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24 UNITED STATES DISTRICT COURT
 25 CENTRAL DISTRICT OF CALIFORNIA

26 YARDI SYSTEMS, INC.
 27 Plaintiff,
 28 vs.
 29 PROPERTY SOLUTIONS
 30 INTERNATIONAL, INC.
 31 Defendant.

32 _____
 33 PROPERTY SOLUTIONS
 34 INTERNATIONAL, INC.,
 35 Counter-Claimant,
 36 vs.
 37 YARDI SYSTEMS, INC.
 38 Counter-Defendant

Case No. 2:13-CV-07764-FMO-CW
**MEMORANDUM OF POINTS AND
 AUTHORITIES IN OPPOSITION TO
 MOTION FOR SUMMARY
 JUDGMENT**

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I. INTRODUCTION

1
2 In 2004, Property Solutions International, Inc. (nka Entrata Inc.) (“PSI”)
3 approached Yardi Systems, Inc. (“Yardi”) and expressed interest in building a
4 “custom interface” program to enable the exchange of data between PSI’s portal
5 products and Yardi clients’ Voyager databases. The parties entered into non-
6 disclosure agreements (“NDAs”) in 2004 and 2006, and Yardi disclosed
7 confidential information to PSI pursuant to those agreements. The NDAs did not
8 authorize PSI to use or possess a copy of Yardi Voyager, Yardi’s property
9 management software platform (the “Voyager application”), and expressly
10 prohibited PSI from reverse engineering or misusing any Yardi confidential
11 information, however obtained. With Yardi’s help, PSI developed its custom
12 interface utility (the “Custom Interface”) and for years Yardi worked cooperatively
13 with PSI so PSI could maintain and improve the Custom Interface for the benefit of
14 mutual customers.

15 Of course, this case is not—and has never been—about the *Custom Interface*.
16 (Ex. 47¹ at 484-85.) This case is about PSI’s theft and misuse of Yardi’s
17 intellectual property, including the *Voyager application*, which Yardi developed
18 over the course of 30 years. PSI coveted the Voyager application’s specialized
19 features, functions, methods, and techniques because customers needed them. But
20 because PSI lacked the time, expertise, and resources it needed to understand,
21 develop and perfect these key features for its “own” property management software
22 called Entrata Core, PSI: (1) illegally obtained, installed, and used copies of the
23 Voyager application on PSI’s servers; (2) hired specialists to examine and attempt
24 to duplicate features and functions from the Voyager application; (3) lied to and
25 manipulated mutual clients to gain unlawful access to Yardi’s intellectual property;
26 (4) had its CEO Dave Bateman *personally hand-carry* a server to his software

27
28 ¹ Exhibits 47 through 89 are filed with this opposition in Yardi’s Evidentiary
Appendix. Exhibits 1 through 46 were filed with PSI’s motion (Dkt. No. 163).

1 development team in India—which just happened to contain copies of the Voyager
 2 application PSI illegally obtained; (5) engaged in an elaborate conspiracy of
 3 deception specifically orchestrated to conceal from Yardi what PSI was doing,
 4 which it did not publicly acknowledge until it announced the release of Entrata
 5 Core in June 2012; and (6) when confronted by Yardi, PSI repeatedly lied to Yardi
 6 about all of this—and continued lying even after Yardi was forced to file its
 7 lawsuit.

8 Because PSI can no longer deny what it did, PSI argues instead that Yardi
 9 knew and approved of PSI’s conduct all along—and that, even if Yardi did not
 10 approve, Yardi should have sued PSI sooner. But to support its arguments, PSI’s
 11 summary judgment motion relies on disputed facts, and obfuscates,
 12 mischaracterizes, and makes unsupportable inferences from undisputed facts.²
 13 Summary judgment is not proper.

14 II. ARGUMENT

15 A. Yardi’s Trade Secrets Claim Is Timely, and PSI’s Contentions to the 16 Contrary Are for the Jury to Resolve

17 1. A Jury Must Resolve the Parties’ Competing Contentions

18 PSI’s contention that Yardi’s trade secrets claim is untimely is built upon
 19 PSI’s obfuscation of the facts. Yardi disputes not only material facts that PSI
 20 alleges are “undisputed,” but also many of the *inferences* PSI attempts to draw from
 21 the facts, including facts that Yardi does not dispute. Competing inferences are for
 22 a jury to decide, and on summary judgment all reasonable inferences from the

23 _____
 24 ² The facts Yardi disputes are set forth in its Separate Statement. Yardi also
 25 disputes *the inferences* PSI’s draws from numerous additional facts, as discussed in
 26 detail below. For the Court’s convenience, those disputed inferences concern PSI
 27 facts D18, D27, D28, D29, D34, D45, D46, D49, D50, D52, D57, D62, D63. All
 28 told, Yardi disputes facts and inferences regarding 55 out of PSI’s 106 alleged
 “undisputed” facts. The only alleged PSI “facts” Yardi does not take issue with are
 those in which PSI simply restates Yardi’s allegations, or are otherwise irrelevant
 (i.e. general facts about the parties’ background, et cetera).

1 facts—even undisputed facts—must be drawn in Yardi’s favor. *Anderson v.*
 2 *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986) (“The
 3 evidence of the non-movant is to be believed, and all justifiable inferences are to be
 4 drawn in his favor.”); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct.
 5 1598, 1608 (1970) (even if the facts are undisputed, if reasonable minds could
 6 differ concerning the inferences to be drawn from those facts, summary judgment
 7 should be denied).

8 **a. Competing Inferences and Factual Disputes Regarding the**
 9 **2004 and 2006 WNG Communications**

10 PSI contends that 2004 and 2006 communications involving mutual customer
 11 WNG establish beyond dispute that PSI “obtain[ed] access to [the] Voyager
 12 [application] and Voyager databases with Yardi’s knowledge and approval.” (Mot.
 13 at 3-4). This is simply not true. First, in 2004 and pursuant to an NDA, Yardi
 14 provided PSI with the *Genesis* application (which is not at issue in this case) for
 15 purposes of developing the Custom Interface. (Ex. 1 at 1-2; Ex. 48 at 488 ¶ 3; Ex.
 16 49 at 497-99; Ex. 50 at 500; Ex. 51 at 501-02.) Second, none of the
 17 communications (in 2004 or 2006) show Yardi approving PSI’s *possession* of the
 18 *Voyager application*. Instead, these communications show that, in the ordinary
 19 course of the parties’ business relationship, Yardi did not object to WNG providing
 20 PSI, pursuant to the parties’ NDAs, a copy of WNG’s *Voyager database* to help
 21 PSI troubleshoot the Custom Interface.³ (P124, Ex. 2 at 4; Ex. 55 at 550 ¶ 10.)

22 ³ PSI obfuscates the important distinctions between a *Voyager database*, the
 23 *Voyager application*, and PSI’s *Custom Interface*. To help clarify, Yardi submits
 24 the diagram in Appendix A to the Declaration of Anant Yardi (“Yardi Decl.”). (Ex.
 25 48 at 489-90 ¶ 5). In sum, a *Voyager database* contains client data, whereas the
 26 *Voyager application* is a complex software program that uses and writes data to and
 27 from a *Voyager database* and performs a wide range of property management and
 28 accounting functions, methods and techniques, many of which are at issue in this
 case. PSI’s *Custom Interface* has no relationship to the *Voyager application* or
 Yardi’s trade secrets; rather, the *Custom Interface* is a small utility that allows *PSI’s*
client websites (“*portals*”) to exchange data with that client’s *Voyager database*.

