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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOBIAK, LLC., a Delaware Limited Liability Company;

Plaintiff,

v.

BOTMAKERS LLC, d.b.a. TARTA.AI,
a Delaware Limited Liability Company

Defendant.

Case No. 2:23-cv-8604-MEMF (MRW)

DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: July 11, 2024
Time: 10:00 a.m.
Judge: The Honorable Maame Ewusi-Mensah Frimpong
Location: Courtroom 8B, 8th Floor, United States District Court, 350 West First Street, Los Angeles, CA, 90012

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 11, 2024, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 8B, 8th Floor, United States District Court, 350 West First Street, Los Angeles, CA, 90012, before the Honorable Maame Ewusi-Mensah Frimpong, Botmakers LLC ("Botmakers") will and hereby does move under Rule 12(b)(2), (3) and (6) of the Federal Rules of Civil Procedure to dismiss Plaintiff Jobiak LLC's ("Jobiak") claims. This motion is based on this Notice, the Memorandum of Points and Authorities, the Declaration of Xinlin Li Morrow ("Morrow Decl."), the Declaration of Eugene Smirnov ("Smirnov Decl."), the Declaration of Oleksandr Gamaniuk ("Gamaniuk Decl."), all documents in the Court's file, and any other argument that may be presented at or before the motion hearing. This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on April 30, 2024.

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STATEMENT OF RELIEF REQUESTED

Under Rule 12(b)(2), (3) and (6) of the Federal Rules of Civil Procedure, Botmakers moves to dismiss Jobiak's Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Jobiak's Complaint should be dismissed for the following reasons.

First, Jobiak does not make out a prima facie case of personal jurisdiction. Although Jobiak alleges that Botmakers' principal place of business and headquarters are in California, affidavit evidence shows otherwise. Further, Jobiak has not alleged sufficient minimum contacts showing that Botmakers purposefully directed its actions at California to support *specific* personal jurisdiction. Indeed, according to the Complaint, the alleged accessing and scraping conduct was directed *outside* of California.

Second, Jobiak's copyright infringement claim fails whether Jobiak asserts copyright over its database or individual listings in the database. Jobiak owns no valid copyright over the asserted materials because its AI-generated database is not copyright eligible and the individual listings are owned by third parties and not covered by Jobiak's copyright registration. Botmakers also cannot copy the database without making an exact copt. Botmakers further cannot copy the individual listings because Botmakers' listings predate Jobiak's in each instance. Moreover, under 17 U.S.C. § 412(2), Jobiak's claims for statutory damages and attorneys' fees fail because Jobiak did not register its copyright before commencement of the alleged infringement or within 3 months of the first publication.

Third, Jobiak's claims under the Computer Fraud and Abuse Act (CFAA), the California Comprehensive Data Access and Fraud Act (CDAFA) and the Digital Millennium Copyright Act (DMCA) fail because Jobiak's website is generally accessible to the public. As such, Botmakers' access to data is not unauthorized or

in excess of authorization. Caselaw is clear that Jobiak's so-called "security strategy" of blocking certain IP addresses is insufficient to sustain CFAA, CDAFA or DMCA claims.

Fourth, the CDAFA claim and Unfair Competition Law ("UCL") claim also fail because they do not apply extraterritorially to conduct outside California; Jobiak's allegations of Botmakers' access and scraping all relate to conduct outside California.

Fifth, the UCL claim is pre-empted by, or in any case falls with, Jobiak's copyright infringement claim.

II. BACKGROUND

Jobiak sent a demand letter to Botmakers in January 2023 alleging copyright infringement. Complaint, Ex. C. At that time, Jobiak had not registered any copyright. Five months later, Jobiak registered the copyright it asserts in this case. *Id.* Ex. A.

Another four months later, Jobiak filed its Complaint asserting, among other things, copyright infringement against Botmakers on October 12, 2023. Five days later, Jobiak filed, in this District, a similar complaint against Aspen Technology Labs, Inc., a Colorado corporation. Ex. 1[1] (*Aspen* Complaint). Jobiak's *Aspen* complaint alleged the same five causes of action as here. On December 22, 2023, Aspen moved to dismiss Jobiak's complaint for no personal jurisdiction, improper venue and for failure to state a claim. On February 5, 2024, Judge Fischer dismissed Jobiak's complaint for lack of personal jurisdiction.[2] Jobiak was granted leave to amend by March 4, 2024, but did not do so.

[1] Unless otherwise specified, all numbered exhibits refer to exhibits attached to the declaration of Xinlin Li Morrow.

[2] The *Aspen* court did not need to reach past the threshold personal jurisdiction issue in its analysis. Ex. 2 (*Aspen* MTD Order), 6 n.1.

Exactly two weeks later, on March 18, 2024, Jobiak served the Complaint in *this* case on Botmakers.

III. LEGAL STANDARDS

A. Personal Jurisdiction under Rule 12(b)(2)

Personal jurisdiction over a non-resident Defendant is tested in two parts—first, the satisfaction of the applicable state long-arm statute, then, whether the exercise of jurisdiction comports with due process. *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1404-5 (9th Cir. 1994). Due process permits the exercise of jurisdiction where Defendant has "certain minimum contacts" with the relevant forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006). California's long-arm jurisdictional statute is coextensive with federal due process requirements. *Id.*

Personal jurisdiction may be general or specific. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court,* 141 S. Ct. 1017, 1024 (2021). General jurisdiction applies "only when a defendant is 'essentially at home' in the State." *Id.* It is the plaintiff's burden to establish that the defendant has sufficient minimum contacts with California to satisfy due process. *VBConversions LLC v. Now Solutions, Inc.,* CV-13-00853-RSWL(ANx), 2013 WL 2370723, at *2 (C.D. Cal. May 30, 2013).

