McNAUL EBEL NAWROT & HELGREN, PLLC
JERRY R. McNAUL
jmcnaul@mcnaul.com
Admitted Pro Hac Vice
LESLIE J. HAGIN
lhagin@mcnaul.com
Admitted Pro Hac Vice
600 University Street, Suite 2700
Seattle, Washington 98101-3143
Telephone (206) 467-1816
Facsimile (206) 624-5128

KINSELLA WEITZMAN ISER KUMP & ALDISERT LLP
HOWARD WEITZMAN (SBN 38723)
hweitzman@kwikalaw.com
JONATHAN P. STEINSAPIR (SBN 226281)
jsteinsapir@kwikalaw.com
808 Wilshire Boulevard, 3rd Floor
Santa Monica, California 90401
Telephone (310) 566-9800
Facsimile (310) 566-9850

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ACTIVERAIN CORP., a Washington Corporation,

Plaintiff,

v.

MOVE, INC., a Delaware corporation,

Defendant.

Case No. CV-07-5037 DDP (CTx)

PLAINTIFF ACTIVERAIN CORP.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT MOVE, INC.'S MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Move's motion for summary judgment ("Mtn.") is based on mischaracterizations of the evidence and the applicable law. Move consistently misstates the evidence it cites and ignores contrary evidence. *See* ActiveRain's Statement of Genuine Issues of Material Fact in Opposition to Defendant Move's Motion for Summary Judgment ("Issues").

This case centers around Move's desire to enter the business of social networking websites for realtors. Move operates the official website(s) for the National Association of Realtors ("NAR"). In 2006-2007, Move recognized the need to enter this social networking business, and was debating internally whether to enter it through internal development of its existing websites or through acquisition ("build" versus "buy" decision). Move was concerned about, and coveted, ActiveRain's site, in particular. *See* Hagin Decl., Ex. A-B. ActiveRain had launched its social networking site for realtors in June 2006, and was quickly acknowledged to be in the "first-mover" position relative to social networking sites for realtors. By late 2006, ActiveRain was being courted by Move competitors. Move's solution to this dilemma was to assure ActiveRain it would purchase its assets at a figure including earnouts of up to $30 million (thereby inducing ActiveRain to enter into a "no shop" and take it off the market); obtain ActiveRain's confidential information while, undisclosed to ActiveRain, it continued its "build" efforts; and then, armed with ActiveRain's confidential information and the results of the internal build effort, Move could later make a decision as to whether or not to actually purchase ActiveRain. Among other false promises, Move assured ActiveRain that everyone was in favor of the acquisition (i.e., it was a "done deal"). Then on the day the acquisition of ActiveRain was supposed to close, Move pulled the plug. Within

two weeks of cancelling the transaction, Move announced its intentions to launch its "own" social network site for realtors.

II. LEGAL STANDARDS GOVERNING THIS MOTION

A party is only entitled to summary judgment if it establishes there is no genuine issue as to any material fact that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. 56(c). Move bears the burden of showing that there is no evidence which supports an element essential to the non-movant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court may not make credibility determinations or weigh conflicting evidence, as such determinations are for the jury. *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1328 (9th Cir. 2000). All inferences must be drawn in the light most favorable to ActiveRain. *Matushita Elec. Corp. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. STATEMENT OF FACTS

ActiveRain, formed by Jonathan Washburn, Matt Heaton and James Hillyerd in 2006, created and operates a social networking site for realtors (the ActiveRain Network). ActiveRain had established the "first mover" advantage in the emerging field of providing a social networking site for realtors in late 2006/early 2007. Heaton Decl. at ¶¶4, 7; Morris Decl. at ¶4.[1] ActiveRain

---

[1] Move's repeated effort to conflate "blogs" and "social networking" and use of the term "blog/social network" is misleading. (Mtn. at 1). Blog sites and social networking sites are not the same thing. Move had ***blogs*** in late 2006/early 2007. It did not have a social networking site for realtors. Heaton Decl. at ¶12; Washburn Decl. at ¶¶10-11; Hagin Decl., Ex. D at 88:25-89:15. *See also e.g.*, Richard A. Paul and L. Hurd Chung, *Brave New Cyberworld*: *The Employer's Legal Guide to the Interactive Internet*, 24 The Labor Lawyer 109 (2008) at 110, 112 (explaining differences between blogs and social networking sites):

> Blogs. . . developed in the early days of the Internet. . . . A blog is a type of Web site that allows an author to write on any subject in any fashion.
>
> * * *

secured this advantage by developing essential, confidential information concerning its social networking techniques, methods, analyses, processes, marketing and business plans, financial models, *pro formas,* and member database compilations ("confidential information"), through the investment of substantial time, effort, skill, and money. Heaton Decl. at ¶¶4, 24; Hagin Decl., Ex. C. This confidential information was valuable in this market.[2]

At least as early as the second half of 2006, Move recognized that it was essential to expand its website services into the social network site business. Move specifically noted in an internal email on November 1, 2006 that

> **Realtors**. This is probably our largest untapped resource. There are hundreds (if not thousands) of realtors who write about topical issues on

---

> Social networking sites (SNSs) sprung up in the early part of the decade and caught fire. *** "[S]ocial networks are focused on connecting people and are built on user-generated content.
>
> Over recent years, people have begun to use SNSs to replace telephones, e-mails, and coffee shops.

[2] Move mischaracterizes the testimony of ActiveRain's principals on this issue (Issues 101-102). Their actual testimony reflects they were being asked to break apart the aggregate information, and place a specific dollar value on each of the various elements of it, which they said they were not qualified to do. They did not say the information in the aggregate has no value. It obviously does. Heaton Decl. at ¶¶4, 7, 24-25; Hagin Decl., Ex. E at 59:6-60:12. Indeed, Move's Board members from Elevation Partners met with the ActiveRain principals, and acknowledged that they had captured "lightning in a bottle" and developed the "secret sauce" with regard to the techniques necessary for a successful social networking site for realtors – phrases often repeated later by Move executives in assuring ActiveRain that everyone at Move was in favor of the acquisition, and the transaction would close. Hagin Decl., Ex. G at 78:4-12; 80:1-7; 124:15-125:5; 126:12-25; Ex. H at 70:20-71:7; Ex. I at 258:1-259:7. *See also, e.g., Brave New Cyberworld, supra,* at 112-113 (noting that the social networking site "MySpace was only a few years into its run when Rupert Murdock, CEO of News Corporation, bought it in 2005 for $580 million;" "[a]nother SNS, YouTube.com, though still in its infancy and with no discernible business model, was purchased by Google for $1.65 billion;" and that "large corporations are attempting to create services resembling MySpace and YouTube to bring customers together online.").