1 More specifically, PSI contends that in 2004, PSI “reached out” to Yardi to
2 obtain a copy of the Voyager database and a “Voyager test system” to help PSI
3 make the Custom Interface work for the WNG project. PSI claims that, in
4 response, Yardi provided “a license file that allowed PSI to install and operate
5 Yardi Genesis, *the desktop application version of Voyager.*” (Mot. at 3:12-22)
6 (emphasis added). But Yardi disputes this—(1) the reference by PSI to “Voyager
7 test system” is another erroneous inference drawn by PSI; the actual evidence reads
8 “test system” and, in context, plainly refers to a test *database* (D19: disputed, Ex.
9 12 at 31-32); (2) there is nothing here (or anywhere) to indicate that Yardi
10 “approved” PSI obtaining access to or possession of the Voyager application (D18:
11 disputed inference; Ex. 12 at 31-32); and (3) Yardi’s Genesis software is not “the
12 desktop application version of Voyager” as PSI construes it (D21: disputed; Millar
13 Tr. [Ex. 35] 18:6-19:14; Ex. 48 at 488 ¶ 3; Ex. 55 at 552 ¶ 16; D22, D23: disputed
14 inference). The Genesis software and the Voyager software are both property
15 management programs written by Yardi, but in 2004 Genesis targeted smaller
16 clients and lacked significant features and functionality found in the Voyager
17 application. (Ex. 48 at 488 ¶ 3.) In any event, PSI’s use and possession of Genesis
18 was strictly subject to the 2004 NDA and thus Genesis has no relevance whatsoever
19 to PSI’s (erroneous) argument that Yardi gave PSI permission to obtain and possess
20 the Voyager application from mutual client WNG—or otherwise. (Ex. 1 at 1-2; Ex.
21 48 at 488 ¶ 3; Ex. 49 at 497-99; Ex. 50 at 500; Ex. 51 at 501-02.)

22 The factual disputes about the 2006 WNG communications are even starker.
23 PSI contends that in 2006, PSI CEO David Bateman contacted Yardi vice president
24 Bryant Shoemaker by phone and explained that, to complete the WNG integration,
25 PSI “would need access to both the Voyager application and the database.” (Mot.
26

27 The Custom Interface is not customer-facing software, is not property management
28 software, and it performs no specialized property management or accounting
functions. (*Id.*; Bateman 12/8/15 Tr. [Ex. 52] 113:11-114:25.

1 at 3-4.) According to Bateman’s self-serving testimony⁴—which is not supported
2 by any other evidence—Shoemaker “told [PSI] to get the Voyager application and
3 database from WNG.” (*Id.*; D104: disputed; Bateman 12/8/15 Tr. [Ex. 43] at
4 259:5-24.) PSI claims Bateman’s supposed “recollection” is supported by the fact
5 that WNG sent a “license file” to Bateman, copying Shoemaker on the email, and
6 argues this shows Yardi “approved” PSI obtaining a copy of the Voyager
7 *application*. (Mot. at 3-4.) However: (1) there is no substantive communication to
8 Shoemaker in this email; (2) Shoemaker makes no comment about the license file
9 or what it is used for in the email (nor does anyone else); and (3) there is no
10 indication Shoemaker saw or read the email. (D33: disputed; Ex. 13 at 33-34; Ex.
11 48 at 495 ¶ 12; Ex. 54 at 544-45 ¶¶ 4,7.)

12 On summary judgment PSI’s inferences cannot contradict what the emails
13 actually say—and what Yardi justifiably contends—which is that the 2006 WNG
14 emails pertain *only* to the Voyager *database*:

15 **First:** On their face these emails between Bateman and Shoemaker reference
16 only the Voyager *database*. (Ex. 13 at 33-34; Ex. 2 at 4; Bateman 12/8/15 Tr. [Ex.
17 52] 283:4-19.) This is not Yardi’s inference—it’s what the emails actually say.
18 (D27, D28, D34: disputed inference; Ex. 13 at 33-34; Ex. 2 at 4; Bateman 12/8/15
19 Tr. [Ex. 52] 283:4-19.) There is no mention of the Voyager *application*, nor is
20 there any discussion between Bateman and Shoemaker (or anyone) about using the

21
22 ⁴ In his first deposition, Bateman stated he only recalled that he had
23 conversations in which Shoemaker supposedly gave PSI permission to obtain a
24 copy of the Voyager application, but admitted “I don’t remember the specifics of
25 the verbal conversations.” (Bateman 12/4/14 Tr. [Ex. 32] 112:8-25.) In his
26 December 8, 2015 deposition, however, Bateman “recalled” that there were
27 “multiple” and “very specific” communications with Shoemaker, and purported to
28 quote detailed statements Shoemaker made in these supposed conversations –
statements that, conveniently, support PSI’s summary judgment motion. (Bateman
12/8/15 Tr. [Ex. 52] 97:11-99:3, 267:19-268:21.) The serious credibility questions
here—and elsewhere—preclude summary judgment.

1 Voyager *database* for anything other than PSI’s work on the Custom Interface.
2 Finally, there is no reference to PSI using *any* Yardi material to develop a
3 competing property management accounting product. (Ex. 55 at 554 ¶ 21.)

4 **Second:** Bateman’s supposed recollection of 2006 telephone conversations
5 in which Shoemaker purportedly approved giving PSI a copy of the Voyager
6 application is simply not credible. (D103, 104: disputed; Ex. 54 at 544-47 ¶¶ 5-10;
7 D29: disputed inference.) It is not reflected in any correspondence between
8 Bateman and Shoemaker—including the correspondence that dealt specifically with
9 PSI’s possession of the WNG Voyager database—and in any event it is pure
10 fantasy to think Yardi would have agreed to give its flagship Voyager property
11 management software to anyone outside of the normal sales and licensing process,
12 let alone that a third-party would be told to get Yardi’s flagship software from a
13 client. (Ex. 54 at 544-47 ¶¶ 4-10.)

14 Moreover, even if Yardi *had* given PSI permission to obtain a copy of the
15 Voyager *application* from WNG (which Yardi did not), this would have been of far
16 greater significance than PSI obtaining a client’s Voyager *database* and thus surely
17 would have been memorialized in the relevant correspondence. (*Id.*) According to
18 PSI CEO Bateman, PSI wanted to “make sure” PSI had “crossed [its] T’s and
19 dotted [its] I’s” so that Yardi was “directly” aware that PSI had obtained “copies of
20 the database and application” which, if true, would be entirely consistent with
21 memorializing PSI’s supposed authorization to possess the Voyager application;
22 but no such memorialization exists. (Bateman 12/8/15 Tr. [Ex. 52] 98:23-99:3.)
23 Bateman’s testimony thus raises further issues as to his credibility, which are for
24 the jury to resolve. *See Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513 (“Credibility
25 determinations, the weighing of the evidence, and *the drawing of legitimate*
26 *inferences* from the facts are *jury* functions...”) (emphasis added). Even setting
27 aside Bateman’s self-admitted lies (discussed below) and the believability of his
28 “new” recollection, the underlying facts are still in dispute. (Ex. 54 at 544-47 ¶¶ 4-

1 10.)