Further, "mere allegations of the complaint, when contradicted by affidavits, are [not] enough to confer personal jurisdiction of a non-resident defendant. In such a case, facts, not mere allegations, must be the touchstone." *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 639 (9th Cir. 1967); *VBConversions,* 2013 WL 2370723, at *3 ("a plaintiff's version of the facts is not taken as true if it is directly contravened.").

B. Failure to State a Claim under Rule 12(b)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Facial plausibility exists only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

"[T]he court 'must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party.'" *Usher v. Los Angeles*, 828 F. 2d 556, 561 (9th Cir. 1987). But "courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Nor need the Court "accept as true allegations contradicting documents that are referenced in the complaint." *Lazy Y Ranch Ltd. v. Behrens,* 546 F.3d 580, 588 (9th Cir. 2008).

IV. ARGUMENTS

A. The Complaint Should Be Dismissed for Lack of Personal Jurisdiction and/or Improper Venue.

1. There Is No General Personal Jurisdiction over Botmakers.

"Typically, a forum has general jurisdiction over a business only if it is incorporated in the forum state or has its principal place of business in the forum state." *Prescott v. Bayer HealthCare LLC,* No. 5:20-cv-00102 NC, 2020 WL 3505717, at *2 (N.D. Cal. June 29, 2020), citing *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014). Otherwise, general jurisdiction over a foreign corporation may only be found in an "exceptional case," where the Defendant's operations "may be so substantial and of such a nature as to render the corporation at home in that State." *Daimler*, 571 U.S., 137-9, n.19 (no general jurisdiction over foreign Defendant with multiple California facilities and California regional office).

Here, Jobiak conclusorily alleges that Botmakers' principal place of business

and headquarters are in Playa Vista, California, and that Botmakers is incorporated in Philadelphia. Complaint, at ¶¶6, 12, 1-2. These allegations are all false.

Botmakers' principal place of business is in Ukraine. Declaration of Botmakers' COO Eugene Smirnov ("Smirnov Decl.") ¶4; Declaration of Oleksandr Gamaniuk, Botmakers' President ("Gamaniuk Decl.") ¶¶3, 7. It does not, and has never had, a corporate office in California. Nor does it have employees in California. Smirnov Decl. ¶5; *cf.* Complaint ¶12. Botmakers is simply not "at home" in California. Botmakers is incorporated in Delaware. Smirnov Decl. ¶3. Indeed, Jobiak knows this, having sent its *pre-suit* demand letter to Delaware. Complaint, Ex. C. Jobiak cannot make plainly false allegations, controverted by affidavit evidence and even the exhibits to its Complaint, to get through the general jurisdiction door. *See Taylor*, 383 F.2d, at 639.

2. There Is No Specific Personal Jurisdiction over Botmakers.

There are three requirements for a court to exercise specific jurisdiction over a nonresident defendant:

> (1) the defendant must either "purposefully direct his activities" toward the forum or "purposefully avail[ ] himself of the privileges of conducting activities in the forum";
>
> (2) "the claim must be one which arises out of or relates to the defendant's forum-related activities"; and
>
> (3) "the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."

Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1068 (9th Cir. 2017).

All three prongs must be present to satisfy due process. *Omeluk v. Langsten Slip & Batbyggeri A/S,* 52 F.3d 267, 270 (9th Cir. 1995). The plaintiff bears the burden of satisfying the first and second prongs. *Schwarzenegger v. Fred Martin Motor Co.,* 374 F.3d 797, 802 (9th Cir. 2004). Once established, the burden shifts to

the defendant "to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Id*. Neither of the first two prongs is satisfied here.

a. Botmakers Has Not Purposely Directed Its Activities Towards California.

"For copyright infringement, and tort claims, courts use the purposeful direction test." Ex. 2 (*Aspen*), at 4, citing *Axiom*, 874 F.3d, at 1069. That is, "[t]he defendant must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.*

Here, Jobiak's allegations relevant to the first two prongs all fail.

First, Jobiak alleges that Botmakers "directed their wrongful actions towards Jobiak LLC, a company with clients, contracts, and employees located within this judicial district." Complaint, ¶11. But, "[w]hether Jobiak has clients, contracts, and employees located within the Central District is irrelevant." Ex. 2 (*Aspen*), at 4. Indeed, "[e]xpress aiming requires more than the defendant's awareness that the plaintiff it is alleged to have harmed resides in or has strong ties to the forum, because 'the plaintiff cannot be the only link between the defendant and the forum.'" *Ayla, LLC v. Alya Skin Pty. Ltd.,* 11 F.4th 972, 980 (9th Cir. 2021).

Second, Jobiak alleges that Botmakers has its "headquarters in Playa Vista, CA" and "employees situated within this judicial district." Complaint, ¶12. These are false. Smirnov Decl. ¶¶4-5; Gamaniuk Decl. ¶3.

