation of a trade secret, or criminal remedies.

In *K.C. Multimedia*, *supra*, 171 Cal.App.4th at 958 the California Court of Appeal for the Sixth Appellate District unanimously held, in agreement with the federal cases applying California law, that section 3426.7, subdivision (b), preempts common law claims that are "based on the same nucleus of facts as the misappropriation of trade secrets claim for relief."

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[1] Some courts have preferred to use the term supersesession rather than preemption to describe the supersession of one state by law another. *See Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 232 (*citing Zengen, Inc. v. Comerica Bank* (2007) 41 Cal. 4th 239, 247, fn. 5)

In that case, plaintiff K.C. Multimedia supplied technology for banking applications to Bank of America. K.C. Multimedia filed suit, alleging that Bank of America misappropriated its trade secrets. *Id.* at 945. The final complaint included claims for trade secret misappropriation, breach of confidence, breach of contract, tortious interference with contract, and unfair competition. *Id.* Just before trial, the court addressed the preemption issue and dismissed K.C. Multimedia's claims for breach of confidence, interference with contract, and unfair competition. *Id.* at 948.

The court reasoned that subdivision (b)(2), which states that CUTSA "does not affect…other civil remedies that are not based upon misappropriation of a trade secret," would be rendered meaningless if claims that *are* based on trade secret misappropriation were not preempted by CUTSA. *Id.* at 958 (*citing Digital Envoy, Inc. v. Google, Inc.* (N.D. Cal. 2005)) 370 F.Supp.2d at 1035).

The Court of Appeal in *K.C. Multimedia* also unanimously rejected the Bank of America's argument that it could maintain separate causes of action to the extent that they had "more" to their factual allegations than just misuse or misappropriation of trade secrets. *Id.* at 956. That is, a common law cause of action cannot be based on the same nucleus of facts as a trade secret claim simply because it alleges new facts, different injuries and damages, or a different theory of liability. *Id.* at 957. In support of this argument, Bank of America cited case law from other states interpreting similar trade secret statutes. However, the *K.C. Multimedia* court distinguished those other states' trade secrets statutes from California's: the other states' statutes contained a "displacement" provision, meaning that only that law which directly conflicts with the trade secret statute is displaced. California's legislature rejected the "displacement" provision "in favor of an entirely different one." *Id.* at 956. Thus, a plaintiff bringing a trade secret claim cannot state a claim for relief for common law conversion even if it alleges "more" facts, injuries or claims than those in its trade secret claim.

Here, as in K.C. Multimedia, the SAC "as a whole rests on factual allegations of trade secret misappropriation." *Id.* at 959. That is, each cause of action "hinges upon the factual allegation that [defendants] misappropriated trade secrets." *Id.* This is true of the conversion claim,

as Plaintiff claims that the information or data allegedly converted, such as the identity of its customers, is a trade secret or has some other value. SAC, ¶ 17 (alleging that customer lists were one of the trade secrets misappropriated by Defendants).

In *Silvaco Data Systems*, *supra*, 184 Cal.App.4th at 239, the court "emphatically reject[ed] the suggestion that [CUTSA] was not intended to preempt 'common law conversion claims based on the taking of information that, though not a trade secret, as nonetheless of value of the claimant.'" Thus, to the extent that the second cause of action for conversion concerns information of value to the Plaintiff, it is preempted by CUTSA. The demurrer to the second cause of action should be granted without leave to amend.

C. The Second Cause of Action Is Uncertain Because It Lacks the Required Specificity

Of the Defendants who have been served in this action, Michael V. is the only Defendant against whom the conversion claim runs. However, other un-served Defendants also listed under the second cause of action are Pepper Wagner, Tile & Art Design Works by Pepper Gallery, Richard Deridder, Kenneth Jayes, Joshua Tree Lake RV and Campground, Wendy Cohen, Marge Doyle, Jack Kennedy & Does 1 through 200. Plaintiff, however, fails to specify which Defendant committed which alleged act(s) of conversion.

For example, in Paragraph 37 Plaintiff alleges that "DEFENDANTS appropriated or used and controlled computer network data..." even though many of the un-served defendants are customers of MojaveWifi. Plaintiff should clarify which defendants, exactly, are alleged to have converted which items of Plaintiff's personal property. Thus, because the second cause of action is vague and lacks the required specificity, the demurrer to the second cause of action should be granted.

