

1 William A. Delgado (State Bar No. 222666)  
wdelgado@willenken.com  
2 Leemore Kushner (State Bar No. 221969)  
lkushner@willenken.com  
3 **WILLENKEN WILSON LOH & LIEB LLP**  
707 Wilshire Boulevard, Suite 3850  
4 Los Angeles, California 90017  
Tel: (213) 955-9240 • Fax: (213) 955-9250  
5

6 Attorneys for Defendants  
OVERSEE.NET, JEFF KUPIETZKY,  
and LAWRENCE NG  
7

8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

MONTE CAHN, an individual,  
Plaintiff,

v.

OVERSEE.NET, a California  
corporation; JEFF KUPIETZKY, an  
individual; LAWRENCE NG, an  
individual; and DOES 1 through 10  
Defendants.

Case No. CV11-03800 SVW (AGRx)

**DEFENDANTS' NOTICE OF  
MOTION AND MOTION TO  
DISMISS PURSUANT TO RULE  
12(B)(6) AND MOTION TO STRIKE  
PURSUANT TO RULE 12(F)**

DATE: July 11, 2011  
TIME: 1:30 p.m.  
PLACE: Crtrm. 6

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 11, 2011, at 1:30 p.m. in Courtroom 6 of  
3 the United States District Court for the Central District of California, located at 312 N.  
4 Spring Street, Los Angeles, CA 90012, Defendants Oversee.net, Jeff Kupietzky, and  
5 Lawrence Ng will, and hereby do, move, pursuant to Federal Rule of Civil Procedure  
6 12(b)(6) to dismiss various claims in the Complaint in this action on the ground that  
7 they fail to state a claim upon which relief can be granted and to strike Plaintiff's  
8 request for punitive damages.

9 The grounds for this motion are as follows: (1) the Second Claim for Breach of  
10 Contract fails to state a claim for relief, (2) Plaintiff has not and cannot allege that  
11 Oversee owed him a fiduciary duty to justify his Fifth Claim for Breach of Fiduciary  
12 Duty, (3) the Seventh and Eighth Claims for Intentional and Negligent  
13 Misrepresentation are an improper attempt by Plaintiff to convert his contract claims to  
14 tort claims, Plaintiff has failed to allege these claims with specificity as required under  
15 Rule 9(b) of the Federal Rules of Civil Procedure, and the alleged misrepresentation is  
16 a non-actionable opinion statement, (4) the Ninth Claim for Conversion fails to state a  
17 claim for relief, and (5) Plaintiff has failed to plead his Tenth Claim for violation of  
18 Business & Professions Code Section 17200 ("UCL") with specificity, and Plaintiff  
19 seeks remedies that are unavailable to him under the UCL.

20 Defendants additionally hereby move to strike Plaintiff's prayer for punitive  
21 damages on the grounds that Plaintiff has failed to plead any claim pursuant to which  
22 he has entitled to that form of damages.

23 //  
24 //  
25 //  
26 //  
27 //  
28

1 This Motion is brought pursuant to this Notice of Motion and Motion; the  
2 Memorandum of Points and Authorities filed herewith, and on such other or further  
3 matters as may be presented at the hearing of this matter. This Motion is made  
4 following a conference of counsel pursuant to Local Rule 7-3 which took place on May  
5 26, 2011.

6 Dated: June 1, 2011

WILLENKEN WILSON LOH & LIEB LLP

7  
8  
9 By: /s/ William A. Delgado  
William A. Delgado  
10 Attorneys for Defendants OVERSEE.NET,  
11 JEFF KUPIETZKY, and LAWRENCE NG  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<b><u>Page(s)</u></b>
I. INTRODUCTION.....	1
II. SUMMARY OF ALLEGATIONS.....	2
A. Factual Allegations from Plaintiff’s Complaint.....	2
B. Claims Alleged Against Defendants.....	3
III. LEGAL STANDARD.....	4
IV. ARGUMENT.....	4
A. Plaintiff’s Second Claim For Breach of the Commission Plan Fails.....	4
B. Plaintiff’s Fifth Cause of Action for Breach of Fiduciary Duty Should Be Dismissed.....	5
C. Plaintiff’s Fraud Claims Fail to State a Claim.....	7
1. Plaintiff cannot convert its contract claims into tort claims.....	8
2. Plaintiff’s fraud claims are not pled with the requisite specificity.....	10
3. The alleged misrepresentations are non-actionable opinions.....	11
D. Plaintiff’s Ninth Claim for Conversion Should Be Dismissed.....	12
1. A conversion claim cannot be premised on a contractual right of payment.....	12
2. Plaintiff failed to properly allege his conversion claim.....	13
E. The Tenth Claim Under Business & Professions Code Section 17200 Fails to State a Claim Upon Which Relief May be Granted.....	14
1. The UCL claim is not alleged with particularity.....	14
2. Plaintiff Seeks Remedies That Are Unavailable To Him Under the UCL.....	15

1 V. PLAINTIFF’S PRAYER FOR PUNITIVE DAMAGES SHOULD BE  
2 STRICKEN BECAUSE PUNITIVE DAMAGES ARE NOT AVAILABLE  
3 REMEDIES UNDER PLAINTIFF’S ASSERTED THEORIES.....17  
4 VI. CONCLUSION.....18  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Page(s)**

**State Cases**

*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*,  
7 Cal. 4<sup>th</sup> 503 (1994) ..... 8, 13

*Bank of the West v. Superior Court*,  
2 Cal. 4<sup>th</sup> 1254 (1992) ..... 16

*Cel-Tech Communications v. L.A. Cellular Tel. Co.*,  
20 Cal. 4<sup>th</sup> 163 (1999) ..... 16

*City of Hope Nat’l Med. Ctr. v. Genentech, Inc.*,  
43 Cal. 4<sup>th</sup> 375 (2008) ..... 5

*Cruz v. Pacific Health Systems, Inc.*,  
30 Cal. 4<sup>th</sup> 303 (2003) ..... 14

