

No. A101571

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION 3**

VIROLOGIC, INC., a Delaware Corporation,

Plaintiff and Appellant,

v.

DOES 1 through 10, Inclusive,

Defendants and Respondents.

---

San Francisco County Superior Court No. CGC 02 407068  
The Honorable A. James Robertson II, Judge

---

**APPELLANT'S OPENING BRIEF [NON-CONFIDENTIAL VERSION]**

---

**UNFAIR COMPETITION CASE  
(SEE BUS. & PROF. CODE, § 17209 AND  
CAL. RULES OF COURT, RULE 15(E)(2).)**

COOLEY GODWARD LLP  
ANTHONY M. STIEGLER (126414)  
LORI R.E. PLOEGER (202113)  
MATTHEW D. BROWN (196972)  
CHRISTOPHER B. DURBIN (218611)  
One Maritime Plaza, 20th Floor  
San Francisco, CA 94111-3580  
Telephone: (415) 693-2000  
Facsimile: (415) 951-3699

ATTORNEYS FOR APPELLANT  
VIROLOGIC, INC.

No. A101571

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION 3**

VIROLOGIC, INC., a Delaware Corporation,

Plaintiff and Appellant,

v.

DOES 1 through 10, Inclusive,

Defendants and Respondents.

---

San Francisco County Superior Court No. CGC 02 407068  
The Honorable A. James Robertson II, Judge

---

**APPELLANT'S OPENING BRIEF [NON-CONFIDENTIAL VERSION]**

---

**UNFAIR COMPETITION CASE  
(SEE BUS. & PROF. CODE, § 17209 AND  
CAL. RULES OF COURT, RULE 15(E)(2).)**

COOLEY GODWARD LLP  
ANTHONY M. STIEGLER (126414)  
LORI R.E. PLOEGER (202113)  
MATTHEW D. BROWN (196972)  
CHRISTOPHER B. DURBIN (218611)  
One Maritime Plaza, 20th Floor  
San Francisco, CA 94111-3580  
Telephone: (415) 693-2000  
Facsimile: (415) 951-3699

ATTORNEYS FOR APPELLANT  
VIROLOGIC, INC.





**TABLE OF CONTENTS  
(CONTINUED)**

	<b>PAGE</b>
b.    [	
	] ..... 46
c.    Defendant Publicly Disclosed ViroLogic’s Trade Secrets.....	48
3.    ViroLogic Would Be Entitled to Monetary or Injunctive Relief if This Case Were Allowed to Proceed .....	52
E.    ViroLogic Established a Prima Facie Case of Unfair Competition .....	56
1.    ViroLogic Set Forth a Prima Facie Case of Unfair Competition Based on Misappropriation of Trade Secrets and Misuse of Confidential Information .....	59
2.    ViroLogic Is Entitled to Injunctive Relief To Prohibit Doe’s Further Unfair and Unlawful Business Practices.....	61
V.    CONCLUSION.....	62

## TABLE OF AUTHORITIES

	PAGE
<b>CASES</b>	
<i>ABBA Rubber Co. v. Seaquist</i> (1991) 235 Cal.App.3d 1 .....	36, 38
<i>Am. Credit Indem. Co. v. Sacks</i> (1989) 213 Cal.App.3d 622.....	34, 54
<i>Am. Philatelic Soc’y v. Claibourne</i> (1935) 3 Cal.2d 689.....	56
<i>Balboa Ins. Co. v. Transglobal Equities</i> (1990) 218 Cal.App.3d 1327.....	58
<i>Bank of the West v. Superior Court (Indus. Indem. Co.)</i> (1992) 2 Cal.4th 1254 .....	57
<i>Barquis v. Merchs. Collection Ass’n of Oakland, Inc.</i> (1972) 7 Cal.3d 94.....	56
<i>Berkla v. Corel Corp.</i> (E.D.Cal. 1999) 66 F.Supp.2d 1129.....	44, 59
<i>Briggs v. Eden Council for Hope &amp; Opportunity</i> (1999) 19 Cal.4th 1106 .....	32
<i>Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.</i> (1999) 20 Cal.4th 163 .....	55, 56
<i>Church of Scientology of Cal. v. Wollersheim</i> (1996) 42 Cal.App.4th 628.....	32, 38, 48
<i>Clark v. Bunker</i> (9th Cir. 1972) 453 F.2d 1006.....	36
<i>Columbia Ins. Co. v. Seescandy.com</i> (N.D.Cal. 1999) 185 F.R.D. 573 .....	24
<i>Comm. of Children’s TV, Inc. v. Gen. Foods Corp.</i> (1983) 35 Cal.3d 197.....	58
<i>Consumer Justice Center v. Trimedica Int’l, Inc.</i> (2003) 107 Cal.App.4th 595.....	33
<i>Courtesy Temp. Serv., Inc. v. Camacho</i> (1990) 222 Cal.App.3d 1278.....	36, 39, 41, 42, 53, 55, 58, 59, 61
<i>Den-Tal-Ez, Inc. v. Siemens Capital Corp.</i> (Pa. Super. Ct. 1989) 566 A.2d 1214 .....	37

**TABLE OF AUTHORITIES**  
(CONTINUED)

	<b>PAGE</b>
<i>Doe v. 2TheMart.com Inc.</i> (W.D.Wash. 2001) 140 F.Supp.2d 1088.....	23, 24, 26
<i>Films of Distinction v. Allegro Film Prods.</i> (C.D.Cal. 1998) 12 F.Supp.2d 1068.....	57
<i>Frantz v. Johnson</i> (Nev. 2000) 999 P.2d 351 .....	52
<i>Governor Gray Davis Com. v. Am. Taxpayers Alliance</i> (2002) 102 Cal.App.4th 449.....	20
<i>Immunomedics, Inc. v. Doe</i> (N.J. Super. Ct. 2001) 775 A.2d 773 .....	23, 24
<i>In re Subpoena Duces Tecum to Am. Online, Inc.</i> (2001) 52 Va.Cir. 26 .....	24
<i>Isuzu Motors, Ltd. v. Consumers Union of U.S., Inc.</i> (C.D.Cal. 1998) 12 F.Supp.2d 1035.....	57
<i>Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.</i> 37 Cal. App. 4th 855 (1995).....	27, 28, 33
<i>M.G. v. Time Warner, Inc.</i> (2001) 89 Cal. App. 4th 623.....	33, 55
<i>Moss, Adams &amp; Co. v. Shilling</i> (1986) 179 Cal.App.3d 124.....	36
<i>Nagel v. Twin Labs., Inc.</i> (2003) 109 Cal.App.4th 39.....	31
<i>Navellier v. Sletten</i> (2002) 29 Cal.4th 82 .....	32
<i>People ex rel. Mosk v. Nat'l Research Co. of Cal.</i> (1962) 201 Cal.App.2d 765.....	56
<i>People ex rel. Van de Kamp v. Cappuccio, Inc.</i> (1988) 204 Cal.App.3d 750.....	57
<i>Precision Plating &amp; Metal Finishing, Inc. v. Martin-Marietta Corp.</i> (5th Cir. 1970) 435 F.2d 1262 .....	53, 54
<i>Rivero v. Am. Fed'n of State, County &amp; Mun. Employees, AFL-CIO</i> (2003) 105 Cal.App.4th 913.....	20

**TABLE OF AUTHORITIES**  
(CONTINUED)

	<b>PAGE</b>
<i>Rosenthal v. Great W. Fin. Sec. Corp.</i> (1996) 14 Cal.4th 394 .....	33, 55
<i>Rothschild v. Tyco Int'l (US), Inc.</i> (2000) 83 Cal.App.4th 488.....	55
<i>Rubin v. Green</i> (1993) 4 Cal.4th 1187 .....	55
<i>Schroeder v. Irvine City Council</i> (2002) 97 Cal.App.4th 174.....	27, 28
<i>Seattle Times Co. v. Rhinehart</i> (1984) 467 U.S. 20 .....	28
<i>State Farm Fire &amp; Cas. Co. v. Superior Court</i> (1996) 45 Cal.App.4th 1093.....	56, 57
<i>Univ. Computing Co. v. Lykes-Youngstown Corp.</i> (5th Cir. 1974) 504 F.2d 518 .....	52
<i>Vermont Microsystems, Inc. v. Autodesk, Inc.</i> (2d Cir. 1996) 88 F.3d 142 .....	38

