

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN		
BARGER-GREAT SOUTH VENTURES, LLC.	DATE FILED:	9/8/2004
PLAINTIFF(s)	CASE TYPE:	COMPLAINT
VS.	CASE SUBTYPE:	FRAUD
EQUILIBRIUM TECHNOLOGIES, INC., ET AL.	DATE OF LAST ACTIVITY:	5/7/2007
DEFENDANT(s)	DATE/TIME RUN:	06/07/2022 04:02 PM
REGISTER OF ACTIONS	CASE NUMBER:	CIV 043997

INVOLVED PERSON/PARTY AND ATTORNEY SUMMARY:

AUTOMATED MEDIA PROCESSING SOLUTIONS, INC. is the PLAINTIFF and is represented by: THOMPSON, RODERICK M.

SCENE7 INC., A CALIFORINA CORPORATION is the DEFENDANT and is represented by: BURTT, DAVID R.

MACK, DOUGLAS is the DEFENDANT and is represented by: BURTT, DAVID R.

SAMANIEGO, CHRIS is the DEFENDANT and is represented by: BURTT, DAVID R.

BIGONESS, TIM is the DEFENDANT and is represented by: BURTT, DAVID R.; KOO, JONMI N.

ROULSTEN, KIRK is the DEFENDANT and is represented by: BURTT, DAVID R.

NOEL, PETER is the DEFENDANT and is represented by: BURTT, DAVID R.

REGISTER OF ACTIONS:

09/08/2004 CASE OPEN / ACTIVE STATUS HON. LYNN O'MALLEY TAYLOR

09/08/2004 FILING FEE PROCESSED: PLTF, BARGER-GREAT SOUTH VENTURES, LLC. - 293.00

09/08/2004 COMPLAINT/FIRST PAPER COMPLAINT FOR FRAUD, DECEIT, FRAUDULENT TRANSFER, FORECLOSURE ON SECURITY, CONSTRUCTIVE TRUST, BREACH OF FIDUCIARY DUTY, AND CIVIL CONSPIRACY

09/08/2004 SUMMONS ISSUED

09/08/2004 HEARING CONFIRMED FOR: 11/17/2004 AT: 09:00 AM FOR APPEARANCE TYPE: OSCH IN DEPARTMENT: 03

09/08/2004 HEARING CONFIRMED FOR: 12/17/2004 AT: 09:00 AM FOR APPEARANCE TYPE: OSCH IN DEPARTMENT: 03

09/08/2004 HEARING CONFIRMED FOR: 01/26/2005 AT: 09:00 AM FOR APPEARANCE TYPE: CMGT IN DEPARTMENT: 03

11/17/2004 HEARING CONTINUED TO: 01/26/2005 AT: 09:00 AM FOR APPEARANCE TYPE: OSCH IN DEPARTMENT: 03 FROM DATE: 11/17/2004 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: OSCH FROM DEPARTMENT: 03

11/17/2004 APPEARANCE DROPPED FOR 12/17/2004 AT: 09:00 AM FOR APPEARANCE TYPE: OSCH IN DEPARTMENT: 03 DROP REASON: AT THE REQUEST OF J. ERLICH 11-16-04. CASE MAY SETTLE

12/28/2004 CASE REASSIGNED TO JUDGE HON. VERNON F. SMITH

12/28/2004 APPEARANCE MOVED TO: 01/26/2005 AT: 09:00 AM FOR APPEARANCE TYPE: OSCH IN DEPARTMENT: 06 MOVE REASON: JUDICIAL REASSIGNMENT FROM DATE: 01/26/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: OSCH FROM DEPARTMENT: 03

12/28/2004 APPEARANCE MOVED TO: 01/26/2005 AT: 09:00 AM FOR APPEARANCE TYPE: CMGT IN DEPARTMENT: 06 MOVE REASON: JUDICIAL REASSIGNMENT FROM DATE: 01/26/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: CMGT FROM DEPARTMENT: 03

12/29/2004 NOTICE OF CASE REASSIGNMENT AND NOTICE OF HEARING MAILED TO THE PARTIES

01/20/2005 APPEARANCE MOVED TO: 04/21/2005 AT: 09:00 AM FOR APPEARANCE TYPE: OSCH IN DEPARTMENT: 06 MOVE REASON: PER EHRlich'S LETTER OF 1/10/05 FROM DATE: 01/26/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: OSCH FROM DEPARTMENT: 06

