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12
13 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ

14
15 MICHAEL E. MCNEIL and TODD S.
GLASSEY,

16 Plaintiff,

17 v.

18 SYMMETRICOM, INC.,
19 Defendant.

CASE NO. CV-165643

PLAINTIFF TODD S. GLASSEY'S
OPPOSITION TO DEFENDANT
SYMMETRICOM, INC.'S DEMURRER TO
SECOND AMENDED COMPLAINT

Date: May 19, 2011
Time: 8:30 a.m.
Dept.: 5
Judge: Hon. Jeffrey Almquist
Case Filed: October 28, 2009

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1 I. SUMMARY OF ARGUMENT

2 Plaintiff Todd S. Glassey hereby opposes the demurrer filed by defendant Symmetricom,
3 Inc. (“Symmetricom”) against the second amended complaint filed by Mr. Glassey and plaintiff
4 Michael E. McNeil.

5 The second amended complaint (“SAC”) alleges six causes of action: rescission, two
6 causes of action for breach of contract, conversion, unjust enrichment, and reformation. *See*
7 *generally* SAC. Symmetricom requests the Court sustain its demurrer to all six causes of action
8 in the SAC pursuant to Code of Civil Procedure section 430.10, which provides that the party
9 against whom a complaint has been filed may object by demurrer to the pleading on the ground
10 that it does not state facts sufficient to constitute a cause of action against that party. Demurrer,
11 1:9-15; Code Civ. Proc. § 430.10. Specifically, Symmetricom asserts that plaintiffs’ claims for
12 contract rescission, reformation and breach of contract fail to allege the requisite elements of
13 such causes of action. Demurrer, 1:9-10. With respect to plaintiffs’ allegations of conversion
14 and unjust enrichment, Symmetricom argues that plaintiffs have failed to allege facts sufficient
15 to state a cause of action because it contends that the statute of limitations has run on both
16 claims. Demurrer, 1:10-13.

17 In response to Symmetricom’s demurrer, plaintiffs will dismiss their cause of action for
18 reformation (count six). Symmetricom’s remaining arguments, however, fail. As set forth
19 below, plaintiffs have properly alleged all facts necessary to constitute causes of action for
20 rescission and breach of contract. Symmetricom’s argument that plaintiffs’ causes of action for
21 unjust enrichment and conversion are time barred cites some allegations, while ignoring key
22 assertions that support plaintiffs’ claims and fails to acknowledge the ongoing nature of these
23 violations of plaintiffs’ intellectual property rights. As such, Glassey requests the Court overrule
24 Symmetricom’s demurrer.

25 II. SUMMARY OF ACTION

26 Glassey has been involved in computer science for some time, and has developed an
27 expertise in digital evidence systems focusing on location and time infrastructure. SAC, ¶ 18.
28 Glassey founded Coastek InfoSys, Inc. (“Coastek”) in 1996 to implement Glassey’s digital

1 document security and evidence tools. SAC, ¶¶ 3, 10. In 1997, Glassey left Coastek to
2 independently create a digital time management technology for the addition in his previous
3 document evidence systems, including, but not limited to Trusted Time Infrastructure (generally
4 “TTI”), Global Time Service (“GTS”), Glassey Digital Time Stamp (“GDTS”), Geospatial
5 keying controls and Glassey’s Certified Timing Authority (“CTA”). SAC, ¶ 13. Coastek agreed
6 that Glassey’s independent development of the time controls would remain his intellectual
7 property. SAC, ¶ 14. McNeil, who at the time was a Coastek employee, also left to assist
8 Glassey in the development of the time controls. SAC, ¶ 15.

9 On or about, October 1997, Glassey approached Datum, Inc. (“Datum”) to manufacture a
10 component of the time controls for Glassey’s email and document control gateway that would
11 implement the time control technology. SAC, ¶¶ 10, 16. Datum wanted to understand whether
12 there were derivative businesses that it could capture and as such agreed to undertake market
13 research to determine the commercial potential for Glassey’s time control technology. SAC, ¶
14 17. In November 1997, Datum and Glassey executed a mutual non-disclosure agreement (“1997
15 Datum NDA”) wherein Glassey believed that Datum agreed to not interfere with Glassey’s pre-
16 existing commercial relationships and that, among other things, Datum would hold in confidence
17 Glassey’s intellectual property. SAC, ¶ 18.