**STATUTES**

Business and Professions Code § 17200 et seq., .....	12, 13, 18, 33, 55, 58, 59, 60
<b>California Civil Code</b>	
§ 3426 et seq. ....	18, 33
§ 3426.1 .....	20, 34, 36, 44, 45
§ 3426.2 .....	34, 54, 56
§ 3426.3 .....	34, 54
<b>California Code of Civil Procedure</b>	
§ 425.16 .....	3, 13, 17, 32
§ 425.16(b)(1).....	32
§ 904.1(a)(13).....	3
§ 2019(d) .....	14



**TABLE OF AUTHORITIES  
(CONTINUED)**

	<b>PAGE</b>
<b>RULES</b>	
California Rules of Court, Rule 2(a)(2) .....	3
654966 v1/PA #1DS011.DOC 8/10/03	

## I. INTRODUCTION

This is an appeal from an extraordinary order granting a Doe defendant's special motion to strike ViroLogic, Inc.'s complaint under California's so-called anti-SLAPP statute, and simultaneously refusing to permit outside counsel for ViroLogic to disclose directly or indirectly any identifying or other information regarding Doe to ViroLogic officers or employees. ViroLogic's outside counsel was required to prepare its prima facie case in a vacuum created by the superior court's order refusing to allow direct or indirect disclosure to ViroLogic of any information garnered at a half-day, outside-counsel-only deposition of Doe—the only discovery available to ViroLogic. The superior court's refusal to allow disclosure of this information violated ViroLogic's due process rights in opposing the motion to strike. Whatever First Amendment rights Doe might have to anonymous speech were more than outweighed by ViroLogic's need for identifying information about Doe in order to assist its counsel in pursuing its good-faith complaint against Doe.

Notwithstanding the handicap imposed by the superior court's refusal to allow disclosure to ViroLogic of any information learned during Doe's deposition, ViroLogic submitted evidence in opposition to Doe's

motion to strike sufficient to satisfy ViroLogic's minimal burden at this early stage of the litigation. ViroLogic brought suit against Doe defendants after a series of postings appeared on a public Internet message board dedicated to discussion of ViroLogic. These postings disclosed ViroLogic's confidential, trade-secret information, including [

] <sup>1</sup> They

also disclosed [

.] Realizing that the anonymous poster possessed ViroLogic's trade-secret information and was posting that information in the most public way—on the Internet—ViroLogic brought suit against Doe defendants.

As ViroLogic's outside counsel discovered in the limited deposition of Doe, [

---

<sup>1</sup> A confidential version of this brief was lodged conditionally under sealed accompanied by a motion to seal that brief. In this non-confidential version of the brief, redacted material is enclosed in brackets.

] Because these facts along with others set forth below were sufficient to present a prima facie case on both of ViroLogic's claims, the superior court erred in granting Doe's special motion to strike.

## **II. STATEMENT OF APPEALABILITY**

This Court has jurisdiction over ViroLogic's appeal under California Code of Civil Procedure section 904.1(a)(13), which authorizes an appeal from an order granting or denying a special motion to strike under section 425.16 of the California Code of Civil Procedure. The superior court granted defendant Doe's special motion to strike on November 22, 2002. Defendant Doe served the notice of entry of order on ViroLogic on December 3, 2002. (Appellant's Appendix ("A.A.") vol. VII, tab 59.) ViroLogic timely filed its notice of appeal on January 31, 2002. (A.A. vol. VII, tab 61; see also Cal. Rules of Court, Rule 2(a)(2) [requiring that notice of appeal be filed no later than 60 days after appealing party is served with notice of entry].)

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background**

##### **1. ViroLogic's Proprietary Information and Trade Secrets.**

ViroLogic is a publicly traded biotechnology company that develops, markets, and sells innovative products and technologies to guide and improve the treatment of viral diseases. (See A.A. vol. V, tab 48, at p. 746.) Among the proprietary technologies developed by ViroLogic is “PhenoSense,” designed to test the drug resistance of viruses that cause serious viral diseases such as AIDS, hepatitis B, and hepatitis C. (*Id.*) In addition to developing its own proprietary technologies, ViroLogic provides testing services to pharmaceutical companies for the purpose of evaluating new drugs and drug candidates. (*Id.*)

As is typical for a company in the biotechnology field, ViroLogic's business activities involve a great deal of proprietary, confidential, and trade-secret information. (*Id.*) Because much of ViroLogic's business success depends on keeping confidential or trade-secret information out of the public view, ViroLogic has implemented measures to prevent dissemination of this information. (See *id.* at pp. 746–47.) Foremost among these are confidentiality agreements, that ViroLogic employees,

vendors, and contractors must sign, which require signatories to hold in strict confidence all confidential information obtained through contacts with ViroLogic. (*Id.*; see also *id.* at pp. 751–60.) ViroLogic also limits access to sensitive information to only those employees, contractors, and vendors who have signed and acknowledged their duties under confidentiality agreements to keep such information confidential during and after their relationship with the company, and has promulgated policies restricting the dissemination and use of such information. (See *id.* at pp. 746–47.)

ViroLogic’s business involves a substantial amount of confidential, non-public information about the company’s business operations and forecasts, as well as information regarding [

]. (*Id.*; see also A.A. vol. V, tab 50, at p. 890.) [

] (See A.A. vol. V, tab 48, at p. 747.) [

] (*Id.*) [

] (See *id.*) [

] (*Id.*)

[

] (*Id.* at pp. 747–48.) [

] (*Id.*) [

] (See *id.*; see also *id.* at p. 761.) ViroLogic treated [

] as highly confidential and sensitive

business information. (*Id.* at pp. 748–49.)

Information about [ ]

is also confidential. [

] (A.A. vol. V, tab 50, at pp. 825–32.) [

.]

(*Id.*) [

] (See *id.*)<sup>2</sup>

2. [

]

[

]

(A.A. vol. V, tab 50, at p. 785.) [

---

<sup>2</sup> These [ ] were submitted by declaration of counsel in opposition to Doe's special motion to strike. (A.A. vol. V, tab 48, at pp. 749–50; see also A.A. vol. V, tab 50, at pp. 770–76.) Cooley Godward was not permitted to disclose Doe's identity to ViroLogic personnel. [

] (See A.A. vol. V, tab 50, at



] (*Id.* at pp. 837–44.) [

] (*Id.* at p. 775; see also *id.* at p. 845.)<sup>3</sup>

[

] (*Id.* at p. 776; see also *id.* at pp. 796, 798.) [

] (See *id.* at pp. 770–71, 825–32.) [

] (*Id.* at pp. 787, 810.)

---

pp. 771–72.)

<sup>3</sup> These materials too were submitted to the superior court as an offer of proof in opposition to Doe’s special motion to strike. (A.A. vol. V, tab 50.)

[

] (*Id.* at pp. 823–24, 833–36.) [

] (*Id.* at p. 823;

see also *id.* at p. 791.) [

] <sup>5</sup> (*Id.* at p. 835.)

---

<sup>4</sup> [

p. 823.)

] (A.A. vol. V, tab 50, at

<sup>5</sup> [

] (A.A. vol. V, tab 50, at p. 795.)

### 3. **Anonymous Postings on Internet “Chat Rooms” Reveal Confidential ViroLogic Information.**

In February 2002, ViroLogic’s officers became aware of a series of “posts” on an Internet “message board” dedicated to on-line discussion of ViroLogic’s business and financial information. (See A.A. vol. V, tab 48, at p. 748.) These posts, authored by an anonymous individual or individuals going by aliases such as “billyyoungwont,” “testingtesting1,” “vlgcsucks,” and “byebyevlgc,”<sup>6</sup> commanded ViroLogic’s attention because the messages contained or referred to confidential, non-public ViroLogic business information as well as information about operations and employees that likely only someone closely related to the company would know. (*Id.*) [

] (A.A. vol. V, tab 50, at pp. 799, 801, 804.)

[ ] suspicious messages (in February 2002) described alleged “discord among the ‘officers’” at ViroLogic, even referring specifically to one officer’s lack of “respect for her colleagues.”

---

<sup>6</sup> [

(See *id.* at p. 869.) [

] suggested to ViroLogic  
personal knowledge of internal workings at the company. (A.A. vol. V, tab  
48, at p. 748.)

