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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ACTIVERAIN CORP., a Washington corporation,

Plaintiffs,

vs.

MOVE, INC., a Delaware corporation,

Defendant.

CASE NO.: CV07-5037 DDP (CTx)
Assigned to: Hon. Dean D. Pregerson

DEFENDANT MOVE, INC.'S NOTICE OF MOTION, MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT OF ISSUES; DECLARATIONS OF THOMAS CASE, ESQ.

[Filed Concurrently with: Separate Statement of Uncontroverted Facts and Conclusions of Law]

Date: January 19, 2009
Time: 10:00 a.m.
Courtroom: 3

Action Filed: August 2, 2007
Discovery Cut-off: January 5, 2009
Pre-Trial Conf: February 24, 2009
Trial Date: March 3, 2009

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 19, 2009, at 10:00 a.m., or as soon as the matter can be heard in Courtroom 3 of the U.S. District Court for the Central District of California, located at 312 N. Spring Street. Los Angeles, CA, defendant Move, Inc. will and hereby does move for summary judgment on Plaintiff ActiveRain Corp.'s First Amended Complaint, or in the alternative, summary adjudication of the following issues:

Issue No. 1: Plaintiff cannot maintain its First Cause of Action for violation of the California Uniform Trade Secrets Act ("CUTSA") as a matter of law because the alleged trade secrets do not qualify as trade secrets, plaintiff has no evidence that Move misappropriated or used the alleged trade secrets, and plaintiff has no evidence of damages;

Issue No. 2: Plaintiff cannot maintain its Second Cause of Action for Breach of Contract because plaintiff has no evidence of breach or damages;

Issue No. 3: Plaintiff cannot maintain its Third Cause of Action for Unjust Enrichment because CUTSA preempts this claim and plaintiff has no evidence of misappropriation or use of alleged trade secrets and no evidence of unjust enrichment;

Issue No. 4: Plaintiff cannot maintain its Fourth Cause of Action for Promissory/Equitable Estoppel because CUTSA preempts this claim and plaintiff has no evidence of misappropriation or use of alleged trade secrets, no evidence of justifiable reliance, and no evidence of damages;

Issue No. 5: Plaintiff cannot maintain its Fifth Cause of Action for Common Law Unfair Competition because CUTSA preempts this claim and plaintiff has no evidence of misappropriation or use of alleged trade secrets, and no evidence of damages;

Issue No. 6: Plaintiff cannot maintain its Sixth Cause of Action for Unfair Competition in Violation of California Business & Professions Code § 17200, et seq.

because CUTSA preempts this claim and plaintiff has no evidence of misappropriation or use of alleged trade secrets, and no evidence of unjust enrichment or damages;

Issue No. 7: Plaintiff cannot maintain its Seventh Cause of Action for Fraud/Deceit because CUTSA preempts this claim, and plaintiff has no evidence of misrepresentation, false promise, or concealment, no evidence of justifiable reliance, and no evidence of damages.

This motion is made pursuant to Federal Rule of Civil Procedure 56 and Local Rules 56-1 to 56-4, and is based on this notice and motion, the accompanying memorandum of points and authorities, and accompanying declarations and exhibits, the Statement of Uncontroverted Facts and Conclusions of Law, and all exhibits, papers and records on file, and on such further evidence and argument as the Court may permit.

DATED: December 15, 2008

HENNELLY & GROSSFELD LLP

By: /s/
MICHAEL G. KING
THOMAS H. CASE
Attorneys for Defendant,
MOVE, INC.

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I. STATEMENT OF FACTS.

A. The Parties.

This is a business dispute between ActiveRain Corp. and Move, Inc.

1. Plaintiff ActiveRain.

Plaintiff ActiveRain Corp. is a privately-held, "start-up" corporation founded by three talented men under 30 years old – Messrs. Heaton, Hillyerd, and Washburn. (Fact 1) In June 2006, ActiveRain launched a real estate blog and social network site that allows real estate professionals to communicate with each other by posting information on the site. (Fact 2) Essentially, plaintiff's site is a free, business-to-business, marketing tool for real estate professionals – allowing them to market themselves to other professionals in the hope of referrals and other business. (Fact 3) Plaintiff's site was not the first blog or social network site overall (e.g., MySpace, Facebook, and LinkedIn all pre-dated it) and not even the first in the real estate industry. (Fact 4) Plaintiff's site, however, quickly grew to be the most successful such site in the real estate industry (e.g., in terms of blog posts, members, and web traffic). (Fact 5) Plaintiff's business was so new (throughout discussions with Move), it had no profits or even revenues. (Fact 6)

Real estate professionals become "members" of ActiveRain for no charge by entering information about themselves, and almost all of that information is publicly available (and searchable) on the site, including their name, occupation, address, website, phone number, email link, (and even pictures of themselves). (Fact 7) Because plaintiff's business is conducted publicly on-line at www.activerain.com, little is secret about it. (Fact 8) Further, the independent contractor that was closely involved in marketing and outreach for plaintiff's site – Caleb Mardini – never signed a Non-Disclosure Agreement with plaintiff. (Fact 9)

2. Defendant Move, Inc.

Whereas plaintiff was a privately-held "start-up" of about four employees and no revenues, Move was (and is) a revenue-generating, publicly-traded company

comprised of hundreds of employees and is the number-one provider of real estate-related information on the Internet. (Fact 10) Move operates a number of Web sites, including REALTOR.com® (Move has a contractual relationship with the National Association of Realtors), through which it provides consumers the content, tools, and professional connections they need before, during and after a move. (Fact 11) Move generates revenue by selling business solutions to real estate agents and advertisements on its Web sites. (Fact 12)