> a regular basis, and yet we don't really have an effective way to empower them with the necessary data and arguments when news breaks. * * * At this point, the group that is most effectively organizing this resource (realtors) is ***the people at ActiveRain ....***

Hagin Decl., Ex. F. In a task-force briefing dated December 27, 2006, Move identified the following as being "Competitive Threats Illustrative Examples: Zillow, ActiveRain, Trulia, YouTube." And it specifically stated its intent to "create a realtor community (***ActiveRain***)." *Id.,* Ex. A (emph. added). At the same time, its Top Producer affiliate, headed by Errol Samuelson, was trying to "[m]ake a Real Estate Blog environment ***a la ActiveRain"***). *Id.*, Ex. B (emph. added). *See also id.,* Ex. J at 137:16-24; *id.,* Ex. I at 256:24-257:20.

On January 9, 2007, Move's senior executives Allan Merrill and Errol Samuelson met with ActiveRain's Jon Washburn and Matt Heaton in New York during a leading industry conference. In writing to the very top people at Move about that meeting, Mr. Merrill stated:

> First of all, these guys [referring to ActiveRain], while still pretty humble, are being treated like rock stars here ... including a full court press by Google right in front of my eyes. ... They have had a variety of conversations about "investments" and "sales" with everyone from Trulia to Zillow to Yahoo! to Craigslist to Google ... so this is regrettably a very competitive situation .....

Mr. Merrill then went on to outline

> three choices, two of which are actually practical: (1) we could do nothing. In this instance, they will partner with someone and be part of a crusade to get realtors in front of consumers with local market information (including realtor-provided videos which are coming soon), not just listings. They expect to be able to reach 75,000 to 90,000 members within two years. (2) We could take a minority investment (approximately 15% for $1.5mm) against a $10mm valuation, matching other proposals they have received. They don't really believe we should do this, since our missions overlap to such a great extent that it would be very difficult for us to have a minority/passive stake while essentially competing for realtor content. (I agree that this is impractical in the short-term. But worse, it might enable them to create a highly-valued entity that we have no control over, with insufficient participation in their upside.) (3) We could buy them on an earnout basis that would create a downside value of $10mm over two years and (sit down for this) a $30-40mm total valuation upside IF THEY ACHIEVE A SET OF AGGRESSIVE MEMBER, CONTENT AND TRAFFIC METRICS. ...

> ***That is why, if they achieve the member and content metrics, they're not irrational, in this market, to be thinking $50mm in two years on a stand-alone basis.***

Mr. Merrill closed by stating:

> The argument against is that with our Top Producer and Realtor.com customers, we can build our own realtor-generated content site pretty quickly, erasing the near-term advantage ActiveRain has. ***While I think that argument has merit, I think it's dangerous to assume they will either sit still OR be on their own for very long.***

Id., Ex. K (emph. added).

Errol Samuelson and his group had been working internally to develop a social network site for realtors "a la ActiveRain." *Id.*, Ex. B. He resented the idea of Move paying $30 million to ActiveRain, while Move had given his group a "shoestring budget" to develop a similar social networking site internally. *Id.*, Ex. L. He was convinced Move's capital was "better deployed through him." *Id.*, Ex. M. Contrary to Move's assurances to ActiveRain that everyone was in favor of the acquisition, Mr. Samuelson was actually against acquiring ActiveRain from the "get go." *Id.*, Ex. J at 60:8-16.

So what to do? Move resolved this internal dilemma by taking ActiveRain off the market for several months while (undisclosed to ActiveRain) it continued its internal efforts to build a competing social network site. It accomplished this by assuring ActiveRain it would purchase its assets at a figure including earnouts of up to $30 million (thereby inducing ActiveRain to enter into a "no shop" and taking it off the market); obtaining ActiveRain's confidential information while (undisclosed to ActiveRain), it continued its internal "build" efforts; and then, armed with ActiveRain's confidential information and the results of the internal build effort, Move could make a decision as to whether or not to actually purchase ActiveRain.

On January 18, 2007, Move asked ActiveRain to cease discussions with any other companies. Move then entered into a Letter of Intent ("LOI") with

ActiveRain on March 9, 2007 that contained a formal "no shop" provision, expressly preventing ActiveRain from even talking with another suitor or potential investor. *Id.*, Ex. N. Move also requested and received extensions of the "no shop" provision based on additional specific assurances to ActiveRain that the purchase was approved by the Move Board on March 15, 2007; that everyone at Move was in favor of the acquisition; and that the transaction would quickly close. DelGrande Decl. at ¶¶5, 11 and Ex. A .[3]

Under the auspices of due diligence, Move required ActiveRain to provide its confidential information to Errol Samuelson and his group, and others within Move, who were continuing the effort to build a competing social network site "a la ActiveRain." Move never told ActiveRain that Mr. Samuelson's group and others within Move were continuing these efforts to build a competing site. Quite the contrary: Move assured ActiveRain that it had made the decision to buy ActiveRain (i.e., to "buy" and not "build").[4]

---

[3] Contrary to Move's contention, ActiveRain was effectively bound by a no-shop provision for over four months, from January 18, 2007 until May 3, 2007. *Id.* at ¶5. This was a critical time in this fast-moving market, when Move's competitors (and other potential acquirers or strategic investors in ActiveRain) were making a "build" or "buy" decision about social networking sites. By the time Move cancelled the deal, the key window of opportunity for ActiveRain had closed. Heaton Decl. at ¶¶7, 21; Hagin Decl., Ex. E at 14:8-20; 21:15-23:22; 52:22-53-22. *See also* Morris Decl. at ¶¶4, 7-8, 10.