Messages posted in March and April revealed [

]. In March 2002, [

] (A.A. vol. V, tab 50, at  
p. 872.) [

] (See *id.* at  
pp. 825–32.)

Doe’s messages in April were also revealing. [

---

]

] (*Id.* at p. 865; see also *id.* at p. 799.) [

] <sup>7</sup> (*Id.* at p. 866; see also *id.* at p. 801.) Further postings [

] (*Id.* at pp. 867, 868, 870–71.)

## **B. Procedural History**

### **1. Preliminary Filings**

Unable to discern the identity of the anonymous posters and unable to quell the publication of its trade secrets, ViroLogic filed suit against Does 1–10 in April 2002. (A.A. vol. I, tab 1, at pp. 1–8.) The complaint asserted misappropriation of trade secrets, defamation, trade libel, unfair competition (Cal. Code of Civ. Proc., § 17200), and intentional interference with prospective economic advantage. (*Id.*) The court subsequently

---

<sup>7</sup> In deposition, Doe explained that [

] (A.A. vol. V, tab 50, at p. 804 [

granted ViroLogic’s motion for expedited non-party discovery to learn the identity of the poster or posters using the “testingtesting1,” “vlgcsucks,” and “billyyoungwont” aliases. (See A.A. vol. I, tabs 2–5.)

After amending its complaint to allege only trade-secret and section 17200 claims (A.A. vol. I, tab 7), ViroLogic served two subpoenas on Yahoo! Inc.—the company responsible for maintaining the Internet message boards at issue—seeking the identity and contact information for the individual or individuals using the “testingtesting1,” “vlgcsucks,” and “billyyoungwont” aliases. (See A.A. vol. I, tabs 6 & 8.)

Apparently notified by Yahoo! of the subpoenas, on May 28, 2002, [ ] retained counsel and filed papers supporting a motion to strike ViroLogic’s complaint,<sup>8</sup> a demurrer, and motions to quash the Yahoo! subpoenas and stay all discovery.<sup>9</sup> (See A.A. vol. I, tabs 9–14.) The parties then stipulated to a protective order that permitted either party to designate materials as

---

].)

<sup>8</sup> Doe’s “Special Motion to Strike” was filed pursuant to section 425.16 of the California Code of Civil Procedure, which is designed to grant defendants a particular remedy when the plaintiff’s action is alleged to be a “SLAPP” suit (“Strategic Lawsuit Against Public Participation”).

<sup>9</sup> The substance of these motions is described *infra* section II.B.3.

simply “confidential” or as “confidential – attorneys only” (*i.e.*, neither Doe nor employees of ViroLogic may view the materials). (A.A. vol. I, tabs 15–18.)

With a protective order in place to prevent further disclosure of its confidential information, ViroLogic served Doe with its statement of trade secrets pursuant to Code of Civil Procedure section 2019(d). (A.A. vol. V, tab 50, at p. 891.)

## **2. The Superior Court Allowed ViroLogic Limited Discovery.**

On June 21, 2002, ViroLogic filed a motion for limited discovery, seeking a focused deposition of Defendant Doe 1 to ascertain Doe’s identity and relationship to ViroLogic. Without such information, ViroLogic argued, it would be in no position to make its *prima facie* case to withstand Doe’s anti-SLAPP motion. (A.A. vol. II, tab 20, at pp. 161–63.)

After a hearing, the superior court granted ViroLogic’s motion in part by ordering a half-day deposition of Doe 1 (known in court by the alias “billyyoungwont”), but limiting access to information acquired at the deposition to ViroLogic’s outside counsel, Cooley Godward. (A.A. vol. III, tab 31, at pp. 423–25.) The order allowed that ViroLogic, following the deposition, could apply *ex parte* for permission to reveal information

gathered at the deposition to ViroLogic employees. (*Id.*) Absent such subsequent permission, Cooley Godward was obligated to hold all information learned at the deposition in “strict confidence,” and was prohibited from disclosing it to ViroLogic either directly or indirectly. (*Id.*)

At the July 29, 2002, deposition, Cooley Godward learned Doe’s identity, and that [

] (A.A.

vol. V, tab 50, at pp. 799–804.) [

] (*Id.* at pp. 794–98.) [

] (*Id.*) [

] (*Id.* at p.

792.)



**3. The Superior Court Refused to Allow ViroLogic's Outside Counsel to Disclose Information Learned at Doe's Deposition to ViroLogic Officers and Employees.**

Immediately following the Doe deposition, ViroLogic accepted the court's invitation to move *ex parte* for permission to reveal to select ViroLogic personnel the information that ViroLogic's outside counsel obtained at the deposition. (A.A. vol. III, tabs 32–34.) Counsel for ViroLogic argued that it required the assistance of ViroLogic personnel [

] (A.A. vol. III, tab 32, at p. 436.)

On August 1, 2002, in a one-page order, the court line-edited ViroLogic's proposed order granting the *ex parte* motion to disclose into a denial of that motion. (A.A. vol. IV, tab 36, at p. 627.)

Although the briefing schedule for Doe's special motion to strike was fast approaching, the court (via a voicemail from the court's chambers) invited ViroLogic to submit a regularly noticed motion and briefing essentially repeating the substance of its *ex parte* motion to disclose. (A.A. vol. IV, tab 39, at pp. 634–36.) On August 9, 2002—only five days before its opposition to the special motion to strike was due—ViroLogic submitted

its fully noticed motion to disclose and moved for an order shortening time for consideration of that motion. (A.A. vol. IV, tabs 38–40, 42–44.) ViroLogic again urged the court to permit it to reveal Doe’s identity to ViroLogic personnel; a denial would force ViroLogic’s outside counsel to prepare a prima facie case in less than one week without any input from [

] (A.A. vol. IV, tab 43, at pp. 655–56.)

The court granted ViroLogic’s motion in part, but set the motion for hearing on the same date as Doe’s special motion to strike—two weeks later than ViroLogic had requested and, significantly, after ViroLogic’s opposition was to be filed. (A.A. vol. IV, tab 41.)

#### **4. The Superior Court Granted Doe’s Special Motion to Strike.**

Shortly after being informed of the Yahoo! subpoenas and retaining counsel in mid-May, Doe filed a special motion to strike ViroLogic’s first amended complaint under section 425.16.<sup>10</sup> In particular, Doe relied on

---

<sup>10</sup> With the special motion to strike, Doe filed motions to quash the Yahoo! subpoenas and to stay discovery. (A.A. vol. I, tabs 9 & 11.) ViroLogic filed a response to these motions with its opposition to the special motion to strike, arguing that the motions to quash and stay were based on protecting Doe’s anonymity—a concern obviated by the July deposition. (A.A. vol. V, tab 45.) Doe also filed a demurrer to ViroLogic’s First Amended

(1) the fact that ViroLogic could not identify the precise trade secrets that Doe had revealed through anonymous postings and (2) that the postings were anonymous opinions protected by the First Amendment. (A.A. vol. I, tab 11.) These arguments were made two months before Doe revealed during deposition [

] (See generally

A.A. vol. V, tab 50, at pp. 784–820.)

Only five days after ViroLogic filed its noticed motion to disclose, ViroLogic responded to Doe’s anti-SLAPP motion by arguing that— notwithstanding the inability to consult directly or indirectly with ViroLogic personnel—sufficient evidence had been presented to make out a prima facie case under the both California Uniform Trade Secrets Act, section 3426 *et seq.*, and California Unfair Competition Law, section 17200 *et seq.* Counsel for ViroLogic prepared its prima facie case under the

---

Complaint. (A.A. vol. I, tab 10.) The superior court denied each of these motions as moot in its November 22, 2002 order granting Doe’s special motion to strike. (A.A. vol. VII, tab 59, at p. 1306.)

restraints imposed by the order precluding it from disclosing—directly or indirectly—information learned during Doe’s half-day deposition. (See A.A. vol. V, tab 50, at p. 770.) Because counsel was not permitted to say or do anything that would disclose Doe’s identity indirectly, ViroLogic was forced to operate in a factual vacuum when attempting to provide documentary and other evidence to its counsel that might support a prima facie case. (See A.A. vol. V, tab 50, at pp. 770–71.) As a result, ViroLogic’s prima facie case was supported in part by “offers of proof” [

] (See A.A. vol. V, tab 50.)