Like almost every other online real estate business, Move was incorporating blogs and social networking features into its websites in 2006, before negotiations with plaintiff began. (Fact 13) Move had developed its own blog, hired a blog/social network expert, and publicly announced plans to develop blogs, social network features, and other "user generated content" in 2006. (Fact 14) The software and technology used by ActiveRain and Move for their respective blogs were entirely different – e.g., different third-party platforms (ActiveRain used Ruby on Rails while Move used Word Press), different programming languages (Ruby vs. PHP), and different databases (postINGRES vs. MySql). (Fact 15)

B. Social Networking in the Real Estate Industry.

Incorporating blogs and social networking features made business sense not only for ActiveRain and Move, but for other on-line real estate competitors as well. (Fact 16) Blogging and social networking by real estate agents generally results in more traffic at a company's website (and, thus, more ad revenue), more content (for better search engine results), and contact with potential new customers (real estate agents that can purchase products). (Fact 17) According to plaintiff's founder, Matt Heaton, essentially the entire on-line real estate industry was looking to "build or buy" blogs and social networks in late 2006 and into 2007. (Fact 18)

Because plaintiff quickly became the fastest growing blog/social network, Move was one of many on-line real estate companies interested in acquiring plaintiff. (Fact 19) At a January 2007 real estate industry conference (where

plaintiff's president spoke about the importance of social networking), plaintiff's principals were treated like "rock stars" – having business/acquisition discussions with numerous on-line real estate companies, including Move. Seeking to acquire ActiveRain was a competitive situation for Move. (Fact 20)

C. The Early Discussions and Non-Disclosure Agreement ("NDA").

The parties discussed the possibility of Move acquiring ActiveRain (Fact 21). ActiveRain's principals understood that Move was a competitor. (Fact 22) In fact, the parties' competitive relationship was the basis for the proposed acquisition – plaintiff was the industry leader in blogging/social networking and Move wanted to acquire plaintiff rather than continue competing with it. (Fact 23)

On January 16th, 2007, the parties signed a mutual Non-Disclosure Agreement ("NDA"). (Fact 24) (Plaintiff was represented by an attorney and investment banker throughout the negotiations.) (Fact 25) The NDA reflects the parties' competitive relationship: "Each party acknowledges that the other may already possess or have developed products, services or information similar to or competitive with those of the other party…." (Fact 26)

In the NDA, each party promised to "take reasonable and appropriate precautions" to protect each other's "Confidential Information" and limit its disclosure and use of it solely to evaluating the proposed acquisition. (Fact 27) Move took steps to keep plaintiff's information confidential, including restricting disclosure only to those who worked on the transaction and using the code name "Waterfall." (Fact 28)

The NDA does not specify the "reasonable and appropriate precautions" and ActiveRain never asked Move to specify the precautions or take additional ones. (Fact 29) If Move chose not to acquire ActiveRain, either party could demand that the other return or destroy its Confidential Information, but each party could keep an archival copy of the other's Confidential Information. (Fact 30)

D. The Acquisition's Framework and March 9th Letter of Intent.

After signing the NDA, the parties spent about 1 ½ months negotiating a framework for the proposed acquisition. (Fact 31) It took this long to arrive at a framework for a number of reasons. One was the nascent stage of social networking generally, and plaintiff's site particularly – it was less than one year old and had no revenues let alone profits. (Fact 32) Move believed that ActiveRain could be worth as much as $30 million in the future if: 1) it continued to aggressively grow (e.g., in terms of members, content, and traffic); 2) its members consisted largely of successful real estate agents (Move's potential customers); and 3) ActiveRain's business-to-business bloggers could be coaxed into writing more consumer-friendly content for Move's business-to-consumer model (e.g., writing about the neighborhoods they live and work in rather than how to better sell a home). (Fact 33)

On March 9, 2007, the parties signed the Non-Binding Letter of Intent ("LOI") outlining the framework for an asset acquisition. (Fact 34) Move contemplated paying a possible total of $33 million – $11 million as largely non-contingent and the remaining $22 million as potential future earn-outs – formulas intended to align the two companies' interests and ensure payment to ActiveRain's shareholders for bringing economic value to Move. (Fact 35) The $11 million portion was broken down as $8 million to plaintiff's shareholders ($5 million up front and $3 million two years later) and another $3 million as operating capital to aggressively grow the business. (Fact 36) The $22 million in potential earn-outs were separated into two different $11 million "earn-out" formulas. (Fact 37) In the March 9th LOI, one earn-out formula was for members (the number of new members posting blogs on Move's site and the number of posts) and the other was for traffic (the number of unique users). (Fact 38) Move signed the LOI with reservations about the second (traffic) earn-out and informed plaintiff of its reservations and desire to renegotiate the "traffic" earn-out the following week. (Fact 39) The parties agreed to alter the traffic earn-out – replacing it with a proposed content earn-out (based on the number and

type of blog posts) – and signed a revised LOI on or about March 23rd. (Fact 40) Move's LOI proposal was subject to approval of Move's Board of Directors, and the satisfactory completion of due diligence. (Fact 41)

