

No. 24-

IN THE
Supreme Court of the United States

BINYOMIN RUTSTEIN,

Petitioner,

v.

COMPULIFE SOFTWARE, INC., *et al.*,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

MICHAEL DIAZ, JR.
Counsel of Record
MARTA COLOMAR GARCIA
BRANT C. HADAWAY
ZHEN PAN
DIAZ, REUS & TARG, LLP
100 Southeast Second Street,
Suite 3400
Miami, FL 33131
(305) 375-9220
mdiaz@diazreus.com

Counsel for Petitioner

333884



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This case involves an important question of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(c). The question is whether an action that is *not* unlawful under the federal Defend Trade Secrets Act (“DTSA”) when performed manually by a human (or humans) *is* unlawful when performed by a computer robot. The Eleventh Circuit Court of Appeals answered that question in the affirmative.

Specifically, this case concerns a technique for extracting large amounts of publicly available data from a website by using a robot. The technique, called “web-scraping,” collects information at speeds far beyond what a human could achieve manually. The web-scraping at issue involved use of HTML source code to obtain insurance premium quotes from a website operated by Respondent, Compulife Software, Inc. At the time of the scraping, the website imposed no restrictions on the number of quotes a person could generate or how the quotes could subsequently be used. Nevertheless, Respondent claimed that Petitioner’s use of scraping constituted an improper means to misappropriate trade secrets in violation of the DTSA.

The DTSA defines “improper means” to include “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means,” but “does not include reverse engineering, independent derivation, or any other lawful means of acquisition.” 18 U.S.C. § 1839(6). Although the Eleventh Circuit held that acquiring publicly available data *manually* would not violate the DTSA, it likened scraping such data to hacking, and thus held that scraping constitutes an improper means of obtaining trade secrets under the DTSA.

PARTIES TO THE PROCEEDING

Binyomin Rutstein is Petitioner and was one of Defendants-Appellants in the below proceedings.

Compulife Software, Inc. is Respondent and Plaintiff-Appellee below.

Moses Newman, Aaron Levy, and David Rutstein are considered Respondents pursuant to Rule 12.6. and were Defendants-Appellants below.

RELATED PROCEEDINGS

Compulife Software Inc. v. Moses Newman, et al., docket numbers 9:16-cv-81942-RLR and 9:16-cv-80808-RLR, the United States District Court for the Southern District of Florida. Judgement was entered on March 12, 2018.

Compulife Software Inc. v. Moses Newman, et al., docket numbers 18-12004-CC and 18-12007-CC, the United States Court of Appeals for the Eleventh Circuit. Judgement was entered on May 20, 2020.

Compulife Software Inc. v. Moses Newman, et al., docket numbers 9:16-cv-81942-BER and 9:16-cv-80808-BER, the United States District Court for the Southern District of Florida. Corrected final judgement was entered on January 18, 2022.¹

Compulife Software Inc. v. Moses Newman, et al., docket numbers 21-14071-CC and 21-14074-CC, the United States Court of Appeals for the Eleventh Circuit. Judgement was entered on August 1, 2024.

Compulife Software Inc. v. Moses Newman, et al., docket numbers 22-12909-HH, the United States Court of Appeals for the Eleventh Circuit. Judgement was entered on August 1, 2024.

1. The district court issued its original final judgement on October 20, 2021. After all parties timely appealed, the Eleventh Circuit Court of Appeals *sua sponte* issued a notice of intention to correct mistake in the original judgment.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RELATED PROCEEDINGS	iii
TABLE OF CONTENTS.....	iv
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
I. Legal Background.....	2
II. Factual Background.....	3
III. Procedural History.....	6
a. The first bench trial and appeal	6
b. The second bench trial and appeal	8

Table of Contents

	<i>Page</i>
REASONS FOR GRANTING THE WRIT	10
A. The Eleventh Circuit Likened Scraping Public Data to Hacking	10
B. At Least Two District Courts Have Held That Scraping Is Not Hacking	12
C. The Eleventh Circuit’s Decision Threatens a Split over What Constitutes Improper Means under the DTSA	13
CONCLUSION	17

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 1, 2024.....	1a
APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED JULY 12, 2021	29a
APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 20, 2020	87a
APPENDIX D — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES COURT OF APPEALS FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED MARCH 12, 2018	140a
APPENDIX E — RELEVANT STATUTORY PROVISIONS	213a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Ali v. Fed. Bureau of Prisons</i> , 552 U.S. 214, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008)	14
<i>Cvent, Inc. v. Eventbrite, Inc.</i> , 739 F. Supp. 2d 927 (E.D. Va. 2010)	12, 13, 16
<i>E. I. Du Pont de Nemours & Co. v. Christopher</i> , 431 F.2d 1012 (5th Cir. 1970)	6, 7, 8, 9, 14, 15
<i>Physicians Interactive v. Lathian System, Inc.</i> , No. CA 03-1193-A, 2003 U.S. Dist. LEXIS 22868 (E.D. Va. Dec. 5, 2003)	8, 9, 10, 11, 12
<i>Sandvig v. Sessions</i> , 315 F. Supp. 3d 1 (D.D.C. 2018)	16
Statutes, Rules and Regulations	
18 U.S.C. § 1836	2
18 U.S.C. § 1839	2
18 U.S.C. § 1839(5)	2
18 U.S.C. § 1839(5)(A)	2
18 U.S.C. § 1839(5)(B)(i)	2

Cited Authorities

	<i>Page</i>
18 U.S.C. § 1839(5)(B)(ii)(I)	2
18 U.S.C. § 1839(5)(B)(ii)(II)	3
18 U.S.C. § 1839(5)(B)(ii)(III)	3
18 U.S.C. § 1839(5)(B)(iii)	3
18 U.S.C. § 1839(6)(A)	3
18 U.S.C. § 1839(6)(B)	3, 14
28 U.S.C. § 1254(1)	1
FLA. STAT. § 934.03	15
Florida Uniform Trade Secrets Act	5
Virginia Uniform Trade Secrets Act	11

Other Authorities

Andrew Sellars, <i>Twenty Years of Web Scraping and the Computer Fraud and Abuse Act</i> , 24 B. U. J. of Science & Tech. L. 372 (2018)	14
Microsoft Encarta College Dictionary (2001)	11
Pub. L. No. 114-153, § 2(e), 130 Stat. 376 (2016)	2
Restatement of Torts § 757 (1939)	6, 15

OPINIONS BELOW

The proceedings below involved two bench trials in the district court and two appellate decisions from the Eleventh Circuit. The question presented arises from the Eleventh Circuit's decision in the second appeal (Pet. App. 1a-28a—Appendix A), which is published at 111 F.4th 1147 (11th Cir. 2024).

The district court's ruling in the first bench trial (Pet. App. 140a-212a—Appendix D) is available at 2018 U.S. Dist. LEXIS 41111 (S.D. Fla. March 12, 2018). That ruling led to the Eleventh Circuit's decision in the first appeal (Pet. App. 87a-139a—Appendix C), which is published at 959 F.3d 1288 (11th Cir. 2020). The district court's ruling in the second bench trial (Pet. App. 29a-86a—Appendix B) is available at 2021 U.S. Dist. LEXIS 160881 (S.D. Fla. July 12, 2021).

JURISDICTION

The Eleventh Circuit entered its judgment on August 1, 2024. *See* Pet. App. 1a. The original deadline to file a Petition for a Writ of Certiorari was October 30, 2024. On October 17, 2024, Justice Clarence Thomas granted Petitioner's Application for Extension of Time to File a Petition for a Writ of Certiorari, extending the deadline to November 29, 2024.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are 18 U.S.C. § 1836 (reproduced at Pet. App. 213a-223a—Appendix E) and 18 U.S.C. § 1839 (reproduced at Pet. App. 224a-227a—Appendix E).

STATEMENT OF THE CASE

I. Legal Background

The DTSA provides an independent avenue for litigating trade secret disputes in federal courts. Congress enacted the DTSA in May 2016 to promote uniformity in trade secret law. *See* Pub. L. No. 114-153, § 2(e), 130 Stat. 376, 381-82 (2016). The DTSA created a federal civil cause of action for misappropriation of trade secrets, which largely aligns with the provisions of the Uniform Trade Secrets Act.

Under the DTSA, misappropriation of trade secrets can be established in three ways: improper acquisition, disclosure, and/or use. 18 U.S.C. § 1839(5), Pet. App. 224a-226a. Misappropriation by acquisition occurs when a person “knows or has reason to know that the trade secret was acquired by improper means.” 18 U.S.C. § 1839(5) (A), Pet. App. 225a. Misappropriation by disclosure or use occurs when a person discloses or uses the trade secret “without express or implied consent” and knew or should have known that the trade secret was derived from or through a person who had used improper means to acquire the trade secret. *Id.* § 1839(5)(B)(i)&(ii) (I), Pet. App. 225a-226a. In other words, to establish liability under any one of the DTSA’s three prongs, one

must prove that a trade secret was acquired by improper means.²

The DTSA defines the term “improper means” to include “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” 18 U.S.C. § 1839(6)(A), Pet. App. 226a. Of particular significance to this case, the DTSA explicitly excludes “reverse engineering, independent derivation, [and] other lawful means of acquisition” from the definition of improper means. 18 U.S.C.S. § 1839(6)(B), Pet. App. 227a.

II. Factual Background

Respondent, Compulife Software, Inc. (“Compulife”), alleged below that Petitioner and his co-Defendants misappropriated Compulife’s trade secrets through web-scraping—*i.e.*, by using a robot to extract insurance premium quotes from one of Compulife’s websites (the “Website”). Pet. App. 51a-54a. At the time of the scraping, Compulife allowed members of the public to use the Website to generate insurance quotes and obtain comparative quotes free of charge. *Id.* After a user

2. Misappropriation by disclosure or use under the DTSA can also be established when a defendant discloses or uses a trade secret without consent and at the time of disclosure or use knew or had reason to know that the trade secret was acquired in a manner giving rise to a duty to maintain secrecy or derived from a person who owed a duty to maintain secrecy to the owner; or before a material change in his position, knew or had reason to know that it was a trade secret and had been acquired by accident or mistake. *See* 18 U.S.C. § 1839(5)(B)(ii)(II)&(III)&(iii), Pet. App. 225a-226a. These grounds are inapplicable to the issue here.

entered personal information (such as his or her state of residence, date of birth, gender, and smoking status), the Website would generate quotes based on the information provided and return the calculated quotes to the user, including a list of life insurance agents in the user's area. *Id.* at 33a-34a.

As the first step in generating insurance quotes, the source code underlying the Website, which refers to a set of instructions written in a programming language that the developer (Compulife) used to build the Website, would first gather the information entered by the user. *Id.* at 37a-38a. Compulife's source code contained eleven parameters, each of which related to the user's answer to a given variable. *Id.* at 38a-39a. For example, one of the parameters in Compulife's source code was birth month, and its corresponding variables were 1 through 12. *Id.* at 37a, n.9.

Based on the information entered by the user, the source code would transmit the corresponding parameters and variables to Compulife's system and database to look up insurance quotes for the user. *Id.* Compulife's database, created by Compulife's founder, Mr. Robert Barney, consisted of insurance rates.³ *Id.* at 34a-35a. Some of the rates were public information, others were provided by life insurance companies to Compulife. *Id.*

3. There is a difference between the terms "insurance quotes" and "insurance rates." Insurance rates are one of the raw materials used in developing an insurance premium for a policy. Insurance rates are never given to a consumer. Instead, rates are used to calculate insurance premium quotes given to consumers to tell them how much the insurance will cost. Pet. App. 35a.

Compulife alleged that Defendants used a scraping technique to extract its insurance quotes pertaining to two zip codes, located in New York and Florida, from Compulife's database. *Id.* at 77a-79a. Specifically, Defendants caused a single internet protocol address to send more than 800,000 automated requests to the Website over a four-day period to extract quotes. *Id.* at 78a. Each request used the parameters in Compulife's source code while incrementing the corresponding variables one at a time. *Id.*

At the time of the scraping, the Website had no restrictions on the volume of "request" commands to generate insurance quotes. *Id.* at 53a. In other words, the Website contained no restrictions limiting the number of quotes a user could generate or how the quotes could subsequently be used. The Website also did not require a user to agree to any specific terms or restrictions before generating quotes. *Id.* at 53a-54a, 155a.

While it was certainly not unlawful for an individual or even a large group of people working in tandem to generate multiple insurance quotes, Compulife claimed that Petitioner's scraping of its Website constituted an improper means of acquiring trade secrets in violation of the DTSA.⁴

4. Under the same facts and theory, Compulife also claimed the scraping violated the Florida Uniform Trade Secrets Act, which mirrors the DTSA in substance. In this regard, the Eleventh Circuit held that "the substantive standard for misappropriation is identical under FUTSA and DTSA, at least as they apply here." Pet. App. 122a, n.13; *see also* Pet. App. 18a, n.1.

III. Procedural History

a. The first bench trial and appeal

Compulife filed suit in the Southern District of Florida. After a bench trial, the district court entered judgment in favor of Defendants on Compulife's misappropriation claims, on grounds that the quotes did not constitute trade secrets because each quote was publicly available. Pet. App. 192a-193a. This led to the first appeal to the Eleventh Circuit, which reversed on the scraping question.

In addressing the legal standard, the Eleventh Circuit first recognized that, under the DTSA, "lawful means of acquisition' are expressly exempted from the definition of 'improper means.'" Pet. App. 122a, n.13. The circuit court then relied on *E. I. Du Pont de Nemours & Co. v. Christopher*, 431 F.2d 1012, 1014 (5th Cir. 1970) ("*Christopher*") for the proposition that "[a]ctions may be 'improper' for trade-secret purposes even if not independently unlawful." *Id.* at 125a.

The trade secrets claim in *Christopher* was predicated upon the 1939 version of the Restatement of Torts § 757, which simply stated:

One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if

- (a) he discovered the secret by improper means,
- or
- (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him * * *.

Christopher, 431 F.2d at 1014-15 (omission in original). “Under the broad definition adopted in *Christopher*, [the Eleventh Circuit held that] misappropriation occurs whenever a defendant acquires the secret from its owner ‘without his permission at a time when he is taking reasonable precautions to maintain its secrecy.’” Pet. App. 126a (quoting *Christopher*, 431 F.2d at 1015).

With respect to scraping, the Eleventh Circuit explained that it “is a technique for extracting large amounts of data from a website.” *Id.* at 97a. The panel then likened Defendant’s scraping technique to hacking: “The concept is simple; a hacker requests information from a server using ordinary HTTP commands similar to those that a legitimate client program of the server might employ in the ordinary course.” *Id.* While the panel recognized that one “could obtain the data [from a website] manually by entering each command as a line of code and then recording the results,” scraping involved use of a computer robot, which could “make many requests automatically and much more rapidly than any human could.” *Id.*

The panel explained:

the fact that the defendants took the quotes from a publicly accessible site [did not] automatically mean that the taking was authorized or otherwise proper. Although Compulife has plainly given the world implicit permission to access as many quotes as is *humanly* possible, a robot can collect more quotes than any human practicably could. So, while manually accessing quotes from Compulife’s database is unlikely

ever to constitute improper means, using a bot to collect an otherwise infeasible amount of data may well be—in the same way that using aerial photography may be improper when a secret is exposed to view from above.

Id. at 131a (citing *Christopher*, 431 F.2d at 1013) (emphasis in original).

The Eleventh Circuit next considered *Physicians Interactive v. Lathian System, Inc.*, No. CA 03-1193-A, 2003 U.S. Dist. LEXIS 22868 (E.D. Va. Dec. 5, 2003) as “the most closely analogous case.” *Id.* In *Physicians Interactive*, the Eastern District of Virginia held that “the use of a computer software robot to hack into a computer system and to take or copy proprietary information is an improper means to obtain a trade secret[.]” *Physicians Interactive*, 2003 U.S. Dist. LEXIS 22868, at *25.

Likening web-scraping to hacking, the Eleventh Circuit applied the reasoning of *Physicians Interactive* and held that “the simple fact that the quotes taken were publicly available does not *automatically* resolve the question in the defendants’ favor.” Pet. App. 133a (emphasis in original). It did not decide whether the scraping was “improper such that the acquisition or use of the quotes could amount to misappropriation.” *Id.* The issue was remanded for the district court to address. *Id.*

b. The second bench trial and appeal

The district court conducted a second bench trial on remand. Following the Eleventh Circuit’s guidance, the district court found in favor of Compulife on the issue

of scraping. *Id.* at 77a-81a. Citing to *Christopher* and *Physicians Interactive*, the district court held that “using a robot to hack” the Website constituted an improper means under the DTSA. *Id.* at 81a.

This time, the Eleventh Circuit affirmed based on its prior decision and *Christopher*. *Id.* at 3a. The panel reiterated the legal principles derived from *Christopher*, that conduct which is not unlawful might still constitute an improper means for misappropriation of trade secrets. *Id.* at 22a. It also emphasized that the number of insurance quotes extracted by scraping was “far more than a human could ever physically obtain.” *Id.* at 6a. While acknowledging that “scraping and related technologies (like crawling) may be *perfectly legitimate*” and that “[m]uch of the modern internet is built on those technologies,” the panel found that scraping crossed the line:

[T]he defendants in this case did not take innocent screenshots of a publicly available site; instead, they copied the order of Compulife’s copyrighted code and *used that code* to commit a scraping attack that acquired millions of variable-dependent insurance quotes. If they had not formatted and ordered their code exactly as Compulife did, they would not have been able to get the millions of quotes that they got.

Id. at 22a-23a (emphasis in original).

This Petition follows.

REASONS FOR GRANTING THE WRIT

This case presents a substantial and important ongoing legal question concerning the use of web-scraping, crawling, and related technologies in collecting public information. The Eleventh Circuit’s decision sacrifices what would be a bright-line rule (that acquiring public data is not unlawful) in favor of a more amorphous rule (that using a bot to acquire public data *may* cross a line into hacking). As discussed below, there are already signs of a looming split over this question. The Court should take this opportunity to step in and provide clarity, lest confusion roil the tech industry and the courts.

A. The Eleventh Circuit Likened Scraping Public Data to Hacking.

The Eleventh Circuit relied on *Physicians Interactive* as “the most closely analogous case” in addressing the scraping issue. Pet. App. 80a, 131a. But a closer examination of the method used by the defendants in *Physicians Interactive* in acquiring information, which involved unauthorized access to the plaintiff’s database, reveals significant differences from the scraping here.

In *Physicians Interactive*, the plaintiff ran a website for physicians featuring medical products and pharmaceutical data. *See* 2003 U.S. Dist. LEXIS 22868, at *3. The plaintiff alleged that the defendants “hacked its website by sending electronic robots to steal its customer list, computer code, and confidential data.” *Id.* On its file server, the plaintiff maintained a confidential electronic database of the names, street addresses, and email addresses of those physicians and medical professionals

who used plaintiff's service. *Id.* While the file server was accessible on the Internet, members of the public could not have access to plaintiff's client lists without receiving a user password and a personal identification number. *Id.* at*4.

The *Physicians Interactive* defendants launched various attacks on the plaintiff's file servers to obtain proprietary information stored on the plaintiff's website. *Id.* During one of the attacks, the defendants used a robot or a software program to issue "a constant stream of commands [] at a rate of approximately 2.4 commands per second" to access the plaintiff's servers to obtain a significant number of the medical professional information. *Id.* at*6.

Of particular significance to that case, the court found that the "information stored on [the plaintiff's] computer file server was not meant for the public domain and, therefore, was not stored in the public area of the website." *Id.* at *24. The court also examined the term "hack," defined in the Microsoft Encarta College Dictionary (2001) as: "to explore and manipulate the workings of a computer or other technological device or system, either for the purpose of understanding how it works or to gain unauthorized access." *Id.* at*1 n.1. The court held that defendants' "use of a computer software robot to hack into a computer system and to take or copy proprietary information is an improper means to obtain a trade secret" under the Virginia Uniform Trade Secrets Act. *Id.* at *25.

B. At Least Two District Courts Have Held That Scraping Is Not Hacking.

Notably, in a subsequent published opinion, the same court that decided *Physicians Interactive* held that scraping *did not* constitute hacking. *See Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927 (E.D. Va. 2010). In that case, the plaintiff operated a website that assisted customers with organizing and locating venues for large-scale events and licensed its web-hosted software for use by companies and their meeting planners. *Id.* at 930. The plaintiff allegedly invested substantial resources into developing its website and database and obtained registered copyrights for its website, which were displayed on its webpages. *Id.* The defendant was a competitor of the plaintiff. *Id.*

Rather than aggregate the venue information itself, the defendant hired a computer engineer “to ‘scrape’ (i.e. copy) the information directly from [the plaintiff]’s website . . . then reformatted the material into its own layouts and made it available on [the defendant’s] website.” *Id.* The district court held that the scraping employed by the defendant did not constitute hacking or other unauthorized access to plaintiff’s database because the information scraped was “publicly available on the Internet, without requiring any login, password, or other individualized grant of access.” *Id.* at 932. The court further held that plaintiff’s website, including its underlying database, was “not protected in any meaningful fashion by its terms of use or otherwise” because the plaintiff did not display the terms “in any way in which a reasonable user could be expected to notice them” and that the plaintiff’s “website in fact [took] no affirmative steps to screen competitors

from accessing its information.” *Id.* at 933. Thus, according to district court in *Cvent*, scraping publicly available information is not hacking.

C. The Eleventh Circuit’s Decision Threatens a Split over What Constitutes Improper Means under the DTSA.

The scraping in this case did not involve any unlawful activities. The Eleventh Circuit appears to suggest that Defendants’ use of Compulife’s copyright registered source code by formatting the parameters and variables in the exact order in scraping quotes was improper. Pet. App. 22a-23a. But web-scraping requires one to use the exact parameters and variables defined in the programming language, which can be found simply by inspecting the source code of the webpage.

As described by Professor Andrew Sellars of the Boston University School of Law:

Web scraping generally refers to the retrieval of content posted on the World Wide Web through *the use of a program other than a web browser or an application programming interface (API)*. In most cases this is done through a computer script that will send *tailored* queries to websites to retrieve specific pieces of content. These requests are often sent in an automatically generated series of requests, in order to extract material across an array of websites or a large collection of material from a specific website.

Andrew Sellars, *Twenty Years of Web Scraping and the Computer Fraud and Abuse Act*, 24 B. U. J. of Science & Tech. L. 372, 373-74 (2018) (emphasis added). Professor Sellars further observed that scraping “has countless applications,” including extracting data and aggregating information from disparate sources, which would “help competition by lowering startup information barriers.” *Id.* at 374. (estimating “that about a quarter of all current web traffic comes from web scrapers”).

The DTSA explicitly exempts “lawful means of acquisition” from “improper means” under 18 U.S.C. § 1839(6)(B). The Eleventh Circuit was aware of the boundary set by Congress in this regard. *See* Pet. App. 122a, n.13. However, during both appeals, the Eleventh Circuit held that “[a]ctions may be ‘improper’ for trade-secret purposes even if not independently unlawful.” *Id.* at 22a, 125a. In doing so, the Eleventh Circuit inserted criteria that simply is not found in the text of the DTSA. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008) (“We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.”).

The Eleventh Circuit did so in reliance on the “the broad definition [of improper means] adopted in [its precedent] *Christopher*, [that] misappropriation occurs whenever a defendant acquires the secret from its owner without his permission at a time when he is taking reasonable precautions to maintain its secrecy.” Pet. App. 22a, 126a. But *Christopher* predated the DTSA and far predated the explosion of the internet, AI, and machine learning.

The decision in *Christopher* had its roots in the 1939 version of the Restatement of Torts § 757, which shed no light on what constituted or did not constitute an improper means at all. *See* Restatement of Torts § 757 (1939). In finding that acquisition of a trade secret through surreptitious aerial photography was improper, *Christopher* relied on the following comments to Section 757:

if one uses physical force to take a secret formula from another's pocket, or breaks into another's office to steal the formula, his conduct is wrongful and subjects him to liability apart from the rule stated in this Section. Such conduct is also an improper means of procuring the secret under this rule. But means may be improper under this rule even though they do not cause any other harm than that to the interest in the trade secret. Examples of such means are fraudulent misrepresentations to induce disclosure, tapping of telephone wires, eavesdropping or other espionage. A complete catalogue of improper means is not possible. In general they are means which fall below the generally accepted standards of commercial morality and reasonable conduct.

Christopher, 431 F.2d at 1016.

But the scraping here did not involve any force, tricks, or fraudulent scheme in obtaining quotes from Compulife. Nor did it use wiretapping or eavesdropping, which are unlawful at least under Florida law. *See* FLA. STAT. § 934.03. And prior to the scraping in this case, Compulife

neither limited the number of quotes a user could pull nor required users to assent to any restrictions before gaining access to the database.

The District Court for the District of Columbia has reached a similar conclusion to that of the Eastern District of Virginia in *Cvent*. In a published decision, the D.C. District held that scraping that would require use of robots to automatically record public information from websites was “not meaningfully different from using a tape recorder instead of taking written notes, or using the panorama function on a smartphone instead of taking a series of photos from different positions.” *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 9, 16 (D.D.C. 2018).

Similarly, here, the scraping did not extract any insurance quotes that the public could not access. Nevertheless, the Eleventh Circuit found that, while “Compulife has plainly given the world implicit permission to access as many quotes as is *humanly* possible,” the number of quotes acquired by the scraping exceeded what any human practicably could obtain. Pet. App. 131a (emphasis in original); *see also id.* at 80a.

While far from indicating a present circuit split, the decision of the Eleventh Circuit, when compared to the district court decisions in *Cvent* and *Sandvig* and the plain text of the DTSA, points to the likelihood of confusing, contradictory outcomes in determining whether scraping public data is a lawful activity that is exempted from the definition of “improper means” under the DTSA. The question begs for guidance from this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant certiorari.

Respectfully submitted,

MICHAEL DIAZ, JR.

Counsel of Record

MARTA COLOMAR GARCIA

BRANT C. HADAWAY

ZHEN PAN

DIAZ, REUS & TARG, LLP

100 Southeast Second Street,

Suite 3400

Miami, FL 33131

(305) 375-9220

mdiaz@diazreus.com

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 1, 2024	1a
APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED JULY 12, 2021	29a
APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 20, 2020	87a
APPENDIX D — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES COURT OF APPEALS FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED MARCH 12, 2018	140a
APPENDIX E — RELEVANT STATUTORY PROVISIONS	213a

**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT, FILED AUGUST 1, 2024**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-14071, No. 21-14074

COMPULIFE SOFTWARE, INC,

Plaintiff-Appellee, Cross-Appellant,

versus

MOSES NEWMAN, AARON LEVY, BINYOMIN
RUTSTEIN, DAVID RUTSTEIN,

Defendants-Appellants, Cross-Appellees.

COMPULIFE SOFTWARE, INC,

Plaintiff-Appellee, Cross-Appellant,

versus

BINYOMIN RUTSTEIN, DAVID RUTSTEIN,

Defendants-Appellants, Cross-Appellees.

Filed August 1, 2024

Appendix A

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:16-cv-81942-BER

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:16-cv-80808-BER

Judges: Before JORDAN, BRASHER, and ABUDU,
Circuit Judges.

Opinion by: BRASHER

OPINION

BRASHER, Circuit Judge:

We must once again consider an intellectual property dispute between Compulife and its competitors—defendants Moses Newman, Aaron Levy, Binyomin Rutstein, and Binyomin’s father, David Rutstein.

Compulife created software to generate life insurance quotes. To create these quotes, the software relied on Compulife’s secret database of insurance rates. Compulife accuses the defendants of infringing on its copyright by copying the software’s code and using it for their own website. And it says that they stole its trade secret by acquiring portions of the database through improper means. In a previous appeal, we remanded for a trial on Compulife’s claims for copyright infringement and misappropriation of trade secrets. *See Compulife Software*

Appendix A

Inc. v. Newman, 959 F.3d 1288 (11th Cir. 2020) (*Compulife I*).

After a bench trial, the district court ruled against Compulife on the former, but in favor of Compulife on the latter. All parties have appealed again. Their appeals raise three questions.

First, did the district court err in concluding that Compulife's competitors did not infringe on its copyright? We think that by failing to consider the copyrightability of the code's arrangement, the district court erred. And, because of that error, we must reverse and remand for the district court to make new fact findings on the copyright claim.

Second, did the district court err in concluding that the defendants acquired Compulife's trade secret through improper means? We believe that under *Compulife I* and *E. I. duPont de Nemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970), the district court did not err.

Third, did the district court err in holding the defendants jointly and severally liable for misappropriating Compulife's trade secret despite their varying levels of culpability? We believe the district court did not err. Joint and several liability is the standard for trade secret claims, and that sort of liability ignores different degrees of wrongdoing. Accordingly, we affirm the judgment on the trade secret claim.

So we affirm in part, reverse in part, and remand for further proceedings.

*Appendix A***I.**

Compulife makes life insurance comparison and quotation software. It both licenses the software to customers and has an online version that public users can access to generate quotes.

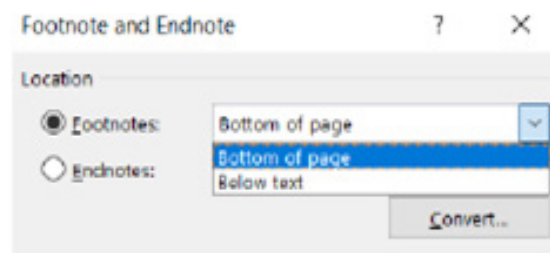
Compulife's software relies on its proprietary database—a factual compilation of insurance rates used as the raw materials to develop quotes for customers. Some rates are independently available, but the whole compilation is not, and it includes some rates not publicly available. Compulife has developed working relationships with various insurance companies. It obtains rates monthly and often ahead of their public release, making Compulife's database and software especially valuable. As a result, Compulife encrypts its database.

The software works by looking up information in the database and compiling a quote. It has different blocks of code to correspond to different areas of the database. The major components of Compulife's code were arranged as follows: state, birth month, birthday, birth year, sex, smoking status, health classification, insurance type, payment option, sorting output, face amount, and minimum life insurance company rating. For the software to work with the database, it must be arranged in exactly that manner, or the user will get an error.

The code uses some elements that Compulife claims are creative, including: (1) the names it came up with for the various variables throughout the code, (2) radio

Appendix A

buttons when making certain input selections, and (3) camel case when writing out the names of variables in the code. The latter two require a brief explanation. Radio buttons are (typically) circular buttons that allow a user to identify single inputs from a defined field of mutually exclusive options. For example, in the picture below, radio buttons constitute the input method on the left, while a dropdown menu is the input method on the right.



Camel case, meanwhile, is a typographical practice when phrases are written *without* spaces but *with* capitalization. For example, a variable in Compulife’s code collecting birth year information was written in camel case as “BirthYear,” instead of in uppercase as “Birth Year,” or in lowercase as “birth year.”

A group of Compulife’s competitors allegedly infringed its copyright and stole its trade secret. David Rutstein was an insurance agent at one time, but he was permanently barred from the profession. He created several websites that used Compulife’s software without a license. The sites were registered in his son Binyomin Rutstein’s name, and one of them was later owned by Aaron Levy. David got the software by misleading Compulife into thinking

Appendix A

that he worked with someone who was licensed to use it. Bin-yomin allowed his father to conduct these insurance activities with his insurance agent license number. On Levy's and David's demands, an employee, Moses Newman, supervised a scraping attack of Compulife's website to get many millions of quotes generated by its website—far more than a human could ever physically obtain. The men then used those quotes for their own websites. Compulife's sales declined as a result.

Compulife sued these competitors for copyright infringement and misappropriation of trade secrets, among other claims. The parties consented to a magistrate judge and waived their right to a jury trial. The magistrate judge held a bench trial. On appeal from the bench trial, we clarified some standards that apply and directed the district court to make more specific findings. *See generally Compulife I*, 959 F.3d 1288.