On September 10, 2002, the superior court held a hearing on Doe’s special motion to strike. (See Reporter’s Transcript (“Tr.”), 9/10/2002 hearing.) The court adopted the tentative ruling it announced orally at the outset of the hearing, granting Doe’s motion to strike. (*Id.* at pp. 2:8–21, 22:19–20.) The court made no specific findings, did not explain which elements of the prima facie case had been met or not met, and simply asked the parties to confer on a proposed form of order. (*Id.* at pp. 22:28–24:12.)

On November 22, 2002, the court filed Doe’s proposed order with regard to the motion to strike, stating only that Doe’s messages concerned issues of public importance, and that ViroLogic had “failed to show a probability of prevailing on its claim.” (A.A. vol. VII, tab 59.) The order also denied ViroLogic’s motion to disclose Doe’s identity to ViroLogic employees, and awarded fees and costs to Doe (pending a determination of the appropriate amount).<sup>11</sup> (*Id.* at pp. 1306–07.) This appeal followed.

#### IV. ARGUMENT

##### A. Standard of Review.

On appeal from a ruling on a motion to strike under the anti-SLAPP statute, the appellate court reviews independently under a *de novo* standard of review whether the plaintiff established a probability of prevailing on the complaint. (*Rivero v. Am. Fed’n of State, County & Mun. Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919 [citing *Governor Gray Davis Com. v. Am. Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456].)

---

<sup>11</sup> If this Court reverses the order granting Doe’s motion to strike, the fee award must necessarily be reversed as well.

**B. The Superior Court's Refusal to Allow ViroLogic's Outside Counsel to Disclose to ViroLogic Information Learned During Doe's Deposition Has No Support in First Amendment Precedent and Violated ViroLogic's Due Process Rights.**

ViroLogic does not quarrel with the proposition that the First Amendment protects anonymous speech in certain circumstances. But it is also well established that the protection afforded by the First Amendment is not absolute. The First Amendment right to anonymous speech cannot be used as a shield against liability for the anonymous speaker's tortious behavior or to thwart a plaintiff's efforts to pursue a good-faith cause of action.

In this case, the superior court should have weighed ViroLogic's due process rights, which were implicated when Doe appeared in the action as Doe 1 and filed a motion to strike ViroLogic's complaint, against the Doe defendant's interest in maintaining the secrecy of Doe's name and other information that would identify Doe. The superior court's "solution" was to permit ViroLogic's outside counsel Cooley Godward to depose Doe, but then to refuse to permit counsel to share the information garnered with ViroLogic. That was no solution at all.

Counsel's inability to communicate with its client about the basic facts stymied the preparation of ViroLogic's opposition to the motion to strike ViroLogic's complaint. Moreover, ViroLogic will be hampered in its litigation of its claims going forward if the Court reverses the order granting the motion to strike without also reversing the superior court's order denying ViroLogic's motion to disclose.

**1. The First Amendment Should Have Posed No Obstacle to the Disclosure to ViroLogic of Doe's Identity and Other Information Learned During Doe's Deposition.**

Doe should not be allowed to use the First Amendment as a shield to prevent the disclosure to ViroLogic of Doe's identity and evidence related to ViroLogic's claims. Only a handful of courts have addressed the circumstances under which a Doe defendant will be allowed to retain his or her anonymity. Courts have consistently concluded that, despite the Constitution's protection of anonymous speech, individuals cannot be allowed to commit wrongs against others while concealing their identities under the rubric of the First Amendment. An anonymous speaker's First Amendment rights must be balanced against those of the wronged party that seeks redress against an anonymous wrongdoer. As a New Jersey

appellate court explained, an anonymous speaker's First Amendment rights must yield in certain circumstances:

Although anonymous speech on the Internet is protected, there must be an avenue for redress for those who are wronged. Individuals choosing to harm another or violate an agreement through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment.

(*Immunomedics, Inc. v. Doe* (N.J. Super. Ct. 2001) 775 A.2d 773, 777–78.)

The plaintiffs' need for identifying information is "especially great" when the anonymous speaker is a party to the litigation because without that information "the litigation against those defendants could not [] continue[]." (*Doe v. 2TheMart.com Inc.* (W.D. Wash. 2001) 140 F.Supp.2d 1088, 1094–95.)

The New Jersey appellate court in the *Immunomedics* case concluded that the First Amendment did not shield the identity of an anonymous individual who, like Doe, had posted electronic messages on a Yahoo! message board. (*Immunomedics, Inc. v. Doe, supra*, 775 A.2d at pp. 774–75.) The postings suggested that the poster was an Immunomedics employee, and the company had brought a breach of contract action against "Jean Doe." The court held that the company had made a sufficient



showing to outweigh whatever First Amendment rights Doe could assert, and rejected Doe's argument that the company should be forced to make its case before discovering her identity, explaining that:

To allow a potential tortfeasor to disprove a plaintiff's case before the plaintiff is even provided the opportunity to learn the defendant's identity, let alone gather any discovery, has no foundation in New Jersey law. [Plaintiff] presented the court with a valid claim for breach of contract, and should be given the opportunity to pursue that claim. Having done so, [Doe defendant] should not be afforded an advantageous position based on the media in which she chose to commit the breach of contract or because she committed that alleged breach anonymously.

(*Id.* at p. 778.)

The district court in the *2TheMart.com* case synthesized existing case law regarding the discovery of a Doe defendant's identity and articulated factors governing whether disclosure should be required: (1) a good-faith basis for bringing the lawsuit, and (2) a need for the discovery sought. (*Id.* at pp. 1094–95 [reviewing and synthesizing *Columbia Ins. Co. v. Seescandy.com* (N.D. Cal. 1999) 185 F.R.D. 573, 578–80, and *In re Subpoena Duces Tecum to Am. Online, Inc.* (2001) 52 Va.Cir. 26, 37, rev'd on other grounds, (2001) 261 Va. 350].)

Applying these factors to this case, the superior court erred in declining to permit ViroLogic's outside counsel to disclose Doe's identity and other identifying information to ViroLogic. At a bare minimum, ViroLogic had a good-faith basis for its complaint, even before counsel took Doe's deposition. ViroLogic brought suit against Doe defendants after messages were posted on a Yahoo! message board revealing ViroLogic's confidential, trade-secret information. (A.A. vol. V, tab 48, at p. 748.)

[

] (A.A. vol. V, tab 50,

at pp. 865–68, 872.)

The limited discovery allowed by the superior court [

] (A.A. vol. V, tab 50, at pp. 799–804); [

] (*id.*); [

] (*id.* at p. 776; see also *id.* at pp. 796, 798);

[

] (*Id.* at pp. 823–24, 833–36.)

The timing and content of the messages posted to the Yahoo! board provided a good-faith basis for ViroLogic’s complaint[

]. This should have been more than sufficient to overcome any First Amendment objection to the disclosure of Doe’s identity to ViroLogic.

As discussed in the following section, ViroLogic’s outside counsel should have been allowed to disclose Doe’s identity and other information learned during Doe’s deposition. Disclosure of this information would have enabled ViroLogic officers and employees fully to assist counsel in preparation of the opposition to the motion to strike. The need to disclose this information to ViroLogic more than satisfies the second *2TheMart.com* factor.

**2. The Superior Court’s Refusal to Allow Counsel to Disclose to ViroLogic Doe’s Identity Violated Fundamental Due Process.**

Disclosure of Doe’s identity and other information counsel learned during Doe’s deposition was also required because ViroLogic’s due process right to pursue its claims in active participation with its counsel outweighed Doe’s tenuous First Amendment rights.

California courts have recognized that an anti-SLAPP motion to strike may present fundamental due process problems if granted before the plaintiff has an opportunity to collect the evidence needed to establish a prima facie case. (See *Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174 [hereafter *Schroeder*]; *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.* (1994) 37 Cal.App.4th 855 [hereafter *Lafayette Morehouse*].) As the Court of Appeal explained in *Schroeder*, application of the SLAPP statute's discovery stay and expedited hearing provisions:

could adversely affect a plaintiff's due process rights by placing the burden on the plaintiff to show a prima facie case without permitting the collection of evidence needed to satisfy that burden, particularly where the principal source of evidence critical to establishing the prima facie case is in the possession of the defendant and not available from other sources.

