IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ENTRATA, INC., a Delaware corporation, Plaintiff, v. YARDI SYSTEMS, INC., a California corporation, Defendant.	**ORDER GRANTING IN PART, AND DEYING IN PART, YARDI'S MOTION FOR SUMMARY JUDGMENT** Case No. 2:15-cv-00102 Judge Clark Waddoups

Before the court is Yardi's Motion for Summary Judgment, (ECF No. 527). At the time Yardi originally filed its Motion, it moved for summary adjudication of (I) Entrata's business tort claims—claims 1, 2, 3, and 4; (II) Entrata's contract claims—claims 8 and 9; and (III) Entrata's antitrust claims—claims 5, 6, and 7. Entrata has since dismissed its seventh claim, (ECF No. 515) and its third, fourth, and eighth claims. (ECF No. 833.) The remaining claims before the court are therefore Entrata's first, second, fifth, sixth, and ninth claims. As explained below, the court GRANTS Yardi's Motion for Summary Adjudication of Entrata's first and ninth claims but DENIES Yardi's Motion for Summary Adjudication of Entrata's second, fifth, and sixth claims.

Facts

In support of its Motion for Summary Judgment, Yardi included sixty exhibits spanning approximately 1,900 pages. In support of its Opposition, Entrata included 264 exhibits spanning approximately 5,400 pages. The facts at issue are largely in dispute. (*See* ECF No. 596 at 9 ("Entrata disputes all but the following 'facts' alleged in Yardi's Motion: Nos. 2,4,10, 17, 22, 24, 25, 27 and 33."); *see also* (ECF No. 629 at 7 ("Yardi disputes as irrelevant, immaterial, misleading, and/or lacking in foundation all but the following 'facts' alleged in Entrata's

Opposition: Nos. 31, 33, 39, 61, 63.").) Given the case's extensive factual background, the court discusses only those facts necessary for the court's resolution of Yardi's Summary Judgment Motion.

Summary Judgment Standard

Yardi, as the movant, "bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Libertarian Party of N.M. v. Herrera,* 506 F.3d 1303, 1309 (10th Cir. 2007) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)). Because Yardi does not bear the burden of persuasion at trial, it may satisfy this burden "by pointing out to the court a lack of evidence on an essential element of" Entrata's claims. *Id.* (citing *Celotex,* 477 U.S. at 325, 106 S. Ct. 2548).

If Yardi meets "this initial burden, the burden then shifts to" Entrata "to set forth specific facts from which a rational trier of fact could find for the nonmovant." *Id.* (quotations omitted) (citing, among others, *Celotex,* 477 U.S. at 324, 106 S. Ct. 2548). To satisfy this burden, Entrata must identify facts "by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.* (citation omitted). These facts "must establish, at a minimum, an inference of the presence of each element essential to the case." *Bausman v. Interstate Brands Corp.,* 252 F.3d 1111, 1115 (10th Cir. 2001); *see also Celotex,* 477 U.S. at 323, 106 S. Ct. 2548 (explaining that a movant is entitled to summary judgment when "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

Analysis

Yardi moves for summary adjudication of (I) Entrata's remaining business tort claims—claims 1 and 2; (II) Entrata's remaining contract claim—claim 9; and (III) Entrata's remaining antitrust claims—claims 5 and 6.

I. Business Tort Claims

Entrata's remaining tort claims against Yardi are for: (A) Injurious Falsehoods (*see* First Amended Complaint (FAC) ¶ 109, ECF No. 55 at 47) and (B) False Advertising (*see* FAC ¶ 117, ECF No. 55 at 48). For these tort claims, Entrata argues that Yardi made public announcements about Entrata that Yardi knew were false.[1] Yardi argues that these tort claims fail because "[e]ven assuming Yardi made false statements," "Entrata cannot show that these statements caused Entrata any economic loss." (ECF No. 528 at 35.)