2 **Third:** PSI implores the Court to accept as undisputed PSI's interpretation
3 of (and Bateman's incredible testimony about) Yardi's license files, arguing that
4 "[t]here would have been 'absolutely no purpose' to have the license file without
5 having a copy of the Voyager application to unlock." (Mot. at 4-5.) But PSI has its
6 facts wrong: a license file can be used for purposes that have nothing to do with the
7 Voyager application, such as allowing Yardi standard interfaces to communicate
8 with a Yardi database—and it is *undisputed* that WNG was using a Yardi standard
9 interface during this time. (Ex. 48 at 495 ¶ 12; *see also* Ex. 89 at 828 ("Matt gave
10 us a sample database to work with a year ago. We haven't used it though because
11 he gave us no lic file. If you could get that to us, we could do some testing to rule
12 out potential versioning issues.")) Additionally, custom interfaces created by other
13 third-party Yardi partners use the license file to communicate with a client's
14 Voyager *database*, in a process that has nothing to do with the Yardi Voyager
15 *application*. (Ex. 48 at 495 ¶ 12.) PSI's mischaracterization of the license file
16 creates a material factual dispute. (D33, D35, D93-D95, D105: disputed; Ex. 13 at
17 33-34; Ex. 54 at 544-47 ¶¶ 4-10; Ex. 48 at 490 ¶ 7.)

18 Even apart from the disputed facts, PSI's characterizations of the WNG
19 communications fail to support its summary judgment motion because any access
20 Shoemaker theoretically provided would have been governed by the NDAs
21 prohibiting PSI from using Yardi's intellectual property, including the Voyager
22 application, in any improper way regardless of how it was obtained. (P114, P115,
23 116; Ex. 56 at 555; Ex. 57 at 556-57.) Because Yardi had no reason to believe PSI
24 would not honor the NDA, PSI's access to the database could not alert Yardi to PSI
25 wrongdoing of any kind.

26 And in any event, Mr. Shoemaker lacked authority to grant PSI access to the
27 Voyager database (P119, Shoemaker Tr. [Ex. 36] 40:6-42:20; Yardi 12/11/14
28 Tr.[Ex. 38] 18:17-19:2; Ex. 55 at 553 ¶ 19) let alone a license file, because a license

1 file is intended only for the specific client that has licensed the Voyager software
2 (Ex. 55 at 553 ¶ 19.) Without authority, his alleged knowledge cannot be imputed
3 to Yardi. *See Van't Rood v. Cnty. of Santa Clara*, 113 Cal. App. 4th 549, 573
4 (2003) (“[T]he knowledge imputed to a principal is limited to that acquired by the
5 agent within the scope of his authority.”); *United States v. One 1986 Chevrolet*
6 *Monte Carlo*, 817 F. Supp. 729, 734 (N.D. Ill. 1993).

7 **b. Competing Inferences and Factual Disputes Regarding 2008**
8 **– 2009 Customer Service Interactions**

9 To support its motion, PSI claims that a series of emails from 2008 to 2009
10 between PSI and Yardi show Yardi allegedly knew and approved of PSI’s
11 possession of the *Voyager application*. According to PSI, these communications
12 “repeatedly made clear to Yardi that PSI had access to Voyager software and
13 Voyager databases.” (Mot. at 5-7.)

14 PSI mischaracterizes these emails. An examination of them indicates that the
15 parties are *only* discussing Yardi providing *access to databases* for Custom
16 Interface development and a “sandbox” environment, pursuant to the parties’ NDA,
17 for PSI’s evaluation of Yardi’s standard interface as an alternative to the Custom
18 Interface. (D37-44, D47-48, D97-101: disputed; Ex. 58 at 560-61 ¶¶ 5-6; Ex. 48 at
19 492-95 ¶ 11; Yardi 12/11/14 Tr. [Ex. 38] at 58:21-59:7; Ex. 3 at 6-9; Millar Tr. [Ex.
20 35] at 32:22-33:9; Ex. 10 at 26-27; Ex. 41 at 381-92; Millar Tr. [Ex. 59] at 36:16-
21 19; D45, D46, D49, D50: disputed inference.) By design, the sandbox is a limited,
22 locked-down test environment that would *not* allow PSI to misappropriate Yardi
23 trade secrets—and, in any event, PSI’s access was plainly covered by the NDAs.
24 (See Ex. 48 at 489-95 ¶¶ 5, 9, 11.) In sum, nothing in these emails indicates PSI
25 was authorized to obtain and possess a copy of the *Voyager application*. (See Ex.
26 48 at 492-95 ¶ 11.) Yardi is entitled to present this entirely correct interpretation of
27 the evidence to a jury. *See Adickes*, 398 US at 157.

28

1 PSI also asserts that “[b]eginning in at least 2008” Yardi personnel
2 participated in video conferences with PSI and mutual clients in which the Yardi
3 representatives allegedly “could see [PSI] representatives logging into the Voyager
4 application.” (Mot. at 6.) To the extent such a vague assertion has any evidentiary
5 force, Yardi disputes it: (1) Yardi personnel most directly involved with PSI’s
6 Custom Interface integration have denied that this occurred; (2) PSI has provided
7 no documents reflecting or otherwise evidencing such occurrences, despite the fact
8 that discovery has shown that PSI recorded many of their video conferences; and
9 (3) there is no way Yardi employees could have discerned from the log-in process,
10 as PSI describes it, that PSI (as opposed to the client) *possessed* the copy of the
11 Voyager application allegedly being used. (D101: disputed; Ex. 58 at 561-62 ¶¶ 7-
12 8; P174; Ex. 84 at 804 ¶ 13.) Setting aside these factual disputes, even if these
13 incidents occurred, the knowledge of the hypothetical Yardi employees could not
14 be imputed to Yardi. *See Van’t Rood*, 113 Cal. App. 4th at 573.

15 **c. PSI Mischaracterizes the Decompilation and 2009 Emails**

16 PSI asserts that Yardi’s 2009 analysis of PSI’s Custom Interface and
17 subsequent emails between Yardi CEO Anant Yardi and Yardi software developer
18 Jay Shobe, along with Mr. Yardi’s deposition testimony, establish beyond dispute
19 that Yardi should have sued PSI sooner. (Mot. at 7, 11-12.)

20 PSI is wrong. Yardi’s decompilation of the Custom Interface source code
21 was *not*, as PSI erroneously contends (*see* Mot. at 7), motivated by a concern that it
22 was “losing” competitively to PSI. (D52: disputed inference.) The evidence
23 instead shows Yardi analyzed the Custom Interface due to legitimate and well-
24 documented data security concerns, including a specific concern that the Custom
25 Interface allowed “SQL injection,” potentially creating serious risks to the security
26 of Yardi and client data. (D53A, D53B: disputed; Ex. 17 at 43-46; Ex. 18 at 47-48;
27 Yardi 12/11/14 Tr. [Ex. 38] at 124:10-125:13, 126:13-127:10; Ex. 60 at 566-70; Ex.
28 61 [Yardi 12/11/14] at 47:4-24; Ex. 62 at 588; Ex. 63 at 589; Ex. 64 at 590-95;

1 Zimmer Tr. [Ex. 65] 87:4-19, 93:14-24, 119:8-19, 139:11-140:1.) Additionally,
2 Yardi's analysis was not "a violation of the parties' non-disclosure agreement,"
3 despite PSI's assertions otherwise. (*See* Mot. at 11-12; D54: disputed; Yardi
4 12/11/14 Tr. [Ex. 61] at 51:22-53:2; Ex. 62 at 588; Ex. 63 at 589; Ex. 64 at 590-95;
5 Zimmer Tr. [Ex. 65] 87:4-19, 93:14-24, 119:8-19, 139:11-140:1.) In fact, PSI
6 voluntarily provided the Custom Interface source code to Yardi, and willingly
7 allowed—and *today still allows*—Yardi to perform source-code level security
8 review as part of PSI's desire that Yardi continue to host the Custom Interface on
9 Yardi's servers. (Ex. 62 at 588; Ex. 63 at 589.) PSI's mischaracterizations of this
10 review as a cloak-and-dagger Yardi conspiracy is a mere diversion to counter the
11 overwhelming evidence of PSI's lies and deception undertaken to conceal its
12 wrongdoing from Yardi. At a minimum, these factual and interpretative disputes
13 preclude summary judgment.