[4] Move proclaims that it told ActiveRain about "the blogs and social networking features" it was working on. (Mtn. at 5). In fact, Move executives discussed their ***blog*** initiatives (which is quite different from disclosing continued development of a competing social networking site). They never told ActiveRain that Move was continuing an effort to build a competing social networking site. *See* Heaton Decl. at ¶¶10-12 ; DelGrande Decl. at ¶7. Moreover, these discussions about Move (or Top Producer) blogs were in the context of an integration discussion, focused on integrating these blogs with or into the ActiveRain social networking site ***post-acquisition***. In his testimony not cited by Move, Mr. Samuelson admitted that he "probably [did] not" [disclose Move's continuing social networking build efforts] "because the whole focus of the meeting [on March 16, 2007] was to plan post, post acquisition." Hagin Decl.,

ActiveRain never would have shared its confidential and market-sensitive social networking site information with the very people who were building a competing product. Had ActiveRain known Errol Samuelson and his group were continuing their efforts to build a competing site, it never would have shared this confidential information with them, and would not have agreed to a no-shop provision preventing them from having discussions or negotiations with other companies. Heaton Decl. at ¶ 11. DelGrande Decl. at ¶ 7.

Contrary to industry standards, Move did not create any sort of firewall between the people who had access to ActiveRain's trade secret information and Move personnel who were continuing efforts to build within Move a competing social network "a la ActiveRain." Move used these very people to acquire ActiveRain's trade secret information – funneling it directly to them. Hagin Decl., Ex. Q at 74:7-78:6; 79:5-12.[5] In fact, the Move personnel given access to ActiveRain's trade secret information at the same time they were (undisclosed to ActiveRain) continuing to build a competing social network site were not even shown the NDA. Nor were other precautions taken to ensure they did not misuse this confidential information provided under the auspices of due diligence.[6]

Ex. I at 117:19-122:7. Move has also mischaracterized the testimony of ActiveRain transaction counsel Bill Carleton. He actually testified (from his notes) that Move executives assured him and the ActiveRain principals on March 16, 2007 that the Board had approved the deal on March 15, it was a "done deal," and the discussions about Move or Top Producer blogs was part of an integration discussion (sharing of "visions of the future," post-acquisition, with "Realtor.com" to be a "database for blogging" "mesh[ing]" with the "ActiveRain center of excellence for social networking"). *Id.,* Ex. G at 51:1-18; 55:18-56:18; 67:7-70:6; 76:22-77:1; 79:14-80:16; 146:14-15.

[5] *Id.*, Ex. P (Visnick Report at ¶3.1.2; 3.2); DelGrande Decl. at ¶7.

[6] *Id.*, Ex. Q at 78:8-81:16; Ex. R at 430:21-431:6; Ex. S at 72:21-73:3; Ex. I at 117:19-119:5. Move asserts that technical "due diligence was by Move's employees (at its Top Producer affiliate) who were working on its own

Move signed the LOI on March 9, 2007 and tendered it to ActiveRain for signature. ActiveRain assumed Move was acting in good faith, and signed it. Move's internal documents reveal that when it asked ActiveRain to sign the LOI, it had no intention of doing the deal on the basis stated. Move executives wanted ActiveRain to sign an LOI immediately with an earnout provision based upon traffic metrics, so as to lock ActiveRain into the no shop, and then if the Board approved the deal they would go to Seattle and deliver the "bad news" to ActiveRain that the earnout had to be "retraded." *Id.*, Ex. T. Move's Board approved the transaction (on March 15, 2007), giving management authority to close the purchase.[7] Mssrs. Merrill and Samuelson then went to Seattle the next day according to their pre-arranged plan, and told ActiveRain the Board had approved the transaction but falsely claimed "the Board" insisted on one of the two earnouts being changed.[8]

The LOI required Move to unconditionally pay ActiveRain $8 million, and then if ActiveRain achieved the earnout performance metrics, ActiveRain would receive an additional $22 million. *Id.*, Ex. N. Move consistently assured ActiveRain's representatives it expected ActiveRain to meet the earnouts under any of the discussed structures or scenarios. Heaton Decl. at ¶15. The LOI

---

blogs/social networks because they were most familiar with blog/social network technology, could best evaluate plaintiff's software, and could best determine how to integrate it with Move's technology." (Mtn. at 6.) There exists a genuine issue of material fact as to whether this was the true reason Move chose to use these people to acquire ActiveRain's confidential information while they were (undisclosed to ActiveRain) also the ones continuing Move's internal build efforts.

[7] *Id.*, Ex. U; Ex. J at 144:5-20 and 146:6-20; Ex. I at 260:20-22.

[8] Heaton Decl. at ¶13; Hagin Decl., Ex. G at 55:14-56:18. Indeed, Move's CR 30(b)(6) designee on the topic of the March 15, 2007 Board meeting, Errol Samuelson, testified that while he recalled some Board members asking some questions he had no recollection of any Board member expressing "concern" about any earnout provision. *Id.*, Ex. I at 267:2-13.

lasted for 45 days but was extended at Move's request, based on its additional promises of closing. Move asked ActiveRain to grant another extension of the no shop provision on April 24, 2007. DelGrande Decl. at ¶5. On April 25, ActiveRain's investment banker, Chuck DelGrande, wrote to Jack Dennison as follows:

> [O]ur client, ActiveRain, is prepared to agree to one final extension of the in-force no-shop provision governing the [LOI]. They are willing to grant this through close-of-business Monday, May 7th, with the following good faith understanding:
>
> 1. ***In keeping with your characterizing this is the #1 business priority to get closed as fast as possible*** . . . .

Mr. Dennison responded that this was "just as we discussed and is satisfactory to me and Move." *Id.* at ¶11, Ex. A (emph. added). Thus, the ActiveRain principals and Mr. DelGrande went to Westlake Village on May 2, 2007 to work out the few remaining issues and close the transaction.[9]

The morning session of the May 2 meeting seemed to be productive and well-spirited. However, after a break, the Move contingent came back into the room and the atmosphere was entirely different. It looked like Move was searching for a way of getting out of the deal. ActiveRain spent a lot of time addressing Move's articulated concerns, and at the end of the meeting Mr. DelGrande looked Jack Dennison in the eye and asked him if he was going to

[9] *Id.* Meanwhile, Move had also discouraged ActiveRain from doing a number of other things, including foregoing development of its strategically important "Localism" business plan and deferring its plans to monetize its business; and had required ActiveRain to do other things in order to close the transaction, including cancelling its line of credit with its bank and its office lease. *Id.* at ¶9; Heaton Decl. at ¶14.

recommend to the Board the next morning that it approve the transaction.[10] Mr. Dennison said he would do so. DelGrande Decl. at ¶12; Heaton Decl. at ¶19.