The only binding terms of the LOI were the confidentiality and "no shop" provisions (preventing ActiveRain from considering competing offers for 45 days). (Fact 42) Other than those two terms, the LOI stated that it was "not a binding contract," not an offer capable of being accepted, and that a binding commitment could "only result from the execution and delivery of a mutually acceptable definitive written purchase agreement by both parties." (Fact 43)

E. Move's March 15th Board Meeting.

Six days after signing the LOI, Move sought approval for the proposed acquisition from its Board of Directors at a March 15th, 2007 meeting. (Fact 44) Move's senior executives who had worked on the proposed acquisition for months presented the matter to the Board, including its Chief Operating Officer (Jack Dennison), Executive Vice President of Corporate Strategy (Allan Merrill), and President of affiliates Top Producer and Realtor.com (Errol Samuelson). (Fact 45) The Board disapproved of one of the earn-out formulas (the traffic earn-out), directing Move's officers to find an acceptable replacement formula, but nonetheless approved of Move's officers going forward with the proposed acquisition (consistent with its instructions). (Fact 46)

The next day, Move executives (including Merrill and Samuelson) traveled to ActiveRain's Seattle offices, informed the principals, investment banker, and attorney of the Board's general approval of continuing negotiations, however the Board had reservations about the traffic earn-out. (Fact 47) ActiveRain was told that Move executives would have to report back to the Board before closing the transaction. (Fact 48) At that same meeting, Move's executives told ActiveRain about the blogs and social networking features it was working on – including the technology underlying it (e.g., the "Wordpress" platform) and discussed how the two companies

could best integrate their different blogs and technologies after the acquisition.[1] (Fact 49)

F. Move's Due Diligence Efforts.

Before due diligence began, Move was so interested in acquiring plaintiff that it introduced its principals to its largest shareholder (Elevation Partners) and two outside members of its Board of Directors, both of whom were favorably impressed with the proposed acquisition. (Fact 51)

After the March 15th Board meeting, Move conducted due diligence in earnest. (Fact 52)

Technical due diligence was by Move's employees (at its Top Producer affiliate) who were working on its own 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.[2] (Fact 53) (In fact, Top Producer was the Move business unit designated to oversee plaintiff after the proposed closing). (Fact 56) Business due diligence was conducted by Move's executives and legal due diligence was done by Move's outside law firm (Alston & Bird). (Fact 57) Move paid approximately $90,000 to its law firm for due diligence and drafting (and revising) the proposed closing documents. (Fact 58)

As part of its due diligence, Move was interested in examining plaintiff's member roster and made several inquiries to ActiveRain from the outset. (Fact 59) Move's COO said so in a February 2007 email, the March 16th due diligence checklist called for ActiveRain's member roster, and Move's April 4th email specifically asked for the member roster. (Fact 60) Move wanted to review

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[1]/ Plaintiff doesn't allege that Move misappropriated its software or computer code. (Fact 50)

[2]/ ActiveRain knew that Move's blog/social network staff helped evaluate the acquisition of plaintiff because they were told that at the March 16th meeting. (Fact 54) ActiveRain never asked that these Move employees not be given ActiveRain's Confidential Information (e.g., a "Chinese Wall") nor requested any other restriction on the information they reviewed. (Fact 55)

plaintiff's member roster to determine how many members were real estate agents, how many were already Move customers, and how successful the agents were – and thus, how likely they were to buy Move's solutions. (Fact 61) Despite repeated requests, plaintiff did not provide the member roster until May 2nd, just days before the proposed closing. (Fact 62)

Move's efforts to seriously evaluate whether to acquire plaintiff are reflected in hundreds of emails, the significant time Move's most senior executives spent on the proposed deal (including its CEO, COO, Executive Vice President, and affiliate President) and the involvement of Move's board of directors. (Fact 63)

G. The May 2nd Meeting and May 3rd Board Meeting.

Despite negotiating for months, the parties had still not agreed upon some of the key terms of the proposed acquisition, most significantly, the terms of the earn-out provisions – the formulas by which $22 million would be paid by Move to plaintiff's shareholders – within 45 days (the duration of the "no-shop"). (Fact 64) Thus, the parties agreed to one last extension of the LOI, and agreed to have an in-person meeting at Move's headquarters to "hammer out" the remaining half-dozen open business issues, including the earn-outs. (Fact 65)

At that meeting, Move's COO negotiated at length with plaintiff's principals, but the earn-out was not to Move's satisfaction. (Fact 66) In particular, the proposed formula did not prevent plagiarism, ensure consumer-friendly content for Move, or ensure that Move would receive economic value for the proposed $11 million pay-out. (Fact 67) At the conclusion of the May 2nd meeting, Move's executives, dissatisfied with the traffic earn-out, determined that the value in the proposed transaction would have to be from acquiring ActiveRain's members. (Fact 68)

That same day – May 2nd – was the first time plaintiff provided its member roster. (Fact 69) Move analyzed plaintiff's member roster that afternoon and evening – comparing it to Move's list of Realtors® and their historical listing counts.