14 PSI's interpretation of the 2009 internal emails is similarly untenable. First,
15 the emails plainly concern only the Custom Interface, and absolutely nothing
16 related to the authorized review and decompilation alerted—or *could have*
17 *alerted*—Yardi to the possibility that PSI *possessed a copy* of the *Voyager*
18 *application*. (D57, D62, D63: disputed inference; D61: disputed; Ex. 19 at 49-50.)
19 As noted earlier, the Custom Interface is a small, non-consumer facing utility
20 written by PSI that has no user interface functions to speak of, and has absolutely
21 nothing to do with property management and accounting functionality, processes,
22 methods, or techniques. (*See* Ex. 48 at 490 ¶ 6; Bateman 12/8/15 Tr. [Ex. 52] at
23 113:11-114:25.)

24 Second, the potential "access to our system for debugging" Mr. Yardi
25 references in his email and the "suspicion" mentioned in his deposition concern
26 only the development of the Custom Interface. (D57: disputed inference; D58:
27 disputed; Yardi 12/11/14 Tr. [Ex. 61] 191:7-21, 193:22-194:8, 195:12-197:19; Ex.
28 48 at 490-91 ¶ 8.) There is no evidence Mr. Yardi was aware of PSI's Entrata Core

1 accounting software or any related misappropriation of Yardi's trade secrets. In
2 any case, PSI's *access* to the Voyager application would not be enough for PSI to
3 acquire Yardi's trade secrets. As Mr. Yardi has explained, and as echoed by PSI's
4 own witnesses, for PSI to discern the methods and techniques associated with the
5 Voyager application's accounting features and functions and thus acquire Yardi's
6 trade secrets, PSI would need to: (a) actually *possess a copy* of the *Voyager*
7 *application*; (b) actually possess a copy of a Voyager database; (c) exercise
8 property management workflows and processes via the Voyager application; and
9 (d) carefully study and analyze the interaction between the application and the
10 database. This could not be done through "access" alone. (Ex. 48 at 491-92 ¶ 10;
11 Yardi 3/12/15 Tr. [Ex. 61] 34:25- 35:14; Dunn Tr. [Ex. 67] 46:14-48:8; Ex. 68 at
12 615-17.)

13 Third, PSI mischaracterizes Mr. Shobe's email. As the emails themselves
14 indicate, throughout their exchange both Mr. Shobe and Mr. Yardi refer only to the
15 *Custom Interface* PSI provided so that Yardi could review it and install it in the
16 Yardi cloud. (See Ex. 19 at 49-50; Ex. 20 at 51-55; Ex. 48 at 490-91 ¶ 8 (noting
17 that the code referenced in Shobe's email is Custom Interface code); D57: disputed
18 inference; D58, D61: disputed; Yardi 12/11/14 Tr. [Ex. 61] 191:7-21, 193:22-
19 194:8, 195:12-197:19; Ex. 48 at 490-92 ¶¶ 8, 10.) Because it would have been
20 impossible to discern from a review of the Custom Interface that PSI *possessed* a
21 copy of the *Voyager application*—illegally obtained or otherwise—Yardi could not
22 know that PSI had everything indisputably *necessary* to misappropriate Yardi's
23 trade secrets, let alone that PSI had actually misappropriated anything. In short,
24 PSI's erroneous interpretations of the 2009 emails cannot support summary
25 judgment.

26 Finally, and more broadly, even if Yardi did or reasonably should have
27 suspected PSI *possessed a copy* of the *Voyager application* (which Yardi could not
28

1 have discerned in 2009),⁵ Bateman himself acknowledges that the Voyager
 2 application was subject to the 2006 NDA. (Bateman 12/8/15 Tr. [Ex. 52] 99:4-
 3 100:11.)⁶

4 **2. Even Assuming Yardi Had Reason to Suspect a Potential**
 5 **Claim (Which It Did Not), the Jury Must Decide Whether**
 6 **Any Investigation Would Have Revealed PSI's Thefts**

7 The numerous competing factual disputes and inferences set forth above
 8 preclude summary judgment. But even if they did not, PSI faces an additional
 9 hurdle: a reasonable jury could conclude, based on the facts, that even if Yardi had
 10 suspected all of the elements of a trade secrets claim (which it did not), any effort
 11 by Yardi to investigate that suspicion would have been stymied by PSI's deceptions
 12 and concealment, thereby tolling the limitations period. *See, e.g., Fox v. Ethicon*
 13 *Endo-Surgery, Inc.*, 35 Cal. 4th 797, 803 (2005) (claim accrues when plaintiff "has
 14 reason to suspect an injury and some wrongful cause unless the plaintiff pleads and
 15 proves that a reasonable investigation at the time would not have revealed a factual

16
 17 ⁵ At his December 8, 2015, deposition, PSI CEO Bateman testified for the first
 18 time that PSI, for all practical purposes, did not have a property management
 19 accounting system in 2009, had abandoned any plans to develop one, and that,
 20 instead, he single-handedly developed Entrata Core over the course of six months in
 21 2012. (Bateman 12/8/15 Tr. [Ex. 52] 21:21-25:12. 35:12-36:16, 212:1-11, 249:5-
 22 251:1.) Bateman's testimony is ludicrous given the facts, but, assuming it were
 23 true, then PSI's argument that Yardi should have discovered PSI's misappropriation
 24 in 2009 is nonsensical.

25 ⁶ PSI argues that Yardi somehow has "reframed" or "disavowed" its complaint
 26 allegations regarding the impropriety of PSI's possessing a copy of the Voyager
 27 application. (Mot. at 14.) Nonsense. Yardi has been consistent throughout—PSI
 28 never was authorized to use or possess the Voyager application—and Yardi's
 supplemental briefing merely addresses the Court's specific question regarding the
 scope of the NDAs. Yardi pointed out in that briefing, and has consistently
 maintained, that the NDAs governed all Yardi intellectual property in PSI's
 possession, regardless of how PSI obtained it, and that PSI's misuse of the Voyager
 application violated the NDAs.

1 basis for that particular cause of action[,]” thus tolling the limitations period “until
2 such time as a reasonable investigation would have revealed its factual basis”).

