

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
 JOHN L. BARBER, SB# 160317
 2 E-Mail: barber@lbbslaw.com
 KENNETH D. WATNICK, SB# 150936
 3 E-Mail: watnick@lbbslaw.com
 SHAWNA T. RASUL, SB# 252201
 4 E-Mail: rasul@lbbslaw.com
 SONJA PAVLOV, SB# 261053
 5 E-Mail: pavlov@lbbslaw.com
 221 North Figueroa Street, Suite 1200
 6 Los Angeles, California 90012
 Telephone: 213.250.1800
 7 Facsimile: 213.250.7900

8 Attorneys for MONTE CAHN, an
 individual
 9

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
 12

13 MONTE CAHN, an individual,
 14 Plaintiff,
 15 v.
 16 OVERSEE.NET, a California
 corporation; JEFF KUPIETZKY, an
 17 individual; LAWRENCE NG, an
 individual; and Does 1 through 10,
 18 Defendants.
 19

CASE NO. CV11-03800 SVW (AGR_x)

The Hon. Stephen V. Wilson

**MONTE CAHN'S OPPOSITION TO
 DEFENDANTS' MOTION TO
 DISMISS**

DATE: August 15, 2011

TIME: 1:30 p.m.

PLACE: Crtrm. 6

COMPLAINT FILED: May, 3, 2011

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1 Plaintiff MONTE CAHN (“Cahn”) submits the following Opposition to
2 Defendants Oversee.net (“Oversee”), Jeff Kupietzky (“Kupietzky”) and Lawrence
3 Ng’s (“Ng”) (collectively “Defendants”) Motion to Dismiss First Amended
4 Complaint (“Motion to Dismiss”).

5

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 I. **INTRODUCTION**

8 In response to Cahn’s Complaint, Defendants filed a Motion to Dismiss
9 Cahn’s Fourth (Breach of the Covenant of Good Faith and Fair Dealing), Sixth
10 (Intentional Misrepresentation), Eighth (Negligent Misrepresentation), Ninth
11 (Conversion), and Tenth (Unfair Competition) claims for relief. Defendants did not
12 object to Cahn’s First, Second and Third claims for breach of contract, or his Fifth
13 claim for accounting.

14 Defendants have failed to set forth any case law or viable arguments in
15 support of its Motion to Dismiss. First, Defendants argue that Cahn’s forth claim
16 for conversion fails to state a claim because the writings are integrated. This
17 argument fails because Cahn’s claim is much broader than that argued by
18 Defendants, additionally, Cahn has demonstrated that Defendants intentionally
19 interfered with Cahn’s ability to perform under the contract.

20 Second, Defendants argue that Cahn’s sixth and eighth claims for intentional
21 and negligent misrepresentation fail because they are not pled with specificity, they
22 are simply restatements of his contract claim, and the representations are non-
23 actionable opinions. Again, all of these arguments fail. Cahn has alleged a series of
24 specific misrepresentations made by Defendants as an inducement for Cahn to enter
25 into a contract with Defendants. Also, the relevant case law clearly holds that tort
26 damages are permitted on a contract claim when a plaintiff is fraudulent induced to
27 enter into a contract by a defendant. Finally, contrary to the position articulated by
28 Defendants, representations of future conduct are actionable when they are made

1 without the present intent to perform, as they were in this case.

2 Third, in its Motion to Dismiss Defendants’ argue that Cahn did not state a
3 viable claim for conversion because Cahn failed to allege that Oversee knowingly
4 converted Cahn’s property. However, Defendants seem to have misapplied the law
5 again. Conversion is a strict liability tort, and it is not required that Oversee
6 knowingly converted Cahn’s property, only that it intended to assert control over the
7 property (in this case, the domain names), which it did.

8 Finally, Defendants’ object to Cahn’s tenth claim for unfair competition
9 stating that Cahn failed to identify which prong of the statute it asserted a claim
10 under, and that he failed to seek appropriate relief. This is simply incorrect as the
11 Complaint clearly alleges that Oversee’s conduct was unfair and fraudulent under
12 the UCL. Oversee’s conduct was unfair and fraudulent because its behavior was
13 immoral, unethical, oppressive and unscrupulous; Oversee deceived the public; and
14 it violated antitrust laws. Additionally, Cahn stated a remedy for restitution, which
15 is specifically provided for in the statute.

16 Therefore, as explained in further detail below, Cahn has stated viable claims
17 for breach of the covenant of good faith and fair dealing, intentional
18 misrepresentation, negligent misrepresentation, conversion, and unfair competition.
19 As a result, the Court should deny Defendants’ Motion to Dismiss.