(Fact 70) The analysis was done to determine how many were real estate agents, whether Move had existing business relationships with the agents, and how successful they were (e.g., do they sell many homes annually such that they would be likely to afford Move's on-line solutions). (Fact 71)

Move's May 2nd analysis showed that most of plaintiff's members were already realtors (already had a business relationship with Move) and those that weren't had relatively low historical sales – making them much less attractive to Move as potential customers. (Fact 72) When Move ran the numbers to determine how much it would be paying on a per-new-member basis, the proposed $33 million acquisition price – per member – was too high. (Fact 73) Based on that analysis, Move's COO – after conducting a meeting with numerous employees and executives who had worked on the deal – decided to recommend against the deal to the Board. (Fact 74)

At Move's May 3rd Board of Directors meeting, Move's COO presented the pros and cons of the proposed acquisition. (Fact 75) Although he described how acquiring ActiveRain could benefit Move, he recommended that Move not acquire ActiveRain, in large part because of the inordinately high price per member. (Fact 76) After about 20 minutes of discussion, the Board (the same one that recommended on proceeding with the negotiations 1 ½ months earlier) voted against the acquisition. (Fact 77)

That same day, May 3rd, Move told plaintiff that that it was not going forward with the transaction and why. (Fact 78) Move's decision not to acquire plaintiff lifted the "no-shop" restriction in the LOI – a restriction in place less than two months, March 9th to May 3rd, 2007. (Fact 79)

Plaintiff asked Move to destroy all "Confidential Information" disclosed during the negotiations. (Fact 80) Move agreed to do so – e.g., it instructed its employees to destroy ActiveRain's "Confidential Information" and its employees did so – employees shredded paper documents and deleted electronic information. (Fact 81) Although some copies of ActiveRain's "Confidential Information" remained on

Move's servers, Move was permitted to do so under the NDA – authorizing each party to keep an archival copy of the other's Confidential Information. (Fact 82) Plaintiff's Confidential Information was not used by Move for any reason other than to evaluate the proposed acquisition. (Fact 83)

At the May 2007 National Association of Realtors conference, Move announced new features to its products, including enhancements to its blogs – enhancements it had been working since before discussions with plaintiff began and that were made without any of plaintiff's "Confidential Information."[3] (Fact 84)

H. Plaintiff's Alleged Damages.

Throughout the negotiations with Move, plaintiff's business grew – e.g., from approximately 15,000 members in January 2007 to over 30,000 in May 2007. (Fact 86) After Move ended discussions, plaintiff's membership continued to grow, approximately quadrupling to over 140,000 members today.[4] (Fact 87) Further, plaintiff continued to market itself to other potential suitors at the same price discussed with Move. (Fact 89) The day after discussions with Move ended (May 4th), plaintiff's investment banker notified potential suitors that plaintiff was for sale at virtually identical terms discussed with Move. (Fact 90) Weeks later, plaintiff's investment banker told one potential investor that plaintiff's business was doing so well that ActiveRain was actually getting a great gift from Move in not doing the deal with them. (Fact 91)

Plaintiff had discussions with numerous potential suitors after discussions with Move ended, including some of the same companies it talked to before the "no-shop" provision took effect. (Fact 92) Plaintiff's discussions ultimately proved successful,

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[3]/ Plaintiff's principals reviewed Move's enhanced blogs and conceded they were not the same as plaintiff's site, they performed no analysis on the differences between the sites, and that one couldn't tell if ActiveRain's Confidential Information was used simply by looking at Move's site. (Fact 85).

[4]/ When plaintiff's officers were asked what members, blog postings, or traffic was lost because of Move, they could not identify any. (Fact 88).

when plaintiff signed a deal with HouseValues, a Move competitor, in November 2007 – six months after the Move discussions ended. (Fact 93) HouseValues acquired just under one-third of ActiveRain's shares for $2.75 million (valuing the whole company at over $8 million). (Fact 94) HouseValues also acquired the right to buy all of plaintiff's remaining shares of stock (a call right) at the following amounts in the future – $25 million in the first half of 2009, $40 million in the second-half of 2009, and $60 million in the first-half of 2010. (Fact 95)

Comparing the two transactions, under the proposed Move acquisition, plaintiff's shareholders would have received $8 million and the potential for $22 million in earn-out payments (the remaining $3 million was designated as operating capital for ActiveRain). (Fact 96) Under the HouseValues transaction, plaintiff actually received $2.75 million for under 1/3rd of the stock and its shareholders have the potential to receive another $25 million to $60 million in the future for the remaining stock – potentially tens of millions more than under the proposed Move acquisition. (Fact 97)

I. Plaintiff's Claims.

Plaintiff's seven claims are: 1) Misappropriation of Trade Secrets; 2) Breach of the NDA; 3) Unjust Enrichment; 4) Promissory/Equitable Estoppel; 5) Common Law Unfair Competition; 6) Statutory Unfair Competition; and 7) Fraud. (Fact 98). Plaintiff does not allege that Move orally promised to acquire ActiveRain on the terms discussed (Fact 99). The only breach of contract claim is for breach of the NDA, not of any oral contract to acquire plaintiff. In fact, plaintiff's investment banker testified that Move never promised (or guaranteed) to close the transaction, that he understood that there was "no deal" until the closing documents were signed, and that he'd communicated that to his clients as well. (Fact 100)

II. SUMMARY JUDGMENT STANDARD.

The standard for granting summary judgment is cogently set forth in McCaffrey v. Brobeck, Phleger & Harrison, L.L.P., 2005 WL 3358775, at *2 (N.D. Cal. Apr. 27, 2005):

> "[Summary] judgment ... shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c). "Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)]
>
> "The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The court draws all reasonable inferences in favor of the nonmoving party. [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).] The moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. The burden then shifts to the nonmoving party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." [Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1409 (9th Cir.), cert. denied, 502 U.S. 994 (1991).]