18 In May 1998, Datum entered into a short term agreement with Glassey and McNeil
19 (“Datum Consulting Agreement”). SAC, ¶ 23. The Datum Consulting Agreement was in effect
20 from May 4, 1998 to July 4, 1998. SAC, ¶ 24. During that time, Glassey did not conduct any
21 research and development for Datum in the development of any technology or products but,
22 rather, focused on market analysis. SAC, ¶¶ 25, 26.

23 In early 1998 Glassey founded a new company called GMT. SAC, ¶ 27. At that point,
24 the acronym “GMT” stood for Glassey Metrological Technology. SAC, ¶ 28. In April 1998,
25 McNeil joined Glassey, first as an employee and later Glassey offered him partial ownership in
26 GMT. SAC, ¶ 29. Then Glassey and McNeil incorporated “GMT” which now stood for
27 Glassey-McNeil Technologies. SAC, ¶ 30. The purpose of creating GMT was to continue to
28 exploit Glassey’s time control technology. SAC, ¶ 31.

1 At the expiration of the Datum Consulting Agreement on July 4, 1998, Glassey (and
2 McNeil) negotiated with Dave Robinson, President of the Bancom Division of Datum, David
3 Young, CFO of Bancom, and Mr. Stone and ultimately Glassey (and McNeil) agreed to work as
4 independent consultants without a written consulting agreement subject to the understanding that
5 pursuant to the existing 1997 Datum NDA Glassy and McNeil (as GMT) would own any and all
6 intellectual property developed or communicated during the term of the relationship. SAC, ¶ 32.
7 In addition to the existing 1997 Datum NDA Glassey and/or GMT entered into an oral
8 agreement (“Oral Consulting Agreement”) by which Glassey and/or GMT would identify
9 possible acquisition targets and facilitate Datum’s due diligence. SAC, ¶ 33.

10 Pursuant to the Oral Consulting Agreement Glassey and GMT believed that Datum
11 agreed to keep all third-party intellectual property confidential, including intellectual property
12 belonging to Glassey and/or GMT. SAC, ¶ 34. At that point, Glassey and McNeil (as GMT)
13 worked to further develop Glassey’s time controls, including time stamp systems, email
14 gateways, and associated database services and to develop the policies and protocols that would
15 aid market acceptance for this technology. SAC, ¶ 35.

16 From approximately, December 1997 onward Glassey, and later GMT, had other
17 commercial relationships for the purpose of exploiting Glassey’s time control technology. SAC,
18 ¶ 36. One of those clients was Digital Delivery, Inc. (“DDI”). SAC, ¶ 37. Glassey’s
19 relationship with DDI began with an exploration of using DDI’s Confidential Courier product as
20 a component of Glassey’s time control technology. SAC, ¶ 38. Later, DDI decided it wanted
21 other aspects of Glassey’s time control technology to enhance the Confidential Courier product.
22 SAC, ¶ 39.

23 Initially, DDI executed a non-disclosure agreement with Glassey as an individual. SAC,
24 ¶ 40. Later, DDI executed another non-disclosure agreement with GMT with respect to the same
25 scope of work. SAC, ¶ 41. In approximately July 1998 GMT and DDI decided to file a U.S.
26 patent application that would incorporate some of Glassey’s time control technology with some
27 of DDI’s existing Confidential Courier technology as embodied in an earlier U.S. Patent. SAC, ¶
28 42. This new patent application eventually matured into U.S. Patent No. 6,370,629 (the “629

1 patent” or “Controlling Access Patent”). SAC, ¶ 43. In order to better define the parties interests
2 in the new patent application Glassey and McNeil and DDI, on or about October 26, 1998,
3 entered in a Co-Inventor’s Agreement. SAC, ¶ 44. The Co-Inventor’s Agreement defined the
4 parties’ rights and responsibilities with respect to compensation and ownership of the patent
5 application and any patents that issue from that application. SAC, ¶ 45.

