

1996 U.S. Dist. LEXIS 19990, *

NORTH TEXAS PREVENTIVE IMAGING, L.L.C., Plaintiff, v. HARVEY EISENBERG M.D. et al., Defendants.

SA CV 96-71 AHS (EEx)

**UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION**

1996 U.S. Dist. LEXIS 19990

August 19, 1996, Decided

August 19, 1996, FILED; August 26, 1996, ENTERED

DISPOSITION: [*1] Defendants' motion to dismiss claims 1, 4 and 6 granted and defendants' motion to dismiss claims 2, 3, and 5 denied. Plaintiff's motion for preliminary injunction granted.

COUNSEL: For NORTH TEXAS PREVENTIVE IMAGING LLC, a Texas LLC, plaintiff: Michael Joseph Collins, Collins & Bellenghi, Irvine, CA. Steven Brower, Joel D Covelman, Ginsburg Stephan Oringher & Richman, Costa Mesa, CA.

For HARVEY, M.D., an individual, ROBERT EISENBERG, an individual, HEALTH TECHNOLOGIES & WELLNESS INC, a Delaware corporation, MULTI-DIMENSIONAL IMAGING INC, a California corporation aka Medical Imaging Investments Inc, defendants: Christopher S. Williams, Lincoln B. Quintana, Ronald R. Webb, Williams & Gilmore, La Jolla, CA.

For PURA LABS INC, a California corporation dba Multi-Dimensional Imaging Inc, defendant: Michael Joseph Collins, Collins & Bellenghi, Irvine, CA. Christopher S. Williams (See above), Lincoln B. Quintana (See above), Ronald R. Webb (See above).

JUDGES: ALICEMARIE H. STOTLER, UNITED STATES DISTRICT JUDGE

OPINIONBY: ALICE H. STOTLER

OPINION:

ORDER FINDING FEDERAL QUESTION JURISDICTION; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS; GRANTING IN PART PLAINTIFF'S MOTION FOR PRELIMINARY [*2] INJUNCTION

I.**INTRODUCTION**

In 1994, Congress amended the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 ("Act" or "CFAA"), the application of which in this case will confer jurisdiction on the district court for some or all of plaintiff's claims. Plaintiff, a medical diagnostics company, seeks to assert the revised provisions of the Act as private rights of action against defendant software providers. Resolving ambiguities in the legislation in plaintiff's favor, the Court by this Order concludes that plaintiff has stated a claim under federal question jurisdiction and pled two claims under the revised Act. The jurisdictional issue is examined first, followed by a discussion of defendants' motion to dismiss plaintiff's First Amended Complaint ("FAC") and plaintiff's motion for preliminary injunction.

II.**PROCEDURAL HISTORY**

Plaintiff filed this lawsuit on January 23, 1996, alleging only diversity jurisdiction. On March 11, 1996, plaintiff filed the First Amended Complaint ("FAC"), alleging federal question jurisdiction on the basis of the Computer Fraud and Abuse Act.

On April 9, 1996, plaintiff filed a motion for preliminary injunction. Defendants [*3] filed opposition on April 18, 1996; plaintiff filed a reply on April 25, 1996. Oral argument occurred on May 1, 1996, at which time the Court took the matter under submission and ordered the parties to file supplemental briefs on jurisdictional issues. Plaintiff filed supplemental papers on May 10, 1996 and May 24, 1996; defendant filed supplemental papers on May 21, 1996.

On April 15, 1996, defendants filed a motion to dismiss the complaint for failure to state a claim. On April 29, 1996, plaintiff filed opposition. On May 1, 1996, the Court heard oral argument on the motion and took the matter under submission. Defendants filed their reply on June 3, 1996.

III.

SUMMARY OF FIRST AMENDED COMPLAINT

Plaintiff North Texas Preventive Imaging L.L.C. ("NTPI") is a Dallas-based provider of medical diagnostic imaging (i.e., CAT scans), a method of diagnosing coronary artery disease, cancer, osteoporosis, and other medical conditions. To assist with its diagnostic imaging, plaintiff purchased a computer system (the "Scribe system") from defendant Medical Diagnostic Imaging, Inc. ("MDI"). The Scribe system performs computer enhancement of medical images.

Defendant MDI is [*4] a California corporation which allegedly owns and controls the Scribe system software at issue. FAC P 5. Defendants Eisenberg and Pura Labs, Inc. do business as MDI. FAC PP 4-6. Defendant Health Technologies & Wellness, Inc. ("HTW") is a Delaware corporation which, prior to December 27, 1995, owned a majority interest in plaintiff NTPI. FAC P 7. HTW also held itself out as the owner of the Scribe system software. Defendant Harvey Eisenberg is the owner and operator of all the aforementioned business entities. FAC P 8. Defendant Roberta Eisenberg is Harvey Eisenberg's wife. FAC P 3.

Non-party DVI Financial Services, Inc. ("DVIF") is a financing company which helped plaintiff finance the purchase of the Scribe system software by buying it from defendants and leasing it to plaintiff. FAC P 11. DVIF purchased the Scribe system according to the terms of price quotation 950103 on January 22, 1995. FAC P 12. DVIF leased the software under the terms of lease # 8 on February 27, 1995.

In May 1995, the Scribe system was installed in plaintiff's facility. FAC P 15. Plaintiff has allegedly paid 90% of the sales price for the Scribe system software. FAC P 13. The core of the dispute is the parties' [*5] disagreement over the licensing rights conferred by defendant's sale of the Scribe system. The parties have no formal licensing contract; their arrangement is reflected in a price quotation which contains the following provision:

Software License Agreements: Software products provided by Multi-Dimensional Imaging are copyrighted, and all rights are reserved by Multi-Dimensional Imaging. The distribution and sale of Multi-Dimensional Imaging software products are intended for the use of the original purchaser only and for use only on the computer system(s) specified. Lawful users of this product are licensed to use the software as loaded on computers and/or provided on floppy disk for copying to computers. Users are also allowed to make back-up copies for safety. Any other copying, duplicating, selling, or otherwise distributing these products is a violation of the law.

FAC P 13; Friede Decl. Ex. 7 at 7 (full text of price quotation number 950103).

Plaintiffs were dissatisfied with the operation of the Scribe system and on December 27, 1995, sent a letter to MDI "cancelling" the purchase of the Scribe system and demanding return of \$ 161,721 which had been "overpaid." [*6] FAC P 15. Defendants responded with a letter asking plaintiff to enter into a new licensing arrangement and noting that the software would be disabled on January 31, 1996, if the new license were not executed. FAC P 16.

When the software was installed in March 1995, it contained no time restrictions or other disabling codes. Defendants apparently sent plaintiffs "update disks" periodically to update the Scribe system. In late 1995, defendants sent an "update" floppy computer disk to plaintiff which, unbeknownst to plaintiff, contained disabling codes. Disabling codes, or "time bombs," are computer software codes which render a software program inoperable at a pre-set time and date. FAC P 14. The software which plaintiffs loaded onto their computer in late 1995 contained a time bomb set to go off on January 31, 1996. The software was prepared on MDI's computers in California. FAC P 16.

Plaintiff learned of the existence of the time bomb and complained to defendant about its insertion in the Scribe system. A few days before the time bomb was scheduled to go off, MDI sent another set of computer codes which reset the time bomb for May 1, 1996. FAC P 16.

The FAC alleges six causes of [*7] action. First, plaintiff alleges that defendants breached the DVIF-MDI purchase contract and that plaintiff, as third party beneficiary of the contract and assignee of DVIF's rights, may enforce the contract. Plaintiff asserts that it received invoices for \$ 511,500, but received goods worth only \$ 278,730. FAC P 19. MDI has been paid \$ 460,350 for goods supplied, and plaintiff alleges the right to the amount it overpaid for the goods -- \$ 181,620. FAC P 19.