3 Courts have stressed that the determination of what a “reasonable
4 investigation” would have revealed is a highly fact-intensive question inappropriate
5 for summary judgment. *See HiRel Connectors, Inc. v. U.S.*, 465 F. Supp. 2d 984,
6 992 (C.D. Cal. 2005) (“Though Plaintiff almost certainly could have discovered the
7 participation of these defendants with minimal efforts, it would be inappropriate to
8 hold, at the summary judgment stage, that reasonable efforts would have led to the
9 discovery of their involvement...”).

10 There is ample evidence of deception, concealment, and outright lies by PSI
11 intended to hide its theft of Yardi’s intellectual property and, based on this
12 evidence, a jury could readily conclude that a “reasonable investigation” would not
13 have revealed to Yardi the basis for its claims:

- 14 • ***PSI’s position that development of the Entrata Core accounting product was a***
15 ***“trade secret” and “confidential” information that PSI would not have***
16 ***revealed to Yardi.*** (Bateman 12/4/14 Tr. [Ex. 53] 192:13-17) (“Anant [Yardi]
17 was asking Ben [Zimmer of PSI] in meetings are you guys building a
18 competitive product, which I couldn’t believe he actually asked that question
19 because obviously that’s a trade secret for us.”); (Bateman 12/8/15 Tr. [Ex. 52]
20 50:13-52:4 (PSI’s 2009 development of Entrata Core was “confidential”
21 information and would have remained so until the public announcement of the
22 product in 2012).)
- 23 • ***Efforts By Key PSI Executives in 2011 to Ensure They Never Told Yardi***
24 ***About PSI’s Improper Possession of the Voyager Application:*** In an internal
25 2011 email between PSI founder Hanna, CEO Bateman, and President Zimmer,
26 Hanna indicated that he combed through his emails in an apparent effort to
27 ensure that no communications with Yardi revealed that PSI had installed a
28

1 version of Yardi’s software. (P170, P171; Ex. 69 at 618-19; Hanna Tr. [Ex. 86]
2 107:22-108:2, 108:8-11, 108:23-109:7.)

3 • ***Active deception of competitors in 2009 by PSI’s Chief Information Officer***
4 ***and a key 2009 Entrata Core developer.*** Text chats in 2009 between PSI’s
5 Chief Information Officer (“CIO”) Dharmesh Shroff and key Entrata Core
6 developer David Schneider show the two actively planning to deceive a property
7 management accounting software competitor into allowing PSI access to a
8 “demo account” of the competitor’s software, including by creating a fake email
9 account, lying to the competitor about how Schneider (using an assumed
10 identity) heard of them, and falsely pretending to be “a property manager
11 interested in their software.” (P175; Schneider Tr. [Ex. 70] 242:18-245:9; Ex.
12 71 at 626-27.)

13 • ***Active Deception of Competitors in 2010 by PSI’s Chief Information Officer.***
14 An October 21, 2010, internal, PSI email chain involving PSI CIO Shroff and
15 other PSI developers is entitled “Competitor List / Logins.” Shroff’s email lists
16 login information for the stolen software of two competitors, including Yardi,
17 and URLs for several additional competitors, with the comment: “I don’t have
18 an account with them you can sign up for a free trail [sic] version ***but be very***
19 ***careful as we don’t want them to know.***” (P175 Ex. 72 at 628-30) (emphasis
20 added).⁷

21 • ***Active Deception in 2007 of A Mutual PSI/Yardi Customer Regarding PSI’s***
22 ***Efforts to Obtain a Copy of the Voyager Application.*** In an August 2007 email
23 chain, PSI management can be seen recounting PSI’s efforts to deceive a mutual
24 PSI / Yardi customer into providing PSI with a copy of the Voyager application.
25 (P127, P128, P129, P130; Ex. 73 at 631.)

26 ⁷ In the initial email in the chain, Entrata’s Director of User Experience asks
27 Shroff: “Would you mind sending over the competitor list and login info you
28 mentioned yesterday? I’m ready to start analyzing the way they handle data and
functionality.” (Ex. 72 at 628-30.)

1 • ***PSI’s deception and concealment continued into 2012, even after Yardi began***
2 ***to suspect PSI may have stolen Yardi trade secrets.*** During a February 13,
3 2012, telephone conference between Mr. Zimmer, Mr. Bateman, and Yardi
4 representatives, Mr. Yardi asked Mr. Zimmer and Mr. Bateman, “Do you know
5 if...[Voyager] is installed today [on a PSI server?]” (P144, P146, P147; Ex. 74
6 at 633 (Audio recording); Ex. 75 at 646 (Tr. Of Audio recording).) At first,
7 Mr. Bateman responded, “I do not know.” (*Id.*) Later, however, Mr. Bateman
8 conceded that in February 2012, PSI “would have known that PSI had a copy of
9 the Voyager Software.” (P145; Bateman 12/4/14 Tr. [Ex. 53] 69:20-70:3.)
10 Similarly, on another occasion in February 2012, Yardi representatives met with
11 Ben Zimmer, PSI’s president, and asked if PSI had a copy of Voyager. (P142;
12 Zimmer Tr. [Ex. 65] 51:10-12; Yardi Tr. [Ex. 61] 191:3-5.) Mr. Zimmer replied
13 that he did not think that PSI had a copy. (P143; Zimmer Tr. [Ex. 65] 81:8-11.)
14 Mr. Bateman also openly admits that he lied to Yardi in 2012. He knew at the time
15 that PSI had at least one copy of Voyager installed on a server. (Bateman 12/4/14
16 Tr. [Ex. 53] 69:20-70:3,75:10-17.) He explained that he was consciously “trying to
17 give [Yardi] no information,” because PSI “***didn’t want to volunteer any***
18 ***information [Yardi] could use to sue [PSI] and trap [PSI].***” (*Id.* 74:19-75:9;
19 P148) (emphasis added). Mr. Bateman admits that he was “purposefully vague,”
20 that PSI was “trying to give [Yardi] no information,” that PSI “didn’t want to
21 volunteer any information that [PSI] didn’t need to volunteer,” and that he “should
22 have been more forthright and more direct in [his] response.” (*Id.* 177:7-23; 74:19-
23 75:9; P148, P149.)

24 PSI’s deceptions and cover-up continued. In a February 23, 2012, letter,
25 PSI’s principals explicitly represented that “[PSI] does not have any copies of Yardi
26 Voyager software in its possession and is not accessing Yardi Voyager Software”
27 and “[PSI’s] personnel are not logging into the Yardi Voyager software or client
28 test environments.” (P153; Ex. 76 at 652.) PSI’s senior management even involved

1 their outside counsel in their scheme to conceal their wrongdoing. On May 15,
2 2012, presumably having been misinformed by their client, PSI's outside counsel
3 repeated PSI's lies to Yardi. (P156, P157, P158, P159; Ex. 77 at 653-54.)

4 At the same time Yardi was inquiring about PSI's possession of Voyager,
5 CEO Bateman packed up a server containing a copy of Voyager, and personally
6 spirited the server out of the country to Pune, India, where he concealed it at D.B.
7 Xento, a PSI affiliate that Mr. Bateman owns. (P160, P161, P162; Bateman 12/4/14
8 Tr. [Ex. 53] 51:4-12, 53:20-23, 54:5-55:9.) D.B. Xento performed most of the
9 software development and programming of the Entrata Core accounting software at
10 issue in this case.