IV. THE THIRD CLAIM FOR SALE OF STOLEN INTELLECTUAL PROPERTY AND TANGIBLE PROPERTY FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED AND IS DUPLICATIVE OF OTHER CAUSES OF ACTION FOR TRADE SECRET MISAPPROPRIATION

This cause of action does not, as pleaded by the Plaintiff, exist under California

law. The third cause of action is entitled "Sale of stolen intellectual and tangible property" in the caption, but in the body of the SAC it is entitled "Receipt and Sale of stolen property (Penal C. § 496)." The allegations thereunder are:

- Matt "fraudulently appropriated information pertaining to Plaintiff's customers, along with information related to the discovery and development of relay points, as well as actual cable, mounts, and other tangible property…." SAC, ¶ 47.
- Defendants Mojavewifi.com and Matt Villarreal "sold that stolen property or placed it in possession and control of other Defendants." SAC, ¶ 48.

The third cause of action fails to apprise Defendants of the allegations against them because it is unclear against whom the claim runs. Although this cause of action runs against twelve named defendants, only Matt V. and MojaveWifi.com are alleged to have "stolen" or "sold" anything. All other defendants are merely alleged to have "obtained and/or retained this property." SAC, ¶ 49. Hence, it is unclear what conduct by each defendant is actionable or what precise cause of action is alleged against any of the listed defendants.

Furthermore, the information about Plaintiff's customers and relay points that were allegedly misappropriated or stolen is the same exact type of information Plaintiff alleges was misappropriated under its trade secret claim. Thus, to the extent that Plaintiff is alleging the taking of "intellectual property" or data that it considers of value or a trade secret, the third cause of action is duplicative of the first cause of action for trade secret misappropriation and is preempted by CUTSA. *See*, *e.g.*, *K.C. Multimedia, Inc.*, *supra*, 171 Cal.App.4th 939; *Silvaco Data Systems*, *supra*, 184 Cal.App.4th at 239.

Furthermore, to the extent that Plaintiff is alleging the wrongful taking or use of "tangible property," such as personal property (e.g., the cables and mounts), the third cause of action is duplicative of the second cause of action for conversion. But even if this were construed to be a cause of action for Conversion, Plaintiff has failed to allege that it demanded the return of personal property from those who retained it and that it did not consent to the taking or possession of its personal property by any Defendants. *See* CACI 2100. Thus, the Demurrer to the third cause of action should be granted.

V. THE FOURTH CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS/WRONGFUL INDUCEMENT TO BREACH FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED AND IS UNCERTAIN BECAUSE IT LACKS THE REQUIRED SPECIFICITY

A. Plaintiffs' Cause of Action for Intentional Interference with Contractual Relations Fails to State a Claim

Plaintiff's fourth and fifth causes of action are both entitled "Intentional Interference with Contractual Relations/Wrongful Inducement of Breach." The fourth cause of action concerns Defendants' actions with respect to one of Plaintiff's former contractors – Jim Shupe, whereas the fifth cause of action concerns Defendants' actions with respect to Plaintiff's customers.

Specifically, Plaintiff alleges the following for the fourth cause of action:

- "in 2010 at a trade fair in Yucca Valley, Defendant Villarreal solicited for employment a third party under contract with Plaintiff, Jim Shupe." SAC, ¶ 53.
- "This contractor terminated his agreement with Plaintiff without notice soon thereafter; admitting that he became dissatisfied with his contract with Plaintiff as a result of representations made by Defendant Villarreal." SAC, ¶55.
- Defendant Villarreal "incorrectly advised Plaintiff's customers that said contractor would be working for Defendant Mojavewifi.com…." SAC, ¶ 57.

The elements of a cause of action for intentional interference with contract are: (1) a valid contract between plaintiff and a third party; (2) the defendant's knowledge of this contract; (3) defendant's intentional act designed to induce breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and, (5) resulting damages. *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1125.