01/20/2005 APPEARANCE MOVED TO: 04/21/2005 AT: 09:00 AM FOR APPEARANCE TYPE: CMGT IN DEPARTMENT: 06 MOVE REASON: PER EHRlich'S LETTER OF 1/10/05 FROM DATE: 01/26/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: CMGT FROM DEPARTMENT: 06

02/07/2005 AMENDED COMPLAINT FILED (1ST) BY ATTY. EHRlich FOR PLTF.; ADDING DEFENDANTS: CHRIS SAMANIEGO; TIM BIGONESS; NIGEL WARREN; KIRK ROULSTEN; PETER NOEL AND DOES

02/22/2005 SUMMONS ISSUED 1ST AMENDED COMPLAINT

04/15/2005 PROOF OF SERVICE FILED, AS TO: DEFT, SCENE7 INC., A CALIFORINA CORPORATION NOTICE AND ACKNOWLEDGMENT OF RECEIPT 03/31/05

04/15/2005 PROOF OF SERVICE FILED, AS TO: DEFT, KIRK ROULSTEN NOTICE AND ACKNOWLEDGMENT 03/31/05

04/15/2005 PROOF OF SERVICE FILED, AS TO: DEFT, TIM BIGONESS NOTICE AND ACKNOWLEDGMENT 03/31/05

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN

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04/15/2005 PROOF OF SERVICE FILED, AS TO: DEFT, CHRIS SAMANIEGO NOTICE AND ACKNOWLEDGMENT OF RECEIPT 03/31/05

04/15/2005 PROOF OF SERVICE FILED, AS TO: DEFT, DOUGLAS MACK NOTICE AND ACKNOWLEDGMENT OF RECEIPT 03/31/05

04/21/2005 MINUTE ORDER POSTED

JUDGE/PROTEM/REFEREE VERNON SMITH , REPORTER TERESA THOMAS , DEP CLK LOUISE MORRIS

ATTORNEY JOSEPH EHRLICH APPEARED FOR PLAINTIFF

NO APPEARANCE BY OR FOR THE DEFENDANTS

COUNSEL REPORTS THAT ALL DEFENDANTS HAVE BEEN SERVED EXCEPT NIGEL WARREN. MEDIATION IS UNDERWAY. THE COURT CONTINUES THIS HEARING FOR FILING OF ALL PROOFS OF SERVICE, ANSWERS OR DISMISSALS TO 7/20/05 AT 9AM IN DEPT. F.

PLAINTIFF MUST PROVIDE NOTICE OF THIS ORDER TO DEFENDANTS

HEARING CONTINUED TO: 07/20/2005 AT: 09:00 AM FOR APPEARANCE TYPE: OSCH IN DEPARTMENT: 06 FROM DATE: 04/21/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: OSCH FROM DEPARTMENT: 06

HEARING CONTINUED TO: 07/20/2005 AT: 09:00 AM FOR APPEARANCE TYPE: CMGT IN DEPARTMENT: 06 FROM DATE: 04/21/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: CMGT FROM DEPARTMENT: 06

ENTERED BY: LMM

05/04/2005 PROOF OF SERVICE FILED, AS TO: DEFT, PETER NOEL; BY NOTICE AND ACKNOWLEDGMENT OF RECEIPT SIGNED ON 3-31-05

05/13/2005 FILING FEE PROCESSED: DEFT, SCENE7 INC., A CALIFORINA CORPORATION - 293.00 (1ST APPEARANCE)

05/13/2005 FILING FEE PROCESSED: DEFT, DOUGLAS MACK - 293.00 (1ST APPEARANCE)

05/13/2005 FILING FEE PROCESSED: DEFT, CHRIS SAMANIEGO - 293.00 (1ST APPEARANCE)

05/13/2005 FILING FEE PROCESSED: DEFT, TIM BIGONESS - 293.00 (1ST APPEARANCE)

05/13/2005 FILING FEE PROCESSED: DEFT, KIRK ROULSTEN - 293.00 (1ST APPEARANCE)

05/13/2005 FILING FEE PROCESSED: DEFT, PETER NOEL - 293.00 (1ST APPEARANCE)

06/15/2005 AMENDED COMPLAINT FILED (2ND) AMENDED COMPLAINT AGAINST SCENE7, DOUGLAS MACK, CHRIS SAMANIEGO, TIM BIGONESS, NIGEL WARREN, KIRK ROULSTEN, PETER NOEL FILED BY EHRLICH FOR PLTF.