On remand, a new judge conducted a second bench trial but incorporated all our findings as the law of the case. The district court found that most of Compulife's code was not protectable, and the protectable parts were not substantially significant to the defendants' code. The district court thus concluded that Compulife's copyright claim failed. The district court did not consider the arrangement of the code as a *whole*, though it did examine the arrangement of *some* of the variables. Separately, the district court concluded that Compulife prevailed on its misappropriation claim because the scraping constituted improper means. Based on those rulings, the district court granted Compulife injunctive relief and entered

Appendix A

judgment for \$184,225.87 in compensatory damages, relevant prejudgment interest, and \$368,451.74 in punitive damages against all defendants jointly and severally.

Both parties appealed. Compulife appeals the judgment against its copyright claim. Meanwhile, the defendants say Compulife should not have won its misappropriation claim, and in the alternative, that they should not have been held jointly and severally liable on that claim.

II.

“On appeal from a bench trial, the district court’s conclusions of law are reviewed de novo, but its findings of fact shall not be set aside unless clearly erroneous.” *Compulife I*, 959 F.3d at 1301 (cleaned up). In other words, reviewing a bench trial raises a mixed question of law and fact, and the relevant standard depends “on whether answering it entails primarily legal or factual work.” *Id.* “Separately, when an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings.” *Id.* (cleaned up).

III.

We address three main issues in this intellectual property dispute. First, we must determine whether the district court erred in finding that the defendants did not infringe on Compulife’s copyright by copying their code.

Appendix A

Second, we must determine whether the district court erred in finding that the defendants misappropriated Compulife's trade secret by improper means when they obtained a portion of Compulife's database through scraping. Third, we must determine whether the district court erred in holding the defendants jointly and severally liable. We address each issue in turn.

A.

We will start with Compulife's appeal of the district court's judgment against its copyright infringement claim. To establish copyright infringement, a plaintiff must prove "(1) ownership of a valid copyright[] and (2) copying of constituent elements of the work that are original." *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1541 (11th Cir. 1996) (internal quotation marks omitted) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991)).

The first element is easy. We earlier recognized that the existence and validity of Compulife's copyright is undisputed. *Compulife I*, 959 F.3d at 1301. "Under the law-of-the-case doctrine, [the resolution of] an issue decided at one stage of a case is binding at later stages of the same case." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1291 (11th Cir. 2005) (alteration in original) (quoting *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1313 (11th Cir. 2000)). So we can proceed to the second copyright infringement element—copying.

The copying element "comprises two subparts, 'factual and legal copying,' both of which Compulife, as

Appendix A

the plaintiff, has the burden to prove.” *Compulife I*, 959 F.3d at 1301. The factual copying inquiry is “whether the defendant, as a factual matter, copied portions of the plaintiff’s program.” *MiTek Holdings, Inc. v. Arce Eng’g Co.*, 89 F.3d 1548, 1554 (11th Cir. 1996) (quoting *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 832 (10th Cir. 1993)). Again, we already determined that Compulife established factual copying. *Compulife I*, 959 F.3d at 1302.

Compulife’s appeal turns on the element of legal copying. As relevant here, “legal—or actionable—copying occurs when those elements of the copyrighted work that have been copied are protected expression and of such importance to the copied work that the appropriation is actionable.” *Id.* (cleaned up). The district court found no legal copying, but it came to that conclusion after slightly erring in applying our test.

We have adopted a three-step test for legal copying: the abstraction-filtration-comparison test. First, a court should “abstract”—“break down the allegedly infringed program into its constituent structural parts.” *Id.* at 1303 (cleaned up). Second, a court should filter—“sift out all non-protectable material.” *Id.* (cleaned up). Finally, the court should compare the protected material with the copycat. When considering the literal elements of a program, like source code and object code, the plaintiff need establish only a “substantial similarity” between the two works. *Id.* at 1302 n.6. As we held in *Compulife I*, because the dispute here concerns source code, the substantial similarity standard applies. *Id.*

Appendix A

Compulife argues that the district court erred at each step of this three-part test; the defendants argue that it did not. We agree in part with Compulife and in part with the defendants.

1.

Turning first to “abstraction,” we must “break[] down the allegedly infringed program into its constituent structural parts.” *Id.* at 1303. Compulife argues that the *arrangement* of its various components of source code—state, birth month, birthday, birth year, sex, smoking status, health classification, insurance type, payment option, sorting—is creative and therefore protectable. That is, Compulife argues that one “constituent” part of its program is the arrangement of its source code.

Just as we have held that the arrangement of yacht listings within a used boat guide could be protectable, *see BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1145 (11th Cir. 2007), Compulife argues that the arrangement of the variables in its code could be protectable. And, generally, we have held that the arrangement of elements in a program may be protectable. *See MiTek Holdings, Inc.*, 89 F.3d at 1558 (recognizing that the arrangement of elements of a user interface may be protectable as a factual compilation); *see also Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1356 (Fed. Cir. 2014) (holding that the sequence, structure, and organization of various packages in a software are protectable).

A careful reader might argue that this caselaw is distinguishable. Our decision in *MiTek* addressed the

Appendix A

potential protectability of the arrangement of *nonliteral* elements of a program, like a user interface. Here, however, we consider the arrangement of a *literal* element—source code. So one might conclude that, unlike the arrangement of a nonliteral element, the arrangement of a literal element is not protectable.

But we think there is no principled distinction to draw between those two contexts. We explained in *Compulife I* that the virtual-identity standard governs the arrangement of nonliteral elements of a program, even though the substantial-similarity standard is the default standard for other cases. *See* 959 F.3d at 1302 n.6. The substantial-similarity standard asks, unsurprisingly, whether there is a “substantial similarity’ between the allegedly offending program and the protectable, original elements of the copyrighted works.” *Id.* at 1302. The virtual-identity standard, on the other hand, asks whether the two works are virtually identical, which is “a level of similarity greater than the ‘substantial similarity’ standard.” *MiTek*, 89 F.3d at 1558 n.24. This difference, though, concerns only the analysis that a court engages in when comparing the copied and copying works.

But we’re not comparing, we’re abstracting. There is no other meaningful difference between the virtual-identity standard and the substantial-similarity standard to make us think that, when abstracting, courts ought not consider the arrangement of a program. In fact, we have applied the latter standard to the arrangement of information in other contexts multiple times. *See e.g.*, *BUC Int’l Corp.*, 489 F.3d at 1149 n.42 (explaining that *BellSouth Advert. & Pub. Corp. v. Donnelley Info. Pub.*,

Appendix A

Inc., 999 F.2d 1436 (11th Cir. 1993) (en banc), “established the ‘substantial similarity’ standard as the default mode of analysis for compilation copyright claims”). Our conclusion in *MiTek* compels courts, when abstracting, to assess the arrangement of literal elements as a potentially protected constituent part of the program.

Although the district court considered the selection and arrangement of Compulife’s code to some degree, the district court never identified the entire arrangement of these variables in the code as a constituent component of the code. For example, the district court expressly evaluated the arrangement of the birth month, birthday, and birth year variables before filtering. But it didn’t look at the arrangement of *all* the variables together. And, relying on *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 347-48, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991), the district court recognized that factual compilations, “like the ones performed by Compulife’s software in compiling facts . . . to generate a quote” can be protectable. But the *arrangement* of the code itself can be protectable, not just the results produced by the software.

Given that the arrangement of the code may be protectable, we agree with Compulife that the district court should have abstracted the “arrangement” as something to be analyzed at the subsequent filtration step. The defendants offer two arguments to the contrary, but neither works.

To start, the defendants argue that we should not consider whether the arrangement of code is protectable

Appendix A

because Compulife forfeited this argument below. After all, typically, we do not consider issues for the first time on appeal. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). But Compulife raised this issue below. In its proposed findings of fact and conclusions of law before the district court, Compulife said that its “code contained numerous creative elements including a creative way to identify and organize variables related to requests for insurance quotation information.”

On the merits, the defendants argue that the abstraction-filtration-comparison test forecloses analyzing the arrangement of the entire code because abstraction requires the court to break down the code into its constituent structural components. But by recognizing that the arrangement of elements of a program can be protectable, precedents such as *MiTek* and *Oracle* suggest that the arrangement *is* a constituent structural component suitable to be analyzed in the abstraction and filtration steps.

We draw no conclusion about whether the arrangement of this code *is* protectable. We simply hold that the district court erred by failing to consider whether it was.

2.

Although we must remand for the district court to assess whether the arrangement of the code is protectable, we will continue with Compulife’s arguments about the district court’s application of other elements of the test. *See United States v. White*, 846 F.2d 678, 688 (11th Cir.

Appendix A

1988) (explaining that we can address additional alleged errors to provide guidance to the district court in further proceedings).

We will start with filtration. “Before comparing two works to determine if they display the required substantial similarity, a court must ‘eliminate from comparison the unprotectable elements of’ the copyrighted work.” *Compulife I*, 959 F.3d at 1303 (quoting *Bateman*, 79 F.3d at 1545). Beyond the arrangement of the variables, which we leave for the district court to consider on remand, *Compulife* argues that the district court erroneously filtered out other protectable content: (1) the chosen name of the variable that collects birth years (i.e., using “BirthYear” instead of another option like “year”); (2) its use of camel case when naming variables; and (3) the use of radio buttons for making certain selections such as smoker status or gender, rather than other options like a dropdown menu, check box, or manual entry in a text field.

We disagree with *Compulife*. The district court was right to conclude that those elements are not protectable.

We’ll consider first the name of the BirthYear variable. *Compulife* argues that its competitors could have chosen any other name for the variable. But “obvious label[s] . . . lack the requisite originality for copyright protection.” *BellSouth*, 999 F.2d at 1444 (holding that a heading of “Attorneys” for a list of attorneys or “Banks” for a list of banks is not original expression and therefore not protectable). Common sense instructs that the name “BirthYear” for a variable that invites users to input their birth year is too obvious to be original.

Appendix A

Now we'll turn to Compulife's choice to use camel case there and elsewhere. Under *Compulife I*, expression dictated by external factors like industry standards is not protectable. *See* 959 F.3d at 1304-05. There was testimony at trial that camel case is an industry standard. It is perfectly reasonable for the district court to have found that this industry standard dictated Compulife's choice of camel case for "BirthYear" and other variables. So the district court did not err in filtering these elements out.

Finally, we'll address Compulife's use of radio buttons for certain user selections. "Under the merger doctrine, 'expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.'" *BellSouth*, 999 F.2d at 1442 (quoting *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991)). For example, because there are so "few ways of visually presenting the idea that an activity is not permitted," an expression of that idea in the form of "a circle with a diagonal line crossed through it" is not protectable under the merger doctrine. *See BUC Int'l Corp.*, 489 F.3d at 1143.

Likewise, the merger doctrine makes Compulife's use of radio buttons unprotectable. There are very few practicable ways to invite users to make single selections among a set of defined options. A few of Compulife's proposed alternatives don't fit the bill. Checkboxes generally allow you to make multiple selections simultaneously. Open text fields don't limit you to a defined set of options. Only radio buttons and dropdown menus remain. With so few options, allowing Compulife to copyright its use of radio

Appendix A

buttons would merge the expression (the use of radio buttons) with the idea (making single selections from a set of defined options). That is contrary to our law and, at times, Compulife’s own opinion. After all, Compulife inconsistently concedes that its use of radio buttons was not protectable, saying “[n]or did Compulife claim that its use of a radio button was copyrightable,” but later arguing the opposite.

For all these reasons, the district court did not err in filtering out all the other elements besides the arrangement of the code.

3.

Finally, let us turn to comparison. “The last step is to compare any remaining kernels of creative expression with the allegedly infringing program to determine if there is in fact a substantial similarity—comparison.” *Compulife I*, 959 F.3d at 1303 (cleaned up). Under this step, “both the quantitative and the qualitative significance of the amount copied” must be assessed. *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1307 (11th Cir. 2008).

Compulife argues its competitors’ copying was both quantitatively and qualitatively significant. It complains that the defendants copied 84 percent of its code. And it says the copying was qualitatively similar, arguing that the defendants copied the way it named and formatted its variables. Again, we leave Compulife’s arguments about the *arrangement* of the code for the district court to

Appendix A

consider on remand. But we disagree with Compulife that there was significant copying of the *remaining* elements of the code.

Start with quantitative significance. Yes, Compulife’s competitors copied 84 percent of its code. But “even substantial similarity between a copyrighted work’s unprotectable elements and a purportedly infringing work isn’t actionable, regardless of how many unprotectable elements are copied or how important they may be.” *Compulife I*, 959 F.3d at 1303. Of the elements the district court *did* find protectable, Compulife’s competitors copied only 27 of the 347 lines. That’s not the 84 percent that Compulife alleges, but a mere 7.78 percent.

Qualitative significance protects against even quantitatively insignificant copying of a computer program, when that small, copied portion gives the program “distinctive features” or makes “the program especially creative or desirable.” *Id.* at 1302 (quoting 4 Nimmer on Copyright § 13.03 (2019)). Qualitative significance is used to protect quantitatively insubstantial but otherwise incredibly significant copying—like copying “the most powerful passages” from President Ford’s autobiography, concerning his pardon of President Nixon (one of the most significant moments of his presidency). *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985).

Compulife does not offer any reason why the remaining elements are qualitatively significant. It argues that these elements were necessary to perform “key functions”

Appendix A

of the program. But their importance is not the key to their protectability. Nothing in the record suggests the district court erred in finding the remaining elements not distinctive or especially creative.

B.

Having addressed copyright infringement, we will move on to Compulife's trade secret claim. Compulife says that the defendants stole its database of insurance rates, which it argues is a trade secret. A trade secret is a piece of information that has independent economic value from being kept secret and is in fact subject to reasonable efforts to maintain its secrecy. *See Compulife I*, 959 F.3d at 1311. A plaintiff in Florida can sue a defendant who steals his trade secret under both federal and Florida law.¹

To prove that the defendants stole its trade secret, Compulife "must demonstrate that (1) it possessed a trade secret and (2) the secret was misappropriated." *Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1297 (11th Cir. 2018) (quotation and internal quotation marks omitted). First, we will consider whether Compulife's database constituted a trade secret, and second, we will consider whether the defendants misappropriated it.

1. Compulife brings claims under the federal Defend Trade Secrets Act and the Florida Uniform Trade Secrets Act. We already held, and the parties seem to agree, that the federal law is so much like the Florida law that an analysis of a Florida claim amounts to an analysis of a federal one. *Compulife I*, 959 F.3d at 1311 n.13. So like we did in *Compulife I*, we will proceed under the Florida law.

Appendix A

1.

We concluded previously that it was not clearly erroneous for the district court to find that Compulife's database was a trade secret. *Compulife I*, 959 F.3d at 1311. On remand, the district court reasoned that it must respect that finding as the law of the case. The law-of-the-case doctrine has three exceptions: when "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984) (quoting *United States v. Robinson*, 690 F.2d 869, 872 (11th Cir. 1982)).

The defendants argue that the first exception to the law-of-the-case doctrine applies here. After we remanded the case in *Compulife I*, the district court held a new trial. The defendants say that substantially different evidence emerged that suggests that the database was not subject to reasonable efforts to maintain its secrecy. Specifically, the defendants point to new evidence about how Compulife protected its software. None of this evidence undermines our assessment in the initial appeal.

First, contrary to what was originally known, the licensee through which David Rutstein accessed the database was not required by Compulife to sign a license until 2015, long after the misappropriation happened. But there was also testimony from the licensee that he had always understood that his company was bound by a

Appendix A

license when using the Compulife software, even before he formally signed one; he said that he treated the software the same way he treated his company's own trade secrets. None of this new information undermines our conclusion on the first appeal that Compulife goes to great lengths to control the use of its software through licenses.

Second, David Rutstein separately accessed the database by sending a misleading email to Compulife, which gave him access without verifying his statements. But David Rutstein lied. He said he had an account with Compulife through a real Compulife licensee it recognized and asked for help in using the service on the licensee's behalf. Perhaps Compulife should have had a second-factor authentication, but it is not unreasonable for it to believe that someone asking for specialized help in using its service on a licensee's behalf works for that licensee. At the very least, it does not negate all the other work Compulife does in encrypting, licensing, and otherwise securing its database. *See Compulife I*, 959 F.3d at 1312 ("So long as the precautions taken were reasonable, it doesn't matter that the defendant found a way to circumvent them. Indeed, even if the trade-secret owner took no measures to protect its secret from a certain type of reconnaissance, that method may still constitute improper means.").

Third, the public has always been able to pull insurance quotes from the database through the website, with no limitations on how many quotes they could pull. But we previously mentioned that even if individual quotes that are publicly available lack trade secret status, the whole compilation of them (which would be nearly impossible for

Appendix A

a human to obtain through the website without scraping) can still be a trade secret. *See id.* at 1314.

One final point on the law of the case: the defendants also say, with no argument, that we should conclude that our previous decision was clearly erroneous, such that following it would work a manifest injustice. Because the defendants make merely a passing reference to this exception and offer no argument about why it should apply, we consider this issue abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014).

So the law-of-the-case doctrine applies, and the database is a trade secret.

2.

Now, let us consider whether the defendants misappropriated Compulife's trade secret. "One party can misappropriate another's trade secret by either acquisition, disclosure, or use." *Compulife I*, 959 F.3d at 1311 (citing Fla. Stat. § 688.002(2)). "Compulife alleges misappropriation both by acquisition and by use—but not by improper disclosure." *Id.*

Misappropriation by acquisition occurs when a person acquires a trade secret and knows or has reason to know that it was acquired by improper means. *Id.* Misappropriation by use occurs when a person uses a trade secret without consent and either: (1) used improper means to acquire the trade secret; (2) at the time of use knew or had reason to know that it was (a) derived from a person

Appendix A

who used improper means, (b) acquired in a manner giving rise to a duty to maintain secrecy, or (c) derived from a person who owed a duty to maintain secrecy to the owner; or (3) before a material change in his position, knew or had reason to know that it was a trade secret and had been acquired by accident or mistake. *Id.*

Two key questions are at issue. First, did the defendants use improper means? And second, did the defendants acquire the trade secret? The district court answered “yes” to both. And we cannot say the district court erred.

Let’s start with improper means. As we previously explained, “[a]ctions may be ‘improper’ for trade-secret purposes even if not independently unlawful.” *Id.* at 1312. (citing *Christopher*, 431 F.2d at 1014). “Under the broad definition adopted in [our precedent] *Christopher*, misappropriation occurs whenever a defendant acquires the secret from its owner ‘without his permission at a time when he is taking reasonable precautions to maintain its secrecy.’” *Id.*

Here, Compulife alleges that the defendants used “scraping” to acquire its trade secret—i.e., its database of insurance quotes. It is important to note that scraping and related technologies (like crawling) may be *perfectly legitimate*. Much of the modern internet is built on those technologies. See Han-Wei Lui, *Two Decades of Laws and Practice Around Screen Scraping in the Common Law World and Its Open Banking Watershed Moment*, 30 WASH. INT’L L.J. 28, 29 (2020) (explaining that scraping “is now used for targeted advertising, price

Appendix A

aggregation, budgeting apps, website preservation, academic research, journalism, and more”) (citations omitted). But the defendants in this case did not take innocent screenshots of a publicly available site; instead, they copied the order of Compulife’s copyrighted code and *used that code* to commit a scraping attack that acquired millions of variable-dependent insurance quotes. If they had not formatted and ordered their code exactly as Compulife did, they would not have been able to get the millions of quotes that they got. As we explained in the previous appeal, this deceptive behavior resembles the acquisition of a trade secret through surreptitious aerial photography, which we addressed in *Christopher*.

Now let’s consider acquisition. The district court found that the defendants stole anywhere from 3 million to 43.5 million quotes. It is true that we don’t know the total percentage of the database that was taken. But the district court found that Compulife’s revenue declined after the scraping attack, that it lost business it otherwise expected to receive, that the number of customers looking for free trials declined, that the number of free trials that converted to four-month subscriptions declined, and that the number of four-month subscriptions that converted to annual subscriptions declined. All the while, quotes generated from Compulife’s software continued to appear on the defendants’ website. A fair reading of this record supports the district court’s finding that the defendants obtained so much of the database that they posed a competitive threat to Compulife. Faced with this record, the district court did not err in concluding that Compulife’s trade secret was acquired by its competitors.

*Appendix A**C.*

Now let us consider the joint and several liability of the defendants for Compulife's claim of misappropriation of trade secrets. The defendants think it unwarranted because they each argue that they are less at fault than others. Compulife thinks it appropriate.

We start with a few basic principles. First, Florida is a comparative fault regime with an exception for intentional torts. *See Barton Protective Servs., Inc. v. Faber*, 745 So. 2d 968, 976 (Fla. Dist. Ct. App. 1999). Second, in Florida, trade secret misappropriation is an intentional tort. *See Vance v. Tire Eng'g & Distrib., LLC*, 32 So. 3d 774, 776 (Fla. Dist. Ct. App. 2010). Third, joint and several liability is applied "when the defendants acted in concert" and their "separate independent" tortious acts "combined[] to produce a single injury." *Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687, 691 (Fla. Dist. Ct. App. 2002) (quoting *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1091 (Fla. 1987)). The upshot is that defendants in trade secret misappropriation cases are jointly and severally liable under Florida law when their conduct produces a single injury.

The doctrine of joint and several liability does not require equal fault among all defendants. "Joint and several liability was established through the common law and later codified by the legislature. It allows a claimant to recover all damages from one of multiple defendants even though that particular defendant may be the least responsible defendant in the cause." *Agency for Health Care Admin. V. Associated Indus. Of Fla., Inc.*, 678 So. 2d

Appendix A

1239, 1257 (Fla. 1996). Joint and several liability's whole purpose is to treat the defendants as equally responsible, regardless of their fault. It must hold true when applied to trade secret claims. At least one of our sister circuits agrees that joint and several liability applies to trade secrets cases and copyright infringement cases like this one. *Salton, Inc. v. Philips Domestic Appliances & Pers. Care B.V.*, 391 F.3d 871, 877 (7th Cir. 2004). To hold otherwise, we would need to conclude that comparative fault, rather than joint and several liability, is the default regime in trade secret cases.

Applying those principles here supports joint and several liability. There are enough facts in the record to support the district court's finding that each of the defendants acted in concert to commit the wrongs causing Compulife's injury: David Rutstein lied in an email to get Compulife's web quoter put onto his website; Newman supervised the scraping attack at David's and Levy's direction; Binyomin was the investor and owner of the company that his father David used to design the website (the infringing website was registered in his name), and Binyomin gave his father permission to use his insurance license and his agency to collect fees from insurance sales generated by the stolen trade secret. These acts caused a single injury—lost sales and revenues—and, under Florida law, the defendants are jointly and severally liable for that single injury.

The defendants offer no argument for why we may or should create an exception to the typical rules of joint and several liability in the trade secret context. The

Appendix A

defendants say that several courts have suggested that joint and several liability is appropriate when the degree of wrong is the same among the several defendants. *See Brocade Commc'ns Sys., Inc. v. A10 Networks, Inc.*, 873 F. Supp. 2d 1192, 1218 (N.D. Cal. 2012); *Fishkin v. Susquehanna Partners, G.P.*, No. CIV.A.03-3766, 2007 U.S. Dist. LEXIS 19621, 2007 WL 853769, at *3 (E.D. Pa. Mar. 19, 2007). But they are not right that multiple defendants *must* have the same degree of wrong to apply joint and several liability. To draw that conclusion would be “to commit the fallacy of the inverse (otherwise known as denying the antecedent): the incorrect assumption that if P implies Q, then not-P implies not-Q.” *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 589, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014) (Scalia, J., concurring in the judgment).

In fact, the very authorities the defendants cite suggest that joint and several liability is appropriate in this circumstance. The courts in both *Brocade* and *Fishkin* relied on a leading treatise, Milgrim on Trade Secrets. It suggests that the general rule for misappropriation of trade secrets is joint and several liability. *See Brocade*, 873 F. Supp. 2d at 1218 (citing Milgrim for the proposition that “[c]ommentators on trade secret law also suggest that, in general, liability for misappropriation claims is joint and several” before quoting the same degree of wrong language); *Fishkin*, 2007 U.S. Dist. LEXIS 19621, 2007 WL 853769, at *3 (citing Milgrim for the identical point). The treatise proposes a narrow exception to this general rule for a hypothetical corporate employe who is independent of his corporate employer. 4 Milgrim on Trade Secrets § 15.02 (2023). The treatise hypothesizes that in

Appendix A

some cases a court could split a single loss into multiple losses across time, such that if a corporate employee quits his job “at some time during the period of wrongful use, as to him damages might only be computed for wrongful use prior to such termination.” *Id.* The narrowness of that hypothetical exception—which is not present on the facts here—emphasizes the breadth of the presumption in favor of joint and several liability.

Binyomin Rutstein separately suggests that his culpability was so low that he should not have been found liable at all. But we cannot say the district court clearly erred. The district court found that David Rutstein’s infringing websites were registered in Bin-yomin’s name, Binyomin owned an insurance agency which benefited from the stolen database, and Binyomin allowed David to use his license in violation of a consent decree to illicitly engage in the insurance business. Nothing in the record suggests that those findings are clearly erroneous. And those findings support the district court’s conclusion that Binyomin participated in and benefited from the misappropriation of Compulife’s trade secret.

We will mention one final issue about joint and several liability. One could argue that, even though joint and several liability is the rule for *compensatory* damages in a case like this one, the district court should have considered the defendants’ different levels of culpability in the context of *punitive* damages. The general principle is that “exemplary damages imposed on a defendant should reflect ‘the enormity of his offense.’” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d

Appendix A

809 (1996) (quoting *Day v. Woodworth*, 54 U.S. 363, 371, 14 L. Ed. 181 (1852)). And several of our sister circuits have recognized that, under certain state laws, joint and several liability is inappropriate for punitive damages. See, e.g., *Rodick v. City of Schenectady*, 1 F.3d 1341, 1349 (2d Cir. 1993); *Hahn v. Monsanto Co.*, 39 F.4th 954, 973 (8th Cir. 2022). For their part, however, the Florida courts at least occasionally approve of joint and several liability for punitive damages. See *Parton v. Palomino Lakes Prop. Owners Ass'n, Inc.*, 928 So. 2d 449, 454 (Fla. Dist. Ct. App. 2006); *Wrains v. Rose*, 175 So. 2d 75, 79 (Fla. Dist. Ct. App. 1965). Whether the district court should have considered imposing separate punitive damages is a complicated issue, which would have benefited from the parties raising it. Nobody did. So the issue was forfeited. See *United States v. Campbell*, 26 F.4th 860, 873 (11th Cir. 2022). We therefore do not address it.

IV.

The district court is **AFFIRMED** in part and **REVERSED** in part. The matter is **REMANDED** for further proceedings consistent with this opinion.

**APPENDIX B — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA, FILED JULY 12, 2021**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 9:16-CV-80808-REINHART

COMPULIFE SOFTWARE, INC.,

Plaintiff,

v.

BINYOMIN RUTSTEIN a/k/a BEN RUTSTEIN,
DAVID RUTSTEIN a/k/a DAVID GORDON
a/k/a BOB GORDON a/k/a NATE GOLDEN
and JOHN DOES 1 TO 10,

Defendants.

CASE NO.: 9:16-CV-81942-REINHART

COMPULIFE SOFTWARE INC.,

Plaintiff,

v.

MOSES NEWMAN, DAVID RUTSTEIN,
BINYOMIN RUTSTEIN AND AARON LEVY,

Defendants.

*Appendix B***ORDER**

Plaintiff Compulife Software, Inc. (“Compulife”) and the Defendants are direct competitors in the business of generating life insurance quotes on the internet. These two lawsuits stem from Defendants’ alleged theft of Compulife’s intellectual property. These matters are before me upon the Eleventh Circuit’s reversal of the judgment entered in Defendants’ favor following an October 2017 bench trial of these matters before a different magistrate judge. *See Compulife Software Inc. v. Newman*, 959 F.3d 1288 (11th Cir. 2020).¹ According to the Eleventh Circuit’s remand order, the claims that remain for adjudication are as follows:

- in the ’08 case, Counts I and II of the Amended Complaint, which allege copyright infringement, and Counts IV and V, which allege theft of trade secrets. *See* Case No. 16-cv-80808-BER (ECF No. 8); and
- in the ’42 case, Counts I and V of the Complaint, which allege theft of trade secrets, and Counts II and III, which allege copyright infringement. *See* Case No. 16-cv-81942-BER (ECF No. 24).

Specifically, in the ’08 case, Compulife alleges that Defendants infringed on its copyright in the HTML source

1. On July 6, 2020, the parties consented to have me preside over the final disposition of these matters. Case No. 16-cv-80808-BER (ECF Nos. 266, 267); Case No. 16-cv-81942-BER (ECF Nos. 277, 278). All citations in this decision are to the filings in the ’08 case.

Appendix B

code of its life insurance “web quoter” when Defendants implemented similar quoters on their own websites.² Compulife also alleges that Defendants misappropriated its trade secret by accessing its Transformative Database on another server to generate life insurance quotes without Compulife’s permission. *See* Case No. 16-cv-80808-BER (ECF No. 8).³

In the ‘42 case, Compulife alleges that Defendants (1) infringed on its copyright by copying parameters and variables from its HTML source code in order to carry

2. A “web quoter” is used as a marketing tool to attract customers: once a website is equipped with a web quoter, prospective life-insurance purchasers can enter demographic information into fields on the site and receive insurance rate quotes directly . . . the web quoter generates quotes by communicating with an internet-quote engine hosted on Compulife’s server. *Compulife Software Inc.*, 959 F.3d at 1296. The HTML source code of the web quoter is protected by a registered copyright. *Id.*

3. Compulife maintains a database of insurance-premium information—called the “Transformative Database”—to which it sells access. *Compulife Software Inc.*, 959 F.3d at 1296. The Transformative Database is valuable because it contains up-to-date information on many life insurers’ premium-rate tables and thus allows for simultaneous comparison of rates from dozens of providers. *Id.* Most of Compulife’s customers are insurance agents who buy access to the database so that they can more easily provide reliable cost estimates to prospective policy purchasers. *Id.*

As the Eleventh Circuit noted, “[Mr.] Barney personally updates Compulife’s Transformative Database. To do so, he draws on insurers’ publicly available rate information, but he also employs a proprietary calculation technique—in particular, a secure program to which only he has access and that only he knows how to use.” *Compulife Software Inc.*, 959 F.3d at 1298.

Appendix B

out a “scraping attack” and (2) misappropriated a trade secret by scraping data from its Term4Sale site. *See* Case No. 16-cv-81942-BER (ECF No. 24).⁴

I conducted a non-jury trial of these matters from November 16, 2020 through November 20, 2020. I heard counsel’s closing arguments on December 17, 2020. On January 19, 2021, counsel submitted their Proposed Findings of Fact and Conclusions of Law. ECF Nos. 306, 307.⁵ Pursuant to Federal Rule of Civil Procedure 52(a)(1), I hereby enter my findings of fact and conclusions of law.

FINDINGS OF FACT

Compulife’s Business Operations

1. Compulife develops and markets life insurance comparison and quotation software. (Vol. 1, 39:5-6).⁶

2. Robert Barney founded the company in 1982 and is its president. (Vol. 1, 38:24-39:3, 41:4; Vol. 2, 16:4-5). Chris Bruner is Compulife’s programmer. (Vol 2, 119:5-7). Jeremiah Kuhn is in charge of customer and technical support and is Compulife’s chief financial officer. (Vol. 3, 34:8-9, 72:13-15).

4. “Scraping” is a technique whereby a hacker extracts large amounts of data from a website. *Id.* at 1299.

5. The identical Proposed Findings of Fact and Conclusions of Law were also filed in the ‘42 case. ECF No. 308, 309.

6. References to Volumes 1-5 correspond to the transcripts filed in the ‘08 case from each day of the five-day trial. ECF No. 308-312.

Appendix B

3. Compulife licenses its software for use by term life insurance agents to perform life insurance policy comparisons. *See* Statement of Uncontested Facts (SUF) ¶ 3 (ECF No. 286-1).