11 PSI's outside counsel, presumably unwittingly, continued to repeat PSI's
12 falsehoods for another ten months. (P166, P167, Ex. 78 at 655 (“[PSI] reiterates
13 that it does not...use any other means of inappropriately accessing Yardi
14 proprietary information to test changes to [PSI's] custom interface.”), Ex. 79 at 657
15 (confirming that PSI's statement that it was not accessing or in possession of a copy
16 of Voyager “remains true today.”) Yet, over 500 PSI personnel continued to log on
17 to Voyager through May 24, 2012, and D.B. Xento personnel logged on at least
18 through January 2013. (P164; Ex. 80 at 671-74,735-38, App'x A.)

19 In addition to tolling the statute of limitations, PSI's misrepresentations also
20 equitably estop PSI from asserting its limitation argument.⁸ Under the doctrine of
21 equitable estoppel, “[o]ne cannot justly or equitably lull his adversary into a false
22 sense of security, and thereby cause his adversary to subject his claim to the bar of
23

24 ⁸ PSI asserts that Yardi has somehow failed to specifically plead the defenses
25 of fraudulent concealment and equitable estoppel. But case law (including the case
26 Entrata cites) requires only that Yardi plead *the facts* supporting these defenses.
27 See *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055 (9th Cir. 2012) (plaintiff
28 “must plead facts showing that [the defendant] affirmatively misled it”) (internal
quotation omitted); *Wasco Products, Inc. v. Southwall Techs., Inc.*, 435 F.3d 989,
991 (9th Cir. 2006). Yardi has done so. See, e.g., Am. Compl. ¶¶ 11(f), 30, 33-34.

1 the statute of limitations, and then be permitted to plead the very delay caused by
2 his course of conduct as a defense to the action when brought.” *Carruth v. Fritch*,
3 36 Cal. 2d 426, 433 (1950). Here, PSI actively concealed its possession of
4 Voyager, directly and through outside counsel. (Ex. 69 at 618-19; Exs. 77-79 at
5 653-58.) PSI did this for the very purpose of preventing Yardi from uncovering the
6 basis of this lawsuit. (Bateman 12/4/14 Tr. [Ex. 53] 177:7-23, 74:19-75:9 (“[W]e
7 were trying to give [Yardi] no information. We didn’t want to volunteer any
8 information they could use to sue us and trap us.”).) Having successfully delayed
9 this lawsuit, PSI may not avoid liability by invoking the statute of limitations.

10 PSI argues that its 2012 deceptions and lies are not relevant to equitable
11 tolling and fraudulent concealment because, according to PSI, “Yardi already was
12 on notice of the basis of its trade secret claim in 2012.” (Mot. at 12.) PSI points to
13 cases holding that concealment does not toll a statute of limitations, “whatever the
14 lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on
15 notice of a potential claim.” (See Mot. at 13, citing *Rita M. v. Roman Catholic*
16 *Archbishop*, 187 Cal. App. 3d 1453, 1460 (1986).)

17 PSI’s argument misses the point: the extremely powerful evidence of PSI’s
18 blatant and repeated deceptions in 2012 shows how PSI would have responded *even*
19 *if* Yardi had reason to investigate anything earlier (which it did not). In other
20 words, some of the best evidence of how PSI would have responded to a Yardi
21 investigation at any time—including from 2004 through 2009 (the time period PSI
22 focuses on in its brief)—is how PSI *actually* responded in 2012 when Yardi *did*
23 have reason to investigate. This evidence, albeit embarrassing for PSI, is
24 nevertheless highly relevant. Moreover, as Yardi has shown, PSI’s fraudulent
25 conduct stretches back earlier than any inquiry by Yardi and demonstrates PSI’s
26 concerted efforts to conceal the truth about PSI’s misconduct from Yardi.⁹

27 _____
28 ⁹ PSI also cites *Bergstein v. Strook & Strook & Lavan LLP*, 236 Cal. App. 4th
793 (2015), in an attempt to argue that PSI’s conduct did not amount to fraudulent

1 **3. Yardi Had No Trade Secret Claim, and the Statute**
2 **Therefore Did Not Begin to Run, Until Yardi Suffered**
3 **Injury in 2012**

4 Yardi's trade secret claim is based on the fact that PSI improperly acquired
5 and used Yardi's Voyager application trade secrets to develop the competing
6 "Entrata Core" accounting software, thereby causing Yardi harm. See First
7 Amended Complaint ("Am. Compl."), Docket No. 41, ¶¶ 56-59. PSI insists that,
8 based on Yardi's alleged suspicions, Yardi should have investigated and discovered
9 that PSI had acquired the Voyager application well before June 2012. That would
10 be irrelevant, even if true. "[T]he discovery rule may extend the statute of
11 limitations, **but it cannot decrease it**, and a statute of limitations does not accrue
12 until a cause of action is 'complete with all of its elements,' *including injury*."
13 *Cleveland v. Internet Specialties W., Inc.*, 171 Cal. App. 4th 24, 32 (2009)
14 (emphasis added) (internal quotes omitted). As a matter of law, Yardi's claim did
15 not accrue until PSI began selling Entrata Core in approximately June 2012,
16 because it is at that point, and no earlier, that PSI's conduct caused Yardi injury.
(Ex. 81 at 768 ¶ 126.)

17 In *Cleveland*, the trial court ruled that the plaintiff should have discovered
18 the wrongdoing, which ultimately caused him to lose his investment, by mid-1996.
19 The Court of Appeals reversed, holding that, entirely aside from the discovery rule,
20 the causes of action could not have accrued by mid-1996, because the plaintiff had
21 not yet suffered his alleged injury. The defendant had not even started doing
22 business until 1997, so it could not have owed the plaintiff any returns on his

23 _____
24 concealment. But in *Bergstein*, unlike here, the accusations of access to confidential
25 information and the "denials of wrongdoing" by the defendants came *after* the
26 plaintiffs suspected enough wrongdoing to bring a lawsuit against the defendants'
27 fellow wrongdoer and *after* one plaintiff executed a declaration stating his belief that
28 his former attorney was wrongly sharing information with the defendants. *Id.* at
817-21. The *Bergstein* court found that neither fraudulent concealment nor equitable
estoppel applied to toll the one-year statute of limitations because it was "clear that
plaintiffs had already discovered their claims" more than a year earlier. *Id.* at 821.

1 investment until then.¹⁰ *Id.* at 31-32. Similarly, in *Glue-Fold v. Slautterback*, the
2 plaintiff’s “first clue concerning Slautterback’s unreliability when the latter
3 requested permission to market the buckle folder applicator [containing the trade
4 secret] in the fall of 1992,” was not sufficient to establish actual notice. 82 Cal.
5 App. 4th 1018, 1027 (2000). Only once the plaintiff also made “the discovery in
6 August of 1995 that Slautterback had previously *sold* an applicator” did the “first
7 clue” combined with the discovery of a prior sale “constitute actual notice of
8 Slautterback’s misappropriation.” *Id.* The sale of the applicator caused the plaintiff
9 lost sales. *Id.* “Having suffered appreciable harm from Slautterback’s wrong,
10 Glue-Fold’s cause of action was complete at that time.” *Id.*

11 **B. Yardi’s Intentional Interference Claim Is Not Preempted**

12 PSI claims Yardi’s intentional interference with contractual relations claim is
13 preempted under California Civil Code Section 3426.7 because, according to PSI, it
14 is based on the same facts as Yardi’s misappropriation of trade secrets claim. PSI is
15 wrong: the facts supporting each claim, and the resulting harm from PSI’s
16 misconduct, are in fact separate and distinct.

