

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

REAL ESTATE INDUSTRY
SOLUTIONS, LLC,

Plaintiff,

vs.

CASE NO.: 6:10-CV-1045-ORL-22-GJK

CONCEPTS IN DATA MANAGEMENT
U.S., INC.,

Defendant.

ANSWER, DEFENSES AND COUNTERCLAIM

Defendant Concepts in Data Management U.S., Inc. ("CDM" or "Defendant") answers Plaintiff Real Estate Industry Solutions, LLC's ("REIS" or "Plaintiff") Complaint, asserts affirmative defenses, and counterclaims as follows:

ANSWER

Common Allegations

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Without knowledge.
7. Without knowledge.
8. Without knowledge.

9. Denied.

10. The allegations contained in Paragraph 10 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

11. Without knowledge.

12. Admitted.

13. Admitted.

14. The allegations contained in Paragraph 14 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

15. Denied.

16. Admitted that REIS granted CDM a sublicense to use FR forms. Additional allegations in Paragraph 16 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

17. The allegations contained in Paragraph 17 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

18. Denied.

19. The allegations in Paragraph 19 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

20. Admitted that FR members log into TransactionDesk using a username and password. Additional allegations in Paragraph 20 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

21. The allegations in Paragraph 21 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

22. The allegations in Paragraph 22 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

23. Admitted.

24. The allegations in Paragraph 24 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

25. The allegations in Paragraph 25 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

26. The allegations in Paragraph 26 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

27. The allegations in Paragraph 27 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

28. The allegations in Paragraph 28 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

29. Without knowledge.

30. CDM is without knowledge as to whether REIS hired a software developer. Otherwise, denied.

31. Without knowledge.

32. Admitted that TransactionDesk Lite was made available to FR members on or about March 23, 2010. Otherwise, denied.

33. Denied.

34. Admitted that CDM rebranded part of TransactionDesk as TransactionDesk Pro and another part as TransactionDesk Lite. Otherwise, denied.

35. Denied.

- 36. Denied.
- 37. Denied.
- 38. Admitted that CDM has sent emails to FR members. Otherwise, denied.
- 39. Denied.
- 40. Denied.

COUNT I
(Copyright Infringement)

- 41. CDM adopts and reincorporates its foregoing responses as if set forth fully herein.
- 42. Admitted for jurisdictional purposes.
- 43. Without knowledge.
- 44. Denied.
- 45. Denied.
- 46. Denied.

COUNT II
(Trade Secrets Misappropriation)

- 47. CDM adopts and reincorporates its foregoing responses as if set forth fully herein.
- 48. Admitted for jurisdictional purposes.
- 49. Denied.
- 50. Denied.
- 51. Denied.
- 52. Denied.
- 53. Denied.
- 54. Denied.
- 55. Denied.

COUNT III
(Breach of Confidentiality Agreement)

56. CDM adopts and reincorporates its foregoing responses as if set forth fully herein.

57. Admitted for jurisdictional purposes.

58. The allegations in Paragraph 58 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

59. The allegations in Paragraph 58 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

60. Denied.

61. Denied.

62. Denied.

COUNT IV
(Breach of Contract)

63. CDM adopts and reincorporates its foregoing responses as if set forth fully herein.

64. Admitted for jurisdictional purposes.

65. The allegations in Paragraph 65 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

66. Denied.

67. The allegations in Paragraph 67 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

68. Denied.

69. The allegations in Paragraph 68 of Plaintiff's Complaint refer to a written document that speaks for itself. Otherwise, denied.

70. Denied.

71. Denied.

GENERAL DENIAL

All allegations in Plaintiff's Complaint not expressly admitted above are denied.

REQUEST FOR ATTORNEY'S FEES

CDM is entitled to recover its reasonable attorney's fees in connection with its defense of Plaintiff's Complaint, pursuant to §30(c) of the Agreement, and requests an award of same.