6 The Co-Inventor Agreement had a term of one-year from execution. SAC, ¶ 46. DDI did
7 not pay Glassey (or McNeil) for their work with DDI. SAC, ¶ 47. In reliance on the protections
8 in the Co-Inventor’s Agreement, Glassey executed an assignment of the patent application (Appl.
9 No. 09/182,342) that matured into the ‘629 patent. SAC, ¶ 48.

10 Glassey introduced Datum to DDI and to Coastek in late 1998 due to Datum’s desire to
11 acquire companies with existing complementary technology. SAC, ¶ 50. In November 1998,
12 GMT executed a non-disclosure agreement with Coastek (“Coastek Non-Disclosure
13 Agreement”) for the specific purpose of facilitating Datum’s due diligence and expanding
14 GMT’s use of the Coastek intellectual property (Coastek was dormant at the time and had no
15 ongoing operations or activities). SAC, ¶ 51. GMT turned over to Datum various pieces of
16 Coastek intellectual property for the purposes of Datum’s due diligence. SAC, ¶ 52. Prior to the
17 turnover to Datum, Glassey included some of his own intellectual property with Coastek’s to
18 make the company more attractive to Datum. SAC, ¶ 53. The Glassey intellectual property
19 included the Certified Timing Authority (“CTA”). SAC, ¶ 54. The turnover of the Coastek and
20 Glassey CTA intellectual property was pursuant to the Coastek Non-Disclosure Agreement, 1997
21 Datum NDA and the Oral Consulting Agreement between Glassey, GMT and Datum. SAC, ¶
22 55. Datum decided not to acquire Coastek, but did not return any of the information that GMT
23 provided to it, including Glassey’s CTA intellectual property. SAC, ¶ 56.

24 Datum acquired DDI on or about July 1999. SAC, ¶ 57. After the acquisition, Glassey
25 (and McNeil) through GMT built the TSAPI (Time Stamping Application Programming
26 Interface) which is a software specification for the structure of a time stamp and the services
27 which would enable its use for Datum pursuant to the Oral Consulting Agreement. SAC, ¶ 58.
28 Glassey and GMT do not dispute Datum’s ownership of the TSAPI because it was built pursuant

1 to Datum's request and specifications and did not include any Glassey and/or GMT intellectual
2 property. SAC, ¶ 59. Thereafter, both DDI and Datum requested that Glassey (and McNeil)
3 acting through GMT start designing specific pieces of technology that were going to be
4 incorporated into the Datum product line. SAC, ¶ 60. Glassey (and McNeil) through GMT
5 refused this request because GMT had its own pre-existing document control architecture (this
6 technology was part of Glassey's original time control technology) and Datum's requests
7 potentially required disclosure of Glassey's intellectual property and Glassey did not want to
8 create a dispute regarding ownership of that intellectual property. SAC, ¶ 61.

9 In response to Glassey and/or GMT's refusal to design the desired equipment, Datum
10 filed suit against Plaintiffs on or about August 20, 1999, alleging, among other things, breach of
11 contract, breach of the covenant of good faith and fair dealing, misappropriation of trade secrets
12 and proprietary business information trade libel and slander and declaratory relief. SAC, ¶ 62.
13 To resolve the lawsuit, the parties entered into a several settlement agreements. SAC, ¶ 63. The
14 parties to the first agreement were GMT, Glassey, McNeil and Datum. SAC, ¶ 64. That
15 agreement "Datum-TTI Settlement" was executed by GMT, Glassey and McNeil (and approved
16 as to form and content by Book) on November 19, 1999. SAC, ¶ 64. The parties to the second
17 agreement were GMT, Glassey, McNeil and Datum and DDI. SAC, ¶ 65. The "Controlling
18 Access Settlement" dealt with the ownership and use of various technologies, some of which had
19 already become U.S. Patents. SAC, ¶ 65. Specifically, the Controlling Access Settlement gave
20 Glassey and McNeil all right and title to the Phase II technology. SAC, ¶ 66. It also gave DDI
21 and Datum license to Phase II in connection with DDI's Confidential Courier product and other
22 products covered by the Controlling Access Patent (which had not issued at that time). SAC, ¶
23 67.