17 A claim will be preempted only if it amounts to “restating a trade secrets
18 claim as something else.” *Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210,
19 240 (2010). “The determination of whether a claim is based on trade secret
20 misappropriation is largely factual.” *K.C. Multimedia, Inc. v. Bank of Amer. Tech.
21 & Ops., Inc.*, 171 Cal. App. 4th 939, 954 (2009). Here, Yardi’s intentional
22 interference claim is “free of any dependency on trade secrets law” and, therefore,
23 is not displaced. *Silvaco*, 184 Cal. App. 4th at 242. PSI’s misconduct in inducing
24

25 ¹⁰ In contrast, PSI relies on decisions turning on when plaintiffs discovered
26 injuries that had already occurred. *Gabriel Techs. Corp. v. Qualcomm Inc.*, 857 F.
27 Supp. 2d 997, 1003 (S.D. Cal. 2012) (“[I]t is undisputed that the alleged
28 misappropriation of trade secrets took place outside the limitations period[.]”);
Alamar Biosciences, Inc. v. Difco Labs., Inc., 94-CV-1856, 1996 WL 648286 (E.D.
Cal. Oct. 13, 1995) (plaintiff observed trade show presentations of defendant’s
product using its trade secrets, which defendant already developed and marketed).

1 several Yardi customers to break their contractual obligations to Yardi has harmed
2 Yardi's business relationships. (Ex. 28 at 202-210.) PSI's liability for this
3 wrongful inducement stems not from whether those contracts happen to also protect
4 Yardi's intellectual property, but instead from the breach of the agreements
5 themselves and the resulting damage to Yardi's business relationships with its
6 customers. Yardi's claim for intentional interference with contractual relations thus
7 is unrelated to trade secrets, and therefore is not preempted.

8 **C. Yardi's Intentional Interference with Contract and Breach of**
9 **Implied Contract Claims Are Timely.**

10 The California discovery rule has been codified in the statute of limitations
11 for intentional interference with contract and breach of implied contract. *See* Cal.
12 Civ. Proc. Code § 339(1). As discussed above, Yardi did not have cause to know of
13 PSI's misconduct before 2012, and even then PSI actively sought to conceal its
14 actions, tolling the limitation period and estopping it from raising a limitations
15 defense. Moreover, as to the intentional interference claim, even when it learned
16 generally of PSI's misconduct, Yardi did not know the elements of an interference
17 claim existed until its subsequent investigation uncovered that PSI had induced
18 clients to breach their contractual obligations. (Ex. 28 at 202-210.) This was well
19 within two years of when Yardi brought this lawsuit. Yardi's claims are timely.

20 **D. Yardi May Recover Damages for All PSI Copyright and DMCA**
21 **Violations**

22 PSI contends that Yardi cannot collect copyright damages incurred more than
23 three years before it filed this action. The Ninth Circuit, however, has rejected this
24 argument: "the statute of limitations does not prohibit recovery of damages incurred
25 more than three years prior to the filing of suit if the copyright plaintiff was
26 unaware of the infringement, and that lack of knowledge was reasonable under the
27 circumstances." *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th
28 Cir. 2004) ("Because Polar Bear did not discover Timex's infringement until within

1 three years of filing suit, Polar Bear may recover damages for infringement that
2 occurred outside of the three-year window”). The Ninth Circuit has “reject[ed] an
3 interpretation of the federal discovery rule that would commence limitations
4 periods upon **mere suspicion** of the elements of a claim.” *O’Connor v. Boeing N.*
5 *Am., Inc.*, 311 F.3d 1139, 1148 (9th Cir. 2002) (emphasis added).

6 Here, there is no limitation on the damages Yardi may recover for copyright
7 infringement, as PSI cannot demonstrate that Yardi knew or should have known of
8 PSI’s infringement before 2011. (Ex. 26 at 179-81, Rog 13.) Until 2011, Yardi
9 “had assumed that [PSI] did not have a copy” of the Voyager software. (Yardi
10 12/11/14 Tr. [Ex. 61] 194:1-8.) Yardi’s lack of knowledge was reasonable because
11 Yardi had executed non-disclosure agreements with PSI. (Ex. 56 at 555; Ex. 57 at
12 556-57.) Even if the Court determines that Yardi knew PSI had a copy of the
13 Voyager software, Yardi did not know that PSI would “copy,” reverse engineer, or
14 otherwise use it in an infringing manner.

15 Yardi’s lack of knowledge was also reasonable because PSI took elaborate
16 steps to conceal its possession and infringement of the Voyager software both
17 before and after Yardi began its investigation of PSI. *Oracle USA, Inc. v. Rimini*
18 *St., Inc.*, 6 F. Supp. 3d 1108, 1124 (D. Nev. 2014) *order clarified*, No. 10-CV-
19 00106, 2014 WL 5285963 (D. Nev. Oct. 14, 2014) (“Where a defendant expressly
20 assures competitors that it is not violating the competitor’s intellectual property
21 rights, a plaintiff cannot be charged with knowledge of the infringing conduct.”).
22 In light of PSI’s established pattern of deception, even if Yardi had begun
23 investigating PSI prior to 2012, Yardi would not have been on notice that
24 potentially infringing conduct had occurred. *See In re Napster, Inc. Copyright*
25 *Litig.*, 04-CV-3004, 2005 WL 289977, at *4 (N.D. Cal. Feb. 3, 2005) (“A claim for
26 copyright infringement accrues on the date that a reasonable investigation would
27 have put the rights holder on notice that potentially infringing conduct has
28 occurred.”).

1 Under *Polar Bear Products*, because Yardi did not know of PSI's
2 infringement until within three years of filing suit, Yardi is permitted to recover all
3 of its damages for copyright infringement. The same is true for Yardi's DMCA
4 claim. DMCA causes of action, being based upon copyright, are subject to the
5 same statute of limitations requirements as traditional copyright causes of action.
6 See *Sims v. Viacom, Inc.*, No. 11-CV-675, 2012 WL 280609, at *5 (W.D. Pa. Jan.
7 31, 2012); *Sogecable, S.A. v. NDS Grp. PLC*, No. SACV 03-1174DOCANX, 2004
8 WL 5618525, at *2 (C.D. Cal. Aug. 3, 2004) *rev'd and remanded on other grounds*,
9 No. 04-56990, 2006 WL 3698713 (9th Cir. Dec. 13, 2006).

10 **E. PSI Violated the DMCA by Engaging in Circumvention**

11 PSI does not dispute that it used license and log-in information obtained from
12 third parties to gain access to Voyager without Yardi's authorization. (Mot. at 23.)
13 PSI instead, relying exclusively on out-of-Circuit authority, contends that such
14 unauthorized access does not constitute "circumvention" under the DMCA. The
15 fundamental purpose of the DMCA, and the unanimous line of case law in the
16 Ninth Circuit, establish that PSI is wrong.