III. LEGAL ARGUMENT.

A. Plaintiff's Misappropriation Of Trade Secrets Claim Lacks Merit.

Under the California Uniform Trade Secrets Act (CUTSA), the essential elements of a claim for misappropriation of trade secrets are: "'(1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff.' [Citation.]" Cytodyn, Inc. v. Amerimmune Pharmaceuticals, Inc., 160 Cal.App.4th 288, 297 (2008) (quoting Sargent Fletcher, Inc. v. Able Corp., 110 Cal.App.4th 1658, 1665 (2003).)

1. The Definition of a Trade Secret.

The California Trade Secrets Act defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process, 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." As explained below, none of plaintiff's information satisfies this definition.

a. No Independent Economic Value.

ActiveRain effectively concedes that its trade secrets have no independent economic value, individually or collectively. ActiveRain's principals testified that many of its claimed trade secrets had no independent economic value and that it was not possible to value any one trade secret independently or even provide a value for them collectively. (Fact 101) In response to Move's Interrogatory No. 30 (asking plaintiff "For each trade secret you allege was misappropriated, state its value at the time is was appropriated"), plaintiff responded that it was "not [its] intent to place a value on each trade secret separately, standing alone, or in isolation. Rather, they will be valued in the aggregate. Such valuation is ***expected*** to be the subject of expert opinion and testimony." (Emphasis added.) (Fact 102) Plaintiff's experts, however,

did not place a value on its alleged trade secrets - either individually or collectively. (Fact 103)[5] Because neither plaintiff nor its experts have evidence or opinions how its alleged trade secrets have independent economic value, this essential element is absent. Yield Dynamics, Inc. v. TEA Systems Corp., 154 Cal.App.4th 547, 562-565 (2007) (finding no trade secret where insufficient evidence of value); Maheu v. Hughes Tool Co., 569 F.2d 459, 474-475 (9th Cir. 1977); Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp., 594 F.2d 730, 738-739 (9th Cir. 1979).

b. Many of the "Trade Secrets" Are Public Knowledge.

Because plaintiff's business – blogging and social networking – is well known, publicly conducted on-line, and used by thousands of businesses and individuals, There is very little about this business that could qualify as a trade secret. (Facts 7 & 8) For example, plaintiff's membership is publicly viewable and searchable on the site, including each member's name, company, phone number, email address, website, professional licenses, and experience. (Fact 7) DVD Copy Control Ass'n Inc. v. Bunner, 116 Cal.App.4th 241, 251 (2004) (publication of information on the internet widely available to competitors destroys secrecy). Further, as plaintiff is aware, readily available "scraping" software can obtain and collate a membership list automatically, so it is not necessary to spend hours scrolling through the information to obtain the list. (Fact 7) Therefore, plaintiff's membership list is public knowledge, not a trade secret. American Paper & Packaging, Inc. v. Kirgan, 183 Cal.App.3d 1318, 1326 (1986) (list of readily obtainable customers not a trade secret).

2. Plaintiff Lacks Evidence Of Misappropriation.

Move used plaintiff's Confidential Information and alleged "trade secrets" solely to analyze the proposed acquisition of plaintiff. Move never used or disclosed

[5] Instead of placing an economic value on the alleged trade secrets, plaintiff's expert's report states: "We understand that the Plaintiff intends to argue at trial that most or all of the value of ActiveRain's operations, both historical and prospective, derived from its confidential information and trade secrets." (Fact 104)

any of this information for any other purpose. (Fact 83)

Plaintiff has no contradictory evidence. In fact, plaintiff admits it has no evidence that Move misappropriated some of its alleged trade secrets. (Fact 105) As to the balance, all plaintiff points to is speculation. (Fact 106) For example, plaintiff's response to Interrogatory No. 4 (asking for all facts supporting the contention that Move used plaintiff's Confidential Information) states that shortly after acquiring ActiveRain's Confidential Information, Move released a 'new' software platform that "appears to use similar features to and was inspired by ActiveRain's platform, including but not limited to the ability to have 'featured posts.'" (Fact 107) The appearance of similarity, however, is not evidence of misappropriation. Plaintiff does not say that the unidentified "similarities" in the websites reflects misappropriation; in fact, it admits that it never analyzed the "similarities" and cannot tell whether Move misappropriated anything simply by looking at Move's websites. (Fact 108)

As the Central District explained in a similar case:

> "Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, 'inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party.' [Citation.] 'This requires evidence, not speculation.' [Citation.] In that regard, 'a mere "scintilla" of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some "significant probative evidence tending to support the complaint."' [Citation.]"

QR Spex, Inc. v. Motorola, Inc., 2004 WL 5642907, at *7 (C.D. Cal. Oct. 28, 2004)(citations omitted); see also Steinberg Moorad & Dunn, Inc. v. Dunn, 2002 WL 31968234, at *24 (C.D. Cal. Dec. 26, 2002).