Move's excuse for cancelling the transaction is plainly pretextual. Move argues it made "repeated requests" for ActiveRain's member database, only received it on May 2, and was then able to perform an "analysis" comparing Move's user database with ActiveRain's which revealed substantial "overlap" between the memberships and that some number of ActiveRain members had alleged "low sales activity." (Mtn. at 7-8) In fact, ActiveRain had already provided Move with its member roster, as requested by Move, in PDF form. Move had previously told ActiveRain that its member data was not a priority item – but simply a "checkmark" on their due diligence list, which should be considered "behind" the other due diligence items in terms of importance. But at the May 2 meeting, Move suddenly insisted on being provided the entire ActiveRain member database, with additional data fields of confidential information, and in electronic format. DelGrande Decl. at ¶13, Ex. C; Heaton Decl. at ¶17. In addition, Errol Samuelson had already "scraped" ActiveRain's site in early January 2007 and concluded that "there probably is at least a 50% overlap between the Move customer database and the ActiveRain database." Hagin Decl., Ex. V. Move then told ActiveRain the overlap was one of the ***justifications*** for the deal. Heaton Decl. at ¶18. Moreover, the primary Move negotiator, Allan Merrill, was specifically asked what he thought the risks were of the transaction not closing. He never identified any actual or potential member overlap between Move and ActiveRain's databases as even being a risk

[10] By this time, Move had told ActiveRain, contrary to what it previously had told them, that management needed to go back to the Board for approval.

that could result in the transaction not closing. Hagin Decl., Ex. W at 179:3-180:6.[11]

ActiveRain was shocked when Move cancelled the acquisition, as was its experienced investment banker. *See* DelGrande Decl. at ¶10. ActiveRain's whole effort over the last several months had been devoted to the deal and providing Move with all of the confidential information it sought under the auspices of due diligence; the company had been put on hold during that period (a critical time period in the market); and it had used up most of its funds. *Id.* at ¶16; Heaton Decl. at ¶20-21; Washburn Decl. at ¶14; Morris Decl. at ¶¶ 6-10.

Just eight days after cancelling the transaction, on May 11, 2007, Mr. Samuelson advised Move's senior management that he planned to launch Move's own "blogging initiative" with social networking features for realtors at the upcoming National Association of Realtors ("NAR") Semi-Annual conference. Hagin Decl. at Ex. X. On or about May 18, Errol Samuelson announced at the NAR conference that Move was launching its own social network. *Id.*, Ex. Y.

---

[11] Move's excuse for cancelling the deal lacks credibility in other ways. For example, it claims to no longer have any copies of this "analysis" (although it retained copies of ActiveRain's member data and vast amounts of other ActiveRain confidential information it was supposed to have destroyed). Errol Samuelson claims the "analysis" is impossible to replicate or recreate. Hagin Decl., Ex. I at 178:4-180:20. And he and other Move witnesses cannot even recall who performed the comparison, nor other basic details about this allegedly all-important "analysis." *See id.*, Ex. S at 44:25-45:24; 46:20-24; 47:8-16; 171:7-175:11 (CR 30(b)(6) designee on alleged "analysis," Vadakan, cannot recall who did work and unable to explain measurements actually used for alleged "sales activity" comparison); Ex. I at 174:3-175:16; 184:11-14; (Samuelson cannot recall who did "analysis" or "agent productivity" issue; cannot recall level of overlap); Ex. Q at 292:21-24; 294:4-13 (Simos cannot recall details of alleged analysis and does not know why such could not have been done with PDF version of member roster already provided); Ex. J at 188:14-19 (Dennison does not know who performed "analysis").

Not surprisingly, Move proclaims that "Plaintiff's Confidential Information was not used by Move for any reason other than to evaluate the proposed acquisition" (Mtn. at 9). The evidence is compelling, however, that Move did misappropriate ActiveRain's confidential and trade secret information. For example, one of the Move employees given access to ActiveRain's confidential information was Dustin Luther who was heavily involved in Move's blogging efforts and in its (undisclosed) continuing social networking build effort. *See* Washburn Decl. at ¶10. On May 4, 2007, the day after Move cancelled the transaction, he wrote an email to Errol Samuelson (and his immediate supervisor Lisa Farris) reporting on his efforts to "make the blogging, and social networking in general, work at Move." This email, and the one from his supervisor forwarding it on to Jack Dennison, indicate that Mr. Luther had been "requeste[ed]" (apparently by Errol Samuelson) to "replicate the ActiveRain platform" as the way for Move to "begin developing a bridge between blogging and social networking." Mr. Luther's email twice refers to "replicat[ing]" the ActiveRain site relative to his assignment to "make the blogging, and social networking in general, work at Move." *Id.*, Ex. CC.

Incredibly, Mr. Luther testified he could not remember anything about why he used the term "replicate" relative to the ActiveRain site twice in this email, or even what he had discussed for the better part of two days about this work with Mr. Samuelson and Ms. Farris. *Id.*, Ex. R at 328:19-22; 329:20-24. Nonetheless, the diagrams in his email – showing the "ActiveRain Model" next to his proposed "Integrated Move Model" – are virtually identical. *Id.*, Ex. CC. And Mr. Luther admitted that he still had access to ActiveRain's confidential

information at the time and easily could have been influenced by that information. *Id.*, Ex. R at 332:1-335:13; 337:11-341:3.[12]

In addition, pursuant to the NDA, ActiveRain promptly asked for return of all of its due diligence information and materials and/or acknowledgement that Move had ensured the deletion and destruction of all such information it possessed. *Id.* at Ex. Z; *see also* Ex. AA. Move assured ActiveRain it had done so. Contrary to these assurances, Move failed to even ask a number of key people to return or destroy ActiveRain's confidential information for nearly a month – including Errol Samuelson. *See id.*, Ex. BB, Ex. Q at 337:1-340:22; 341:5-25. In fact, Mr. Samuelson ***never*** deleted ActiveRain's confidential information. *Id.*, Ex. I at 206:6-208:21.[13]

And, indeed, consistent with the above, there are a number of similarities between the Move social networking features launched after it obtained ActiveRain's confidential information and cancelled the deal, and the ActiveRain confidential and trade secret information sought by and disclosed to Move under the auspices of due diligence. This further indicates or reflects Move's "replication" and/or other misappropriation of ActiveRain's confidential

[12] Mr. Luther's email also states he had started to document what changes Move would need to make "assuming that [Move] moved forward with simply trying to replicate the ActiveRain platform," and sent this in a "Google Doc." to Mr. Samuelson and others. Move has yet to identify or produce this "Google Doc," despite repeated requests. *Id.*, Ex. DD.