20

21 **II. STATEMENT OF RELEVANT FACTS**

22 Plaintiff Monte Cahn is the founder of Moniker.com (“Moniker”). (¶ 9 of
23 Complaint.) Cahn sold Moinker to Seevast Corp. (“Seevast”) in 2005, but stayed on
24 as CEO in order to continue to manage and operate the business in the same manner
25 that had made it the success that it was. (¶ 10 of Complaint.) In 2007 Oversee, a
26 competitor of Moniker, approached Seevast regarding the purchase of Moniker. (¶
27 12 of Complaint.) However, Cahn’s agreement to join Oversee was an explicit
28 condition of the agreement to purchase Moniker from Seevast. (¶ 12 of Complaint.)

1 Therefore, in addition to negotiating a sale price with Seevast, Oversee also had to
 2 induce Cahn to join Oversee. In an attempt to convince Cahn to join, Defendants
 3 made a series of representations regarding Cahn's management of Moniker, the
 4 resources that would be available to him, and his compensation. (¶¶ 13-21 of
 5 Complaint.) Included in the negotiations was also an ability for Cahn to earn \$13
 6 million through a goal oriented bonus structure. (¶ 19 of Complaint.) However, at
 7 the time of these negotiations, Defendants knew that they would not be able to abide
 8 by their representations.¹ The parties reached an agreement on or around December
 9 14, 2007. (¶ 22 of Complaint.) After Cahn joined Oversee, Defendants took a
 10 series of affirmative actions specifically targeted to deny Cahn the ability to reach
 11 his benchmarks under the MIP. (¶¶ 24-25 of Complaint.) In June 2010 Oversee
 12 offered Cahn another opportunity to earn additional compensation by earning
 13 commission on individual sale transactions, however, Oversee failed to compensate
 14 Cahn under this agreement as well. (¶¶ 28-29 of Complaint.) As a result, Cahn
 15 was forced to bring this suit against Defendants to recover monies that are rightfully
 16 owed to him.

17

18 III. STANDARD

19 "A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if,
 20 accepting all well-pleaded allegations in the complaint as true, and viewing them in
 21 the light most favorable to plaintiff, plaintiff is not entitled to relief." (*In re*
 22 *Burlington Coat Factory Sec. Litig.* (3d Cir. 1997) 114 F.3d 1410, 1420.) Dismissal

23

24 ¹ Since filing the Complaint, it has come to our attention that during these
 25 negotiations there was a contract in place between Google and Oversee, which
 26 Defendants had knowledge of, and which precluded Cahn from attaining the
 27 benchmarks/goals in his MIP.

28

1 for failure to state a claim is “proper only where there is no cognizable legal theory
 2 or an absence of sufficient facts alleged to support a cognizable legal theory.”
 3 (*Shroyer v. New Cingular Wireless Servs.* (9th Cir. 2010) 622 F.3d 1035, 1041,
 4 *citing Navarro v. Block* (9th Cir. 2001) 250 F.3d 729, 732.)

5 Motions to dismiss under Rule 12(b)(6) are disfavored and rarely granted.
 6 (*See SCLC v. Supreme Court* (5th Cir. 2001) 252 F.3d 781, 786; *Lone Star*
 7 *Industries, Inc. v. Horman Family Trust* (10th Cir. 1992) 960 F.2d 917, 920.) “A
 8 complaint should not be dismissed for failure to state a claim unless it appears
 9 beyond doubt that the plaintiff can prove no set of facts in support of his claim
 10 which would entitle him to relief.” (*Simon Oil Co. v. Norman* (9th Cir. 1986) 789
 11 F.2d 780, 781, *citing Conley v. Gibson* (1957) 355 U.S. 41, 45-46.) Courts must
 12 assume that all general allegations “embrace whatever specific facts might be
 13 necessary to support them.” (*Pelozza v. Capistrano Unified School Dist.* (9th Cir.
 14 1994) 37 F.3d 517, 521, *see also United States v. Redwood City* (9th Cir. 1981) 640
 15 F.2d 963, 966 [dismissal is proper only in “extraordinary” cases].)

16
 17 **IV. CAHN’S FOURTH CLAIM FOR BREACH OF THE COVENANT OF**
 18 **GOOD FAITH AND FAIR DEALING IS SUFFICIENTLY PLED.**

19 **A. Cahn Has Alleged Defendants’ Breach of the Implied Covenant of**
 20 **Good Faith and Fair Dealing Under the MIP.**

21 The MIP’s choice of law provision provides that “the terms of this Plan shall
 22 be governed by the laws of the State of California...” (P. 2 of the MIP, Exhibit “2”
 23 to Defendant’s Request for Judicial Notice (“RJN”).)

24 Under California law it is well established that “[t]here is an implied covenant
 25 of good faith and fair dealing in every contract that neither party will do anything
 26 which will injure the right of the other to receive the benefits of the agreement.”
 27 (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658.) Additionally,
 28 “[t]his covenant not only imposes upon each contracting party the duty to refrain

1 from doing anything which would render performance of the contract impossible by
 2 any act of his own, but also the duty to do everything that the contract presupposes
 3 that he will do to accomplish its purpose.” (*Harm v. Frasher* (1960) 181 Cal. App.
 4 2d 405, 417.)