3. Plaintiff Lacks Evidence of Damages[6].

Damages are an essential element of all plaintiff's claims. Sargent Fletcher, 110 Cal.App.4th at 1666. Plaintiff, however, has no evidence of damages from any alleged misappropriation. In fact, plaintiff's economics expert confirms that plaintiff's business grew throughout the negotiations with Move – from approximately 15,000 members in January 2007 to over 30,000 in May 2007 – and thereafter - roughly quadrupling in membership after negotiations ended (it has over 140,000 members today).[7] (Facts 86 & 87)

Plaintiff's expert does not say that Move was unjustly enriched or that plaintiff lost any sales, revenues, or profits because of any misappropriation. (Fact 109) Instead, plaintiff's expert opines that ActiveRain missed a "window of opportunity" to sell itself to others in the on-line real estate industry because of Move and "was thus deprived of the benefit of the bargain it had made." (Fact 110). While a "benefit of the bargain" may be a proper damages measure for a contract claim, it is not authorized for misappropriation of trade secrets claim. Cal. Civ. Code § 3426.3; Ajaxo v. E*Trade Group, 135 Cal.App.4th 21, 56-57 (2006); Unilogic v. Burroughs, 10 Cal.App.4th 612, 626 (1992). Because plaintiff has no evidence of damages from any misappropriation of trade secrets, this claim fails.

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[6]/ Damages is an essential element of each of plaintiff's causes of action: CDF Firefighters v. Maldonado, 158 Cal.App.4th 1226, 1239 (2008)(breach of contract); Memry Corp. v. Kentucky Oil Technology, N.V., 2007 WL 3289142, at *9 (N.D. Cal. Nov. 5, 2007) (unjust enrichment); Laks v. Coast Federal Sav. & Loan Ass'n, 60 Cal.App.3d 885, 890 (1976)(promissory/equitable estoppel); Balboa v. Trans Global Equities, 218 Cal.App.3d 1327, 1342 (1990); City Solutions v. Clear Channel Communications, 365 F.3d 835, 842 (9th Cir. 2004)(common law unfair competition); FAS Technologies, Ltd. v. Dainippon Screen Mfg. Co., 2001 WL 637451, at *4 (N.D. Cal. May 31, 2001) (Bus. & Prof. Code § 17200 claim based on misappropriation of trade secret); Engalla v. Permanente Medical Group, Inc., 15 Cal.4th 951, 974 (1997) (fraud).

[7]/ When plaintiff's officers were asked what members, blog postings, or traffic were lost because of Move, they could not identify any. (Fact 88)

That plaintiff suffered no damages is further shown by plaintiff's actions after the Move discussions ended – e.g., marketing itself at the same price,[8] (Fact 111) telling a potential investor that Move gave it a "great gift" in walking away from the negotiations,[9] (Fact 112) and selling under one-third of its stock for $2.75 million with the potential to sell the remaining shares for $25 million in the first-half of 2009, $40 million in the second-half of 2009, and $60 million in the first-half of 2010. (Fact 94)

Not only is plaintiff's "benefit of the bargain" damages analysis unauthorized by California law, it is unsupported by the facts. Plaintiff's expert claims that plaintiff "missed a window of opportunity" to sell itself because Move "locked up" plaintiff in a "no-shop" provision. (Fact 113) The "no-shop" provision however, was in effect for only about 55 days (March 9th to May 3rd, 2007) and plaintiff cannot say when the "window of opportunity" "opened" or "closed." (Fact 114) Further, the "window of opportunity" theory presumes that another company would have acquired plaintiff for the same price discussed with Move (approximately $33 million), but no such potential acquirer has been, or can be, identified. In fact, plaintiff's communications with other potential acquirers shows that Move's decision to end negotiations had no effect on potential acquirers' willingness to negotiate with plaintiff or their valuation of plaintiff. (Fact 115) See Copeland v. Baskin Robbins U.S.A., 96 Cal.App.4th 1251, 1263 (2002) (plaintiff cannot recover lost expectations from terminated negotiations because there is no way of knowing what the ultimate terms of the agreement would have been or even if there would have been an ultimate agreement).

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[8]/ After Move ended negotiations, plaintiff gave other suitors the same or similar projections supporting its valuation. (Fact 111)

[9]/ Four days after Move ended negotiations, plaintiff's investment banker wrote: "We think that based on the huge growth in uniques and membership alone from [ActiveRain], these guys are actually getting a great gift from Move in not doing the deal with them. They'll be worth considerably more…. one could claim that [ActiveRain] is worth almost four times that now." (Fact 112)

Since plaintiff has no damages, and there is no evidence that Move used its alleged trade secrets, plaintiff's remaining claims fail because they are all dependent on these allegations. Digital Envoy, Inc. v. Google, Inc., 2006 WL 824412, at *2 (N.D. Cal. Mar. 28, 2006) (claims dismissed where no damages could be recovered and damages was an element of all claims asserted, including breach of contract and trade secret claims.) As the court explained in a similar case:

> "Each of Plaintiffs' remaining claims for breach of confidential relationship, unjust enrichment, conversion, unfair competition, breach of contract and fraud . . . is dependent upon Plaintiffs proving that [defendant] improperly used, disclosed or otherwise misappropriated Plaintiffs' trade secrets and/or confidential information.[10] As set forth in the preceding section, Plaintiffs have not presented the Court with any admissible evidence that [Defendant] used, disclosed, or otherwise misappropriated their trade secrets and/or confidential information. [¶] Accordingly, the Court finds . . . [Defendant] is entitled to judgment as a matter of law on Plaintiffs' [remaining] Claims for Relief."

QR Spex, Inc. v. Motorola, Inc., 2004 WL 5642907, at *7 (C.D. Cal. Oct. 28, 2004).

Nevertheless, in an abundance of caution, Move will explain why each of the remaining claims fails for independent reasons.