Third, Jobiak alleges that Botmakers "owns and operates the website www.california.tarta.ai, which caters to the California job market." Complaint, ¶12. It also provides a single example of a job listing posted in August 2023[3], found on

[3] As discussed below, this listing is posted after the timeframe of Jobiak's copyright registration, which covers only Jobiak's "published updates from 9/1/2022 - 11/30/2022."

california.tarta.ai. Complaint, Ex. B, at 13. Jobiak also alleges that Botmakers runs the website tarta.ai. Complaint, ¶19. This is the website's main landing page. Smirnov Decl. ¶8. Botmakers has state subdomains to the main landing page for most states. *Id*. ¶9; Complaint, Ex. B, 10-12, 21-22 (providing allegedly "infringing" examples from ar.tarta.ai and nc.tarta.ai).

In *Aspen*, Jobiak similarly alleged that "Defendant lists job postings on https://ups.thehiringstore.com/california catering to the California job market." Ex. 1, ¶12; Ex. 2, 5. The *Aspen* court nonetheless found no specific personal jurisdiction. *Id.* 6. The Court reasoned that "there is no allegation that [Defendant] used Jobiak's copyrighted material to target the California market or that any of Jobiak's copyrighted material appeared on Aspen's website that caters to the California market." *Id.* This reasoning, too, applies here.

Case law shows that Botmakers' website does not establish sufficient minimum contacts with California. "A person's act of placing information on the Internet is not sufficient by itself to "subject that person to personal jurisdiction in each State in which the information is accessed." *L.A. Gem & Jewelry Design, Inc. v. Reese*, CV 15-03035 SJO (MRWx), 2015 WL 4163336, at *5 (C.D. Cal. July 9, 2015) (internal quotations omitted); Ex. 2 (*Aspen*), at 4. Even interactivity of a website does not, by itself, establish "express aiming." *Briskin v. Shopify, Inc.*, 87 F.4th 404, 417 (9th Cir. 2023). Were it otherwise, "every time a seller offered a product for sale through an interactive website, the seller would be subjecting itself to specific jurisdiction in every forum in which the website was visible … [which] would be too broad to comport with due process." *Id.*, citing *Herbal Brands, Inc. v.*

Complaint, Ex. A (Copyright Registration). Thus, on the face of its own complaint, Jobiak does not allege that Botmakers used copyright-protected material to target the California market or that such material appeared on california.tarta.ai.

Photoplaza, Inc., 72 F.4th 1085, 1091 (9th Cir. 2023).

Rather, "something more" must be shown when a website is asserted as a jurisdictional connection for the purposes of establishing "express aiming" for interactive websites:

> What is needed … is ***some prioritization*** of the forum state, ***some differentiation*** of the forum state from other locations, ***or some focused dedication to the forum state which permits the conclusion that the defendant's suit-related conduct "create[s] a substantial connection" with the forum***. *Walden*, 571 U.S. at 284. And that "substantial connection" must be something substantial beyond the baseline connection that the defendant's internet presence already creates with every jurisdiction through its universally accessible platform.

Briskin, 87 F.4th at 417-8 (emphasis added).

Here, the Complaint shows that *even assuming* Botmakers' website rises to the required level of interactivity when accessed from California, nothing *sets California apart* from treatment of other forums. Smirnov Decl. ¶9 (state sub-domain available for most states); Complaint, Ex. B, 10-12, 21-22 (allegedly "infringing" examples from other state sub-domains).

Further, the Northern District of California's "express aiming" analysis in *WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, 472 F. Supp. 3d 649 (N.D. Cal. 2020), *aff'd on other grounds*, 17 F.4th 930 (9th Cir. 2021) is instructive, on similar facts. Where "plaintiffs allege[d] that defendants targeted and accessed [Plaintiff]'s servers without authorization," the court reasoned found "critical" to the "express aiming analysis that "WhatsApp's own servers … were located in California." *Id.* at 671-2. The court found that the fact that Defendant had "electronically entered the forum state seeking out plaintiffs' servers" was "a necessary component" to the transmission of malicious code to users. *Id.* at 673; *Craigslist, Inc. v. Naturemarket, Inc.,* 694 F. Supp. 2d 1039, 1053 (N.D. Cal. 2010) (on claims that defendant

violated plaintiff's website copyright, defendant expressly aimed its intentional conduct at California where Plaintiff maintained its website); *SCI Shared Res., LLC v. Echovita, Inc.,* No. 14-22-00077-CV, 2023 WL 5354115, at *6 (Tex. App. Aug. 22, 2023) (Texas court could assert personal jurisdiction over website scraping claims where servers hosting the allegedly scraped data were located in Texas).

Here, Jobiak makes no allegations that its database and/or website are hosted on servers in California, nor that the act of "scraping" or "access" occurred in California. Indeed, there are no allegations that Jobiak itself—a Delaware company with its principal place of business in Massachusetts—is found in California. Complaint ¶5.

As to the third prong of the applicable test, Jobiak has only pled a single conclusory statement, that "[t]his Court also has personal jurisdiction over Defendant because Defendant has caused injury to Plaintiff within the State of California and within this judicial district." *Id.* ¶13. Jobiak has not alleged *any facts* to show that Botmakers knew harm would likely be suffered in California, nor that Jobiak is found in California. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1113-14 (9th Cir. 2002) (summarizing case law finding that the location of economic harm was at a company's principal place of business).