5 Cahn and Oversee entered into the MIP on October 1, 2007. (¶ 19 of
 6 Complaint.) The bonus structure set forth under the proposed MIP was based on
 7 Cahn's attainment of certain performance goals in four categories. (*Id.*) Pursuant to
 8 California law, once Oversee entered into the MIP with Cahn it had a duty to refrain
 9 from doing anything that would interfere with Cahn's ability to attain the
 10 performance goals delineated in the MIP (*Comunale*, 50 Cal.2d at p. 658), and an
 11 affirmative duty to do everything that the MIP presupposes that Oversee would do
 12 to accomplish its purpose. (*Harm*, 181 Cal. App. 2d at p. 417.) Oversee breached
 13 its duty of good faith and fair dealing under the MIP by:

- 14 • Delegating Cahn the additional responsibility of running the
 15 SnapNames and DomainSponsor divisions of Oversee, and removing
 16 Cahn's oversight and control from the Registrar Business Segment,
 17 while failing to make the requisite alterations to the MIP goals to
 18 account for the changes. (¶ 24A of Complaint.)
- 19 • Improperly diverting substantial revenues and profits from Moniker to
 20 other subsidiaries of Oversee. (¶ 24B of Complaint.)
- 21 • Reducing Cahn's staff at Moniker by more than 33%. (¶ 24C of
 22 Complaint.)
- 23 • Improperly and incorrectly reporting Moniker's Selling, General &
 24 Administrative Expenses. (¶ 24D of Complaint.)
- 25 • Severely restraining the marketing and public relations budget available
 26 to Moniker. (¶ 24E of Complaint.)
- 27 • Restricting Moniker's ability to transact in adult domain names which,
 28 pre-merger, comprised a substantial portion of Moniker's business, and

- 1 again, without making the requisite alterations to the MIP goals to
2 account for the change. (¶ 24F of Complaint.)
- 3 • Denying Moniker the opportunity to cross-market to other Oversee
4 subsidiaries' customers. (¶ 24G of Complaint.)
 - 5 • Delaying the infrastructure and technology integration between
6 Moniker and Oversee inhibiting Moniker's inability to fully monitor,
7 account for and measure its own performance levels. (¶ 24H of
8 Complaint.)
 - 9 • Implementing a nine month freeze on development of new products
10 and services post-merger. (¶ 24I of Complaint.)
 - 11 • Altering Cahn's reporting relationship several times throughout his
12 tenure, stripping Cahn of his ability to effectively manage Moniker.
13 (¶¶ 24J and K of Complaint.)
 - 14 • Oversee failed to obtain a California escrow license for Moniker so that
15 it could legally perform its auctions in California. (¶ 24L of
16 Complaint.)
 - 17 • Reducing Moniker's staff training budget to less than 1/10 of what
18 Cahn needed. (¶ 24M of Complaint.)

19 Each of these allegations were incorporated into the Fourth Claim for Relief for
20 Breach of the Covenant of Good Faith and Fair Dealing. (¶ 49 of Complaint.)

21 Therefore, as set forth above, Cahn has sufficiently pled a cause of action for
22 breach of the covenant by demonstrating that Oversee intentionally committed a
23 deluge of actions specifically targeted at interfering and disrupting Cahn's ability to
24 receive his benefits under the MIP. (*Comunale*, 50 Cal.2d at p. 658)

25 Oversee's argument that Cahn's claim for breach of the covenant is really a
26 claim for breach of contract is incorrect. As stated above, dismissal for failure to
27 state a claim is "proper only where there is no cognizable legal theory or an absence
28 of sufficient facts alleged to support a cognizable legal theory." (*Shroyer*, 622 F.3d

1 at p. 1041.) Here, Cahn has identified at least twelve specific instances where
2 Oversee breached its duty of good faith and fair dealing by intentionally interfering
3 with Cahn's ability to perform under the MIP. (See ¶¶ 24A-M of Complaint.)
4 Accordingly, Cahn has pled a viable claim for breach of the covenant of good faith
5 and fair dealing under the MIP.

6 **B. Cahn Has Alleged Defendants' Breach of the Implied Covenant of**
7 **Good Faith and Fair Dealing Under the Commission Plan.**

8 Under Florida law, like California law, "every contract contains an implied
9 covenant of good faith and fair dealing, requiring that the parties follow standards of
10 good faith and fair dealing designed to protect the parties' reasonable contractual
11 expectations. [Citation omitted.] A breach of the implied covenant of good faith
12 and fair dealing is not an independent cause of action, but attaches to the
13 performance of a specific contractual obligation." (*Centurion Air Cargo v. UPS Co.*
14 (11th Cir. Fla. 2005) 420 F.3d 1146, 1151-1152.) "The purpose of the implied
15 covenant of good faith is to protect the reasonable expectations of the contracting
16 parties." (*Three Keys, Ltd. v. Kennedy Funding, Inc.* (2009) 28 So. 3d 894, 903.)