[13] Move tries to spin this evidence by arguing it had a right to retain "archival" copies of ActiveRain's confidential information under the NDA. (Issue 82) Yet when asked why he did not delete or destroy ActiveRain's confidential information Mr. Samuelson testified he had been too "busy," could not "recall" if was asked to purge his files, and could not "say why I wouldn't have done it." *Id.*, Ex. I at 207:9-18; 208:12-18; 209:8-11.

and trade secret information. *See* Heaton Decl. at ¶¶ 22-25 ; Washburn Decl. at ¶¶ 17-20.

IV. LEGAL ARGUMENT

A. TRADE SECRETS CLAIM

Under a trade secret claim, plaintiff must present evidence from which the jury may find that (1) it owned trade secret information; (2) defendant acquired, disclosed, or used that information through improper means; and (3) plaintiff suffered a "loss caused by the misappropriation." Cal. Civ. Code § 3426. Move cannot seriously argue that ActiveRain's social networking business plans, projections, marketing plans, customer database compilations and the like do not "qualify" as trade secret information. *See, e.g., Reeves v. Hanlon*, 33 Cal. 4th 1140, 1155 (2004); *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1452–56 (2002); *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1521–22 (1997).[14]

Nor can Move credibly argue that this information had no value (or potential value). There need only be some evidence from which a jury may "form some solid sense" that the information at issue "is sufficiently valuable and secret to afford an actual or potential economic advantage over others." And the advantage need not be great, but merely ***"more than trivial."*** CACI No. 4412, Independent Economic Value; *Yield Dynamics, Inc. v. TEA Sys. Corp.,* 154 Cal.App.4th 547, 565, 66 Cal.Rptr.3d 1 (Cal. App. 6 Dist. 2007). Move is mistaken that ActiveRain must place a specific value amount on each element of the trade secret information it disclosed to Move. Indeed, a careful reading of Move's own authorities (*e.g., Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal.App.4th 1658, 3 Cal. Rptr.3d 279 (2003)), reveals they do not support

[14] *See also* Morris Decl. at ¶ 14. Indeed, this is the very type of information that Move itself treats as valuable and worthy of protection. Hagin Decl. at Ex. EE.

Move's argument. *See also Syntron Bioresearch, Inc. v. Fan*, 2002 WL 660446, at *11 (Cal.App.4 Dist. April 23, 2002) ("plaintiff bears the burden of establishing with reasonable certainty the existence of damages, not its amount"). Clearly, ActiveRain's confidential information had value. It constituted a "ready-made" set of business and marketing plans, customer compilations, and explanations of successful techniques and methodologies for Move's desired entry into the social networking website market for realtors. Without the information from ActiveRain, Move would have to "start from scratch." This is exactly the sort of information the CUTSA contemplates as having "independent economic value." *See e.g., AT&T Communications of California, Inc. v. Pac. Bell,* 238 F.3d 427, 2000 WL 1277937, at *2 (9th Cir. 2000).[15]

Move falsely asserts that "almost all" of ActiveRain's membership information "is publicly available (and searchable) on the site"; that "little is secret" about ActiveRain's business" (Mtn. at 1); and ActiveRain's membership information is publicly available, or can be obtained "automatically" by "scraping" (Mtn. at 13).[16] While the customer names and some other

---

[15] Move itself described this information as the "lightening in a bottle" and "the secret sauce" relative to a social networking site for realtors. Clearly, ***most of the value of ActiveRain,*** at least (actual or potential), lies in its trade secret information. *See* Heaton Decl. at ¶7; Hagin Decl., Ex. E at 35:5-36:9; 59:6-60:12 (HouseValues CEO, Ian Morris, testifying that ActiveRain's confidential information "was definitely valuable;" "the source of our interest in ActiveRain;" and "the sources of value [HouseValues] saw [in ActiveRain] and the reason we wanted to invest in ActiveRain").

[16] Move also misstates the law. It "is not necessary in order that a process of manufacture be a trade secret that it be patentable or be something that could not be discovered by others by their own labor and ingenuity." *By-Buk Co. v. Printed Cellophane Tape Co.*, 163 Cal.App.2d 157, 166 (1958). The central issue is whether the system or information as a whole gains value from being kept confidential, not whether others could possibly derive a similar system through independent effort. *Id; see also e.g., Abba Rubber Co. v. Seaquist*, 235

information about ActiveRain customers may be gathered through the use of sophisticated "scraping software" by skilled technicians, it is not an easy process that anyone can do. Moreover, the database ActiveRain provided to Move included highly sensitive, non-public information (e.g., searchable email addresses, and other internal, confidential data fields). Heaton Decl. at ¶6. Move's assertion that ActiveRain's member data was critical to its "buy" decision and not received until May 2, 2007, is sure evidence that the information was not publically available.[17]

Cal.App.3d 1, 18 (1991). Even if every component of a system is a "standard part [ ] that could be procured by anyone on the open market," the system as a whole may qualify as trade secret information. *By-Buk Co.,* 163 Cal.App.2d at 166. *See also Cammate Sys., Inc. v. Telescopic, LLC*, 2008 WL 215830, at *2 (D. Ariz. Jan. 23, 2008).