A. Injurious Falsehoods

Entrata alleges that "Yardi's assertions in the Yardi January 14 Announcement that Entrata engages in SQL injection and arbitrary alteration of Yardi .dll files in the Yardi Voyager code are false." (FAC ¶ 110, ECF No. 55 at 47.) Entrata argues that "the injurious falsehoods described herein have resulted in, among other things: (a) Entrata losing customers; (b) Entrata not gaining prospective customers who otherwise would have engaged with Entrata, but for the injurious falsehoods disseminated by Yardi described herein; and (c) Entrata's current customers reducing or discontinuing their business with Entrata." (FAC ¶ 113, ECF No. 55 at 47.)

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[1] (FAC ¶ 110, ECF No. 55 at 47 ("Yardi's assertions in the Yardi January 14 Announcement that Entrata engages in SQL injection and arbitrary alteration of Yardi .dll files in the Yardi Voyager code **are false**." (bold added).); (FAC ¶ 118, ECF No. 55 at 48 ("Yardi, in interstate commerce and in commercial promotion of its Voyager and Plug-In Products, **has made materially false or misleading representations of fact**, including but not limited to those found in the Yardi January 14 Announcement accusing Entrata of engaging in SQL injection and alteration of .dll files in the Voyager code, as well as stating that newer versions of the Voyager application do not integrate with Entrata's Point Solutions Products." (bold added).)

As it does with the other tort claim, Yardi argues that Entrata's Injurious Falsehood claim fails because "Entrata cannot show that [Yardi's] statements caused Entrata any economic loss." (*See* ECF No. 528 at 35.) "To establish a claim for injurious falsehood" under Utah law, a "plaintiff 'must prove falsity of the statements made, malice, and **special damages**.'" *IHC Health Servs. Inc. v. ELAP Servs., LLC*, No. 217CV01245JNPEJF, 2018 WL 4688358, at *7 (D. Utah Sept. 28, 2018) (bold added) (quoting *Direct Imp. Buyers Ass'n v. KSL, Inc.*, 538 P.2d 1040, 1042 (Utah 1975), *overruled on other grounds in later appeal sub nom. Direct Imp. Buyer's Ass'n v. K. S. L., Inc.*, 572 P.2d 692 (Utah 1977)). "The damages must specifically relate to the economic harm *caused by the disparagement* of title, product, or business." *Id*. (emphasis added). The briefing on this cause of action was limited and largely inadequate on both sides; nevertheless, the court agrees with Yardi that Entrata points to no evidence that the damages Entrata complains of—losing customers, not gaining customers, and customers discontinuing their business with Entrata—were caused by the disparaging statements regarding SQL injection. The court GRANTS Yardi's Motion for Summary Adjudication of Entrata's first claim for Injurious Falsehoods.

B. <u>False Advertising 15 U.S.C. § 1125(a)(1)(B)</u>

Entrata alleges that Yardi's "January 14 Announcement and Yardi's other false and misleading communications to the industry constitute commercial speech, in that they were made by Yardi in connection with its offering a variety of software products that compete with those offered by Entrata." (FAC ¶ 119, ECF No. 55 at 48–49.) Entrata further alleges that "[a]s a direct and proximate result of Yardi's . . . misleading communications to the industry, Entrata has suffered injury and damages." (FAC ¶ 119, ECF No. 55 at 49.) Entrata argues that Yardi's communications "constitute actionable false advertising under 15 U.S.C. § 1125(a)(1)(B) . . . ."

(FAC ¶ 120, ECF No. 55 at 49.) Entrata further argues that it "is entitled to injunctive and monetary relief . . . pursuant to, at the least, sections 34, 35, and 43 of the Lanham Act, 15 U.S.C. §§ 1116, 1117, and 1125." (FAC ¶ 123, ECF No. 55 at 50.)

"In order to succeed on its false advertising claim under 15 U.S.C. § 1125(a)(1)(B), [Entrata] must show:"

> (1) defendant made false or misleading representations of fact in connection with the commercial or promotion of its product or services;
>
> (2) in commerce;
>
> (3) the misrepresentations are material, *i.e.*, likely to influence the purchasing decision;
>
> (4) that are either likely to cause confusion or mistake as to (a) the origin, association or approval of the product or services with or by another; or (b) the characteristics of the goods or services; and
>
> (5) injured plaintiff.

Electrology Lab., Inc. v. Kunze, 169 F. Supp. 3d 1119, 1157 (D. Colo. 2016). Yardi argues that Entrata cannot satisfy the last element because it cannot show economic loss resulting from Yardi's false advertising. (*See* ECF No. 528 at 36.)