And even if Jobiak *had* pled any facts showing knowledge of harm likely to be suffered in California (it has not), its allegations would have to show a higher-level "brunt of the harm" or "some significant amount of harm" suffered in California. *Id.* at 1113; *Aquino v. Breede*, No. 18-cv-06916-BLF, 2019 WL 4081902, at *10 (N.D. Cal. Aug. 29, 2019). Notably, the *Aspen* court found insufficient for personal jurisdiction the suggestion of a commonplace level of harm *wherever* the Plaintiff has a presence. Ex. 2, at 5 ("[i]f [Defendant]'s website did harm to Jobiak in California, it did harm to Jobiak in every state where Jobiak has a presence. The Ninth Circuit has rejected the proposition that a plaintiff may bring its

claims in any state in which it had a presence at the time of the alleged copyright infringement.").

b. The Claims Do Not Arise Out of or Relate to Botmakers' Forum-Related Activities.

The Ninth Circuit follows a "but for test" in determining whether an action arises out of the defendant's contacts with the forum state. *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir.1995). "[A] plaintiff must show that there is a non-tenuous connection between the out-of-state defendant's forum-directed activities and the plaintiff's alleged injuries." *Gaudio v. Critical Mass Indus. LLC,* No. 2:19-cv-082-FWS-AGR, 2019 WL 8162804, at *9 (C.D. Cal. Dec. 9, 2019).

Here, the entirety of Jobiak's claims arise out of or relate to Botmakers' alleged "intentional access" to Jobiak's "computers and servers," the "intention[al]" "accessing and scraping" of Plaintiff's "automated database," and the "scraping" of "data from Plaintiff's website and using this database" for "[copyright] infringing listings." Complaint, ¶¶ 19, 48, 51, 57, 63, 67. Such conduct is by definition *not* forum-related or -directed, because Jobiak has not alleged that its servers and websites hosted *in California* were scraped. *Id.* ¶ 5. Neither has Jobiak pled that any listings targeted at California infringed material within an applicable copyright registration's scope of protection. *Supra.* at 14-16. Thus it cannot be said that "but for" *forum-related* activities, Jobiak's claimed injuries would not have occurred.

c. Exercise of Personal Jurisdiction Would Not Comport with Fair Play and Substantial Justice.

Even assuming the first two prongs of the test are met by Jobiak (they are not), the Court's exercise of jurisdiction here would not be reasonable. In assessing reasonableness, the Court considers seven factors: "(1) the extent of a defendant's purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum

state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum." *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998). The Court balances all seven factors and no one factor is dispositive. *Id.*

Here, Jobiak has only alleged a singular fact showing any degree of interaction by Botmakers with California, that is, the existence of california.tarta.ai, which allegedly caters to the California job market. Complaint, ¶13. But the degree of this "interjection," assuming it may even be called that, is no more than other U.S. States. Smirnov Decl. ¶9. Neither is it factually tethered to any of Jobiak's claims.

Further, here, both litigants are out-of-state. *Id.* ¶¶3, 4; Complaint, ¶5. And Jobiak's allegations center around acts concerning Jobiak's servers, the location of which is believed *not* to be California. Indeed, Jobiak itself partially conceded this in *Aspen*. Ex. 3 (Jobiak Opposition to Aspen MTD), at 8 ("Jobiak concedes that on the facts known to date, the District of Colorado and very likely, the District of Massachusetts, would be available for this litigation.").

3. Venue Is Improper Here.

Jobiak bears the burden of establishing that venue is proper for each claim asserted. *Allstar Mktg. Grp., LLC v. Your Store Online,* LLC, 666 F.Supp.2d 1109, 1126 (C.D. Cal. 2009).

Copyright Claim. 28 U.S.C. § 1400(a) provides that venue for Jobiak's copyright infringement claim be "in the district in which the defendant or his agent resides or may be found." Section 1400(a) has been interpreted to be co-extensive with personal jurisdiction. *Michael Grecco Prod., Inc. v. PicClick, Inc.,* No. CV 21-4510-MWF (EX), 2022 WL 2188534, at *2 (C.D. Cal. Jan. 11, 2022) (citation omitted). Hence, for the same reasons that personal jurisdiction fails, venue is

improper.

Non-Copyright Claims. Pursuant to 28 U.S.C. § 1391(b), proper venue requires a showing that a defendant resides in the judicial district; a substantial part of the events or omissions giving rise to the claim occurred in the judicial district; or if there is no district in which an action may otherwise be brought, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action. None of these requirements are satisfied here, for the same reasons as above.

B. Jobiak Fails to State a Claim.

1. Jobiak Fails to State a Claim for Copyright Infringement.

The elements of a copyright infringement claim are "(1) ownership of a valid copyright; and (2) that the defendant violated the copyright owner's exclusive rights under the Copyright Act." *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C. § 501(a)). The Complaint fails to properly allege either element.

a. <u>Jobiak's AI-generated Database Is Not Copyright Protectable.</u>

To be eligible for copyright, a work must have a human author. *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018). In the absence of any human involvement in the creation of the work, a work generated autonomously by AI is not eligible for copyright. 17 U.S.C. § 102(a); *Thaler v. Perlmutter,* No. CV 22-1564 (BAH), 2023 WL 5333236 (D.D.C. Aug. 18, 2023); United States Copyright Office, *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, available at https://copyright.gov/ai/ai_policy_guidance.pdf ("In the Office's view, it is well-established that copyright can protect only material that is the product of human creativity.").

