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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LOOP AI LABS INC,  
Plaintiff,  
v.  
ANNA GATTI, et al.,  
Defendants.

Case No. 15-cv-00798-HSG

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS**

Re: Dkt. No. 60

Before the Court is Defendant Almawave USA, Inc.’s (“Almawave USA’s”) partial motion to dismiss the second, fourth, ninth, and fourteenth causes of action of the First Amended Complaint (“FAC”). *See* Dkt. No. 60 (“Mot”). The Court has considered the arguments and evidence presented by the parties and, for the reasons stated below, **GRANTS IN PART AND DENIES IN PART** Almawave USA’s motion.

**I. BACKGROUND**

In this action, Plaintiff Loop AI Labs, Inc. (“Loop AI”) alleges that Anna Gatti, its now-former CEO, conspired with the other Defendants to misappropriate Loop AI’s trade secrets and generally frustrate the success of the company in order to force a sale to Almawave USA. *See generally* Dkt. No. 1 (“Compl.”). On March 17, 2015, Almawave USA filed a motion to dismiss the Complaint in its entirety. *See* Dkt. No. 38. Loop AI filed the FAC on April 6, 2015, *see* Dkt. No. 45, and, on April 23, 2015, Almawave USA filed a partial motion to dismiss, *see* Dkt. No. 60 (“Mot.”).<sup>1</sup> Loop AI opposed that motion on May 7, 2015. Dkt. No. 87 (“Opp.”). Almawave USA

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<sup>1</sup> Loop AI argues that Almawave USA’s revised motion is procedurally improper because it raises new arguments not contained in its original motion to dismiss. *Opp.* at 4-5. The Court disagrees. Almawave USA’s second motion to dismiss does not challenge any cause of action that it did not also seek to dismiss through its original motion. *Compare* Dkt. No. 38 *with* Dkt. No. 60. In other words, Almawave USA has not blindsided Loop AI with new challenges that could or should have been raised before. That the legal arguments contained in Almawave USA’s motions are not

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1 filed a reply brief on May 14, 2015. *See* Dkt. No. 92 (“Reply”). The Court held a hearing on the  
2 motion on July 2, 2015.

### 3 **II. LEGAL STANDARD**

4 A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it  
5 does not contain sufficient facts to state a plausible claim on its face. *See Bell Atlantic Corp. v.*  
6 *Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads  
7 factual content that allows the court to draw the reasonable inference that the defendant is liable  
8 for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility  
9 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that  
10 a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557). “While a complaint  
11 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a  
12 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than  
13 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.  
14 Factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*,  
15 550 U.S. at 555 (internal citations and parentheticals omitted).

16 In considering a motion to dismiss, a court must accept all the plaintiff’s allegations as true  
17 and construe them in the light most favorable to the plaintiff. *See id.* at 550; *Erickson v. Pardus*,  
18 551 U.S. 89, 93-94 (2007). If the court dismisses the complaint, it should grant leave to amend  
19 “unless it determines that the pleading could not possibly be cured by the allegation of other  
20 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citation omitted). When a party  
21 repeatedly fails to cure deficiencies, however, the court may order dismissal without leave to  
22 amend. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

23  
24 completely identical is unsurprising. The FAC contains almost one hundred new paragraphs of  
25 factual allegations. *See* Dkt. No. 45. Almawave USA is permitted to tailor its arguments to the  
26 new allegations contained in the FAC. However, even assuming that some portion of Almawave  
27 USA’s motion constitutes a technical violation of Rule 12(g), the Court will exercise its discretion  
28 to consider the motion in full. *See Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, No. 10-cv-  
05696-CRB, 2011 WL 2690437, \*2 n. 1 (N.D. Cal. 2011). (Although Rule 12(g) “technically  
prohibits successive motions to dismiss that raise arguments that could have been made in a prior  
motion . . . courts faced with a successive motion often exercise their discretion to consider the  
new arguments in the interests of judicial economy”).

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**III. DISCUSSION**

Almawave USA’s motion seeks to dismiss five claims asserted against it in the FAC: (1) violation of the Computer Fraud and Abuse Act (“CFAA”); (2) Comprehensive Data Access and Fraud Act (“CDAFA”);<sup>2</sup> (3) interference with prospective economic advantage; (4) intentional interference with contract; and (5) unjust enrichment.<sup>3</sup> The Court will address Almawave USA’s challenge to each claim in turn.