4. Compulife licenses its software in a stand-alone version that operates on a personal computer (“the PC version”), and as the “Compulife Internet Engine” which runs on a server that can provide insurance quotes to visitors to the Compulife customer’s website. (Vol. 1, 44:9-11, 49:14-16; SUF ¶ 2). Compulife Internet Engine customers typically sell life insurance to the public or service multiple agents as a distributor of life insurance products. (SUF ¶ 4).

5. The Compulife PC version is sold with a click-through licensing agreement. (Vol. 2, 45:15-18; Vol. 3, 35:10-17). Customers seeking to license the Compulife internet engine version must also license the PC version; customers cannot license the Compulife internet quote engine without also licensing the PC version of the software. (Vol. 2, 45:15-24).

6. Compulife offers initial thirty-day trials of its PC software to insurance agents. (Vol. 2, 35:16-21; Vol. 3, 40:14-41:16). After the thirty-day trial, potential customers who complete a tutorial can get a four-month free trial subscription with the “web-quote” option. (Vol. 2, 36:1-4; Vol. 3, 35:4-12, 41:19-42:17). Four-month trial customers sign a Compulife licensing agreement. (Vol. 2, 36:5-7). Typically, the four-month free trials translate into sales of licenses for Compulife’s software. (Vol. 3, 41:19-42:17).

Appendix B

7. Compulife also operates the website Term4Sale.com that uses the company's internet engine software operated on Compulife's server. (Vol. 1, 50:11-15, 52:3-6, 53:9-11; Vol. 2, 119:25). Term4Sale.com is a way for consumers to get quotes for life insurance and to find Compulife software customers in their area, who are life insurance agents, from whom they can buy life insurance. (Vol. 1, 50:16-20). The insurance agents pay Compulife for this service. (SUF ¶ 5). Term4Sale.com generates income of approximately \$125,000.00 to \$150,000.00 per year for Compulife. (Vol. 2, 38:18-22).

8. Visitors to Term4Sale.com enter their personal information to obtain a quote, including their zip code. (Vol. 1, 52:9-22, 132:8-13; Vol. 2, 37:20). Compulife uses the visitor's zip code to generate the list of up to three Compulife agents in their area to contact to purchase life insurance. (Vol. 1, 52:9-22). Visitors to Term4Sale.com can also send a message to the Compulife agents in their area through the Term4Sale website. (Vol. 1, 132:10-18). Not all insurance companies sell life insurance in all states, so Compulife uses the zip code information to determine which insurance policies from which companies to quote to the consumer. (Vol. 1, 53:3-8).

9. Prior to September of 2016, Term4Sale.com contained no restrictions limiting the number of quotes a user could generate from Compulife's database or how the quotes were subsequently used. (Vol. 2, 40:21-41:1; Vol. 3, 16:16-25, 97:22-98:17).

10. Compulife's software relies on a database of life insurance companies' rates that Mr. Barney created.

Appendix B

(Vol. 1, 41:8-10; Vol. 2, 120:5-11, 122:18-123:3). There is a difference between insurance rates and insurance quotes: rates are one of the “raw materials” used in developing an insurance premium for a policy; rates are never given to a consumer, instead, rates are used to calculate the premium which is given to a consumer to tell them how much the insurance will cost (“the quote”). (Vol. 1, 45:25-46:9).

11. Insurance rates are typically public information. (Vol. 1, 42:8-10). Compulife gets its insurance rate information from rate books and rate charts published by life insurance companies. (Vol. 1, 41:12-13). Some life insurance companies do not publish their rates, but Compulife has relationships with most of these companies to obtain their rate information in a timely manner. (Vol. 1, 41:16-42:4). Compulife’s system includes rate tables from over a hundred insurance companies. (Vol. 2, 5:1-3). Compulife’s software uses the rate information to generate quotes mathematically. (Vol. 3, 14:12-19).

12. For insurance rate information to be useful it must be current; based on the relationships that Compulife has developed, insurance companies provide Compulife with their current rate tables before they are released to the public. (Vol. 1, 42:15-24).

13. When Compulife receives rate information from insurers, sometimes as frequently as every month, Mr. Barney enters the rate information into Compulife’s system using Compulife’s software and the database that Compulife designed. (Vol. 1, 42:3-5, 44:12-45:9; Vol. 2,

Appendix B

123:4-12). Compulife assigns its own internal four-letter company codes to the different insurance companies whose insurance policy information it inputs into its database. (Vol. 2, 157:18-158:9, PX 109).⁷ Compulife updates its rate information in its software and provides those updates to its customers monthly. (Vol. 1, 48:17-19).

14. Because the data files could be reverse-engineered if not protected, Compulife designed an encryption system so that if someone outside the company looked at the data files, “it just looks like a bunch of garbage.” (Vol. 1, 45:10-20). Both the PC version and the internet quote engine versions of Compulife’s software use the same encrypted data files. (Vol. 1, 50:21-51:2).

15. Mr. Bruner wrote both the Compulife PC version and the Compulife internet engine version of the software in C++. (Vol. 3, 22:15-19, 27:18-23). Bruner also wrote the Compulife HTML Source Code that communicates with the Compulife internet engine. (Vol. 3, 22:17). Compulife’s 2001 HTML Source Code was registered with the Copyright Office on May 29, 2015 and assigned Reg. No. TX-8-106-360. (PX 153, 541). Compulife’s 2010 HTML Source Code, the updated version of its 2001 HTML Source Code, was registered with the Copyright Office on May 29, 2015 and assigned Reg. No. TX-8-106-364. (Vol. 2, 131:15-21, PX 153, 542).

16. The Compulife internet engine and HTML work together: “If a person accesses a website that contains the

7. Plaintiff’s exhibits are referenced by “PX” and Defendants’ exhibits by “DX.”

Appendix B

HTML code and inputs the right information, the HTML code will then contact the C++ code, pass information to the C++ code, the C++ code does some computation and passes information back to the HTML code, which then displays it on the website.” (Vol. 3, 27:18-23). The Compulife HTML gathers information from the end user such as age, sex, smoking status, and then the HTML calls the Compulife internet engine which calculates an insurance quote and produces the results back to the user. (Vol. 2, 120:18-19, 121:9-17). To accomplish the task of looking up insurance quotes for a user, the HTML code contains different blocks of code: each block of code relates to the different information needed from a user to produce an insurance quote: state selection code⁸ (Vol. 2, 139:10-20); birthdate and birth month selection code⁹ (Vol. 2, 139:21-140:6); birth year code written in camel case

8. The state selection code translates each state name into a number, rather than the typical abbreviation of states by two letter acronyms. (Vol. 2, 147:17-19, PX 567). Mr. Bruner testified that he “inherited the code . . . where each state had its own number” from a program that already existed in the Compulife source code library. (Vol. 2, 147:6-11, 182:13-183:4). On cross-examination, Mr. Bruner admitted that the way he programmed the state selection code was a common way of doing it, but that there were many ways to program it differently. (Vol. 3, 6:21-7:2).

9. The birth month selection code uses “camel case” where two words are combined without a space between them, here “BirthMonth.” The second capitalized word forms a hump like that of a camel. (Vol. 2, 148:6-16, PX 567). Camel case is commonly used in computer programming. (Vol. 2, 140:1-2, 184:19-20). The birth months and days in Compulife’s code are assigned consecutive numbers and organized to correspond to the way they appear on a calendar. (Vol. 4, 67:25-68:13, 68:20-69:3).

Appendix B

(Vol. 2, 140:7-9); gender selection code¹⁰ (Vol. 2, 140:11-17); smoker/tobacco code¹¹ (Vol. 2, 140:18-21); health class code¹² (Vol. 2, 140:22-141:7); insurance category code (Vol. 2, 141:8-23); mode used code¹³ (Vol. 2, 142:2-5, 154:9-14); the code for sorting output information (Vol. 2, 154:24-155:11); and face amount code (Vol. 2, 142:19-143:4).

17. In order for the Compulife HTML code to communicate with the Compulife internet engine, the HTML code must send the engine the correct parameters and variables defined in the HTML code; it must be a one-to-one match. (Vol. 3, 27:24-29:3; SUF ¶ 14). The Compulife internet engine is expecting the parameters and variables to come to it in the particular way it is written in the Compulife HTML, and if it does not come to the engine in that way the software will spit out an error message and not produce results. (Vol. 2, 121:18-122:3). The parameters are: “State”, “BirthMonth”, “Birthday”,

10. Compulife’s HTML only offers a choice between “male” and “female.” (Vol. 2, 149:18, PX 567).

11. The smoker/tobacco code, which uses camel case, defines a “radio button” to choose between smoker or non-smoker, but it could have been written to use a drop-down choice instead. (Vol. 2, 149:24-150:7, PX 567). Bruner admitted that radio buttons are common in computer programming. (Vol. 3, 1:15-17).

12. This code defines health by different insurance classifications: ¶¶ for preferred plus, ¶ for preferred, RP for regular plus, and R for regular. (Vol. 2, 150:8-17, PX 567).

13. The “mode used” code gives the annual premium as well as the “modal” premium. The modal premium is monthly, quarterly, or semiannually. (Vol. 2, 154:9-14).

Appendix B

“BirthYear”, “Sex”, “Smoker”, “Health”, “NewCategory”, “ModeUsed”, “SortOverride1”, and “FaceAmount.” (Vol. 2, 146:4-8, PX 542, 567). All the parameters must be present, spelled correctly and provided in the correct order for the software to produce quotes. (Vol. 2, 121:18-22). Mr. Barney acknowledged that these variables and parameters are based on standard insurance industry requirements. (Vol. 2, 27:6-16, 28:7-11, 18-25).

18. The only way to communicate with the Compulife internet engine is to use Compulife’s HTML commands in Compulife’s HTML code. (Vol. 1, 53:24-25). Compulife’s HTML code creates the web page a website visitor sees when they use the life insurance quote engine function. (Vol. 2, 64:20-65:5).

19. For Compulife customers who want to obtain Compulife’s quote system on a single website, Compulife offers a “web quote” option which allows one user access to a copy of Compulife’s internet quote engine that Compulife runs on its servers. (Vol. 1, 54:1-7). To use the Compulife web quote option, a user must at least subscribe to “Compulife Basic” which costs \$96 a year plus the web quote option for an additional \$96 per year, or \$192 total per year. (Vol. 1, 54:14-19, Vol. 2, 32:4-13; Vol. 3, 36:12).

20. Alternatively, Compulife offers the Compulife internet quote engine for more sophisticated customers who have “their own ideas about how they want to present their website to the consumer.” (Vol. 1, 54:21-23). The Compulife internet quote engine costs \$1,500 per year. (Vol. 1, 54:9-13). Internet quote engine customers can

Appendix B

customize Compulife's software to their needs, run the software on their own server, and give third parties access. (Vol. 1, 49:21-50:2, 53:12-21, 54:21-55:13). Compulife does not require the users of the internet version to disclose on their websites that the quotes are being generated by Compulife's software. (Tr. Vol. 2, 31:12-32:3).

21. "[I]nternet quote engine users . . . who want to remarket services to other individuals or agencies can do so providing that they make th[at] third party . . . a customer of the PC version of Compulife." (Vol. 1, 55:7-13). The Compulife internet engine license agreement requires users who access the Compulife internet engine software to have valid Compulife PC licenses. (Vol. 1, 59:14-17, PX 537).

22. Compulife's licensing agreements provide that Compulife's software constitutes Compulife's valuable trade secrets, contains confidential and trade secret material, and that the user will not duplicate Compulife's software except for back-up purposes. (Vol. 3, 37:10-40:9; PX 532, 533, 534, 535; SUF ¶ 16). Compulife's licensing agreements prohibit the user from duplicating, reverse compiling, reverse engineering, reformatting, or providing internet web quoting services to sub-users without Compulife's permission. (Vol. 3, 37:10-40:9; PX 532, 533, 534, 535; SUF ¶ 17). Compulife's licensing agreements provide that Compulife displays life insurance quotations on the internet through a proprietary system of template files originally created by Compulife, and that the user will not permit sub-users to re-format a quotation on another computer. (Vol. 3, 37:10-40:9; PX 532, 533, 534,

Appendix B

535; SUF ¶ 19). Compulife licensing agreements provide that Compulife's software includes names of variables and lists of variables which are proprietary to Compulife and subject to Compulife's copyright. (Vol. 3, 37:10-40:9; PX 532, 533, 534, 535; SUF ¶ 20). Compulife's licensing agreements provide that the user's license for Compulife's software is not transferable without the written consent of Compulife. (Vol. 3, 37:10-40:9; PX 532, 533, 534, 535; SUF ¶ 21).

Defendants' Business Activities

23. Defendant David Rutstein was previously licensed by the Florida Department of Financial Services as an insurance agent. (Vol. 4, 128:13-14, PX 1). On April 19, 2012, David Rutstein agreed in a Consent Order that his insurance license was revoked and he was barred from working in the insurance industry for life in *The State of Florida, Division of Financial Services, in the Matter of David Brian Rutstein*, Case No. 115256-11-AG. (Vol. 1, 129:2-10, Vol. 4, 128:13-14, 128:22-129:7, PX 1). David Rutstein was immediately and permanently removed and permanently barred from any and all direct or indirect participation in and/or affiliation with any entity which is licensed or regulated under the Florida Insurance Code, and any individual or entity which is otherwise involved in the business or transaction of insurance. (PX1; SUF ¶ 30).

24. David Rutstein founded the National Association of Accredited Insurance Professionals (NAAIP) and purchased the NAAIP.org domain name in 2010. (Vol. 1, 144:13-14, PX 165; SUF ¶¶ 29, 46). By 2016, the ownership

Appendix B

of the NAAIP.org website was transferred to Defendant Aaron Levy. (Vol. 1, 145:1-2, PX 165). Defendant Binyomin Rutstein, who is David Rutstein's son, is purportedly NAAIP's president, but according to his father, Binyomin never had any involvement in the company. (SUF ¶¶ 32, 45; Vol. 4, 194:3-5).¹⁴

25. NAAIP is a website that creates "free" websites for life insurance agents. (SUF ¶¶ 22, 28). A key benefit offered by a "free" NAAIP website is access to NAAIP's "Life Insurance Quote Engine." (SUF ¶ 23). The "Life Insurance Quote Engine" allows internet visitors to a free NAAIP website to enter certain basic information about their age, insurance rating and type of policy, as well as name telephone number and email address, and the NAAIP "Life Insurance Quote Engine" will provide a list of quotes for term life insurance policies that are available. (SUF ¶ 24).

26. David Rutstein also founded BeyondQuotes. (SUF ¶ 29). In 2008, the domain registration for BeyondQuotes.com was in Binyomin Rutstein's name (Vol. 1, 145:4-12), but it was later owned by David Rutstein. (Vol. 4, 179:17-19, 183:3-5).

27. Although he did not have a license to do so, David Rutstein put the Compulife "web quoter" on BeyondQuotes.

14. Binyomin Rutstein is an insurance agent licensed in 35 different states and is currently appointed as an agent by approximately 19 different insurance companies. (SUF ¶¶ 33, 48). Binyomin Rutstein has never sold a life insurance policy. (SUF ¶ 34).

Appendix B

com, calling it the “Life Insurance Quote Engine,” sometime around August 2010. (Vol. 4, 181:9-14, 183:7-23, 186:18). This allowed visitors to www.BeyondQuotes.com to enter certain basic personal information and obtain a list of quotes for term life insurance policies. (SUF ¶ 25). If a visitor wanted to purchase a policy, that visitor becomes a “lead” that BeyondQuotes would sell to insurance agents who are its customers. (SUF ¶ 26).

28. NAAIP’s free websites and BeyondQuotes’ “Life Insurance Quote Engine” both provide internet visitors the ability to obtain free quotes for term life insurance policies, the same service provided by the Compulife Software and Compulife’s www.Term4Sale.com website. (SUF ¶ 35).

29. American Web Designers, Ltd. (“AWD”) is owned by Binyomin Rutstein and is licensed as an insurance agency. (Vol. 4, 134:21-22, 135:14-16, 177:14-23). To have a license for an insurance agency in Florida, there must be an individual who stands as the principal for that agency; Binyomin Rutstein is the licensed insurance agent in Florida for American Web Designers. (Vol. 1, 146:11-18, PX 564).

30. Binyomin gave permission for David to use Binyomin’s insurance license. (Vol. 4, 194:10-14). David Rutstein opened AWD’s bank account with Bank of America by presenting his passport with his photograph as identification and became an authorized signor on that account. (Vol. 4, 137:14-138:25, PX 106).

Appendix B

31. Brian McSweeney is an insurance agent with MBM Life Quotes, Inc. *See* McSweeney 2017 Trial Tr. 168:13-20 (PX 569). MBM Life Quotes was a Compulife customer with a license for the PC version of Compulife's software and access to its web quoter. (Vol. 3, 72:16-73:3).

32. In August 2011, David Rutstein used AWD to enter into an agreement with Brian McSweeney whereby for every lead Mr. McSweeney received that became a sale of an insurance policy, a "lead generation fee" was paid to AWD. (Vol. 4, 180:4-181:11; PX 28). Mr. McSweeney paid Defendants over \$75,819.00 in exchange for sales leads that Defendants provided to Mr. McSweeney (generated from BeyondQuotes.com) while Compulife's software and data were used on the website. (PX 569 at 218:6-10, PX 30).

33. MSCC Corporation, owned by Michael Steinhardt, sold internet software to insurance agents and was an authorized re-seller of Compulife's software for approximately 20 years. *See* Steinhardt Dep. Tr. 7:3-5, 9:5-13 (PX 566). MSCC had Compulife's internet quote engine software installed on its website; before MSCC's customers could use Compulife's software on its website, MSCC verified that the customer was a subscriber of Compulife's PC service. (*Id.* at 9:16-10:25). Until May 2015, MSCC was not required to sign a licensing agreement with Compulife or pay it for its use of Compulife's internet quote engine. (Vol. 2, 46:10-23).

34. Mr. McSweeney of MBM Life Quotes, Inc. instructed MSCC to put a web quoter on BeyondQuotes.com that was connected to MSCC's server. (PX 566 at

Appendix B

33:14-20; PX 569 at 193:23-194:12).¹⁵ Mr. Steinhardt believed that BeyondQuotes.com was owned by Mr. McSweeney, although he never verified that. (PX 566 at 37:8-13).

35. MSCC provided Compulife's HTML source code for the web quoter to be used on BeyondQuotes.com, which incorporated Compulife's field names and values. (*Id.* at 13:4-14, 48:12-49:6).

36. A Compulife licensee can only put Compulife's web quoter on their own website; putting it on a website they

15. Unbeknownst to Compulife, David Rutstein's access to Compulife's HTML code and database dated back to August 2011, when David Rutstein emailed Brian McSweeney and service@compulife.com, with the subject line "Dear Compulife—I have an account with you through Eric Savage." (DX 1). The email requested assistance from Compulife to put a quote engine on www.BeyondQuotes.com. The email said, "I also work with Brian McSweeney of www.BMlifequotes.com." (DX 1; Vol. 4, 181:17-20).

Jeremiah Kuhn of Compulife received the email and believed that David Rutstein was a website designer for Eric Savage (a Compulife subscriber) and Brian McSweeney. (Vol. 3, 75:14-25, 76:13-16). Mr. Kuhn thought BeyondQuotes.com was owned by Mr. McSweeney or Mr. Savage. (Vol. 3, 79:7-13). Mr. Kuhn provided the Compulife HTML quoter code to David Rutstein. (Vol. 3, 81:7-11, 106:24-107:6, DX 4). Had Mr. Kuhn known the truth about David Rutstein and that he intended to use the Compulife HTML quoter code on BeyondQuotes.com and NAAIP.org without paying a licensing fee, Mr. Kuhn never would have provided the Compulife HTML code to David Rutstein. (Vol. 3, 107:23-108:7).

Sometime thereafter, David Rutstein, via Mr. McSweeney, had the internet quoter on BeyondQuotes.com changed from Compulife's server to MSCC's server. (Vol. 4, 184:3-185:9).

Appendix B

do not own would be in breach of the license agreement. (Vol. 3, 77:4-7).

37. One Resource Group (“ORG”) is a life insurance wholesaler that entered into an agreement with AWD dated March 24, 2014. (PX 42). Pursuant to the agreement, ORG paid AWD \$108,406.87 in commissions from sales of insurance policies by NAAIP.org members during the period of time that NAAIP used Compulife’s software and data. (Vol. 1, 148:1-12, PX 43). David Rutstein confirmed that NAAIP.org received that approximate amount from ORG over a two-to-three-year period. (Vol. 4, 191:3-12).

Compulife’s Investigation of Defendants

38. On April 8, 2015, Mr. Barney received a telephone call from a Compulife customer alerting him to the existence of the NAAIP.org webpage. (Vol. 1, 59:21-60:6). Mr. Barney ran a quote on the NAAIP website and immediately recognized company names and product names from Compulife’s software because they appeared exactly as he had entered the information in the Compulife database. (Vol. 1, 64:9-14, 66: 21-23).

39. After he discovered NAAIP, Mr. Barney called the telephone number on the NAAIP.org webpage, and a man by the name of David Gordon answered the phone. (Vol. 1, 70:16-20). Based on common addresses and phone numbers, Mr. Barney and Mr. McSweeney concluded that David Gordon is an alias for David Rutstein. (Vol. 1, 121:21-22, 127:20-128:24, 137:2-5; PX 569 at 183:11-22, PX 32).

Appendix B

40. On April 9 and 10, 2015, Mr. Barney sent emails to support@naaip.org advising that it was using Compulife's software without permission or license and advising NAAIP to stop. (PX 129).

41. On April 10, 2015, Mr. Barney printed out the source code used on the NAAIP website. (Vol. 1, 67:20-24, PX 149). Not all of the 25 pages of code Mr. Barney reviewed was taken from Compulife but beginning at line 503, Mr. Barney recognized Compulife's HTML code used to communicate information to Compulife's internet engine software. (Vol. 1, 68:15-69:7, compare PX 149 to PX 542). The state selection code and "State" parameter were identical. (Vol. 2, 148:3-5, PX 567 (Bruner Demonstrative 1 comparing PX 149 to PX 542) at 5-7). The birthday and birth month selection code and "Birthday" and "BirthMonth" parameters were identical. (Vol. 2, 148:8-22, PX 567 at 9-10). The birth year selection code and "BirthYear" parameter was identical. (Vol. 2, 148:24-25, PX 567 at 11). The gender selection code and "Sex" parameter were identical. (Vol. 2, 149:14-16 at 12). The smoker selection code and "Smoker" parameter were identical. (Vol. 2, 149:21-22, PX 567 at 13). The health class code was identical except NAAIP changed "Standard" to "Regular"; the "Health" parameter and values of "PP", "P", "RP", and "R" were identical. (Vol. 2, 150:8-151:9, PX 567 at 15). The new category code was identical for categories corresponding to term insurance policies for 5 years, 10 years, 15 years, 20 years, 25 years, 30 years, to age 70, to age 75; the "NewCategory" parameter and the category selection variables for the categories copied were identical. (Vol. 2, 152:20-24, PX 567 at 20-21). The

Appendix B

mode used code and parameter for monthly premium was identical. (Vol. 2, 154:19, PX 567 at 22). The code for sorting output information was identical. (Vol. 2, 155:1, PX 567 at 23).

42. On April 10, 2015, Mr. Barney's investigation led him to the website at www.BeyondQuotes.com, which was also using Compulife's HTML code. Mr. Barney ran an insurance quote on the website. (Vol. 1, 76:6-13, PX 448). Mr. Barney then used the contact form at the BeyondQuotes.com website to contact the owner; Mr. Barney received a response email from info@beyondquotes.com that indicated it came from "Agent Republic." (PX 33). Mr. Barney looked up "Agent Republic" in Compulife's customer records and found that "Agent Republic" was connected to Compulife customer Brian McSweeney. (Vol. 1, 77:6-22).

43. Mr. Barney contacted Mr. McSweeney who believed that the quotes may have been coming from his account with MSCC, so Mr. Barney contacted Michael Steinhardt at MSCC. (Vol. 1, 77:19-22, 79:18-23). Mr. Steinhardt recognized the HTML code on www.NAAIP.org as belonging to Compulife. (PX 566 at 21:21-22:13; PX 157). Mr. Steinhardt determined that the account being used to produce the quotes at NAAIP.org belonged to Mr. McSweeney. (PX 566 at 19:5-20:13). Mr. Steinhardt disabled Mr. McSweeney's account's access to the Compulife internet engine software running on MSCC's server. (PX 566 at 19:5-20:13; PX 157). This immediately stopped NAAIP.org websites and the www.BeyondQuotes.com website from producing life insurance quotes. (PX 566 at 19:5-21:20; Vol. 1, 106:3-10, PX 157).

Appendix B

44. Shortly thereafter, on Monday, April 13, 2015, Mr. McSweeney received a message from David Rutstein that said “the compulife guy disabled my quote engines . . . which may have been coming from you.” (PX 569 at 184:10-18, PX 36, DX 38). That same day, Gordon/Rutstein sent an email to Mr. Barney threatening to steal Compulife’s Term4Sale customers. (Vol. 1, 105:3-13, PX 129). On April 25, 2015, Gordon/Rutstein made similar threats to Compulife’s business by email. (Vol. 1, 112:13-19, PX 253, DX 99).

45. On June 5, 2015, Gordon/Rutstein used Compulife’s Term4Sale website to generate hundreds of life insurance quotes; after he was presented with each quote, he sent messages through the Term4Sale website to the Compulife insurance agent customers stating: “Compulife quote engine: Beware of security flaw. Your back office is not password protected,” and provided a hyperlink to NAAIP followed by the statement “term life quote engines are free.” (Vol. 1, 131:13, 132:10-133:17, PX 272, 273). As a result, Mr. Barney was forced to do “damage control” with his customers, some of whom thought that the contacts they normally would receive from the Term4Sale website were being diverted somewhere else. (Vol. 1, 133:18-137:1; Vol. 2, 42:1-11).

46. Between April and May of 2015, Mr. Barney reviewed hundreds of NAAIP free agent websites at www.NAAIP.org and used the “Wayback Machine” at www.archive.org to review the websites as they appeared in the past; the source code for all of these other agent websites at www.NAAIP.org featured a life insurance quoter and

Appendix B

contained Compulife's HTML source code. (Vol. 1, 87:14-23, 89:2-91:14, 92:2-16, 93:3-94:17, 95:3-96:16, 97:2-98:9, 99:8-101:6, PX 551, 552, 553, 554, 555).

47. In June of 2015, Compulife's quotes began appearing on the NAAIP.org website again. Mr. Barney recognized the quotes as his information coming from Compulife's database in Compulife's software. (Vol. 1, 114:16-117:19, PX 291, 292, 309 and 1-S).

48. Defendants had no authority to use Compulife's software. (Vol. 2, 111:6-8). Defendants never had authority to use Compulife's data to generate life insurance quotes. (Vol. 2, 112:2-4). Compulife never intended to provide such authorization. (Vol. 2, 114:13-17).

49. In response to Defendants' activities, Compulife modified its software to detect and prevent similar situations in the future, such as having its internet engine software check for valid software serial numbers when information is requested from the internet engine and adding a "watermark" to its insurance quotes. (Vol. 1, 119:4-16; Vol. 2, 120:24-121:6, 126:22-127:8, PX 568 at 36). Compulife's expert in software design, Nancy Miracle, described this watermarking system as an effective way for Compulife to identify whether the data displayed on a website is Compulife's data and, if so, the source of that data; according to Ms. Miracle, the watermark is unique and difficult to detect. (Vol. 4, 6:19-7:16). Ms. Miracle tested the watermark system and confirmed it worked as described by Compulife. (Vol. 4, 8:16-22).

Appendix B

The Scraping Attack

50. During September 1-4, 2016, Compulife's Term4Sale.com website experienced a "scraping" attack. (Vol. 2, 133:22-134:4). Over 800,000 "get" requests were sent to the Term4Sale.com server, each request consisting of a single line of code. (PX 200). The Term4Sale server logged the IP address generating each quote request, the date and time the request was made, and the request itself. (Vol. 2, 134:15-17).

51. Defendant Moses Newman, who began programming for NAAIP.org in April 2016, testified that an Israeli woman named Matal performed the scraping attack. (Vol. 4, 109:19-110:6). While living in Tel-Aviv, Israel, Mr. Newman watched Matal use a computer to send automated requests in a way that was consistent with scraping. (Vol. 4, 110:3-6; Vol. 5, 67:22-68:3).¹⁶ The requests Matal sent were for two zip codes: 10458 in Bronx, New York, and 33433 in Boca Raton, Florida. (Vol. 4, 113:2-6). Matal took the information from the scraping attack and put it in a large CSV file, which Mr. Newman then integrated into the database that provided quote information to NAAIP.org websites. (Vol. 4, 110:7-18). Mr. Newman acknowledged the information in the CSV file came from Compulife's Term4Sale website. (Vol. 4, 114:5-9). Mr. Newman was paid for his work from a Paypal account that he thought belonged to Aaron Levy. (Vol.

16. Mr. Newman later confirmed that Matal had carried out the scraping attack on Compulife, testifying, "I wanted to know who scraped it and what was scraped. I believe Aaron Levy told me there is this girl, Matal, that did it." (Vol. 4, 115:6-9).

Appendix B

4, 112:20-24; Vol. 5, 47:9-16). The CSV files were never produced to Compulife during discovery because they were routinely deleted. (Vol. 4, 110:19-21).

52. Both Mr. Bruner and Compulife's expert Nancy Miracle testified as to what occurred during the scraping attack. (Vol. 2, 161:21-172:13, PX 568; Vol. 4, 10:20-27:18, PX 550). A single internet protocol (IP) address (which Mr. Bruner traced to a computer or server in Jerusalem, Israel) sent over 800,000 requests to the Term4Sale server over a four-day period; each request used the parameters in Compulife's HTML code while incrementing the corresponding variables one at a time, thus scraping the Compulife database. (Vol. 2, 134:1-4, 135:10-24; Vol. 3, 19:25-20:13; PX 200). The attack sent requests for information for two zip codes: 10458 in Bronx, New York, and 33433 in Boca Raton, Florida. (Vol. 2, 160:8-21). The attack on the Compulife internet engine server at Term4Sale.com used the same parameters from the Compulife HTML code—spelled, formatted, and organized identically to how they appear in Compulife's code registered with the Copyright Office. (Vol. 2, 121:18-22, 163:21-165:8; Vol. 4, 15:19-16:2).

53. Mr. Bruner compared the quotes that NAAIP produced after the scraping attack and they matched the quote information obtainable at Compulife's Term4Sale website exactly, except that NAAIP rounded down to whole dollars. (Vol. 2, 172:7-12, PX 568 at 36-40). Ms. Miracle also examined the quotes NAAIP produced and found Compulife's digital watermarks in the quotes. (Vol. 4, 8:23-10:14).

Appendix B

54. Mr. Bruner also examined software code produced by Defendants. (PX 107). In Defendants' code Mr. Bruner found 111 company codes that Mr. Barney had created, which corresponded to insurance company names and ratings. (Vol. 2, 156:9-160:3). Ms. Miracle examined the software code Defendants produced as well. (Vol. 4, 25:20-23). Ms. Miracle discovered that Defendants have a database on the NAAIP server that contains quote information with specific fields that match Compulife's parameters and zip codes that correspond to the two zip codes scraped in the attack on the Term4Sale website. (Vol. 4, 25:25-26:23).

55. Ms. Miracle estimated the scraping attack produced 43.5 million results. (Vol. 4, 9:12).¹⁷ Defendant Newman disputed that number; he testified that NAAIP.org's database only contained "three million or so" quotes. (Vol. 4, 117:16-118:8). Mr. Newman agreed that three and a half million quotes was not an insignificant amount because, as he admitted candidly, "nobody wanted to be scraped, and nobody ever wants to be scraped." (Vol. 4, 120:10-11).