17 As identified above, paragraphs 24A-M of Complaint clearly set forth an
18 abundance of facts demonstrating Oversee's deliberate interference with Cahn's
19 ability to properly manage his business units, thereby impairing his rights under the
20 Commission Plan. Again, paragraphs 24A-M of Complaint were incorporated into
21 the Fourth Claim for Relief through paragraph 49. Accordingly, Cahn has pled a
22 viable claim for Oversee's breach of the covenant of good faith and fair dealing
23 under the Commission Plan.

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1 V. CAHN'S SIXTH AND EIGHTH CLAIMS FOR NEGLIGENT AND
2 INTENTIONAL MISREPRESENTATION ARE SUFFICIENTLY
3 PLED.

4 A. Cahn's Claims for Misrepresentation Are Pled With the Requisite
5 Level of Specificity.

6 The elements of fraud that will give rise to a tort action for deceit are: (1) a
7 misrepresentation (false representation, concealment, or nondisclosure); (2)
8 knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4)
9 justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12
10 Cal.4th 631, 638, *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal. 4th
11 951, 974.)

12 Further, dismissal for failure to state a claim is "proper only where there is no
13 cognizable legal theory or an absence of sufficient facts alleged to support a
14 cognizable legal theory." (*Shroyer*, 622 F.3d at p. 1041.) While Cahn's claims for
15 misrepresentation may be more appropriately deemed "promissory fraud",
16 promissory fraud is simply a type of intentional misrepresentation.

17 To maintain an action for deceit based on a false promise, one
18 must specifically allege and prove, among other things, that the
19 promisor did not intend to perform at the time he or she made
20 the promise and that it was intended to deceive or induce the
21 promisee to do or not do a particular thing. [Citations omitted.]

22 Given this requirement, an action based on a false promise is
23 simply a type of intentional misrepresentation, i.e., actual fraud.

24 (*Tarmann v. State Farm Mut. Auto. Ins. Co.*, (1991) 2 Cal. App. 4th 153, 159.)

25 Oversee claims that Cahn has not pled his claims for fraud with adequate
26 specificity. However, the courts have interpreted Rule 9(b) to require that
27 "allegations of fraud are specific enough to give defendants notice of the particular
28 misconduct which is alleged to constitute the fraud charged so that they can defend

1 against the charge and not just deny that they have done anything wrong.”
2 (*Semegen v. Weidner* (9th Cir. 1985) 780 F.2d 727, 731.) Additionally, a pleading
3 “is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so
4 that the defendant can prepare an adequate answer from the allegations.”
5 (*Neubronner v. Milken* (9th Cir. 1993) 6 F.3d 666, 671-672.) Therefore, while “mere
6 conclusory allegations of fraud are insufficient” (*Moore v. Kayport Package*
7 *Express* (9th Cir. 1989) 885 F.2d 531, 540), Cahn has stated more than sufficient
8 facts apprising Defendants of the claims and allegations asserted against them.

9 In the Complaint, Cahn specifically and particularly alleges the following²:

- 10 • Kupietzky and Ng were primarily responsible for the negotiations on
11 behalf of Oversee and for making several statements, the purpose of which
12 were to induce Cahn to join Oversee after the merger. (¶ 13 of
13 Complaint.)
- 14 • Around December 2007, Kupietzky promised that Moniker would get
15 adequate marketing and public relations assistance from Oversee. (¶ 14 of
16 Complaint.)
- 17 • Around December 2007, Kupietzky claimed that Oversee could and would
18 centralize the operations of both Moniker and Oversee. (¶ 14 of
19 Complaint.)
- 20 • Around December 2007, Kupietzky promised that there would be
21 integration and cross-selling potential between all of Oversee’s
22 subsidiaries. (¶ 15 of Complaint.)

23
24
25 ² All of the statements identified below are incorporated by reference into the Sixth
26 and Seventh Claims for Relief by and through paragraphs 62 and 70 of the
27 Complaint.

- 1 • During the negotiations, Ng promised that the merger with Oversee would
2 provide Moniker with the resources and staffing it needed to flourish in the
3 market. (¶ 16 of Complaint.)
- 4 • During the negotiations, its was determined and agreed upon that, if Cahn
5 were to join Oversee, he would serve as the President of Moniker, and
6 would have the normal duties, responsibilities, functions and authority as
7 are normally associated with and appropriate for such position. (¶ 17 of
8 Complaint.)
- 9 • During negotiations it was also determined and agreed upon that Cahn
10 would report directly to Ng, who was then the CEO, ensuring Cahn had
11 adequate authority and dominion to carry out and achieve Moniker's
12 performance goals within Oversee's infrastructure. (¶ 18 of Complaint.)
- 13 • Oversee, through Ng and Kupietzky, proposed a "Management Incentive
14 Plan" ("MIP") whereby Cahn would be able to earn up to \$13,000,000
15 through a goal oriented bonus structure. (¶ 19 of Complaint.)
- 16 • Kupietzky represented that the overall Oversee EBITDA in the MIP would
17 be adjusted, either up or down, throughout the term of the MIP, and those
18 calculations would be the controlling benchmarks. (¶ 21 of Complaint.)