24 Jason Book was acting as counsel to GMT at the time the Datum-TTI Settlement and the
25 Controlling Access Settlement. SAC, ¶ 68. Book was explicit with GMT that the Datum-TTI
26 Settlement only encompassed trusted timing infrastructure ("TTI") intellectual property that was
27 created during the time period of February 1, 1998 to March 1, 1999. SAC, ¶ 69. Book, acting
28 as counsel to GMT, also told Glassey that execution of the Controlling Access Settlement would

1 not prejudice his, or GMT's, rights of ownership of the Phase II technology including the Phase
2 II technology incorporated into the '629 patent. SAC, ¶ 70. Despite the language in the
3 Controlling Access Settlement wherein Glassey, McNeil and GMT disavow any ownership of
4 the '629 patent and give up the right to create products that incorporate Phase II technology,
5 Book continued to advise Glassey and/or GMT that execution of the Controlling Access
6 Settlement would not impair Glassey's and/or GMT's enjoyment of the rights associated with
7 Phase II technology including portions of that technology incorporated into the '629 patent.
8 SAC, ¶ 71. Glassey and/or GMT relied upon Book's erroneous advice in deciding to agree to
9 execute the Controlling Access Settlement. SAC, ¶ 72. Despite the clear integration language in
10 the Datum-TTI and Controlling Access Settlements, Book also advised Glassey and/or GMT that
11 subsequent to the execution of the Datum-TTI and Controlling Access Settlements that the
12 parties would execute additional, subsidiary agreements. SAC, ¶ 73. According to Book, the
13 parties had agreed to create and execute these subsidiary agreements to better define the parties'
14 ownership and use rights of the broadly defined intellectual property within the Datum-TTI and
15 Controlling Access Settlements. SAC, ¶ 74. Those subsidiary agreements were never created.
16 SAC, ¶ 75. Glassey and/or GMT relied upon Book's erroneous advice in deciding to agree to
17 execute the Controlling Access Settlement. SAC, ¶ 76.

18 John F. Cannon represented Datum in its dispute with GMT, Glassey and McNeil. SAC,
19 ¶ 77. During the negotiations regarding the Controlling Access Settlement and the Datum-TTI
20 Settlement, Cannon either made material misstatements regarding the content and effect of the
21 two agreements, or ratified material misstatements made by Book. SAC, ¶ 78. Specifically, on
22 several occasions, Cannon stated that Glassey would retain all rights to any TTI technology not
23 created specifically for Datum through Datum and Glassey's relationship. SAC, ¶ 79.
24 Moreover, Cannon also stated (and ratified Book's statement) that Glassey (and McNeil) would
25 retain all rights and title to the Phase II technology, including, but not limited to the Phase II
26 technology incorporated into the '629 Patent. SAC, ¶ 80.

27 In approximately late 2000 or early 2001 Datum and Certified Time entered into a written
28 non-disclosure agreement ("Certified Time NDA") and Datum paid Certified Time

1 approximately \$360,000 in “standstill” money while Datum conducted its due diligence for the
2 proposes of potential Datum acquisition. SAC, ¶ 81. Pursuant to the Certified Time NDA,
3 Certified Time turned over to Datum all its intellectual property. SAC, ¶ 82. Moreover,
4 Certified Time turned over to Datum Glassey’s personal intellectual property, including the
5 Global Time Service (including all computer source code for the GTS components), network
6 infrastructure models, CRADA 1681 controls, and the associated audit and certification practices
7 and policies. SAC, ¶ 83.

8 Datum decided not to purchase the company, but to Glassey’s knowledge has not
9 returned any of the Certified Time or Glassey intellectual property. SAC, ¶ 84. In
10 approximately mid-2002 Symmetricom acquired Datum. SAC, ¶ 85.

11 Sometime in 2009, Glassey learned that Symmetricom (formerly Datum) breached its
12 obligations pursuant to the Controlling Access Settlement. SAC, ¶ 86. The Controlling
13 Accesses Settlement limited Symmetricom’s use of Glassey’s and/or GMT’s Phase II technology
14 to the original DDI Confidential Courier product and products that are covered by the ‘629
15 patent. SAC, ¶ 87. Glassey inspected a piece of equipment manufactured by Thales
16 Corporation, a successor to nCipher Corporation, who Glassey believes received the technology
17 from Symmetricom. SAC, ¶ 88. Specifically, Glassey asked Symmetricom if it had sold the
18 subject technology to nCipher and Symmetricom refused to respond. SAC, ¶ 89. Glassey
19 evaluated the Thales product and was able to discern that Thales’ time stamp model, policy
20 model around the time stamps and the mechanism under which the time stamps were issued and
21 validated encroached upon Glassey’s and/or GMT’s Phase II technology. SAC, ¶ 90.