56. Prior to 2016, Term4Sale.com had no process in place by which to restrict the use of "get" commands to generate insurance premium quotes. (Tr. Vol. 2, 177:22-178:3; Tr. Vol. 4, 93:11-14).

17. Compulife estimates that the scraping incident caused 870,000 requests to be made at Term4Sale.com over a four-day period and that each request usually generates 50 quotes, resulting in 43.5 million quotes. (Tr. Vol. 2, 161:25-162:3; Tr. Vol. 4, 9:8-12).

Appendix B

57. In response to the scraping attack, Compulife modified its internet engine so that if more than five requests are quotes are made within one second the software starts slowing down and produces fewer results. (Vol. 2, 125:23-126:2, 181:1-11). Compulife also added a terms of use agreement to the Term4Sale website. (Vol. 2, 41:7-14).

Decline in Compulife's Sales

58. Mr. Barney performed further research on whether NAAIP continued to use Compulife's software, and he found quotes on the NAAIP website that came from the Compulife software as recently as the Spring of 2019. (Vol. 2, 107:2-6, 108:4-109:4).

59. Compulife lost business it otherwise expected to receive during the period of time that NAAIP operated. Between 2012 and 2019, the number of free trials Compulife gave out to potential customers declined, and the number of those trials that converted to four-month free subscriptions declined. During that same period the number of four-month subscribers who converted to paying annual subscription customers also declined. Compulife would have charged each agent an annual licensing fee for their use of Compulife's software and data. (Vol. 3, 43:20-54:2, PX 151, 546, 547).

60. Compulife acknowledges that more competitors have entered the market in the last five years, which may have contributed to the loss of Compulife's customers. (Vol. 3, 93:24-94:19).

*Appendix B***CONCLUSIONS OF LAW****I. Law of the Case Doctrine**

In its decision remanding these matters, the Eleventh Circuit made several findings that I am bound by as law-of-the-case. The first establishes the existence and validity of Compulife’s copyright. *Compulife Software Inc.*, 959 F.3d at 1301.¹⁸ The second is that Defendants engaged in factual copying. *Id.* at 1302. The third is that Compulife’s alphabetization of the 50 states is “unoriginal and unprotectable.” *Id.* at 1307. The fourth is that Compulife’s Transformative Database constitutes a trade secret. *Id.* at 1311.¹⁹

“Under the law-of-the-case doctrine, [the resolution of] an issue decided at one stage of a case is binding at later stages of the same case.” *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1291 (11th Cir. 2005) (quoting *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1313 (11th Cir. 2000)). “The doctrine operates to preclude courts from revisiting issues that were decided explicitly or by necessary implication in a prior appeal.” *Schiavo*, 403 F.3d at 1291 (citing *Luckey v. Miller*, 929 F.2d 618, 621 (11th

18. Defense counsel conceded this point in her closing argument. ECF No. 313 at 26:13-15.

19. The Eleventh Circuit stated, “[t]he magistrate judge found that Compulife’s Transformative Database was a trade secret, a finding that is not clearly erroneous and that, in any event, doesn’t seem to be contested on appeal. We can therefore move straight to the question of misappropriation.” *Compulife Software Inc.*, 959 F.3d at 1311.

Appendix B

Cir. 1991)). The only time that the doctrine does not bar reconsideration of an issue is when “(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice.” *Silva v. Baptist Health S. Fla., Inc.*, 838 F. App’x 376, 383 (11th Cir. 2020) (citing *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984)). None of these exceptions applies here.

Thus, to the extent that either party attempts to relitigate these issues, I am bound by the Eleventh Circuit’s findings and there is no basis for me to engage in reconsideration.

II. Copyright Infringement

As the Eleventh Circuit’s remand order sets forth, “To succeed on its claim of copyright infringement, Compulife ‘must prove (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’” *Compulife Software Inc.*, 959 F.3d at 1301 (quoting *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1541 (11th Cir. 1996)). Given the Eleventh Circuit’s determination that “[t]he existence and validity of Compulife’s copyright are undisputed,” on remand, I am to “proceed directly to the second prong—copying” which involves an analysis of “factual and legal copying,” both of which Compulife has the ultimate burden to prove. *Compulife Software Inc.*, 959 F.3d at 1301 (citing *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1148 n.40 (11th Cir. 2007)).

Appendix B

Here, too, the Eleventh Circuit has already determined that Defendants' factual copying of Compulife's copyrighted material is undisputed, and thus, only the issue of legal copying remains to be decided. An analysis of legal copying begins with the Defendants' burden to prove (as part of the filtration process explained below) that the elements they copied from Compulife's copyrighted work are unprotectable. *Compulife Software Inc.*, 959 F.3d at 1305. Then, "[a]fter filtration is complete, the burden shifts back to [Compulife] to prove substantial similarity between any remaining (i.e., unfiltered) protectable material and the allegedly infringing work." *Id.* at 1306.

a. Factual and Legal Copying

As set forth above, Compulife has the burden to prove that Defendants engaged in both factual and legal copying. Factual copying (Defendants' actual use of Compulife's material) can be shown either by direct evidence, or it may be inferred from indirect evidence by demonstrating that Defendants had "access to the copyrighted work and that there are probative similarities between the allegedly infringing work and the copyrighted work." *Compulife Software Inc.*, 959 F.3d at 1301 (quoting *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 89 F.3d 1548, 1554 (11th Cir. 1996)). The Eleventh Circuit concluded that "[f]actual copying isn't really disputed here, and we think it has been established, in any event, so we focus here on legal copying." *Compulife Software Inc.*, 959 F.3d at 1302.²⁰

20. According to the Eleventh Circuit, "[Defendant] David Rutstein frankly admits that the defendants had access to Compulife's copyrighted HTML. Further, his testimony strongly

Appendix B

“‘Legal’—or ‘actionable’—copying occurs when “those elements of the [copyrighted work] that have been copied are protected expression and of such importance to the copied work that the appropriation is actionable.” *Id.* (quoting *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1300 (11th Cir. 2008)). “In most cases, a ‘substantial similarity’ between the allegedly offending program and the protectable, original elements of the copyrighted works establishes actionable copying.” *Compulife Software Inc.*, 959 F.3d at 1302 (quoting *Bateman*, 79 F.3d at 1542); *see also BUC*, 489 F.3d at 1149 n.42 (“the ‘substantial similarity’ standard [is] the default mode of analysis for compilation copyright claims.”).

“[B]ecause ‘a small portion of the structure or code of a [computer] program may nonetheless give it distinctive features or may make the program especially creative or desirable,’ copying of that portion is actionable.” *Compulife Software Inc.*, 959 F.3d at 1302 (quoting 4 Nimmer on Copyright § 13.03[F][5] (2019)). Notably, when considering factual compilations, the “substantial similarity” test is “narrowed” because “the components of a compilation are generally in the public domain, and a finding of substantial similarity . . . as to matters in the public domain will not suffice to prove infringement.” *BellSouth Advert. & Pub. Corp. v. Donnelley Info. Pub.*,

suggests copying in fact . . . [and] defendants make similar admissions in their brief to us . . . All of which is to say that the defendants have conceded access, at the very least, and they don’t meaningfully dispute factual copying.” *Compulife Software Inc.*, 959 F.3d at 1302, n.5.

Appendix B

Inc., 999 F.2d 1436, 1445 n.22 (11th Cir. 1993).

“Substantial similarity ‘must be assessed with respect to both the quantitative and the qualitative significance of the amount copied to the copyrighted work as a whole.’” *Compulife Software Inc.*, 959 F.3d at 1302 (quoting *Peter Letterese*, 533 F.3d at 1307). Quantitatively insubstantial copying may still be actionable if it is qualitatively substantial. *Compulife Software Inc.*, 959 F.3d at 1302.

b. Filtration

According to the Eleventh Circuit,

Before comparing two works to determine if they display the required substantial similarity, a court must “eliminate from comparison the unprotectable elements of” the copyrighted work. This process—known as “filtration”—is necessary because even substantial similarity between a copyrighted work’s unprotectable elements and a purportedly infringing work isn’t actionable, regardless of how many unprotectable elements are copied or how important they may be.

Compulife Software Inc., 959 F.3d at 1303 (quoting *Bateman*, 79 F.3d at 1544-45). At this filtration stage, Defendants bear the burden of showing that the copied material is unprotectable and should be filtered out of the analysis before the Court compares the two works. *Compulife Software Inc.*, 959 F.3d at 1306. “If

Appendix B

the defendant demonstrates—at the filtration stage—that it copied only unprotectable material, such that no substantial similarities remain after filtration, the defendant is entitled to summary judgment.” *Id.* at 1306. However, “where the defendant’s evidence is insufficient to prove that a particular element is unprotectable, the court should simply assume that the element is protectable and include that element in the final substantial-similarity comparison between the works.” *Id.*

The Supreme Court has held that “[t]he *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 111 S. Ct. 1282, 1287, 113 L. Ed. 2d 358 (1991) (citation omitted). “Original . . . means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity . . . the requisite level of creativity is extremely low; even a slight amount will suffice.” *Id.* “The fact that computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world.” *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1208, 209 L. Ed. 2d 311 (2021). Thus, “in determining the lawful scope of a computer program copyright,” it is important to “distinguish between expressive and functional features of computer code.” *Id.*, 141 S. Ct. at 1198.

In its remand decision, the Eleventh Circuit noted that “some filtration is warranted here [because] [s]ome elements of Compulife’s code are unprotectable—and

Appendix B

indeed, are so obviously so that no proof is necessary.” *Compulife Software Inc.*, 959 F.3d at 1307 (referring to Compulife’s alphabetization of the 50 states, which the Court deemed “unoriginal and unprotectable”).

There are a variety of reasons why copied material may be unprotectable. For example, “copyright protection extends only to a work’s expressive elements, not to any underlying ‘idea, procedure, process, system, method of operation, concept, principle, or discovery’ expressed therein.” *Id.* at 1304 (quoting 17 U.S.C. § 102). *See also Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1224 (11th Cir. 2008) (copyright protection extends only to a “particular expressions of ideas”).

For example, it is well settled that

[F]acts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence . . . The discoverer merely finds and records. Census takers, for example, do not “create” the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Census data therefore do not trigger copyright because these data are not “original” in the constitutional sense . . .

Appendix B

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.

Feist Publications, Inc., 499 U.S. at 347-48, 111 S. Ct. 1282, 1288-89 (quotations and citations omitted).

Another possible basis for finding a work unprotectable is the merger doctrine. Its premise is that “some expression may be so intrinsic to the communication of an idea—or procedure, process, etc.—that it is considered to have ‘merged’ into the idea. According to the merger doctrine, where there are sufficiently ‘few ways of expressing an idea, not even the expression is protected by copyright.’” *Compulife Software Inc.*, 959 F.3d at 1304 (quoting *BUC*, 489 F.3d at 1143); see, e.g., *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967) (rules governing a sweepstakes were unprotectable because the ideas expressed were “so straightforward and simple” that

Appendix B

“at best only a limited number” of possible modes of expression could exist to convey them).

Likewise, as noted above, “material taken from the public domain is unprotected, even if incorporated into a copyrighted work.” *Compulife Software Inc.*, 959 F.3d at 1304 (citing *Stewart v. Abend*, 495 U.S. 207, 234, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990) (holding that an author “may receive protection only for his original additions,” not “elements . . . already in the public domain”).

In its remand decision, the Eleventh Circuit noted that “elements of computer source-code expression ‘dictated by external factors’ aren’t entitled to copyright protection.” *Compulife Software Inc.*, 959 F.3d at 1304-05 (quoting *Bateman*, 79 F.3d at 1546-47 and *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 709 (2d Cir. 1992) (“compatibility requirements and industry demands . . . [can make it] ‘virtually impossible to write a program to perform particular functions in a specific computing environment without employing standard techniques.’”)). Thus, “[t]he author of a copyrighted code can’t obtain protection for such standard modes of expression, lest he effectively monopolize an underlying ‘idea.’” *Compulife Software Inc.*, 959 F.3d at 1305.

In sum, “filtration should eliminate from comparison the unprotectable elements of ideas, processes, facts, public domain information, merger material . . . and other unprotectable elements.” *Id.* (quoting *Bateman*, 79 F.3d at 1545).

Appendix B

Here, Defendants assert that Compulife's 2010 HTML source code is not protectable because "the variable terms needed to calculate life insurance premiums, such as sex, amount, health, age and location, are generally standard for the life insurance industry" and Compulife's use of common names for these variables ("State," "sex," etc.) are "elements taken from the public domain." ECF No. 306 at 19-20. Defendants argue that "inputs into the quoter are dictated by the insurance industry," and "there are very few ways to create a form to collect the necessary information to generate a quote." *Id.* at 19. Defendants contend that that a "menu" is merely "an idea, a concept for how to display options to generate an insurance quote," and therefore, it is not a protected expression. *Id.* at 20.

Likewise, Defendants argue that "alphabetization of the states, as well as the chronological order of the birth months, birthdays and birth years and ascending order of policy amounts are 'dictated solely by logic and efficiency' and therefore, [are] unprotectable." *Id.* Defendants rely upon Mr. Bruner's testimony that he did not create the "states" portion of the Compulife source code to argue that it is not an original work. *Id.* Defendants also contend the "computer language" used to create the website quoter such as "tr" for "table rows" is unprotectable because it is dictated by "computer-industry programming and practices." *Id.* According to Defendants, once the unprotected lines of code are filtered out from Compulife's 2010 HTML source code, any copying of the remaining lines of protectable code is minimal and does not amount to infringement. *Id.* In fact, Defendants contend that only nine lines of Compulife's code are protectable. *Id.*

Appendix B

Notwithstanding that the Eleventh Circuit holds a contrary view, Compulife appears to argue that all of its code is protectable. According to Compulife, its 2010 HTML code is “original creative authorship entitled to copyright protection [because] Bruner, Compulife’s programmer, wrote the 2010 HTML code himself and did not copy it from anyone else.” ECF No. 307 at 39-40. Compulife relies on the testimony of its expert, Ms. Miracle, claiming, without citation to the trial transcript that she “opined that the 2010 HTML code contained numerous creative elements including a creative way to identify and organize variables related to requests for insurance quotation information.” *Id.* at 40.²¹ Compulife argues that Defendants failed to satisfy their burden of proof by refuting this testimony with any evidence showing that the code was unoriginal. *Id.* at 40. I disagree.

During the trial, defense counsel elicited testimony that Bruner copied parts of the 2010 HTML code. Moreover, both Mr. Bruner and Ms. Miracle testified that camel case is commonly used in computer programming. Although Defendants did not present an expert witness, the simplicity of Compulife’s code is such that I am capable of assessing its originality and protectability.

As noted above, to obtain copyright protection, a work must be independently created by the author and

21. I will disregard Ms. Miracle’s opinions regarding the creativity and originality of Compulife’s code because these constitute legal conclusions. *See United States v. Delatorre*, 308 F. App’x 380, 383 (11th Cir. 2009) (“[A]n expert witness may not testify as to h[er] opinion regarding ultimate legal conclusions”).

Appendix B

must possess at least a minimal degree of creativity. Even though the requisite level of creativity is “extremely low,” in performing the filtration analysis I must be mindful that “compatibility requirements and industry demands . . . [make it] ‘virtually impossible to write a program to perform particular functions in a specific computing environment without employing standard techniques’” and that “where there are sufficiently ‘few ways of expressing an idea, not even the expression is protected by copyright.’” *Compulife Software Inc.*, 959 F.3d at 1304-05 (citations omitted). I am also mindful that factual compilations, like the ones performed by Compulife’s software in compiling facts about the consumer’s biographical information and the rates used by insurance companies to generate a quote, must involve some creativity (in terms of the facts Compulife chose to include and how to arrange the collected data) to be protectable.

As an initial matter, I find that although Compulife presented evidence that Defendants factually copied the variables and parameters from its 2010 HTML Source Code,²² Defendants succeeded in proving that

22. *See Compulife Software Inc.*, 959 F.3d at 1299 (“A comparison of the HTML used by the defendants with Compulife’s HTML source code shows without a doubt that the defendants copied some of it, although . . . the legal significance of that copying is disputed.”). *See id.* at 1310 ([e]ven a cursory comparison . . . suggests that the defendants’ work copied material from nearly every page of the copyrighted work. The defendants’ code includes nine of the eleven basic sections of Compulife’s code, arranged in almost exactly the same order.”).

Appendix B

the majority of the program's copied elements are unprotectable.²³

First, Compulife's closed menu of limited options from which the end user must select to enable Compulife's program to produce a life insurance quote falls within the merger doctrine. As set forth above, when the expression is so intrinsic to the communication of a procedure or process, courts will find that the two have merged. This typically occurs when there are only a limited number of ways to present an idea. Here, as Mr. Barney conceded, it is an insurance industry standard to ascertain an applicant's age, gender, health, and location in preparing a life insurance quote. It is indisputable that there are only few methods by which Compulife can gather and compile the information needed to generate a life insurance quote. Thus, Compulife's use of a radio button, as opposed to a drop-down menu, to identify the applicant's gender does not constitute an original expression. *See BUC Int'l Corp.*, 489 F.3d at 1143 (The Eleventh Circuit found that the image of a circle with a diagonal line crossed through it to express the idea that something is not allowed would

23. As the Eleventh Circuit set forth, Defendants must "identify the species of unprotectability" and "present supporting evidence where appropriate." *Compulife Software Inc.*, 959 F.3d at 1306. "If, for instance, the defendant believes that some part of the copyrighted work is in the public domain, he must narrow the inquiry by indicating where in the public domain that portion of the work can be found. Similarly, if he thinks that what he copied amounts to usual industry practice, he must indicate the standards that dictate that technique. The plaintiff then faces the manageable task of 'respond[ing],' to the appropriately narrowed issue." *Id.* (quoting *Bateman*, 79 F.3d at 1542).

Appendix B

not qualify as protected expression because there are few ways of visually presenting the idea that an activity is not permitted.).

Moreover, Defendants established that Mr. Bruner copied the source code for the organization of the states from a pre-existing library that he “inherited,” which renders that portion unoriginal and thus unprotectable. I find Comulife’s use of “FaceAmount” to name the parameter that identified the amount of the life insurance policy sought to be unoriginal.²⁴ Compulife’s witnesses acknowledged that the use of camel case in computer programming is common, which by definition means that it is not original. Similarly, I find that the traditional numeric sequencing of birth months, dates and years is logical, most efficient, and that they could not reasonably be presented in an alternative manner. Mr. Bruner’s testimony that “I could have called [birth year] whatever I wanted” (Vol. 2, 149:1-4) does not convince me that his decision to name that parameter “BirthYear” rises to the level of creative or original expression.

Notably, even the report produced by Compulife’s expert, Ms. Miracle, does not opine that these obviously-named parameters are protectable.²⁵ Rather, Ms. Miracle

24. During her cross-examination of Ms. Miracle, defense counsel introduced the source code from another life insurance-quoting website (unaffiliated with Defendants) called WinQuote, to show that it used many of the same parameter names as Compulife and therefore, they are not original. DX 116.

25. Notably, Compulife relied on the expert report that Ms. Miracle prepared for the first trial of these matters, dated

Appendix B

points to only a few parameters that she contends are “purely arbitrary and not dictated by any external factor.” (PX 173 at 17-18). These include “SortOverride1”, “HealthClass” and “NewCategory”. *Id.* In her closing argument, defense counsel conceded that these parameters are unique. ECF No. 313 at 36.

However, Mr. Bruner’s testimony comparing the “HealthClass” variables used in its source code to those used by NAAIP revealed that there are differences. Compulife uses preferred plus (PP), preferred (P), regular plus (RP), and regular (R), whereas the text displayed on NAAIP’s website uses “standard” and “standard plus” instead of “regular” and “regular plus.” (Vol. 2, 140:24-141:7). Mr. Bruner also testified that Compulife “never use[s]” the “SortOverride” parameters. (Vol. 2, 142:7-9). This leaves “NewCategory” (the name Mr. Bruner used for the parameter that established the term length of the insurance policy sought) and “ModeUsed” (to identify whether the premium would be paid on a monthly, quarterly, semi-annually, or annual basis) as the only protectable variable names that Defendants copied.

In sum, Defendants have met their burden of establishing that a significant portion of Compulife’s source code does not constitute protectable expression.

December 1, 2016. (PX 173). The report would have benefitted from some updating to reflect the issues in dispute during this trial. For example, Ms. Miracle’s report states, “I am unaware of any argument that . . . these elements are unworthy of copyright protection” (*id.* at 16), even though the protectability of Compulife’s variables and parameters was hotly contested during this trial.

Appendix B

Since much of Compulife's source code has been filtered out, only a small portion of Compulife's source code is protectable and subject to an evaluation of substantial similarity.

c. Substantial Similarity

In its remand decision, the Eleventh Circuit found that "Compulife provided at least some evidence of both quantitative and qualitative significance" and that while "[q]ualitative significance is often apparent on the face of the copied portion of a copyrighted work," Compulife went a step further by introducing

extrinsic evidence of the qualitative significance of some copied elements. Chris Bruner testified that part of the code copied by the defendants includes variable names and parameters that must be formatted exactly for the web quoter to communicate with the Transformative Database at all. At a minimum, this testimony is some evidence of the qualitative significance of the copied portion of Compulife's work.

Compulife Software Inc., 959 F.3d at 1310.

With regard to quantitative significance, the Eleventh Circuit found that the similarities between the texts of the two codes to be "apparent on their faces" and that

[e]ven a cursory comparison . . . suggests that the defendants' work copied material from

Appendix B

nearly every page of the copyrighted work. The defendants' code includes nine of the eleven basic sections of Compulife's code, arranged in almost exactly the same order.

Id.

I agree that a cursory comparison suggests that Defendants copied a quantitatively significant portion of Compulife's source code. Nevertheless, as discussed above, I have determined that most of the material Defendants copied was unprotectable. According to Compulife, its HTML source code totals 347 lines (Vol. 3, 147:4), and Defendants copied 282 of those lines. (Vol. 3, 144:7-146:22). I find that, at most, the protectable portions of Compulife's code that Defendants copied are limited to 27 lines, namely lines 507, 508, 761, 764-788. (PX 149). Even so, as discussed below, Compulife failed to establish that lines 764-788 of Defendants' code are substantially similar to its copyrighted code. Thus, quantitatively, Defendants' copying was insignificant. *See, e.g., Google LLC v. Oracle Am., Inc.*, 141 S. Ct. at 1205 (out of several million lines in Oracle's Sun Java API computer code, Google copied roughly 11,500 lines to create its Android platform (0.4%); the Supreme Court focused on the "several million lines that Google did not copy" and noted that with regard to the lines Google did copy, it was not "because of their creativity [or] their beauty").

I further find a lack of qualitative significance in the protectable portions of the code that Defendants copied. "The qualitative component concerns the importance of

Appendix B

the portion taken to the value of the original work . . .” *Lagasse v. Roy*, No. 14-14303-CIV, 2017 WL 1397410, at *4 (S.D. Fla. Jan. 31, 2017) (J. Marra). The Eleventh Circuit found that because the variable names and parameters “must be formatted exactly for the web quoter to communicate with the Transformative Database,” this established at least “some evidence of the qualitative significance” of the Compulife code that Defendants copied. Even so, as discussed above, the formatting of most of the names and variables was based on common sense and logic and did not involve any original or creative expression. Thus, the need for the formatting to be “exact” does not transform the code into something protectable. Once this part of the code is filtered out, I find the qualitative significance of what remains to be lacking and insufficient to support a finding of infringement. First, there are differences between Compulife’s protected lines of code and the comparable code used by NAAIP. For example, in “NewCategory” NAAIP assigns different values and names to each type of term policy that are different from those assigned in Compulife’s code. *Compare* PX 149 at lines 759-788 *with* PX 542 at 7-8. Moreover, NAAIP’s code reveals that it did not use Compulife’s “ModeUsed” variable because it is undefined. *See* PX 149 at line 507.

Compulife has the burden at this stage of the analysis and I find that Compulife failed to identify “distinctive features” or elements of its code that “make the program especially creative or desirable.” *Compulife Software Inc.*, 959 F.3d at 1302. Without an adequate showing of the qualitative significance of the minimal lines of code Defendants copied that are protectable, Compulife has failed to meet its burden and its copyright infringement

Appendix B

claims (Counts I and II in the '08 case, and Counts II and III in the '42 case) must fail.

III. Misappropriation of Trade Secrets

Compulife claims that Defendants violated the Federal Defend Trade Secrets Act (“DTSA”) and the Florida Uniform Trade Secrets Act (“FUTSA”) in both the '08 and '42 cases.

In order for Compulife to prevail on its claim for misappropriation of trade secrets, it must demonstrate that (1) it possessed a trade secret;²⁶ and (2) its trade secret information was “misappropriated, either by one who knew or had reason to know that the secret was improperly obtained or by one who used improper means to obtain it.” *Del Monte Fresh Produce Co. v. Dole Food Co.*, 136 F. Supp. 2d 1271, 1291 (S.D. Fla. 2001). As noted above, the determination that Compulife’s Transformative Database is a trade secret is law of the case. Therefore, my analysis is limited to whether Compulife has proven that Defendants misappropriated it.

26. “The DTSA and FUTSA similarly define[] a ‘trade secret’ as (1) any type of information, (2) that derives economic value from being secret, and (3) that is kept secret.” *Id.* “Information that is generally known or readily accessible to third parties cannot qualify for trade secret protection.” *Primo Broodstock, Inc. v. Am. Mariculture, Inc.*, No. 2:17-CV-9-FTM-29CM, 2017 U.S. Dist. LEXIS 64886, 2017 WL 1502714, at *11 (M.D. Fla. Apr. 27, 2017) (quoting *Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998)). Both the DTSA and FUTSA provide that compilations may constitute trade secrets. *See* 18 U.S.C. § 1839(3); Fla. Stat. § 688.002(4).

Appendix B

A trade secret can be misappropriated by either acquisition, disclosure, or use. *See Fla. Stat. § 688.002(2)*. Compulife alleges Defendants misappropriated its trade secret by acquisition and by use. A person misappropriates a trade secret by acquisition when he acquires it and “knows or has reason to know that the trade secret was acquired by improper means.” § 688.002(2)(a). A person misappropriates a secret by use if he uses it “without express or implied consent” and either:

1. Used improper means to acquire knowledge of the trade secret; or
2. At the time of disclosure or use, knew or had reason to know that her or his knowledge of the trade secret was:
 - a. Derived from or through a person who had utilized improper means to acquire it;
 - b. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - c. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
3. Before a material change of her or his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Id. § 688.002(2)(b).

Appendix B

The Florida Statute states that “improper means” for acquiring a trade secret include “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” § 688.002(1). Even if measures taken by the trade-secret owner to protect the secret prove to be inadequate, that alone will not render a means of acquisition proper. *Compulife Software Inc.*, 959 F.3d at 1312. “So long as the precautions taken were reasonable, it doesn’t matter that the defendant found a way to circumvent them.” *Id.* “[M]isappropriation occurs whenever a defendant acquires the secret from its owner ‘without his permission at a time when he is taking reasonable precautions to maintain its secrecy.’” *Id.* (quoting *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1015 (5th Cir. 1970)).

As for what constitutes misappropriation-by-use, the Eleventh Circuit has noted that the bar is “generally low” in that “any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant is a ‘use.’” *Compulife Software Inc.*, 959 F.3d at 1313 (quoting *Penalty Kick Mgmt. v. Coca Cola Co.*, 318 F.3d 1284, 1292 (11th Cir. 2003)).

a. Misappropriation in the ’08 Case

In its remand order, the Eleventh Circuit observed that in the ’08 case, Defendants “plausibly engaged in ‘misrepresentation’—and thus ‘improper means’ . . . given the way that David Rutstein explained the defendants’ affiliation with McSweeney and Savage to Compulife’s Jeremiah Kuhn when Rutstein initially sought access

Appendix B

to the Transformative Database.” *Compulife Software Inc.*, 959 F.3d at 1313. Having observed the testimony of the relevant witnesses, I find that David Rutstein unquestionably misrepresented his affiliation and that this is sufficient to establish Defendants’ misappropriation of Compulife’s trade secret.

The testimony and exhibits establish that on August 17, 2011, David Rutstein emailed Brian McSweeney and service@compulife.com, with the subject line “Dear Compulife—I have an account with you through Eric Savage.” (DX 1). The email requested assistance from Compulife to put a quote engine on www.BeyondQuotes.com. The email said, “I also work with Brian McSweeney of www.BMlifequotes.com.” (DX 1; Vol. 4, 181:17-20). Mr. Kuhn testified that he received the email and believed that David Rutstein was a website designer for Eric Savage and Brian McSweeney, both of whom were Compulife customers. (Vol. 3, 75:14-25, 76:13-16). I reject Mr. Rutstein’s testimony that his email “said [BeyondQuotes.com] is my website” (Vol. 4, 181:19); the email says no such thing.²⁷ Moreover, Mr. Kuhn testified that Mr. Rutstein’s email led him to believe that BeyondQuotes.com was owned by Mr. McSweeney or Mr. Savage. (Vol. 3, 79:7-13). I fully credit Mr. Kuhn’s testimony and I find his understanding of the situation to be reasonable. Moreover, I find Mr. Kuhn’s mistaken beliefs to be the direct and intended consequence of Mr. Rutstein’s misrepresentation.

27. This is just one example of why I found that overall, David Rutstein was not a credible witness.

Appendix B

Upon receiving Mr. Rutstein's email, Mr. Kuhn provided the Compulife HTML quoter code to him. (Vol. 3, 81:7-11, 106:24-107:6, DX 4). However, Mr. Kuhn testified that had he known that Mr. Rutstein intended to use the Compulife HTML quoter code on BeyondQuotes.com and NAAIP.org without paying a licensing fee, Mr. Kuhn never would have given him the Compulife HTML code. (Vol. 3, 107:23-108:7). I credit this testimony and reject Defendants' assertion that "David Rutstein was freely given access to Compulife's database" because "Compulife, itself, provided David Rutstein with a website quoter and link to its [] database." ECF No. 306 at 30-31. I find that David Rutstein intentionally misled Compulife in August 2011, which directly resulted in his acquisition of Compulife's Transformative Database without Compulife's permission.²⁸ Furthermore, the testimony reveals that this unlawful acquisition occurred at a time when Compulife was taking reasonable precautions to maintain the secrecy of the Transformative Database, through the use of licensing agreements, which amounts to misappropriation. Therefore, in the '08 case, Compulife is entitled to judgment in its favor on Counts IV and V.

b. Misappropriation in the '42 Case

In the '42 case, Compulife contends that Defendants engaged in misappropriation-by-use when they conducted

28. Defendants' subsequent acquisition of the Transformative Database from MSCC was likewise achieved through improper means, in that David Rutstein directed Brian McSweeney (an MSCC account holder) to put BeyondQuotes.com on MSCC's server. McSweeney accomplished this by deceiving Mr. Steinhart into believing that he owned BeyondQuotes.com.

Appendix B

a scraping attack of Compulife's Term4Sale website during the first four days of September 2016. Having observed Moses Newman as a witness during the trial, I find his testimony to be credible.

Mr. Newman, a computer programmer who worked for NAAIP.org in 2016, testified that at David Rutstein and Aaron Levy's direction, he watched an Israeli woman named Matal use a computer to send automated requests in a way that was consistent with scraping. (Vol. 4, 109:19-110:6; Vol. 5, 67:22-68:3). Mr. Newman testified that the information Matal scraped came from Compulife. (Vol. 4, 114:5-9). Matal took the information from the scraping attack and put it in a large CSV file, which Mr. Newman then integrated into the database that provided quote information to NAAIP.org websites. (Vol. 4, 110:7-18).