19 The statements identified above, in paragraphs 13-21 of the Complaint,
20 specifically identify which defendant made what representations, and when they
21 made them. Further, paragraphs 24A-M of Complaint (identified above) and
22 paragraphs 67 and 76 specifically identify *why* each of the representations were
23 false.

24 Additionally, since filing the First Amended Complaint, it has come to our
25 attention that there was a contract in place between Google and Oversee during the
26 time Oversee was negotiating with Seevast and Cahn, which Defendants had
27 knowledge of, and which directly effected Cahn's performance under the MIP. We
28 are of the understanding and belief that the acquisition of Moniker was in direct

1 violation of the Google contract. Therefore at the time Defendants entered the MIP,
2 Defendants knew that Cahn would never be able to reach the benchmarks set forth
3 under his MIP as a result of the Google contract, and therefore Cahn never even had
4 the ability to earn the \$13 million bonus.

5 An action for promissory fraud may lie where a defendant fraudulently
6 induces the plaintiff to enter into a contract. (*Chelini v. Nieri* (1948) 32 Cal. 2d 480,
7 487 [“tort of deceit” adequately pled where plaintiff alleges “defendant intended to
8 and did induce plaintiff to employ him by making promises . . . he did not intend to
9 (since he knew he could not) perform...”].) Here Oversee induced Cahn to enter
10 into his employment agreement and his MIP by the various representations alleged
11 in paragraphs 13-21 of the Complaint. Additionally, as alleged in paragraphs 24A-
12 M, 67 and 76 of the Complaint, these representations were false, and Defendants
13 knew that they were false at the time they entered into the contracts because, for
14 example, they knew of the existence of the Google contract. Therefore, Cahn’s
15 sixth and eighth claims for fraud are adequately pled.

16 **B. Cahn’s Claims for Misrepresentation Are Not Restatements of His**
17 **Contract Claim.**

18 Defendants argue that conduct amounting to a breach of contract becomes
19 tortious only when it also violates an independent duty arising from principles of
20 tort law. (11:4-12 of Motion to Dismiss [Doc. 12].) However, Defendants failed to
21 identify all the instances where tort damages have been permitted in contract cases.
22 In analyzing the application of tort damages to breach of contract causes of action,
23 the Court in *Erlich v. Menezes* (1999) 21 Cal. 4th 543 found that:

24 Tort damages have been permitted in contract cases where a
25 breach of duty directly causes physical injury [citation omitted];
26 for breach of the covenant of good faith and fair dealing in
27 insurance contracts [citation omitted]; for wrongful discharge in
28 violation of fundamental public policy [citation omitted]; or

1 where the contract was fraudulently induced. [citation omitted]
2 In each of these cases, the duty that gives rise to tort liability is
3 either completely independent of the contract or arises from
4 conduct which is both intentional and intended to harm.

5 (*Erlich v. Menezes* (1999) 21 Cal. 4th 543, 551-552; see also *Robinson Helicopter*
6 *Co., Inc. v. Dana Corp.* (2004) 34 Cal. 4th 979, 989-990, and *Freeman & Mills, Inc.*
7 *v. Belcher Oil Co.* (1995) 11 Cal. 4th 85, 108 [Our determination to allow the
8 plaintiff to sue for fraud and to potentially recover exemplary damages is not
9 justified by the plaintiff's greater loss, but by the fact that the breach of a
10 fraudulently induced contract is a significantly greater wrong, from society's
11 standpoint, than an ordinary breach.])

12 The courts have specifically identified fraudulent inducement to enter into a
13 contract as grounds for awarding tort damages in a breach of contract cause of
14 action because it arises from conduct which is both intentional and intended to harm.
15 (*Id.*, see also *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235
16 Cal. App. 3d 1220, 1238 [Court found that where sellers entered into lease
17 guaranties without the intent to perform, they were subject to tort liability.])

18 In *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal. 4th 979,
19 plaintiff purchased parts from defendant manufacturer, and defendant provided false
20 certificates of conformance. (*Id.* at pp. 985-986.) The court stated that but for
21 defendant's affirmative misrepresentations by supplying the false certificates of
22 conformance, plaintiff would not have accepted delivery and used the
23 nonconforming clutches over the course of several years, nor would it have incurred
24 the cost of investigating the cause of the faulty clutches. Accordingly, defendant's
25 fraud was a tort independent of the breach of contract. (*Id.* at pp. 990-991.)