In support of its argument, Yardi cites an Eighth Circuit case for the proposition that "[a] 'heightened level of proof of causation and specific injury' is required when the plaintiff is seeking money damages" under the Lanham Act.[2] (ECF No. 528 at 36 (quoting *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1335–36 (8th Cir. 1997).) The language Yardi quotes

[2] Yardi does not address the fact that Entrata, in its First Amended Complaint, seeks injunctive relief under the Lanham Act. (*See* FAC ¶ 123, ECF No. 55 at 50.) Yardi's own cited authority provides that "cases involving injunctive relief and those seeking monetary damages under the Lanham Act have different standards of proof." *Porous Media Corp.*, 110 F.3d at 1335. Because Yardi does not seek summary adjudication of Entrata's request for injunctive relief, the court only focuses on Yardi's arguments related to monetary damages.

regarding the "heightened level of proof of injury" relates to "suit[s] for money damages where a defendant misrepresents its *own* product . . . ." *Porous*, 110 F.3d at 1336 (emphasis added).

But Entrata does not argue that Yardi misrepresented one of Yardi's own products. Rather, Entrata argues that Yardi sent out a notice to mutual Entrata and Yardi customers on January 14, 2015, that misrepresented *Entrata's* products. Entrata argues that Yardi falsely alleged that Entrata's custom interface uses SQL injection. (*See* ECF No. 596 at 18.[3]) Courts have made clear that a plaintiff's burden when a defendant misrepresents its own products is different than when a defendant misrepresents a competitor's products. *See Porous*, 110 F.3d at 1334 ("In *Harper House*, the defendant made false statements about its own product with no reference to another's product. Under the circumstances, the court required specific proof of causation and damage. This is in contrast to a case of comparative advertising where the plaintiff's product is specifically targeted."). "[I]n cases where there is no comparative advertising involved, the plaintiff must shoulder the full burden of proof of both cause in fact and injury." *Id*. But "in comparative advertising cases where money damages are sought and where there exists proof of willful deception," a plaintiff is entitled to a "presumption of causation and harm to the plaintiff." *See id*. at 1336.

The Tenth Circuit has discussed the "presumption of causation and injury" "that allows a factfinder to presume injury caused by representations which are literally false or demonstratively deceptive." *Hutchinson v. Pfeil*, 211 F.3d 515, 522 (10th Cir. 2000). "[T]his presumption is . . . invoked primarily to resolve the merits of Lanham Act claims—to establish injury as an essential element of the claim . . . ." *Id*. The Tenth Circuit has provided that "the

[3] Entrata agues: "Yardi's January 2015 Notice claimed that Entrata's custom interface 'is known to use SQL injection and to make .dll modifications without notice.' This was untrue." (ECF No. 596 at 18) (citations omitted).)

presumption is properly limited to circumstances in which injury would indeed likely flow from the defendant's objectionable statements, i.e., when the defendant has explicitly compared its product to the plaintiff's or the plaintiff is an obvious competitor with respect to the misrepresented product." *Id*.

Viewing the evidence in the light most favorable to Entrata, the court finds that there are sufficient facts to allow a factfinder to presume Entrata's injury. Yardi's own witness admitted that the representation that "Entrata's customer interface is known to use SQL injection" "was a wording choice . . . that was incorrect." (*See* ECF No. 597-4 at 129, Schindelbeck 131: 2–3.) This is sufficient evidence for a factfinder to determine that Yardi's statement was false.

Yardi's (possibly) false statement was that Entrata's "custom interface" "is known to use SQL injection." (ECF No. 597-13 at 9.) Entrata has presented evidence that "SQL injection" "is a term used typically by hackers and attackers to attack a system. It is a technique used to attack a system intentionally. So it does have negative connotations to the public, for certain." (ECF No. 597-14 at 247.) Yardi's announcement to mutual customers was that Yardi's "standard interface application" "does not allow SQL injection . . . ." (ECF No. 597-13 at 9.) In contrast, as discussed above, Yardi's announcement made clear that Entrata "custom interface" applications were "known to use SQL injection." (ECF No. 597-13 at 9.) Yardi's announcement associated Entrata's custom interfaces with illegal hacking while simultaneously making clear that Yardi's standard interface did not suffer from that vulnerability. In short, Yardi made an objectionable statement that compared its standard interface to Entrata's custom interface. A reasonable factfinder could therefore apply the presumption of causation and injury. With the presumption in place, Entrata has established its entitlement to damages at this stage of the proceedings.