Mr. Bruner and Ms. Miracle testified that the scraping attack originated from a single internet protocol (IP) address (which Mr. Bruner traced to a computer or server in Jerusalem, Israel), and it sent over 800,000 requests to the Term4Sale server over a four-day period; each request used the parameters in Compulife's HTML code while incrementing the corresponding variables one at a time, thus scraping the Compulife database. (Vol. 2, 134:1-4, 135:10-24; Vol. 3, 19:25-20:13; PX 200). Mr. Newman corroborated Mr. Bruner's testimony that the attack sought information for two zip codes, one in New York and the other in Florida. (Vol. 2, 160:8-21; Vol. 4, 113:2-6). Mr. Bruner compared the quotes that NAAIP produced after the scraping attack and they matched the quote information obtainable at Compulife's Term4Sale

Appendix B

website. (Vol. 2, 172:7-12, PX 568 at 36-40). Ms. Miracle also examined the quotes NAAIP produced and found Compulife's digital watermarks in the quotes. (Vol. 4, 8:23-10:14). She also discovered that Defendants have a database on the NAAIP server that contains quote information with specific fields that match Compulife's parameters and zip codes that correspond to the two zip codes scraped in the attack on the Term4Sale website. (Vol. 4, 25:25-26:23).

Although the individual quotes themselves are not entitled to protection as trade secrets because they are publicly available, I find that so much of the Transformative Database was taken during the scraping attack that it amounted to a protected portion of Compulife's trade secret. Indeed, Ms. Miracle estimated that the scraping attack produced 43.5 million results. (Vol. 4, 9:12). The volume of Compulife's data that Defendants acquired during the scraping attack constituted such a significant compilation of information that "[d]erives independent economic value . . . from . . . not being readily ascertainable" as to warrant trade secret protection. *See Compulife Software Inc.*, 959 F.3d at 1314-15 ("Even if quotes aren't trade secrets, taking enough of them must amount to misappropriation of the underlying secret at some point. Otherwise, there would be no substance to trade-secret protections for 'compilations,' which the law clearly provides.") (citing Fla. Stat. § 688.002(1), (4)); *Penalty Kick Mgmt.*, 318 F.3d at 1292-1293 ("[U]se of any substantial portion of the secret is sufficient to subject the actor to liability" for misappropriation of trade secret.).

Appendix B

As the Eleventh Circuit noted, “[a]lthough Compulife has plainly given the world implicit permission to access as many quotes as is *humanly* possible, a robot can collect more quotes than any human practicably could. So, while manually accessing quotes from Compulife’s database is unlikely ever to constitute improper means, using a bot to collect an otherwise infeasible amount of data may well be. . . .” *Compulife Software Inc.*, 959 F.3d at 1314 (citing *Christopher*, 431 F.2d at 1013). In its analysis, the Eleventh Circuit relied on “the most closely analogous case of which we are aware,” namely, *Physicians Interactive v. Lathian Sys., Inc.*, No. CA 03-1193-A, 2003 U.S. Dist. LEXIS 22868, 2003 WL 23018270, at *8 (E.D. Va. Dec. 5, 2003). There, the district court stated, “There can be no doubt that the use of a computer software robot to hack into a computer system and to take or copy proprietary information is an improper means to obtain a trade secret, and thus is misappropriation under the VUTSA,” which the Eleventh Circuit found to be “sufficiently similar” to the FUTSA. *Compulife Software Inc.*, 959 F.3d at 1314-15. Moreover, the Eleventh Circuit agreed with the Virginia court’s finding that “the trade-secret owner’s ‘failure to place a usage restriction on its website’ did not automatically render the hacking proper,” stating, “So too, here.” *Id.* (quoting *Physicians Interactive*, 2003 U.S. Dist. LEXIS 22868, 2003 WL 23018270, at *7). Given the foregoing, I reject Defendants’ argument that Compulife cannot establish misappropriation due to its failure to restrict use at Term4Sale.com prior to the scraping attack.

Based on the circumstances here, including evidence in the record of David Rutstein’s persistent efforts to

Appendix B

sabotage Compulife by luring away its customers, I find that by using a robot to hack the Term4Sale website, Defendants intentionally sought to acquire Compulife's trade secrets through improper means. Defendants' subsequent use of the Term4Sale website in a way that was never intended, stealing a significant portion of Compulife's data, and knowingly incorporating that stolen data into its own websites also constitutes improper means. Thus, in the '42 case, Defendants are liable for misappropriation of Compulife's trade secrets through both acquisition and use and Compulife is entitled to judgment on Counts I and V.

VI. Joint and Several Liability

“Joint and several liability was established through the common law and later codified by the legislature [to] allow[] a claimant to recover all damages from one of multiple defendants even though that particular defendant may be the least responsible defendant in the cause.” *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1257 (Fla. 1996).

Florida is a comparative fault state, meaning that “[i]n a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.” *Martinez v. Miami-Dade Cty.*, 975 F. Supp. 2d 1293, 1296 (S.D. Fla. 2013) (citing Fla. Stat. § 768.81(3)). Nevertheless, Florida's comparative fault statute specifically excludes “any action based upon an intentional tort.” Fla. Stat. § 768.81(4). “Misappropriation

Appendix B

of trade secrets is an intentional tort in the state of Florida.” *Bovie Med. Corp. v. Livneh*, No. 8:10-CV-1527-T-24EAJ, 2010 U.S. Dist. LEXIS 134490, 2010 WL 5297172, at *6 (M.D. Fla. Dec. 20, 2010) (citing *Vance v. Tire Eng’g and Distribution, LLC*, 32 So.3d 774, 776 (Fla. Dist. Ct. App. 2010)). Thus, imposing joint and several liability against all of the Defendants named in these actions is proper. See *Hennis v. City Tropics Bistro, Inc.*, 1 So. 3d 1152, 1154-55 (Fla. Dist. Ct. App. 2009) (“The statutory language excluding actions ‘based on an intentional tort’ effectuated a public policy against permitting negligent tortfeasors to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of the tortfeasor’s negligence.”) (citing § 768.81(4)).

Here, the evidence established that all four Defendants were involved in either directly acquiring Compulife’s trade secrets or in using these trade secrets for economic gain and/or to the detriment of Compulife. David Rutstein was heavily involved in acquiring Compulife’s Transformative Database through misrepresentation and deceit. Mr. Levy and Mr. Moses were directly involved in the scraping attack. And Binyomin Rutstein owned AWD, a licensed insurance agency, which he allowed his father to use to collect fees from insurance sales leads generated by Compulife’s stolen Transformative Database. Binyomin allowed his father to use his insurance license and name to establish insurance-related businesses in violation of the consent decree barring him from the insurance industry. Each Defendant played a critical role in the enterprise to misappropriate Compulife’s trade secrets, and therefore,

Appendix B

joint and several liability is appropriate.

VII. Damages

FUTSA provides that damages for misappropriation of trade secrets “can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. . . . If willful and malicious misappropriation exists, the court may award exemplary damages in any amount not exceeding twice any award made. . . .” Fla. Stat. § 688.004.²⁹ The burden of proof on damages in trade secret cases has been described as “liberal” in that “when some damage is proven and the ‘uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.’” *Premier Lab Supply, Inc. v. Chemplex Indus., Inc.*, 94 So. 3d 640, 644 (Fla. Dist. Ct. App. 2012) (quoting *Perdue Farms, Inc. v. Hook*, 777 So. 2d 1047, 1051 (Fla. Dist. Ct. App. 2001)); *see also Advantor Sys. Corp. v. DRS Tech. Servs., Inc.*, 678 F. App’x 839, 857 (11th Cir. 2017).

Here, I find that Compulife is entitled to recover the unjust enrichment Defendants received as a direct result of misappropriating Compulife’s trade secrets. Specifically, Compulife is entitled to the \$75,819.00 that Mr. McSweeney paid to AWD for sales leads he received from BeyondQuotes.com while Compulife’s software and data

29. In addition, if a court finds that “willful and malicious misappropriation exists, [it] may award reasonable attorney’s fees to the prevailing party.” Fla. Stat. § 688.005.

Appendix B

were used on the website. Likewise, Compulife is entitled to recover the \$108,406.87 that One Resource Group paid to AWD in commissions from sales of insurance policies by NAAIP.org members during the period of time that NAAIP used Compulife's software and data.

I further find that Compulife has established that Defendants acted willfully and maliciously in misappropriating Compulife's trade secrets. For example, Compulife produced evidence that after Defendants' access to Compulife's internet quote engine was terminated, David Rutstein sent emails to Mr. Barney threatening to steal Compulife's customers. David Rutstein even attempted to carry out this threat by using Compulife's Term4Sale website to generate hundreds of life insurance quotes, which he then used to send messages through the Term4Sale website to Compulife's insurance agent customers stating: "Compulife quote engine: Beware of security flaw. Your back office is not password protected," and providing a hyperlink to NAAIP followed by the statement "term life quote engines are free." This compelled Mr. Barney to reassure his customers, some of whom thought that the contacts they normally would receive from the Term4Sale website were being diverted somewhere else. Based on this evidence, I find that Compulife is entitled to exemplary damages under the FUTSA in an amount twice that of their actual damages. Moreover, given the collaborative efforts of all four Defendants, I find that each of them is liable for misappropriating Compulife's trade secrets; thus, Defendants shall be jointly and severally liable for these damages.

Appendix B

I find that Compulife is entitled to injunctive relief based on Defendants' continued use of Compulife's data. Even though the data stolen in the scraping attack is now nearly five years old, Mr. Barney testified that Defendants are still using that data to advertise their free life insurance quote engine, thus attracting potential Compulife customers, who would otherwise have to pay for that service. Thus, Compulife is being irreparably injured and cannot be compensated for this loss by money damages because they are too speculative. Accordingly, Defendant shall be enjoined from future use of Compulife's data.

Compulife's request for damages to compensate for the time Mr. Bruner spent investigating the scraping attack and implementing additional security measures is denied. I find that these activities are within the scope of Mr. Bruner's employment and that Compulife did not incur additional costs for these services.

Finally, Compulife's request for damages representing their alleged lost licensing fees are denied. While I recognize that courts may be "liberal" with damages awarded to victims of trade-secret misappropriation, I find that the evidence regarding Compulife's lost licensing fees is too speculative to justify an award. There is simply no basis to assume that every user of the NAAIP website would have paid an annual licensing fee to Compulife, had NAAIP never existed. Moreover, Mr. Barney acknowledged that the influx of legitimate competitors into the marketplace during the last five years may have contributed to Compulife's decline in revenue. The absence

Appendix B

of “proof of a reasonable basis” from which Compulife’s lost licensing fees “can be inferred or approximated” (*Premier Lab Supply, Inc.*, 94 So. 3d at 644), necessitates the denial of these damages.

CONCLUSION

Based on the foregoing, Compulife is entitled to judgment in its favor on its claims for misappropriation of trade secrets (Counts IV and V in the ’08 case and Counts I and V in the ’42 case). Defendants shall be jointly and severally liable for damages in the amount of \$368,451.71, plus prejudgment interest. Judgment shall be entered in favor of Defendants on the copyright infringement claims (Counts I and II in the ’08 case and Counts II and III in the ’42 case).

Plaintiff’s counsel shall submit a proposed final judgment, including proposed provisions for the permanent injunction, within one week of this order.

DONE and ORDERED in Chambers this 12th day of July, 2021, at West Palm Beach in the Southern District of Florida.

/s/ Bruce E. Reinhart
BRUCE E. REINHART
UNITED STATES MAGISTRATE JUDGE

87a

**APPENDIX C — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT, FILED MAY 20, 2020**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12004

D.C. Docket No. 9:16-cv-81942-RLR

COMPULIFE SOFTWARE INC.,

Plaintiff-Appellant,

versus

MOSES NEWMAN, AARON LEVY, DAVID
RUTSTEIN, a.k.a. DAVID ANTHONY GORDON,
a.k.a. BOB GORDON, a.k.a. NATE GOLDEN,
BINYOMIN RUTSTEIN, a.k.a. BEN RUTSTEIN,

Defendants-Appellees.

No. 18-12007

D.C. Docket No. 9:16-cv-80808-RLR

COMPULIFE SOFTWARE INC.,

Plaintiff-Appellant,

versus

Appendix C

BINYOMIN RUTSTEIN, a.k.a. BEN RUTSTEIN,
JOHN DOES 1-10, DAVID RUTSTEIN,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(May 20, 2020)

Before JORDAN and NEWSOM, Circuit Judges, and
HALL,* District Judge.

NEWSOM, Circuit Judge:

There's nothing easy about this case. The facts are complicated, and the governing law is tangled. At its essence, it's a case about high-tech corporate espionage. The very short story: Compulife Software, Inc., which has developed and markets a computerized mechanism for calculating, organizing, and comparing life-insurance quotes, alleges that one of its competitors lied and hacked its way into Compulife's system and stole its proprietary data. The question for us is whether the defendants crossed any legal lines—and, in particular, whether they infringed Compulife's copyright or misappropriated its trade secrets, engaged in false advertising, or violated an anti-hacking statute.

* Honorable James Randal Hall, United States District Chief Judge for the Southern District of Georgia, sitting by designation.

Appendix C

With the parties' consent, a magistrate judge was tasked with tackling these thorny issues in a bench trial. He determined that Compulife had failed to prove any legal violation. We conclude, however, that in finding that Compulife hadn't demonstrated either copyright infringement or trade-secret misappropriation, the magistrate judge made several discrete legal errors and, more generally, failed to adequately explain his conclusions. Accordingly, we vacate the judgment in part and remand with instructions to make new findings of fact and conclusions of law.

I**A**

Warning: This gets pretty dense (and difficult) pretty quickly.

Compulife and the defendants are direct competitors in a niche industry: generating life-insurance quotes. Compulife maintains a database of insurance-premium information—called the “Transformative Database”—to which it sells access. The Transformative Database is valuable because it contains up-to-date information on many life insurers' premium-rate tables and thus allows for simultaneous comparison of rates from dozens of providers. Most of Compulife's customers are insurance agents who buy access to the database so that they can more easily provide reliable cost estimates to prospective policy purchasers. Although the Transformative Database is based on publicly available information—namely,

Appendix C

individual insurers' rate tables—it can't be replicated without a specialized method and formula known only within Compulife.

Compulife sells two different kinds of access to the Transformative Database—a “PC version” and an “internet-engine version”—each run by its own piece of software and each accompanied by its own type of license. Both pieces of software contain an encrypted copy of the database. The PC-version software—called the “PC quoter”—is sold along with a PC license that allows licensees to install copies of the quoter on their personal computers and other devices for (depending on the number of devices) a cost of either \$180 or \$300 per year. The PC quoter uses its local copy of the Transformative Database to generate insurance-rate estimates corresponding to demographic information entered by the end user.

A PC licensee can purchase an add-on called the “web quoter” for an extra \$96 per year. The web-quoter feature allows the PC licensee to put a quoter on its own website, which it can then use as a marketing tool to attract customers. Once a licensee's website is equipped with the web quoter, prospective life-insurance purchasers can enter demographic information into fields on the licensee's site and receive quotes directly from the licensee. Unlike the PC quoter—which contains its own local copy of the Transformative Database—the web quoter generates quotes by communicating with an internet-quote engine hosted on Compulife's server. The HTML source code of the web quoter is protected by a registered copyright.

Appendix C

A second kind of license—the “internet-engine” license—permits a licensee to host Compulife’s internet-quote engine, which includes the Transformative Database, on its own server and to integrate it with additional features of its own creation. (Naturally, it’s more expensive—it costs \$1200 per year.) An internet-engine licensee can then sell access to “its” product—which is an amalgamation of Compulife’s internet-quote engine with any accoutrements that the licensee has seen fit to add. Importantly, though, internet-engine licensees can sell access only to Compulife’s PC licensees. This arrangement allows an internet-engine licensee to include Compulife’s internet-quote engine—again, with the Transformative Database—as a part of its own product, while simultaneously ensuring that it doesn’t compete with Compulife for potential insurance-agent customers. Compulife also permits an internet-engine licensee to provide its web-quoter HTML code to the licensee’s customers so that the customers’ websites can retrieve quotes from the licensee’s server. This is the same copyrighted HTML code that Compulife provides to PC licensees with the web quoter add-on.

In addition to the PC-version and internet-engine products that it licenses to agents and that contain the Transformative Database, Compulife also provides consumers with direct access to life-insurance quotes through its Term4Sale internet site, www.term4sale.com. Term4Sale communicates with essentially the same internet-quote engine that PC licensees’ web quoters access and that internet-engine licensees are permitted to maintain on their own servers. Anyone can use the

Appendix C

Terms4Sale site to receive free life-insurance quotes directly from a copy of the Transformative Database that Compulife hosts on its own server. The Term4Sale site refers prospective life-insurance purchasers to insurance agents with whom Compulife partners, who in turn pay Compulife for the referrals.

Now, to the defendants, who are also in the business of generating life-insurance quotes—primarily through a website, www.naaip.org. “NAAIP” stands for National Association of Accredited Insurance Professionals, but as the court below found, “NAAIP is not a real entity, charity, not-for-profit, or trade association, and is not incorporated anywhere.” *Compulife Software, Inc. v. Rutstein*, No. 9:16-cv-80808, 2018 U.S. Dist. LEXIS 41111, at *15 (Mar. 12, 2018). Through naaip.org, the defendants offer a service similar to—and, the evidence shows, at least partially copied from—Compulife’s web quoter, which they call a “Life Insurance Quote Engine.” Any insurance agent can sign up for a free website located on the domain naaip.org—for example, “<http://naaip.org/tmatteson77>.” The defendants host thousands of these sites on a server in Israel and equip each one with the Life Insurance Quote Engine. Prospective life-insurance purchasers can then obtain quotes on any of these NAAIP-hosted websites by entering demographic information, just as they could on the website of any Compulife PC licensee with a web quoter add-on. Each NAAIP site includes a link that allows consumers to purchase insurance through One Resource Group, Inc., a brokerage firm with which the defendants have partnered. If a visitor to an NAAIP site uses the link to buy insurance, the defendants receive a

Appendix C

part of One Resource's brokerage fees in exchange for the referral.

The defendants also operate the BeyondQuotes website, www.beyondquotes.com, which includes a Life Insurance Quote Engine like the ones on participating NAAIP websites. BeyondQuotes operates similarly to Compulife's Term4Sale site, generating revenue by selling referrals to affiliated insurance agents.

B

Having canvassed Compulife's and the defendants' respective businesses, we should introduce the (complex) cast of individual characters that populate this case. The first is Robert Barney, the founder and CEO of Compulife. Barney personally updates Compulife's Transformative Database. To do so, he draws on insurers' publicly available rate information, but he also employs a proprietary calculation technique—in particular, a secure program to which only he has access and that only he knows how to use. Other relevant players at Compulife include Jeremiah Kuhn, its CFO/COO, and Chris Bruner, the programmer who created the Transformative Database.

Most significant among the defendants is David Rutstein, the founder of NAAIP and the owner of BeyondQuotes. He operates naaip.org and beyondquotes.com with help from his son, defendant Binyomin Rutstein, and their co-defendants Aaron Levy and Moses Newman. At one point—more on this to come—the defendants also

Appendix C

employed a hacker named Natal, who, it is undisputed, took Compulife’s data for use in the defendants’ software.¹

There are also several key characters who aren’t directly affiliated with any of the parties. MSCC is a software company and a Compulife customer with an internet-engine license. It sells access to a proprietary program for life-insurance agents called “Vam DB,” which (as is permissible for internet-engine licensees) includes Compulife’s internet engine. And because MSCC hosts Compulife’s internet engine on its Vam DB server, it also hosts (again, as is permissible) a copy of Compulife’s Transformative Database.

Brian McSweeney is a life-insurance agent who, during the time of the defendants’ alleged misconduct, was a Compulife PC licensee who used MSCC’s Vam DB server. At the same time, McSweeney also had a working relationship with the defendants—in particular, he was one of the agents who (as already described) paid the defendants for leads generated from the BeyondQuotes site. Eric Savage—another Compulife licensee—also had a working relationship with defendant David Rutstein. McSweeney and Savage are important here because the defendants used their relationships with them to gain access to Vam DB, and thus to Compulife’s Transformative Database.

1. There is some confusion about the hacker’s name in the record. We don’t know her first name. As for her last, sometimes it’s rendered Natal, sometimes Matal. For simplicity’s sake, we will use Natal.

*Appendix C***C**

With that background, we turn (at last) to the alleged espionage. Compulife claims that the defendants' websites don't report their own quotes but merely reproduce Compulife's own proprietary data. According to Compulife, the defendants stole its data in two different ways, which form the basis of two separate lawsuits. These suits—which have been called the “08 case” and the “42 case” throughout these proceedings, to denote their original docket numbers—were consolidated for trial and remain consolidated on appeal.

In the 08 case, Compulife contends that the defendants gained access to the Transformative Database under false pretenses by purporting to work for licensed Compulife customers. In particular, David Rutstein, using the email address bob@naaip.org, represented that he was working with Compulife PC licensees McSweeney and Savage and requested the HTML code for Compulife's web quoter, which he said would allow his websites to communicate with the copy of the Transformative Database hosted on MSCC's Vam DB server. Compulife CFO/COO Kuhn responded by sending Rutstein the HTML code, believing that he was a web designer employed by McSweeney, a licensed customer.² A comparison of the HTML used

2. As already noted, the defendants really did have a professional relationship with McSweeney and Savage, but Kuhn provided the HTML code only because he misunderstood the nature of that relationship. Rutstein had partnered with McSweeney and Savage and forwarded them customer leads from Beyond Quotes, but Beyond Quotes was not owned by McSweeney

Appendix C

by the defendants with Compulife's HTML source code shows without a doubt that the defendants copied some of it, although (as we'll discuss) the legal significance of that copying is disputed.

For several years, the defendants' websites enjoyed access to Compulife's internet engine—and thus to the Transformative Database—on MSCC's Vam DB server. They used this access to generate quotes for all NAAIP websites and for their own BeyondQuotes site. Compulife eventually discovered the ruse and cut off the defendants' unauthorized access, at which point their sites temporarily (and conspicuously) stopped producing quotes. The defendants don't deny that they connected their NAAIP websites and BeyondQuotes to Compulife's database on the Vam DB server—they simply claim that their access was innocent.

or Savage. Nevertheless, when Rutstein requested HTML code for www.beyondquotes.com by email he claimed to have an "account . . . thru Eric Savage." He also explained that he intended to set up a web quoter to forward "leads" to McSweeney, although he planned to set it up on a website that "would be separate from" McSweeney's. In context, Kuhn took this to mean that Rutstein was a web designer helping McSweeney to set up a second website of his own. As Kuhn had explained to Savage in an email exchange a few months earlier, each customer was permitted to put the quoter on any website that he owned without an additional license, but an additional license was required before the quoter could be implemented on a website owned by someone else. Kuhn testified that he wouldn't have emailed the HTML code if he had known that "Beyond Quotes did not belong to Eric Savage or Brian McSweeney or any other authorized user."

Appendix C

In the 42 case, Compulife alleges that the defendants hired a hacker, Natal, to “scrape” data from its server. Scraping is a technique for extracting large amounts of data from a website. The concept is simple; a hacker requests information from a server using ordinary HTTP commands similar to those that a legitimate client program of the server might employ in the ordinary course. Although a hacker could obtain the data manually by entering each command as a line of code and then recording the results, the true power of a scraping attack is realized by creating a robot—or “bot,” for short—that can make many requests automatically and much more rapidly than any human could. A bot can request a huge amount of data from the target’s server—technically one query at a time, but several queries per second—and then instantaneously record the returned information in an electronic database. By formulating queries in an orderly fashion and recording the resulting information, the bot can create a copy—or at least a partial copy—of a database underlying a website.

Natal used this scraping technique to create a partial copy of Compulife’s Transformative Database, extracting all the insurance-quote data pertaining to two zip codes—one in New York and another in Florida.³ That means the

3. David Rutstein testified that he asked Natal to obtain data on New York and *California*. Whether he misspoke or Natal simply scraped the wrong data is unclear, but unrebutted testimony establishes that the defendants set up their quote engines to provide only New York and Florida quotes—specifically, quotes corresponding to two zip codes: 10458 and 33433. Moreover, it is undisputed that the defendants received data files from Natal with data for just those zip codes.

Appendix C

bot requested and saved all premium estimates for every possible combination of demographic data within those two zip codes, totaling more than 43 million quotes. Doing so naturally required hundreds of thousands of queries and would have required thousands of man-hours if performed by humans—but it took the bot only four days. The HTML commands used in the scraping attack included variables and parameters—essentially words (or for that matter any string of characters) used to designate and store values—from Compulife’s copyrighted HTML code. For example, the parameter “BirthMonth” in Compulife’s code stores a number between one and twelve, corresponding to a prospective purchaser’s birth month.)

Compulife alleges that the defendants then used the scraped data as the basis for generating quotes on their own websites. The defendants don’t disagree, except to claim that they didn’t know the source of the scraped data but, rather, innocently purchased the data from a third party. Moses Newman testified, however, that he watched Natal collect the requested data in a manner consistent with a scraping attack. David Rutstein also testified that when the defendants instructed Natal to obtain insurance-quote information, they fully intended for her to “extract[] data” from an existing website.

D

Compulife filed suit in the United States District Court for the Southern District of Florida. In both the 08 case and the 42 case, it asserted counts of copyright infringement and trade-secret misappropriation. In the 08

Appendix C

case, Compulife alleged that the defendants (1) infringed its copyright in the HTML source code of its web quoter when they implemented similar quoters on their own websites and (2) misappropriated its trade secret by accessing the Transformative Database on MSCC's Vam DB server to generate quotes without permission. In the 42 case, Compulife alleged that the defendants (1) infringed its copyright by copying parameters and variables from the HTML source code in order to carry out a scraping attack and (2) misappropriated a trade secret by scraping data from its Term4Sale site. Compulife also asserted false-advertising claims under the Lanham Act, Florida Deceptive and Unfair Trade Practices Act, and Florida common law in both cases, as well as a violation of the Florida Computer Abuse and Data Recovery Act in the 42 case.

The parties consented to a bench trial before a federal magistrate judge. Although the judge found, as an initial matter, that Compulife had a valid copyright in the text of its HTML source code and that its Transformative Database was a protectable trade secret, he ruled in favor of the defendants. In doing so, he held that Compulife hadn't met its burden to prove—as it had to in order to make out a copyright-infringement claim—that the defendants' copied code was “substantially similar” to its own and, further, that the defendants hadn't misappropriated any trade secrets. The judge separately rejected Compulife's false-advertising claims on the ground that Compulife had failed to identify any false or misleading advertisement. Finally, he ruled that the defendants hadn't violated the Florida Computer Abuse and Data Recovery Act, because

Appendix C

Compulife failed to show that the data that the defendants took was protected by any “technological access barrier” within the meaning of that statute.

Compulife contends that all of these determinations were in error, identifying what it contends are mistakes of both law and fact in the magistrate judge’s decision. Regarding copyright infringement and trade-secret misappropriation, we agree with Compulife. As to the false-advertising and Florida statutory claims, we agree with the magistrate judge’s conclusions. Accordingly, we will vacate the judgment in part and remand for new findings and conclusions limited to the issues of copyright infringement and trade-secret misappropriation.

II

On appeal from a bench trial, “the district court’s conclusions of law are reviewed de novo,” but its “findings of fact . . . ‘shall not be set aside unless clearly erroneous.’” *MiTek Holdings, Inc. v. Arce Eng’g Co.*, 89 F.3d 1548, 1554 (11th Cir. 1996) (citation omitted) (quoting Fed. R. Civ. P. 52(a)(6)). “[T]he standard of review for a mixed question [of law and fact] all depends—on whether answering it entails primarily legal or factual work.” *U.S. Bank Nat. Ass’n ex rel. CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967, 200 L. Ed. 2d 218 (2018). Separately, “[w]hen an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings.”

Appendix C

Pullman-Standard v. Swint, 456 U.S. 273, 291, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982).

We must also review findings of fact and conclusions of law to ensure that they satisfy Federal Rule of Civil Procedure 52(a)(1). That rule requires that a district court “find the facts specially and state its conclusions of law separately.” Fed. R. Civ. P. 52(a)(1). We will vacate and remand a judgment resulting from a bench trial where “the findings of the district court do not provide a sufficiently definite predicate for proper appellate review.” *Hydrospace-Challenger, Inc. v. Tracor/MAS, Inc.*, 520 F.2d 1030, 1034 (5th Cir. 1975).

* * *

With that précis, we will consider Compulife’s claims in turn: (1) copyright infringement; (2) trade-secret misappropriation; (3) false advertising; and (4) violation of Florida’s Computer Abuse and Data Recovery Act.

III

A

To succeed on its claim of copyright infringement, Compulife “must prove ‘(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’” *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1541 (11th Cir. 1996) (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991)). The existence and validity of

Appendix C

Compulife’s copyright are undisputed, so we can proceed directly to the second prong—copying. Copying comprises two subparts, “factual and legal copying,” both of which Compulife, as the plaintiff, has the burden to prove. *See BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1148 n.40 (11th Cir. 2007).

Factual copying—the question “whether the defendant actually used the plaintiff’s material,” *id.*—may be shown “either by direct evidence, or, in the absence of direct evidence, it may be inferred from indirect evidence demonstrating that the defendant had access to the copyrighted work and that there are probative similarities between the allegedly infringing work and the copyrighted work.” *MiTek*, 89 F.3d at 1554.⁴ Factual copying isn’t really disputed here, and we think it has been established, in any event,⁵ so we focus here on legal copying.

4. A warning here: Although “probative similarity” may sound just like “substantial similarity”—which we’ll encounter momentarily—“[t]here is a vital distinction here between” them. 4 Nimmer on Copyright § 13.02[B] n.70.4 (2019). “[P]robative similarity is but one of several vehicles to prove copying as a factual matter,” whereas “substantial similarity” is part of the test for legal copying and “remains an indispensable element of plaintiff’s proof, even in cases . . . in which defendant does not contest factual copying.” *Id.* § 13.01[B].

5. David Rutstein frankly admits that the defendants had access to Compulife’s copyrighted HTML. Further, his testimony strongly suggests copying in fact, because he admits that “a life insurance quote engine [was] put on to Beyond Quote” after “[c]ommunications between myself and Compulife Software.” The defendants make similar admissions in their brief to us. Finally, defendant Moses Newman agreed that he modified the HTML on

Appendix C

“Legal”—or “actionable”—copying occurs when “those elements of the [copyrighted work] that have been copied are protected expression and of such importance to the copied work that the appropriation is actionable.” *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1300 (11th Cir. 2008) (alteration in original) (quoting *MiTek*, 89 F.3d at 1554). In most cases, a “substantial similarity’ between the allegedly offending program and the protectable, original elements of the copyrighted works” establishes actionable copying. *Bateman*, 79 F.3d at 1542; *see also BUC*, 489 F.3d at 1149 n.42 (“*BellSouth* established the ‘substantial similarity’ standard as the default mode of analysis for compilation copyright claims.”).⁶

naaip.org “so that it would no longer be the same” as Compulife’s copyright-protected HTML. All of which is to say that the defendants have conceded access, at the very least, and they don’t meaningfully dispute factual copying.

6. In special circumstances, we have required that two works be more than substantially similar before infringement can be found, but this is not such a case. In *MiTek*, we adopted a “virtual identicality” standard for “analyzing claims of compilation copyright infringement of nonliteral elements of a computer program.” 89 F.3d at 1558. The virtual-identicality standard originated in the Ninth Circuit. *See Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994). Nonliteral elements of a computer program “are the products that are generated by the code’s interaction with the computer hardware and operating program(s),” of which “screen displays and the main menu” are illustrative examples. *MiTek*, 89 F.3d at 1555 n.15. “Source and object code,” on the other hand, are “literal elements.” *Id.* Copying of these elements, even nonliterally—*i.e.*, without verbatim copying—therefore does not fall into the category

Appendix C

Substantial similarity “must be assessed with respect to both the quantitative and the qualitative significance of the amount copied to the copyrighted work as a whole.” *Peter Letterese*, 533 F.3d at 1307. Quantitatively insubstantial copying may still be actionable if it is qualitatively substantial. See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 565, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985). For instance, because “a small portion of the structure or code of a [computer] program may nonetheless give it distinctive features or may make the program especially creative or desirable,” copying of that portion is actionable. 4 Nimmer on Copyright § 13.03[F][5] (2019).