Second, plaintiff alleges that defendants breached the express and implied warranties for defect-free performance of the software and hardware. FAC P 24. Plaintiff alleges that it has been damaged in the amount of \$ 10,000, representing the cost of labor and measures taken to keep the Scribe system running. FAC P 27; see also p. 24.

Third, plaintiff alleges that defendants' conduct in secreting the time bomb in its Scribe system constitutes a violation of CFAA sections 1030(a)(5)(A) and (B). In particular, plaintiff claims that defendant, using its computers located in California, clandestinely caused the time bomb to be inserted in the Scribe system at plaintiff's facility in Texas. FAC P 29. The time bomb potentially impairs [*8] the medical examination, diagnosis, and treatment of NTPI's patients. FAC P 33.

Fourth, plaintiff alleges that defendants' intentional insertion of the time bomb in the Scribe system constitutes conversion because it interferes with plaintiff's right to quiet possession and use of the Scribe system. FAC PP 37-39. Plaintiff requests damages in the amount of \$ 460,350, representing the amount paid for the Scribe system. FAC P 38.

Fifth, plaintiff requests a declaratory judgment because it is impossible to determine who owns and controls the Scribe system software at issue in this lawsuit and that several defendants have used the name "MDI." Plaintiff requests a declaration as to which defendant owns and controls the software, and whether plaintiff holds a "non-exclusive license to use the software without cloud on title to such right." FAC P 43.

Sixth, plaintiff alleges that defendants HTW and Harvey Eisenberg committed "fraudulent misrepresentation and constructive fraud." Claim 6, while captioned as a fraud claim, substantively appears to allege a claim for breach of fiduciary duty. In particular, claim 6 alleges that HT&W, as majority owner of plaintiff, and Eisenberg, as manager [*9] of NTPI, owed a fiduciary duty to disclose relevant information regarding the insertion of the time bomb in the Scribe system. Plaintiff alleges that both defendants breached their fiduciary duties to NTPI by knowingly failing to disclose this information. FAC PP 45-46. Plaintiff requests compensatory damages in the amount of \$ 460,350 plus various additional damages caused by defendants' breach. FAC at p. 26.

IV.

DISCUSSION

1. Federal Question Jurisdiction: Does the Computer Fraud and Abuse Act ("Act" or "CFAA") prohibit the conduct complained of in the complaint?

The CFAA proscribes the unauthorized access to certain computer systems for harmful purposes by means of a modem or direct keyboard entry.

Section 1030(a)(5)(A) of statute reads:

"[Whoever] through means of a computer used in interstate commerce or communications, knowingly causes the transmission of a program, information, code, or command to a computer or computer system if--

(i) the person causing the transmission intends that such transmission will--

(I) damage, or cause damage to, a computer, computer system, network, information, data, or program;

or

(II) withhold or [*10] deny, or cause the withholding or denial, of the use of a computer, computer services, system or network, information, data or program; and

(ii) the transmission of the harmful component of the program, information, code, or command--

(I) occurred without the authorization of the persons or entities who own or are responsible for the computer system receiving the program, information, code, or command; and

(II)(aa) causes loss or damage to one or more other persons of value aggregating \$ 1,000 or more during any 1-year period; or

(bb) modifies or impairs, or potentially modifies or impairs, the medical examination, medical diagnosis, medical treatment, or medical care of one or more individuals...

[shall be punished as provided in subsection (c) of this section]."

Section 1030(a)(5)(B) of the statute criminalizes the same conduct when done with "reckless disregard of a substantial and unjustifiable risk that the transmission will" cause harmful effects.

However, it is unclear whether the CFAA prohibits a person from sending a disk containing disabling codes to an authorized person who then unwittingly loads the codes onto a computer. The Court has found no [*11] cases on point, and indeed very few cases which construe § 1030(a)(5) at all. n1 The issue appears to be one of first impression.

n1 None of the cases deal with the current post-1994 version of section 1030(a)(5). *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991) (discussing criminal liability for putting a "worm" on the Internet and causing many computer systems to crash); *United States v. Morris*, 728 F. Supp. 95, 96 (N.D.N.Y. 1990) (defining elements of crime under § 1030(a)(5)); *United States v. Fernandez*, 1993 U.S. Dist. LEXIS 12661, 1993 WL 88197 (S.D.N.Y.) (overruling vagueness objection to § 1030(a)(5) and defining the term "federal interest computer").

Although written as a criminal prohibition, the statute also creates a private right of action:

Any person who suffers damage or loss by reason of a violation of the section, other than a violation of subsection (a)(5)(B), may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. Damages [*12] for violations of any subsection other than subsection (a)(5)(A)(ii)(II)(bb) or (a)(5)(B)(ii)(II)(bb) are limited to economic damages...

18 U.S.C. § 1030(g).

A. Legislative History of the CFAA

The CFAA, enacted in 1984, was intended to prohibit the gaining of unauthorized access to "federal interest" computers. The original CFAA focussed on unauthorized "access" to computers causing harm and did not reach harms caused by methods other than unauthorized access. The 1984 CFAA therefore contained a loophole in cases where: (1) an authorized person caused harm to a protected computer system, or (2) an unauthorized person gave a floppy computer disk or computer codes to an authorized person who loads it onto the computer.

The CFAA was amended in 1986 and 1994. The 1994 amendment was intended to broaden the scope of criminalized activities to reflect the broader range of techniques being used in society to wreak havoc on computer systems. The sponsor of the 1994 amendment, Senator Leahy, stated that:

These amendments clarify the intent standards, the actions prohibited and the jurisdiction of the current Computer Fraud and Abuse Act... Under the current statute, [*13] prosecution of computer abuse crimes must be predicated upon the violator's gaining unauthorized access to the affected Federal interest computers. However, computer abusers have developed an arsenal of new techniques which result in the replication and transmission of destructive programs or codes that inflict damage upon remote computers to which the violator never gained "access" in the commonly understood sense of that term.

139 Cong. Rec. S16421-03, Nov. 19, 1993 (stmt. of Sen. Leahy) (reprinted at 1993 WL 490040). Thus while the pre-1994 CFAA was directed towards the unauthorized "access" of a computer system, presumably by modem or by direct keyboard entry, the post-1994 CFAA is directed towards a broader range of conduct by which a person knowingly "causes" the "transmission" of a program, information, code, or command to a computer. 18 U.S.C. § 1030(a)(5). Senator Leahy stated that:

The new subsection of the CFAA created by *this bill places the focus on harmful intent and resultant harm, rather than on the technical concept of computer access...*

The computer abuse amendments make it a felony intentionally to cause harm to a computer or the information [*14] stored in it by transmitting a computer program or code -- including destructive computer viruses -- *without the knowledge and authorization of the person responsible for the computer attacked*. This is broader than existing law, which prohibits intentionally accessing a federal interest computer without authorization, if that causes damage.

139 Cong. Rec. S16421-03, Nov. 19, 1993 (stmt. of Sen. Leahy) (reprinted at 1993 WL 490040) (emphasis added). The post-1994 CFAA undoubtedly is and was meant to be broader than previous law.

The question, however, is whether the current law proscribes defendants' conduct in this lawsuit -- the act of sending a floppy computer disk containing a time bomb to a party who unknowingly loads it onto a computer.