07/18/2005 HEARING CONFIRMED FOR: 09/07/2005 AT: 09:00 AM FOR APPEARANCE TYPE: LMCV IN DEPARTMENT: 06

07/20/2005 MINUTE ORDER POSTED

JUDGE/PROTEM/REFEREE VERNON SMITH , REPORTER ELAINE NINKOVICH , DEP CLK LOUISE MORRIS

COURT CALL APPEARANCE BY JOSEPH EHRLICH FOR PLAINTIFF

COURT CALL APPEARANCE BY DAVID BURTT FOR ALL DEFENDANTS EXCEPT EQUILBRIUM TECHNOLOGIES

COUNSEL'S REQUEST TO REQUEST A 90 DAY CONTINUANCE IS DENIED. COUNSEL EHRLICH INDICATES THAT DEFENDANT NIGEL WARREN WILL BE DISMISSED. PER COUNSEL BURTT INDICATES THAT EQUILIBRIUM TECHNOLOGIES WILL BE DISMISSED. THE COURT CONTINUES OSC RE: PROOF OF SERVICE TO 9/7/05. THE OSC RE; ANSWER TRAILS THE DEMURRER HEARING SET ON 9/7/05 THIS HEARING IS CONTINUED TO 9/7/05 AT 9AM IN DEPT.F

HEARING CONTINUED TO: 09/07/2005 AT: 09:00 AM FOR APPEARANCE TYPE: CMGT IN DEPARTMENT: 06 FROM DATE: 07/20/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: CMGT FROM DEPARTMENT: 06

HEARING CONTINUED TO: 09/07/2005 AT: 09:00 AM FOR APPEARANCE TYPE: OSCH IN DEPARTMENT: 06 FROM DATE: 07/20/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: OSCH FROM DEPARTMENT: 06

ENTERED BY: LMM

08/26/2005 APPEARANCE MOVED TO: 10/12/2005 AT: 09:00 AM FOR APPEARANCE TYPE: LMCV IN DEPARTMENT: 06 MOVE REASON: STIPULATION SIGNED 8/26/05 FROM DATE: 09/07/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: LMCV FROM DEPARTMENT: 06

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN

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DEFENDANT(s)	DATE/TIME RUN:	06/07/2022 04:02 PM
REGISTER OF ACTIONS	CASE NUMBER:	CIV 043997

09/07/2005 PARTIAL DISMISSAL AS TO: DEFT, NIGEL WARREN WITH PREJUDICE

09/07/2005 MINUTE ORDER POSTED
 JUDGE/PROTEM/REFEREE VERNON F. SMITH , REPORTER ELAINE NINKOVICH , DEP CLK TERESA RAMIREZ
 ATTORNEY JOSEPH EHRlich APPEARED FOR PLAINTIFF
 ATTORNEY DAVID ONGARO APPEARED FOR DEFENDANT'S
 COUNSEL STATES DEFENDANT WARREN IS DISMISSED.
 THE LAW AND MOTION MATTER IS SET FOR 10/12/05.
 CASE MANAGEMENT CONT. TO 10/12/05 @ 9:00AM.
 HEARING CONTINUED TO: 10/12/2005 AT: 09:00 AM FOR APPEARANCE TYPE: CMGT IN DEPARTMENT: 06 FROM
 DATE: 09/07/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: CMGT FROM DEPARTMENT: 06
 HEARING CONTINUED TO: 10/12/2005 AT: 09:00 AM FOR APPEARANCE TYPE: OSCH IN DEPARTMENT: 06 FROM
 DATE: 09/07/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: OSCH FROM DEPARTMENT: 06
 NO ADDITIONAL STATEMENTS ARE NEEDED.
 ENTERED BY: T. RAMIREZ