**A. Computer Fraud and Abuse Act**

Almawave USA moves to dismiss Loop AI’s second cause of action for violation of the CFAA on the grounds that (1) the CFAA applies to individuals who access computers without authorization, not to violations of corporate computer use restrictions or violations of a duty of loyalty; and (2) Loop AI has not pled sufficient loss or damage as required by the Act. Mot. at 5-6. Loop AI argues that the FAC sufficiently pleads both requirements. Opp. at 9.

**1. Unauthorized Access**

The Ninth Circuit has held that the plain language of the CFAA “target[s] the unauthorized procurement or alteration of information, not its misuse or misappropriation.” *United States v. Nosal*, 676 F.3d 854, 862 (9th Cir. 2012) (rejecting the decisions of other circuits that “interpret the CFAA broadly to cover violations of corporate computer use restrictions or violations of a duty of loyalty”). The Ninth Circuit has reasoned that:

[t]his narrower interpretation is also a more sensible reading of the text and legislative history of a statute whose general purpose is to punish hacking—the circumvention of technological access barriers—not misappropriation of trade secrets—a subject Congress has dealt with elsewhere. Therefore, we hold that “exceeds authorized access” in the CFAA is limited to violations of restrictions on *access* to information, and not restrictions on its *use*.

*Id.* (emphasis in original) (citation omitted).

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<sup>2</sup> Loop AI asserts claims pursuant to both the CFAA and CDAFA under the second cause of action.

<sup>3</sup> Almawave USA dedicates two pages of its reply brief to the argument that Loop AI’s allegations are impermissibly conclusory to support the inference that Almawave USA acted unlawfully. Reply at 5-6. Almawave USA did not raise this argument in its opening brief and, accordingly, the Court will not consider it. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The district court need not consider arguments raised for the first time in a reply brief.”).

1           Loop AI’s citation to the district court’s decision on remand in the *Nosal* action, Opp. at 8,  
2 does not (and could not) contradict the Ninth Circuit’s decision. While the district court fairly  
3 noted that *Nosal* did not limit the CFAA’s application to instances of hacking—*i.e.*, the  
4 circumvention of technological access barriers—it also underscored the Ninth Circuit’s holding  
5 that “it is not a violation of the CFAA to access a computer with permission, but with the intent to  
6 use the information gained thereby in violation of a use agreement.” *United States v. Nosal*, 930  
7 F. Supp. 2d 1051, 1060 (N.D. Cal. 2013) (citing *Nosal*, 676 F.3d at 863-64). This Court reads the  
8 *Nosal* decision in the same light. While a plaintiff need not necessarily allege computer hacking  
9 in order to plead a cause of action under the CFAA, a CFAA claim does not lie where the  
10 defendant is alleged to have merely misappropriated or otherwise misused information to which he  
11 or she had been granted access.

12           Accordingly, *Nosal* forecloses CFAA liability for many of the factual allegations contained  
13 in the FAC. For example, in paragraph 221, Loop AI alleges that the Defendants directed Gatti to  
14 access “critical confidential and proprietary information” contained on the computer that Gatti—as  
15 the then-current CEO of the company—*was assigned* by Loop AI. FAC ¶ 221. This is a clear  
16 example of improper use, not unauthorized access. The Court disagrees with Loop AI that,  
17 although Gatti was provided access to Loop AI’s confidential business information by virtue of  
18 her executive-level position, that authorization was impliedly revoked “when she became an  
19 employee, officer and agent of the IQSystem and Almaviva Defendants.” *Id.* ¶ 222. Neither legal  
20 authority nor common sense supports the argument that Loop AI silently withdrew Gatti’s  
21 authorization to access its systems before it knew of the grounds to do so. That Gatti is alleged to  
22 have used the access granted by Loop for an improper purpose has no bearing on when her  
23 authorization was terminated.

24           Given the facts asserted in the FAC, *Nosal* does not appear to bar all potential liability  
25 under the CFAA in this action. The FAC contains at least two allegations suggesting that the  
26 Defendants (through Gatti) continued to access Loop AI’s computer files and computer system  
27 after Gatti’s termination. First, Loop AI alleges that Gatti accessed its calendar system after she  
28 was fired in an effort to delete evidence of the Defendants’ scheme. *See* FAC ¶ 227. Second,

1 Loop AI alleges that Gatti retained possession and continued to access her company laptop after  
2 she was fired. *Id.* ¶ 225. Under the threshold standard applicable at the pleading stage, these  
3 allegations could plead a plausible cause of action under the CFAA, assuming that Gatti's  
4 authorization to access Loop AI's system and documents was revoked at the same time as she was  
5 fired.