During debates on the 1994 amendment, software manufacturers objected to the possibility that their practice of inserting "disabling codes" in software programs would be criminalized because disabling codes can be used as a legitimate security measure. On this issue, Senator Leahy stated that the new language would not criminalize the use of disabling codes "when their use is pursuant to a lawful licensing agreement that specifies [*15] the conditions for reentry or software disablement." Cong. Rec. vol. 140 no. 122, 103d Cong., 2d sess., 8/23/94 at S. 12313 (plaintiff's brief of 5/10/96 at 15-16). Although Senator Leahy did not state the converse proposition, i.e., that the bill did criminalize the use of disabling codes which are not specified in a lawful licensing agreement, this is certainly a reasonable implication of the statement. The Court has found nothing in the statute or legislative history to suggest that Congress intended a blanket exemption for the use of time bombs from the CFAA's prohibitions. n2 Rather, time bombs would appear to fall within the statute's proscription on the use of "codes, information, programs, or commands" to cause harm to protected computer systems. Whether the use of a time bomb is illegal appears to require a case-by-case analysis of the defendant's intent, the type of computer involved, and the resulting harm. n3

n2 Defendants' citation to Senator Leahy's 1990 and 1991 comments regarding the freezing up of Vermont's computer network do not establish a blanket exemption from the CFAA for time bombs. In 1989, Vermont's computer network accidentally froze up as a result of disabling codes inserted by the software manufacturer. Senator Leahy commented that the event was a nuisance, but under the circumstances it was "not criminal." Senator Leahy did not explain why the manufacturer's act was not illegal, but given the context of his comments it is probably because the act was not done with the requisite intent. There is no support for a blanket exemption for time bombs in the CFAA.

[*16]

n3 Defendants' cite to Deputy Assistant Attorney General Mark Richard's 1990 testimony (defendants' Opp. of 5/21/96 at 4) is informative, but not helpful here. Mr. Richard commented that the new amendment would apply to cases where "the ac-

tual use of the computer in the offense was in interstate commerce." Richard's statements help define the breadth of the 1994 amendment but do not provide much guidance with respect to the narrower issue before the Court.

C. Conclusion

By casting the net broadly to include many different "transmission" techniques, the 1994 amendment shifted the CFAA's focus from the act of unauthorized access to the intent of the defendant. The transmission of a disabling code by floppy computer disk may fall within the new language, if accompanied by the intent to cause harm. 18 U.S.C. § 1030(a)(5). Accordingly, plaintiff has established federal question jurisdiction in claim 3 of the first amended complaint. The Court also chooses to exercise federal question jurisdiction over claim 5 (declaratory relief) and supplemental jurisdiction over remaining state law claims [*17] 1, 2, 4, and 6.

2. Defendants' Motion to Dismiss the First Amended Complaint

Defendants seek to dismiss all six claims in the FAC for failure to state a claim upon which relief can be granted or, alternatively, to require a more definite statement or to strike parts of the FAC. As noted, the FAC alleges causes of action for: (1) breach of contract, (2) breach of implied and express warranties, (3) violation of the CFAA, (4) conversion, (5) declaratory relief, (6) and fraud.

A. Claim 1 -- Breach of Contract

Defendants move to dismiss claim 1 on grounds the FAC does not adequately identify the contract which was allegedly breached. Claim 1 states that defendants "failed to supply goods specified on its written price quotation number 950103." FAC P 19. Further, claim 1 alleges that defendants breached the software use license contained in the price quotation by "demanding that NTPI enter into a new written software license agreement on substantially different terms, without any additional consideration..." FAC P 20.

Defendants allege that claim 1 fails to identify the contract being sued upon, the provisions of the contract allegedly breached, the breaching act, or [*18] the breaching party. Claim 1 identifies the contract as price quotation number 950103; however, it does not identify which provisions were allegedly breached. The claim states that defendants "substituted certain inferior, or lower priced goods, for items specified" in the contract, and that as a result plaintiff received goods worth only \$ 278,730. FAC P 19. However, claim 1 fails to identify which goods were substituted or how plaintiff calculated the value received at only \$ 278,730. Accordingly, it is difficult to see how defendants can adequately respond to the allegations. Defendants' motion to dismiss claim 1 is granted.

B. Claim 2 -- Breach of Express and Implied Warranty

Defendants seek to dismiss claim 2 because it fails to identify: (1) the source of the express warranty, (2) the source of the implied warranty, (3) the breaching party, or (4) the breaching act.

However, the FAC identifies the source of the express warranty as price quotation number 950103, see FAC P 24, and defendants quote the exact language of the express warranty in their moving papers. Mtn. at 7:2-3. The FAC also appears to allege that the same sale gave rise to the implied warranty of fitness [*19] for intended use. FAC P 24. Further, the FAC identifies the breaching party as "all defendants," see FAC Count Two, or as "MDI." FAC PP 24-26. Plaintiff identifies the breaching party sufficiently for defendants to prepare a response. FAC P 4. Finally, plaintiff lists a number of ways in which the product delivered by defendants allegedly failed to perform according to the warranties and caused damages. FAC PP 26-27. Accordingly, defendants' motion to dismiss claim 2 is denied.

C. Claim 3 -- Violation of the CFAA

Defendants argue for dismissal of claim 3 on grounds that: (1) claim 3 fails to identify any individual responsible for the acts alleged, (2) claim 3 fails to plead violations of subsections (B)(i) and (B)(ii)(I), as required to state a claim under 18 U.S.C. § 1030(a)(5)(B).

First, claim 3 alleges that "MDI has knowingly developed computer program code which it sent to NTPI in Texas, containing instructions through which MDI has sought to disable the operation of NTPI's Scribe System..." FAC P 33. Plaintiff has therefore identified the parties responsible, as well as identified the conduct which allegedly violates the CFAA.

Second, as discussed above, claim 3 [*20] alleges facts which state a claim for violation of § 1030(a)(5)(A) and § 1030(a)(5)(B). To state a claim for violation of § 1030(a)(5)(A), a plaintiff must plead that the defendant: (1) knowingly caused the transmission of a program, information, code, or command to a computer system (2) with the intent to cause damage to a computer system or to withhold or deny the use of a computer system (3) without the authorization of the computer system's owners or operators (4) causing a loss of more than \$ 1,000 or harm to medical examination, diagnosis, treatment, or care of individual(s). n4

n4 It is unclear whether a civil action may be maintained at all under § 1030(a)(5)(B). Congress' creation of a private right of action states that "any person who suffers damage or loss by reason of a violation of the section, other than a violation of subsection (a)(5)(B), may maintain a civil action..." 18 U.S.C. § 1030(g). This sentence suggests that there is no civil right of action under (a)(5)(B).

However, the next sentence states that "damages for violations of any subsection other than subsection (a)(5)(A)(ii)(II)(bb) or (a)(5)(B)(ii)(II)(bb) are limited to economic damages. This sentence suggests that there is a civil right of action for violations of subsection (a)(5)(B).

Having decided that plaintiff has stated a claim under subsection (a)(5)(A), and assuming that the damages available upon a finding of liability under each subsection would be coextensive in this case, the Court will permit plaintiff to go forward with its claim under subsection (a)(5)(B).

[*21]

Here, claim 3 alleges that defendants developed the time bomb on their California computers; that defendants transmitted the computer code to plaintiff for loading on its computers in Texas; that defendants did not disclose the existence of the time bomb to plaintiff (FAC PP 33-34); that plaintiff's facility is involved in the medical examination, diagnosis, and treatment of patients (FAC PP 33-34); that these acts were committed with knowledge or reckless disregard of a substantial risk of the resulting potential harm to the Scribe system (FAC PP 33-34, respectively); and that the conduct has the potential to disrupt plaintiff's medical diagnosis and treatment (FAC P 35). Accordingly, defendants' motion to dismiss claim 3 is denied.

D. Claim 4 -- Conversion

Defendants seek to dismiss claim 4 for failure to state a claim because: (1) claim 4 fails to allege defendants' claim of right hostile to that of plaintiff, and (2) claim 4 fails to state a right to operate the software at issue.