Of course, at trial, Yardi can overcome the presumption "by proof that customers and/or prospective customers were not deceived" by the statements related to SQL injection "and/or that [Entrata] has not suffered any damages as a result of" Yardi's statements. *Porous*, 110 F.3d at 1333. Moreover, even if Entrata establishes its claim at trial, it will "still [bear] the burden of proving an evidentiary basis to justify any monetary recovery." *Id*. at 1336.

The court DENIES Yardi's Motion for Summary Adjudication of Entrata's second claim.

II. Contract Claim

Entrata brings one remaining contract claim against Yardi for Breach of Express Contract—2006 NDA (*See* FAC ¶ 172, ECF No. 55 at 60.)

A. Breach of Express Contract

In its ninth claim, Entrata alleges that Yardi breached a 2006 non-disclosure agreement (NDA) when it "modified, reverse engineered, duplicated, simulated, decompiled, [and] created derivative works from, or disassembled one or more of Entrata's software programs without Entrata's prior written consent . . . ." (FAC ¶ 175, ECF No. 55 at 60.) Entrata argues that Yardi breached the NDA in two ways. (*See* FAC ¶¶ 176–177, ECF No. 55 at 60.) First, Entrata argues that Yardi's CEO in 2009 "instruct[ed] his software developers to decompile the Entrata custom integration to obtain its source code . . . ." (FAC ¶ 176, ECF No. 55 at 60.) Second, Entrata argues that "Yardi purposefully" modified, removed, renamed, or disabled "the diagnostics.asmx file located within Entrata's custom interface files" in 2015. (FAC ¶ 177, ECF No. 55 at 60.)

The NDA provided that it "shall be construed and enforced in accordance with the laws of the State of California." (ECF No. 597-10 at 303.) In this case, there is complete diversity of citizenship. (*See* FAC ¶¶ 1–2, ECF No. 55 at 2.) "A federal court sitting in diversity applies the . . . choice of law rules . . . of the forum state." *Barrett v. Tallon*, 30 F.3d 1296, 1300 (10th

Cir.1994). The forum state is Utah. "Under Utah's choice of law rules, a contractual provision selecting a particular state's law will be upheld." *Wakefield Kennedy, LLC v. State Capital Holdings, LLC*, 614 F. App'x 929, 933 (10th Cir. 2015) (citing *Jacobsen Constr. Co. v. Teton Builders*, 106 P.3d 719, 723 (Utah 2005)). California law governs Entrata's breach of express contract claim.

In California, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821, 250 P.3d 1115, 1121 (2011). Yardi argues that Entrata is unable to satisfy the last element because Entrata "fails to show any damage resulting from [Yardi's] alleged breach." (ECF No. 528 at 46.)

Yardi argues that "Entrata provides no evidence that the 2009 decompilation or 2015 Quarantine caused Entrata any harm." (ECF No. 528 at 46.) With respect to the 2009 decompilation, Yardi argues that "it is undisputed that Entrata voluntarily allowed Yardi to review the Custom interface source code" in 2007, and "it is also undisputed that decompilation reveals no more information about source code than does direct source code review itself." (ECF No. 528 at 46.) Yardi further argues that Entrata has offered "no evidence that the specific version that Yardi decompiled" in 2009 had, "in fact, been upgraded or otherwise changed since 2007." (ECF No. 528 at 46 n. 154.)

In response, Entrata argues that its harm from the 2015 Quarantine is the same harm that it described with respect to its tort damage. (ECF No. 596 at 45.) The court agrees with Yardi that Entrata's conclusory response on this issue is insufficient to survive summary judgment. Regarding the 2009 decompilation, Entrata relies on two cases—*Artifex Software, Inc. v.*

Hancom, Inc., No. 16-CV-06982-JSC, 2017 WL 4005508 (N.D. Cal. Sept. 12, 2017) and *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 F. App'x 665 (9th Cir. 2010).