DEFENSES

CDM asserts the following affirmative defenses to Plaintiff's Complaint.

First Defense

Plaintiff has failed to state a claim upon which relief can be granted.

Second Defense

As more fully set forth in CDM's Counterclaim, Plaintiff's request for relief fails under the doctrine of unclean hands, including without limitation, wrongfully induced Defendant into accepting an early termination provision of the Agreement insisted upon by Plaintiff when Plaintiff had every intention of manufacturing the circumstances to invoke the early termination clause after utilizing Defendant's proprietary and confidential information to create a competing product.

Third Defense

Plaintiff has waived some or all of its claims, including without limitation by failing to abide by the notice provisions contained in § 7(b) of the Agreement.

Fourth Defense

CDM has not violated any of REIS's rights as an exclusive licensee of FR's alleged registered copyrights. All actions taken by CDM, including usage of FR's allegedly copyright

protected material, were permitted under the terms of the Agreement. The services offered through the TD Lite interface have always been offered as part of CDM's suite of services since CDM entered into its first agreement with FR in 2001.

Fifth Defense

CDM has not violated the Agreement. All actions taken by CDM, including usage of any confidential material of REIS, were permitted under the terms of the Agreement. The services offered under through the TD Lite interface have always been offered as part of CDM's suite of services since CDM entered into its first agreement with FR in 2001.

Sixth Defense

CDM did not improperly disclose any confidential or trade secret information of REIS to any party not entitled to receive such information under the terms of the Agreement. All usage of any confidential and/or trade secret information of REIS was done so in accordance with the terms of the Agreement and within the normal course of conduct between CDM and REIS/FR since 2001.

Seventh Defense

The FR member database, data, and log files do not constitute trade secrets as defined by the Florida Trade Secrets Act, Chapter 688, Florida Statutes.

Eighth Defense

CDM did not take any actions constituting "misappropriation" as defined by the Florida Trade Secrets Act, Chapter 688, Florida Statutes.

Ninth Defense

REIS has not demonstrated that it has been irreparably harmed and therefore is not entitled to some or all of the relief it seeks.

Tenth Defense

REIS has not demonstrated that it does not have an adequate remedy at law for any alleged injuries and therefore is not entitled to some or all of the relief it seeks.

Eleventh Defense

Some or all of the purported copyrights owned by FR were not validly acquired or registered, or are no longer valid; therefore CDM has not violated those purported copyright protected material or REIS's exclusive license to any such copyright protected material.

Twelfth Defense

Some or all of Plaintiff's claims must be dismissed for failure to join indispensable parties. Specifically, all of the claims and rights between the parties cannot be fully adjudicated without the addition of FR as a party in this litigation. FR is the purported owner of the copyright protected material and proprietary and confidential information that is the subject of Plaintiff's claims. FR also exerts such a high level of control over REIS that they are effectively acting as one organization.

Thirteenth Defense

Some or all of Plaintiff's claims fail because Plaintiff's promises under the Agreement were illusory, thus Plaintiff did not supply proper consideration to support the Agreement.

Fourteenth Defense

CDM is entitled to set-off of any potential award of damages to REIS based upon CDM's Counterclaim in this action.

COUNTERCLAIM

Defendant/Counterclaimant Concepts in Data Management U.S., Inc. (“CDM”) sues Plaintiff/Counter-Defendant Real Estate Industry Solutions, LLC (“REIS”), and alleges as follows:

NATURE OF THE CASE

1. This is an action for breach of contract based upon REIS's violation of a number of provisions of the TransactionDesk Services and Support Agreement entered into on November 1, 2008 between CDM and REIS (the "Agreement").
2. The monetary relief sought by Counterclaimants exceeds seventy-five thousand dollars (\$75,000), exclusive of costs, interest and attorney fees.

JURISDICTION & VENUE

3. Jurisdiction and venue are proper in this Court by virtue of the Complaint filed by Counter-Defendant REIS in this Court.