Conversion is "any act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with the owner's rights therein." *Customer Co. v. City of Sacramento*, [*22] 18 Cal. App. 4th 472, 23 Cal. Rptr. 2d 154, 168 (3d App. Dist. 1993), citing *Messerall v. Fulwider*, 199 Cal. App. 3d 1324, 1329, 245 Cal. Rptr. 548 (1988) To state a claim for conversion, plaintiff must plead: (1) plaintiff's ownership or right to possession of the property at the time of the conversion, (2) defendant's conversion by wrongful act, and (3) damages. It is not necessary that plaintiff plead a manual taking of the property; only that defendant wrongfully asserted dominion over the property. *Oakdale Village Group v. Fong*, 43 Cal. App. 4th 539, 50 Cal. Rptr. 2d 810, 812 (3d App. Dist. 1996); see also *Clayton X-Ray Co. v. Professional Sys. Corp.*, 812 S.W.2d 565, 566-67 (Mo. Ct. App. 1991) (upholding jury verdict in favor of plaintiff on conversion claim stemming from software provider's use of disabling codes to "lock up" purchaser's files at pre-set time).

Here, plaintiff alleges that defendants' insertion of a time bomb in the Scribe system has interfered with plaintiff's right to quiet enjoyment of the Scribe system. FAC P 38. Plaintiff's right to use and enjoy the Scribe system is allegedly premised on the license to use the Scribe system contained in price quotation [*23] number 950103. See FAC PP 13, 38. Defendants do not contest plaintiff's rights as third-party beneficiary under the MDI-DVIF purchase agreement and under the DVIF-NTPI lease agreement. Further, defendants' alleged insertion of the time bomb in the Scribe system could deprive plaintiff of the "unrestricted use of the Scribe system for which it bargained." FAC P 38. However, plaintiff fails to allege facts supporting any actual deprivation of its use of the Scribe system stemming from the insertion of the time bomb. Claim 4 fails to allege the element of damages, and therefore defendants' motion to dismiss claim 4 is granted.

E. Claim 5 -- Declaratory Relief

Claim 5 alleges that plaintiff cannot determine who owns and controls the Scribe system software at issue in this lawsuit and that several defendants have used the name "MDI." Further, claim 3 alleges that all relevant defendants are "mere alter egos of defendant Harvey Eisenberg." FAC P 42. Plaintiff requests a declaration answering two questions: (1) which defendant owns and controls the software, and (2) whether plaintiff holds a "non-exclusive license to use the software without cloud on title to such right." FAC P [*24] 43.

Defendants allege that claim 5 is improper because: (1) MDI holds a valid copyright to the software at issue, and (2) an unlimited license is not supported by the parties' licensing agreement (price quotation number 950103). Defendants' motion to dismiss, therefore, is premised on the view that the answer to plaintiff's first question is obvious and that plaintiff is not entitled to the declaration it requests on the second question. Defendants disagree, in other words, that the declaration requested by plaintiff is proper -- all of which suggests that there is a case or controversy before the Court. Accordingly, the Court denies defendants' motion to dismiss claim 5.

F. Claim 6 -- Fraudulent Misrepresentation and Constructive Fraud

Claim 6 alleges that defendant HTW, as majority owner of NTPI, had a fiduciary duty to inform NTPI of the insertion of the time bomb in NTPI's computers in late 1995, and that HTW failed to do so. FAC P 46. Claim 6 also alleges that Dr. Harvey Eisenberg, as a manager at NTPI, had a fiduciary duty to do the same and that he failed to do so. FAC P 47.

Defendants seek to dismiss claim 6 for failure to comply with the pleading requirements of Fed. [*25] R. Civ. P. 9(b). Plaintiff asserts that claim 6 is not subject to the requirements of Rule 9(b) because claim 6 is in fact a claim for breach of fiduciary duty. Plaintiff's citation to *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995) is inapposite, because that case dealt with whether Rule 9(b) applied to cases alleging breach of fiduciary duty by an ERISA administrator, where the complaint does not allege fraud or mistake. In such cases, Rule 9(b) does not apply.

Here, claim 6 is captioned "fraudulent misrepresentation and constructive fraud." However, the substance of claim 6 is breach of fiduciary duty, and the caption of the claim does not necessarily govern the type of claim asserted. Accordingly, because no fraud claim is presented, the provisions of Rule 9(b) do not apply. *Id.* at 1503. Nevertheless, plaintiff fails to plead the requisite element of damages resulting from the alleged breach of fiduciary duty, and defendants' motion to dismiss claim 6 is therefore granted.

3. Plaintiff's Motion for Preliminary Injunction

On April 9, 1996, plaintiff filed a motion for preliminary injunction, requesting that the Court order defendant to remove the disabling [*26] codes from the Scribe system. The Court held oral argument on May 1, 1996, the date upon which the time bomb was set to expire. At oral argument, defense counsel indicated that defendants had forwarded a floppy computer disk to plaintiff which would extend the time bomb until August 1, 1996. The urgency having been abated, the Court took the matter under submission and ordered supplemental briefing from the parties on jurisdictional issues.

Plaintiff's motion for preliminary injunction, was premised on the danger that its Scribe system would be disabled by the time bomb which was set to go off on May 1, 1996. Since that time, no information has been provided to suggest that defendants have not continued to forward updated disks. Because plaintiff is likely to suffer irreparable harm absent an injunction and in order to maintain the status quo, the Court enjoins defendants from withholding updated disks from plaintiff during the pendency of this litigation.

V.

CONCLUSION

For the foregoing reasons, the Court has federal question jurisdiction over claim 3 and chooses, in its discretion, to exercise jurisdiction over claim 5 and supplemental jurisdiction over the remaining [*27] state law claims (claims 1, 2, 4, and 6).

The Court grants defendants' motion to dismiss claims 1, 4, and 6 and denies defendants' motion to dismiss claims 2, 3, and 5. Plaintiff may serve and file a second amended complaint, if at all, no later than September 9, 1996.

The Court grants plaintiff's motion for preliminary injunction. The Court has this date modified, signed, and filed plaintiff's proposed findings of fact and conclusions of law (mis-captioned as "proposed statement of uncontroverted facts and conclusions of law").

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on all counsel of record.

Dated: August 19, 1996.

ALICEMARIE H. STOTLER

UNITED STATES DISTRICT JUDGE

ATTACHMENT

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORTH TEXAS PREVENTIVE IMAGING L.L.C., Plaintiff, vs. HARVEY EISENBERG M.D., ROBERTA EISENBERG, HEALTH TECHNOLOGIES & WELLNESS, INC., MULTI-DIMENSIONAL IMAGING, INC., MEDICAL IMAGING INVESTMENTS, INC., PURA LABS, INC. AND PURA LABS, INC. doing business as MULTI-DIMENSIONAL IMAGING, Defendants.

CASE NO: SA CV 96-71 AHS (EEX)

FINDINGS OF FACTS AND CONCLUSIONS OF LAW RE PRELIMINARY [*28] INJUNCTION IN FAVOR OF PLAINTIFF (F.R.C.P. 52(a))

Date: May 1, 1996

Time: 10:00 a.m.

Courtroom: 1

After consideration of the papers in support of and in opposition to plaintiff's motion for preliminary injunction, and the arguments of counsel, the Court determines that the following facts have been established.

I. STATEMENT OF UNCONTROVERTED FACTS

A. UNCONTROVERTED FACTS ESTABLISHING PLAINTIFF'S RIGHT TO A PRELIMINARY INJUNCTION

FACTS and SUPPORTING EVIDENCE

1. Plaintiff, North Texas Preventive Imaging, Inc. (hereafter "NTPI") is a Texas limited liability company with its place of business located in Texas.
(Hickey decl., P1, Hickey decl., Ex. 1-3; Friede decl., PP16, 17.)