Entrata cites *Foster Poultry* for the proposition that "a violation of a confidentiality obligation can be harmful in and of itself, which is a fact in dispute for the jury." (ECF No. 596 at 45.) But in *Foster Poultry*, the defendant "misused" the plaintiff's "information *for its own profit*." *Foster Poultry*, 377 F. App'x at 669 (emphasis in original). Moreover, the "gains from the breach" of the confidentiality agreement were "specifically quantifiable." *Id*. at 668. It was for this reason that the Ninth Circuit held that "under California law, a defendant's unjust enrichment can satisfy the 'damages' element of a breach of contract claim, such that disgorgement is a proper remedy." *Id*. at 669. But Entrata has pointed to no specific evidence that Yardi gained an unfair profit from its breach. Entrata's reliance on *Foster Poultry* is therefore misplaced.

Entrata also cites to *Artifex* in support of its argument that "Yardi gained valuable, proprietary information about Entrata's superior technology, which has harmed Entrata and precludes summary judgment." (ECF No. 596 at 45.) But in *Artifex*, the court held that the defendant "failed to establish as a matter of law that unjust enrichment or disgorgement [were] not available as a measure of Plaintiff's damages" because in that case "a party obtained a benefit they would not have otherwise obtained *and profited from that benefit* without providing a corresponding benefit to the other party." *Artifex*, 2017 WL 4005508, at *4 (emphasis added).

Unlike in *Artifex* and *Foster Poultry*, Entrata has pointed to no evidence that Yardi profited from its breach. Based on the arguments made, the court holds that Yardi is entitled to summary judgment on Entrata's direct breach of contract claim. Yardi's Motion for Summary Adjudication of Entrata's ninth claim is GRANTED.

III. Antitrust Claims

Entrata's fifth and sixth claims allege violations of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. (*See* FAC ¶ 143, ECF No. 55 at 54; FAC ¶ 151; ECF No. 55 at 56.) Section 2 of the Sherman Act prohibits monopolization or attempted monopolization of "any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. "Illegal monopolization under § 2 of the Sherman Act has two distinct elements: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 841 (10th Cir. 2016) (citation omitted). "'A refusal to deal may be one of the mechanisms by which a monopolist maintains its power.'" *Id.* (citation omitted). Entrata brings its antitrust claims under the refusal to deal doctrine.

To invoke the refusal to deal doctrine, the Supreme Court and the Tenth Circuit have explained that "at least two features" "must be present." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074 (10th Cir. 2013). First, "there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival." *Id*. Second, "the monopolist's discontinuation of the preexisting course of dealing must suggest a willingness to forsake short-term profits to achieve an anti-competitive end." *Id*. at 1075 (internal quotation marks omitted) (citations omitted). That is, "the monopolist's conduct must be irrational but for its anticompetitive effect." *Id*.

Yardi makes several arguments in support of its position for summary adjudication of Entrata's antitrust claims. The court addresses each in turn.

A. Entrata's Antitrust Claims Are Not Foreclosed by Tenth Circuit Precedent

Yardi argues that two Tenth Circuit cases require summary judgment—*Novell* and *SOLIDFX*. (*See* ECF No. 629 at 8 ("*Novell* Requires Summary Judgment."); *see also* ECF No. 629 at 17 ("*Jeppesen* Requires Summary Judgment.").)

Preexisting Course of Dealing

Yardi argues that Entrata cannot satisfy the first feature of a refusal to deal claim—a preexisting voluntary and profitable course of dealing. (*See* ECF No. 629 at 11.) Yardi argues that Entrata changed the preexisting course of dealing when "it introduced Entrata Core to compete head-to-head with Voyager." (*See* ECF No. 629 at 12.) But on this point, Entrata has pointed to ample evidence of a preexisting, profitable course of dealing and provides evidence that Yardi unilaterally ended the relationship. (*See e.g.*, ECF No. 597-16 at 40.) Entrata's evidence creates a dispute that precludes summary judgment.