In *Thaler,* the owner of a computer system had attempted to seek copyright protection over artistic images generated by that computer system. *Thaler,* 2023 WL

5333236, at *1. Denied copyright registration by the Copyright Office, the owner appealed. The court was thus faced with the question of whether "a work generated entirely by an artificial system absent human involvement should be eligible for copyright." *Id.* The answer was in the negative—it held that "human authorship is an essential part of a valid copyright claim." *Id.*

Here, the Complaint alleges that Jobiak is an "AI-based recruitment platform" that "leverag[es] machine learning technology to optimize job descriptions in real-time" and "offer such an automated database for job listings." Complaint, ¶1. Specifically, Jobiak alleges that "[u]sing proprietary technology, … [it] has been the first to not only search 100% of all online jobs in real-time but also automate the conversion and optimization of job descriptions to meet Google's schema requirements." *Id.* ¶15. As one example, Jobiak alleges that its "proprietary keyword technology" inserts "'dummy' keywords that have no relation to the position listed." *Id.* ¶20. Thus, by Jobiak's own allegations, like *Thaler*'s computer system, Jobiak's proprietary machine learning technology generated the content in its automated database.

Instead of disclosing the AI-generated content on its copyright registration, however, Jobiak only identified three human authors for the automatic compilation.[4] *Id.* Ex. A. But it is impossible for the three human authors to search 100% of online jobs and then convert and optimize them to meet Google's schema requirements.

[4] *See* United States Copyright Office, *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, available at https://copyright.gov/ai/ai_policy_guidance.pdf ("Applicants who fail to update the public record after obtaining a registration for material generated by AI risk losing the benefits of the registration. If the Office becomes aware that information essential to its evaluation of registrability 'has been omitted entirely from the application or is questionable,' it may take steps to cancel the registration. Separately, a court may disregard a registration in an infringement action pursuant to section 411(b) of the Copyright Act if it concludes that the applicant knowingly provided the Office with inaccurate information, and the accurate information would have resulted in the refusal of the registration.").

Indeed, the Complaint is silent on the three human authors' involvement or creative input in compiling the presumably massive database. On this analysis, there can be *no* copyright protection over Jobiak's AI-generated database.

b. Jobiak Fails to Allege that Botmakers Exactly Copied Its Database.

Even if Jobiak's AI-generated database is entitled to copyright protection (it is not), Jobiak's copyright claim still fails because the Complaint does not allege that Botmakers exactly copied the database, which is a compilation.

In a compilation, "only the compiler's selection and arrangement may be protected; the raw facts may be copied at will." *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.,* 499 U.S. 340, 350 (1991). Because the protected information is the ***selection*** and ***arrangement*** of data, courts have found that relief is only available "against those who used forms that ***exactly copied*** [the] selection of information." *Experian Info. Sols., Inc. v. Nationwide Mktg. Serv. Inc.,* 893 F. 3d 1176, 1185 (9th Cir. 2018) (citing *Kregos v. Associated Press*, 937 F.2d 700, 709-10 (2d Cir. 1991)). "[T]here can be no infringement unless the works are virtually identical. It is not enough to compare the allegedly infringing compilation with only a portion of the copyrighted work." *Experian*, 893 F. 3d at 1186.

Here, Jobiak alleges only that Botmakers copied a few individual listings and not the entire database. Complaint, ¶19, Ex. B. Under *Experian*, Jobiak's copyright claim fails as a matter of law.

c. "Jobiak's" Individual Job Listings Are Not Protected by Its Copyright Registration.

Jobiak's copyright registration is a group registration of its compiled database, including the updates from September 1 to November 30, 2022. Complaint, Ex. A ("Group Registration for Automated Database Entitled ALL JOBS by Jobiak, published updates from 9/1/2022 - 11/30/2022"; "Basis of Claim:

new compilation of database information"). The *individual* job postings in the database are *not* protected by this compilation copyright. *Feist,* 499 U.S. at 350 (1991). This is evident from the copyright registration itself. Complaint, Ex. A ("Pre-existing Material" of the registered database includes "third party text").

Moreover, by their *nature*, the individual job postings consist of third party data from job-offering employers. In fact, Jobiak's pleading concedes the job listings originate from third parties. Complaint, Ex. C (Jobiak's pre-suit demand letter) ("[Jobiak] has been the first to … scrape 100% of all online jobs in real-time"). And Jobiak admits in its own terms of service that third parties own the online job postings, for which Jobiak itself only has a "non-exclusive" "license" (Jobiak Terms of Service, available at https://jobiak.ai/terms-of-service/: "You retain full ownership of your Content, but you hereby grant us a … non-exclusive … license").

Here, Jobiak alleges that Botmakers has scraped and copied Jobiak's job "postings," or "listings," from Jobiak's database. Complaint, ¶¶1, 5 ("job postings"), ¶¶2, 19, Exhibit B ("listings"). *See also Id.* ¶¶47, 56, 72. But these individual job listings are not protected by Jobiak's copyright registration of their *compilation* database; thus, Jobiak's copyright infringement claim fails.

d. Botmakers Cannot Infringe Because the Alleged "Infringed Material" Is Not Covered by the Copyright Registration and Because Botmakers' Listings Pre-Date the "Infringed Material."