10/12/2005 MINUTE ORDER POSTED
 JUDGE/PROTEM/REFEREE VERNON F. SMITH , REPORTER ELAINE NINKOVICH , DEP CLK TERESA RAMIREZ
 ATTORNEY DAVID ONGRO APPEARED FOR DEFENDANTS
 ATTORNEY JOSEPH BRUBAKER-APPEARED LATE APPEARED FOR PLAINTIFF
 PLAINTIFF'S COUNSEL CAME LATE- MATTER REHEARD.
 SANCTIONS PREVIOUSLEY ORDERED TODAY IS STRICKEN.
 CASE MANAGEMENT CONT. TO 12/01/05 @ 9:00AM.
 MR. ONGRO MUST PROVIDE NOTICE OF THIS ORDER TO ALL PARTIES
 HEARING CONTINUED TO: 12/01/2005 AT: 09:00 AM FOR APPEARANCE TYPE: CMGT IN DEPARTMENT: 06 FROM
 DATE: 10/12/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: CMGT FROM DEPARTMENT: 06
 ENTERED BY: T. RAMIREZ

10/12/2005 MINUTE ORDER POSTED
 JUDGE/PROTEM/REFEREE VERNON F. SMITH , REPORTER ELAINE NINKOVICH (NOT REPORTED) , DEP CLK
 TERESA RAMIREZ
 NO APPEARANCE BY OR FOR THE PARTIES
 THE COURT MAKES THE FOLLOWING TENTATIVE RULING AS FOLLOWS:
 DEFENDANTS' DEMURRER TO THE SECOND AMENDED COMPLAINT IS SUSTAINED IN PART AND OVERRULED IN
 PART. INITIALLY, THE COURT FINDS THAT PLAINTIFF'S ALTER EGO ALLEGATIONS ARE DEFICIENT. AS TO THE
 EQUILIBRIUM INDIVIDUALS, PLAINTIFF ALLEGES IN CONCLUSORY FASHION THAT THEY "TREATED EQUILIBRIUM
 AS THEIR ALTER EGO" AND "IGNORED THE CORPORATE FORM OF EQUILIBRIUM." THESE ARE CONCLUSIONS,
 NOT FACTS. THE ONLY FACTUAL ALLEGATION IS THAT "THEIR ACTIONS RESULTED IN AN
 UNDERCAPITALIZATION OF EQUILIBRIUM, AND THE DIVERSION OF EQUILIBRIUM TANGIBLE AND INTANGIBLE
 ASSETS OF EQUILIBRIUM TO THEIR OWN USES." HOWEVER, PLAINTIFF'S ALLEGATIONS SHOW THAT
 EQUILIBRIUM BECAME UNDERCAPITALIZED AND LOST ASSETS AS A RESULT OF THE TRANSFER OF ASSETS TO
 SCENE7. THIS IS NOT A SITUATION WHERE THE INDIVIDUALS TREATED THE ASSETS OF EQUILIBRIUM AS THEIR
 OWN. EVEN IF IT WERE, SEVERAL FACTORS MUST BE PRESENT IN ORDER TO FIND THAT THE CORPORATION IS
 AN ALTER EGO OF THE INDIVIDUALS. (SEE UNITED COMMUNITY CHURCH V. GARCIN (1991) 231 CAL. APP.3 D 327,
 342-343, CONCURRING OPINION.)

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PLAINTIFF'S ALLEGATIONS ARE SIMILARLY DEFICIENT AS TO SCENE7 AND THE INDIVIDUALS ASSOCIATED WITH IT. PLAINTIFF'S ALLEGATIONS THAT THEY "TREATED EQUILIBRIUM AS SCENE7'S ALTER EGO" AND "IGNORED THE CORPORATION FORM OF EQUILIBRIUM" ARE CONCLUSIONS. FURTHER THE FACT THAT EQUILIBRIUM'S ASSETS WERE TRANSFERRED TO SCENE7 DOES NOT SHOW THAT THERE WAS "SUCH UNITY OF INTEREST AND OWNERSHIP THAT THE SEPARATE PERSONALITIES OF THE CORPORATION(S) NO LONGER EXIST(ED)." (IBID.) DEFENDANTS' DEMURRER TO THE SECOND CAUSE OF ACTION FOR CONSPIRACY TO DEFRAUD IS SUSTAINED. PLAINTIFF FAILS TO ALLEGE THAT DEFENDANTS CONSPIRED WITH CMGI OR EQUILIBRIUM, THE PARTIES WHO ALLEGEDLY MADE THE REPRESENTATIONS, TO DEFRAUD PLAINTIFF. INSTEAD, PLAINTIFF ALLEGES THAT DEFENDANTS "CONSPIRED AND AGREED WITH MONKS AND OTHERS AT EQUILIBRIUM TO EFFECTIVELY TRANSFER ALL OF EQUILIBRIUM'S ASSETS TO SCENE 7..." ALTHOUGH PLAINTIFF ALLEGES THAT THE REPRESENTATIONS WERE MADE IN ORDER TO PRODUCE THE DISMISSAL OF PLAINTIFF'S LAWSUIT AGAINST CMGI, THE EARLIER ALLEGATIONS SHOW THAT IT WAS BARGER WHO DISMISSED HIS LAWSUIT (E.G., RELIED). BARGER IS NOT THE PLAINTIFF.