*Downey v. Humphreys*,  
102 Cal. App. 2d 323 (1951) ..... 6

*Ehrlich v. Menezes*,  
21 Cal. 4<sup>th</sup> 543 (1990) ..... 8

*Farmers Ins. Exchange v. Zerín*,  
53 Cal. App. 4<sup>th</sup> 445 (1997) ..... 12

*Foreman & Clark Corp. v. Fallon*,  
3 Cal.3d 875 (1971) ..... 11

*Haigler v. Donnelly*,  
18 Cal. 2d 674 ..... 13

*Khoury v. Maly’s of California*,  
14 Cal. App. 4<sup>th</sup> 612 (1993) ..... 15

*Korea Supply Co. v. Lockheed Martin Corp.*,  
29 Cal. 4<sup>th</sup> 1134 (2003) ..... 16, 17

*Lazar v. Hertz Corp.*,  
69 Cal. App. 4<sup>th</sup> 1494 (1999) ..... 15

*Lovejoy v. AT&T Corp.*,  
92 Cal. App. 4<sup>th</sup> 85 (2001) ..... 7

*Michelson v. Hamada*,  
29 Cal. App. 4<sup>th</sup> 1566 (1994) ..... 13

1	<i>Neu-Visions Sports, Inc. v. Soren/McAddam/Bartells,</i>	
	86 Cal. App. 4 <sup>th</sup> 303 (2000) .....	11
2		
3	<i>Pacesetter Homes, Inc. v. Brodtkin,</i>	
	5 Cal. App. 3d 206 (1970) .....	12
4	<i>Plummer v. Day/Eisenberg, LLP,</i>	
	184 Cal. App. 4 <sup>th</sup> 38 (2010) .....	12
5		
6	<i>Podolsky v. First Healthcare Corp.,</i>	
	50 Cal. App. 4 <sup>th</sup> 632 (1996) .....	14
7	<i>Shahood v. Cavin,</i>	
	154 Cal. App. 2d 745 (1957) .....	14
8		
9	<i>Tarmann v. State Farm Mut. Auto Ins. Co.,</i>	
	2 Cal. App. 4 <sup>th</sup> 153 (1991) .....	11
10	<i>Vu v. Cal. Commerce Club, Inc.,</i>	
	58 Cal. App. 4 <sup>th</sup> 229 (1997) .....	14
11		
12	<i>Waverly Productions v. RKO General, Inc.,</i>	
	217 Cal. App. 2d 721 (1963) .....	6
13	<i>Wilens v. TD Waterhouse Group, Inc.,</i>	
	120 Cal.App.4 <sup>th</sup> 746 (2003) .....	4
14		
15	<i>Wiltsee v. California Emp. Com.,</i>	
	69 Cal. App. 2d 120 (1945) .....	6
16	<i>Wolf v. Superior Court,</i>	
	107 Cal. App. 4 <sup>th</sup> 25 (2003) .....	5, 6
17		
18	<i>Worldvision Enterprises, Inc. v. American Broadcasting Companies, Inc.,</i>	
	142 Cal. App. 3d 589 (1983) .....	6
19		
20	<b>Federal Cases</b>	
21	<i>Aquino v. Credit Control Servs.,</i>	
	4 F. Supp. 2d 927 (N.D. Cal. 1998).....	15
22	<i>Bell Atlantic Corp. v. Twombly,</i>	
	500 U.S. 544 (2007).....	4
23		
24	<i>Blake v. Dierdorff,</i>	
	856 F.2d 1365 (9 <sup>th</sup> Cir. 1988) .....	10
25	<i>Clegg v. Cult Awareness Network,</i>	
	18 F.3d 752 (9 <sup>th</sup> Cir. 1994) .....	4
26		
27	<i>Cusano v. Klein,</i>	
	280 F. Supp. 2d 1035 (C.D. Cal. 2003).....	9
28		

1	<i>Erikson v. Pardus</i> ,	2, 4
	551 U.S. 89 (2007).....	
2		
3	<i>Glen Holly Entm't, Inc. v. Tektronix, Inc.</i> ,	10, 11
	100 F. Supp. 2d 1086 (C.D. Cal. 1999).....	
4	<i>Ileto v. GLock, Inc.</i>	4
	49 F.3d 1199 (9 <sup>th</sup> Cir. 2003) .....	
5		
6	<i>In re GlenFed, Inc. Sec. Litig.</i> ,	10
	42 F.3d 1541 (9 <sup>th</sup> Cir. 1994) .....	
7	<i>McGehee v. Coe Newnes/McGehee UCL</i> ,	8, 13
	2004 WL 2452855 at *2 (N.D. Cal. 2004).....	
8		
9	<i>Neubronner v. Milken</i> ,	10
	6 F.3d 666 (9 <sup>th</sup> Cir. 1993) .....	
10	<i>Ortega v. Toyota Motor Sales, USA, Inc.</i> ,	12, 13
	572 F. Supp. 2d 1218 (S.D. Cal. 2008) .....	
11		
12	<i>Saldate v. Wilshire Credit Corp.</i> ,	15
	268 F.R.D. 87 (E.D. Cal. 2010).....	
13	<i>Silicon Knights, Inc. v. Crystal Dynamics, Inc.</i> ,	14
	983 F. Supp. 1303 (N.D.Cal. 1997).....	
14		
15	<i>Sonoma Foods, Inc. v. Sonoma Cheese Factory, Inc.</i> ,	5
	634 F. Supp. 2d 1009 (N.D.Cal. 2007).....	
16	<i>Vess v. Ciba-Geigy Corp. USA</i> ,	10
	317 F.3d 1097 (9 <sup>th</sup> Cir. 2003) .....	
17		
18	<i>Walker v. Armco Steel Corp.</i> ,	8
	446 U.S. 740 (1980).....	
19	<i>Wilkerson v. Butler</i> ,	17
	229 F.R.D. 166 (E.D. Cal. 2005).....	
20		
21	<b>Rules</b>	
22	Federal Rule of Civil Procedure 12(b)(6).....	4
23	Federal Rule of Civil Procedure 9(b) .....	8, 10
24	Federal Rules of Civil Procedure 12(f).....	17
25		
26	<b>Statutes</b>	
27	Cal. Civ. Code § 1710(1).....	7
28	Cal. Civ. Code § 1710(2).....	7
	Cal. Civ. Code § 3294.....	16



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

California Business and Professions Code Section 17200 (“UCL”).....	passim
California Business and Professions Code Section 17203 .....	16

**Other Authorities**

Unfair Business Practices Act .....	16
-------------------------------------	----

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

At its core, this case is nothing more than an alleged breach of contract case based on three written agreements: a financial incentive plan called the Management Incentive Plan (the “MIP”) in which Plaintiff allegedly participated, a Commission Plan in which Plaintiff allegedly participated, and a commission agreement for the sale of the domain name, <restaurants.com>. Unfortunately, in a veritable “kitchen sink” pleading, the Complaint contains a hodgepodge of claims against Oversee and two of its officers, Jeff Kupietzky and Lawrence Ng (collectively, “Defendants”).