In *Reeves v. Hanlon* (2004) 33 Cal. 4th 1140, the California Supreme Court held that, while an action for intentional interference with contract may lie against a defendant who induces an at-will employee to quit working for the plaintiff, the plaintiff must plead and prove that the defendant engaged in some independently wrongful act; that is, an act proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. *Id.* at

1144-45, 1152-53. This is the same standard that applies to actions for intentional interference with prospective economic advantage. *Id.* at 1144. The reasoning is that such an interference is "primarily an interference with the future relation between the plaintiff and the at-will employee….." *Id.*

Here, Plaintiff has alleged that Mr. Shupe was its independent contractor, whose work relationship with Plaintiff was governed by a contract. However, Plaintiff fails to allege that any Defendants committed any act(s) "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." Merely soliciting an employee does not meet the standard for conduct that is an independently wrongful act. *Id.* at 1150 (*citing Diodes, Inc. v. Franzen* (1968) 260 Cal.App.2d 244, 255).

Plaintiff also alleges that Mr. Shupe told Plaintiff that he became dissatisfied with working for Plaintiff as a result of Defendants' representations. SAC, ¶55. However, Plaintiff does not describe any of these alleged representations with the required specificity. For example, if a prospective employer tells a prospective employee the salary it would be willing to pay is significantly higher than the employee's current salary, this may cause an employee to become dissatisfied with his or her current employer. However, this type of statement is not independently wrongful under the *Korea Supply* standard and would not be actionable. Thus, the demurrer to the fourth cause of action for intentional interference with Mr. Shupe's contract should be granted for failure to allege an independently wrongful act.

B. <u>The Fourth Claim Is Uncertain Because It Lacks the Required Specificity</u>

Where an action is based on an alleged breach of contract, the complaint must indicate on its face whether the contract is written, oral, or implied by conduct. *Otworth v. Southern Pacific Transportation Co*. (1985) 166 Cal.App.3d 452, 458-459. Further, when there is an allegation that a contract is written, "the terms of a contract must be set forth verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." *Id*. at 459; *see also A. Teichert & Son, Inc. v. California* (1965) 238 Cal.App.2d 736, 748, *disapproved on other grounds*, 65 Cal. 2d 787, 792 ("[i]f writings form a necessary link in a cause of action, they should be quoted in the complaint, set out *in haec verba* or incorporated by

reference"). Failure to do so is ground for a special demurrer. *Cal. Civ. Proc. Code* § 430.10(g).

Here, Plaintiff alleges that Defendants induced Mr. Shupe to breach his contract with Plaintiff. But since the contract is not attached to the SAC or even described in the allegations, Defendants do not know what contract terms they are accused of inducing Mr. Shupe to breach. Furthermore, if Plaintiff is alleging, however ambiguously, that Mr. Shupe breached a contract containing a confidentiality clause regarding trade secrets, then this cause of action may also be preempted by CUTSA. *See K.C. Multimedia*, *supra*, 171 Cal.App.4th at 960 (holding a cause of action for intentional interference with contract preempted by CUTSA where the allegations were that defendants helped and encouraged one of plaintiff's employees to, among other things, disclose trade secrets and come work for defendant.")

The contract between Plaintiff and Mr. Shupe is not attached to the complaint nor are its terms described verbatim in the complaint. Thus, the demurrer to the fourth cause of action for intentional interference with Mr. Shupe's contract should be granted.

VI. THE FIFTH CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS/WRONGFUL INDUCEMENT TO BREACH FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED AND IS UNCERTAIN BECAUSE IT LACKS THE REQUIRED SPECIFICITY

A. The Fifth Cause of Action Is Preempted by CUTSA

The fifth cause of action concerns Defendants' actions with respect to Plaintiff's customers. This cause of action is preempted by CUTSA because it is based on the same allegations that support Plaintiff's trade secret claim – that Defendants misappropriated confidential information and used it to, among other things, solicit Plaintiff's existing and prospective customers. SAC, ¶¶ 17-23; *K.C. Multimedia*, *supra*, 171 Cal.App.4th at 958.

B. The Fifth Cause of Action Is Uncertain

Where an action is based on an alleged breach of contract, the complaint must indicate on its face whether the contract is written, oral, or implied by conduct. *Otworth v. Southern Pacific Transportation Co*. (1985) 166 Cal.App.3d 452, 458-459. Further, when there is an allegation that a contract is written, "the terms of a contract must be set forth verbatim in the body of the

complaint or a copy of the written instrument must be attached and incorporated by reference." *Id*. at 459; *see also A. Teichert & Son, Inc. v. California* (1965) 238 Cal.App.2d 736, 748, *disapproved on other grounds*, 65 Cal. 2d 787, 792 ("[i]f writings form a necessary link in a cause of action, they should be quoted in the complaint, set out *in haec verba* or incorporated by reference"). Failure to do so is ground for a special demurrer. *Cal. Civ. Proc. Code* § 430.10(g).