PARTIES

4. Counterclaimant CDM is a Canadian corporation with its principal place of business at 205 Oxford Street East, Suite 204, London, Ontario, Canada and doing business in Florida.
5. Counter-Defendant REIS is a Florida limited liability company with its principal place of business located at 7025 Augusta National Drive, Orlando, Florida.

FACTUAL BACKGROUND

CDM's Relationship With FAR And REIS

6. In 2001, CDM first attained a license from the Florida Association of Realtors (“FAR”) to provide software based forms services and support to real estate brokerages and

associations across Florida using real estate forms created by FAR, through a proprietary internet-based platform developed by CDM.

7. FAR is currently known as Florida Realtors, Inc., a Florida not-for-profit corporation, and is the parent organization of Counter-Defendant REIS.

8. The original forms service provided by CDM was called Forms Online Gold (“FOLG”).

9. CDM’s forms service was so successful and popular among real estate agents and organizations that CDM entered into negotiations with FAR to offer FOLG to all members of FAR as a member benefit.

10. In August 2003, CDM entered into an agreement with FAR to offer FOLG as a member benefit to all FAR members.

11. Beginning in 2004, CDM provided FAR with monthly data containing information about how frequently FAR members were using FOLG.

12. In October 2005, CDM and FAR renewed the real estate forms license agreement through 2008 so that FAR members could continue to receive access to FOLG as a member benefit.

13. Shortly thereafter, FAR incorporated REIS as a for-profit subsidiary and asked CDM to assign the remainder of its services agreement to REIS. According to FAR, the organization was growing rapidly and it needed to create REIS to take over some of its revenue generating activities so that FAR would not lose its tax-exempt not-for-profit status.

14. CDM agreed to the assignment and began working with REIS to provide the forms services to FAR members.

15. Upon information and belief, even though REIS was supposed to take over management of the forms services agreement with CDM, FAR continued to exert control over REIS's performance under the agreement, and FAR controlled the negotiations of future renewals of the agreement.

16. In 2006, CDM developed an enhanced forms services product called TransactionDesk that offered its users advanced transaction management capabilities enhancing those offered in FOLG. The same services available in FOLG were also made available in TransactionDesk. CDM worked with REIS management and trainers to develop a program to help transition FAR members who wanted to progress from using FOLG to using TransactionDesk.

17. Even after TransactionDesk was developed, CDM continued to offer FOLG to FAR members as part of the TransactionDesk suite, as a simpler offering of services and concomitant ease of use was all that was required by many of the FAR membership.

18. As the relationship continued, CDM shared more information (including some proprietary information) with REIS/FAR including, but not limited to, usage numbers, product information, marketing plans, and sales activity. Between 2006 and 2008, CDM and REIS entered into a cross-marketing agreement whereby each organization shared with the other detailed product information and royalties and cross-promoted CDM and REIS products and services.

FAR And REIS Secretly Plan To Replace CDM's Services With Their Own Software

19. In 2008, management at FAR and REIS changed. As a result of the new management, the relationship between REIS and CDM became strained.

20. In mid-2008, REIS began making requests for large amounts of additional data and product information from CDM, including unusual requests for specific usage numbers for particular forms and transactions. CDM had no contractual obligation to provide this additional information but CDM consented in order to maintain what had previously been a good working partnership between CDM and REIS.

21. Without any prior complaints or notice to CDM on the subject, and despite the additional information CDM had provided, legal counsel for REIS sent a letter to CDM dated July 29, 2008, accusing CDM of not providing certain reports and information that was required under their agreement. These accusations were false and CDM met with many members of the management of REIS and FAR in order to demonstrate that CDM had in fact met its obligations and provided the required information.

22. Unbeknownst to CDM, FAR and REIS management also falsely reported to their respective boards that the FAR membership was not utilizing CDM's services sufficiently to justify continuing to offer the services as a member benefit. FAR and REIS leadership also reported that CDM was unresponsive to their needs and to the needs of FAR members and was difficult to work with. All of these statements by REIS and FAR representatives were false.