[17] Move also mischaracterizes the testimony of Caleb Mardini in an effort to show ActiveRain did not reasonably protect its trade secret information. "[O]nly in an extreme case can what is a 'reasonable precaution be determined on a motion for summary judgment." *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.,* 925 F.2d 174, 179 (7th Cir. 1991) *(quoted in AT&T Communications of California v. Pac. Bell,* 238 F.3d 427, 2000 WL 1277937, at *2 (9th Cir. 2000). Mr. Mardini was clear that he agreed to maintain the confidentiality of the ActiveRain confidential information, to which he was given access on a need-to-know basis. Hagin Decl., Ex. D at 46:9-:50:14. He was also given a written letter reflecting and reiterating this understanding, upon his departure from ActiveRain. Washburn Decl. at ¶ 5 and Ex. A. *See also* Morris Decl. at ¶ 14 (regarding ActiveRain's use of NDAs). The trade secrets statute requires only that an entity make "efforts that are reasonable ***under the circumstances*** to maintain [the] secrecy" of trade secret information, not "absolute secrecy." *Cal. Int'l Chem. Co. v. Sister H. Corp.*, 168 F.3d 498, 1999 WL 50891, at *3 (9th Cir. Jan. 19, 1999) (emph. added) (plaintiff's information a trade secret even when some licensees of system only verbally informed that certain components of the system were trade secrets and not all signed non-disclosure agreements); *Courtesy Temp. Serv., Inc. v. Camacho*, 222 Cal. App. 3d 1278, 1288 (1990) (customer list was trade secret information in absence of a non-disclosure agreement when employees "told of the confidential and proprietary nature of [the] information" and access limited to those employees whose business function required it"). Also, as Move itself notes, ActiveRain was a small "'start-up' of about four employees and no revenues." And the employees were long-

"[C]ircumstantial evidence is sufficient to withstand summary judgment" in trade secret misappropriation cases. *Friedman v. Quest International Fragrances Co.*, 58 Fed. Appx. 359 (9th Cir. 2003); CAJI 202, *Direct and Indirect Evidence* (2008). Circumstantial evidence is particularly appropriate in trade secret cases, because:

> [M]isappropriation and misuse can rarely be proved by convincing direct evidence. In most cases plaintiffs must construct a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences ... that it is more probable than not that what plaintiffs allege did in fact take place. Against this often delicate construction of circumstantial evidence there frequently must be balanced defendant's and defendants' witnesses who directly deny everything.

UniRAM Tech., Inc. v. Taiwan Semiconductor Mfg. Co., 2007 WL 2572225, at *5 (N.D. Cal. Sept. 5, 2007); *see also Hanger Prosthetics & Orthopedics, Inc. v. Capstone Orthopedic, Inc.*, 556 F.Supp.2d 1122, 1136 (E.D. Cal. 2008) (same). Courts simply do not expect to find direct evidence of misappropriation because "corporations rarely keep direct evidence of their use [of competitor's trade secrets] ready for another party to discover." *Stratienko v. Cordis Corp.*, 429 F.3d 592, 601 (6th Cir. 2005).

Move tries to sweep away the vast amount of compelling circumstantial evidence of its misappropriation by calling it "speculation." In fact, there is substantial circumstantial evidence from which the jury may find that Move improperly disclosed ActiveRain's confidential information to people it should not have, *i.e.*, Samuelson's group; failed to take any sort of precautionary measures including the construction of a firewall according to industry

---

time friends. *See* Heaton Decl. at ¶¶3, 5. *See Rockwell Graphic Sys., Inc., supra* (reasonable efforts under circumstances a function of cost analysis for a particular business).

standards; and that Move utilized or "replicated" ActiveRain's trade secret information in launching its own social network, "a la ActiveRain."

More specifically, the evidence is clear that Move coveted not just any social networking site for realtors, but one like ***ActiveRain***. Prior to obtaining ActiveRain confidential and trade secret information, Move had been unable to develop a social networking website. Then, within days of obtaining all of ActiveRain's confidential and trade secret information, and having cancelled the deal, Move announced that it had somehow developed a social networking site of its own like ActiveRain's. It is difficult to imagine more compelling circumstantial evidence of misappropriation. *See e.g., Electro-Miniatures Corp. v. Wendon Co., Inc.*, 771 F.2d 23, 26 (2nd Cir. 1985) (fact-finder may find misappropriation where defendant largely unable to develop product before gaining access to plaintiff's trade secrets); *Veteran Medical Products, Inc. v. Bionix Dev. Corp.*, 2008 WL 696546, at *10 (W.D. Mich. Mar. 13, 2008) ("sudden development" of a business plan sufficient circumstantial evidence to defeat summary judgment).

ActiveRain may recover damages for "the actual loss caused by misappropriation." Cal. Civ. Code § 3426.3 (a). In this particular case, the jury is entitled to find that the "loss caused by" Move's misappropriation of ActiveRain's trade secret information is the loss of the deal itself. There is ample evidence from which the jury may find that Move cancelled the promised transaction because, after it had obtained ActiveRain's confidential information and funneled it to the very people (undisclosed to ActiveRain) who were continuing to build a competing site "a la ActiveRain," Move concluded it no longer needed to close the transaction – that is, it could "save itself" the $30 million acquisition cost. But for Move's misappropriation of these trade secret assets, ActiveRain would have been paid for them according to the terms of the

acquisition agreed to by Move and ActiveRain. See Hagin Decl. at Ex. FF (Johnson Report at 5-6).[18]

Move's argument that ActiveRain must not have been damaged because it continued to try to "market" itself, after Move canceled the transaction, on the same terms as it could command before (*see* Mtn. at 9), is completely off the mark. ActiveRain was not "successful" in this effort, as asserted by Move (Mtn. at 9). DelGrande Decl. at ¶¶14-17; Hagin Decl., Ex. GG at 191:18-192:11; 194:5-22. The investment transaction it finally managed to put together with HouseValues in November 2007 was subpar in comparison to the Move deal and was dictated by the weakened condition and changed market ActiveRain was in as a result of Move's misconduct. *See* Morris Decl. at ¶¶4, 6-11. Even with an offset for the post-May 2, 2007 value of ActiveRain indicated by the HouseValues investment, ActiveRain's damages are either "(1) a minimum of $15.6 million to $17.6 million (floor value); or (2) a maximum of $23.5 to $24.0 million (assuming that the full earnout would have been reached as intended by the parties)." *Id.*, Ex. FF (Johnson Report at 16).[19]

---

[18] Move misapprehends ActiveRain's misappropriation damages claim. ActiveRain and its expert do not contend that it is entitled to "benefit of the bargain" damages as legally defined. Hagin Decl., Ex. GG at 150:17-151:19. Rather, the claim is that, "but for" Move's misappropriation, the transaction would have closed as Move promised. *Id.* The jury is entitled to find, as a matter of fact, that in this case the requisite "actual loss caused by" Move's misappropriation of ActiveRain's trade secret information was the loss of the promised transaction. *See also Syntron Bioresearch, supra,* 2002 WL 660446, at *11 (Cal.App.4 Dist. April 23, 2002) ("plaintiff bears the burden of establishing with reasonable certainty the existence of damages, not its amount").