Before comparing two works to determine if they display the required substantial similarity, a court must “eliminate from comparison the unprotectable elements of” the copyrighted work. *Bateman*, 79 F.3d at 1545. This process—known as “filtration”—is necessary because even substantial similarity between a copyrighted work’s unprotectable elements and a purportedly infringing work isn’t actionable, regardless of how many unprotectable elements are copied or how important they may be. *Id.* at 1544.

analyzed for “virtual identicality” as identified in *MiTek*. “[A]pplication of ‘virtual identicality’ [is] limited to a specific factual context” that we have described as “narrow.” *BUC*, 489 F.3d at 1149 n.42. Because the copying alleged here concerns source code, the substantial-similarity standard, rather than the heightened virtual-identicality standard, applies.

*Appendix C***B**

We conclude that the magistrate judge (sitting as the district court) made several errors in the course of concluding that Compulife had failed to prove actionable—or legal—copying. Unpacking those errors will take some doing, but in short they are as follows. First, the magistrate judge improperly placed the burden on Compulife to prove, as part of the filtration analysis, that the elements the defendants copied were protectable; we hold that he should have required the defendants to prove that those elements were *not* protectable. Second, the judge seems to have evaluated the substantiality of the defendants’ copying vis-à-vis their allegedly infringing work; we hold that he should have judged the substantiality of the copied material vis-à-vis Compulife’s copyrighted work. Finally, even if the magistrate judge hadn’t based his decision on these legal errors, he failed to state on the record sufficient findings of fact and conclusions of law to permit meaningful appellate review. All of these missteps call for the same corrective: vacatur of the judgment with respect to copyright infringement.

1

First, the misplaced burden. To properly frame this error, a little background is in order. The magistrate judge misallocated the burden of proof applicable to the filtration step of the substantial-similarity analysis. Filtration, again, refers to the process of separating the protectable

Appendix C

elements of a copyrighted work from elements that, for one reason or another, aren't protected.⁷

The notion that unprotected material should be disregarded when comparing two works is at least a century old. *See Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234, 39 S. Ct. 68, 63 L. Ed. 211 (1918). Conceiving of filtration as a distinct step in the infringement analysis, however, came into the law relatively recently, in the Second Circuit's seminal decision in *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992). We have adopted a version of *Altai's* test, *see Bateman*, 79 F.3d at 1543-46, which has three steps: (1) abstraction, (2) filtration, and (3) comparison. *Altai*, 982 F.2d at 706. In order to “ascertain[] substantial similarity under this approach, a court . . . first break[s] down the allegedly infringed program into its constituent structural parts”—that's abstraction. *Bateman*, 79 F.3d at 1544 (quoting *Altai*, 982 F.2d at 706). Next, the court “sift[s] out all non-protectable material”—filtration. *Id.* The “last step [is] to compare” any remaining “kernels[] of creative expression” with the “allegedly infringing program” to determine if there is in fact a substantial similarity—comparison. *Id.* Although we have observed that *Altai*, by its terms, dealt only with a narrow category of copying, *see MiTek*, 89 F.3d at 1555 n.16, “a parallel type of analysis”—including

7. Filtering “protectable expression from non-protectable expression is . . . a question of law or, at the very least, a mixed question of law and fact.” *Home Design Servs., Inc. v. Turner Heritage Homes Inc.*, 825 F.3d 1314, 1325 (11th Cir. 2016) (alteration in original) (quoting *Interinvest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 920 (11th Cir. 2008)).

Appendix C

filtration, or its equivalent—applies more generally, *see Bateman*, 79 F.3d at 1545. Here, we focus on the filtration step because that’s where we conclude the magistrate judge went astray.

Filtration can be tricky because copied material may be unprotectable for a wide variety of reasons. First, for instance, copyright protection extends only to a work’s expressive elements, not to any underlying “idea, procedure, process, system, method of operation, concept, principle, or discovery” expressed therein. 17 U.S.C. § 102; *see also Baker v. Selden*, 101 U.S. 99, 102, 25 L. Ed. 841, 1880 Dec. Comm’r Pat. 422 (1879) (“[T]here is a clear distinction between the book, as such, and the art which it is intended to illustrate.”). Courts call this the “idea-expression” dichotomy, with the term “idea” standing in “as a metonym for all eight categories” of unprotectable material. 1 Nimmer on Copyright § 2A.06; *see, e.g., Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1224 (11th Cir. 2008). Second, and separately, some expression may be so intrinsic to the communication of an idea—or procedure, process, etc.—that it is considered to have “merged” into the idea. According to the merger doctrine, where there are sufficiently “few ways of expressing an idea, not even the expression is protected by copyright.” *BUC*, 489 F.3d at 1143. In one seminal example, the First Circuit determined that a written rule governing a sweepstakes—requiring, for instance, that “[e]ntrants should print name, address and social security number on a boxtop, or a plain paper”—wasn’t protectable because the ideas it expressed were “so straightforward and simple” that “at best only a limited number” of possible

Appendix C

modes of expression could exist to convey them. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967).

Third—and this is easier to understand—material taken from the public domain is unprotected, even if incorporated into a copyrighted work. See *Stewart v. Abend*, 495 U.S. 207, 234, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990) (holding that an author “may receive protection only for his original additions,” not “elements . . . already in the public domain”). Fourth, material may be unprotected if it constitutes *scènes à faire*—that is “[i]ncidents, characters, or settings that are indispensable or standard in the treatment of a given topic.” *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1251 (11th Cir. 2007) (alteration in original) (quoting *Herzog v. Castle Rock Entm’t*, 193 F.3d 1241, 1248 (11th Cir. 1999)); see also *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994) (describing *scènes à faire* as “stock scenes that naturally flow from a common theme”). For example, we have noted that there is “no protection for common elements in police fiction, such as ‘drunks, prostitutes, vermin and derelict cars’ and ‘foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop.’” *Corwin*, 475 F.3d at 1251 (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986)). Finally, certain ways of arranging information—say, alphabetically—are entirely unoriginal, and therefore unprotectable. See *Feist*, 499 U.S. at 363 (explaining that presenting data in alphabetical order is “so commonplace that it has come to be expected as a matter of course”).

Appendix C

How might these categories of unprotectability apply in a case like this one? Well, for one, by analogy to merger and *scènes à faire*, elements of computer source-code expression “dictated by external factors” aren’t entitled to copyright protection. *Bateman*, 79 F.3d at 1547. Frequently, “compatibility requirements and industry demands . . . [can make it] ‘virtually impossible to write a program to perform particular functions in a specific computing environment without employing standard techniques.’” *Id.* at 1546-47 (quoting *Altai*, 982 F.2d at 709). The author of a copyrighted code can’t obtain protection for such standard modes of expression, lest he effectively monopolize an underlying “idea.”

In any event, many species of unprotectability may be at issue in a single case, and the filtration process must eliminate all of them so that only protectable material is considered when deciding—at the comparison step—whether two works are substantially similar. *Bateman*, 79 F.3d at 1545 (“[F]iltration should eliminate from comparison the unprotectable elements of ideas, processes, facts, public domain information, merger material, *scènes à faire* material, and other unprotectable elements.” (alteration in original)).

With that background, we come to the magistrate judge’s first error. In his opinion, the magistrate judge implicitly placed on Compulife the burden of proving that the elements of its HTML code that the defendants copied were protectable. In particular, he faulted Compulife for having “made no attempt to identify the protectable elements of the 2010 HTML Source Code.” *Compulife*

Appendix C

Software, 2018 U.S. Dist. LEXIS 41111, at *38. Although we haven't previously done so, we now clarify that after an infringement plaintiff has demonstrated that he holds a valid copyright and that the defendant engaged in factual copying, the *defendant* bears the burden of proving—as part of the filtration analysis—that the elements he copied from a copyrighted work are *unprotectable*. That is so for two main reasons. First, assigning this burden to the defendant is consonant with our existing precedent, and it enjoys the support of the foremost copyright treatise. *See Bateman*, 79 F.3d at 1542 (“[T]he plaintiff must also *respond* to any proof advanced by the defendant that the portion of the copyrighted work actually taken does not satisfy the constitutional requirement of originality as set forth in Article I, § 8, cl. 8.” (emphasis added)); 4 Nimmer on Copyright § 13.03[F][3] (“Although [a] plaintiff’s failure to present proof about [merger and *scènes à faire*] could defeat a plaintiff’s application for a preliminary injunction, it would seem that defendant must go forward at trial with appropriate evidence as to those doctrines.”).

Second, placing the burden to prove protectability on the infringement plaintiff would unfairly require him to prove a negative. Protectability can't practicably be demonstrated affirmatively but, rather, consists of the absence of the various species of *unprotectability*. If the plaintiff had the burden of proving protectability, he would have to preemptively present evidence negating all possible theories of *unprotectability* just to survive a motion for summary judgment. *Cf. Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993) (noting that a summary-judgment movant “simply may . . . point[] out

Appendix C

. . . that there is an absence of evidence to support the non-moving party’s case” where the non-moving party bears the burden of proof). And, of course, some types of unprotectability can be negated only by presenting practically infinite evidence. A plaintiff, for instance, can’t be expected to present the entirety of the public domain as it existed when he authored his copyrighted material in order to show that no elements of his work were taken from it. Nor could a plaintiff reasonably introduce the entire corpus of relevant, industry-standard techniques just to prove that none of the material copied from his work constituted *scènes à faire*. Placing the burden of proving protectability on the plaintiff would seemingly require just these kinds of impossibilities.

Placing the burden on the defendant, by contrast, merely requires him to identify the species of unprotectability that he is alleging and to present supporting evidence where appropriate. If, for instance, the defendant believes that some part of the copyrighted work is in the public domain, he must narrow the inquiry by indicating where in the public domain that portion of the work can be found. Similarly, if he thinks that what he copied amounts to usual industry practice, he must indicate the standards that dictate that technique. The plaintiff then faces the manageable task of “respond[ing],” *Bateman*, 79 F.3d at 1542, to the appropriately narrowed issue. Placing the burden on the defendant, therefore, isn’t just consistent with our own precedent and leading scholarly commentary, but also fairer and more efficient.

Appendix C

In light of these considerations, copyright-infringement analysis should proceed as follows: Once the plaintiff has proven that he has a valid copyright and that the defendant engaged in factual copying, the defendant may seek to prove that some or all of the copied material is unprotectable. If the defendant carries this burden as to any portion of the copied material, that material should be filtered out of the analysis before comparing the two works. After filtration is complete, the burden shifts back to the plaintiff to prove substantial similarity between any remaining (*i.e.*, unfiltered) protectable material and the allegedly infringing work. If the defendant demonstrates—at the filtration stage—that it copied only unprotectable material, such that no substantial similarities remain after filtration, the defendant is entitled to summary judgment. *See Home Design Servs., Inc. v. Turner Heritage Homes Inc.*, 825 F.3d 1314, 1322 (11th Cir. 2016). But because the defendant bears the burden to demonstrate unprotectability, the mere failure of the plaintiff to present evidence of protectability—assuming that a valid copyright and factual copying have already been established—isn’t a sufficient reason to give judgment to the defendant. Rather, where the defendant’s evidence is insufficient to prove that a particular element is unprotectable, the court should simply assume that the element is protectable and include that element in the final substantial-similarity comparison between the works.⁸

8. That is not to say that the defendant must always introduce *evidence* in order to enable the district court to filter. The defendant may sometimes be able to demonstrate by argument alone that an element of a copyrighted work is unprotected. For example, no evidence would be necessary to convince a court that

Appendix C

Accordingly, the magistrate judge here erred by placing on Compulife the burden of proving protectability. For the reasons we have explained, Compulife didn't have to affirmatively prove that the copied portions of its code were protectable. Rather, the defendants had the burden to demonstrate that the copied elements were unprotectable. If the magistrate judge believed that the record contained insufficient evidence to make a conclusive finding about the protectability of any element, he should have proceeded to the comparison step—*i.e.*, proceeded to determine substantial similarity—without filtering anything out. Instead, the judge found for the defendants—seemingly without undertaking any comparison of the parties' codes—in effect treating the entirety of Compulife's code as unprotectable. That was an error.

To be sure, some filtration is warranted here. Some elements of Compulife's code are unprotectable—and indeed, are so obviously so that no proof is necessary.

alphabetization is an entirely unoriginal method of arranging data and thus unprotectable as a structural element of a work. *See Feist*, 499 U.S. at 363. But where evidence is required to determine whether some element is protectable, it is the defendant who must advance it or risk abandoning the issue.

One other thing: A plaintiff may concede that some element of code is unprotectable, in which case a district court will not err in filtering that element. When, for instance, the plaintiff provides a list of features it believes to be protectable, he implicitly concedes that elements not included on the list are unprotectable. *See MiTek*, 89 F.3d at 1555 (“After submitting a specification of the elements that it deemed to be protectable, [a plaintiff] cannot now argue that the district court failed to abstract further the elements of its own designation of protectable features.”).

Appendix C

For example, in order to calculate insurance quotes, Compulife’s code has to collect each consumer’s state of residence, and in organizing that information Compulife has chosen to alphabetize the 50 states and assign each state a number. Although the decision to order the states in this way may have originated with Compulife, mere alphabetization is unoriginal and unprotectable. *See Feist*, 499 U.S. at 363. As a result, although the defendants copied the alphabetization, that particular structural element should be filtered out and excluded when analyzing the similarities between the works.⁹

But the magistrate judge never even reached the filtration issue. Instead, having placed the burden on Compulife to prove that the copied elements of its code were protectable—and found its evidence lacking—he gave judgment for the defendants without ever undertaking a filtration analysis. In so doing, he failed to make required factual findings and legal conclusions “because of an erroneous view of the law.” *Swint*, 456 U.S. at 291. Accordingly, we must vacate and “remand for further proceedings” to give the district court a chance to make the missing findings. *Id.* We won’t attempt a comprehensive filtration analysis from scratch—“[w]e are, after all, a court of review, not a court of first view.” *Callahan v. United States Dep’t of Health & Human*

9. A closer question, however, is whether Compulife’s inclusion of the District of Columbia in the list of states and the bifurcation of New York into business and non-business categories are protectable elements of structure. We don’t reach the question, but rather leave all specific filtering questions for the district court to consider in the first instance on remand.

Appendix C

Servs. through Alex Azar II, 939 F.3d 1251, 1266 (11th Cir. 2019).¹⁰

2

Explaining the magistrate judge’s second legal error is more straightforward. (A low bar.) As we will explain, he implicitly evaluated the significance of the defendants’ copying vis-à-vis their offending work, rather than

10. It is enough to remand for new findings and conclusions rather than an entirely new trial. *See, e.g., Ionmar Compania Naviera, S. A. v. Olin Corp.*, 666 F.2d 897, 905 (Former 5th Cir. 1982) (Tjoflat, J.); *Golf City, Inc. v. Wilson Sporting Goods, Co.*, 555 F.2d 426, 438 & n.20 (5th Cir. 1977). Like the rest of this case, though, the procedural history here is complicated. The magistrate judge retired just days after issuing his decision and wasn’t available even to consider Compulife’s motion for a new trial. In his absence, the district court encouraged Compulife to withdraw the motion and file this appeal, noting that it would take considerable time for a new magistrate to get sufficiently up to speed on the technical facts of this case to rule on its motion for a new trial, a suggestion that Compulife seems to have followed. Federal Rule of Civil Procedure 63 allows one judge to substitute for another in conducting a hearing or trial “upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties,” but “[i]n a hearing or a nonjury trial, the successor judge must, at a party’s request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden.” Because the issues are technical and complicated, new findings will be necessary here, and the parties will likely be entitled to recall many witnesses should they wish, the substitute judge may be “satisfied that he cannot perform the duties we have given him.” *Golf City*, 555 F.2d at 438 n.20 (5th Cir. 1977). If so, the judge “may in his discretion grant a new trial.” *Id.*

Appendix C

Compulife’s copyrighted work. In so doing, the magistrate judge called his ultimate conclusion into doubt. The law is clear that both the quantity of the appropriation and the qualitative importance of the appropriated portion are properly judged by their significance to the copyrighted work, not their significance to the allegedly infringing work. As the Supreme Court has said—and as we have reaffirmed—“a taking may not be excused merely because it is insubstantial with respect to the *infringing* work.” *Harper & Row*, 471 U.S. at 565 (emphasis in original); see also *Peter Letterese*, 533 F.3d at 1307 (explaining that “it is the relative portion of the copyrighted work—not the relative portion of the infringing work—that is the relevant comparison”).

The magistrate judge evinced this error in stating that Compulife “provided no basis on which to evaluate what quantity of the HTML code from the www.naaip.org agent’s website, which spans twenty-five pages, is copied from [Compulife’s] 2010 HTML code, which spans just over nine pages.” *Compulife Software*, 2018 U.S. Dist. LEXIS 41111, at *39-40. In addition to being wrong as a matter of fact—the full texts of both codes are in the record, and a side-by-side comparison reveals the extent of the defendants’ copying—this statement implies a mistaken view of law. A 25-page work could, of course, reproduce the entirety of a 9-page work verbatim, even though it also necessarily includes some material not taken from the shorter work. Seemingly, then, by pointing to the disparity in lengths here, the magistrate judge meant to suggest that the defendants’ inclusion of additional material could undercut or even preclude a finding of infringement. But,

Appendix C

under controlling law, adding new material to copied material doesn't negate (or even ameliorate) the copying. *See Harper & Row*, 471 U.S. at 565. That the accused work is significantly longer than the copyrighted work is irrelevant because the substantiality of copying is evaluated only with respect to the copyrighted work. *See Peter Letterese*, 533 F.3d at 1307. The magistrate judge's ultimate determination that the works are not substantially similar therefore implicitly rests on another misunderstanding of law. Remand is necessary to allow fresh findings, untainted by this error.

3

Finally—with respect to copyright infringement, anyway—even if the magistrate judge hadn't based his determination on the foregoing legal errors, his analysis was insufficient to permit meaningful appellate review. Rule 52 requires a district court conducting a bench trial to “find the facts specially and state its conclusions of law separately” and to include these findings and conclusions on the record. Fed. R. Civ. P. 52(a)(1). A court's failure to “to state [findings of fact] with sufficient detail to indicate the factual basis for [the] ultimate conclusions of law” requires us to vacate the judgment and remand for a new bench trial because it renders appellate review “practically impossible.” *Ionmar Compania Naviera, S. A. v. Olin Corp.*, 666 F.2d 897, 903 (Former 5th Cir. 1982) (Tjoflat, J.).¹¹ Vacatur and remand are also warranted

11. *Ionmar* was decided by a non-unit panel of the Former Fifth Circuit and is therefore binding on us. *See Ionmar*, 666 F.2d at 897 n.*; *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir.

Appendix C

where the district court fails to reach a sufficiently important conclusion of law necessary to support its judgment. *Gechter v. Davidson*, 116 F.3d 1454, 1458 (Fed. Cir. 1997) (“The same rule governs when a conclusion on a crucial issue of law is omitted.”). Rule 52 violations require us to vacate and remand for new findings and conclusions because “[w]e are . . . a court of review, not a court of first view.” *Callahan*, 939 F.3d at 1266.

To allow meaningful appellate review, a district court must indicate which elements of the copyrighted work it considers to be unprotectable in more detail than was given here. The magistrate judge didn’t filter—or even specifically identify—any protectable or unprotectable elements of Compulife’s copyrighted code.¹² Nor did he evaluate the importance of any copied elements of that code as part of a substantial-similarity analysis. Nor,

1982) (explaining that a decision “made by a non-unit panel of the Former Fifth, the full en banc court of the Former Fifth, or Unit B panel of the Former Fifth Circuit” is “binding precedent which we would have to follow absent Eleventh Circuit en banc consideration”).

12. As already noted, which elements should be filtered is a question of law, or at least a mixed question of law and fact, to be determined by a judge before a factfinder decides whether copying was substantial. *See supra* note 7. We would likely review the filtration determination de novo—based on our case law and because it requires primarily legal work—but we needn’t definitively settle on a standard of review here. Even if this determination is reviewed for clear error, the magistrate judge’s failure to make a specific determination frustrates our ability to meaningfully review the ultimate determination of actionable copying.

Appendix C

finally, did he even identify, at the threshold, which elements of Compulife’s code the defendants had copied as a factual matter. Instead of making these necessary determinations, the magistrate judge merely stated that Compulife “failed to prove that ‘th[e] elements of the program that have been copied are protected expression,” *Compulife Software*, 2018 U.S. Dist. LEXIS 41111, at *38 (quoting *MiTek*, 89 F.3d at 1554), that Compulife had “failed to provide any basis on which to conclude that the copied portions of the 2010 HTML Source Code . . . are important,” *id.* (quotation and quotation marks omitted), and that Compulife “provided no basis on which to evaluate what quantity of the HTML code from the www.naaip.org agent’s website . . . is copied from [its] 2010 HTML code,” 2018 U.S. Dist. LEXIS 41111 at *39-40. We can’t effectively review the magistrate judge’s ultimate conclusion—that Compulife failed to prove its case—without answers to the important prerequisite questions that he left unaddressed. And we decline to answer such questions as a matter of “first view.” *Callahan*, 939 F.3d at 1266. Accordingly, vacatur and remand are appropriate.

It bears noting that the magistrate judge’s reasoning would have been sufficient if it really were true that, in seeking to demonstrate substantial similarity, Compulife had provided “no basis” to evaluate either the quantity or the quality of the defendants’ copying. Although “[t]he burden is on the copyright owner to demonstrate the significance of the copied features,” *MiTek*, 89 F.3d at 1560, and “both the quantitative and the qualitative significance of the amount copied” must be assessed, *Peter Letterese*, 533 F.3d at 1307, the plaintiff needn’t prove *both* the

Appendix C

quantitative *and* qualitative substantiality of copying—it’s enough to prove one or the other. *See id.* (noting that qualitatively important copying may be actionable even where “the amount of expression copied [is] quantitatively small with respect to the length” of the copyrighted work). If Compulife had failed in both respects, that failure would have been fatal. In fact, though, Compulife provided at least some evidence of both quantitative and qualitative significance.

To start, Compulife provided the texts of both works, and the court could easily have analyzed the similarities between them to ascertain the *quantitative* extent of copying. So too, the *qualitative* significance could have been evaluated solely on the basis of the two texts. Although the copyright owner has the burden to prove qualitative significance, *MiTek*, 89 F.3d at 1560, nothing requires him to introduce extrinsic evidence of that significance. Qualitative significance is often apparent on the face of the copied portion of a copyrighted work. *See Peter Letterese*, 533 F.3d at 1315 (inferring the qualitative significance of “the way [concepts] were ‘selected, coordinated, or arranged’” from statements within the work itself). Moreover, and in any event, Compulife actually did provide extrinsic evidence of the qualitative significance of some copied elements. Chris Bruner testified that part of the code copied by the defendants includes variable names and parameters that must be formatted exactly for the web quoter to communicate with the Transformative Database at all. At a minimum, this testimony is some evidence of the qualitative significance

Appendix C

of the copied portion of Compulife's work. A district court is free not to credit such testimony, but it can't ignore it.

The magistrate judge's failure to look more closely at the texts of the two codes is particularly concerning given the similarities apparent on their faces. Even a cursory comparison of the two segments suggests that the defendants' work copied material from nearly every page of the copyrighted work. The defendants' code includes nine of the eleven basic sections of Compulife's code, arranged in almost exactly the same order. The defendants' code even reproduces idiosyncratic elements of Compulife's work, like treating New York as two separate jurisdictions—one for business and another for non-business—an element of the code that was obsolete by the time the defendants copied it. Perhaps the magistrate judge had good reasons to discount these and other similarities, but his failure to explain himself prevents any meaningful review.

Accordingly, the magistrate judge's conclusions that Compulife failed to present necessary evidence were unwarranted. At the least, the judge should have engaged with the evidence presented by Compulife and explained why he found it unconvincing. He then should have explained what elements of Compulife's work he had filtered out and why the defendants' code was not substantially similar to whatever material survived filtration. The omission of these details from the magistrate judge's findings of fact and conclusions of law precludes meaningful review and requires vacatur and remand.

Appendix C

IV

And now for something completely different—trade-secret law. To prove a claim under the Florida Uniform Trade Secrets Act (FUTSA), Compulife “must demonstrate that (1) it possessed a trade secret and (2) the secret was misappropriated.” *Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1297 (11th Cir. 2018) (quotation and quotation marks omitted).¹³ Florida law defines a trade secret as

information . . . that: (a) [d]erives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) [i]s the subject of efforts that

13. Compulife also alleges a violation of the Defend Trade Secrets Act (DTSA). DTSA creates a federal cause of action that largely mirrors FUTSA. *See* 18 U.S.C. § 1836(b)(1) (“An owner of a trade secret that is misappropriated may bring a civil action.”). Indeed, DTSA’s definitions of “misappropriation” and “improper means” are largely identical to those discussed in text, with one important difference. *See* 18 U.S.C. § 1839(5), (6). In DTSA, “reverse engineering, independent derivation, or any other lawful means of acquisition” are expressly exempted from the definition of “improper means.” 18 U.S.C. § 1839(6)(B). The definition of “trade secret,” while not identical to FUTSA’s definition, is substantially equivalent. 18 U.S.C. § 1839(3). We assume, as the parties seem to, that the substantive standard for misappropriation is identical under FUTSA and DTSA, at least as they apply here. Accordingly, we won’t undertake a separate analysis of Compulife’s DTSA claim.

Appendix C

are reasonable under the circumstances to maintain its secrecy.

Fla. Stat. § 688.002(4). “[W]hether something is a trade secret is a question typically ‘resolved by a fact finder after full presentation of evidence from each side.’” *Yellowfin Yachts*, 898 F.3d at 1298-99 (quoting *Lear Siegler, Inc. v. Ark-Ell Springs, Inc.*, 569 F.2d 286, 288-89 (5th Cir. 1978)). The magistrate judge found that Compulife’s Transformative Database was a trade secret, a finding that is not clearly erroneous and that, in any event, doesn’t seem to be contested on appeal. We can therefore move straight to the question of misappropriation.

One party can misappropriate another’s trade secret by either acquisition, disclosure, or use. *See* Fla. Stat. § 688.002(2). Compulife alleges misappropriation both by acquisition and by use—but not by improper disclosure. A person misappropriates a trade secret by *acquisition* when he acquires it and “knows or has reason to know that the trade secret was acquired by improper means.” *Id.* § 688.002(2)(a). A person misappropriates a secret by *use* if he uses it “without express or implied consent” and either:

1. Used improper means to acquire knowledge of the trade secret; or
2. At the time of disclosure or use, knew or had reason to know that her or his knowledge of the trade secret was:

Appendix C

- a. Derived from or through a person who had utilized improper means to acquire it;
 - b. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - c. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
3. Before a material change of her or his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Id. § 688.002(2)(b).

The concept of “improper means”—which under FUTSA may apply in both the acquisition and use contexts—is significant here, so we should pause to unpack it. As used in FUTSA, “[i]mproper means” is defined to include “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” *Id.* § 688.002(1). In the law of trade secrets more generally, “theft, wiretapping, or even aerial reconnaissance” can constitute improper means, but “independent invention, accidental disclosure, or . . . reverse engineering” cannot. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470,

Appendix C

476, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974).¹⁴ Actions may be “improper” for trade-secret purposes even if not independently unlawful. *See E. I. Du Pont de Nemours & Co. v. Christopher*, 431 F.2d 1012, 1014 (5th Cir. 1970) (rejecting the argument “that for an appropriation of trade secrets to be wrongful there must be a trespass, other illegal conduct, or breach of a confidential relationship”). Moreover, the inadequacy of measures taken by the trade-secret owner to protect the secret cannot alone render a means of acquisition proper. So long as the precautions taken were reasonable, it doesn’t matter that the defendant found a way to circumvent them. Indeed, even if the trade-secret owner took no measures to protect its secret from a certain type of reconnaissance, that method may still constitute improper means.

In one case from the former Fifth Circuit, for example, DuPont claimed that trade secrets had been misappropriated by photographers who took pictures of its methanol plant from a plane. *See Christopher*, 431 F.2d at 1013. These aerial photographs, DuPont contended, threatened to reveal its secret method of manufacturing methanol. *See id.* at 1013-14. The photographers sought summary judgment, emphasizing that “they conducted all of their activities in public airspace, violated no government aviation standard, did not breach any confidential relation, and did not engage in any fraudulent or illegal conduct.” *Id.* at 1014. The Fifth Circuit rejected their contention and held that the aerial photography

14. The defendants here don’t argue that they reverse-engineered any trade secret, so we needn’t address the reverse-engineering question.

Appendix C

constituted improper means even though DuPont had left the its facility open to inspection from the air. *See id.* at 1015. Under the broad definition adopted in *Christopher*, misappropriation occurs whenever a defendant acquires the secret from its owner “without his permission at a time when he is taking reasonable precautions to maintain its secrecy.” *Id.*

* * *

Although the magistrate judge found Compulife’s Transformative Database to be a trade secret, he determined that the defendants hadn’t misappropriated it. The magistrate judge’s analysis, however, contains two flaws. First, in both in the 08 case and in the 42 case, he failed to consider the several alternative varieties of misappropriation contemplated by FUTSA. Second, in the 42 case, he erred in reasoning that the public availability of quotes on Compulife’s Term4Sale site automatically precluded a finding that scraping those quotes constituted misappropriation.

A

The magistrate judge rejected the misappropriation-by-use claims in the 08 case because he found that Compulife had “failed to prove the existence of the duty critical to its claims of trade secret misappropriation through use.” *Compulife Software*, 2018 U.S. Dist. LEXIS 41111, at *50. The judge erred in considering only varieties of misappropriation by use that require a violation of

Appendix C

some legal “duty” external to the statute.¹⁵ To be sure, some types of use-misappropriation do require proof of an external duty under the Florida statute, *see* Fla. Stat. § 688.002(2)(b)(2)(b), (c). Just as surely, though, the same statute describes other kinds of use-misappropriation that do *not* depend on the existence of an external duty. When, for instance, a defendant knows that his knowledge of a trade secret was acquired using “improper means,” or that he has acquired knowledge of a trade secret “by accident or mistake” and still uses it, such use is actionable misappropriation. Fla. Stat. § 688.002(2)(b)1., 2.a., 3. Moreover, while not defined in the statute, the bar for what counts as “use” of a trade secret is generally low. *See Penalty Kick Mgmt. v. Coca Cola Co.*, 318 F.3d 1284, 1292 (11th Cir. 2003) (“[A]ny exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant is a ‘use.’” (quoting Restatement (Third) of Unfair Competition § 40 cmt. c (1995))). Even assuming that the defendants had no external “duty” not to use Compulife’s trade secret, they nonetheless may have used the secret in violation of the statute.

The magistrate judge never considered these possibilities, although they are plainly contemplated in the Florida statute. And there was clearly enough evidence of these other, non-duty-based varieties of use-misappropriation that the magistrate judge should have

15. Compulife doesn’t concede that it failed to prove a preexisting duty, which it locates in its licensing agreements. We needn’t address the contractual-duty issue because we vacate the judgment on other grounds.

Appendix C

discussed them before dismissing them. In the 08 case, the defendants plausibly engaged in “misrepresentation”—and thus “improper means” within meaning of the statute—given the way that David Rutstein explained the defendants’ affiliation with McSweeney and Savage to Compulife’s Jeremiah Kuhn when Rutstein initially sought access to the Transformative Database. Fla. Stat. § 688.002(1), (2)(b)(1). Alternatively, even if the email exchange between Rutstein and Kuhn didn’t amount to “improper means,” it could have been understood as an “accident or mistake” of which the defendants knew or had reason to know and by which they gained knowledge of the Transformative Database. *Id.* § (2)(b)(3). In either case, the defendants’ use would amount to misappropriation—without respect to the presence (or absence) of any external duty. The magistrate judge’s failure to consider either possibility requires vacatur and remand. *See Swint*, 456 U.S. at 291 (explaining that failure “to make a finding because of an erroneous view of the law” generally requires remand “to permit the trial court to make the missing findings”).