Nevertheless, it is apparent from Plaintiff’s Complaint that every single claim is premised on and arises from Plaintiff’s singular contention that Oversee did not perform as required under the agreements. Plaintiff’s attempt to expand this straightforward contract dispute to a ten cause of action complaint is without basis, improper, and should not be countenanced. The claims which Defendants seek to dismiss are repetitive, superfluous and/or legally deficient, and they should all be dismissed without leave to amend.

//  
//  
//  
//  
//  
//  
//  
//  
//  
//

1 **II. SUMMARY OF ALLEGATIONS<sup>1</sup>**

2

3 A. Factual Allegations from Plaintiff's Complaint.

4

5 In 1999, Plaintiff formed a company called Domain Systems, Inc. dba  
6 Moniker.com ("Moniker"), which provided internet users with a streamlined interface  
7 to search for, register, and manage their domain names. Complaint at ¶ 9. Plaintiff  
8 sold Moniker to Seevast Corp. in 2005. *Id.* at ¶ 10. Seevast sold Moniker to Oversee  
9 2007. *Id.* at ¶ 12. The gravamen of Plaintiff's Complaint is focused on three  
10 agreements that followed Oversee's purchase of Moniker.

11 First, Plaintiff alleges that subsequent to Oversee's purchase of Moniker,  
12 Oversee retained Plaintiff to serve as president of Moniker, and his compensation  
13 package included participation in a Management Incentive Plan ("MIP") "whereby  
14 Cahn would be able to earn up to \$13,000,000 through a goal oriented bonus  
15 structure." *Id.* at ¶¶ 12, 17. The MIP was to be in effect from October 1, 2007 through  
16 December 31, 2010 and divided into three determination periods. *Id.* at ¶ 19. Cash  
17 awards were to be paid for each determination period provided that Plaintiff achieved  
18 certain specified performance goals proscribed by the MIP. *Id.* at ¶¶ 13, 19.<sup>2</sup> The MIP  
19 is a fully integrated agreement that contains the entire agreement of the parties. *Id.* at ¶  
20 30. Plaintiff contends that Oversee is wrongfully withholding bonus payments owed to  
21 him under the MIP. Complaint, ¶ 15.

22

23

24 <sup>1</sup> While Defendants do not concede any of Plaintiff's allegations, Defendants  
25 acknowledge that the Court must accept as true Plaintiff's allegations on a motion  
to dismiss. *Erikson v. Pardus*, 551 U.S. 89, 93 (2007).

26 <sup>2</sup> While this allegation must be accepted as true for purposes of this motion, it is,  
27 in fact, untrue. The MIP provided for bonuses in the event that certain business  
28 units, not Plaintiff, met proscribed targets. That said, this inaccuracy does not  
affect the present motion.

1           Second, Plaintiff alleges that, while the MIP was in effect, Plaintiff and Oversee  
2 also entered into a separate commission plan on or about June 4, 2010, whereby  
3 Plaintiff would receive a predetermined percentage of his sales of third-party and  
4 owned-and-operated domain names (“Commission Plan”). *Id.* at ¶¶ 21, 35. The  
5 Complaint does not allege any of the terms of the Commission Plan, and only vaguely  
6 alleges that Oversee’s conduct constituted a material breach of the Commission Plan.  
7 *Id.* at 37. The Complaint does not describe the “conduct” Oversee allegedly engaged  
8 in that deprived him of his benefits under the Commission Plan.

9           The third agreement alleged in the Complaint pertains to the sale of the Internet  
10 domain name <restaurants.com.> Plaintiff alleges that he and Oversee entered into an  
11 agreement that, upon the closing of the sale of <restaurants.com>, Plaintiff would  
12 receive a commission equivalent to fifty percent of the payable commission. *Id.* at ¶ 40.  
13 Plaintiff contends that Oversee failed to pay Plaintiff his commission payment. *Id.* at  
14 42.

15  
16           B.     Claims Alleged Against Defendants

17  
18           The Complaint alleges ten claims against Oversee for: breach of the MIP, Commission  
19 Plan and Restaurants.com Agreement (Claims 1 through 3, respectively), breach of the  
20 implied covenant of good faith and fair dealing (Claim 4), breach of fiduciary duty  
21 (Claim 5), accounting (Claim 6), intentional and negligent misrepresentation (Claims 7  
22 and 8), conversion (Claim 9), and violation of Section 17200 of the California Business  
23 and Professions Code (Claim 10). Only two of those claims – the Seventh and Eighth  
24 Claims for Intentional and Negligent Misrepresentation– are also asserted against  
25 defendants Jeff Kupietzky and Lawrence Ng. Kupietzky is presently Chief Executive  
26 Officer and President of Oversee. Complaint, ¶ 5. Ng is presently Chairman of the  
27 Board of Oversee and one of its original co-founders. *Id.*, ¶ 6.  
28

1           There is only one alleged misrepresentation complained of in the Complaint: that  
2 Plaintiff was told he would have the ability to earn up to \$13 million in bonus  
3 payments under the MIP. Complaint, ¶¶ 63.  
4