2. NTPI provides medical diagnostic and consultation services which include the scanning of patients' tissues with an Imatron/Siemens Ultrafast CT Scanner, and the interpretation of these scans. (Hickey decl., PP1, 9, 15, 16; Hickey decl., Ex., 1, 2 (§ 1.5); Hickey Supplemental decl., PP3, 4, 5; Friede decl., PP16-18; Friede decl., Ex. 3, pp. 1-3.)

[REDACTED BY THE COURT.] (Covelman decl., Ex. 1-7; Young decl., P2; Friede decl., P20.)

[REDACTED BY THE COURT.] (Plaintiff's First Amended Complaint, Prayer.) [*29]

5. A business entity identified as Multi-Dimensional Imaging, Inc. submitted a written offer to NTPI to supply computers and software to NTPI for use in Texas, F.O.B. Multi-Dimensional Imaging's Newport Beach, California location. (Friede decl., P 18; Friede decl., Ex.7 (Note 3); Hickey decl., PP4, 6, 9, and 11.)

6. Multi-Dimensional Imaging, Inc.'s written offer to supply computers and software to NTPI was transmitted to an equipment leasing company, DVI Financial Services, Inc., which acquired the merchandise and leased it to NTPI. (Friede decl., P18; Friede decl., Ex. 7.)

7. The computers and software offered by Multi-Dimensional Imaging, Inc. were identified as the "Physicians Scribe-A Comprehensive medical imaging environment" (hereafter "Scribe System"). (Friede decl., Ex. 7.)

8. The Scribe System enhances the electronic signals from an Imatron/Siemens CT Scanner so that the tissues of patients scanned can be viewed, and the presence and severity of such diseases as cancer, coronary artery califications, and osteoporosis can be detected. (Friede decl., PP3, 4; Friede decl., Ex. 3, pp. 1-3, Ex. 4, pp. 1-3, Ex.5, [*30] pp. 1-4, Ex. 6, pp. 1-3, Ex. 7; Hickey decl., PP5, 15, 16.)

9. Multi-Dimensional Imaging, Inc.'s written offer to supply computer hardware and software to NTPI contained a license for NTPI to use the Scribe System software in the following language:

"Software License Agreements: Software products provided by Multi-Dimensional Imaging are copyrighted, and all rights are reserved by Multi-Dimensional Imaging. The distribution and sale for Multi-Dimensional Imaging software products are intended for the use of the original purchaser only and for use only on the computer system(s) specified. Lawful users of this product are licensed to use the software as loaded on computers and/or provided on floppy disk for copying to computers. Users are also allowed to make back-up copies for safety. Any other copying, duplicating, selling, or otherwise distributing these products is a violation of law." (Friede decl., Ex. 7, (Note 7).)

10. Through a lease financing arrangement with non-party DVI Financial Services, Inc. (hereafter "DVIF"), NTPI accepted the offer of Multi-Dimensional Imaging, Inc. and acquired the right to possess and use the Scribe System. (Hickey decl., PP8, 11. [*31] Custodian of Records of DVI Financial Services, Inc. decl; Ex. 1-4 to DVI Financial Services, Inc. Records Custodian's decl.)

11. The Scribe System was delivered to NTPI in Texas in the Spring of 1995. (Harvey Eisenberg, M.D. decl., P4.)

[REDACTED BY THE COURT.] (Custodian of Records of DVI Financial Services, Inc., decl., Ex.4; Hickey decl., P8.)

[REDACTED BY THE COURT.] (Harvey Eisenberg, M.D. decl., P8.)

[REDACTED BY THE COURT.] (Harvey Eisenberg, M.D. decl., P8.)

15. The Scribe System as delivered to NTPI contained no software instructions which would disable its operation at a predetermined future date. (Hereafter such software instructions shall be referred to as a "timebomb.") (Young decl., PP9, 10, 13-15; Sorensen decl., PP2-5.)

16. The Scribe System as delivered to NTPI contained a security device made by Rainbow Technologies, Inc., called the Sentinel (hereafter the "Sentinel"), which prevents unauthorized copies of Scribe system software from running on unauthorized computers. (Sorensen decl., P5, Eisenberg, M.D. decl., P9; Covelman Supplemental decl., Ex. A.)

[REDACTED BY THE COURT.] (Hickey decl., PP12-13.)

18. [*32] At the express direction of Dr. Harvey Eisenberg, M.D., and sometime after initial of delivery to NTPI of its Scribe System, Jason Young created, in California, a timebomb intended for installation in NTPI's Scribe System. (Young decl., PP9, 10, 12-15, March 14, 1996 depo. Eisenberg, M.D. p. 100, 11. 3-17.)

19. The timebomb created by Jason Young may deactivate the Scribe System at a present future date - initially every two months - unless new instructions postponing the date of deactivation are first loaded onto the computers. (Young decl., P12.)

20. During November, 1995, Stan Sorensen, acting on behalf of Health Technologies & Wellness, Inc. (hereafter "HT&W") received from Jason Young in California floppy disks to be loaded onto NTPI's Scribe System. (Sorensen decl., P2; Young decl., P14.)

21. Unknown to Mr. Sorensen at the time he received them, the floppy disks he received from Jason Young contained a timebomb. (Sorensen decl., PP2, 4.)
22. Mr. Sorensen was led to believe that the floppy disks he received from Jason Young contained an update or beneficial modification to NTPI's Scribe System software. (Sorensen decl., P2.)
23. Stan Sorensen [*33] carried the floppy disks containing the timebomb from California to Texas. (Sorensen decl., P3.)
24. In early December, 1995, Mr. Sorensen loaded the timebomb onto NTPI's Scribe System. (Sorensen decl., P3.)
25. At a date after November, 1995, and at the direction of Harvey Eisenberg, M.D., a Scribe System computer containing a timebomb was sent from California to NTPI in Texas. (Young decl., P15.)
26. Dr. Harvey Eisenberg was a manager of NTPI. (Hickey decl., P18; Friede decl., P19.)
27. Dr. Harvey Eisenberg had actual knowledge of the creation of, and delivery to NTPI, of Scribe system software containing a timebomb. (Young decl., PP9, 12, 13-15, March 14, 1996 depo. of Eisenberg, M.D. p. 100, 11. 3-17.)
28. The operating regulations of NTPI require each of its managers to act in its best interest. (Hickey decl., Ex. 2 (§ 3.1).)
29. Gerald Friede, who was Vice President of HT&W, and a manager of NTPI, did not know that a timebomb had been created and installed in NTPI's Scribe System until after this had occurred. (Friede decl., P21.)
30. Dr. David Hickey, who is a manager of NTPI, did not know that a timebomb had been created [*34] and installed in NTPI's Scribe System until after this had occurred. (Hickey decl., P17, Hickey decl., Ex. 4.)
31. Dr. Theodore Simon, who is a manager of NTPI, did not know that a timebomb had been created and installed in NTPI's Scribe System until after this had occurred. (Hickey decl., P17; Hickey decl., Ex. 4.)
32. Notification of the existence of a timebomb in NTPI's Scribe system first came to its managers in a letter dated January 3, 1996, from the Chief Operating Officer of Multi-Dimensional Imaging, Inc., Mr. Howard Eisenberg. (Hickey decl., P17; Hickey decl., Ex. 4.)
33. Dr. Havey Eisenberg did not disclose the creation or installation of a timebomb in NTPI's Scribe System to his fellow NTPI managers, Drs. Hickey and Simon, and Mr. Friede. (Hickey decl., P17, Friede decl., P21.)
34. An attorney for Multi-Dimensional Imaging, Inc., Gilbert N. Kruger, acknowledged in a letter to NTPI's managers, dated January 26, 1996, the existence of a timebomb in NTPI's Scribe System which was set to disable the Scribe System on February 1, 1996. (Hickey decl., Ex. 6.)
35. Attorney Kruger, on behalf of Multi-Dimensional Imaging, Inc., in his January [*35] 26, 1996 letter to NTPI's managers, acknowledged the interest of NTPI's patients in the continued functioning of NTPI's Scribe System, and on behalf Multi-Dimensional Imaging, Inc. requested that Jason Young remove the timebomb from NTPI's Scribe System. (Hickey decl., Ex. 6.)
36. Attorney Kruger, on behalf of Multi-Dimensional Imaging, Inc., in a letter dated January 29, 1996, to NTPI's managers, advised them that a "patch" had been created by Multi-Dimensional Imaging, Inc. to extend the date on which NTPI's Scribe System would be disabled from February 1, 1996 to May 1, 1996. This letter no longer offered removal of the timebomb from NTPI's Scribe System. Instead it offered "periodic updates," but only "if the differences between MDI and NTPI regarding the licensing of the SCRIBE Systems are resolved" (Hickey decl., P20; Hickey decl., Ex. 7.)
37. David Weite created new software in California to extend the date on which NTPI's Scribe System would be disabled from February 1, 1996 to May 1, 1996 (hereafter referred to as the "fuse lengthening software"). (Weite depo.; Brower decl., P4d-f and h; Hickey decl., Ex. 8.)
38. David Weite created new software [*36] in California which is free of any timebomb, and delivered this to Howard Eisenberg. (Weite depo.; Brower decl., P4i;)
39. Only David Weite's fuse lengthening software was shipped by Multi-Dimensional Imaging, Inc. to NTPI in Texas. (Hickey decl., P20; Hickey decl., Ex. 8; Eisenberg, M.D. decl., PP6, 7; Eisenberg decl., Ex. A.)
40. A timebomb remains in NTPI's Scribe System. (Eisenberg M.D., decl., PP6, 7; Eisenberg M.D., decl., Ex. A.)