PLAINTIFF MUST SHOW THAT CMGI AND EQUILIBRIUM INTENDED TO DECEIVE PLAINTIFF AND THAT PLAINTIFF RELIED UPON THE REPRESENTATIONS. FINALLY, PLAINTIFF FAILS TO ALLEGE WHO MADE THE REPRESENTATIONS. (SEE TARMANN V. STATE FARM MUT. AUTO. INS. CO. (1991) 2 CAL. APP.4TH 153, 157.)

DEFENDANTS' DEMURRER TO THE FOURTH CAUSE OF ACTION FOR INTERFERENCE WITH CONTRACT IS SUSTAINED AS FOLLOWS: A) PROMISSORY NOTE AND NON-DILUTABLE STOCK WARRANTS (56): EVEN IF THE COURT ASSUMES THAT THE EQUILIBRIUM INDIVIDUALS KNEW OF THESE AGREEMENTS BY VIRTUE OF THEIR STATUS AS OFFICERS AND MEMBERS OF THE BOARD OF DIRECTORS, PLAINTIFF ALLEGES NO FACTS SHOWING THAT SCENE7 AND THE INDIVIDUALS ASSOCIATED WITH IT HAD KNOWLEDGE OF THE STOCK WARRANTS. FURTHER, PLAINTIFF ALLEGES NO FACTS SHOWING THAT ANY OF THE DEFENDANTS HAD KNOWLEDGE THAT CMGI ASSIGNED THE PROMISSORY NOTE AND NON-DILUTABLE STOCK WARRANTS TO PLAINTIFF. B) TRANSACTION AGREEMENT AND OTHER SECURITY DOCUMENTS (57):

AGAIN, EVEN IF THE COURT ASSUMES THAT THE EQUILIBRIUM INDIVIDUALS KNEW OF THESE AGREEMENTS, PLAINTIFF FAILS TO SHOW THAT SCENE7 AND THE INDIVIDUALS ASSOCIATED WITH IT HAD KNOWLEDGE OF THESE AGREEMENTS OR THAT ANY OF THE DEFENDANTS HAD KNOWLEDGE THAT THESE AGREEMENTS WERE ASSIGNED BY CMGI TO PLAINTIFF. ADDITIONALLY, THERE ARE NO FACTS SHOWING HOW DEFENDANTS DISRUPTED THESE CONTRACTS. FINALLY, THERE ARE NO FACTS SHOWING HOW PLAINTIFF WAS DAMAGED AS A RESULT OF THESE BREACHES.

C) EMPLOYEE AGREEMENTS (58): THERE ARE NO FACTS SHOWING THAT SCENE7 OR THE INDIVIDUALS ASSOCIATED WITH IT HAD KNOWLEDGE OF THESE AGREEMENTS. AS TO THE INDIVIDUALS ASSOCIATED WITH EQUILIBRIUM, IT IS NOT CLEAR WHETHER PLAINTIFF IS REFERRING TO THEIR CONTRACTS WITH EQUILIBRIUM OR THE CONTRACTS OF OTHER UNIDENTIFIED EMPLOYEES WHO WENT TO WORK FOR SCENE7. IN EITHER EVENT, THE CAUSE OF ACTION IS IMPROPER."...(A) PARTY TO A CONTRACT OWES NO TORT DUTY TO REFRAIN FROM INTERFERENCE WITH ITS PERFORMANCE..." (APPLIED EQUIPMENT CORP. V. LITTON SAUDI ARABIA, LTD. (1994) 7CAL. 4TH 503, 514.)"...(I)T IS WELL ESTABLISHED THAT CORPORATE AGENTS AND EMPLOYEES ACTING FOR AND ON BEHALF OF A CORPORATION CANNOT BE HELD LIABLE FOR INDUCING A BREACH OF THE CORPORATION'S CONTRACT.'..." (REYNOLDS V. BEMENT (2005) 36 CAL. 4TH 1075, 1087.) AS TO ALL OF THE DEFENDANTS, PLAINTIFF HAS NOT ALLEGED THAT DEFENDANTS INTENTIONALLY INTERFERED WITH THESE CONTRACTS AND THERE ARE NO FACTS SHOWING HOW EQUILIBRIUM WAS INJURED BY THE INTERFERENCE.