Here, Plaintiff alleges that Defendants intentionally interfered with the contracts Plaintiffs had with existing customers and induced those customers to breach them. But as these contracts are not attached to the SAC or even described in the allegations, Defendants do not know what contract terms they are accused of inducing Plaintiff's customers to breach. Thus, the demurrer to the fourth cause of action for intentional interference with customer contracts should also be granted.

VII. THE SIXTH CLAIM FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

A. Plaintiff Fails to Allege All Essential Factual Elements of Interference With Prospective Economic Advantage

The elements of an intentional interference claim with prospective economic or business advantage are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1153. It must also be reasonably probable that the prospective economic advantage would have been realized but for defendant's interference. *Youst v. Longo* (1987) 43 Cal. 3d 64, 71, fn. 6.

Here, Plaintiff alleges that Defendants "began to contact Plaintiff's prospective customers" and made various false representations to them. However, by failing to describe who these "prospective customers" are, Plaintiff has not alleged a reasonable probability that the advantage

would have been realized. *Youst v. Longo*, *supra*, 43 Cal. 3d at 71. That is, Plaintiff has not alleged a shred of evidence that all individuals without an Internet service provider in several cities would probably have become customers of Plaintiff *but for* Defendants' interference. Thus, the demurrer to the sixth cause of action should be granted.

B. The Sixth Cause of Action for Intentional Interference With Prospective Economic Advantage Is Preempted By CUTSA

Plaintiff alleges that Defendants had "no education or experience relevant to providing internet service or computer technical service" prior to its affiliation with Plaintiff. SAC, ¶ 13. The gist of the entire complaint against Defendants is that they used what they learned, and then misappropriated from the Plaintiff, such as technical trade secrets and customer lists, to set up a rival business in the same geographic areas served by Plaintiff. Accordingly, Plaintiff's interference with prospective economic advantage claim is inextricably dependent on its allegations of trade secret misappropriation. That is, it was only *because* the Defendants misappropriated trade secrets from Plaintiff that they were they able to set up a rival Internet service provider and unfairly lure away Plaintiff's prospective customers.

Thus, to the extent that the sixth cause of action for intentional interference with prospective economic advantage is based on conduct alleged to be trade secret misappropriation, it is preempted by CUTSA. *See First Advantage Background Services Corp. v. Private Eyes, Inc.* (N.D. Cal. 2008) 569 F.Supp.2d 929 (dismissing claims for intentional interference with prospective economic advantage; holding that common law claims based on trade secret misappropriation are preempted by CUTSA).

C. The Sixth Cause of Action is Uncertain Because It Lacks the Required Specificity

In *First Advantage Background Services Corp. v. Private Eyes, Inc.*, *supra*, 569 F.Supp.2d at 937, the plaintiff supported its intentional interference with prospective economic advantage claim with allegations sounding in trade libel, injurious falsehood and and/or disparagement. The court stated that even though the plaintiff was alleging trade libel rather than defamation, and even though trade libel does not require the specific pleading that defamation does, the plaintiff was

still required to describe the exact comments in their full context. *Id.* at 938.

Here, nothing in the SAC indicates which defendant made what defamatory statements to which individuals, when the statements were made, or what exactly was said. Without detailed allegations, a claim for interference with prospective economic advantage is deficient. *Id.* at 937; *See also Eldorado Stone v. Renaissance Stone, Inc.*, 2005 WL 5517731 (S.D. Cal. 2005) (dismissing trade libel claim where plaintiff failed to identify author or speaker, recipient, time, and location of each allegedly libelous statements). Nor does the court have any way of discerning whether the statements were protected or privileged speech, such as under the competition privilege. *See San Francisco Design Center Assoc. v. Portman Cos.* (1995) 41 Cal.App.4th 29, 40 (the privilege of competition is an affirmative defense to actions for intentional interference with economic relations).