41. If NTPI's Scribe System is deactivated by the timebomb, this will have the following effects on NTPI's business:

- a. NTPI will be unable to perform the full-torso HealthView Scans it has advertised and promoted to the public and to referring physicians;

Hickey supplemental decl., P5.

- b. NTPI will be unable to perform the coronary artery disease screenings unique to the Scribe System;

Hickey supplemental decl.,P3.

- c. NTPI will not have access to Hickey previously taken Scribe System scans to use for consultation with treating physicians, or to use to compare with new scans for the purpose of determining efficacy of treatment modalities, and progress of patients under treatment -- abilities [*37] which NTPI has widely promoted to the public and referring physicians;

(Hickey decl., P15; supplemental decl., PP3-5.)

- d. NTPI will not be able to generate enough revenue to pay its fixed and recurring expenses, and may cease doing business;

(Hickey decl., P14; Hickey supplemental decl., P5.)

42. If the timebomb remains in NTPI's Scribe System, but the defendants agree to send periodic instructions to postpone detonation of the timebomb, this will have the following effects on NTPI's business:

- a. NTPI will have to rely upon the capabilities and questionable good will of the defendants to send new software on time;

Hickey decl., Ex. 7, Hickey supplemental decl., PP2, 9; Eisenberg, M.D. decl., PP3, 6, 7.

- b. NTPI will have to admit to its employees that it is possible during any two-month period that its Scribe System may be shut down for an unpredictable length of time due to circumstances it cannot control;

(Hickey supplemental decl., P9.)

- c. NTPI will have to either risk loss of good will with the public and referring physicians, if services are unpredictably unavailable, or NTPI will have to restrict or modify that portion [*38] of its advertising and promotional efforts which highlight its ability to compare old scans with new scans, its ability to provide consultation services based upon review of scans stored in its Scribe System, and ease and convenience of obtaining a scan upon the making of an appointment, since all of these benefits may be jeopardized if fuse lengthening software is not provided, or is not timely provided.

(Hickey supplemental decl., PP4, 5.)

43. If the timebomb in NTPI's Scribe System deactivates it, the medical care of patients could be adversely affected, because their already taken Scribe scans will not be available for review of their condition, and because new Scribe scans cannot be taken either to detect new illnesses or disease processes, or to compare with old scans to monitor effectiveness and progress of treatment. (Hickey decl., PP15, 16; Hickey supplemental decl., PP3, 9.)

44. Through its attorney, Multi-Dimensional Imaging, Inc. has acknowledged the threat to the health of medical patients if the timebomb shuts down NTPI's Scribe System. (Hickey decl., Ex. 6.)

[REDACTED BY THE COURT.] (Weite depo.; Brower P4c, e, g.)

[REDACTED BY [*39] THE COURT.] (Weite depo.; Brower decl., P46.)

[REDACTED BY THE COURT.] (March 14, 1996 depo. of Eisenberg, M.D., pp. 99-100.)

B. UNCONTROVERTED FACTS BEARING UPON WHO SHOULD BE ENJOINED

FACTS and SUPPORTING EVIDENCE

48. The Scribe System software was authored by Sal P. Raya. (Covelman decl., Ex. 9; Covelman supplemental decl., Ex. C; Eisenberg, M.D., decl., P3.)
49. Dr. Harvey Eisenberg claims to have helped develop the Scribe System software. (Eisenberg, M.D., decl., P3.)
50. Pura Labs, Inc. claims to have owned the Scribe System software. (Eisenberg, M.D., decl., P3.)
51. Pura Labs, Inc. was formed by Dr. Harvey Eisenberg on November 18, 1987. (Covelman decl., Ex. 1.)
52. Pura Labs, Inc. is a California corporation suspended from doing business since February 1, 1990. (Covelman decl., Ex. 2.)
53. Pura Labs, Inc. purported to do business under its own name, and under the name "Multi-Dimensional Imaging" during the years 1993, 1994 and 1995. (Young decl., PP 5, 6; Young decl., Ex. 1; Friede decl., PP4-7; Friede decl., Ex. 1 and 2.)
54. Pura Labs, Inc. claims to have transferred all of its assets to an entity [*40] named "Multi-Dimensional Imaging, Inc." in May, 1994. (Eisenberg, M.D., decl., P3.)
55. "Multi-Dimensional Imaging, Inc." was the name of a California corporation formed by Dr. Harvey Eisenberg on October 15, 1991. This corporation was named Multi-Dimensional Imaging, Inc. from October 21, 1992 through December 20, 1993. (Covelman decl., Ex. 3.)
56. On December 20, 1993 Multi-Dimensional Imaging, Inc., the California corporation, changed its name to Medical Imaging Investments, Inc. (Covelman decl., Ex. 3, 4.)
57. On December 17, 1993, Multi-Dimensional Imaging, Inc., the California corporation, using the name Medical Imaging Investments, Inc., entered into a memorandum agreement to supply the Scribe System as part of its capital contribution to be contributed to form NTPI. (Hickey decl., PP4, 7; Hickey decl., Ex. 1-3; Friede decl., PP16-18.)
58. On February 1, 1994, Multi-Dimensional Imaging, Inc., the California corporation, also known as Medical Imaging Investments, Inc., had its corporate rights and privileges to conduct business suspended. (Covelman decl., Ex. 4.)
59. On May 10, 1994, Dr. Harvey Eisenberg formed Multi-Dimensional Imaging, [*41] Inc., the Delaware corporation. (Covelman decl., Ex. 6.)
60. In May, 1994, all of the assets of Pura Labs, Inc., including the Scribe System, were purportedly transferred to an entity identified by Dr. Harvey Eisenberg as "Multi-Dimensional Imaging, Inc.," but whether this is the Delaware corporation or the California corporation is unclear. (Eisenberg, M.D., decl., P3.)
61. On December 30, 1993, Health Technologies & Wellness, Inc. was formed in Delaware by Dr. Harvey Eisenberg. (Covelman decl., Ex. 5.)
62. On September 6, 1994, Multi-Dimensional Imaging, Inc. registered its copyrights in the Scribe System software. (Covelman decl., Ex. 8.)
63. The copyright registration statement shows Multi-Dimensional Imaging, Inc. to be the original author of the Scribe System software, in 1993, and that this work was first published on September 10, 1993. (Covelman decl., Ex. 8 (§ 3).)
64. The deposit made with the Library of Congress in connection with the registration of Multi-Dimensional Imaging, Inc.'s copyrights in the Scribe System software recites that the original author of the work is Sai P. Raya and that Pura Labs, Inc. claimed copyrights in the work for the [*42] years 1990-1994. (Covelman decl., Ex. 9.)
65. Users' Manuals for Scribe System software show copyrights claimed by Multi-Dimensional Imaging, Inc. for the years 1992 and 1993 - in other words, for years before the Delaware corporation by that name was in existence, but when the California corporation had that name, and Pura Labs, Inc. used that name. (Sorensen decl., Ex. 1, 2, 3.)
66. Prints of screen displays taken from NTPI's Scribe System computers show copyrights claimed by Pura Labs, Inc. for the years 1992 and 1993. (Sorensen decl., Ex. 4, 5.)