D) CUSTOMER MAINTENANCE AGREEMENTS (59): THERE ARE NO FACTS SHOWING THAT ANY OF THE DEFENDANTS HAD KNOWLEDGE OF THESE AGREEMENTS. PLAINTIFF DOES NOT ALLEGE THAT DEFENDANTS INTENDED TO INTERFERE WITH THE CONTRACTS. PLAINTIFF HAS NOT CLEARLY ALLEGED HOW EQUILIBRIUM WAS DAMAGED BY THE INTERFERENCE. BECAUSE PLAINTIFF HAS IDENTIFIED THE NATURE OF THE CONTRACTS, IT DOES NOT NEED TO IDENTIFY EVERY CUSTOMER. (SEE ACCUIMAGE DIAGNOSTICS CORP. V. TERARECON, INC. (N.D.CAL. 2003) 260 F. SUPP. 2D 941,956.)

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DEFENDANTS' DEMURRER TO THE FIFTH CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING IS SUSTAINED AS TO THE INDIVIDUAL DEFENDANTS AND OVERRULED AS TO SCENE7. AS TO THE INDIVIDUALS, THOSE WHO ARE NOT PARTIES TO THE AGREEMENT ARE NOT SUBJECT TO AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING. (GRUENBERG V. AETNA INS. CO. (1973) 9 CAL. 3D 566, 576.) AS TO SCENE7, DEFENDANTS DO NOT ARGUE THAT PLAINTIFF HAS NOT STATED A CAUSE OF ACTION BASED UPON THE SCENE7-EQUILIBRIUM LICENSE AGREEMENT AND EXCLUSIVITY AGREEMENT. "ORDINARILY, A GENERAL DEMURRER DOES NOT LIE AS TO A PORTION OF A CAUSE OF ACTION, AND IF ANY PART OF A CAUSE OF ACTION IS PROPERLY PLEADED, THE DEMURRER WILL BE OVERRULED." (FIRE INS. EXCHANGE V. SUPERIOR COURT (2004) 116 CAL. APP. 4TH 446, 452.)

NO OPPOSITION AND GOOD CAUSE APPEARING THEREFOR, DEFENDANTS' DEMURRER TO THE SIXTH CAUSE OF ACTION FOR CONVERSION-MISAPPROPRIATION OF TRADE SECRETS IS SUSTAINED.

DEFENDANTS' DEMURRER TO THE SEVENTH CAUSE OF ACTION FOR MISAPPROPRIATION OF CORPORATE OPPORTUNITIES IS SUSTAINED. PLAINTIFF ARGUES THAT EQUILIBRIUM OWES PLAINTIFF A FIDUCIARY DUTY (SEE OPPOSING BRIEF AT 9:1-16), BUT THE CAUSE OF ACTION IS BASED UPON WRONGS COMMITTED AGAINST EQUILIBRIUM.

DEFENDANTS' DEMURRER TO THE EIGHTH CAUSE OF ACTION FOR CONSPIRACY TO MISAPPROPRIATE CORPORATE OPPORTUNITIES IS SUSTAINED. ALTHOUGH THE COMPLAINT CONTAINS A GENERIC BOILERPLATE AGENCY ALLEGATION, THE FACTS DO NOT SUPPORT A CONCLUSION THAT SCENE7, MACK AND NOEL WERE ACTING AS AGENTS OF MONKS WHEN MONKS BREACHED HIS FIDUCIARY DUTY TO EQUILIBRIUM, (SEE EVEREST INVESTORS 8 V. WHITEHALL REAL ESTATE LIMITED PARTNERSHIP XI (2002) 100 CAL. APP.4TH 1102, 1104.) EVEN IF THE COURT WERE TO ACCEPT THE GENERAL AGENCY ALLEGATION, PLAINTIFF HAS ALLEGED NO FACTS SHOWING THAT SCENE7, MACK AND NOEL WERE ACTING FOR THEIR OWN BENEFIT IN ORDER TO AVOID THE AGENT'S IMMUNITY RULE. (IBID.)