22 Sometime in late 2010, Glassey found Symmetricom had created a product called the
23 Time Scale Server, which is a direct implementation of Glassey’s GTS, including its regional
24 and master timing center infrastructure and service. SAC, ¶ 91. Specifically, this product was
25 designed to utilize the CRADA 1681 services to create a stand-alone master time scale reference
26 system suitable for use as a geographic and/or nationalized time service. SAC, ¶ 92.

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1 III. PLAINTIFFS HAVE ASSERTED A UNILATERAL MISTAKE OF WHICH DATUM
2 WAS AWARE AND, THEREFORE, HAVE ALLEGED FACTS SUFFICIENT TO
3 STATE A CAUSE OF ACTION UPON FOR RESCISSION OF THE CONTROLLING
4 ACCESS SETTLEMENT

5 In its demurrer, Symmetricom argues that plaintiffs' cause of action for rescission fails
6 because they have not stated specific allegations of (1) fraud in the inducement of the
7 Controlling Access Settlement or (2) mistake when entering into that agreement. Demurrer, 5:1-
8 11:5. Symmetricom's demurrer to plaintiffs' first cause of action for rescission should be
9 overruled. Plaintiffs do not seek rescission of the Controlling Access Settlement on the ground
10 of fraud by Datum, the other party to the agreement. Plaintiffs, however, have alleged all
11 requisite facts to support a claim of rescission based upon a unilateral mistake of which Datum's
12 counsel was aware and ratified. SAC, ¶¶ 70-80, 105. Moreover, Symmetricom's assertion that
13 "mistake of fact claims must be pled with specificity" when seeking rescission is not supported
14 by the cited California authority. Glassey therefore requests the Court overrule Symmetricom's
15 demurrer.

16 A party to a contract may rescind the contract if the consent of the rescinding party was
17 given by mistake and if the other party knew of the rescinding party's mistake. Cal. Civ. Code §
18 1689(b)(1); see *Hernandez v. Badger Constr. Equip. Co.* (1994) 28 Cal.App.4th 1791, 1814, n.
19 18. Plaintiffs have clearly alleged (1) that they relied on the advice of counsel, Jason Book,
20 when deciding to enter into the Controlling Access Settlement (SAC ¶ 72); (2) that Book advised
21 them that the Controlling Access Settlement would not jeopardize their rights of ownership of
22 the Phase II technology, including that which was incorporated into the '629 patent (SAC ¶¶ 70,
23 71) and that subsequent to executing the Controlling Access Settlement, the parties would
24 execute additional, subsidiary agreements that would further define the parties' ownership rights
25 and use rights of the intellectual property (SAC ¶¶ 73, 74); (3) that John Cannon, counsel for
26 Datum in its dispute with plaintiffs, either made material misstatements regarding the content
27 and effect of the two agreement or *ratified material misstatements made by Book* (SAC ¶ 78);
28 and (4) that those misstatements by Cannon included statements that plaintiffs would retain all
rights to any TTI technology not created specifically for Datum through Datum's relationship

1 with Glassey and that plaintiffs would retain all rights to the Phase II technology, including but
2 not limited to the Phase II technology incorporated into the '629 Patent (SAC ¶¶ 79, 80). In
3 other words, Datum (through its counsel, Cannon) knew of plaintiffs' mistake about the terms of
4 the Controlling Access Settlement (SAC ¶ 105).