26 The analysis in *Robinson Helicopter* is similar to the allegations in Cahn's
27 Complaint -- but for the false representations made by Defendants, Cahn would not
28 have entered into the MIP, which was the keystone in the sale of Moniker to

1 Oversee. In both scenarios the breach of contract was accompanied by an
2 intentional tort, not negligence. Therefore, Defendant's fraud is a tort independent
3 of Cahn's breach of contract claims.

4 In their Motion to Dismiss, Defendants rely upon *Cusano v. Klein* (2003) 280
5 F. Supp. 2d 1035, for the proposition that fraud claims which do no more than allege
6 breach of contractual duties should be dismissed. Even though Cahn's allegation of
7 fraudulent inducement is sufficient grounds to seek tort damages, *Cusano* is
8 distinguishable, nevertheless. *Cusano* involved a plaintiff who was seeking
9 royalties under a written agreement. (*Id.* at pp. 1038-1039.) The court found that
10 since the plaintiff only claimed the amount of royalties due him was falsely
11 reported, he alleged only a breach of contract and his fraud claims were dismissed.
12 (*Id.* at p. 1042) The court stated that "[a] fraud claim fails when it merely states an
13 alleged breach of contractual duties and does not concern representations that are
14 collateral or extraneous to the parties' contract." (*Id.*)

15 In our case, Cahn has alleged several facts which do not appear in the parties'
16 contract and which were made for the specific purpose of inducing Cahn to enter
17 into the MIP. These statements are extraneous to the parties' agreement and are
18 therefore independently actionable.

19 **C. A Promise of Future Conduct is Actionable as Fraud if Made**
20 **Without the Intent to Perform.**

21 Oversee's assertion that predictions as to future events, or statements as to
22 future action by some third party, are deemed opinions, and not actionable fraud is
23 also only partially correct. (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2
24 Cal. App. 4th 153, 158.) Oversee deliberately, and strategically, omits that other
25 half of the law which holds that "a promise of future conduct is actionable as fraud
26 only if made without a present intent to perform." (*Magpali v. Farmers Group*
27 (1996) 48 Cal. App. 4th 471, 481, *see also Tarmann*, 2 Cal. App. 4th at pp. 158-
28 159.)

1 As explained in detail above, Oversee knew that at the time it was negotiating
2 the MIP with Cahn that it was *impossible* for Cahn to meet the benchmarks imposed
3 by Oversee, as a result Defendants had no intent of paying Cahn the bonuses as
4 negotiated. Therefore, since Defendants did not have the present intent to perform
5 under the MIP, its promises of future conduct – including the promise of paying
6 Cahn \$13 million in bonuses – are actionable as fraud.

7

8 **VI. CAHN'S NINTH CLAIM FOR CONVERSION IS SUFFICIENTLY**
9 **PLED.**

10 Conversion is simply the wrongful exercise of dominion over the property of
11 another. The elements of a conversion claim are: (1) the plaintiff's ownership or
12 right to possession of the property; (2) the defendant's conversion by a wrongful act
13 or disposition of property rights; and (3) damages." (*Burlesci v. Petersen* (1998) 68
14 Cal. App. 4th 1062, 1066.) Further, "[c]onversion is a strict liability tort. The
15 foundation of the action rests neither in the knowledge nor the intent of the
16 defendant." (*Burlesci v. Petersen* (1998) 68 Cal. App. 4th 1062, 1066.)
17 Accordingly, as a general rule, "conversion rests neither in the knowledge nor the
18 intent of the defendant. It rests upon the unwarranted interference by defendant with
19 the dominion over the property of the plaintiff from which injury to the latter results.
20 Therefore, neither good nor bad faith, neither care nor negligence, neither
21 knowledge nor ignorance, are the gist of the action." (*Burlesci v. Petersen* (1998)
22 68 Cal. App. 4th 1062, 1067, *see also Enter. Leasing Corp. v. Shugart Corp.* (1991)
23 231 Cal. App. 3d 737, 747-748.) "Thus, while the act constituting the conversion
24 must be intentionally done - that is, the defendant must intend to assert dominion
25 over the property - the defendant's good faith or lack thereof is immaterial." (*Chase*
26 *Inv. Servs. Corp. v. Law Offices of Jon Divens & Assocs.* (2010) 748 F. Supp. 2d
27 1145, 1178.)