5           **III. LEGAL STANDARD**  
6

7           A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the  
8 legal sufficiency of the claims alleged in the complaint. *Ileto v. GLock, Inc.*, 349 F.3d  
9 1199-120 (9<sup>th</sup> Cir. 2003). In determining whether the complaint’s allegations are  
10 sufficient to state a claim for relief, all allegations of material fact are taken as true.  
11 *Erikson v. Pardus*, 551 U.S. 89, 93 (2007). “To survive a motion to dismiss, a  
12 complaint must contain sufficient factual matter, accepted as true, to state a claim to  
13 relief that is plausible on its face.” Moreover, the Court is not required to accept legal  
14 conclusions cast in the form of factual allegations if those conclusions cannot  
15 reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d  
16 752, 754-55 (9<sup>th</sup> Cir. 1994). The plaintiff’s obligation to provide the grounds of  
17 entitlement to relief “requires more than labels and conclusions, and a formulaic  
18 recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v.*  
19 *Twombly*, 500 U.S. 544, 555 (2007).  
20

21           **IV. ARGUMENT**  
22

23           A.     Plaintiff’s Second Claim For Breach of the Commission Plan Fails.  
24

25           The elements of a breach of contract claim are: (1) the existence of a contract,  
26 (2) plaintiff’s performance, (3) defendant’s breach, and (4) damages. *Wilens v. TD*  
27 *Waterhouse Group, Inc.*, 120 Cal.App.4<sup>th</sup> 746, 757 (2003). The Complaint does not  
28 attach the Commission Plan and fails entirely to plead the terms that purportedly define

1 its parameters. Rather, the Complaint vaguely alleges that the Commission Plan  
2 provided that Plaintiff could earn commissions for his sale of both third party and  
3 Oversee-owned and operated domain names. Complaint, ¶¶ 21, 35. Then, Plaintiff  
4 alleges that “Oversee’s conduct, *as alleged*, constitutes a material breach of the  
5 Commission Plan...” Complaint, ¶ 37 (emphasis added). But, nowhere in the  
6 Complaint does Plaintiff *actually allege* the “conduct” that purportedly comprises that  
7 breach. *See*, Complaint, ¶¶ 21, 34-38. Plaintiff has, therefore, neglected to plead one  
8 of the essential elements of a breach of contract claim: Oversee’s purported breach of  
9 the Commission Plan. For that reason, this claim must be dismissed.

10  
11 B. Plaintiff’s Fifth Cause of Action for Breach of Fiduciary Duty Should Be  
12 Dismissed.

13  
14 Fiduciary relationships arise in one of two ways: either the parties enter into a  
15 recognized *type* of relationship (such as attorney-client, trustee-beneficiary, joint  
16 venture, or partnership) in which fiduciary duties are imposed as a matter of law, or  
17 they expressly agree to undertake fiduciary duties. *City of Hope Nat’l Med. Ctr. v.*  
18 *Genentech, Inc.*, 43 Cal. 4<sup>th</sup> 375, 386 (2008). “Before a person can be charged with a  
19 fiduciary obligation, he must either knowingly undertake to act on behalf of and for the  
20 benefit of another, or must enter into a relationship which imposes that undertaking as  
21 a matter of law.” *Id.* This requirement is unsurprising given that a fiduciary is duty-  
22 bound to act with utmost good faith for the benefit of the other party and to subordinate  
23 its individual interests to the extent they conflict with that duty. *Wolf v. Superior*  
24 *Court*, 107 Cal. App. 4<sup>th</sup> 25, 31 (2003). Thus, where a plaintiff does not plead any  
25 facts demonstrating that the defendant agreed to a fiduciary relationship as part of a  
26 transaction, a claim for breach of fiduciary duty must be dismissed as a matter of law.  
27 *See Sonoma Foods, Inc. v. Sonoma Cheese Factory, Inc.*, 634 F. Supp. 2d 1009, 1021  
28

1 (N.D.Cal. 2007) (dismissing breach of fiduciary duty claim where plaintiff failed to  
2 plead any facts that would give rise to a fiduciary duty).

3 Here, the Complaint does not allege the existence of a traditionally recognized  
4 fiduciary duty owed by Oversee, does not allege that the agreements at issue expressly  
5 created a fiduciary relationship, and does not allege that Oversee agreed to owe a  
6 fiduciary duty to Plaintiff. Complaint, ¶¶ 52-54. Instead, the Complaint alleges that  
7 Oversee owed Plaintiff a fiduciary duty to comply with the terms of the MIP and  
8 Commission Plan, to disclose information that would affect Plaintiff's ability to  
9 achieve his awards, to refrain from interfering with Plaintiff's ability to achieve the  
10 awards, and to evaluate Plaintiff's performance in good faith. Complaint, ¶ 52.

11 However, the mere fact that the parties are bound by a contract and repose trust in one  
12 another as a result does not give rise to a fiduciary obligation. *Wolf*, 107 Cal. App. 4<sup>th</sup>  
13 at 31; *Worldvision Enterprises, Inc. v. American Broadcasting Companies, Inc.*, 142  
14 Cal. App. 3d 589, 595 (1983); *Waverly Productions v. RKO General, Inc.*, 217 Cal.  
15 App. 2d 721, 731-32 (1963).

16 Moreover, "the contractual right to contingent compensation in the control of  
17 another has never, by itself, been sufficient to create a fiduciary relationship where one  
18 would not otherwise exist." *Id.*, at 30-31; *see, e.g. Downey v. Humphreys*, 102 Cal.  
19 App. 2d 323, 332 (1951) (the obligation to pay money is a debt; "A debt is not a trust"  
20 and does not create a fiduciary relationship, "whether [debtor's] liability is certain or  
21 contingent); *Wiltsee v. California Emp. Com.*, 69 Cal. App. 2d 120, 125 (1945)  
22 (employment contract entitling employee to 25 percent of future profits neither created  
23 a joint venture nor gave rise to a fiduciary relationship). Indeed, the contractual right  
24 to compensation is governed by the implied covenant of good faith and fair dealing and  
25 not by a fiduciary duty. *Wolf*, 107 Cal. App. 4<sup>th</sup> at 31. As the court articulated in *Wolf*,  
26 *supra*:

27 Every contract requires one party to repose an element of  
28 trust and confidence in the other to perform. For this

1 reason, every contract contains an implied covenant of  
2 good faith and fair dealing, obligating the contracting  
3 parties to refrain from ‘doing anything which will have  
4 the effect of destroying or injuring the right of the other  
5 party to receive the fruits of the contract....’ [Citations.]  
6 ‘Being of universal prevalence, [the implied covenant]  
7 cannot create a fiduciary relationship; it affords basis  
8 for redress for breach of contract and that is all.