23. Until 2008 when new management took control of REIS and FAR, CDM had an excellent, seven-year working relationship with FAR, and a shorter but equally acceptable relationship with REIS beginning when REIS was formed. CDM had been responsive to any complaints or concerns over the years. FAR and REIS had not voiced any strong complaints about CDM until the new management took control. In fact, 2009 was a record setting year for FR membership use of Transaction Desk services, and 2010 was exceeding the record setting usage by FR membership, even with a drop in actual FR membership from prior periods.

24. Contemporaneous with their campaign of disseminating false information, the management of REIS and FAR began working together to develop their own internet-based forms service to replace CDM's services for the FAR members. Upon information and belief, REIS and FAR also intended to offer this new real estate forms service in the national market as a competitor to CDM's real estate forms services.

25. Even as REIS worked on developing its own forms service, REIS continued to negotiate with CDM for renewal of the services and support agreement for TransactionDesk and FOLG. During that process, REIS never revealed its true intentions to CDM, *i.e.*, to develop a competing forms service.

26. REIS renewed its agreement with CDM by entering into the Agreement on November 1, 2008, which is the primary basis of REIS's Complaint against CDM. The renewal extended the contract through November, 2011, but, for the first time, made the contract subject to annual funding requirements by the FR Board of Directors to provide the service as a member benefit. At this time, CDM and REIS also agreed not to renew their cross-marketing agreement.

27. Due to the prior cross-marketing agreement, however, REIS had been provided access to large and detailed amounts of CDM's proprietary product and marketing information.

28. FAR and REIS also had been providing technical support for FAR members using CDM's services, thus gaining an extensive and intimate knowledge of the operation of TransactionDesk and FOLG. CDM provided REIS employees with a significant amount of training on TransactionDesk and FOLG in connection with these services.

29. Additionally, REIS was provided with the software coding for various functionalities of TransactionDesk and FOLG as part of the cross-marketing agreement and technical support arrangement. This coding was confidential material under the Agreement.

30. Upon information and belief, REIS and FAR made a push in early 2009 to develop their own online forms service to replace TransactionDesk and FOLG. At this time, REIS hired a software developer and the technical support team from FAR transferred to REIS.

31. Upon information and belief, REIS and FAR utilized CDM's proprietary and confidential information in developing its competing internet-based forms service.

32. In March 2010, after hearing about the statements REIS and FAR leadership were making about CDM's services and after receiving direct user feedback, CDM released a new interface into the TransactionDesk suite based on the easy to use interface found in FOLG, but with a new "web 2.0" look and feel, and labeled it TD Lite. Consistent with the functionality of FOLG, the TD Lite interface simply offers direct access to some of the more basic functions available in the TransactionDesk suite for users who do not require all of the more complex functions also available in the TransactionDesk suite.

33. After CDM began offering the TD Lite interface as part of its suite of TransactionDesk services, CDM rebranded the group of more complex services and functionalities within the TransactionDesk suite as TransactionDesk Pro ("TD Pro").

34. The content and services currently available through the TD Lite interface and the TD Pro interface have always been available to FAR members through the original FOLG and TransactionDesk suite. The two separate interfaces merely make it easier for users to access either basic functions or more complex functions as needed, and both interfaces utilize the same underlying source code.

35. On April 1, 2010, REIS released its forms service called Form Simplicity. According to REIS, it is a more basic forms service designed for more technologically inexperienced users.

36. Form Simplicity is similar in content and functionality to CDM's services, offering a striking number of the same proprietary features that CDM first developed in FOLG and TransactionDesk.

REIS And FAR Terminate The Services And Support Agreement

37. During the negotiations of the 2008 renewal of the Agreement, REIS insisted on adding a new condition for termination of the Agreement. Under the new condition, if the FAR board of directors voted against funding to provide CDM's services as a member benefit in any given year, REIS could terminate the Agreement prior to its stated expiration in 2011.