[19] Move's "comparison" of the two transactions (Mtn. at 9-10) is not only speculative, but contradicted by the actual facts, ActiveRain's investment banker, and its damages expert. The fact that ActiveRain's "shareholders" have the "potential" to receive $25 million, if HouseValues were to exercise its call options, is exceptionally speculative. There is no indication HouseValues will exercise its options. Quite the contrary, it had the opportunity to do so in December 2008 at $17.5 million and chose not to. Morris Decl. at ¶ 12. Also,

B. NON TRADE SECRETS CLAIMS

1. ActiveRain's Non Trade Secrets Claims are Not Preempted by the CUTSA

Move is wrong that ActiveRain's other causes of action are preempted by the CUTSA. Move's cited cases do not even support this assertion. For example, *Airdefense, Inc. v. Airtight Networks*, 2006 WL 2092053, at *2 (N.D. Cal. Jul. 26, 2006) actually demonstrates that preemption is not appropriate here. The court acknowledged that courts have read Cal. Civ. Code § 3426 to permit "claims arising out of facts similar to, but distinct from, those underlying a claim for misappropriation." *Id.* at *3. But while the court found several of plaintiff's claims preempted, it did so only for those claims for which misappropriation of trade secret information was a ***necessary element of the other causes of action***. *Id.* at *4-6.[20] In short, it is true that "[c]ourts have held

---

the damages caused by Move are to ActiveRain, the company, not its "shareholders." Moreover, at most, the HouseValues investment "results in an indicated pre-money value for [ActiveRain] of between $6 and $6.5 million – not "over $8 million" as baldly asserted by Move. And much of that value was for the call options and right of first refusal HouseValues obtained as part of the investment. *Id.* at ¶¶ 12-13. *See also* Hagin Decl., Ex. FF (Johnson Report at 15); *id.*, Ex. GG at 27:25-29:7; 32:13-42:12; 157:7-158:10; DelGrande Decl. at ¶¶14-17.

As also explained by Mr. Johnson, ActiveRain's damages are the same under each of its claims and theories, and whether a "but for" or "benefit of the bargain" damages approach is utilized. *See* Hagin Decl., Ex. FF.

Nowhere in its motion does Move question the reliability or methodology of Mr. Johnson's report. ActiveRain provided its expert reports to Move on December 10, well before it filed its motion on December 15, 2008. Having failed to raise the issue in its motion, Move cannot raise such issues in reply as a proper basis for summary judgment. *United States ex rel. Giles v. Sardie*, 191 F. Supp.2d 1117, 1127 (C.D. Cal. 2000).

[20] The court did not hold plaintiff's claim for intentional interference with prospective economic advantage preempted by the CUTSA, despite the fact that this claim relied on similar facts to those underlying the misappropriation claim, because it rested on allegations ***"additional to the facts alleged with respect to the claim of misappropriation of trade secrets."*** *Id.* at *5 (emph. added). As

that where a claim is based on the 'identical nucleus' of operative facts as a trade secret misappropriation claim, it is preempted by the CUTSA." *Ali v. Fasteners For Retail, Inc.*, 544 F.Supp.2d 1064, 1071 (E.D. Cal. 2008). But where the claim is "based on 'an alternative theory of liability [and] new facts,'" the claim is not preempted. *Silicon Image, Inc. v. Analogix Semiconductor, Inc.*, 2007 WL 1455903, at *9 (N.D. Cal. May 16, 2007) (quoting *Postx Corp. v. Secure Data In Motion, Inc.*, 2004 WL 2663518, at *3 (N.D. Cal. Nov 20, 2004)).[21]

None of ActiveRain's non-trade secret claims are necessarily dependent upon the facts underlying the misappropriation claim, and are thus not preempted.

2. Specific Non-Trade Secret Claims

a. Fraud and Deceit

The elements of fraud, which give rise to the tort action of deceit, are: (a) misrepresentation (false representation, concealment, or non-disclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, *i.e.*, to induce reliance;

Move's other cited authorities also reflect, the existence of separate facts in support of a separate theory of recovery prevents preemption – even where the two claims share some common set of facts. *See e.g., Monolithic Power Systems, Inc. v. 02 Micro International Ltd.*, 2007 WL 801886 (N.D. Cal. Mar. 14, 2007) (unfair competition claim preempted only to the extent based or dependent on misappropriation).

[21] *See also Imax Corp. v. Cinema Tech. Inc.*, 152 F.3d 1161, 1169 (9th Cir. 1998) ("Under California law a plaintiff can maintain a common law unfair competition claim regardless of whether it demonstrates a legally protectable trade secret."); *Callaway Golf Co. v. Dunlop Slazenger Group Americas*, 318 F.Supp.2d 216, 220 (D. Del. 2004) (applying California law) (issue is "whether allegations of trade secret misappropriation alone comprise the underlying wrong"); *LaFrance Corp. v. Werttemberger*, 2008 WL 5068653, at *2 (W.D. Wash. Nov. 24, 2008) (weight of authority is that common law claims that require allegations in addition to those necessary to state a claim for trade secret misappropriation are not preempted by UTSA).