5 Symmetricom argues that plaintiffs have not pled mistake with specificity and, therefore,
6 their claim for rescission fails. Demurrer, 10:7-17. In support of this argument, Symmetricom
7 cites an inapplicable Federal Rule of Civil Procedure and *Wood v. Metzenbaum* (1951) 107
8 Cal.App.2d 727, for the proposition that mistake must be pled with specificity. Demurrer, 10:7-
9 17. Contrary to Symmetricom's assertion, *Wood* did not hold a pleading insufficient for failure
10 to plead mistake with specificity. In *Wood*, a defendant filed a cross-complaint, alleging a cause
11 of action for rescission based on mutual mistake. Despite the asserting rescission on the basis of
12 mutual mistake in their cross-complaint, defendants only alleged that plaintiff was mistaken.
13 The *Wood* defendants did not allege that both parties were mutually mistaken. The Court never
14 considered the issue of whether mistake must be pled with specificity. A case is not authority for
15 propositions not considered. *Acosta v. SI Corp.* (2005) 129 Cal.App.4th 1370, 1379.
16 Symmetricom's argument that rescission based on mistake must be specifically plead fails.

17 Symmetricom asserts that even if plaintiffs were mistaken and if Datum knew of that
18 mistake, plaintiffs' claim for rescission fails because they neglected a legal duty by disregarding
19 the clear language of the agreement. Demurrer, 10:18-11:5 (citing Cal. Civ. Code § 1577).
20 "Neglect of a legal duty" means gross negligence, "the want of even scant care or an extreme
21 departure from the ordinary standard of conduct." *Harris v. Rudin, Richman & Appel* (2002) 95
22 Cal.App.4th 1332, 1342. Regardless of whether Symmetricom concludes that the SAC, on its
23 face, demonstrates gross negligence on the part of the plaintiffs, this is an issue of fact for the
24 jury which cannot be resolved on demurrer.

25 IV. PLAINTIFFS' SECOND AND THIRD CAUSES OF ACTION AGAINST
26 SYMMETRICOM FOR BREACH OF CONTRACT ALLEGE ALL FACTS
NECESSARY TO STATE A CLAIM

27 Symmetricom contends that plaintiffs' second and third causes of action for breach of
28 contract fail because (1) plaintiffs fail to set forth the breached contract terms and do not allege

1 or assert that Symmetricom had any contractual obligation to perform specified acts; and (2) with
2 respect to plaintiffs' claim for breach of the Certified Time NDA, they fail to plead the existence
3 of any contractual obligations restricting use of Glassey's GTS. Demurrer, 11:10-16.
4 Symmetricom ignores the allegations in the SAC and the nature of plaintiffs' claims.

5 A. Plaintiffs' second cause of action for breach of the Controlling Access Settlement
6 alleges facts sufficient to state a claim.

7 Plaintiffs' second cause of action for breach of the Controlling Access Settlement
8 asserts that Symmetricom breached that agreement, which gave DDI and Datum (and
9 subsequently, Symmetricom) a license to use the Phase II technology but limited that use to the
10 original DDI Confidential Courier Product and products covered by the '629 Patent. SAC, ¶¶
11 65-67, 87. Glassey and McNeil retained all right and title to the Phase II technology under the
12 Controlling Access Settlement. SAC, ¶ 66. Plaintiffs allege that Symmetricom breached the
13 Controlling Access Settlement when it sold the Glassey's and/or GMT's Phase II Technology to
14 Thales Corporation and used Glassey's technology in the development of its Time Scale Server.
15 SAC, ¶¶87-92.

16 Symmetricom contends that plaintiffs' breach of contract cause of action fails to state a
17 claim because (1) plaintiffs did not allege that the technology sold and/or used by Symmetricom
18 was not "covered by the '629 Patent" or otherwise subject to Symmetricom's license and (2)
19 regardless, plaintiffs have not alleged that the terms of the Controlling Access Settlement
20 prohibit Symmetricom from using Glassey's Phase II technology other than in relation to the
21 Confidential Courier product and products covered by the '629 Patent. Demurrer, 11:24-12:6.
22 These allegations, however, are made in the SAC. Plaintiffs clearly allege (1) that but for the
23 original DDI Confidential Courier Product and products covered by the '629 Patent, they
24 retained all right and title to the "Phase II technology" (SAC, ¶¶ 66-67); (2) that it was Glassey's
25 Phase II technology upon which Thales' time stamp model (the technology for which plaintiffs
26 allege was received from Symmetricom) encroached upon Glassey's "Phase II technology"
27 (SAC, ¶ 90); and (3) that the terms of the license were limited to Phase II in connection with
28

1 DDI's Confidential Courier product and other products covered by the Controlling Access Patent
2 (SAC, ¶ 67).

3 The allegations define the scope of Symmetricom's license to use the Phase II technology
4 under the Controlling Access Settlement and allege that Symmetricom's actual use exceeded the
5 scope of that license. Plaintiffs have alleged facts sufficient to state a claim for breach of the
6 Controlling Access Settlement.