38. Upon information and belief, REIS intended to artificially create these grounds for termination by influencing the FAR board to vote against funding CDM after REIS completed its new forms service, but never disclosed that as the real reason for insisting on the new funding conditions to continuation of the contract. However, REIS had to induce CDM into continuing to provide its services; otherwise, the FAR membership would not have access to a forms service until REIS could complete its competing product.

39. Before releasing Form Simplicity, REIS and FAR management began informing FAR members that CDM's services would no longer be available in 2011 and that the contract with CDM would terminate at the end of 2010. Upon information and belief, the technical support employees of REIS and FAR were repeating the same information to FAR members.

40. Absent improper early termination, the Agreement does not terminate until November 2011.

41. After releasing Form Simplicity, REIS and FAR management began in earnest their campaign to convince the FAR board to vote against funding CDM's services so that REIS could terminate the Agreement before the end of its term in 2011.

42. REIS and FAR engaged in these activities despite REIS's Director of Marketing and Communications having given assurances to CDM that REIS fully intended to comply with the terms of the Agreement.

43. REIS and FAR were successful in their campaign and the FAR board voted against funding CDM's services as a member benefit in September 2010. REIS promptly provided notice of termination of the Agreement.

44. Section 30(c) of the Agreement states:

In any action or proceeding under this Section 31, the Prevailing Party shall be reimbursed by the other party for all costs and expenses (including, without limitation, reasonable attorneys' fees and costs at all levels) incurred in connection with such action or proceeding.

COUNT I - BREACH OF CONTRACT

45. CDM re-alleges and incorporates by reference the foregoing allegations in paragraphs 1 through 44 as if fully set forth herein.

46. The Agreement contains a number of confidentiality provisions. The Agreement defines "Confidential Information" as "proprietary information of either party, which information is not within the provisions of 16(c) and which the Disclosing Party (as defined in section 16) delivers or communicates in writing to the Receiving Party (as defined in section 16) as being 'confidential information.'"

47. Section 16(a) of the Agreement states:

Each party (the "Receiving Party") agrees to hold all Confidential Information of the other party ("Disclosing Party") in confidence and not to use any Confidential Information other than as expressly permitted by this Agreement. The Receiving Party shall not disclose any Confidential Information of the Disclosing party without the prior written consent of the Disclosing Party, other than to those employees, agents, subcontractors or representatives of the Receiving Party who have a need to know such Confidential

Information for the purposes of carrying out its obligations under this Agreement.

48. Section 16(d) of the Agreement states:

Each party agrees not to reverse engineer, reverse assemble or reverse compile any software or other intellectual property owned by the Disclosing Party and utilized in providing the Services or any ecommerce component thereof and not to alter or remove any proprietary rights or copyright notice or identification which indicates a party's ownership of proprietary materials.

49. REIS and FAR had access to and received large amounts of CDM's proprietary information throughout the years of working closely with CDM, providing technical support to FAR members and through the prior cross-marketing agreement. REIS and FAR had a thorough and intimate knowledge of the operation of both TransactionDesk and FOLG.

50. This proprietary information of CDM falls within the definition of "Confidential Information" under the Agreement.

51. Upon information and belief, REIS utilized its extensive knowledge of CDM's proprietary and confidential information to create Form Simplicity, thus breaching Section 16(a) and Section 16(d) of the Agreement.

52. CDM has been damaged by REIS's breach of the Agreement in an amount to be proven at trial.

WHEREFORE, CDM respectfully requests that the Court enter judgment against REIS for damages resulting from REIS's breach of the Agreement in an amount to be proven at trial, including interest, reasonable attorneys' fees, costs, and all other and further relief that the Court deems just and proper.

COUNT II - BREACH OF CONTRACT

53. CDM re-alleges and incorporates by reference the foregoing allegations in paragraphs 1 through 52 as if fully set forth herein.