The magistrate judge should also have considered misappropriation by use in the 42 case. The judge seems to have considered only misappropriation by acquisition as to that case—more on that momentarily—but there was no justification for truncating the analysis in this way. If the scraping attack constituted “improper means”—a question that the magistrate judge also failed to address—it would be difficult to escape the conclusion that the defendants either (1) used a trade secret of which they had improperly acquired knowledge or (2) used a trade secret

Appendix C

of which they had acquired knowledge from a person whom they knew or had reason to know had improperly acquired the knowledge. *See* Fla. Stat. § 688.002(2)(b)(1), (2)(a). The defendants admitted both to hiring the hacker and to observing her take actions consistent with a scraping attack. It's hard to see how the defendants didn't at least "have reason to know" that Natal had acquired knowledge of a trade secret for them by improper means—if, indeed, the scraping attack amounted to improper means. The magistrate judge's failure to consider this possibility must also be rectified on remand.

B

In addition to improperly ignoring the possibility of misappropriation by use in the 42 case, the magistrate judge erred in his treatment of misappropriation by acquisition. He reasoned—improperly, we conclude—that the Transformative Database couldn't have been misappropriated by acquisition in the 42 case because the individual quotes that Natal scraped were freely available to the public. True, the quotes' public availability is important to the first prong of trade-secret misappropriation—the initial determination whether a protectable secret exists. Public availability creates a vulnerability, which—if unreasonable—could be inconsistent with the reasonable precautions requisite to trade-secret protection. *See* Fla. Stat. § 688.002(4)(b). But here the magistrate judge found that the Transformative Database *was* a trade secret; he gave judgment for the defendants because he believed that the public availability of the quotes precluded a finding of misappropriation. The

Appendix C

magistrate judge reasoned that all “claims in the 42 case, alleging misappropriation of these quotes, necessarily fail” simply because the individual quotes were available to the public and thus did “not constitute trade secrets.” *Compulife Software*, 2018 U.S. Dist. LEXIS 41111, at *45.

That is incorrect. Even granting that individual quotes themselves are not entitled to protection as trade secrets, the magistrate judge failed to consider the important possibility that so much of the Transformative Database was taken—in a bit-by-bit fashion—that a protected portion of the trade secret was acquired. The magistrate judge was correct to conclude that the scraped quotes were not *individually* protectable trade secrets because each is readily available to the public—but that doesn’t in and of itself resolve the question whether, in effect, the database *as a whole* was misappropriated. Even if quotes aren’t trade secrets, taking enough of them must amount to misappropriation of the underlying secret at some point. Otherwise, there would be no substance to trade-secret protections for “compilations,” which the law clearly provides. *See* Fla. Stat. § 688.002(4) (“‘Trade secret’ means information, including a . . . compilation.”); *Unistar Corp. v. Child*, 415 So. 2d 733, 734 (Fla. Dist. Ct. App. 1982) (holding that a “distillation of” publicly available information was a protectable trade secret). And total, stem-to-stern appropriation is unnecessary to establish liability; appropriation of a “substantial portion” is sufficient. *Cf. Penalty Kick Mgmt.*, 318 F.3d at 1292-1293 (“The unauthorized use need not extend to every aspect or feature of the trade secret; use of any substantial portion of the secret is sufficient to subject the actor to liability.”)

Appendix C

(quoting Restatement (Third) of Unfair Competition § 40 cmt. c (1995))).

Nor does the fact that the defendants took the quotes from a publicly accessible site automatically mean that the taking was authorized or otherwise proper. Although Compulife has plainly given the world implicit permission to access as many quotes as is *humanly* possible, a robot can collect more quotes than any human practicably could. So, while manually accessing quotes from Compulife's database is unlikely ever to constitute improper means, using a bot to collect an otherwise infeasible amount of data may well be—in the same way that using aerial photography may be improper when a secret is exposed to view from above. *See Christopher*, 431 F.2d at 1013. In the most closely analogous case of which we are aware, a district court held that hacking a public-facing website with a bot amounted “improper means.” *Physicians Interactive v. Lathian Sys*, No. CA 03-1193-A, 2003 U.S. Dist. LEXIS 22868, 2003 WL 23018270, at *8 (E.D. Va. Dec. 5, 2003) (“There can be no doubt that the use of a computer software robot to hack into a computer system and to take or copy proprietary information is an improper means to obtain a trade secret, and thus is misappropriation under the VUTSA.”).¹⁶ In that case, the

16. VUTSA—the Virginia Uniform Trade Secrets Act—is sufficiently similar to FUTSA that *Physicians Interactive* provides a persuasive indication that similar hacking would constitute improper means under FUTSA, as well. *Compare* Va. Code § 59.1-336 (“‘Improper means’ includes theft, bribery, misrepresentation, use of a computer or computer network without authority, breach of a duty or inducement of a breach of

Appendix C

trade-secret owner’s “failure to place a usage restriction on its website” did not automatically render the hacking proper. 2003 U.S. Dist. LEXIS 22868, [WL] at *7. So too, here.

Consider how broadly the magistrate judge’s reasoning would sweep. Even if Compulife had implemented a technological limit on how many quotes one person could obtain, and even if the defendants had taken *all* the data, rather than a subset of it, each quote would still be available to the public and therefore not entitled to protection individually. On the magistrate judge’s logic, Compulife couldn’t recover even in that circumstance, because even there—in the magistrate judge’s words—“any member of the public [could] visit the website of a Compulife customer to obtain a quote” with “no restriction” on the subsequent use of the quote. *Compulife Software*, 2018 U.S. Dist. LEXIS 41111, at *45. But under the plain terms of the governing statute, the defendants would be liable in this scenario; they would have acquired a compilation of information that “[d]erives independent economic value . . . from . . . not being readily ascertainable” and “[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy” by means which plainly amount to “espionage through electronic . . . means.” Fla. Stat. § 688.002(1), (4).

a duty to maintain secrecy, or espionage through electronic or other means.”) *with* Fla. Stat. § 688.002(1) (“Improper means’ includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.”).

Appendix C

The magistrate judge treated the wrong question as decisive—namely, whether the quotes taken were individually protectable. He left undecided the truly determinative questions: (1) whether the block of data that the defendants took was large enough to constitute appropriation of the Transformative Database itself, and (2) whether the means they employed were improper. Having found that the Transformative Database was protectable generally, the magistrate judge was not free simply to observe that the portions taken were not individually protectable trade secrets.

We express no opinion as to whether enough of the Transformative Database was taken to amount to an acquisition of the trade secret, nor do we opine as to whether the means were improper such that the acquisition or use of the quotes could amount to misappropriation. We merely clarify that the simple fact that the quotes taken were publicly available does not *automatically* resolve the question in the defendants' favor. These issues must be addressed on remand.¹⁷

17. The magistrate judge rejected the acquisition-based claims in the 08 case because it found that the nature of the defendants' access to the Transformative Database couldn't amount to acquisition. This question should also be reconsidered on remand, however, because the magistrate judge's misunderstanding of the location of the Transformative Database was clear error and may have played a dispositive role in that determination. The magistrate judge found that "[e]nd users can access the Transformative Database only through . . . www.term4sale.com." *Compulife Software*, 2018 U.S. Dist. LEXIS 41111, at *6-7. But in so doing, the judge cited to trial testimony in which Chris Bruner said the opposite. Bruner explained that the internet

Appendix C

V

That concludes the hard part. We turn now to the more straightforward issues, both of which the magistrate judge got exactly right: false advertising and Florida's anti-hacking statute.

A

To recover for false advertising under the federal Lanham Act, 15 U.S.C. § 1051 *et seq.*, Compulife had the burden to prove five elements:

- (1) the ads of the opposing party were false or misleading, (2) the ads deceived, or had the capacity to deceive, consumers, (3) the deception had a material effect on purchasing decisions, (4) the misrepresented product or service affects interstate commerce, and (5) the movant has been—or is likely to be—injured as a result of the false advertising.

“engine is set up to use data files locally to itself” and users therefore can’t normally access “files on Compulife’s server.” The “internet engine software” accesses “data” put into Compulife’s “database” when it uses “data files locally to itself.” This indicates the basic fact that the magistrate judge misunderstood: Compulife provides an encrypted copy of its Transformative Database to each licensed user as part of its software. Robert Barney even testified squarely that “[t]he PC version delivers the database.” Indeed, the defendants don’t appear to contest that point; they acknowledge in their brief that MSCC’s Vam DB sever contained the Transformative Database.

Appendix C

Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1247 (11th Cir. 2002).¹⁸

Compulife bore the burden of proving that the defendants had actually advertised falsely or misleadingly, and the magistrate judge did not clearly err in determining that Compulife failed to prove the existence of any false or misleading advertisement. *See Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1309 (11th Cir. 2010) (“Literal falsity is a finding of fact reviewed for clear error.”). As the magistrate judge observed, Compulife didn’t clearly identify at trial any particular statement alleged to constitute false advertising. In its proposed findings of fact

18. Compulife also asserts false advertising in violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) and Florida common law, but these aren’t truly distinct allegations. Compulife admits that “[t]he legal standards for Florida statutory and common law claims of trademark infringement and unfair competition under . . . [FDUTPA] are the same as those for federal claims of trademark infringement and unfair competition.” Br. of Appellant at 69 (quoting *Rain Bird Corp. v. Taylor*, 665 F. Supp. 2d 1258, 1267 (N.D. Fla. 2009)). Accordingly, Compulife has waived any claim under FDUTPA or Florida common law that doesn’t rise or fall with its Lanham Act claims, and we won’t analyze either separately. *See also Crystal Entm’t & Filmworks, Inc. v. Jurado*, 643 F.3d 1313, 1323 (11th Cir. 2011) (“[T]he legal standards we apply to [the FDUTPA] claim are the same as those we have applied under section 43(a) of the Lanham Act.”); *Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes & of Malta v. Fla. Priory of Knights Hospitallers of Sovereign Order of Saint John of Jerusalem, Knights of Malta, Ecumenical Order*, 702 F.3d 1279, 1296 (11th Cir. 2012) (“The success of . . . state unfair competition and FDUTPA claims is tied to the federal Lanham Act claims for infringement and false advertising.”).

Appendix C

and conclusions of law, Compulife asserted that “[e]nticing . . . users” with “quotes for term life insurance where the source of those quotes is infringing software and stolen trade secrets is . . . unquestionably unfair competition and false advertising.” The bare fact that the defendants hosted a quote engine on their website without providing notification that Compulife was the ultimate source of the quotes, though, doesn’t imply the existence of any advertisement, let alone a false one. And just because the defendants stipulated that the quote engine was a “key benefit” doesn’t mean, as Compulife seems to imply, that the defendants made any particular advertisement regarding that engine, and, again, it certainly doesn’t imply any misleading advertisement. Although before us Compulife singles out an advertisement on NAAIP’s website, it didn’t present that ad to the magistrate judge. Accordingly, it has waived any argument predicated on that ad. *See CSX Transportation, Inc. v. Gen. Mills, Inc.*, 846 F.3d 1333, 1336-37 (11th Cir. 2017) (“[I]f a party hopes to preserve a[n] . . . argument, . . . [it] must first clearly present it to the district court . . . in such a way as to afford the district court an opportunity to recognize and rule on it.” (alterations in original)).

Even if the issue had been properly preserved, we wouldn’t find clear error here. The language from NAAIP’s website on which Compulife now focuses likely doesn’t qualify as false advertising under the statute because it has no capacity to deceive and wasn’t material to any purchasing decision. *See 1-800 Contacts, Inc.*, 299 F.3d at 1247. Compulife claims that the defendants advertised their quote engine as a “key benefit” on their

Appendix C

website, but the contents of this advertisement aren't so clear in the record. The defendants stipulated before the magistrate judge that the quote engine *was* a key benefit of their site, not that they had *advertised* it as such. And while David Rutstein testified that NAAIP “advertises that it has a quote engine” on its home page, he refused to say that it was advertised as “a great quote engine” or that it was “an important selling point.” If credited, Rutstein’s testimony would indicate that the web advertisement lacked materiality and the “capacity to deceive” consumers. *1-800 Contacts, Inc.*, 299 F.3d at 1247 Compulife insists that the ad was deceiving because it held out Compulife’s technology as NAAIP’s, but merely claiming to have a quote engine is unlikely to mislead anyone into assuming anything about the ultimate source of the software or the quotes that it generates. Moreover, even if consumers were misled, it is still difficult to see why that deception would have “had a material effect on purchasing decisions.” *Id.* Consumers have good reason to care about the quality of the quote engine, but not the identity of its author or the host of the server with which it communicates.

We find no error—much less clear error—in the magistrate judge’s determination that Compulife failed to prove false advertising. To make its case, Compulife needed to identify a particular statement or set of statements that amount to a false advertisement, which it failed to do. And Compulife’s belated argument before this Court is both unpreserved and unconvincing. We affirm as to this issue.

*Appendix C***B**

At long last, we reach the final issue in this appeal—the Florida Computer Abuse and Data Recovery Act, which provides a cause of action for certain kinds of hacking. As relevant here, it states: “A person who knowingly and with intent to cause harm or loss . . . [o]btains information from a *protected computer* without authorization . . . [or] [c]auses the transmission of a program, code, or command to a *protected computer* without authorization . . . caus[ing] harm or loss . . . is liable to . . . the owner of information stored in the protected computer.” Fla. Stat. § 668.803(1) & (2) (emphasis added). A “protected computer” is one that “can be accessed only by employing a technological access barrier.” Fla. Stat. § 668.802(6).

Compulife doesn’t attempt to argue that the defendants penetrated a “technological access barrier.” Instead, Compulife maintains that this showing was unnecessary because it did not allege a violation of Fla. Stat. § 668.803(3)—which imposes liability for “[t]raffic[ing] in any technological access barrier through which access to a protected computer may be obtained without authorization”—but only of § 668.803(1) & (2). On this point, Compulife simply misreads the law, overlooking the fact that a “protected computer”—as used in subsections (1) & (2)—is statutorily defined as one that can be accessed only “by employing a technological access barrier.” Fla. Stat. § 668.802(6). All CADRA violations—not just those arising under § 668.803(3)—therefore require proof of access through a “technological access barrier.” Compulife’s undisputed failure to prove the presence of

Appendix C

a “technological access barrier” is fatal to its claim. We affirm as to CADRA.

VI

The magistrate judge committed errors of law and made insufficient findings, which tainted his conclusion that Compulife’s copyright was not infringed. He also erred in his analysis of trade-secret misappropriation, both by failing to consider the application of several species of misappropriation and by committing legal error. Accordingly, we vacate the judgment as to copyright infringement and trade-secret misappropriation and remand for new findings of fact and conclusions of law. We find no reversible error in the magistrate judge’s rejection of Compulife’s other claims and affirm the remainder of the judgment.

AFFIRMED in part, **VACATED** in part, and **REMANDED** for new findings of fact and conclusions of law on the claims of copyright infringement and trade-secret misappropriation.

140a

**APPENDIX D — FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF THE UNITED
STATES COURT OF APPEALS FOR THE
SOUTHERN DISTRICT OF FLORIDA,
FILED MARCH 12, 2018**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CONSOLIDATED FOR TRIAL

CASE NO: 9:16-CV-80808-JMH;
CASE NO.: 9:16-cv-81942-JMH

COMPULIFE SOFTWARE, INC.

Plaintiff,

v.

BINYOMIN RUTSTEIN and DAVID RUTSTEIN,

Defendants.

COMPULIFE SOFTWARE INC.,

Plaintiff,

v.

MOSES NEWMAN, DAVID RUTSTEIN,
BINYOMIN RUTSTEIN and AARON LEVY,

Defendants.

*Appendix D***FINDINGS OF FACT AND CONCLUSIONS OF LAW**

These consolidated cases were tried before the Court in a bench trial held from October 3, 2017 to October 6, 2017. (08 DE 186; 187; 189; 190).¹ During that trial, the Court heard the live testimony of Christopher Bruner, Plaintiff's programmer (Tr. 42 DE 192 at 3-43)²; Nancy Miracle, Plaintiff's expert witness (Tr. 42 DE 192 at 43-66; 42 DE 193 at 1-41); Jeremiah Kuhn, Plaintiff's chief financial officer and chief operating officer (Tr. 42 DE 193 at 41-94); Brian McSweeney, a life insurance agent (Tr. 42 DE 194 at 4-56); Robert Barney, Plaintiff's founder and president (Tr. 42 DE 195 at 15-106; DE 196 at 4-98); Defendant Moses Newman (Tr. 42 DE 197 at 11-49); and Defendant David Rutstein (Tr. 42 DE 197 at 50-100; DE 214 at 15-87). The Court received deposition designations for Defendant Binyomin Rutstein and watched the video of the designated portions during the trial. (Tr. 42 DE 193 at 95-96; DE 194 at 3-4); (*Deposition Designations*, 08 DE 179 at 1-2, 42 DE 194 at 3); (*Video File on DVD*, 08 DE 200); (*Deposition Transcript*, 08 DE

1. Docket entries referring to case number 9:16-CV-80808-JMH will be cited as (08 DE XX). Docket entries referring to case number 9:16-CV-81942-JMH will be cited as (42 DE XX).

2. The transcript of the bench trial is filed in the 42 case at docket entries 192, 193, 194, 195, 196, 197, and 214. When citing to the trial transcript, the Court denotes it with a "Tr." and cites to the appropriate docket entry and page number – found at the top right of each page in the Court's header – and line number(s). The Court does not utilize the transcript's original page numbers, which continue consecutively through the entire transcript, as those numbers are obscured by the Court's header.

Appendix D

196-2). The Court also received deposition designations for Anthony Wilson of One Resource Group; the parties read the designated portions out loud during the trial. (*Deposition Designations*, 08 DE 150 at 1-2; DE 151 at 1-2; DE 179 at 3-4); (*Deposition Transcript*, 08 DE 196-1). The Court additionally received deposition designations for Defendant Aaron Levy; the Court reviewed the designated portions in chambers. (Tr. 42 DE 195 at 11; DE 197 at 102); (*Deposition Designations*, 08 DE 150 at 2; DE 179 at 2-3); (*Video File on DVD*, 08 DE 200). The parties also introduced numerous exhibits, which have been filed in the record. (*Exhibit List*, 08 DE 208); (*Plaintiff's Trial Exhibits*, 08 DE 192, 193, 194, 195); (*Defendants' Trial Exhibits*, 08 DE 191, 197, 199).

On January 24, 2018, the Court held an evidentiary hearing on the issues of: (1) whether the Defend Trade Secrets Act is applicable to the conduct at issue in the 08 case; and (2) whether Plaintiff's state law claims in both cases are preempted by the Florida Uniform Trade Secrets Act. (08 DE 209; 217). At the hearing, the Court heard the live testimony of Robert Barney, (H-Tr. 08 DE 221 at 12:20-24),³ admitted five additional exhibits, (08 DE 218), and received deposition designations for Defendant Moses Newman, (H-Tr. 08 DE 221 at 30:25-31:22). Based upon the testimony, deposition designations, exhibits, stipulations, pleadings, and other proceedings, the Court makes the following findings of fact and conclusions of law.

3. When citing to the transcript of the Evidentiary Hearing held on January 24, 2018, the Court denotes it with a "H-Tr." and cites to the appropriate docket entry and page number – found at the top right of each page in the Court's header – and line number(s).

Appendix D

I. FINDINGS OF FACT

1. Compulife

1. Plaintiff, Compulife Software, Inc. (“Compulife”), is a software company founded by Robert Barney (“Barney”) in 1982. (Tr. 42 DE 195 at 15:24-18:25).

Compulife Program

1. Compulife is the creator of the Compulife Quotation System, a term life insurance comparison software program that performs life insurance policy comparisons (“Program”). (S.F. 08 DE 177 at ¶ 1, 3).⁴
2. Compulife has invested substantial time, effort, and financial resources creating the Program and promoting the Program in interstate commerce to life insurance agents and brokers. (S.F. 08 DE 177 at ¶ 22).
3. Compulife does not sell insurance. (Tr. 42 DE 195 at 19:23-20:11).
4. Compulife licenses its Program to customers as both a stand-alone version that operates on a personal computer (“PC version”) and an internet engine (“Internet Engine version”) that runs independently on the customer’s server. (S.F. 08 DE 177 at ¶ 2); (Tr.

4. The Parties’ Stipulated Facts for Trial are cited as “S.F.” followed by a citation to its location on the docket.

Appendix D

42 DE 192 at 4:6-15; DE 193 at 44:13-15; DE 195 at 28:13-18).

5. Compulife customers that license the PC Version can purchase an add-on that allows the customer to put an internet-based version of the Program on their website; this add-on is known as the Website Quoter. (Tr. 42 DE 193 at 44:4-15, 71:23-72:7).
6. At one point, the Website Quoter was called Website Quotes. (Tr. 42 DE 193 at 71:25-72:1).
7. The Website Quoter speaks to the compulife.net server. (Tr. 42 DE 193 at 71:25-72:7).
8. The PC and Internet Engine versions of the Program are written in C++ code. (Tr. 42 DE 192 at 14:2-22, 53:9-16).
9. Compulife obtained a Certificate of Registration from the United States Copyright Office for two versions of this C++ code: the 2001 version – titled the 2001 Main Source Code – and the 2010 version – titled the 2010 Main Source Code. (P.E. 153 a, filed at 08 DE 193-17)⁵ (2001 Main Source Code Certificate of Registration); (P.E. 153 c, filed at 08 DE 193-19) (2010 Main Source Code Certificate of Registration).

5. Plaintiff's exhibits are identified as "P.E." followed by the exhibit number. Defendants' exhibits are identified as "D.E." followed by the exhibit number. When citing to either party's exhibits, the Court identifies the location of that exhibit on the docket.

Appendix D

10. The 2001 Main Source Code was registered effective May 29, 2015, and was assigned Reg. No. TXu 1-962-793. (P.E. 153 a, filed at 08 DE 193-17) (2001 Main Source Code Certificate of Registration).
11. The 2010 Main Source Code was registered effective May 29, 2015, and was assigned Reg. No. TXu 1-962-792. (P.E. 153 c, filed at 08 DE 193-19) (2010 Main Source Code Certificate of Registration).
12. Chris Bruner (“Bruner”), Compulife’s programmer, wrote both of the registered versions of the C++ code and did not copy them from anyone else. (Tr. 42 DE 192 at 5:2-10).
13. Bruner was an employee of Compulife when he wrote both the 2001 Main Source Code and the 2010 Main Source Code. (Tr. DE 192 at 10:10-12).
14. Bruner assigned ownership in the 2001 Main Source Code and the 2010 Main Source Code to Compulife. (Tr. DE 192 at 9:17-23); (P.E. 153 a, filed at 08 DE 193-17; 153 c, filed at 08 DE 193-19).

Transformative Database

15. Compulife has a transformative database (“Transformative Database”), which contains the information used by Compulife’s host software⁶ to

6. It appears that the host software is the version of the Internet Engine that is stored on a Compulife server and interacts

Appendix D

provide information about user quotes. (Tr. 42 DE 192 at 50:11-14).

16. The information input into the Transformative Database is derived, in part, from insurance rate tables provided by insurance companies. (Tr. 42 DE 192 at 33:16-34:2).
17. The rate tables are public information. (Tr. 42 DE 195 at 21:9-10, 23:11).
18. Barney often gets the rate tables from insurance companies in advance of their public release due to the relationships he has developed with these companies. (Tr. 42 DE 195 at 19:5-22, 20:12-15, 23:11-24:3).
19. Barney inputs certain information from the rate tables into the Transformative Database using a program known as the back-office software. (Tr. 42 DE 192 at 7:5-9, 33:16-34:2, 50:15-16).
20. Barney uses his experience in the term life insurance industry to translate the information in the rate tables into the information that is input into the back-office software program. (Tr. 42 DE 195 at 22:9-23:4).
21. Only Barney knows how the information from the rate tables is input into the back-office software

with the www.term4sale.com website. (Tr. 42 DE 193 at 5:4-6) (discussing Get Commands sent to “host software”).

Appendix D

program. (Tr. 42 DE 192 at 7:7-12; DE 195 at 21:21-22).

22. The back office software program uses a formula to calculate premiums using the information input by Barney. (Tr. 42 DE 192 at 33:16-34:9, DE 195 at 24:4-12).
23. The back-office software program also builds and maintains the Transformative Database. (Tr. 42 DE 192 at 50:15-16).
24. The back-office software program encrypts the information contained in the Transformative Database to ensure that the data files cannot be easily reverse engineered. (Tr. 42 DE 192 at 7:7-21; DE 195 at 23:5-8); (S.F. 08 DE 177 at ¶ 12).
25. Bruner created the back-office software program. (Tr. 42 DE 192 at 34:3-4).
26. The back-office software program is used only by Compulife and is not provided to anyone outside of Compulife. (Tr. 42 DE 192 at 7:16-17); (S.F. 08 DE 177 at ¶ 11).
27. The Transformative Database is stored on one of Compulife's servers. (Tr. 42 DE 192 at 8:5-13).
28. End users can access the Transformative Database only through the Compulife website www.term4sale.com. (Tr. 42 DE 192 at 8:5-13).

Appendix D

Data Used by PC and Internet Engine Versions of Program

29. Insurance agents who purchase a licensed copy of the PC version of the Program receive some encrypted data.⁷ (Tr. 42 DE 192 at 51:3-6).
30. Insurance agencies can purchase a licensed copy of the Internet Engine, which comes with a database of information. Both the Program and the accompanying database of information⁸ are installed on the agencies' server for use by their agents. (Tr. 42 DE 192 at 51:3-9; DE 195 at 28:13-29:4); (P.E. 550 at 5, filed at 08 DE 195-27).
31. Licensees of the Internet Engine version can accept data feeds from other providers that are not Compulife. (Tr. 42 DE 196 at 27:23-28:7).

Serial Numbers and Watermarks

32. Licensed versions of the Program are assigned a serial number. (Tr. 42 DE 192 at 5:20-6:8; 31:18-20; 61:1-2).
33. When a premium request is made using an Internet Engine version, the Program checks the customer's serial number and confirms that that the request is

7. It is unclear whether this encrypted data is a copy of any portion of the Transformative Database.

8. It is unclear whether this database is a copy of any portion of the Transformative Database.

Appendix D

coming from a licensed customer. (Tr. 42 DE 192 at 5:11-6:8).

34. At some point,⁹ Compulife added a watermark system to identify the serial number of the customer requesting the quote. (Tr. 42 DE 192 at 26:8-15).
35. The watermark system identifies the customer requesting the quote by placing a two-letter code that corresponds to the user's serial number within the product name of the quotes returned. (Tr. 42 DE 192 at 26:8-27:15).
36. Quotes obtained through www.term4sale.com display a watermark assigned to the www.term4sale.com website. (Tr. 42 DE 192 at 40:8-12).

Compulife Customers

37. Compulife's licensed customers are typically agents that sell life insurance to the public or distributors of life insurance products that service multiple agents using either the PC or Internet Engine version of the Program. (S.F. 08 DE 177 at ¶ 4); (Tr. 42 DE 192 at 51:3-5).
38. Licensed Internet Engine customers are allowed to remarket access to the Internet Engine to customers that have purchased a license for the PC version of Compulife's Program. (Tr. 42 DE 195 at 28:24-29:6).

9. It is unclear when Compulife added the watermark feature.

Appendix D

39. The public can use the Internet Engine version through Compulife's website, www.term4sale.com. (S.F. 08 DE 177 at ¶ 5); (Tr. 42 DE 192 at 4:18-20; DE 195 at 27:16-22).

Compulife's HTML Code

40. Compulife uses HTML code to provide a user interface to the Internet Engine version of the Program. (Tr. 42 DE 192 at 6:9-11).
41. Through this interface, users input certain information to obtain a list of premiums, which are also called quotes. (S.F. 08 DE 177 at ¶ 5); (Tr. 42 DE 192 at 4:21-24).
42. The HTML code must contain the correct variables, or parameters, in order for the Internet Engine to produce quotes. (Tr. 42 DE 192 at 6:14-20).
43. Bruner made up the variables himself. (Tr. 42 DE 192 at 21:3-5).
44. The HTML code can be viewed on in any web browser. (Tr. 42 DE 192 at 37:18-25, 55:4-6).
45. Compulife obtained a Certificate of Registration from the United States Copyright Office for two versions of this HTML code: the 2001 version – titled the 2001 HTML Source Code – and the 2010 version – titled the 2010 HTML Source Code. (P.E. 153 b, filed at 08 DE 193-18) (2001 HTML Source Code

Appendix D

Certificate of Registration); (P.E. 153 d, filed at 08 DE 193-20) (2010 HTML Source Code Certificate of Registration).

46. The 2001 HTML Source Code was registered effective May 29, 2015, and was assigned Reg. No. TX-8-106-360. (P.E. 153 b, filed at 08 DE 193-18) (2001 HTML Source Code Certificate of Registration).
47. The 2010 HTML Source Code was registered effective May 29, 2015, and was assigned Reg. No. TX-8-106-364. (P.E. 153 d, filed at 08 DE 193-20) (2010 HTML Source Code Certificate of Registration).
48. Bruner wrote both registered versions of the HTML code and did not copy from anyone else. (Tr. 42 DE 192 at 5:2-10).
49. Bruner was an employee of Compulife when he wrote both the 2001 HTML Code and the 2010 HTML code. (Tr. DE 192 at 10:10-12).
50. Bruner assigned ownership in the 2001 HTML Code and 2010 HTML Code to Compulife. (Tr. DE 192 at 10:13-19¹⁰, 11:17-19); (P.E. 153 b, filed at 08 DE 193-18; 153 d, filed at 08 DE 193-20).

10. Although Bruner identified Plaintiff's Exhibit 153 d as the registration certificate for the main source code, the Certificate of Registration found in Exhibit 153 d reflects that it is for the 2010 HTML Source Code.

Appendix D

51. Compulife has always had a copyright notice on the www.term4sale.com website. (Tr. DE 195 at 27:12-13).

www.term4sale.com

52. Compulife developed the www.term4sale.com website around 1999. (Tr. DE 195 at 25:12-24).
53. Visitors to www.term4sale.com can input their certain personal information and receive a list of term life insurance quotes. (S.F. 08 DE 177 at ¶ 5); (Tr. 42 DE 192 at 4:21-24).
54. Visitors can request to have their information sent to three insurance agents who can then contact the visitor. (S.F. 08 DE 177 at ¶ 5); (Tr. 42 DE 192 at 4:21-5:1).
55. Agents who receive these referrals pay Compulife for the service. (S.F. 08 DE 177 at ¶ 5).
56. The version of the Internet Engine that interfaces with www.term4sale.com resides on a Compulife server. (Tr. 42 DE 195 at 28:8-12).

Licensing Agreements and Terms of Use

57. After a 30-day trial period, Compulife requires all users to agree to a licensing agreement in order to continue to use the Compulife Program; if the user

Appendix D

does not do so the Program stops working.¹¹ (S.F. 08 DE 177 at ¶ 15); (Tr. 42 DE 193 at 42:18-43:8; DE 195 at 31:1-16).

58. Compulife has at least three versions of its licensing agreement: a Standard License Agreement, a Personal Use License Agreement, and an Internet Engine License Agreement. (P.E. 532, 533, 534, 535, 536, 537 filed at 08 DE 195-13, -14, -15, -16, -17, -18) (Current, P.E. 532, and 2010, P.E. 533, version of the Standard License Agreement; Current, P.E. 534, and 2010, P.E. 535, version of the Personal Use License Agreement; Current, P.E. 536, and 2015, P.E. 537, version of the Internet Engine License Agreement).
59. These licensing agreements provide that Compulife's software constitutes Compulife's valuable trade secrets, that the object code constituting the Software and updates of the Software contains confidential and trade secret material, and that the user will not duplicate Compulife's software except for back-up purposes. (S.F. 08 DE 177 at ¶ 16); (P.E. 532 at § 3(ii)and (iii), filed at 08 DE 195-13); P.E 533 at § 3(ii)and (iii), filed at 08 DE 195-14; P.E 534 at § 3(ii)and (iii), filed at 08 DE 195-15; P.E 535 at § 3(ii) and (iii), filed at 08 DE 195-16; P.E 536 at § 3(ii)and (iii), filed at 08 DE 195-17; P.E 537 at § 3(ii)and (iii), filed at 08 DE 195-18).