67. Health Technologies & Wellness, Inc. prepared written promotional materials which recite that it has entered into an exclusive arrangement, otherwise undescribed, for technology developed by "Multi-Dimensional Imaging." (Friede decl, Ex. 3, 4, 5, and 6 (at p. 3 of each).)

[REDACTED BY THE COURT.] (Friede decl., Ex. 3, 4, 5 and 6 (at p. 3 of each).)

[REDACTED BY THE COURT.] (Hickey decl., ex. 4 (last paragraph on p. 2).)

[REDACTED BY THE COURT.](Hickey decl., Ex. 5 (§ 9 subsection 1.))

71. Harvey Eisenberg, M.D., Pura Labs, Inc.; Multi-Dimensional Imaging, Inc., the California corporation, also [*43] known as Medical Imaging Investments, Inc.; Multi-Dimensional Imaging, Inc., the Delaware corporation; and Health Technologies & Wellness, Inc. have all done business from the same address at 450 Newport Center Drive, Newport Beach, California from 1993 to 1995. (Friede decl., P20.

72. Dr. Harvey Eisenberg has at various times been identified as holding the following titles and positions with the entities listed below:

a. Pura Labs, Inc. - Chief Executive Officer, President, owner; (Covelman decl., Ex. 3 (President); Friede decl., Ex. 2 (Chief Executive Officer; Friede decl., P4 (owner).

b. Multi-Dimensional Imaging - Chief Executive Officer (of the Delaware corp.), Chairman of the Board of Directors, Chief Medical Director, majority shareholder, President (of both the Delaware and California corps.), Director (of the Delaware corp.), Incorporator (of the Delaware corp.). (Covelman decl., Ex. 5 (director and Incorporation - Delaware corp.); Covelman decl., Ex 7 (President, and Chief Executive Officer - Delaware corp.); Eisenberg, M.D., decl., P1 (Chief Executive Officer - Delaware corp. [?]); Covelman decl., Ex. 3 (President - California corp.); Friede decl., Ex [*44] 1 and 7 (Chief Executive Officer Delaware corp. [?], California corp. [?], or Pura doing business as Multi-Dimensional Imaging, Inc. [?]); Friede decl., Ex. 3, 4. (Chairman of the Board, Chief Medical Director, majority stockholder - Pura doing business as Multi-Dimensional Imaging, Inc. [?], or California Corp. [?].)

c. Health Technologies & Wellness, Inc., - Founder, Co-founder, President, Chief Executive Officer, Chairman of the Board of Directors, Corporate Secretary Incorporator. (Eisenberg, M.D., decl. P1 (Chairman); Hickey decl., Ex. 2 (Chief Executive Officer and Corporate Secretary); Hickey decl., Ex. 3 (Chief Executive Officer); Covelman decl., Ex. 5 (Director, and Incorporator); Friede decl., Ex. 3, 4 (Founder and Chairman of the Board - both on p. 3); Friede decl., Ex. 5, 6 (Co-founder, Chairman of the board - on p. 2 in Ex. 5, on page 3 in Ex. 6).)

73. Dr. Harvey Eisenberg has retained control over the day-to-day operations and activities of Pura Labs, Inc., Multi-Dimensional Imaging, Inc., and Health Technologies & Wellness, Inc. (Friede decl., PP4-13, 15 and 21; Hickey decl., P3; Young decl., PP4,7.)

[REDACTED BY THE COURT.] (Friede decl., [*45] P13; Young decl., P7, Weite depo. testimony, Brower decl. P4b.)

[REDACTED BY THE COURT.] (Friede decl., PP 11, 12.)

76. The written bid of Multi-Dimensional Imaging, Inc. to supply a Scribe System to NTPI was prepared by HT&W from its offices in California, and approved by Dr. Harvey Eisenberg. (Friede decl., P8.)

[REDACTED BY THE COURT.] (Hickey decl., P 10.)

Based upon the foregoing uncontroverted facts, the Court makes the following conclusions of law.

II. CONCLUSIONS OF LAW

A. JURISDICTION

FACTS and SUPPORTING EVIDENCE

[REDACTED BY THE COURT.] (28 U.S.C. § 1332(a).)

2. Plaintiff has pleaded a claim for civil damages and injunctive relief under the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5) and (g). (18 U.S.C. § 1030(a)(5) and 1030(g); Plaintiff's First Amended Complaint, Count Three.)

3. This Court has jurisdiction under 28 U.S.C. § 1331. (28 U.S.C. § 1331.)

4. This Court has supplemental jurisdiction over plaintiff's claims based upon state law under 28 U.S.C. § 1367(a), because all of plaintiff's claims form a single case or controversy, arising from a common nucleus of operative facts, which the plaintiff [*46] would expect to try in a single judicial proceeding. (28 U.S.C. § 1367(a) *United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218.)

B. VENUE

5. Venue is properly laid within the Central District of California. (28 U.S.C. § 1391(a) and (b); Friede decl., PP18, 20; Hickey decl., PP15, 17, 20, Ex. 4, 6, 7, 8; Young decl., PP2, 10; Sorensen decl., PP1, 2; Weite depo. testimony.)

C. PROBABILITY OF SUCCESS AND POSSIBILITY OF IRREPARABLE HARM.

6. Plaintiff, NTPI, has demonstrated that it will probably succeed in establishing the elements of a violation of the federal Computer Fraud and Abuse Act, 18 U.S.C. 1030(a)(5)(A) or § 1030(a)(5)(B); and for injunctive relief under § 1030(g) - to wit: plaintiff has adduced evidence of: (a) knowing transmission across state lines; (b) of computer software; either (c) intended to withhold from plaintiff's use of a computer program, data, and information; or (d) with reckless disregard of the substantial and unjustifiable risk that the transmitted software would withhold from plaintiff's use of a computer program, data and information, (e) which occurred without plaintiff's authorization. This [*47] offending computer software, known as a "timebomb," (f) impairs or potentially impairs the medical examination, diagnosis, or treatment of one or more individuals. (18 U.S.C. 1030(a)(5)(A), § 1030(a)(5)(B), 1030(g).

7. Plaintiff, NTPI, has demonstrated that it will probably succeed in establishing that it has obtained rightful possession of its Scribe System through its lease/finance contract with DVI Financial Services, Inc. (Uniform Commercial Code Art. 10, § 10102, 10201, 10204, California Civil Code § § 1427, 1428, 1549; California Code of Civil Procedure § 26.)