28

1 In his Complaint Cahn alleged that Oversee exercised possession of
2 approximately 4,500 domain names which Cahn personally owned. (¶ 79 of
3 Complaint.) Oversee argues that Cahn failed to allege that Oversee “knowingly and
4 intentionally asserted wrongful control over Cahn’s domain names”. (14:23-26 of
5 Motion to Dismiss.) Again, Oversee has incorrectly applied the law. Conversion is
6 a strict liability tort, it does not require that Oversee knowingly and intentionally
7 asserted control over *Cahn’s* domain names, it simply requires that Oversee
8 intentionally asserted control over the domain names, in general. Specific
9 knowledge that Cahn’s domain names were “mixed up” with Moniker’s is irrelevant
10 under a claim for conversion. “[D]efendant’ good faith, ignorance, mistake or
11 motive is irrelevant and does not constitute a defense.” (*Enter. Leasing Corp. v.*
12 *Shugart Corp.* (1991) 231 Cal. App. 3d 737, 747-748.) Therefore, as long as
13 Oversee had the intent to assert control over Moniker’s domain names, its alleged
14 ignorance, or the fact that Cahn’s domain names were “mixed in” with Moniker’s is
15 irrelevant and does not constitute a defense to a claim for conversion.

16
17 **VII. CAHN’S TENTH CLAIM FOR UNFAIR COMPETITION IS**
18 **SUFFICIENTLY PLED.**

19 **A. Cahn has Pled a Cognizable UCL Claim.**

20 Oversee’s first argument is that Cahn has failed to allege statutory unfair
21 competition because he failed to identify which of the three prongs his claim is
22 based upon. (15:21-23 of Motion to Dismiss.) A cursory reading of the Complaint
23 would reveal that Cahn has alleged that “[t]he conduct described herein constitutes
24 *unfair and fraudulent* business practices.” (¶ 92 of Complaint.) Therefore, Cahn
25 has alleged both violations of the unfair and fraudulent prongs of the UCL.

26 **B. The UCL Is Purposefully Broad.**

27 Additionally, the UCL is purposefully broad and encompasses a wide variety
28 of acts by a business. (*See, e.g., Schnall v. Hertz Corp.* (2000) 78 Cal. App. 4th

1 1144, 1153-1154 “[T]he unfair competition law’s scope is broad. Unlike the Unfair
2 Practices Act . . . it does not proscribe specific practices. Rather, as relevant here, it
3 defines ‘unfair competition’ to include ‘any unlawful, unfair or fraudulent business
4 act or practice.’ Its coverage is ‘sweeping, embracing anything that can properly be
5 called a business practice and that at the same time is forbidden by law.’ . . . By
6 proscribing ‘any unlawful’ business practice, ‘section 17200 borrows violations of
7 other laws and treats them as unlawful practices’ that the unfair competition law
8 makes independently actionable.”.]

9 *Schall* goes on to state: “The statutory language referring to ‘any unlawful,
10 unfair or fraudulent’ practice makes clear that a practice may be deemed unfair even
11 if not specifically proscribed by some other law.” (*Id.* at p. 1153.) “[T]he
12 Legislature . . . intended by this sweeping language to permit tribunals to enjoin on-
13 going wrongful business conduct in whatever context such activity might occur.”
14 (*Id.* at p. 1153.) “[T]he determination of whether a particular business practice is
15 unfair necessarily involves an examination of its impact on its alleged victim,
16 balanced against the reasons, justifications and motives of the alleged wrongdoer. In
17 brief, the court must weigh the utility of the defendant’s conduct against the gravity
18 of the harm to the alleged victim...” (*Id.* at p. 1167.)

19 **C. *Oversee’s Actions Were Unfair Under the UCL.***

20 An “unfair” business practice occurs when that practice “offends an
21 established public policy or when the practice is immoral, unethical, oppressive,
22 unscrupulous or substantially injurious to consumers.” (*People v. Casa Blanca*
23 *Convalescent Homes, Inc.* (1984) 59 Cal App 3d 509, 530, *see also Smith v. State*
24 *Farm Mutual Automobile Ins. Co.* (2001) 93 Cal. App. 4th 700, 718-719.)

25 In this case, Cahn has sufficiently alleged an unfair business practice on
26 behalf of *Oversee*. *Oversee* intentionally misrepresented the resources and
27 opportunities which would be provided if Cahn agreed to enter into his employment
28 agreement and MIP. (¶¶ 13-21, 87-89 of Complaint.) Cahn relied upon these false

1 promises and conveyed them to Moniker's customers in the form of personal
2 communications in response to complaints and publically posted letters describing
3 services and commitments which would be provided. Thus, not only was Cahn
4 deceived, Oversee's misrepresentations inevitably deceived the public and Cahn's
5 customer base that he had spent years developing and fostering. Furthermore, as
6 explained above, at the time that Oversee and Cahn entered into their contractual
7 obligations, Oversee knew that Cahn would not be able to reach the benchmarks in
8 his MIP because of the existing Google contract. They fraudulently enticed Cahn to
9 enter into the MIP with the promise of a large bonus in exchange for his approval of
10 the sale of Moniker to Oversee. Defendants' behavior was exceptionally immoral,
11 unethical, oppressive and unscrupulous.