Some Evidence that Yardi Was Willing to Sacrifice Short-Term Profits

Next, Yardi argues that "there is no evidence that Yardi gave up short-term profits." (ECF No. 629 at 12.) In *Novell*, the plaintiff "presented **no evidence** from which a reasonable jury could infer that Microsoft's discontinuation of [a prior] arrangement suggested a willingness to sacrifice short-term profits . . . ." *Novell*, 731 F.3d at 1076 (bold added). In *Novell*, the cotemporaneous evidence presented demonstrated that Bill Gates' decision was motivated by a desire to increase Microsoft's profits—and did not "suggest Microsoft intended to forgo profits." *Id*. at 1078; *see also id*. at 1076 ("[I]t's not clear Microsoft lost **or expected** to lose revenues in the short term." (bold added)). *Novell* does not require summary judgment on this issue because—viewing the evidence in the light most favorable to Entrata, as this court must—Entrata has presented at least some contemporaneous evidence that Yardi was willing "to forsake short-term profits to achieve an anti-competitive end." *Novell*, 731 F.3d at 1075. For example, Entrata has provided evidence that Yardi's CEO was willing to lose 100 customers to "cut off" Entrata's "custom integration." (ECF No. 597-8 at 76.[4]) And Entrata has pointed to evidence that Yardi offered substantial discounts to mutual Entrata/Yardi customers to persuade them to remain with Yardi after Yardi cutoff Entrata. Because Entrata has provided some evidence of Yardi's willingness to sacrifice short-term profits, the factfinders will have to weigh Yardi's competing evidence and decide whether Yardi's decision was motivated by a desire to increase its profits.

<u>Some Evidence that Yardi's Conduct Was Irrational</u>

Next, Yardi argues that "there is no evidence that Yardi acted irrationally." (ECF No. 629 at 16.) In addition to a willingness to give up short-term profits, *Novell* "require[s] a showing that the monopolist's refusal to deal was part of a larger anticompetitive enterprise, such as . . . seeking to drive a rival from the market or discipline it for daring to compete on price." *Novell*, 731 F.3d at 1075. "Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect." *Id*. at 1075.

Yardi argues that "[e]ven if Yardi accepted that it would lose profits, Yardi still had multiple rational justifications to end its relationship with Entrata—reasons which . . . support summary judgment." (ECF No. 629 at 16.) A refusal to deal with a competitor does not violate Section 2 if "valid business reasons exist for that refusal." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597, 105 S. Ct. 2847, 2854, 86 L. Ed. 2d 467 (1985). Yardi argues

[4] Entrata has presented evidence that Yardi's CEO made this statement to a (previously) mutual Entrata/Yardi customer shortly after Yardi's November 2015 announcement that it would no longer host custom interfaces. (*See* ECF No. 597-8 at 72–73.)

that it "need only have a single valid business reason to defeat Entrata's claims." (ECF No. 629 at 16.)

Yardi's argument presupposes that the reasons it now offers for refusing to deal with Entrata were valid. But *Aspen* makes clear that that is a question for the jury to decide—not the court—so long as there is some evidence in the record that could support a finding that Yardi's proffered business reasons for its refusal to deal with Entrata were invalid. *See Aspen*, 472 U.S. at 604–05 ("Since the jury was unambiguously instructed that Ski Co.'s refusal to deal with Highlands 'does not violate Section 2 if valid business reasons exist for that refusal,' we must assume that the jury concluded that there were no valid business reasons for the refusal. The question then is whether that conclusion finds support in the record."). The court cannot at this time hold, as a matter of law, that Yardi's justifications are valid.[5]

[5] In order to answer this question, "perhaps [the] most significant" consideration for the fact finder "is the evidence relating to" Yardi itself, and whether Yardi's conduct "was justified by any normal business purpose." *Aspen*, 472 U.S. at 608. Yardi argues that it had multiple rational business purposes to end its relationship with Entrata—among them that Entrata misappropriated and lied about possessing a copy of Voyager and also that it was protecting its own intellectual property. Entrata argues that Yardi's "proffered business justifications" "are pretextual," as evidenced by Yardi's "shifting" and "inconsistent" positions. (*See* ECF No. 596 at 33.) The court agrees with Entrata that there is evidence that Yardi has offered shifting justifications for its conduct. As in *Aspen*, there is at least some evidence that from which a jury could conclude that Yardi's justifications are invalid.