17 It is undisputed in the Ninth Circuit that "circumvention" under the DMCA
18 includes any and all means of "avoid[ing]" or "bypass[ing]" technological measures
19 meant to protect copyrighted work. *MDY Indus. v. Blizzard Entm't, Inc.*, 629 F.3d
20 928, 945 (9th Cir. 2010) (quoting 17 U.S.C. § 1201(a)(3)(A)). PSI argues that
21 unauthorized use of security passwords or codes does not constitute
22 "circumvention," but courts in this Circuit flatly disagree. In *Dish Network LLC v.*
23 *DiMarco*, 11-CV-1962, 2012 WL 917812 (D. Nev. Mar. 14, 2012), the District
24 Court for the District of Nevada held that the use of an adapter and warranty codes
25 to access the plaintiff's encrypted media was "circumvention." In doing so, the
26 court declared that the "circumvention" inquiry should focus on whether the
27 accused party's access was authorized. The court also rejected the defendant's
28 argument that use of warranty codes did not "descramble" or "decrypt" the

1 plaintiff's work, holding that the use of codes to merely intercept the work was
2 "almost certainly designed to 'otherwise avoid, bypass, etc.' effective technological
3 security measures," thus constituting "circumvention." *Id.* at *5.

4 In *Actuate Corp. v. Int'l Bus. Machines Corp.*, 09-CV-5892, 2010 WL
5 1340519 (N.D. Cal. Apr. 5, 2010), the Northern District of California held that the
6 distribution of passwords and usernames – the exact action taken by PSI here – falls
7 within the DMCA's definition of "circumvention." The court expressly declined to
8 follow *I.M.S. Inquiry Mgmt. Sys., Ltd. v. Berkshire Info. Sys., Inc.*, 307 F. Supp. 2d
9 521 (S.D.N.Y. 2004), which PSI now relies upon. *Actuate*, 2010 WL 1340519, *9,
10 citing *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). The
11 *Actuate* decision is not an outlier. The Northern District previously reached the
12 same conclusion in *Microsoft Corp. v. EEE Business Inc.*, 555 F.Supp. 2d 1051
13 (N.D. Cal. 2008) (holding that distribution of a user key constituted circumvention),
14 and *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004)
15 (holding that unauthorized distribution of software containing an "authorized key to
16 unlock [] encryption" was circumvention). *See also* H.R. REP. 105-551(I), 17-18
17 (1998) (House of Representatives' report on the DMCA, which reveals no
18 distinction between passwords and other methods of access for purposes of DMCA
19 circumvention prohibition).

20 **F. The Voyager Application Is A Protected Trade Secret.**

21 PSI contends the Voyager application in its entirety cannot be a trade secret.
22 Its argument is two-fold: first, as a general rule, PSI argues, a software program can
23 never be a trade secret; and second, Voyager specifically is not a trade secret,
24 because portions of it have been made available to third parties. PSI is wrong on
25 both points.

26 The Uniform Trade Secrets Act expressly defines the term "trade secret" to
27 include a compilation or program. Cal. Civ. Code § 3426.1(d) ("Trade secret"
28 means information, including a formula, pattern, **compilation, program**, device,

1 method, technique, or process” that derives economic value from not being
2 generally known and is the subject of reasonable efforts to maintain secrecy)
3 (emphasis added). Under this definition, “a trade secret can exist in a combination
4 of characteristics and components, each of which, by itself, is in the public domain,
5 but the unified process, design and operation of which, in unique combination,
6 affords a competitive advantage and is a protectable secret.” *Integrated Cash*
7 *Mgmt. Servs. v. Digital Transactions, Inc.*, 920 F.2d 171, 174 (2d Cir. 1990)
8 (holding that software program constituted trade secret) (quoting *Imperial Chem.*
9 *Indus. Ltd. v. Nat’l Distillers & Chem. Corp.*, 342 F.2d 737, 742 (2d Cir.1965)).

10 This statutory language is clear that even if computer software is comprised
11 of unprotected elements, the combination of all those elements is still entitled to
12 protection. *Id.*; see also *Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504
13 F.2d 518, 534 (5th Cir. 1974) (computer programs are clearly protectable under the
14 rubric of trade secrets, if the other elements are also proven); *Pyro Spectaculars*
15 *North, Inc. v. Souza*, 861 F. Supp. 2d 1079, 1089 (E.D. Cal. 2012) (compilation of
16 publicly available information constituted trade secret). PSI’s assertion that
17 Voyager cannot be a trade secret because some portions of it are publicly available
18 is thus invalid as a matter of law.

19 PSI also asserts that a computer program can never be a trade secret because
20 the operation of a program is self-revealing and readily observable. PSI quotes
21 *Silvaco* for the proposition that “[t]o the extent the mere use of a program does
22 disclose ‘how it works,’ the program is in no sense ‘secret.’” 184 Cal. App. 4th at
23 229. But *Silvaco* does **not** stand for the proposition that a computer program may
24 never be a trade secret; to the contrary, the reasoning of *Silvaco* is consistent with
25 extending trade secret protection to a program *the workings of which are*
26 *maintained as confidential*, as Yardi’s plainly are. See *Altavion, Inc. v. Konica*
27 *Minolta Sys. Lab. Inc.*, 226 Cal. App. 4th 26, 60 (2014) (noting that *Silvaco*
28 addresses *disclosed* trade secrets, and that “[a] potent distinction exists between a

1 trade secret which *will* be disclosed if and when the product in which it is embodied
2 is placed on sale, and a ‘trade secret’ embodied in a product which has been placed
3 on sale, which product admits of discovery of the ‘secret’ upon inspection, analysis,
4 or reverse engineering.”) (emphasis original, internal quotation omitted).

5 As discussed above, the design of the Voyager application is not
6 ascertainable by using only the application, but requires access to the application
7 *and* the database *and* analyzing their interactions. (P168, P169; Yardi 3/12/05 Tr.
8 [Ex. 66] 34:8-35:14.) Moreover, Yardi took the reasonable efforts required to
9 protect the confidentiality of its software by (i) licensing its product to select
10 consumers pursuant to a license agreement, which limited the software’s use; and
11 (ii) password-protecting the software so only licensed users could access and use it.
12 (P111, P112, P113; Ex. 55 at 549-50 ¶¶ 7-8; Ex. 82 at 774-81.) *See Mattel, Inc. v.*
13 *MGA Entm’t, Inc.*, No. 04-CV-9049, 2011 WL 3420571, at *3 (C.D. Cal. Aug. 4,
14 2011) (trade secrets adequately protected when plaintiff “required everyone who
15 entered the showroom to sign a nondisclosure agreement”); *United States v. Suibin*
16 *Zhang*, No. 05-CR-00812, 2012 WL 1932843, at *5 (N.D. Cal. May 29, 2012)
17 (system of password protection adequately protected trade secrets disclosed to
18 existing and potential customers).

19 Voyager cannot be bought at Best Buy or Amazon.com like off-the-shelf
20 software, because it is not. (P107; Ex. 48 at 489 ¶ 4; Ex. 55 at 549 ¶ 7.) It is
21 licensed to individual clients directly by Yardi only pursuant to written license
22 agreements that limit use and require confidentiality. (P108, P109, P110, P111; Ex.
23 48 at 489 ¶4; Ex. 55 at 549-50 ¶¶ 7-8; Ex. 82 at 778 (at YAR-0228103); D69-73:
24 disputed inferences). This only underscores that Voyager derives economic value
25 from not being generally known and is the subject of reasonable efforts to maintain
26 secrecy, which is just what makes the program a trade secret.

27 III. CONCLUSION

28 Yardi respectfully requests that the Court deny PSI’s motion in its entirety.

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Respectfully submitted,
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