6 However, because the FAC's allegations concerning the CFAA are premised on the legally  
7 incorrect proposition that "Gatti lost authority to access [the] computer, as well as all of the other  
8 electronic accounts of the Company when she became an employee, office and agent of the  
9 IQSystem and Almaviva Defendants," FAC ¶ 222, the FAC does not contain facts sufficient to  
10 determine whether the allegations that could state a claim under the CFAA occurred after Gatti's  
11 authorization was actually revoked. Accordingly, Almax USA's motion to dismiss the CFAA  
12 cause of action is **GRANTED**, but only on the limited ground that Loop AI has not alleged facts  
13 establishing when Gatti's permission to access Loop AI information was terminated (*e.g.*, when  
14 Gatti was told she no longer had access, when Gatti's username and password were discontinued,  
15 etc.). Loop AI is granted leave to amend the FAC to allege facts detailing when Loop AI actually  
16 withdrew that authorization, assuming that Loop AI can do so consistent with its Rule 11  
17 obligations.

## 18 2. Loss or Damage

19 Almax USA contends that the FAC fails to adequately plead either damage or loss as  
20 defined by the CFAA. To maintain a civil action under the CFAA, the plaintiff must show that he  
21 or she "suffer[ed] damage or loss by reason of [the defendant's] violation" of the Act. 18 U.S.C. §  
22 1030(g). The CFAA defines "damage" as "any impairment to the integrity or availability of data,  
23 a program, a system, or information." *Id.* § 1030(e)(8). "Loss" is defined as "any reasonable cost  
24 to any victim, including the cost of responding to an offense, conducting a damage assessment,  
25 and restoring the data, program, system, or information to its condition prior to the offense, and  
26 any revenue lost, cost incurred, or other consequential damages incurred because of interruption of  
27 service." *Id.* § 1030(e)(11).

28 Loop AI does not allege facts sufficient to show that its \$7,000 in "real economic

1 damages” arise from the type of damage or loss contemplated by the statute. Loop AI’s sole  
2 allegation concerning its “loss” or “damage” is contained in the 228th paragraph of the FAC: “[a]s  
3 a result of this unauthorized access, the Company has suffered a loss during any one-year period  
4 of in excess of \$7,000 in value in real economic damages.” FAC ¶ 228. Loop AI has not pled  
5 facts suggesting that the \$7,000 loss alleged was incurred “responding to an offense, conducting a  
6 damage assessment, and restoring the data, program, system, or information to its condition prior  
7 to the offense, and any revenue lost, cost incurred, or other consequential damages incurred  
8 because of interruption of service.” *Id.* § 1030(e)(11). Accordingly, its allegation is insufficient to  
9 plead a cause of action under the CFAA.

10 Almawave USA’s motion to dismiss the CFAA cause of action for failure to adequately  
11 plead damages or loss is **GRANTED**. Loop AI may amend the FAC to allege facts supporting the  
12 inference that its alleged loss was of the type defined in the CFAA, if it can do so consistent with  
13 its Rule 11 obligations.

14 **B. Comprehensive Data Access and Fraud Act**

15 Almawave USA devotes one sentence of its motion to the argument that Loop AI’s  
16 CDAFA claim must be dismissed because it does not allege that Gatti accessed Loop AI’s  
17 computers or network in a manner that circumvents technical or code-based barriers. Mot. at 6.  
18 Loop AI responds that California does not impose a “technical or code-based barrier” requirement  
19 to CDAFA claims, but asserts that, even if such a requirement exists, Loop AI has alleged facts  
20 sufficient to satisfy it here. Opp. at 8-9.

21 Neither party adequately addresses the split of authority concerning whether this  
22 requirement exists under California law. Some judges in this District have applied such a  
23 limitation, *see Facebook, Inc. v. Power Ventures, Inc.*, No. 08-cv-05780-JW, 2010 WL 3291750,  
24 at \*11 (N.D. Cal. July 20, 2010); others have not, *see Facebook, Inc. v. ConnectU LLC*, 489 F.  
25 Supp. 2d 1087, 1091 (N.D. Cal. 2007); while still others have deferred the question where the  
26 parties have not adequately briefed the issue, *see Weingand v. Harland Fin. Solutions, Inc.*, No.  
27 11-cv-3109-EMC, 2012 WL 2327660, at \*5 (N.D. Cal. June 19, 2012) (denying a Rule 15 motion  
28 concerning the existence of “technical or code-based barrier” requirement under the CDAFA until



1 a later stage of the case given the “limited” briefing provided by the parties). Like Judge Chen in  
2 *Weingand*, the Court finds that the limited briefing provided by the parties does not permit it to  
3 conclude that the limitation endorsed by Judge Ware in *Power Ventures* applies or whether, even  
4 assuming it does, the allegations contained in the FAC would satisfy that requirement. This ruling  
5 is without prejudice to either party bringing an adequately-briefed Rule 56 motion at the  
6 appropriate time regarding the existence and import of the requirement articulated in *Power*  
7 *Ventures*.