Additionally, in determining whether Yardi's "refusal to deal was part of a larger anticompetitive enterprise," *Novell*, 731 F.3d at 1075, "it is [also] relevant [for the fact finder] to consider the impact on consumers and whether [Yardi] has impaired competition in an unnecessarily restrictive way." *See Aspen*, 472 U.S at 605. "If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory." *Id*. (internal quotation marks omitted) (citation omitted). "It is, accordingly, appropriate to examine the effect of the challenged conduct on consumers . . . ." *Id.*

Entrata has offered ample evidence that mutual customers preferred Entrata's integration products and were displeased at being forced to choose between Yardi and Entrata—especially because that choice increased costs for some customers. (*See e.g*, ECF No. 597-14 at 40 (An email from a (previously) mutual Yardi/Entrata customer to a Yardi representative provided, in relevant part: "Given our history with Yardi, and the reputation management Marisa has cultivated over the past two decades, Sentinel chose to align itself with Yardi **at a greater financial cost than we were paying to Entrata**. To now tell our executive committee that the **increased cost comes with decreased functionality** is going to damage that reputation within our company." (bold added).))

The effect of Yardi's conduct on consumers, and the evidence that Yardi was willing to damage its own reputation in order to cut off Entrata, provides further evidence of Yardi's irrational conduct.

Factual Disputes Preclude Yardi's Invocation of SOLIDFX

In its Motion for Summary Judgment, Yardi argued that "[i]t is undisputed that, at the time Yardi made its decision to no longer work with Entrata," it "believed that Entrata had violated Yardi's intellectual property rights . . . ." (ECF No. 528 at 23.) Yardi argues that its "decision to discontinue Entrata's access to its intellectual property is shielded from antitrust liability" because that decision is a presumptively valid business justification that Entrata cannot rebut. (*See* ECF No. 528 at 23–24.)

Yardi relies on *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827 (10th Cir. 2016) in support of its argument. In *SOLIDFX*, the Tenth Circuit referenced decisions from the First and Federal Circuits stating that a company's "unilateral refusal to sell or license copyrighted expression" to a competitor triggers a "presumptively rational business justification for a unilateral refusal to deal." *See SOLIDFX*, 841 F.3d at 841–42. Although the Tenth Circuit stated that it agreed with that approach, it was not required to resolve what facts would be necessary to rebut the presumption because "SOLIDFX did not present any rebuttal evidence to prove [the defendant] acted solely with an anticompetitive motivation." *Id*. at 843. Thus, the metes and bounds of what evidence is required to rebut any presumption remains to be resolved in an appropriate case presenting that factual issue.

In *SOLIDFX*, it was undisputed that the antitrust plaintiff required access to the antitrust defendant's copyrighted toolkits in order to develop an Ipad app that would allow the antitrust plaintiff to develop software that would allow end users to display the defendant's copyrighted terminal charts. *See SolidFX, LLC v. Jeppesen Sanderson, Inc.*, 935 F. Supp. 2d 1069, 1082 (D. Colo. 2013) ("it is undisputed that, in order to develop its app, Plaintiff needs access to

Defendant's JIT, for which Defendant also holds a copyright.").[6] After previously granting the plaintiff access to the copyrighted toolkits to develop software for e-readers, the defendant decided to not grant the plaintiff access to the copyrighted toolkits to develop software for the Ipad apps.[7] Rather, the defendant decided to develop its own application using its own intellectual property. Thus, it used its own intellectual property to innovate and compete in the relevant market.

As explained below, the court holds that Yardi is not entitled to summary judgment based on *SOLIDFX* because unlike in that case, it is not undisputed that Entrata requires access to any of Yardi's copyrighted materials in order for its custom integration to function or that Yardi took the challenged action to use its intellectual property to innovate a new competitive product.