9 *Id.* (brackets in original, citations omitted).

10 Simply put, Oversee does not owe a fiduciary duty to Plaintiff either as a matter  
11 of law or pursuant to the contract at issue. Thus, Plaintiff’s fifth claim fails and must  
12 be dismissed.

13  
14 C. Plaintiff’s Fraud Claims Fail to State a Claim.

15  
16 Fraud, or intentional misrepresentation, is the suggestion, as a fact, of that which  
17 is not true, by one who does not believe it to be true. Cal. Civ. Code § 1710(1).  
18 Negligent misrepresentation, by contrast, is the assertion, as a fact, of that which is not  
19 true, by one who has no reasonable ground for believing it to be true. Cal. Civ. Code §  
20 1710(2). With the exception of knowledge of falsity, the elements of the two claims  
21 are identical: (1) misrepresentation of past or existing fact, (2) knowledge of falsity –  
22 whether the defendant knew the statement was false (fraud) or had no reasonable basis  
23 upon to which to believe it was true (negligent misrepresentation), (3) intent to induce  
24 reliance, (4) justifiable reliance, and (5) resulting damage. *See, e.g., Lovejoy v. AT&T*  
25 *Corp.*, 92 Cal. App. 4<sup>th</sup> 85, 93 (2001).

26 Plaintiff’s Seventh and Eighth Causes of Action for intentional  
27 misrepresentation and negligent misrepresentation, respectively (“Fraud Claims”), fail  
28 for three reasons. First, the Fraud Claims fail because this is a straightforward contract



1 action, and the law is well settled that plaintiffs cannot improperly convert a breach of  
2 contract claim into a tort claim. Second, they fail because Plaintiff has not alleged  
3 these claims with the requisite specificity required under Federal Rule of Civil  
4 Procedure 9(b). Third, the Fraud Claims fail because the alleged misrepresentation is  
5 not a misrepresentation at all; it is a non-actionable opinion statement.

6  
7 1. Plaintiff cannot convert its contract claims into tort claims.

8  
9 The essence of Plaintiff’s pleading is that Oversee failed to fulfill certain  
10 contractual promises (Claims 1 through 3). To the extent there is any truth to this  
11 allegation (and there is not), the contracts set forth the contractual remedies available to  
12 Plaintiff. This is a contract case pure and simple.

13 As a general rule, California does not authorize tort recovery for breach of  
14 contract claims. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4<sup>th</sup> 503,  
15 514-15 (1994) (recognizing fundamental differences between contract and tort cases);  
16 *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980) (state substantive law applies  
17 in diversity actions). In contract actions, “[t]he measure of damages is limited to those  
18 losses which might be reasonably foreseen by the parties.” *Ehrlich v. Menezes*, 21 Cal.  
19 4<sup>th</sup> 543, 553 (1990). “Conduct amounting to a breach of contract becomes tortious only  
20 when it also violates a duty independent of the contract arising from principles of tort  
21 law. An omission to perform a contractual obligation is never a tort, unless that  
22 omission is also an omission of a legal duty.” *Id.* at 551 (citations omitted). “The  
23 California Supreme Court has repeatedly held that ‘[c]onduct amounting to a breach of  
24 contract becomes tortious only when it also violates an independent duty arising from  
25 principles of tort law.’” *McGehee v. Coe Newnes/McGehee UCL*, 2004 WL 2452855  
26 at \*2 (N.D. Cal. 2004) (citing *Applied Equipment*, 7 Cal. 4<sup>th</sup> at 515). Here, Plaintiff has  
27 not alleged any “independent duty” because none exists.

1           *Cusano v. Klein*, 280 F. Supp. 2d 1035 (C.D. Cal. 2003), is instructive. There,  
2 the court dismissed the plaintiff’s fraud claims because the fraud claims did no more  
3 than allege breaches of contractual duties. The plaintiff and defendants in *Cusano*  
4 entered into a written contract whereby defendants were obligated to render quarterly  
5 accounting statements to plaintiff for plaintiff’s share of profits derived from  
6 worldwide exploitation of plaintiff’s songs. *Id.* at 1037-38. The plaintiff alleged  
7 breach of contract and fraud based on defendants’ alleged improper accounting for  
8 royalties due to plaintiff, contrary to defendants’ representations that they would  
9 faithfully administer the royalty account. *Id.* at 1039. The Court stated that “a fraud  
10 claim fails when it merely states an alleged breach of contractual duties and does not  
11 concern representations that are collateral or extraneous to the parties’ contract.”<sup>3</sup> *Id.*  
12 at 1042. The Court held that the plaintiff could not “maintain his claims for fraud and  
13 negligent misrepresentation against [the defendant] because they merely state a breach  
14 of contractual duties... The claims against [defendants] do not involve representations  
15 collateral or extraneous to the employment contract.” *Id.*

16           Here, as in *Cusano*, Plaintiff’s fraud claims do not involve duties, actions or  
17 representations collateral or extraneous to the agreements at issue. Indeed, the only  
18 fraud asserted against Oversee is an alleged false promise to perform the contractual  
19 duties at issue. *See, e.g.*, Complaint, ¶¶ 64 (Defendants “formed the intent to withhold  
20 compensation to Cahn under the MIP”), 66 (“Cahn never received any payment from  
21 Oversee under the MIP”), 75 (same). That is precisely the type of “tortifying” of a  
22 contract which California law prohibits. Indeed, every portion of Plaintiff’s Fraud  
23 Claims relates directly to the allegedly contractual promises. Plaintiff’s Fraud Claims  
24 are, therefore, precluded as a matter of law.