8. Plaintiff, NTPI, has demonstrated that it will probably succeed establishing that it has obtained a license of unlimited duration to use its Scribe System software at its facility in Texas without the presence of software instructions which will disable its operation at a future date (hereafter referred to as a timebomb."). (Uniform Commercial Code Art. 10 § 10209; Copyright Act, 17 U.S.C. § 106(3), and § § 201-205.)

[REDACTED BY THE COURT.] Am. Jur.2d, "Conversion" § 1 ("Conversion can be defined as a distinct act of dominion wrongfully exerted over another's personal property in denial of [*48] or inconsistent with his title or rights therein . . . without the owner's consent and without lawful justification); *Quaker Oats Co. v. McKibben*, (9th Cir. 1956) 230 F.2d 652, 654, applying California law; *De Vries v. Brumback* (1960) 53 Cal. 2d 643, 647, 2 Cal. Rptr. 764, 349 P.2d 532; *Groves v. Hanks* (Tex Civ. App. 1976) 546 S.W.2d 638; *Clayton X-Ray Co. v. Prof. Sys. Corp.* (Mo. App. 1991) 812 S.W.2d 565.)

10. Plaintiff, NTPI, has demonstrated that it may possibly suffer, irreparable injury, if a timebomb disables its Scribe System at a future date - to wit: NTPI would likely be forced to go out of business, and this is recognized as a form of irreparable injury; or NTPI may lose good will with patients and referring physicians if its Scribe System is disabled in the future, and it remains in business, and loss of good will is recognized as a form of irreparable injury. *Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.* (2nd Cir. 1995) 60 F.3d 27, 37-38; *Rent-A-Center, Inc. v. Canyon Television & Appliance* (9th Cir. 1992) 944 F.2d 597, 603.)

11. Plaintiff has demonstrated that one or more members of the public, who have been, or who are patients [*49] of NTPI, or who might become patients of NTPI, may suffer irreparable injury, if a timebomb disables NTPI's Scribe System at a future date - to wit: patients may suffer delay in diagnosis or treatment of serious and life-threatening medical conditions, so that the public interest favors granting a preliminary injunction. (*Mississippi Power & Light v. United Gas Pipe Line Co.* (3rd Cir. 1985) 760 F.2d 618, 623-626; *Atari Games Corp. v. Nintendo of America, Inc.* (Fed. Cir. 1990) 897 F.2d 1572; 1575; *American Motorcyclist Ass'n v. Watt* (9th Cir. 1983) 714 F.2d 962, 965.)

12. The periodically recurring threat to NTPI of shutdown of its Scribe System every two months fulfills the requirement that to receive a preliminary injunction the movant must show that the threat of harm is imminent. (*Privitera v. Calif. Bd. Med. Qual. Assur.* (9th Cir. 1991) 926 F.2d 890, 897.)

13. A preliminary injunction may issue pendente lite to prevent a timebomb from disabling (F.R.C.P. 65(a); plaintiff's Scribe System at a future date, and to preserve the last uncontested status which preceded the pending controversy. (*F.R.C.P. Tanner Motor Livery, Ltd. v. Avis, Inc.* (9th Cir. 1963) [*50] 316 F.2d 804, 808-809; *Regents of the University of California v. ABC, Inc.* (9th Cir. 1984) 747 F.2d 511, 514, *Chalk v. U.S. Dist. Ct.* (9th Cir. 1988) 840 F.2d 701, 704.

AS AN ALTERNATIVE TO CONCLUSIONS 6, 7, 8, 9, 10 AND 11. THIS COURT ALSO MAKES CONCLUSIONS 14 AND 15

D. SERIOUS QUESTIONS RAISED AND BALANCE OF HARDSHIPS TIPPED STRONGLY IN FAVOR OF PLAINTIFF.

14. Plaintiff, NTPI, had raised serious questions going to the merits of defendants' conduct; and in particular to the legality of the threatened disabling NTPI's Scribe System, as shown by the declarations of Gem-Sun Jason Young, Gerald Friede, Stan Sorensen, and Dr. David C. Hickey, including the exhibits attached to these declarations (*First Brands Corp. v. Fred Meyer, Inc.* (9th Cir. 1981) 809 F.2d 1378, 1381; *Benda v. Grand Lodge of IAM* (9th Cir. 1978) 584 F.2d 308, 314-315; *Gilder v. PGA Tour, Inc.* (9th Cir. 1991) 936 F.2d 417, 422.)

15. In the absence of a preliminary injunction pendente lite prohibiting the disabling of NTPI's Scribe System, the balance of hardships tips strongly in favor of NTPI - to wit: NTPI is exposed to the possible loss of its business, or the possible [*51] loss of business good will; the possible loss of skilled and trained staff; the exigencies of repeated deliveries of software to postpone the deactivation of its Scribe System, and the exigencies of the capability and desire of the defendants to repeatedly create and delivery software to postpone the deactivation of its Scribe System. Members of the public who have been, or who are now, or who might become patients of NTPI are exposed to possible harm to their medical conditions, if NTPI's Scribe System is deactivated by a timebomb in its software; for their previously taken scans will not be available for review to monitor effectiveness of treatment, or to recommend treatment, and new scans could not be taken to detect serious or possibly life-threatening diseases. By contrast, defendants suffer no hardship in providing plaintiff a copy of Scribe System software they already possess, which contains no timebomb. [REDACTED BY THE COURT.] (*Topanga Press, Inc. v. City of Los Angeles* (9th Cir. 1993) 989 F.2d 1524, 1528; *Benda v. Grand Lodge of IAM* (9th Cir. 1978) 584 F.2d 308, 315.)

E. USUAL BURDEN OF PROOF RATHER THAN HIGHER BURDEN

[REDACTED BY THE COURT.] *Tom* [*52] *Doherty Assoc., Inc. v. Saban Entertainment, Inc.* (2nd Cir. 1995) 60 F.3d 27, 34-35.)

F. NO SECURITY FOR WRONGFUL OR UNWARRANTED INJUNCTION REQUIRED.

[REDACTED BY THE COURT.] (F.R.C.P. 65(c), *Continental Co. v. Frontier Ref. Co.* (10th Cir. 1964) 338 F.2d 780; *Int'l Controls Corp. v. Vesco* (2nd Cir. 1974) 490 F.2d 1334, cert. den. 417 U.S. 932, 94 S. Ct. 2644, 41 L. Ed. 2d 236; 17 U.S.C. § 501 et seq.)

G. WHO SHALL BE ENJOINED

18. Plaintiff has raised serious factual questions as to the bona fides of the existence of the defendant corporations; and whether any of them has any ownership interest in, title to, or legal control of the right to use the Scribe System software.

19. Plaintiff has raised serious questions as to whether defendant, Dr. Harvey Eisenberg, M.D., is the alter ego of some or all of the defendant corporations. (Am. Jur.2d, "Corporations" § 43-54; *Miles v. Amer. Tel. & Tel. Co.* (5th Cir. 1983) 703 F.2d 193, applying Texas law; *Edwards Co., Inc. v. Monogram Indus., Inc.* (5th Cir. 1983) 700 F.2d 994, applying Texas law; *RRX Industries, Inc. v. Lab-Con., Inc.* (9th Cir. 1985) 772 F.2d 543, 545-546, applying California [*53] law.)

20. To avoid an unjust result, and to give full effect to this Court's exercise of its equity powers to preserve the status quo pendente lite, Dr. Harvey Eisenberg, and all those in active concert or participation with him, including all of the corporations that are defendants in this action, shall act in accordance with the Order granting preliminary injunction issued this date.

Dated: Aug. 19, 1996

Honorable Alicemarie H. Stotler

United States District Judge