(*Schroeder, supra*, 97 Cal.App.4th at pp. 190–91 [citing *Lafayette Morehouse, supra*, 37 Cal.App.4th at p. 868].) In this case, although the superior court did permit limited discovery by ViroLogic's counsel, it refused to allow counsel to share the information learned during that limited discovery with ViroLogic.

In opposition to ViroLogic's motion to disclose below, Doe argued that ViroLogic had no "due process" right, relying on the United States

Supreme Court decision in *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20. *Seattle Times* is inapposite. At issue in that case was whether the First Amendment precluded the district court from prohibiting the litigants from publishing or otherwise disseminating information learned in discovery, not what due process requires before a motion to strike is granted. (See *id.* at p. 22.)

The California Court of Appeal has plainly recognized the due process concerns that may result from the intersection of limited discovery and anti-SLAPP dismissals in the early stages of litigation. (*Schroeder, supra*, 97 Cal.App.4th at pp. 190–91 [citing *Lafayette Morehouse, supra*, 37 Cal.App.4th at p. 868].) The due process concerns identified in *Schroeder* and *Lafayette* apply with equal force in this case. ViroLogic was hamstrung in the preparation of its prima facie case by a court-imposed gag order, which precluded counsel from disclosing *directly or indirectly* any information learned during Doe’s deposition. (A.A. vol. VI, tab 36.) The superior court subsequently refused ViroLogic’s request that its counsel be permitted to disclose this information so that ViroLogic officers and employees could assist counsel in preparation of the opposition to the motion to strike. (A.A. vol. VII, tab 59, at p. 1306.)

The offers of proof in counsel’s declaration submitted in support of ViroLogic’s opposition to the motion to strike well illustrate the extraordinary difficulties that ViroLogic faced in attempting to oppose the motion to strike under these circumstances. (See A.A. vol. V, tab 50, at pp. 771–76.) Counsel’s declaration contains numerous “offers of proof,” which are essentially factual statements within the knowledge of ViroLogic employees or officers, but which counsel was unable to adduce in the form of a declaration from the employee or officer without disclosing, directly or indirectly, Doe’s identity. (See *id.*)

[

] (See A.A. vol. V, tab 50, at pp. 771, 825–32.)

[

] (A.A. vol. V, tab 50, at p. 771.) [

] (Compare *id.* at p. 872 with *id.* at pp. 825–32.) ViroLogic’s counsel submitted this important evidence as an offer of proof because obtaining declarations from ViroLogic officers and/or employees risked violating counsel’s obligation under court order not to reveal Doe’s identity, directly or indirectly.

Not only did the superior court’s refusal to allow disclosure force ViroLogic to present important evidence in the form of offers of proof, it also severely hampered counsel’s ability to communicate with the client to determine what additional information ViroLogic officers or employees had to support ViroLogic’s prima facie case. For example, [

]

Although ViroLogic contends that it ultimately was able to present more than a sufficient prima facie case to withstand a motion to strike, even with one hand tied behind its back, an order permitting outside counsel to disclose Doe’s identity and other information learned during Doe’s deposition would have allowed ViroLogic to present an even stronger prima facie case. If this Court determines that ViroLogic presented a prima facie case, and reverses the order granting the motion to strike, the order

denying disclosure should also be reversed to allow ViroLogic fully to assist its counsel in litigating its claims on a going-forward basis. In the unlikely event that this Court were to determine that a prima facie case was not established, the order denying the motion to disclose should nonetheless be reversed; the order granting the motion to strike should be vacated; and the matter remanded to allow ViroLogic to oppose the motion to strike based on a complete and open record.

At a minimum, in the unique circumstances presented in this case, this Court should consider the offers of proof by ViroLogic's counsel in opposition to the motion to strike for the purposes of determining whether ViroLogic stated a prima facie case against Doe. The fundamental fairness principle that animates due process requires no less.<sup>12</sup>

**C. ViroLogic Stated and Substantiated a Legally Sufficient Claim To Defeat Defendant's Motion.**

ViroLogic faced a substantial handicap in opposing Doe's motion to strike ViroLogic's complaint because the superior court improperly refused to allow ViroLogic's outside counsel to inform its client of Doe's identity

---

<sup>12</sup> Under the unique circumstances presented in this case, due process mandates a relaxation of the general rule that an anti-SLAPP motion to strike must be evaluated based only on admissible evidence. (See *Nagel v. Twin Labs., Inc.* (2003) 109 Cal.App.4th 39 [stating the general rule].)



or information learned Doe's half-day deposition. Notwithstanding this handicap, ViroLogic made the minimal prima facie showing required to defeat Doe's motion to strike. Under California Code of Civil Procedure section 425.16, even if a complaint constitutes a SLAPP suit, a court should not strike the complaint if the party filing the complaint establishes a "probability" that it will prevail on the claim. (Cal. Code Civ. Proc., § 425.16(b)(1).) To establish a "probability" the party need only "make a prima facie showing of facts which would, if proved at trial, support a judgment in [the party's] favor." (*Church of Scientology of Cal. v. Wollersheim* (1996) 42 Cal.App.4th 628, 653 [hereafter *Church of Scientology*].)

The California Supreme Court recently emphasized how limited this showing need be under the anti-SLAPP statute: "As our emerging anti-SLAPP jurisprudence makes plain, the statute poses no obstacle to suits that possess *minimal merit*." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 93 (emphasis added); see also *id.* at p. 95 [directing Court of Appeal to consider "whether plaintiffs' . . . claims have the *minimal merit* required to survive an anti-SLAPP motion"] (emphasis added); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 [explaining that the

anti-SLAPP statute “requir[es] the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim”] (quoting *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 Cal.4th 394, 412).)

The court must view all evidence submitted in the light most favorable to the plaintiff (*Lafayette Morehouse, supra*, 37 Cal.App.4th at p. 867), and must not weigh any evidence submitted by defendant against plaintiff’s evidence (*Consumer Justice Center v. Trimedica Int’l, Inc.* (2003) 107 Cal.App.4th 595, 605 [“We do not weigh the evidence, but accept as true all evidence favorable to the plaintiff.”].)

A motion to strike must be denied if *any* theory of recovery stated against the defendant is valid. (See *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 630.) Thus, if the Court determines that ViroLogic made the required minimal showing for either its trade-secret claim or its section 17200 claim, the order granting the motion to strike must be reversed. (See *id.*)

**D. ViroLogic Established a Prima Facie Case of Trade-Secret Misappropriation.**

Broadly speaking, there are two elements of a trade-secret misappropriation cause of action under California’s version of the Uniform Trade Secrets Act (“UTSA”), Civil Code section 3426 et seq.: (1) the

plaintiff owned a “trade secret,” and (2) the defendant “misappropriated” it.<sup>13</sup> (Cal. Civ. Code, §§ 3426.1–3426.3.) If these two elements are satisfied, a plaintiff is entitled to a number of remedies set forth in the UTSA, including injunctive relief, a reasonable royalty for continued use of the trade secret, money damages for actual loss, or a monetary recovery on the basis of the defendant’s unjust enrichment. (*Id.* §§ 3426.2–3426.3.) Even if a plaintiff can prove only threatened, as opposed to actual,

---

<sup>13</sup> The UTSA further defines these terms. These elements are discussed in greater detail below.

misappropriation, the UTSA provides the remedy of injunctive relief.<sup>14</sup> (*Id.* § 3426.2.)

In opposition to Doe’s motion to strike, ViroLogic made a prima facie showing of these two elements sufficient to meet its minimal burden of proof in response to a motion to strike. The evidence presented by ViroLogic would allow a reasonable jury to infer that Doe, [

]

trade-secret information from ViroLogic and misappropriated that information by improperly posting it on the Internet[

].