12 D. **Oversee's Conduct Was Also Unfair Because it Violated Antitrust**
13 **Law.**

14 Additionally, "When a plaintiff who claims to have suffered injury from a
15 direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair'
16 in that section means conduct that threatens an incipient violation of an antitrust law,
17 or violates the policy or spirit of one of those laws because its effects are
18 comparable to or the same as a violation of the law, or otherwise significantly
19 threatens or harms competition." (*Cel-Tech Communications, Inc. v. Los Angeles*
20 *Cellular Telephone Co.* (1999) 20 Cal. 4th 163, 187.) The central question is one of
21 competitive injury. (*GAF Corp. v. Circle Floor Co.* (1972) 463 F.2d 752, 758, *see*
22 *also Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469, 492-493 [the Sherman Act
23 was "enacted in the era of 'trusts' and of 'combinations' of businesses and of capital
24 organized and directed to control of the market by suppression of competition in the
25 marketing of goods and services, the monopolistic tendency of which had become a
26 matter of public concern. The end sought was the prevention of restraints to free
27 competition in business and commercial transactions which tended to restrict
28 production, raise prices or otherwise control the market to the detriment of

1 purchasers or consumers of goods and services, all of which had come to be
2 regarded as a special form of public injury.”].)

3 Prior to the purchase of Moniker, Moniker and Oversee were involved in the
4 same business areas, primarily registration and management of domain names,
5 traffic monetization and parking, and drop and expired name back order and
6 purchasing. (¶¶ 9, 11 of Complaint.) Moniker was the market leader both as a
7 registrar and as a domain brokerage and auction company at the time of the
8 purchase. However, in order for Oversee to retain its market share, and destroy its
9 competition, Oversee fraudulently induced Cahn to enter into the MIP so that
10 Seevast could complete the sale of Moniker to Oversee. The effect of the merger
11 had a detrimental impact on the public by directly destroying one of industry
12 leaders. Therefore, Oversee’s violation of the antitrust laws satisfies the “unfair”
13 prong of the UCL as well.

14 **E. Oversee’s Conduct Was Fraudulent Under the UCL.**

15 The second prong that Cahn asserted is the “fraudulent” prong. The
16 “fraudulent” prong of the UCL “does not refer to the common law tort of fraud but
17 only requires a showing members of the public ‘are likely to be deceived.’”
18 (*Saunders v. Superior Court* (1994) 27 Cal. App. 4th 832, 839, *citing Bank of the*
19 *West v. Superior Court* (1992) 2 Cal. 4th 1254, 1267.) Oversee claims that the
20 Complaint contains no such allegations. (16:5-9 of Motion to Dismiss.) This is
21 incorrect. As discussed above in the “unfair” prong, the Complaint states that as a
22 result of Oversee’s numerous misrepresentations, Moniker’s employees and
23 customers were misled. (¶ 92 of Complaint.) Therefore, Cahn has stated a claim
24 under the “fraudulent” prong of the UCL as well.

25 **F. Cahn Has Alleged an Adequate Remedy.**

26 Oversee asserts that Cahn has failed to seek relief available under the UCL,
27 specifically, that remedies under the UCL are limited to injunctive relief and
28 restitution. (16:17-19 of Motion to Dismiss.) However, Oversee then admits that

1 “the Prayer for Relief requests ‘restitution of all wrongfully withheld amounts and
2 disgorgement of ill-gotten profits, in an amount according to proof.’” (17:3-5 of
3 Motion to Dismiss.) Therefore, by its own admission, Cahn has in fact stated an
4 appropriate remedy for his UCL claim.

5 Furthermore, “the language of section 17203 is clear that the equitable powers
6 of a court are to be used to ‘prevent’ practices that constitute unfair competition and
7 to ‘restore to any person in interest’ any money or property acquired through unfair
8 practices.” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134,
9 1147-1148.) This is what Cahn has pled in his Complaint, and therefore Cahn has
10 alleged a claim for unfair competition under section 17200.

11

12 **VIII. CAHN’S CLAIMS FOR PUNITIVE DAMAGES ARE VALID.**

13 As explained in more detail above, Cahn has stated viable claims for
14 Intentional Misrepresentation and Unfair Competition. Additionally, where the
15 Complaint sets forth facts demonstrating that Defendants acted willfully, unlawfully
16 and maliciously, such allegations are sufficient as against a demurrer to entitle
17 Plaintiff to seek exemplary damages. (*Menzies v. Geophysical Service, Inc.* (1953)
18 16 Cal. App. 2d 419, 424, *see also Hartzell v. Myall* (1953) 115 Cal. App. 2d 670,
19 678.)

20 Cahn has demonstrated, repeatedly, that Defendants acted willfully,
21 unlawfully and maliciously in inducing Cahn to enter in the MIP in order to
22 complete the sale of Moniker to Oversee. (*See, e.g.,* ¶¶ 13-21, 234-25 of Complaint,
23 and §§ 4, 5 and 7 of Cahn’s Opposition to Motion to Dismiss.) Accordingly,
24 Defendants’ request to strike Cahn’s prayer for punitive damages such be denied.

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26 ///

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28 ///