Thus, vague allegations that Defendants disparaged Plaintiff's business are insufficient to support a claim for intentional interference with prospective economic advantage and the Demurrer to the sixth cause of action should be sustained.

VIII. THE SEVENTH CLAIM FOR UNFAIR COMPETITION FAILS TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED AND IS UNCERTAIN BECAUSE IT LACKS THE REQUIRED SPECIFICITY

A. Plaintiff's Unfair Competition Claim Is Preempted by CUTSA To The Extent It Is Based on the Same Facts Supporting Its Misappropriation of Trade Secrets Claim

California's statutory unfair competition law at Business & Professions Code § 17200 *et seq.* permits claims for "unlawful, unfair or fraudulent" business practices. "A claim for common law or even statutory unfair competition may be preempted under Civil Code 3426.7 if it relies on the same facts as the misappropriation claim." *K.C. Multimedia*, *supra*, at 960 (citations omitted); *see also Digital Envoy, Inc. v. Google, Inc.* (N.D. Cal. 2005)) 370 F.Supp.2d 1025, 1035 (holding that plaintiff's unfair competition and unjust enrichment claims were preempted because they were based on the "identical nucleus of facts" as its misappropriation of trade secrets claim).

Here, at least some of Plaintiff's unfair competition claim relies on the same factual

allegations as its trade secret misappropriation claim. For example, Plaintiff alleges that one of the unfair acts committed by Defendants was the "solicitation of individuals under contract with Plaintiff…." SAC, ¶ 92. In its trade secret claim, Plaintiff alleged that Defendants misappropriated customer lists. Without the customer list, Defendants could not have engaged in the unfair act of soliciting them. Hence, the unfair competition absolutely relies on the same facts as the trade secret claim. Plaintiff also alleges "the theft of Plaintiff's property and use of that property to compete against Plaintiff…." SAC, ¶ 92. Here, too, the unfair competition relies on the same facts as the trade secret claim. Although vaguely alleged, this is the heart of the trade secret misappropriation claim – that Defendants misappropriated confidential or secret information of value and used it to compete against Plaintiff.

Thus, to the extent that the unfair competition claims relies on any of the same facts supporting the trade secret misappropriation claim, the demurrer to the seventh cause of action should be granted without leave to amend.

B. The Seventh Cause of Action is Uncertain Because It Lacks the Required Specificity

In its unfair competition claim, Plaintiff alleges "the theft of Plaintiff's property and use of that property to compete against Plaintiff…." SAC, ¶ 92. However, Defendants cannot defend against this allegation without knowing what items of property, tangible or otherwise, that Plaintiff is referring to. It is unclear whether Plaintiff is referring to intellectual property only or intellectual and tangible property. To the extent Plaintiff may be referring to intellectual property, such as trade secrets, this claim is preempted by CUTSA. Thus, the demurrer to the seventh cause of action should be granted for lack of uncertainty, as well.

IX. THE EIGHTH CLAIM FOR DEFAMATION FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED AND IS UNCERTAIN BECAUSE IT LACKS THE REQUIRED SPECIFICITY

Under California law, when a plaintiff seeks damages for another's words, such as in a defamation claim, those words "must be specifically identified, if not pleaded verbatim, in the complaint." *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1612; 5 B. Witkin, California Procedure

§ 688, at 140 (3d ed. 1985); *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 31.

Here, Plaintiff alleges that:

- "Defendants…intentionally publicized false facts pertaining to Plaintiff's ability to provide internet and computer support services to existing and prospective customers…." SAC, ¶ 97.
- "These facts were defamatory, unprivileged…." SAC, ¶ 98.

Nothing in the SAC indicates which defendant(s) made what defamatory statements to which individuals, when the statements were made, or what exactly was said. Without detailed allegations, the individual Defendants have no way of defending against this claim. Nor does the court have any of discerning whether the statements were protected or privileged speech, such as under the privilege of competition. *See*, *e.g.*, *San Francisco Design Center Assoc. v. Portman Cos.* (1995) 41 Cal.App.4th 29, 40 (the privilege of competition is an affirmative defense to actions for intentional interference with economic relations). Thus, the Demurrer to the eighth cause of action should be granted.

X. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant its Demurrer as to the Second through Eighth Causes of Action in Plaintiff's Second Amended Complaint.

DATED: November __, 2011

By: _____

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