4. Plaintiff's Tort and Unfair Competition Claims are Preempted by CUTSA.

California Civil Code § 3426.7 preempts non-contract claims that arise from the same set of facts as an alleged misappropriation of trade secrets under CUTSA:

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[10]/ Plaintiff's expert does not opine that Move was unjustly enriched. (Fact 116)

> "Federal courts have interpreted the CUTSA as superseding common law claims of misappropriation. See Cacique, Inc. v. Robert Reiser & Co., Inc., 169 F.3d 619, 624 (9th Cir. 1999); Digital Envoy, Inc. v. Google, Inc., 370 F.Supp.2d 1025, 1034-35 (N.D. Cal. 2005) (holding that unfair competition and unjust enrichment were preempted by the CUTSA because these claims were based on the "identical facts alleged in its claim for misappropriation of trade secrets"); AccuImage Diagnostics Corp. v. Terarecon, Inc., 260 F.Supp.2d 941, 953 (N.D. Cal. 2003); Calloway Golf Co. v. Dunlop Slazenger Group Americas, Inc., 318 F.Supp.2d 216, 219 (D.Del. 2004) (holding that the CUTSA "preempts common law claims that 'are based on misappropriation of a trade secret' "); B. Braun Medical, Inc. v. Rogers, 163 Fed.Appx. 500, 508 (9th Cir. 2006) (stating that the language of CUTSA "has been interpreted to mean that the CUTSA was intended to occupy the field [of trade secret misappropriation] in California"). The California Court of Appeals also has suggested that common law claims for trade secret misappropriation are preempted by the CUTSA. See Balboa Ins. Co. v. Trans Global Equities, 218 Cal.App.3d 1237, 1345 n. 22 (1990) (holding that because the complaint had been filed before the CUTSA was enacted, common law applied)."

AirDefense, Inc. v. AirTight Networks, Inc., 2006 WL 2092053, at *2 (N.D.Cal. Jul. 26, 2006); accord Monolithic Power Systems, Inc. v. 02 Micro International Ltd., 2007 WL 801886, at *6 (N.D. Cal. Mar. 14, 2007)(finding preemption and granting summary judgment on tort and unfair competition claims arising out of same set of facts as CUTSA claims); Silicon Image, Inc. v. Analogix Semiconductor, Inc., 2007

WL 1455903, at *9 (N.D. Cal. May 16, 2007); Convolve, Inc. v. Compaq Computer Corp., 2006 WL 839022, at *7-*8 (S.D.N.Y. Mar. 31, 2006).

All of plaintiff's claims arise from the same allegations of trade secret misappropriation, and therefore, except for breach of contract, they are all preempted. Further, as Move will demonstrate below, these claims fail for other reasons as well.

B. Fraud.

The elements of a fraud claim are: "a representation, usually of fact, which is false, knowledge of its falsity, intent to defraud, justifiable reliance upon the misrepresentation, and damage resulting from justifiable reliance." Stansfield v. Starkey, 220 Cal.App.3d 59, 72-73 (1990). To maintain a fraud action based on a false promise, "one must specifically allege and prove, among other things, that the promisor did not intend to perform at the time he or she made the promise and that it was intended to deceive or induce the promisee to do or not do a particular thing." Tarmann v. State Farm Mut. Automobile Ins. Co., 2 Cal.App.4th 153, 159 (1991).

Plaintiff alleges a number of misrepresentations for which it has no evidence. First, it alleges that Move was not genuinely interested in acquiring it, but merely pretended to be interested so it could steal plaintiff's trade secrets. (Fact 117) The evidence contradicts this. Move spent scores of hours analyzing the transaction. (Fact 63) It worked through a comprehensive due diligence check list, three drafts of a Letter of Intent, and multiple drafts of a proposed final agreement. (Fact 118) Move retained outside counsel, and had numerous meetings with plaintiff's principals and its investment advisors, both in Washington and in California. (Facts 45, 51, 57 & 63.) Move introduced plaintiff's principals to its main investor. (Fact 51) Plaintiff points to nothing other than the failure of the negotiations to speculate that Move did not negotiate in good faith. But Move's ultimate decision to terminate the negotiations because the acquisition was not worth the price is consistent with a good faith negotiation. Speculation is not evidence. QR Spex, Inc. v. Motorola, Inc., 2004 WL 5642907, at *7 (C.D. Cal. Oct. 28, 2004).

Second, plaintiff alleges that Move concealed that it was developing its own competing blogging and social networking platform at the same time Move was negotiating to acquire plaintiff. (Fact 119) However, plaintiff's own lawyer concedes that Move disclosed precisely what it was working on during the negotiations, including its competing software platform for blogging and social networking. (Fact 54) Synapsis, LLC v. Evergreen Data Systems, Inc., 2007 WL 760591, at *9-*10 (N.D. Cal. Mar. 9, 2007)(summary judgment granted on fraud claim where insufficient evidence that materials were concealed).

Third, plaintiff alleges that Move falsely represented that Move's Board of Directors had approved the deal "subject only to tweaking a few minor details, such as one aspect of the Earn Out formula." (Fact 120) In fact, Move accurately stated to plaintiff that the Board approved going forward with the deal, provided final agreement could be reached on a number of issues, including the Earn Out formula. (Facts 47 & 48) Final agreement was never reached. Plaintiff's investment advisor counseled plaintiff on more than one occasion that they could not count on a done deal until all parties signed a final agreement. (Fact 100) Therefore Move did not misrepresent the Board's approval and plaintiff could not justifiably rely on some misunderstanding that the Board's action guaranteed a final agreement.