---

<sup>14</sup> In Doe’s reply brief below, Doe conflated the concepts of liability and remedies, contending that the cause of action for trade-secret misappropriation included a “separate damages/unjust enrichment element.” (See A.A. vol. V, tab 52, at p. 918.) Further, Doe misconstrued ViroLogic’s position, contending that the company “concedes there is” such a separate element of the cause of action. (See *id.*) Neither of these contentions holds water. The UTSA clearly distinguishes between liability and remedies, and even provides for injunctive and “reasonable royalty” remedies for actual misappropriation, threatened misappropriation, or when “neither damages nor unjust enrichment caused by misappropriation are provable.” (See Cal. Civ. Code, §§ 3426.2-3426.3; see also *Am. Credit Indem. Co. v. Sacks* (1989) 213 Cal.App.3d 622, 630 [distinguishing between cause of action and remedies for trade-secret misappropriation].) ViroLogic’s opposition brief sets out a prima facie case of the “trade secret” and “misappropriation” elements of the cause of action, and correctly states that *to recover a money judgment* for that misappropriation,

These postings resulted in immediate harm to ViroLogic by making public [

], and by damaging ViroLogic's relationship with existing customers as well as its recruiting efforts. In addition, Doe's [

], particularly in light of the disclosures that had already occurred. Thus, if the case had been allowed to go forward, and, after full discovery, ViroLogic ultimately proved the elements of trade-secret misappropriation by a preponderance of the evidence, it would have been entitled to injunctive or monetary remedies.

**1. ViroLogic's Confidential Information Regarding [ ] Are Protectable Trade Secrets.**

The UTSA defines a trade secret as any information that (1) has independent economic value, actual or potential, from not being generally known to the public or to others who could obtain economic value from using or disclosing it, and (2) is the subject of efforts that are reasonable under the circumstances to keep the information secret. (Cal. Civ. Code,

---

it would need to establish its damages or the defendant's unjust enrichment. (See A.A. vol. V, tab 47, at pp. 731-40.)

§ 3426.1(d); *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 18–20.) “[W]hether information is a trade secret constitutes a question of fact” for the jury. (*Moss, Adams & Co. v. Shilling* (1986) 179 Cal.App.3d 124, 128.) In opposition to the motion to strike, ViroLogic established a prima facie case that Doe disclosed ViroLogic’s protectable trade secrets.

It has long been settled that a company’s confidential business information may constitute protectable trade secrets. (See, e.g., *Courtesy Temp. Serv., Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1287–89 [hereafter *Courtesy*] [holding customer lists, payroll records, billing rates, and unsuccessful strategies embodied in business or marketing plans can constitute protectable trade secrets]; *Clark v. Bunker* (9th Cir. 1972) 453 F.2d 1006, 1009 [holding that strategic plans for prepaid funeral services were protectable trade secrets]; *Den-Tal-Ez, Inc. v. Siemens Capital Corp.* (Pa. Super. Ct. 1989) 566 A.2d 1214, 1229–30 [holding that strategic business plans are valid trade secrets].)

Here, Doe, [ ] posted ViroLogic trade secrets on an Internet message board: [

] (A.A. vol. V, tab 48, at p. 761; see also A.A. V, tab 50, at pp. 825–32, 866, 872.)

a. [ ]

[

] (A.A. vol. V, tab 48, at pp. 746–48.)<sup>15</sup>

That information had substantial independent economic value to ViroLogic

from not being readily known by the public or others. [

] <sup>16</sup> (A.A. vol. V, tab 49.)

Further, [

---

<sup>15</sup> In Doe's moving papers opposing ViroLogic's motion for limited discovery, Doe argued that this information could have been pieced together from a variety of different public sources. Suffice it to say that the content and timing of Doe's messages, discussed below, gives rise to a strong inference that [

]. (See *Vermont Microsystems, Inc. v. Autodesk, Inc.* (2d Cir. 1996) 88 F.3d 142, 147 [holding trade secret can exist in a combination of characteristics, each of which by itself is in the public domain, but the combination of which is not generally known].) Doe's argument is essentially that the information was "readily ascertainable," and any such purported evidence, therefore, would only be relevant, if at all, to whether Doe acquired the trade secrets from ViroLogic, *not* to whether they are protectable trade secrets. (*ABBA Rubber Co. v. Seaquist, supra*, 235 Cal.App.3d at p. 21.) However, at this early stage, the Court is not to weigh Doe's purported evidence against ViroLogic's evidence that Doe has misappropriated ViroLogic's trade secrets. (*Church of Scientology, supra*, 42 Cal.App.4th at p. 654.) That weighing of evidence is a jury function.

<sup>16</sup> ViroLogic requested judicial notice of this fact and others in a filing that accompanied its opposition to Doe's special motion to strike. (A.A. vol. 5, tab 49.) The superior court did not expressly rule on either party's evidentiary objections, instead stating that it was relying only on admissible evidence in making its decision. (Tr. 9/10/02 hearing, at p. 22:22–26.) These judicially noticeable facts constitute admissible evidence in support of ViroLogic's prima facie case.



] (A.A. vol. V, tab 48, at pp. 746, 748.) (See *Courtesy*, *supra*, 222 Cal.App.3d at pp. 1287–88 [customer list acquired through lengthy and expensive efforts].) If this information were to become publicly known, however, [

] (See A.A. vol. V, tab 49, at p. 763.) As such, [

]

Moreover, if a direct competitor were to obtain this highly sensitive information, it could use it to the competitor's benefit and ViroLogic's detriment by, [

]

b. [ ]

Like the information regarding [

] (A.A. vol. V, tab 48, at pp.

746–48.) ViroLogic discloses [

] (A.A. vol. V, tab 50, at pp. 775, 860; see also

A.A. vol. V, tab 49, at p. 763.) [ ], this information is highly

confidential. (A.A. vol. V, tab 49, at p. 763.)

ViroLogic's [ ] has independent

economic value derived from it being kept secret. It has value to ViroLogic

[

]

(A.A. vol. V, tab 50, at p. 776.)

On March 27, 2002, Doe [

] posted a

message on the Yahoo! message board that stated, [

] (A.A.

vol. V, tab 50, at p. 872.) [

] (See *id.*, at pp. 825–32.) [

] (See *id.*)

As reflected in Doe’s own reply brief on the motion to strike, [

] (See A.A. vol. V, tab 52,

at pp. 911–13.) California courts have recognized that this type of information[

] can constitute a

trade secret. (See *Courtesy*, *supra*, 222 Cal.App.3d at pp. 1287–88.)

---

<sup>17</sup> [

vol. V, tab 50, at pp. 825–32.) [ ] (See A.A. ]were included as exhibits to

**c. Reasonable Steps to Protect Trade Secrets**

ViroLogic has taken reasonable steps under the circumstances to guard its trade secrets. For example, ViroLogic requires all employees and consultants to sign confidentiality agreements that prohibit the disclosure of the company's trade secrets, and employs numerous company policies prohibiting the disclosure of the company's confidential information. (A.A. vol. V, tab 48, at pp. 746–47, 751–60.) [

] (See *id.* at pp. 747–48; A.A. vol. V, tab 50, at pp. 771–72.) [

] (A.A. vol. V, tab 50, at pp. 775, 823–24, 833–36.) These steps were more than sufficient to satisfy the requirement that ViroLogic have taken reasonable steps to protect its trade-secret information. (See *Courtesy*, *supra*, 222 Cal.App.3d at p. 1288.)

---

the declaration of counsel in opposition to the motion to strike.

**2. There Is Strong Circumstantial Evidence That Defendant Misappropriated ViroLogic's Trade Secrets by [**

**]**

The UTSA is broad, providing liability for trade-secret misappropriation in a range of factual scenarios, including any of the following:

(1) the trade secret is acquired with reason to know it was acquired by "improper means," which is expressly defined to include "breach . . . of a duty to maintain secrecy";

(2) the trade secret is disclosed or used by a person who breached a duty of secrecy in acquiring it; or

(3) the trade secret is disclosed or used by a person who "knew or had reason to know" the information was

(a) "[d]erived from or through" one who breached a duty of secrecy in acquiring it,

(b) "[a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use," or

(c) “[d]erived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.”

(Cal. Civ. Code, § 3426.1(a)–(b).)

a. [

]

[

] (A.A.

vol. V, tab 50, at pp. 790–91, 823–24.) [

] (See *Berkla v. Corel Corp.*

(E.D.Cal. 1999) 66 F.Supp.2d 1129, 1150–51.)

[

] (A.A. vol. V, tab 50, at

pp. 775, 794–95, 798; A.A. vol. V, tab 48, at pp. 746–47, 751–60.) [

] (See Cal. Civ. Code, § 3426.1(a)–(b).)

b. [

]

[

] (A.A. vol. V, tab. 50, at p. 785.)