As an initial matter, the court notes that Yardi, in its Motion for Summary Judgment, failed to specifically identify the intellectual property that it (purportedly) refused to license to Entrata. Instead it simply stated, in a conclusory fashion, that "Yardi's decision to discontinue Entrata's access to its intellectual property is shielded from antitrust liability." (ECF No. 528 at 24.) A prerequisite to the invocation of *SOLIDFX's* presumption is that the antitrust defendant had refused to license or sell a copyrighted or patented technology. Yardi cannot invoke the presumption and argue that it is entitled to summary judgment without identifying the copyrighted technology, and the scope of protection afforded by such a copyright, in its Motion

[6] *See also SolidFX, LLC v. Jeppesen Sanderson, Inc.*, 935 F. Supp. 2d 1069, 1076 (D. Colo. 2013) ("In addition to the Terminal Charts, the Agreement gave Plaintiff a license to use Defendant's **copyrighted** **Jeppesen Integration Toolkits** ("JIT") which are proprietary products that allow the integration of the Terminal Charts in third party systems." (emphases added)); *see id*. at 1077 ("In January 2010, Plaintiff requested the JIT from Defendant so that Plaintiff could develop an app for the iPad."); *see id* ("Plaintiff repeatedly informed Defendant that it was moving forward with plans to develop an iPad app that would display Defendant's Terminal Charts.").

[7] *See id*. at 1077 ("On May 26, 2010, Defendant informed Plaintiff that it would not allow others, including Plaintiff, to have the JIT for the iPad.").

for Summary Judgment. Because it did not, it is not entitled to summary judgment based on its invocation of *SOLIDFX*.

In its Reply, with the benefit of new counsel, Yardi did specifically identify two technologies that it argues entitles it to the *SOLIDFX* presumption. Yardi argued that its "refusal to license its intellectual property to Entrata, whether through [1] **SIPP** or [2] **a custom interface**, is a *per se* valid business justification that defeats Entrata's claims." (ECF No. 629 at 17 (bold added).) Yardi argues that "it is undisputed that Entrata would have access to Yardi's intellectual property as a SIPP partner." (ECF No. 629 at 19 n. 16.) But Entrata disputes that claim. At oral argument, Entrata's counsel argued that "the standard interface, the purpose of the way it's designed, is to protect access to the Voyager program as well as the databases. And vendors that use the standard interface[–] they don't have access to the Voyager program or even the databases beyond what a customer might allow. That's the design of the standard interface. So there is *nothing that is copyrighted here that is needed to keep this relationship alive* and make the products work together." (ECF No. 835 at 173 (emphasis added).) In its Opposition to Yardi's Motion in Limine No. 2, Entrata similarly argues that it would not need to access any of Yardi's copyrighted software to continue its own custom interface. (*See* ECF No. 775 at 12 ("Yardi's unilateral modification and ultimate block of Entrata's own intellectual property underlie Entrata's antitrust claims. Entrata *did not want a license to any Yardi copyrighted software*—it simply sought to stop Yardi from blocking Entrata's own interface.") (emphasis added).)

Thus, unlike in *SOLIDFX*, it is not "undisputed that, in order" for Entrata to develop its custom integration products, it "needs to access" Yardi's copyrighted materials. *See SOLIDFX*, 935 F. Supp. 2d at 1082. This disputed fact precludes summary judgment on this issue.

B. Triable Issues of Fact Regarding Market Definition and Injury Preclude Summary Judgment

Yardi argues that "Entrata cannot carry its burden to define a relevant market," and argues that "Entrata cannot show that its alleged injury flows from a harm to competition." (ECF No. 528 at 25.) "It is well settled that defining the relevant market is an issue of fact." *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1131 (10th Cir. 2002). The court agrees with Entrata that its market definition boundaries constitute material fact disputes for the jury.

Yardi cites *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996) for the proposition that "[a]n antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services, not just his own welfare." (ECF No. 528 at 34 (citation omitted).) "In other words, because 'antitrust law aims to protect competition, not competitors, [a court] must analyze the antitrust injury question from the viewpoint of the consumer.'" *Matthews*, 87 F.3d at 641. Entrata has pointed to ample evidence that Yardi's actions have harmed consumers. (*See e.g.,* ECF No. 596 at 21–22.) Yardi is not entitled to summary judgment on these points.

SO ORDERED this 14th day of August 2019.

BY THE COURT:

Clark Waddoups
United States District Court Judge