(d) justifiable reliance; and (e) resulting damage. *Lazar v. Superior Court*, 12 Cal. 4th 631, 638, 909 P.2d 981 (Cal. 1996). Between parties to a contract: Non-disclosure or concealment may constitute actionable fraud when the defendant had exclusive knowledge of material facts not known to the plaintiff; when the defendant actively conceals a material fact from the plaintiff; or when the defendant makes partial representations but also suppresses some material facts. *LiMandi v. Judkins*, 52 Cal. App. 4th 326, 336, 60 Cal. Rptr. 2d 539 (1997). As discussed above, the jury may find Move actively concealed material facts from ActiveRain in numerous ways.[22]

b. Promissory Estoppel

The elements of promissory estoppel are (1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages "measured by the extent of the obligation assumed and not performed." *Toscano v. Greene Music*, 124 Cal. App. 4th 685, 692, 21 Cal. Rptr. 3d 732 (Cal. App. IV Dist. 2004). "[T]he party's justifiable and detrimental reliance on the promise is regarded as a substitute for consideration required as an element of an enforceable contract." *Id.* at 692. The courts therefore treat promissory estoppel and breach of contract identically "in terms of the damages that may be recovered." *U.S. Ecology, Inc. v. State*, 129 Cal. App. 4th 887, 903, 28 Cal. Rptr. 3d 894 (Cal. App. IV Dist.

[22] For example, Move told ActiveRain that everyone was in favor of this transaction when in fact Errol Samuelson (who had effective veto power over the deal) was against it from the start. Move, with exclusive knowledge of the facts, never disclosed to ActiveRain it was continuing to develop its own competing social networking site at the very time ActiveRain was giving Move its confidential information to the people involved in that build effort, under the auspices of due diligence. Move misled ActiveRain about the LOI on March 9, 2007 (and later), in order to bind ActiveRain up in a no shop provision and keep it off the market. Move made further false promises to ActiveRain that the deal would close, and close quickly, to convince ActiveRain to stop working on its business and monetization plans and extend the no shop.

2005). ActiveRain has demonstrated all the elements of promissory estoppel: a clear promise (indeed, multiple promises) to close the deal with ActiveRain on the essential terms contemplated in the letter of intent; reasonable and foreseeable reliance by ActiveRain; and resulting injury.

The jury is entitled to find that ActiveRain's reliance on Move's promises and assurances was reasonable. Move relies on *Laks v. Coast Federal Savings & Loan Association*, 60 Cal. App. 3d 885 (1976), for the proposition it was not. *Laks* not only fails to support Move's position, but undermines it. The *Laks* plaintiff intended to develop a motel and negotiated with the defendant to provide financing for the project. Defendant sent plaintiff a conditional commitment letter. When the defendant did not provide the financing, plaintiff sued on a number of theories, including promissory estoppel. The promissory estoppel theory was based ***solely*** on the conditional commitment letter, which plaintiff claimed was sufficient because all of the conditions were met or waived. The court rejected this claim, in part, because it concluded it was not reasonable or foreseeable for the plaintiff to rely solely on the conditional commitment letter when it stated it was conditional and "the single most crucial term," the "principal amount committed" to the project, was missing.

Unlike *Laks*, ActiveRain's promissory estoppel claim does not depend upon the LOI. The heart of this claim lies in the numerous specific assurances and requests Move's senior executives made to ActiveRain after the LOI was executed – including but not limited to assuring it that the essential terms of the deal were agreed to; the purchase was approved by the Board; everyone at Move was in favor of the acquisition; and it would close quickly. Move even asked ActiveRain to do things that would only be necessary if the transaction was going to close (e.g., cancelling its line of credit and office lease). *See* DelGrande Decl. at ¶¶8-9 ("I have never seen a deal not close when senior

executives and officers of the acquiring company made both assurances and requests of the sort that Move made in regard to this transaction."). Move's position – i.e., that a promissory estoppel claim can never lie when the parties have signed an LOI with language that it is non-binding, no matter what assurances and promises a party makes thereafter, and no matter how extensive and definite they are – would have the obviously desultory effect of immunizing individuals for any and all promises they make after signing a LOI.

c. Unfair Competition

ActiveRain brings both common law and statutory unfair competition claims. To establish a claim for unfair competition, ActiveRain must demonstrate that Move engaged in conduct that "significantly threatens or harms competition." *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2008); *CEL Tech. Communications Inc. v. Los Angeles Cellular*, 20 Cal. 4th 163, 167, 83 Cal. Rptr. 2d 548 (Cal. 1999) (plaintiff need only show that defendant has engaged in an act or practice that "threatens an incipient violation of an antitrust law or violates the policy or spirit of one of those laws" or otherwise significantly harms competition"). *See also* Cal. Bus. & Prof. Code §17200.[23]

d. Unjust Enrichment

"The elements of an unjust enrichment claim are the receipt of a benefit and the unjust retention of the benefit at the expense of another." *Peterson v. Cellco Partnership*, 164 Cal.App.4th 1583, 1593, 80 Cal.Rptr.3d 316 (Cal.App.

[23] As discussed above, Move deceptively and unfairly "froze" ActiveRain's business development and tied it up (through the no-shop) in an effort to thwart competition – i.e., to keep ActiveRain from continuing to build on its first mover advantage ahead of Move in its desired entry into the market of social networking sites for realtors; and to prevent ActiveRain from doing a deal with a Move competitor during the critical time in the market.

4 Dist. 2008). ActiveRain's cause of action for unjust enrichment is based on Move's various unjust and deceptive efforts discussed above, including but not limited to freezing ActiveRain's business and tie it up in a no shop, to keep it from increasing its first mover advantage and from making a deal with a Move competitor during the critical period in this market.

e. Breach of Contract

The NDA protects ActiveRain's confidential information, whether it rises to the level of trade secret information or not. Move was obligated to take reasonable steps and precautions to prevent improper disclosure of the information. Hagin Decl., Ex. Z. As discussed above, it utterly failed to do so. In fact, Move was caught with its proverbial "hand in the cookie jar" when this action was commenced months after it had assured ActiveRain that it had returned or destroyed all of its confidential information; and was forced to produce hundreds if not thousands of pages of documents showing its wrongful retention of this information.

V. CONCLUSION

For the foregoing reasons, ActiveRain respectfully requests that the Court DENY Move's motion for summary judgment in its entirety.

DATED: January 12, 2009.

Respectfully submitted,

MCNAUL EBEL NAWROT & HELGREN PLLC

By:/s/ Leslie J. Hagin
JERRY R. MCNAUL (*Pro Hac Vice*)
LESLIE J. HAGIN (*Pro Hac Vice*)
Attorneys for Plaintiff