25  
26  
27  
28 <sup>3</sup> The Court applied New York law, which is identical in all pertinent respects to  
California law on this issue.

1                   2. Plaintiff's fraud claims are not pled with the requisite specificity.

2  
3                   In addition to the substantive defect identified above, the Fraud Claims must be  
4 dismissed because they have not been pled in accordance with the heightened pleading  
5 requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *Glen Holly Entm't,*  
6 *Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999). To properly plead  
7 a fraud claim, the complaint must adequately specify the statements that are allegedly  
8 false or misleading, give particulars as to the respect in which plaintiff contends the  
9 statements were fraudulent, state when and where the statements were made, and  
10 identify those responsible for the statements. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d  
11 1541, 1548 (9<sup>th</sup> Cir. 1994); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9<sup>th</sup>  
12 Cir. 2003) (“averments of fraud must be accompanied by the who, what, where, when,  
13 and how of the misconduct charged” (citations omitted)). In addition, “[t]he plaintiff  
14 must set forth what is false or misleading about a statement, and *why* it is false.” *Glen*  
15 *Holly Entm't, Inc.*, 100 F.2d at 1095 (emphasis added); see *Blake v. Dierdorff*, 856  
16 F.2d 1365, 1369 (9<sup>th</sup> Cir. 1988) (holding that Rule 9(b) requires specific descriptions of  
17 the representation made and the reasons for their falsity). Averments that fail to meet  
18 these exacting standards must be dismissed. *Neubronner v. Milken*, 6 F.3d 666, 671  
19 (9<sup>th</sup> Cir. 1993).

20                   There is only one purported misrepresentation alleged by Plaintiff in the  
21 Complaint: “Kupietzky and Ng were primarily responsible for the negotiations on  
22 behalf of Overseer and in making the false representations and assurances to Cahn that  
23 he would be able to earn up to \$13,000,000 in bonuses.” Complaint, ¶ 12, 63, 71.<sup>4</sup>  
24 Setting aside whether this actually constitutes an actionable misrepresentation  
25 (discussed *infra*), this conclusory and general allegation is insufficient to satisfy the

26  
27  
28  
<sup>4</sup> In his negligent misrepresentation claim, Plaintiff generally refers to paragraphs 12-14, 17, 18, 20-21 for the alleged misrepresentations on which his claim is based. Complaint, ¶ 72. But, only paragraph 12 alleges a misrepresentation, as set forth above.

1 heightened pleading standard required for fraud claims. Plaintiff does not specify  
2 where, when, to whom, and by what means *each* of the Defendants made the alleged  
3 representation.

4 Moreover, Plaintiff does not allege *why* the misrepresentation was false. To the  
5 contrary, the allegations make clear that, pursuant to the MIP, Plaintiff did, in fact,  
6 have the ability to earn up to \$13 million in bonuses. Complaint, ¶ 12. The Complaint  
7 explains that Plaintiff's ability to earn such bonuses was conditioned on the attainment  
8 of certain performance goals in four different segments of Oversee's business.  
9 Complaint, ¶ 13. So, since Plaintiff admits that he could earn up to \$13 million  
10 pursuant to the MIP, Kupietzky's and Ng's representation to that same effect (i.e., that  
11 Plaintiff could earn up to \$13 million under the MIP) could not have possibly been  
12 fraudulent.

13  
14 3. The alleged misrepresentations are non-actionable opinions.

15  
16 To be actionable, a misrepresentation "must ordinarily be as to past or existing  
17 material facts. Predictions as to future events, or statements as to future action by some  
18 third party, are deemed opinions, and not actionable fraud." *Tarmann v. State Farm*  
19 *Mut. Auto Ins. Co.*, 2 Cal. App. 4<sup>th</sup> 153, 158 (1991) (internal quotations and citations  
20 omitted) (demurrer properly sustained where the alleged misrepresentation involved  
21 promises of future conduct and not past or existing material fact); *Glen Holly Entm't*,  
22 100 F. Supp. 2d at 1093. Indeed, it is hornbook law that statements regarding future  
23 events are merely deemed opinion. *Neu-Visions Sports, Inc. v.*  
24 *Soren/McAddam/Bartells*, 86 Cal. App. 4<sup>th</sup> 303, 309-10 (2000). Accordingly,  
25 California courts have held that predictions about future sales, profits or value are non-  
26 actionable expressions of opinion. *See, id.* (holding that statement that property was  
27 worth \$5 million was non-actionable opinion, because it essentially was a prediction  
28 that an appraiser would value the property at \$5 million); *Foreman & Clark Corp. v.*

1 *Fallon*, 3 Cal.3d 875, 882 (1971) (affirming trial court’s finding that statements  
2 regarding lessors’ future sales were mere expressions of opinion); *Pacesetter Homes,*  
3 *Inc. v. Brodtkin*, 5 Cal. App. 3d 206, 210 (1970) (affirming trial court’s finding that  
4 statements regarding the future rental income that might be generated after the  
5 completion of unfinished duplex units were non-actionable statements of opinion).

6 As discussed, *supra*, the only misrepresentation alleged is that Plaintiff “would  
7 be able to earn up to \$13,000,000 in bonuses.” Complaint, ¶ 12. But, projections  
8 about future performance are, by definition, not statements about a past or existing  
9 material fact. Indeed, the above-mentioned authorities explicitly hold that such  
10 predictions about Plaintiff’s ability to earn bonuses are non-actionable expressions of  
11 opinion. Therefore, this statement, even if assumed to have been stated, cannot form  
12 the basis of a fraud claim as a matter of law. For that reason, Plaintiff’s fraud claim  
13 fails.

14  
15 D. Plaintiff’s Ninth Claim for Conversion Should Be Dismissed.

16  
17 1. A conversion claim cannot be premised on a contractual right of  
18 payment.

19  
20 Plaintiff’s claim for conversion asserts that by failing to pay the commissions  
21 and cash awards allegedly due under the MIP and the Commission Plan, Defendants  
22 have committed the tort of conversion. Complaint, ¶¶ 79-86. If this was the law, then  
23 every failure to pay monies owed under a contract would be actionable not only as a  
24 breach of contract but also as a tort. Unsurprisingly, that is *not* the law.