54. During negotiations of the Agreement, REIS insisted on adding a new provision that would permit REIS to terminate the Agreement if the FAR board voted not to continue funding CDM's services as a member benefit, citing illusory financial constraints as the reason.

55. CDM agreed to this provision under the mistaken belief that the FAR board would make an independent and unbiased decision about funding each year, without knowing that REIS was planning to develop and market a competing forms service and product, and without knowing REIS's true intention which was to use this provision as the basis for an early termination once their competing product was ready for the market.

56. Based on feedback CDM had received, it knew that ever increasing numbers of FAR members utilized CDM's services and that the FAR members were very satisfied with the services. CDM believed that, absent extraordinary circumstances, FAR would want to continue to offer this valuable service to its members.

57. Upon information and belief, REIS insisted on this termination provision because it intended to manufacture such grounds for termination after completing its own competing forms service (*i.e.*, Form Simplicity).

58. After completing Form Simplicity, REIS leadership actively worked toward convincing members of the FAR board to vote against continuing to fund CDM's services as a member benefit despite there being over a year left on the term of the Agreement.

59. REIS breached its contractual obligations to CDM by wrongfully inducing grounds for termination of the Agreement over a year before the end of the term of the Agreement.

60. As a result of REIS's wrongful actions, the Agreement has been terminated, causing financial losses to CDM.

61. CDM has been damaged by REIS's breach of the Agreement in an amount to be proven at trial.

WHEREFORE, CDM respectfully requests that the Court enter judgment against REIS for damages resulting from REIS's breach of the Agreement in an amount to be proven at trial, including interest, reasonable attorneys' fees, costs, and all other and further relief that the Court deems just and proper.

COUNT III - BREACH OF THE IMPLIED COVENANT OF
GOOD FAITH AND FAIR DEALING

62. CDM re-alleges and incorporates by reference the foregoing allegations in paragraphs 1 through 61 as if fully set forth herein.

63. Pursuant to Florida law, every contract contains an implied covenant of good faith and fair dealing, under which parties to a contract agree to execute their contractual obligations in good faith.

64. REIS has acted in bad faith in breaching its contractual obligations to CDM under the Agreement.

65. Specifically, REIS utilized CDM's proprietary and confidential information and otherwise undertook actions to reverse engineer TransactionDesk and FOLG to create a competing product intended to replace CDM's services as an FAR member benefit and to compete with CDM in the national market.

66. In furtherance of this goal, REIS leadership spread false information to FAR board members about TransactionDesk and FOLG.

67. Moreover, REIS entered into negotiations in 2008 with CDM to renew the Agreement while working on its competing forms service without disclosing its activities or intentions to CDM.

68. REIS also insisted on adding a new provision permitting REIS to terminate the Agreement if the FAR board voted against funding CDM's services as member benefit. REIS negotiated this term in bad faith, knowing that it intended to manufacture the conditions necessary to invoke this provision and terminate the Agreement early after releasing its competing forms service, Form Simplicity.

69. REIS's actions constitute breaches of the covenant of good faith and fair dealing implied in the Agreement under Florida law.

70. CDM has been damaged by REIS's breach of the implied covenant of good faith and fair dealing and resulting breach of the Agreement in an amount to be proven at trial.

WHEREFORE, CDM respectfully requests that the Court enter judgment against REIS for damages resulting from REIS's breach of the implied covenant of good faith and fair dealing contained in the Agreement in an amount to be proven at trial, including interest, reasonable attorneys' fees, costs, and all other and further relief that the Court deems just and proper.

DEMAND FOR JURY TRIAL

Defendant/Counterclaimant CDM demands a trial by jury on all issues so triable.

HOLLAND & KNIGHT LLP

/s/ Bradford D. Kimbro

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 29, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice to all counsel of record.

/s/ Bradford D. Kimbro

Attorney