Jobiak asserts a single copyright—"ALL JOBS by Jobiak"— a group registration for a database including published updates between September 1, 2022 to November 30, 2022. Complaint, Ex. A. The group registration is for "a specific version of a database that existed on a particular date and/or the subsequent updates or revisions to that database within a three-month period." Ex. 4, Section 1112 of the Compendium of U.S. Copyright Office Practices; *see Ipreo Holdings LLC v.*

Thomson Reuters Corp., 09 CV. 8099 BSJ, 2011 WL 855872, at *5 (S.D.N.Y. Mar. 8, 2011).

Jobiak then alleges the following listings show Botmakers' infringement:

Job Listing	**Date Jobiak Listing Posted**	**Date Botmakers Listing Posted**
Shop Porter, Dobbs Peterbilt	July 19, 2023	March 18, 2023
Warranty Administrator, Western Truck Center	September 27, 2023	August 29, 2023
Nursing Aide, Cone Health	September 27, 2023	August 29, 2023

Complaint, ¶19, Ex. B.

By Jobiak's own pleading, copyright infringement is impossible. The 2023 Jobiak listings identified in the Complaint could not have been present in the database within the registered period in 2022 and are not otherwise alleged to be registered for copyright protection. *See Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC,* 139 S. Ct. 881, 885 (2019); *see* 17 U.S.C. § 411(a) ("[N]o civil action for infringement of [a] copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title."). Further, every single one of the "[o]riginal Jobiak listing[s]" is "posted on" a later date than the so-called "infringing listing" by Botmakers.

2. Jobiak Fails to State a Claim under the CFAA and the CDAFA.

The CFAA prohibits acts of computer trespass by those who act "without authorization" or "exceed authorized access." 18 U.S.C. § 1030(a). The CFAA

creates civil (and criminal) liability for whoever "intentionally accesses a computer without authority or exceeds authorized access and thereby obtain . . . information from a protected computer" and caused a loss of $5,000 or more during a one year span. 18 U.S.C. §§ 1030(a)(2)(C) and 1030(g).

The CDAFA differs somewhat from the CFAA. For instance, it requires "knowin[g] access" and acting "without permission," and does not contain a $5,000 damage threshold. Cal. Penal Code § 502(c); *Brodsky v. Apple Inc.,* 445 F. Supp. 3d 110, 131 (N.D. Cal. 2020). However, "[t]he necessary elements of a [CDAFA claim] do not differ materially from the necessary elements of the CFAA." *NovelPoster v. Javitch Canfield Group,* 140 F. Supp. 3d 938, 950 (N.D. Cal. 2014) (finding that the claims "rise or fall" together). Courts thus analyze the CFAA and CDAFA in parallel. *Id.*; *See, e.g., Nowak v. Xapo, Inc.,* No. 5:20-cv-03643-BLF, 2020 WL 6822888, at *5 (N.D. Cal. Nov. 20, 2020).

a. Jobiak Does Not Sufficiently Allege That Botmakers Acted Without Authorization or Exceeded Authorized Access.

The Ninth Circuit analyzed the CFAA in detail in *hiQ Labs, Inc. v. LinkedIn Corp.,* 31 F.4th 1180 (9th Cir. 2022), on similar facts. There, hiQ scraped LinkedIn profiles that were visible to the general public. *Id.* at 1185. In response, LinkedIn employed several technological systems to prohibit access to LinkedIn servers via automated bots, to detect suspicious activity, throttle or block IP addresses, and restrict automated scraping. *Id.* at 1186. LinkedIn sent hiQ a cease-and-desist letter demanding hiQ stop accessing and copying data from LinkedIn's servers. *Id.*

Analogizing the CFAA as a "breaking and entering" and "anti-intrusion" statute, *Id.* at 1196-97, the court observed that "[p]ublic LinkedIn profiles, available to anyone with an Internet connection," fall into a category of computer systems it described as "computers for which ***access is open to the general public*** and

permission is not required." *Id.* at 1197-8 (emphasis added). Thus, for such "websites made freely accessible on the Internet, the '"breaking and entering' analogue … has no application, and the concept of 'without authorization' is inapt." *Id.* Indeed, "authorization is only required for password-protected sites or sites that otherwise prevent the general public from viewing the information." *Id.* at 1197. And notably, the Court's conclusion was unchanged by LinkedIn's implemented technological systems or cease-and-desist letter. *Id.* at 1199 (distinguishing scenarios involving data behind password-authentication gates while "the data hiQ was scraping was available to anyone with a web browser") . *See also Watters v. Breja*, 23-cv-03183-HSG, 2024 WL 201356, at *2-3 (N.D. Cal. Jan. 18, 2024) (finding Plaintiff had not plausibly alleged facts showing access without authorization, where Defendant was only alleged to have interacted with public website interface instead of logging into restricted, password-protected areas).

Similarly, California district courts have repeatedly held that for a Defendant's act to be "without permission" under the CDAFA, Plaintiff "must … allege that the defendant overcame some technical or code barrier" "in place to restrict or bar a user's access." *Enki Corporation v. Freedman*, Case No.: 5:13-cv-02201-PSG, 2014 WL 261798, at *3 (N.D. Cal. Jan. 23, 2014) (describing this as the "governing standard"); *Novelposter*, 140 F. Supp. 3d, 950, n.8; *Williams v. Facebook, Inc.,* 384 F. Supp. 3d 1043, 1053 (N.D. Cal. 2018). Reading this with the analysis in *hiQ* however, the implementation of mere IP-blocking-type measures does *not* rise to the level of a barrier that restricts or bars user access, as to "public websites" for which by their nature "permission is not required." *hiQ*, 31 F.4th, 1197-9.