[

] (A.A. vol. V, tab 50, at pp. 772–72, 837–41, 844.) [

] (*Id.* at pp. 786, 795–97.) [

] (*Id.* at pp.

772, 842–43.)

[

] (*Id.* at

pp. 775, 773, 845.)

[

<sup>18</sup>] (*Id.* at pp. 776, 785–

87, 796–98.) [

] (*Id.*

at p. 776.) [

---

<sup>18</sup>

[

] (A.A. vol. V, tab 50, at pp. 794–95.)



]

(*Id.* at pp. 771–72, 825–32.) [

] (A.A. vol.

V, tab 50, at pp. 775, 860–62; A.A. vol. V, tab 49, at p. 763.) [

] (*Id.* at pp. 775,

860–62; A.A. vol. V, tab 49, at p. 763; see also A.A. vol. V, tab 50, at p.

869 [

.)]

**c. Defendant Publicly Disclosed ViroLogic's Trade Secrets.**

As discussed above, [

] (A.A. vol. V, tab 48, at pp. 747–48.) [

] (*Id.* at p. 761.)<sup>19</sup>

[

]

(A.A. vol. V, tab 50, at 799, 865.) [

] (*Id.* at pp. 866, 801.)

The disclosures in this chain of messages support an inference that  
Doe obtained inside information [

---

<sup>19</sup> Doe attempted to make much of the fact that [

] This is nothing like the *Church of Scientology* decision cited by Doe, in which the documentary evidence affirmatively contradicted the affiant's representations. (See *Church of Scientology, supra*, 42 Cal.App.4th at pp. 656–57.)

] <sup>20</sup>

Doe also disclosed other trade-secret information on the Yahoo message board. In a posting on March 27, 2002 [

] (*Id.* at p. 872.)

[

] (*Id.* at pp. 771, 825–32.) [

] (*Id.*) This

information was highly confidential, and was not released to the public,

---

<sup>20</sup> (See also, e.g., A.A. vol. V, tab 50, at pp. 807, 868, 870–71.)

[  
] (*Id.*; A.A. vol. V, tab 48, at  
p. 746; A.A. vol. V, tab 49, at p. 763.) [

]

Taken together, the direct and circumstantial evidence, outlined above and submitted in opposition to the motion to strike, more than satisfied ViroLogic's burden to establish a prima facie case of trade secret misappropriation. [

] It is highly unlikely that anyone could have merely guessed or otherwise obtained the information disclosed by Doe with the degree of correlative specificity and concurrent timing of internal ViroLogic documents. Based on the existing evidence that was available at this early stage of the litigation, particularly given that counsel for ViroLogic was not permitted to disclose Doe's identity to the Company, and all reasonable

inferences that could be drawn by the jury, ViroLogic should be found to have met its minimal prima facie burden.

**3. ViroLogic Would Be Entitled to Monetary or Injunctive Relief if This Case Were Allowed to Proceed.**

As explained above, ViroLogic is not required to prove damages or unjust enrichment to survive Doe's motion to strike, despite Doe's eagerness to place that burden on ViroLogic. ViroLogic has carried its minimal prima facie burden with respect to the elements of its trade-secret misappropriation claim. However, apparently in an attempt to show that denying the motion to strike would ultimately be futile, Defendant has conflated the concepts of liability and remedies, and attempted to minimize—indeed, to deny the existence of—the harm and threatened continued harm to ViroLogic from this misconduct. For that reason, therefore, we demonstrate here that if this case were allowed to proceed, and ViroLogic were ultimately to carry its burden of proof after full discovery, it would be entitled to monetary or injunctive relief under the UTSA.

Under the UTSA, “normally the value of the secret to the plaintiff is an appropriate measure of damages only when the defendant has in some

way destroyed the value of the secret. The most obvious way this is done is through publication, so that no secret remains.” (*Univ. Computing Co. v. Lykes-Youngstown Corp.* (5th Cir. 1974) 504 F.2d 518, 535.) Courts have further emphasized that in cases brought under the UTSA, “damages need not be proven with mathematical exactitude . . . the mere fact that some uncertainty exists as to the actual amount of damages sustained will not preclude recovery.” (*Frantz v. Johnson* (Nev. 2000) 999 P.2d 351, 360.)

Here, Doe publicly disclosed ViroLogic’s trade-secret information relating to [

] For example, a competitor could use the information to its benefit, and to ViroLogic’s detriment, by [

] (A.A. vol. V, tab 48, at p. 749.)

Similarly, the disclosure of this information has hurt the Company because [

] (*Id.*)

The information disclosed also has independent economic value by being secret. It has internal value to ViroLogic [

] Here, the [

] information disclosed by Doe demonstrated to ViroLogic's competitors that [

]

(A.A. vol. V, tab 50, at pp. 825–32, 872.) Information about [

] (*Id.* at p. 776.) Indeed,

[

] (See *Courtesy, supra*, 222 Cal.App.3d at 1287–88.)

The appropriate measure of damages is thus the value of those secrets before their disclosure. (See *Precision Plating & Metal Finishing, Inc. v. Martin-Marietta Corp.* (5th Cir. 1970) 435 F.2d 1262, 1263.) Doe's disclosure of ViroLogic's confidential information has destroyed the value

of that information. (Cf. *id.*) ViroLogic’s secrets have been stripped of their secrecy, thereby diminishing the full value that the information possessed only when secret. (A.A. vol. V, tab 48, at p. 749.) Thus, the record in this case demonstrates that ViroLogic has—even at this early stage—established that it would be entitled to damages for actual loss. (See Cal. Civ. Code, § 3426.3.)

In addition to claims for money damages, ViroLogic included in its First Amended Complaint a prayer for injunctive relief to prevent Doe from further disclosures of trade secrets [

] (A.A. vol. I, tab 7, at pp. 75–76.) The UTSA provides for injunctive relief to enjoin the “actual or threatened” disclosure of trade secrets. (See Cal. Civ. Code, § 3426.2; see also *Am. Credit Indem. Co. v. Sacks*, *supra*, 213 Cal.App.3d at p. 637.) Because Doe has already demonstrated Doe’s capability and willingness to disclose this information, the threat of further disclosures remains. ViroLogic would therefore be entitled to injunctive relief. (See Cal. Civ. Code, § 3426.2.)



**E. ViroLogic Established a Prima Facie Case of Unfair Competition.**

The trial court's order must be reversed for the additional reason that ViroLogic established a prima facie case under Business and Professions Code section § 17200 *et seq.* (the Unfair Competition Act ("UCA")), which prohibits unfair competition.<sup>21</sup> (See *M.G. v. Time Warner, Inc.*, *supra*, 89 Cal.App.4th at p. 630.) "'Unfair competition' is broadly defined to include 'any unlawful, unfair or fraudulent business act or practice.'" (*Rothschild v. Tyco Int'l (US), Inc.* (2000) 83 Cal.App.4th 488, 493 [quoting Cal. Bus. & Prof. Code, § 17200].) The UCA's coverage is "sweeping, embracing 'anything that can properly be called a business practice and that at the same time is forbidden by law.'" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180 [hereafter *Cel-Tech*] [quoting *Rubin v. Green* (1993) 4 Cal.4th 1187, 1200].) In proscribing any unlawful business practice, the UCA "'borrows' violations of other laws and treats them as unlawful practices" that the unfair competition law

---

<sup>21</sup> The trial court's order states that ViroLogic "failed to show a probability of prevailing on *its claim*." (A.A. vol. VII, tab 59, at p. 1306 (emphasis added).) It thus appears that the trial court did not consider ViroLogic's UCA claim separately from its trade secrets claim, which it was required to do because ViroLogic's UCA claim is not based solely on the establishment of an underlying trade secret. (See, e.g., *Courtesy*, *supra*,

makes independently actionable. (*State Farm Fire & Cas. Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1103.) But the law does more than borrow: “The statutory language referring to ‘any unlawful, unfair *or* fraudulent’ practice [italics added] makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law.” (*Cel-Tech, supra*, 20 Cal.4th at p. 180.)