Fourth, plaintiff alleges that Move falsely reassured plaintiff on or about May 2, 2007 that the deal was still on, subject to receiving plaintiff's membership list in a searchable electronic format. (Fact 121) In fact, Move accurately stated it was still interested in the acquisition, but needed to review and analyze of plaintiff's electronic membership list. (Fact 122) Move had been asking plaintiff for months for a searchable electronic version of plaintiff's list so it could compare it to Move's membership list. (Facts 59-62) To justify the purchase price, Move had to confirm that the acquisition would add sufficient new members with significant real estate business. (Fact 123) Otherwise there would not be sufficient potential for new

profits. When plaintiff finally produced its membership list in searchable format, Move's analysis revealed that the purchase price was too high. (Facts 70-73)

Since plaintiff has no evidence of any misrepresentations, justifiable reliance, or damages, summary judgment should be granted on the fraud claim.

C. Breach of Contract.

The elements of a breach of contract claim are: (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach. CDF Firefighters v. Maldonado, 158 Cal.App.4th 1226, 1239 (2008). The contract at issue is the parties' Mutual Non Disclosure Agreement ("NDA"). Plaintiff alleges that Move breached the NDA by "appropriating and using ActiveRain's Confidential Information without ActiveRain's consent," and that ActiveRain was damaged as a result.[11] (Fact 124)

As demonstrated above, Move did not use plaintiff's Confidential Information for any purpose other than that allowed under the contract, that is, to analyze the proposed acquisition of ActiveRain. (Fact 83) Therefore, like the trade secret claim, the breach of contract claim fails. Synapsis, LLC v. Evergreen Data Systems, Inc., 2007 WL 760591, at *7-*8 (N.D. Cal. Mar. 9, 2007) (summary judgment granted on contract claim where insufficient evidence that defendant breached NDA).

D. Unjust Enrichment.

The elements of a claim for unjust enrichment are: "(1) receipt of a benefit and (2) unjust retention of the benefit at the expense of another." Memry Corp. v. Kentucky Oil Technology, N.V., 2007 WL 3289142, at *9 (N.D. Cal. Nov. 5, 2007)(citing Lectodryer v. SeoulBank, 77 Cal.App.4th 723, 726 (2000). Since Move did not use any of plaintiff's alleged trade secrets or Confidential Information (Fact 83), it did not receive or retain a benefit. Plaintiff's expert does not even offer an

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[11]/ There is no practical distinction between the trade secret and breach of contract claims since plaintiff makes no distinction between its "Confidential Information" and the information it alleges is a trade secret. (Fact 125)

opinion on unjust enrichment. (Fact 110) For these reasons, plaintiff's claim fails.

E. Promissory/Equitable Estoppel.

The essential elements for promissory estoppel are: "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." Laks v. Coast Federal Sav. & Loan Ass'n, 60 Cal.App.3d 885, 890 (1976).

Plaintiff relies on the same alleged misrepresentations described in its fraud claim. As noted above, Move's statements were accurate and plaintiff has no admissible evidence to the contrary. (Facts 47-48, 54, 100 & 122) In addition, plaintiff could not have justifiably relied on any misunderstanding that the proposed acquisition was guaranteed prior to the parties signing a final agreement. Their financial advisor explained this to them. (Fact 100)

A case on point explains why the element of reasonable reliance is absent here:

> "[Plaintiffs] appear, from the record, to be experienced businessmen. They retained the services of a loan broker to assist them. We cannot believe they did not understand the Conditional offer to be just that . . . . They should have resolved the ambiguities and obtained a finalized agreement . . . . In other words, they could not have had legitimate expectations that this was a binding offer; therefore, they could not reasonably have relied on it."

Laks v. Coast Federal Sav. & Loan Ass'n, 60 Cal.App.3d at 893.

F. Common Law Unfair Competition.

The elements of common law unfair competition claim are: (1) plaintiff invested substantial time, skill or money in developing its property; (2) defendant appropriated and used plaintiff's property at little or no cost; (3) defendant's appropriation or use of plaintiff's property was without the authorization or consent

of plaintiff; and (4) plaintiff has been injured by defendant's conduct. AirDefense, Inc. v. AirTight Networks, Inc., 2006 WL 2092053, at *4 (N.D. Cal. Jul. 26, 2006).

As demonstrated above, Move did not misappropriate plaintiff's Confidential Information, and plaintiff has no damages. (Fact 83)

G. Business & Professions Code § 17200.

Plaintiff's claim under Business & Professions Code § 17200 is derivative of its other claims – it merely realleges and incorporates the s underlying its claim for misappropriation of trade secrets and breach of contract. (First Amended Complaint, ¶¶ 67-73.) Therefore, this claim is preempted by plaintiff's statutory claim under CUTSA. AirDefense, Inc. v. AirTight Networks, Inc., 2006 WL 2092053, at *4.

Further, where, as here, Move has met its burden of showing plaintiff has no evidence supporting essential elements of the derivative claims, then the Court should grant summary adjudication of the Section 17200 claim as well. Aguilar v. Atlantic Richfield Co., 25 Cal.4th 826, 875 (2001); White v. Starbucks Corp., 497 F.Supp.2d 1080, 1089-90 (N.D. Cal. 2007)(summary judgment upheld on Section 17200 claims that were derivative of other failed claims).

V. CONCLUSION.

For all the foregoing reasons, Move respectfully asks the Court to grant summary judgment as to all causes of action.

DATED: December 15, 2008

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