Here, like LinkedIn, the data on Jobiak's website appears accessible to the public, and it does not allege otherwise. On the contrary, it gives examples of its alleged listings, available via a public website, that were apparently copied by

Botmakers. Complaint, ¶19, Ex. B. While Jobiak generally alleges that it implemented a "comprehensive security strategy," it appears to be nothing more than simply blocking IP addresses. *Id*. ¶¶47, 56. These alleged protocols are similar to those rejected in the *hiQ* case, and thus fails to establish that the data was not accessible to anyone with a web browser. Neither does Jobiak allege that its website is password protected. For these reasons, Jobiak's CFAA and CDAFA claims should be dismissed.[5]

b. Jobiak Does Not Adequately Plead Damages Under the CFAA.

To maintain a civil action under the CFAA, Jobiak must allege that Botmakers' conduct caused "loss" during any 1-year period aggregating at least $5,000 in value. *See* 18 U.S.C. §§ 1030(g); 1030(c)(4)(A)(i)(I). The term "loss" is statutorily defined, in detail, under 18 U.S.C. § 1030(e)(11). Mere generalizations as to damages are insufficient. *DocMagic, Inc. v. Ellie Mae, Inc.,* 745 F. Supp. 2d 1119, 1150 (N.D. Cal. 2010) (dismissing a CFAA claim where the damages alleged in the complaint were "formulaic recitations of the elements of a cause of action"); *Complete Logistical Servs., LLC v. Rulh,* 350 F. Supp. 3d 512, 522 (E.D. La. 2018) (same); *Novelposter*, 140 F. Supp. 3d, 949.

Here, Jobiak precisely relies on a formulaic allegation of damages in its Complaint. Complaint ¶52. Tellingly, before the *Aspen* court, Jobiak itself had

[5] Jobiak conclusorily invokes Cal. Pen. Code § 502(c)(1), (2), (3) and (6) , but does not allege facts supporting how each applies. Complaint, ¶¶58-61; *See, e.g.* "As [Counterclaimant] does not allege that [Counter-defendant] altered, deleted, damaged, or destroyed any data, computer system or computer network, [Counterclaimant]'s counterclaim is limited to subsections 502(c)(2), (3), and (7)." *Siebert v. Gene Security Network, Inc.,* No. 11-cv-01987-JST, 2013 WL 5645309, at *11 (N.D. Cal. Oct. 16, 2013). Nor does Jobiak plead facts showing "transmission" or "damage" to a computer. 18 U.S.C. § 1030(a)(5); Complaint ¶¶50-51.

conceded that its recitation of damages was "formulaic," and had sought leave to amend in the event the Court agreed. Ex. 3, at 11 ("Jobiak's allegation is still "formulaic"").

3. Jobiak Fails to State a Claim under the Digital Millennium Copyright Act (DMCA).

Under the DMCA, no person is permitted to "circumvent a technological measure that effectively controls access to a [copyright protected work]." 17 U.S.C. § 1201(a)(1)(A). "[T]o 'circumvent a technological measure' means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner." 17 U.S.C. § 1201(a)(3)(A). "A technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." 17 U.S.C. § 1201(a)(3)(B).

Leaving aside that Jobiak has not alleged the predicate that a *copyright protected* work is at issue, "[t]he DMCA is aimed at protecting 'the efforts of copyright owners to protect their works from piracy behind *digital walls* such as encryption codes or password protections.'" *Dish Network L.L.C. v. World Cable Inc.,* 893 F. Supp. 2d 452, 464 (E.D.N.Y. 2012) (citing *Universal City Studios, Inc. v. Corley,* 273 F.3d 429, 435 (2d Cir. 2001)). "The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book." *MDY Indus., LLC v. Blizzard Ent., Inc.,* 629 F.3d 928, 947 (9th Cir. 2010) (citing H.R.Rep. No. 105–551, pt. 1, at 17 (1998)). Where data is available through other means of access, courts have found that there has been no "circumven[tion]" of a "technological protection measure."

See Dish, 893 F. Supp. 2d, 465 (dismissing a DMCA claim where the court found the "room" was already "unlocked"); *Digital Drilling Data Sys. LLC v. Petrolink Servs. Inc.,* 965 F.3d 365, 376-77 (5th Cir. 2020); *Lenmark Int'l, Inc. v. Static Control Components, Inc.,* 387 F.3d 522, 547 (6th Cir. 2004).

On similar facts in *CouponCabin LLC v. Savings.com, Inc.,* No. 2:14-CV-39-TLS, 2016 WL 3181826 (N.D. Ind. June 8, 2016), the Court found no DMCA violation where a company that implemented "technical safeguards and barriers," including IP blocking, to prevent scraping of its website. The Court recognized that "even after [CouponCabin's] implementation of 'technical safeguards and barriers,' its website remains accessible to users of servers and/or internet service providers that have not been blocked by the [CouponCabin's] technology." *Id.* at *6. The Court found no DMCA violation "[a]bsent allegations that a user of the . . . website is required to apply 'information or a process or treatment' to gain access." *Id.*

Here, Jobiak generally alleges that it implemented "layers of technological protections," which in the sentences that follow, emerge to essentially comprise the blocking of IP addresses. Complaint ¶72. IP blocking is not a sufficient "digital wall" or "technological protection measure" under the DMCA. *CouponCabin,* 2016 WL 3181826, at *6. Since, on the face of the pleadings, the website remains accessible to the general public, the alleged "layers of technological protections" did not "effectively control[] access to a work" such that it is in a "locked room." As such, the DMCA claim must be dismissed.