7
8 B. Plaintiffs' third cause of action for breach of the Non-Disclosure Agreement with
Certified Time alleges facts sufficient to state a claim.

9 In their third cause of action for breach of contract, plaintiffs allege that Glassey
10 purchased and owns all of Certified Time's intellectual property and remaining tangible assets
11 through Certified Time's bankruptcy estate. SAC, ¶¶ 120-121. Plaintiffs further allege, upon
12 information and belief, that Certified Time and Symmetricom (as successor to Datum) entered
13 into a non-disclosure agreement that restricts Symmetricom's ability to use Certified Time's
14 intellectual property and, upon information and belief, that Symmetricom breached this
15 agreement by creating the Time Scale Server. SAC, ¶¶ 122-128.

16 Symmetricom argues that plaintiffs' third cause of action for breach of the Certified Time
17 NDA fails to allege facts sufficient to state a cause of action because (1) the specific terms of the
18 agreement have not been alleged in or attached to the SAC; and (2) that plaintiffs do not allege
19 that the Certified Time NDA prohibits the use of Certified Time's intellectual property.
20 Demurrer, 12:18-14:1. This contention fails to acknowledge the assertions that Glassey owns
21 Certified Time's assets and that the allegations made about the existence of the written contract
22 are made upon plaintiffs' information and belief.

23 It sometimes happens that a plaintiff or defendant lacks knowledge
24 and the means of obtaining knowledge of facts material to his or
25 her cause of action or defense. Usually the matters are peculiarly
26 within the knowledge of the adverse party, and the pleader can
27 learn of them only from statements of others. In this situation, the
28 pleader may plead what he or she believes to be true as a result of
information (hearsay) the pleader has received. 4 Witkin, Cal.
Proc. 5th (2008) Plead, § 398, p. 537-538

///

1 Plaintiffs believe that the Certified Time NDA exists and will seek the written document
2 through discovery. Regardless of which party possesses the written document, plaintiffs have
3 pleaded sufficient facts necessary to state a cause of action for breach of the NDA Agreement.

4
5 V. PLAINTIFFS' FOURTH CAUSE OF ACTION FOR CONVERSION AND FIFTH
6 CAUSE OF ACTION FOR UNJUST ENRICHMENT ARE NOT TIME BARRED.

7 In their fourth cause of action for conversion and fifth cause of action for unjust
8 enrichment, plaintiffs allege that Datum and Certified Time entered into the Certified Time NDA
9 in approximately late 2000 or early 2001 for the purpose of allowing Datum to conduct due
10 diligence when considering whether to purchase Certified Time. SAC, ¶ 81. Moreover,
11 plaintiffs allege that pursuant to the Certified Time NDA, Certified Time turned over to Datum
12 all its intellectual property. SAC, ¶ 82. That intellectual property included Glassey's Global
13 Time Service ("GTS"), network infrastructure models, CRADA 1681 controls, and the
14 associated audit and certification practices and policies. SAC, ¶ 83. Datum later decided not to
15 purchase Certified Time but, to Glassey's knowledge, never returned the intellectual property it
16 acquired pursuant to the Certified Time NDA. SAC, ¶ 84. In 2010, Glassey discovered that
17 Symmetricom, which had acquired Datum in mid-2002, had created a product called the Time
18 Scale Server using Glassey's GTS technology. SAC, ¶¶ 91-92. In their fourth and fifth causes
19 of action, plaintiffs allege that Glassey has been harmed by Symmetricom intentional and
20 unauthorized retention of his property and that Symmetricom has been unjustly enriched by its
21 unauthorized use of that property. SAC, ¶¶ 129-140.