“[T]he Legislature . . . intended by the sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur.” (*Barquis v. Merchs. Collection Ass’n of Oakland, Inc.* (1972) 7 Cal.3d 94, 111.) The intentionally broad language was designed to allow the California judiciary the latitude to apply the Act to the multitude of “new schemes which the fertility of man’s invention would contrive.” (*Id.* at p. 112 [quoting *Am. Philatelic Soc’y v. Claibourne* (1935) 3 Cal.2d 689, 698].) It is impossible to list all of the acts prohibited by the UCA because “unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery.” (*People ex rel. Mosk v. Nat’l Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 772.) The UCA does not require that the activity or conduct sought to be enjoined be commercial.

---

222 Cal.App.3d at p. 1291.)

*(Films of Distinction v. Allegro Film Prods. (C.D.Cal. 1998) 12 F.Supp.2d 1068, 1079; Isuzu Motors, Ltd. v. Consumers Union of U.S., Inc. (C.D.Cal. 1998) 12 F.Supp.2d 1035, 1048.)*

Moreover, to state an unfair business practices claim, a party need not plead and prove the elements of a tort. (*Bank of the West v. Superior Court (Indus. Indem. Co.)* (1992) 2 Cal.4th 1254, 1267.) Further, actual injury to the consuming public or to the defendant's business competitors is not required to prove an unlawful business practice. (*People ex rel. Van de Kamp v. Cappuccio, Inc.* (1988) 204 Cal.App.3d 750, 760.)

The remedies available under the UCA are injunctive relief and restitution. (*State Farm Fire & Cas. Co. v. Superior Court, supra*, 45 Cal.App.4th at p. 1102.) "Damages" as such are not recoverable under section 17203. (*Bank of the West v. Superior Court (Indus. Indem. Co.)*, *supra*, 2 Cal.4th at p. 1265.) Moreover, it is "not necessary to show the defendant intended to injure anyone since the violation of the UCA is a strict liability offense." (*State Farm Fire & Cas. Co. v. Superior Court, supra*, 45 Cal.App.4th at p. 1102.)

**1. ViroLogic Set Forth a Prima Facie Case of Unfair Competition Based on Misappropriation of Trade Secrets and Misuse of Confidential Information.**

ViroLogic established the probability of prevailing under the broad UCA standard by establishing that Doe misappropriated ViroLogic's trade secrets.<sup>22</sup> (See Section V.D above.) Misappropriation of trade secrets constitutes an unfair business practice for the purposes of a section 17200 claim. "[A]t bottom, trade secret protection is itself but a branch of unfair competition law." (*Balboa Ins. Co. v. Transglobal Equities* (1990) 218 Cal.App.3d 1327, 1341.) Indeed, the California judiciary has specifically found that violation of California's trade-secret statute constitutes a valid basis for a UCA claim. (*Courtesy, supra*, 222 Cal.App.3d at p. 1291.)

Moreover, an unfair business practice claim under section 17200 does not require that the confidential information disclosed have been a trade secret *per se*. (*Courtesy, supra*, 222 Cal.App.3d at p. 1291.) The *Courtesy* court clarified that misuse of confidential information—even if it falls short of a protectable trade secret—supports a UCA claim. (*Id.*) In *Courtesy*, a temporary agency alleged that former employees had misused the agency's confidential information to solicit, pirate, and deceive the

---

<sup>22</sup> ViroLogic, as a corporation, has standing to sue under the UCA. (*Comm.*

agency's customers in violation of the UCA. The court, in reversing the lower court's order denying a preliminary injunction, found that even if the confidential information (including a customer list) did not meet the trade secret standard, "the unfair and deceptive practices of employees in dealing with [the agency's] customers should have been enjoined under Business and Professions Code Section 17200 et seq." (*Courtesy*, supra, 222 Cal.App.3d at p. 1291.)

[

] (See A.A. vol. V, tab 50, at pp. 785–86, 793–94.) [

] (A.A. vol. V, tab 50,

at pp. 823–24)—is an unfair business practice. (See *Courtesy*, supra, 222 Cal.App.3d at p. 1291; see also *Berkla*, supra, 66 F.Supp.2d at 1150–51.)

[

] (See A.A. vol. V, tab 48, at pp. 747–49.)

---

*of Children's TV, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 215.)

[

] A

reasonable jury could also infer that Doe disclosed ViroLogic's [ ], highly confidential information the disclosure of which could harm the Company. (See, e.g., *Courtesy*, *supra*, 222 Cal.App.3d at pp. 1287–88.) Because ViroLogic established the probability of prevailing on its section 17200 claim based on Doe's unfair business practices, the superior court's order on the UCA claim must be reversed.

**2. ViroLogic Is Entitled to Injunctive Relief To Prohibit Doe's Further Unfair and Unlawful Business Practices.**

Doe misused and disclosed trade secrets and confidential information that [

] (See A.A.

vol. V, tab 50, at pp. 775–76, 794–99.) Because [

] ViroLogic is entitled to pursue injunctive relief prohibiting Doe from further using or disclosing such information—

by posting it on the Internet or otherwise. (See *Courtesy, supra*, 222 Cal.App.3d at p. 1291.)

**V. CONCLUSION**

For these reasons, the Court should reverse the order granting Doe's Special Motion to Strike and Denying ViroLogic's Motion for Order to Disclose, as well as the resulting determination that Doe was entitled to attorneys' fees. Alternatively, the Court should reverse the portion of the order denying ViroLogic's motion to disclose, vacate the order granting the motion to strike, and remand for further proceedings.

Dated: August 11, 2003

COOLEY GODWARD LLP



---

By: Matthew D. Brown

Attorneys for Appellant  
VIROLOGIC, INC.

**CERTIFICATE OF COMPLIANCE**

In compliance with California Rules of Court, Rule 14(c)(1), I, Matthew D. Brown, certify that the foregoing Appellant's Opening Brief uses proportionally spaced typeface of 13 points or more and contains 13,920 words (unredacted and including footnotes), as counted by Microsoft Word 2000, the word processing software used to prepare this brief.

A handwritten signature in cursive script that reads "Matthew D. Brown". The signature is written in black ink and is positioned above a horizontal line.

---

Matthew D. Brown



**CERTIFICATE OF SERVICE**

I am a citizen of the United States and a resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley Godward LLP, One Maritime Plaza, 20th Floor, San Francisco, California 94111-3580. On the date set forth below I served the documents described below in the manner described below:

(BY OVERNIGHT MAIL – CCP § 1013(c)) I am personally and readily familiar with the business practice of Cooley Godward LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described below to be deposited for delivery to a facility regularly maintained by FedEx for overnight delivery, on the following part(ies) in this action:

Joshua Koltun  
Steinhart & Falconer LLP  
333 Market Street, 32nd Floor  
San Francisco, CA 94105-2150  
*Attorney for Doe Defendant 1*

One copy Appellant's Opening  
Brief (confidential and non-  
confidential versions)

Clerk  
Superior Court of California  
County of San Francisco  
400 McAllister Street  
San Francisco, CA 94102

One copy Appellant's Opening  
Brief (confidential and non-  
confidential versions)

On the date set forth below I served the documents described below in the manner described below:

(BY MESSENGER SERVICE – CCP § 1011) by consigning the document(s) below to an authorized courier and/or process server for hand delivery on this date, to:

Frederick K. Ohlrich, Clerk  
California Supreme Court  
350 McAllister St., Rm 1295  
San Francisco, CA 94102

5 copies of Appellant's Opening Brief  
(confidential and non-confidential  
versions)

On the date set forth below I served the documents described below in the manner described below:

(BY U.S. MAIL – CCP § 1013a(1)) I am personally and readily familiar with the business practice of Cooley Godward LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California, addressed as follows:

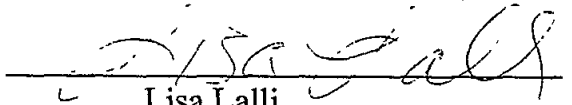
Paul Cummins, Esq.  
Assistant District Attorney  
Office of the District Attorney  
for the City and County of San Francisco  
Hall of Justice  
850 Bryant Street, Room 322  
San Francisco, CA 94103

One copy of Appellant's Opening  
Brief (non-confidential version)

Ronald Reiter, Esq.  
Deputy Attorney General  
455 Golden Gate Ave., 11th Floor  
San Francisco, CA 94102

One copy of Appellant's Opening  
Brief (non-confidential version)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 11, 2003, at San Francisco, California.

  
\_\_\_\_\_  
Lisa Lalli