DEFENDANTS' DEMURRER TO THE NINTH CAUSE OF ACTION FOR INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE IS SUSTAINED. PLAINTIFF ALLEGES NO FACTS SHOWING THAT ANY RELATIONSHIPS WERE DISRUPTED. DEFENDANTS' REMAINING ARGUMENTS HAVE NO MERIT. AMID V. HAWTHORNE COMMUNITY MEDICAL GROUP, INC. (1989) 212 CAL. APP.3D 1383 DOES NOT STAND FOR THE PROPOSITION THAT PLAINTIFF IS REQUIRED TO IDENTIFY EVERY CUSTOMER. THE FACTS SHOW THAT SCENE7, MACK AND NOEL INTENDED TO INTERFERE WITH THE RELATIONSHIP BETWEEN EQUILIBRIUM AND ITS CUSTOMERS. (SEE 31)

DEFENDANTS' DEMURRER TO THE ELEVENTH CAUSE OF ACTION FOR VIOLATION OF STATUTORY DUTY/NEGLIGENCE PER SE/PRIMA FACIE TORT IS OVERRULED. DEFENDANTS AGREE PLAINTIFF HAS PROPERLY ALLEGED NEGLIGENCE PERE SE. "IF THE COMPLAINT STATES A CAUSE OF ACTION UNDER ANY THEORY, REGARDLESS OF THE TITLE UNDER WHICH THE FACTUAL BASIS FOR RELIEF IS STATED, THAT ASPECT OF THE COMPLAINT IS GOOD AGAINST A DEMURRER..." (QUELIMANE CO. V. STEWART TITLE GUARANTY CO. (1998) 19 CAL 4TH 26, 38.)

DEFENDANTS' DEMURRER TO THE TWELFTH CAUSE OF ACTION FOR LIBEL IS OVERRULED. PLAINTIFF ALLEGES THAT "DEFENDANTS" PUBLISHED THE PRESS RELEASE. THE FACT THAT PARAGRAPH 26 IDENTIFIES THE PRESS RELEASE AS "SCENE7('S)...PRESS RELEASE" DOES NOT MEAN THAT IT WAS NOT PUBLISHED BY "DEFENDANTS," THE CAUSE OF ACTION IS NOT UNCERTAIN SINCE DEFENDANTS CAN EASILY ADMIT OR DENY THE ALLEGATIONS, (WEIL AND BROWN, CAL. PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL (TRG 2005) 7:85.)

DEFENDANTS' DEMURRER TO THE THIRTEENTH CAUSE OF ACTION FOR CONSPIRACY IS OVERRULED. ALTHOUGH IT IS IN CERTAIN RESPECTS DUPLICATIVE OF OTHER CAUSES OF ACTION OR IS RENDERED MERITLESS BY VIRTUE OF THE COURT'S ORDER SUSTAINING DEMURRERS TO THE UNDERLYING CAUSES OF ACTION, THE CAUSE OF ACTION IS NOT DUPLICATIVE TO THE EXTENT IT ALLEGES CONSPIRACY TO CONVERT. AS NOTED EARLIER, "(O)RDINARILY, A GENERAL DEMURRER DOES NOT LIE AS TO A PORTION OF A CAUSE OF ACTION, AND IF ANY PART OF A CAUSE OF ACTION IS PROPERLY PLEADED, THE DEMURRER WILL BE OVERRULED." (FIRE INS. EXCHANGE, SUPRA, 116 CAL. APP.4TH AT 452.)

THE MATTER IS NOT HEARD OR REPORTED. THE TENTATIVE RULING IS FINAL.

ENTERED BY: T. RAMIREZ

HEARING CONTINUED TO: 12/01/2005 AT: 09:00 AM FOR APPEARANCE TYPE: OSCH IN DEPARTMENT: 06 FROM DATE: 10/12/2005 FROM TIME: 09:00 AM FROM APPEARANCE TYPE: OSCH FROM DEPARTMENT: 06

10/21/2005

STIPULATION AND ORDER TO EXTEND TIME TO FILE THIRD AMENDED COMPLAINT HON. VERNON F. SMITH

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