25 A mere “contractual right of payment, without more, is not enough to sustain a  
26 conversion claim.” *Ortega v. Toyota Motor Sales, USA, Inc.*, 572 F. Supp. 2d 1218,  
27 1220 (S.D. Cal. 2008); *Plummer v. Day/Eisenberg, LLP*, 184 Cal. App. 4<sup>th</sup> 38, 45  
28 (2010); *Farmers Ins. Exchange v. Zerlin*, 53 Cal. App. 4<sup>th</sup> 445, 452 (1997). Indeed, as

1 discussed above, California law is clear that “[c]onduct amounting to breach of  
2 contract becomes tortious only when it also violates an independent duty arising from  
3 principles of tort law.” *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4<sup>th</sup>  
4 503, 515 (1994). The Northern District of California explained:

5           Such independent duty is required for a tort action because  
6           contract and tort actions are distinct: while a contract action  
7           aims to protect the interest in having private promises between  
8           parties performed, the goal of tort action is to ‘protect some  
9           general public policy interest not directly tied to the contract’s  
10          purposes.’ Therefore, to allow conduct amounting only to  
11          breach of contract to give rise to tort damages would be to  
12          obliterate the vital and established distinctions between contract  
13          and tort theories of liability.

14 *McGehee v. Coe Newnes/McGehee*, 2004 WL 2452855 at \*2 (N.D.Cal. 2004) (citation  
15 omitted). The *McGehee* court thus rejected the plaintiff’s attempt to plead a  
16 conversion claim based on the defendant’s alleged failure to comply with a contractual  
17 requirement that it assign a patent to the plaintiff. *Id.* at \*2-3. Likewise, here, the  
18 proper claim is one for breach of contract and Plaintiff’s conversion claim should,  
19 therefore, be dismissed.

20  
21           2.       Plaintiff failed to properly allege his conversion claim.

22  
23           Plaintiff’s conversion claim fails for the additional reason that generalized  
24 claims for money are not actionable as a claim for conversion, and money can only be  
25 the subject of an action for conversion if a specific sum capable of identification is  
26 involved. *Ortega*, 572 F. Supp. 2d at 1220; *Haigler v. Donnelly*, 18 Cal. 2d 674, 681  
27 (money cannot be the subject of an action for conversion unless a specific sum capable  
28 of identification is involved); *Michelson v. Hamada*, 29 Cal. App. 4<sup>th</sup> 1566, 1589

1 (1994) (refusing to review trial court’s order denying submission of conversion claim  
2 to jury where plaintiff claiming breach of contract because plaintiff did not allege a  
3 “specific, definite sum capable of identification to be recovered”); *Shahood v. Cavin*,  
4 154 Cal. App. 2d 745, 747 (1957) (a claim for conversion lies “only for specific  
5 chattels wrongfully converted, and not for money had and received for payment of  
6 debts, money being the subject of conversion only when it can be described or  
7 identified as a specific chattel”). When money is the subject of a claim for  
8 conversion, a plaintiff must plead facts sufficiently describing and identifying the  
9 property. *Vu v. Cal. Commerce Club, Inc.*, 58 Cal. App. 4<sup>th</sup> 229, 235 (1997). Here,  
10 Plaintiff seeks to recover commissions and cash awards allegedly due to him. Yet,  
11 Plaintiff fails to plead any facts demonstrating that a specific, identifiable sum is  
12 involved. Plaintiff cannot plead a viable conversion claim, and his claim should  
13 therefore be dismissed without leave to amend.

14  
15 E. The Tenth Claim Under Business & Professions Code Section 17200  
16 Fails to State a Claim Upon Which Relief May be Granted.

17  
18 1. The UCL claim is not alleged with particularity.

19  
20 Plaintiff’s Tenth Claim for Relief purports to allege violations of California  
21 Business and Professions Code Section 17200 (“UCL”). The UCL “establishes three  
22 varieties of unfair competition – acts or practices which are unlawful, unfair, or  
23 fraudulent.” *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4<sup>th</sup> 632, 647 (1996). To  
24 state a claim for violation of the UCL, a plaintiff must sufficiently allege the defendant  
25 engaged in an unlawful, unfair or fraudulent business practice. *See Cruz v. Pacific*  
26 *Health Systems, Inc.*, 30 Cal. 4<sup>th</sup> 303, 315 (2003). Moreover, the complaint “must state  
27 with reasonable particularity the facts supporting the statutory elements of the  
28 violation.” *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1316

1 (N.D.Cal. 1997) (citing *Khoury v. Maly's of California*, 14 Cal. App .4<sup>th</sup> 612, 619  
2 (1993)).

3 Plaintiff's claim fails to identify with any specificity whatsoever which of the  
4 three prongs (*i.e.*, unfair, unlawful or fraudulent) his claim is based upon and fails  
5 entirely to allege that Oversee engaged in an unfair, unlawful, or fraudulent business  
6 practice. Rather, the tenth claim merely recycles the allegations made by Plaintiff in  
7 his Fraud Claims.

8 To the extent Plaintiff is basing his Section 17200 claim on the "fraudulent"  
9 prong, he cannot do so. A claim under the "fraudulent" prong is not available where  
10 the alleged fraud is directed at a single victim. *See, e.g., Aquino v. Credit Control*  
11 *Servs.*, 4 F. Supp. 2d 927, 930 (N.D. Cal. 1998) (dismissing plaintiff's UCL claim  
12 because plaintiff only alleged facts regarding her particularized problems with  
13 defendant's service, and failed to allege that defendant's actions harmed or misled the  
14 public). Indeed, the "fraudulent" prong requires a plaintiff to show deception to some  
15 members of the public, or harm to the public interest, or to allege that members of the  
16 public are likely to be deceived. *Saldate v. Wilshire Credit Corp.*, 268 F.R.D. 87, 103  
17 (E.D. Cal. 2010). The Complaint contains no such allegations.