22 Symmetricom contends that plaintiffs' fourth cause of action for conversion and fifth
23 cause of action for unjust enrichment are time barred on their face because the allegations
24 establish that Symmetricom's acquisition of Glassey's intellectual property occurred more than
25 three years before this action was filed, which was beyond the three year statute of limitations for
26 conversion and the two year statute of limitations for unjust enrichment. Demurrer, 14:3-6
27 (citing Code Civ. Proc., § 338(c)), 15:2-24 (citing Code Civ. Proc., § 339(1)). According to
28 Symmetricom, the allegation that Datum acquired the intellectual property in late 2000 or early

1 2001 for the purpose of conducting due diligence for a potential acquisition of Certified Time by
2 Datum places these claims beyond the applicable statutes of limitations. Demurrer, 14:3-15:1.

3 These allegations, however, simply tell the story of how Datum came to be in possession
4 of the converted intellectual property. See SAC, ¶¶ 81-83. As explained in that allegation,
5 Datum originally acquired the intellectual property pursuant to the Certified Time NDA. Thus,
6 at that time, Datum had possession of the intellectual property with Certified Time's consent. It
7 was not until some time after Datum chose not to purchase Certified Time that Datum converted
8 Glassey's intellectual property. SAC, ¶ 84. Moreover, Glassey learned of Symmetricom's
9 possession and unauthorized use of the Certified Time intellectual property in 2010 when he
10 discovered that Symmetricom had used the converted technology when it created the Time Scale
11 Server. SAC, ¶¶ 91-92. Thus, contrary to Symmetricom's assertion, the alleged conversion
12 occurred later than late 2000 or early 2001 and Symmetricom's wrongful possession of that
13 technology was not discovered until 2010. This was also the time that Glassey discovered that
14 Symmetricom obtained value from that conversion, resulting in unjust enrichment. Plaintiffs'
15 fourth cause of action for conversion and fifth cause of action for unjust enrichment are therefore
16 not barred by the statute of limitations.

17 (O)ften a plaintiff will not know exactly when a defendant
18 exercised dominion and control over its property and yet the courts
19 have found a time of conversion. See *Russell v. United Pacific Ins.*
20 *Co.*, 214 Cal.App.2d 78 (1963); *Everfresh, Inc. v. Goodman*, 131
21 Cal.App.2d 818 (1955). (See *Stan Lee Trading, Inc. v. Holtz* (C.D.
22 Cal. 1986) 649 F.Supp. 577, 581.)

21 Glassey failed to require that Datum return or destroy his data (GTS, network
22 infrastructure models, CRADA 1681 controls, and the associated audit and certification practices
23 and policies) that Datum obtained from Glassey while Datum conducted its due diligence of
24 Certified Time. SAC, ¶¶ 81-83. Glassey did not discover that Symmetricom used his property
25 until he discovered the Thales Corporation's product in 2010. SAC, ¶88.

26 An exception to the general rule for defining the accrual of a cause
27 of action ... is the discovery rule. It may be expressed by the
28 Legislature or implied by the courts. It postpones accrual of a
cause of action until the plaintiff discovers, or has reason to
discover, the cause of action." (*Norgart v. Upjohn Co.* (1999) 21

1 Cal.4th 383, 397.) (*F.D.I.C. v. Dintino* (2008) 167 Cal.App.4th
2 333, 349-50.)

3 In *F.D.I.C. v. Dintino*, the appellate court held that the statute of limitations for a bank's
4 cause of action for unjust enrichment, based on its mistaken request for recordation of
5 reconveyance of unpaid trust deed on borrower's house, began to run under discovery rule when
6 the bank discovered the mistake or had facts to put it on notice. (See *F.D.I.C. v. Dintino* 167
7 Cal.App.4th 333, 353.) The discovery rule applies to Glassey's unjust enrichment cause of
8 action because of Glassey's mistake (not requiring that Symmetricom (as successor to Datum)
9 return or destroy the data it obtained in late 2000 or early 2001) was not know to Glassey until
10 2010, well within the three year statute of limitation period for a cause of action for unjust
11 enrichment. (See Code Civ. Proc., § 338 (d) "An action for relief on the ground of fraud or
12 mistake. The cause of action is not deemed to have accrued until the discovery, by the aggrieved
13 party, of the facts constituting the fraud or mistake.")

14 VI. CONCLUSION

15 Based on the foregoing, Glassey respectfully requests that the Court overrule
16 Symmetricom's demurrer to the SAC.

17 DATED: MAY 6, 2011

BERLINER COHEN

18 BY: 
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