8 Almawave USA’s motion to dismiss the CDAFA cause of action is **DENIED**.

9 **C. Interference with Prospective Economic Advantage**

10 In order to plead a cause of action for interference with prospective economic advantage, a  
11 plaintiff must allege “(1) an economic relationship between the plaintiff and some third party, with  
12 the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the  
13 relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship;  
14 (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused  
15 by the acts of the defendant.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134,  
16 1153 (2003). Almawave USA argues that Loop AI has failed to state a claim for interference with  
17 economic advantage because the FAC does not allege facts sufficient to meet the first requirement,  
18 *i.e.*, that an economic relationship existed between Loop AI and a third party that had a probability  
19 of future economic benefit. Mot. at 6-7.

20 In support of its argument, Almawave USA primarily relies on *Youst v. Longo*, 43 Cal. 3d  
21 64 (1987), where the plaintiff alleged that the defendant—a competitor in a horserace where  
22 plaintiff’s horse also competed—blocked and whipped plaintiff’s horse during the race in order to  
23 halt its stride. *Id.* at 77 n.9. The plaintiff in *Youst* claimed that this misconduct caused his horse to  
24 fall out of contention and thus interfered with his opportunity to finish higher in the race. *Id.* at  
25 77. In that case, the California Supreme Court held that the plaintiff had not stated a claim for  
26 interference with economic advantage for several reasons, including because the plaintiff had  
27 failed to allege facts showing that his horse would have placed higher absent the defendant’s  
28 interference. *Id.* (“[T]he complaint only alleged in conclusory terms that defendant’s wrongful

1 interference resulted in a lost ‘opportunity’ to finish higher in the money.”).

2           Needless to say, this case is very different. The FAC alleges that funding negotiations  
3 between Loop AI and Investment Fund 4 had “advanced to the final stages” where Investment  
4 Fund 4 had “executed a term sheet setting forth their agreement.” FAC ¶ 117. Loop AI alleges  
5 that Gatti, as part of her scheme with the Defendants, sabotaged the deal by representing to Loop  
6 AI’s founders that Investment Fund 4 wanted to bring in other investors itself, rather than have  
7 Loop AI find additional investors for the funding round. *Id.* In fact, Investment Fund 4 had  
8 expressly informed Gatti that their investment was *contingent* on Loop AI securing (on its own) at  
9 least one other investor to participate. *Id.* ¶ 119. The FAC alleges that this misrepresentation  
10 “scuttled” the investment opportunity with Investment Fund 4. *Id.* ¶ 296.

11           The Court finds that these alleged facts support the existence of a third-party relationship  
12 with the probability of future economic benefit. Loop AI is only required to allege that future  
13 economic benefit arising from that relationship is a probability, not a certainty. Given the  
14 particular circumstances alleged in the FAC, the existence of a term sheet with Investment Fund 4  
15 meets that standard. By the time Gatti and Almaxwave USA allegedly sabotaged the deal, Loop  
16 AI’s relationship with Investment Fund 4 had long passed the hypothetical stage. The parties had  
17 put pen to paper and were discussing the inclusion of other potential investors. Almaxwave USA  
18 provides no authority for its suggestion that Loop AI must have alleged that either (1) the contract  
19 would have been entered into; (2) that Investment Fund 4 was a repeat investor; or that (3) there  
20 were other similar business dealings between Loop AI and Investment Fund 4. The Court declines  
21 to impose those unjustified requirements on Loop AI in this case.

22           Accordingly, the Court **DENIES** Almaxwave USA’s motion to dismiss the interference  
23 with prospective economic advantage cause of action.<sup>4</sup>

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<sup>4</sup> Although the FAC alleges interference with prospective economic advantage arising out of Loop AI’s relationships with other Investment Funds, neither Almaxwave USA’s motion or reply brief provides the Court with any argument concerning why the allegations concerning those relationships are insufficient to state a claim. Accordingly, the Court does not address whether those relationships are sufficiently pled.