18 The remaining two prongs under the UCL are equally unavailable. To proceed  
19 under the "unlawful" prong, there must be a predicate violation of the law. *Lazar v.*  
20 *Hertz Corp.*, 69 Cal. App. 4<sup>th</sup> 1494, 1505 (1999). Here, however, the Complaint  
21 alleges no such predicate violate. Lastly, the Complaint lacks allegations of ongoing  
22 wrongful business conduct or a pattern of such conduct to justify a claim under the  
23 "unfair" prong. *Id.* Thus, Plaintiff's tenth claim should be dismissed.

24  
25 2. Plaintiff Seeks Remedies That Are Unavailable To Him Under  
26 the UCL.  
27  
28



1           The UCL claim must also be dismissed for the independent reason that it seeks  
2 remedies that are not available to Plaintiff. Here, Plaintiff plainly seeks general  
3 damages and punitive damages under its UCL claim. Complaint, ¶ 92 (“[Oversee’s]  
4 conduct was oppressive, fraudulent, and malicious...warranting exemplary and  
5 punitive damages in accordance with *California Civil Code* section 3294.”), 93 (“As a  
6 direct, actual and proximate consequent and result of the conduct alleged herein, Cahn  
7 has suffered and continues to suffer, significant damages in an amount to be proven at  
8 trial, but that exceeds \$75,000, together with interest thereon at a legal rate.”). A  
9 plaintiff’s remedies under the UCL, however, are limited to injunctive relief and  
10 restitution only.<sup>5</sup> Cal. Bus. & Prof. Code §17203; *Korea Supply Co. v. Lockheed*  
11 *Martin Corp.*, 29 Cal. 4<sup>th</sup> 1134, 1150 (2003). General damages, including punitive  
12 damages, are not allowed. *Id.* at 1148 (“[A]ttorney’s fees and damages, including  
13 punitive damages, are not available under the UCL.”); *Cel-Tech Communications v.*  
14 *L.A. Cellular Tel. Co.*, 20 Cal. 4<sup>th</sup> 163, 179 (1999) (plaintiffs suing for unfair  
15 competition may not receive damages, much less treble damages, or attorney’s fees);  
16 *Bank of the West v. Superior Court*, 2 Cal. 4<sup>th</sup> 1254, 1266 (1992) (“the Unfair Business  
17 Practices Act does not authorize an award of damages”).

18           Though not specifically tethered to the UCL claim, the Prayer for Relief also  
19 requests “restitution of all wrongfully withheld amounts and disgorgement of ill-gotten  
20 profits, in an amount according to proof.” Prayer for Relief, ¶ 4. The California  
21 Supreme Court in *Korea Supply* made clear that the concept of restitution applies only  
22 to restore money to plaintiff that the plaintiff provided to the defendant as a result of  
23 the unlawful conduct. Restitution does not include any measure of damages nor does it  
24 include disgorgement of profits obtained by defendant (but not from plaintiff). *Korea*  
25

---

26  
27 <sup>5</sup> Plaintiff does not seek injunctive relief herein. See Prayer for Relief.  
28

1 *Supply*, 29 Cal. 4<sup>th</sup> at 1134.<sup>6</sup> Here, Plaintiff does not seek the return of money he paid  
 2 to Oversee. Indeed, Plaintiff does not allege that he paid money to Oversee at any  
 3 time. Rather, his requested relief is nothing more than a request for non-restitutionary  
 4 disgorgement of profits, which is prohibited under the UCL. Because Plaintiff cannot  
 5 allege facts to support a claim for restitutionary relief – the only relief available to him  
 6 in this case under the UCL – the Tenth Claim should be dismissed without leave to  
 7 amend.

8  
 9 **V. PLAINTIFF’S PRAYER FOR PUNITIVE DAMAGES SHOULD BE**  
 10 **STRICKEN BECAUSE PUNITIVE DAMAGES ARE NOT AVAILABLE**  
 11 **REMEDIES UNDER PLAINTIFF’S ASSERTED THEORIES.**

12  
 13 Plaintiff seeks punitive damages for his Seventh and Eighth Claims for  
 14 Intentional and Negligent Misrepresentation, Ninth Claim for Conversion, and Tenth  
 15 Claim for violations of the UCL. Because neither of these claims has merit, as  
 16 described in more detail, *supra*, punitive damages are not recoverable and should be  
 17 stricken. Fed. R. Civ. P. 12(f); *Wilkerson v. Butler*, 229 F.R.D. 166, 172 (E.D. Cal.  
 18 2005) (“A motion to strike is appropriate to address requested relief, such as punitive  
 19 damages, which is not recoverable as a matter of law”).

20  
 21  
 22 <sup>6</sup> In *Korea Supply*, the plaintiff sought the disgorgement of profits acquired by the  
 23 defendant through its allegedly unfair business practices. *Korea Supply*, 29 Cal.  
 24 4<sup>th</sup> at 1142. The California Supreme Court reaffirmed the distinction it had  
 25 previously made between disgorgement and restitution, in that disgorgement is a  
 26 broader remedy than restitution. *Id.* at 1144-45. The Supreme Court held that,  
 27 while restitution was an available remedy under the UCL, disgorgement of money  
 28 obtained through an unfair business practice is an available remedy in a  
 representative and an individual UCL action only to the extent that it constitutes  
 restitution. *Id.* at 1145. Thus, the Supreme Court confirmed what is clear on the  
 face of the statute: “Restitution is the only monetary remedy expressly authorized  
 by Section 17203.” *Id.* at 1146.

1 **VI. CONCLUSION**

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Plaintiff's attempts to convert a contract action into a tort action. Time and again, California courts have rejected that approach. This court should do the same. For all the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's claims.

Dated: June 1, 2011

WILLENKEN WILSON LOH & LIEB LLP

By: /s/ William A. Delgado  
William A. Delgado  
Attorneys for Defendants OVERSEE.NET,  
JEFF KUPIETZKY, and LAWRENCE NG

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the Electronic Service List for this Case.

Dated: June 1, 2011

WILLENKEN WILSON LOH & LIEB LLP

By: /s/ William A. Delgado  
William A. Delgado  
Attorneys for Defendants OVERSEE.NET,  
JEFF KUPIETZKY, and LAWRENCE NG