4. Jobiak Fails to State a UCL Claim.

a. <u>The UCL Claim Is Pre-Empted.</u>

The Copyright Act preempts California's Unfair Competition Law in circumstances where the rights asserted fall within the scope of copyright protection. *See, e.g., Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc.,* 7 F.3d 1434, 1439 (9th Cir. 1993) ("Federal patent and copyright laws limit the states'

ability to regulate unfair competition.").

"By proscribing 'any unlawful' business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Media.net Advert. FZ-LLC v. NetSeer, Inc.,* 156 F. Supp. 3d 1052, 1074 (N.D. Cal. 2016) (citing Cal. Bus. & Prof. Code § 17200). "To the extent that [a plaintiff] brings [a UCL] claim based on conduct involving subject matter covered by the Copyright Act, the claim is preempted if it implicates rights contained in the Act." *Id.; see also Kodadek v. MTV Networks, Inc.* 152 F.3d 1209, 1212-13 (9th Cir. 1998).

Here, because Plaintiff's UCL claim is solely predicated on its alleged rights under the Copyright Act, it must be dismissed. Complaint, ¶67 ("Defendant has engaged in 'unfair' business practices … thereby infringing upon Plaintiff's copyrights."). Notably, on a practically identical UCL pleading, Jobiak recently conceded pre-emption of its UCL claim before the *Aspen* court. Ex. 3, at 4.

b. <u>"Unfairness" Is Not Properly Alleged.</u>

"Unfair" conduct is that which violates a public policy "tethered to specific constitutional, statutory, or regulatory provisions." *Scripps Clinic v. Superior Court,* 108 Cal. App. 4th 917, 940 (Cal. Ct. App. 2003). "A plaintiff alleging unfair business practices [under the UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's, Inc.,* 14 Cal. App. 4th 612, 617 (Cal. Ct. App. 1993). Furthermore, particularity notwithstanding, a plaintiff cannot maintain a UCL claim if such claim is premised upon deficient underlying violations. *See, e.g., Smith v. State Farm Mut. Auto. Ins. Co.,* 93 Cal. App. 4th 700, 718 (Cal. Ct. App. 2001).

Here, the UCL claim is "premised upon deficient underlying violations" and has not stated supporting facts with "reasonable particularity" because its copyright infringement claim fails. *Supra,* at 12-16.

5. Jobiak's California Statutory Claims (CDAFA and UCL) Fail Because They Do Not Apply Extra-Territorially.

California law holds a presumption against extraterritorial applications of its statutes. Ordinarily, "the statutes of a state have no force beyond its boundaries." *Oman v. Delta Air Lines, Inc.,* 889 F.3d 1075, 1079 (9th Cir. 2018) (quoting *N. Alaska Salmon Co. v. Pillsbury,* 174 Cal. 1, 162 (1916)). "[I]f the liability-creating conduct occurs outside of California, California law generally should not govern that conduct" unless the California legislature indicates otherwise. *Id.* (quoting *Sullivan v. Oracle Corp.,* 254 P.3d 237, 248 (2011)).

"The presumption against extraterritoriality applies to the [UCL] in full force." *Sullivan,* 254 P.3d at 248. Courts readily dismiss CDAFA and UCL claims when plaintiffs fail to allege that the wrongful conduct creating liability occurred in California. *See, e.g., M Seven System Ltd. v. Leap Wireless Int'l, Inc.,* 2013 WL 12072526, at *3 (S.D. Cal June 26, 2013) (dismissing CDAFA claims where there was alleged access, from a foreign jurisdiction, of computers located in a foreign jurisdiction, observing that it was "not persuaded that the California Penal Code is intended to reach the acts of citizens of a foreign jurisdiction that occurred solely in that foreign jurisdiction"); *In re Arthur J. Gallagher Data Breach Litigation,* 631 F. Supp. 3d 573, 591 (N.D. Ill. 2022) (dismissing UCL claim brought by California and non-California plaintiffs for ransomware attack on Delaware corporation with a principal place of business in Illinois with no allegation that the wrongful conduct emanated from California); *Toretto v. Donnelley Fin. Sols., Inc.,* 583 F. Supp. 3d 570, 605 (S.D.N.Y. 2022) (dismissing UCL claim because the "conduct allegedly creating liability…occurred wholly outside of California").

Here, the conduct Jobiak presumably alleges underlying CDAFA and UCL liability relates to Botmakers' alleged accessing and scraping of data from Jobiak's from Jobiak's database on its computers and servers. *See* Complaint, ¶¶48, 51, 57,

63, 67. There are no allegations that the stated conduct alleged took place in California (indeed, Jobiak has made no allegations that it hosts its computers and servers in California, for example). *Supra,* 8-9.

V. CONCLUSION

For these reasons, Botmakers respectfully requests that the Court grant its motion.

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant, certifies that this brief contains 6,959 words, which complies with the word limit of L.R. 11-6.1.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2024, the foregoing document was filed electronically through the Court's Electronic Case Filing System. Service on this date of the public copy of this document is being made upon all counsel of record in this case by the Notice of Electronic Filing issued through the Court's Electronic Case Filing System on this date.

By: */s/ Xinlin Li Morrow*

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