11. It is unclear when Compulife began requiring users to agree to a licensing agreement.

Appendix D

60. These licensing agreements further provide that the user's license for Compulife's software is not transferable without the written consent of Compulife. (S.F. 08 DE 177 at ¶ 21); (P.E 532 at § 3(v), filed at 08 DE 195-13); P.E 533 at § 3(v), filed at 08 DE 195-14; P.E 534 at § 3(v), filed at 08 DE 195-15; P.E 535 at § 3(v), filed at 08 DE 195-16; P.E 536 at § 3(viii), filed at 08 DE 195-17; P.E 537 at § 3(viii), filed at 08 DE 195-18).
61. The 2015 version and Current version of the Internet Engine License Agreement provide that Compulife displays life insurance quotations on the internet through a proprietary system of template files originally created by Compulife, and that the user will not permit sub-users to re-format a quotation on another computer. (P.E 536 at § 3(v), filed at 08 DE 195-17; P.E 537 at § 3(v), filed at 08 DE 195-18).
62. The 2015 version and Current version of the Internet Engine License Agreement also provide that the process of posting variables by an html page involves names of variables and lists of variables which are proprietary to Compulife and subject to Compulife's copyright. (P.E 536 at § 3(vi), filed at 08 DE 195-17; P.E 537 at § 3(vi), filed at 08 DE 195-18).
63. The 2015 version and Current version of the Internet Engine License Agreement further provide that, prior to providing internet web quoting service to sub-users, the customer will contact Compulife by email to confirm that the third party is a licensee of

Appendix D

Compulife. (P.E 536 at § 3(iv), filed at 08 DE 195-17; P.E 537 at § 3(iv), filed at 08 DE 195-18).

64. After September 6, 2016, Compulife added a “Terms of Use Agreement” to the www.term4sale.com website. (S.F. 08 DE 177 at ¶ 53).

2. Defendants

David Rutstein

65. David Rutstein (“David”) is an individual who currently resides in Jerusalem, Israel, and has resided in Israel since 2004. (S.F. 08 DE 177 at ¶ 35).
66. David is also known as David Gordon, Bob Gordon, and Nate Golden. (S.F. 08 DE 177 at ¶ 35).
67. David was previously licensed by the Florida Department of Financial Services as an insurance agent. (S.F. 08 DE 177 at ¶ 36).
68. At one time David had insurance licenses in 40 different states. (S.F. 08 DE 177 at ¶ 37).
69. Beginning in 2010, insurance regulators began to terminate and/or stop renewing David’s insurance licenses. (S.F. 08 DE 177 at ¶ 38).
70. On April 19, 2012, in the Matter of David Brian Rutstein, Case No. 115256-11-AG, a Consent Order was entered revoking the license to sell

Appendix D

insurance previously issued to David, and David was immediately and permanently removed and permanently barred from any and all direct or indirect participation in and/or affiliation with, any entity which is licensed or regulated under the Florida Insurance Code, and any individual or entity which is otherwise involved in the business or transaction of insurance. (S.F. 08 DE 177 at ¶ 39); (P.E. 1, filed at 08 DE 192-1).

Binyomin Rutstein

71. Binyomin Rutstein (“Binyomin”) is David Rutstein’s son. (S.F. 08 DE 177 at ¶ 40).
72. Binyomin’s resident agent address and place of business is 11618 Briarwood Circle, #1, Boynton Beach, Florida. (S.F. 08 DE 177 at ¶ 42).
73. However, Binyomin does not live or work at 11618 Briarwood Circle, #1, Boynton Beach, Florida. (S.F. 08 DE 177 at ¶ 42).
74. Instead, 11618 Briarwood Circle, #1, Boynton Beach, Florida, is the address of the home of Binyomin’s grandmother Arleen Rutstein. (S.F. 08 DE 177 at ¶ 42).
75. Binyomin is a legal resident of Jerusalem, Israel, where he has lived for the past seven years. (S.F. 08 DE 177 at ¶ 44).

Appendix D

76. Binyomin is an insurance agent licensed in 35 different states and appointed as agent by 70 different insurance companies to act as the producer on sales of insurance policies. (S.F. 08 DE 177 at ¶ 41).
77. Binyomin has never sold a life insurance policy. (S.F. 08 DE 177 at ¶ 43).
78. American Web Designers, Ltd. (“AWD”) is an Ohio company set up by Binyomin that is licensed as an insurance agency in Florida. (Tr. 42 DE 197 at 62:18-24).

Moses Newman

79. Moses Newman (“Newman”) is an individual who currently has temporary residence in the United States. (Tr. 42 DE 197 at 11:20-22).
80. By April of 2016, Newman was doing programming work for www.naaip.org . (Tr. 42 DE 197 at 34:3-35:25).

Aaron Levy

81. Aaron Levy (“Levy”) is an individual who resides at 111 Agripas, Apt. 20, Jerusalem, Israel 9451311. (S.F. 08 DE 177 at ¶ 46).

Appendix D

3. www.naaip.org and www.beyondquotes.com

www.naaip.org

82. David became involved in internet sites at least thirteen years ago when he moved to Israel. (Tr. 42 DE 197 at 55:19-21).
83. He has created 30 to 40 insurance-related lead generation websites. (Tr. 42 DE 197 at 56:20-57:4).
84. David and Levy came up with the idea for www.naaip.org . (Tr. 42 DE 197 at 57:13-18).
85. David founded the “National Association of Accredited Insurance Professionals” or “NAAIP” in 2010. (S.F. 08 DE 177 at ¶ 34).
86. David initially claimed that he ceased being involved with NAAIP after April 19, 2012. (S.F. 08 DE 177 at ¶ 60).
87. Before trial, David stipulated that he was involved with NAAIP after April 19, 2012. (S.F. 08 DE 177 at ¶ 72).
88. During trial, David admitted he was not truthful at his deposition when he said he was not involved with NAAIP after April 19, 2012. (Tr. 42 DE 197 at 50:7-14; 214 at 16:19-17:11).

Appendix D

89. During trial, David admitted that he sent and received emails from the david@naaip.org email account. (Tr. 42 DE 214 at 26:25-27:17).
90. Binyomin initially claimed that he was never involved in NAAIP, but later admitted that he authorized Aaron Levy and Moses Newman to use his insurance licenses in connection with the operation and marketing of NAAIP to insurance agents. (S.F. 08 DE 177 at ¶ 59).
91. NAAIP is not a real entity, charity, not-for-profit, or trade association, and is not incorporated anywhere. (S.F. 08 DE 177 at ¶ 24).
92. NAAIP does not issue credentials or accreditation. (S.F. 08 DE 177 at ¶ 24).
93. The concept of www.naaip.org is to provide an automated process for giving free websites to insurance agents using a simple website template. (S.F. 08 DE 177 at ¶ 25); (Tr. 42 DE 197 at 57:19-58:8).
94. The key benefit offered by a free www.naaip.org website is access to NAAIP's "Life Insurance Quote Engine." (S.F. 08 DE 177 at ¶ 26).
95. Visitors to one of these free www.naaip.org websites can enter certain basic personal information and the Life Insurance Quote Engine will return a list of quotes for term life insurance policies. (S.F. 08 DE 177 at ¶ 27).

Appendix D

www.beyondquotes.com

96. In 2008, David purchased the www.beyondquotes.com website for \$5,000 from a non-party. (Tr. 42 DE 197 at 57:5-12); (P.E. 166 at 50-51, filed at 08 DE 193-26).
97. David used www.beyondquotes.com to generate insurance leads. (Tr. 42 DE 197 at 59:22-25).
98. The www.beyondquotes.com website also operates a “Life Insurance Quote Engine” that allows internet visitors to www.beyondquotes.com to enter certain basic personal information and obtain a list of quotes for term life insurance policies. (S.F. 08 DE 177 at ¶ 29).
99. If a visitor to www.beyondquotes.com wishes to purchase one of the policies, that visitor becomes a “lead” that www.beyondquotes.com sells to insurance agents who are customers of www.beyondquotes.com. (S.F. 08 DE 177 at ¶ 30).

4. VAM DB and Brian McSweeney

100. VAM DB is an insurance customer relationship manager software program owned by MSCC Corporation (“MSCC”). (S.F. 08 DE 177 at ¶ 62); (Tr. 42 DE 194 at 11:17-12:2); (P.E. 157, filed at 08 DE 193-21).

Appendix D

101. Michael Steinhardt (“Steinhardt”) is the owner and founder of MSCC. (S.F. 08 DE 177 at ¶ 64); (P.E. 157, filed at 08 DE 193-21).
102. MSCC is a Compulife customer that has a license to the Internet Engine version of the Compulife Program. (S.F. 08 DE 177 at ¶ 63).
103. Brian McSweeney (“McSweeney”) is a life insurance agent. (Tr. 42 DE 194 at 4:19-20).
104. McSweeney is currently employed by MBM Life Quotes, LLC (“MBM”). (Tr. 42 DE 194 at 4:13-17).
105. McSweeney is the sole owner of MBM. (Tr. 42 DE 194 at 23:20-21).
106. MBM¹² is a former Compulife customer. (Tr. 42 DE 194 at 5:6-7; 24:2-9).
107. MBM is also a VAM DB customer. (Tr. 42 DE 194 at 11:19-21).
108. As a Compulife customer, MBM licensed the PC Version of the Program with a Quoter Add-On. (Tr. 42 DE 193 at 70:4-6).

12. It is unclear whether McSweeney as an individual or MBM as an entity was technically the Compulife customer. *Compare* (Tr. 42 DE 194 at 5:6-7, 24:2-13) (McSweeney, answering questions regarding whether he is or was a Compulife customer) *with* (Tr. 42 DE 193 at 70:4-6) (Kuhn, testifying about MBM’s Compulife account). For purposes of clarity and consistency, the Court refers to MBM as the Compulife customer.

Appendix D

109. On August 15, 2011, MBM entered into a lead agreement with AWD (“Lead Agreement”). AWD was represented by David Rutstein for purposes of the Lead Agreement. (Tr. 42 DE 194 at 5:16-22); (P.E. 28, filed at 08 DE 192-12).
110. Pursuant to the Lead Agreement, www.beyondquotes.com provided MBM with leads for the sale of insurance policies. (Tr. 42 DE 194 at 6:4-9, 7:12-17).
111. For every sale made pursuant to one of these leads, MBM paid AWD a lead generation fee. (Tr. 42 DE 194 at 6:4-9).
112. About ninety days after entering into the Lead Agreement, McSweeney asked Steinhardt to integrate leads from www.beyondquotes.com into MBM’s VAM DB account. (Tr. 42 DE 194 at 13:21-25; 26:9-15).
113. These leads were integrated into MBM’s database using VAM DB’s Compulife account. (Tr. 42 DE 194 at 14:6-17).
114. David also partnered with Eric Savage, who was a licensed Compulife customer. (Tr. 42 DE 193 at 91:12-14; DE 196 at 62:15-18; DE 197 at 60:4-6).
115. On March 23, 2011, Eric Savage sent an email to service@compulife.com. Savage noted that he may be using a different domain name and website soon and asked whether he needed to “buy compulife” for

Appendix D

his second website or whether, instead, he could use the “same engine” for both. (D.E. 2, filed at 08 DE 191-2).

116. Jeremiah Kuhn (“Kuhn”), Plaintiff’s chief financial officer and chief operating officer, responded to that email the same day, stating that per his conversation with Savage, Savage’s web designer could put the Website Quoter on any website that Savage owned. (D.E. 2, filed at 08 DE 191-2).
117. On August 17, 2011, David Rutstein, using the email address bob@naaip.org, sent an email to McSweeney and service@compulife.com. The email stated that David had an account with Compulife through Eric Savage and asked that Compulife make adjustments to the quote engine on www.beyondquotes.com. The email also stated that David worked with McSweeney and asked Compulife how to adjust the system by which clients put in their information and received life insurance quotes. David stated that his site would be separate from McSweeney’s so that David could track the leads, but stated that “they will be going to [McSweeney] anyways.” (D.E. 1, filed at 08 DE 191-1).
118. Kuhn responded to this email the next day and stated that “for both Eric [Savage] and Brian [McSweeney]’s Website Quotes, I have sent you a separate email with an attachment that has the code for that option.” In the separate email, Kuhn sent the Website Quoter to the bob@naaip.org email address. (D.E. 3, filed

Appendix D

at 08 DE 191-3) (8/18/11 response from Kuhn to David); (D.E. 4, filed at 08 DE 191-4) (separate email referenced in 8/18/11 response from Kuhn); (Tr. 42 DE 193 at 73:8-13).¹³

119. Kuhn believed that the August 17, 2011 email was from a web designer that was associated with McSweeney. (Tr. 42 DE 193 at 90:7-10).
120. Kuhn also thought www.beyondquotes.com belonged to Eric Savage. (Tr. 42 DE 193 at 91:24-92:2).
121. Kuhn would not have provided the Website Quoter for use on www.beyondquotes.com if he had known that www.beyondquotes.com was not owned by either Savage or McSweeney. (Tr. 42 DE 193 at 92:6-9).
122. On April 8, 2015, Barney was made aware of the www.naaip.org website by one of Compulife's customers. (Tr. 42 DE 195 at 31:17-25).
123. Barney visited the www.naaip.org website and ran a life insurance quote. (Tr. 42 DE 195 at 32:1-2).
124. Barney recognized the company and product names in the quote obtained from www.naaip.org as the ones created for the Compulife Program. (Tr. 42 DE 195 at 32:1-12).

13. Although Defense Counsel referenced Defense Exhibit 5 in discussing this email, it is clear that she was referencing Defense Exhibit 4 as that Exhibit is the email between Kuhn and bob@naaip.org which sent the Website Quoter.

Appendix D

125. Barney viewed the source code of the www.naaip.org agent's website, but was unable to determine what internet engine and server the website was calling. (Tr. 42 DE 195 at 32:12-23).
126. Barney then called the toll free number on the www.naaip.org home page and spoke to David, who identified himself as David Gordon. (Tr. 42 DE 195 at 38:18-39:1).
127. From April 8, 2015, through at least April 13, 2015, Barney repeatedly contacted David to assert that David was using Compulife's products without permission and demand that David either stop using the products or purchase a license. (Tr. 42 DE 195 at 38:22-44:12); (P.E. 17, filed at 08 DE 192-8; 129, filed at 08 DE 193-9; 236, filed at 08 DE 194-12).
128. Upon discovering a link between www.beyondquotes.com and www.naaip.org and receiving an email from www.beyondquotes.com that evidenced a link to McSweeney, Barney called McSweeney to inquire about the use of Compulife's Website Quoter on those two websites. (Tr. 42 DE 195 at 45:2-15).
129. McSweeney did not have any information, but pointed Barney to Steinhardt. (Tr. 42 DE 195 at 45:13-15).
130. On April 10, 2015, Barney contacted Steinhardt, who discovered that the access was coming through MBM's VAM DB user account. (Tr. 42 DE 194 at 17:4-13; DE 195 at 45:16-21, 56:15-23); (P.E. 157, filed at 08 DE 193-21).

Appendix D

131. Steinhardt took down the link on the VAM DB server between MBM and www.naaip.org by disabling MBM's VAM DB account. (Tr. 42 DE 194 at 17:4-13; DE 195 at 56:15-23; DE 214 at 29:7-10); (P.E. 157, filed at 08 DE 193-21).
132. After Steinhardt disabled the account, www.naaip.org and www.beyondquotes.com stopped producing life insurance quotes. (Tr. 42 DE 195 at 56:15-23).
133. Barney informed McSweeney that NAAIP had obtained access to the Compulife Website Quoter through the VAM DB account that was associated with MBM. (Tr. 42 DE 194 at 16:6-25).
134. McSweeney never gave authorization to David or AWD to access to the Website Quoter. (Tr. 42 DE 194 at 17:1-3).

HTML Code on www.naaip.org

135. Plaintiff's 2010 HTML Source code is contained in Plaintiff's Exhibit 542. (filed at 08 DE 195-20).
136. The code contained in this exhibit is the code that was deposited with the copyright office in order to obtain the Registration for the 2010 HTML Source code. (Tr. 42 DE 192 at 12:20-24).
137. Plaintiff's expert, Nancy Miracle, compared the 2010 HTML Source code to the source code on one of the www.naaip.org agent websites. (Tr. 42 DE 192 at 56:24-57:14).

Appendix D

138. Miracle testified about her comparison of the two codes and, specifically, about the comparison – found on Slide 9 of Miracle’s demonstrative slide show – of a small excerpt of the 2010 HTML Source Code with an excerpt from the code on the www.naaip.org agent website.¹⁴ (P.E. 550 at 9, filed at 08 DE 195-27).
139. When asked whether the code from the www.naaip.org agent’s website was a copy of portions of Plaintiff’s HTML code, Miracle answered “yes, of course,” noting that the “parameters have to be exact.” (Tr. 42 DE 192 at 59:10-12).
140. Barney also testified about the source code on the www.naaip.org agent website. Barney stated that while some of the information in the www.naaip.org source code was “not [his] stuff,” he identified line 508 of that code as code used by Compulife. He also testified that the www.naaip.org source code used number, as opposed to letter, codes to identify states and that Compulife also uses these number codes in its code. Finally, Barney testified that the www.naaip.org.

14. Slide 9 identifies the comparison code from the www.naaip.org agent’s website as Exhibit 426. (P.E. 550 at p. 9, filed at 08 DE 195-27). Plaintiff did not admit an exhibit 426; neither did Defendants. (08 DE 208) (Exhibit List). Instead, the excerpt that appears in Slide 9 also appears in Plaintiff’s Exhibit 149, which is the source code found on www.naaip.org website of agent “TMattteson77.” *Compare* (P.E. 550 at p. 9, filed at 08 DE 195-27) (Slide 9) *with* (P.E. 149 at p. 15-16, filed at 08 DE 193-14). For purposes of its analysis, this Court assumes that Miracle compared Plaintiff’s 2010 HTML Source Code, found in Plaintiff’s Exhibit 542, with the code found in Plaintiff’s Exhibit 149.

Appendix D

org source code distinguished between personal and business policies for the state of New York, which is something still contained in Compulife's codes even though such a distinction is no longer used in New York. (Tr. 42 DE 195 at 36:7-38:17).

5. Get Commands

141. Between September 1, 2016 and September 6, 2016, a total of 871,055 requests were made to the www.term4sale.com website¹⁵ from the IP address 5.29.63.18, which is owned by ISP¹⁶ called Hot-Net Internet Services, Ltd, that is located in Israel. (S.F. 08 DE 177 at ¶ 65); (Tr. 42 DE 192 at 18:3-19:6; 62:16-25).

15. Although parties stipulated that the requests were made to the www.term4sale.com website, there is conflicting testimony as to whether the requests were made to the website or, instead, to the server that speaks to the website. *See, e.g.*, (Tr. 42 DE 192 at 16:2-7; 17:5-17) (Bruner, testifying that a Get Command is a request to a server and discussing requests made to server that are logged in Plaintiff's Exhibit 200); (Tr. 42 DE 193 at 7:9-8:3) (Miracle, discussing hits on server); (Tr. 42 DE 192 at 9:19-21) (Miracle, referring to her analysis of the "attack" on the Compulife website); (Tr. 42 DE 193 at 24:15-25:14) (Miracle, stating that a get command has "nothing to do with the website; it has to do with the host"). It is further unclear whether the server that speaks to the www.term4sale.com website is the server on which the Transformative Database is stored.

16. Although unclear from the record, ISP likely refers to an internet service provider.

Appendix D

142. Plaintiff's Exhibit 200 is a log file of the www.term4sale.com server that lists the 997,386 hits on the www.term4sale.com server that occurred between September 1 and September 6 of 2016. 126,331 of these hits came from users of the www.term4sale.com website and not from the Israeli IP address. (Tr. 42 DE 192 at 17:5-17; 21:11-20); (P.E. 200, filed at 08 DE 194-5 through -8).
143. The requests from the Israeli IP address used a "Get Command," also known as a "Get Code" or "Get Request." (Tr. 42 DE 192 at 15:16-23; 16:2-4).
144. The requests from users of the www.term4sale.com website used a "Post" request. (Tr. 42 DE 193 at 8:4-8).
145. The requests from the Israeli IP address were sent at a rate of several requests per second, indicating that they were sent using an automated process. (Tr. 42 DE 192 at 62:16-18; DE 193 at 7:7-21).
146. For each Get Command, the www.term4sale.com server returned life insurance quotes for the parameters – such as zip code and birth month – that were contained in the Get Command. (Tr. 42 DE 193 at 4:8-7:24).
147. The Get Commands from the Israeli IP address requested quotes for only two zip codes: 10458 (a New York zip code) and 33433 (a Florida zip code). (Tr. 42 DE 192 at 23:6-24:1; DE 193 at 8:13-22).

Appendix D

148. Newman received a data file in CSV format from woman named Natal who lives in Israel. (Tr. 42 DE 197 at 42:24-43:3).
149. At some point, Newman observed Natal obtain the information contained in the CSV data files by using a computer to send automated requests. (Tr. 42 DE 197 at 43:4-11).
150. The information from these CSV files was integrated into the database that provides quote information to the www.naaip.org websites. (Tr. 42 DE 197 at 43:12-16).
151. The database for the www.naaip.org websites contains data for only two zip codes: one in Florida and one in New York. (Tr. 42 DE 197 at 44:12-17).
152. Bruner compared the Compulife HTML code¹⁷ to the Get Commands sent from the Israeli IP address and discovered that the parameters in the Get Commands were the same as those in Compulife's HTML code. (Tr. 42 DE 192 at 16:8-14, 20:22-21:10).

17. It is unclear whether Bruner's comparison was to the 2001 or 2010 version of the HTML Source Code.

*Appendix D***6. Defendants' Admissions Regarding Permission and Authority from Compulife**

153. The Defendants are not and have never been authorized users of the Compulife Software.¹⁸ (S.F. 08 DE 177 at ¶ 69).
154. The Defendants have never had permission or authority to copy, use, display, make available,

18. The stipulated facts regarding these admissions are based on Defendants' admissions to allegations in Plaintiff's Complaints in the 08 and 42 cases. In the 08 Complaint, the term "Compulife Software" is defined to mean "the Compulife Quotation System [], a life insurance comparison software program." (08 DE 8 at ¶ 7). The 08 Complaint further alleges that Compulife has registered the Compulife Software with the Copyright Office and lists the Registrations for the 2001 and 2010 Main Source Codes and the 2001 and 2010 HTML Source Codes. (08 DE 8 at ¶ 10). The 42 Complaint states that the term "Compulife Software" means "Compulife's software and database that are the subject of the [Registrations for the 2001 and 2010 Main Source Codes and the 2001 and 2010 HTML Source Codes]." (42 DE 24 at ¶ 13). However, the Registrations for the Main Source Code and HTML Source Code reflect that the subject material was "computer program" for the Main Source Codes and "text, HTML code," for the HTML Source Codes. (P.E. 153 a, filed at 08 DE 193-17) (2001 Main Source Code Certificate of Registration); (P.E. 153 c, filed at 08 DE 193-19) (2010 Main Source Code Certificate of Registration); (P.E. 153 b, filed at 08 DE 193-18) (2001 HTML Source Code Certificate of Registration); (P.E. 153 d, filed at 08 DE 193-20) (2010 HTML Source Code Certificate of Registration). No database was included in the copyright subject material. Defendants' admissions are limited to the meaning of the term "Compulife Software" as used in the 08 and 42 Complaints.

Appendix D

distribute or make derivative works of the Compulife Software. (S.F. 08 DE 177 at 1167,70,71).

155. The Defendants were never authorized by Compulife to use or access the Compulife Internet Engine. (S.F. 08 DE 177 at ¶ 66, 68).
156. Compulife never gave Defendants permission to access Compulife's database of insurance information, or copy, distribute or make derivative works of Compulife's HTML code. (S.F. 08 DE 177 at ¶ 68).

II. CONCLUSIONS OF LAW

The Court finds, and both parties agree, that this Court has subject matter jurisdiction over these consolidated cases pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(a), and 1367. (42 DE 159-2).

In the 08 case, Plaintiff's allegations center on the Life Insurance Quote Engine on both www.naaip.org and www.beyondquotes.com. Plaintiff asserts that the Life Insurance Quote Engine is an unauthorized copy of Plaintiff's Website Quoter. The Amended Complaint in case number 16-CV-80808 asserts the following claims against Defendants David Rutstein and Binyomin Rutstein: Count I: Direct Copyright Infringement (17 U.S.C. § 501); Count II: Contributory Copyright Infringement (17 U.S.C. § 501); Count III: Federal Unfair Competition (15 U.S.C. § 1125(a)); Count IV: Federal Theft of Trade Secrets (18 U.S.C. § 1836(b)); Count V: Florida

Appendix D

Theft of Trade Secrets (Chapter 688, Florida Statutes); Count VII: Unfair Competition (Florida Common Law); Count VIII: Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. § 501.204). (08 DE 8). Plaintiff voluntarily dismissed Count VI, which alleged a violation of the Florida Computer Abuse and Data Recovery Act (Fla. Stat. § 668.803), before trial.

In the 42 case, Plaintiff's alleges that in September of 2016, Defendants David Rutstein, Binyomin Rutstein, Aaron Levy, and Moses Newman caused over 800,000 quotes to be generated by www.term4sale.com with get commands and then stored the quotes in a database used by the quote engine on www.naaip.org and www.beyondquotes.com. The Verified Complaint in case number 16-CV-81942 asserts the following claims against all Defendants: Count I: Violation of the Economic Espionage Act of 1996 as Amended by the Federal Defend Trade Secrets Act of 2016¹⁹ (18 U.S.C. § 1836(b)); Count II: Direct Copyright Infringement (17 U.S.C. § 501); Count III: Contributory Copyright Infringement (17 U.S.C. § 501); Count IV: Federal Unfair Competition (15 U.S.C. § 1125(a)); Count V: Florida Theft of Trade Secrets (Chapter 688, Florida Statutes); Count VI: Violation of the Florida Computer Abuse and Data Recovery Act (Fla. Stat. § 668.803); Count VII: Unfair Competition (Florida Common Law). (42 DE 24).

19. This Count is brought under the same statute as Count IV in the 08 case. It is unclear why Plaintiff titled these counts differently.

Appendix D

Weight Assigned to Miracle's Expert Report and Trial Testimony

As an initial matter, the Court addresses the weight assigned to the legal conclusions contained within the expert report and trial testimony of Plaintiff's expert, Nancy Miracle. "[A]n expert witness may not testify as to h[er] opinion regarding ultimate legal conclusions," *United States v. Delatorre*, 308 F. App'x 380, 383 (11th Cir. 2009) (citing *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990)), and "courts must remain vigilant against the admission of legal conclusions." *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977).²⁰ However, a court's gatekeeping role is relaxed when the case is tried by bench trial. See *Chick-Fil-A, Inc. v. CFT Dev., LLC*, No. 5:07-CV-501-OC-10GRJ, 2009 U.S. Dist. LEXIS 139187, 2009 WL 1754058, at *2 (M.D. Fla. May 16, 2009) (Where a "case is set for a bench trial, there is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself") (quotation omitted). Nonetheless, when testimony containing opinions regarding legal conclusions is admitted those opinions are "entitled to no deference." See *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 983 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996) (testimony from plaintiff and his patent attorney, regarding proper construction of patent claim, "amount[ed] to no more than legal opinion" and was

20. All decisions of the former Fifth Circuit handed down prior to September 30, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

Appendix D

entitled to no deference; court noted that “as to these types of opinions, the court has complete discretion to adopt the expert legal opinion as its own, to find guidance from it, or to ignore it entirely, or even to exclude it”).

The Court deemed Miracle “an expert on matters relating to computer software programming and the other computer-related matters” at issue in this case. (Tr. 42 DE 192 at 46:12-19). Miracle is not an attorney. (Tr. 42 DE 193 at 16:16-17). Miracle’s expert report and trial testimony²¹ included numerous opinions on legal conclusions. *See, e.g.*, (Tr. 42 DE 192 at 49:15-25) (opinion that compilation of information contained in Plaintiff’s database is a trade secret); (Tr. 42 DE 193 at 13:20-14:23) (opinion that the use of the Get Commands constituted a violation of the Florida Computer Abuse and Data Recovery Act); (*Expert Report*, 08 DE 72 at 19) (opinion that Defendants infringed on Plaintiff’s copyrights). Miracle testified that in reaching these opinions, she used case law and legal principles provided by Plaintiff’s counsel. (Tr. 42 DE 193 at 16:12-17:15). The legal principles provided by Plaintiff’s counsel are incorporated in Miracle’s expert report. (Tr. 42 DE 193 at 17:7-11). Because Miracle is not competent to offer opinions containing legal conclusions, the Court exercises its discretion to not consider such opinions, as it indicated during trial. (Tr. 42 DE 193 at 20:19-21:22).

21. Defense counsel failed to object to the majority of Miracle’s testimony containing opinions on legal conclusions. However, defense counsel did raise an objection on that basis towards the end of Miracle’s direct examination, which the Court sustained. (Tr. 42 DE 193 at 12:19-13:5).

*Appendix D***A. DIRECT COPYRIGHT INFRINGEMENT**

(Count I in 08 case; Count II in 42 case)

“To establish a claim of copyright infringement, [Plaintiff] must prove ‘(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’” *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1541 (11th Cir. 1996) (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991)).

Feist’s First Prong

“To satisfy *Feist’s* first prong, plaintiff must prove that the work *as a whole* is original and that the plaintiff complied with applicable statutory formalities.” *MiTek Holdings, Inc. v. Arce Eng’g Co.*, 89 F.3d 1548, 1553-54 (11th Cir. 1996) (emphasis added) (quotation omitted). “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Feist*, 499 U.S. at 345 (citing 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §§ 2.01 [A], [B] (1990)) [hereinafter *Nimmer 1990*]. “[T]he requisite level of creativity is extremely low; even a slight amount will suffice.” *Id.* “The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.” *Id.* (quoting *Nimmer 1990* at § 1.08 [C] [1]).

“In any judicial proceedings the certificate of a registration made *before or within five years after first*

Appendix D

publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate,” 17 U.S.C. § 410(c) (emphasis added), including the originality of the author, *see* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 12.11[B][1][a] (Matthew Bender, rev. ed., 2017) [hereinafter Nimmer] (“Because originality of the author is a necessary condition to validity of the copyright, it follows that a certificate of registration, properly obtained within the prescribed five-year period, constitutes *prima facie* evidence of the author’s originality.”) (footnotes omitted). However, “[t]he evidentiary weight to be accorded the certificate of a registration *made thereafter* shall be within the discretion of the court.” 17 U.S.C. § 410(c) (emphasis added). “[T]he court, in its discretion, may accord such later filings presumptive validity.” Nimmer at § 12.11[A][1]. “Upon receipt of some evidence for plaintiff’s ownership, courts typically extend the presumption.” *Id.* “[T]he burden [then] shifts to the defendant to demonstrate why the claim of copyright is invalid.” *Bateman*, 79 F.3d at 1541. “At this juncture, it is incumbent upon a putative infringer to establish that the work in which copyright is claimed is unprotectable (for lack of originality) or, more specifically, to prove that the *portion* of the copyrighted work actually taken is unworthy of copyright protection.” *Id.* (emphasis added). Here, “the task is to distinguish between protectable expression and unprotectable ‘methods of operation,’ ‘processes,’ and the like.” *Id.* n.21 (quoting 17 U.S.C. § 102(b)).

In both the 08 and the 42 case, Plaintiff claims that Defendants infringed on its 2010 HTML Source

Appendix D

Code. (P.P. 08 DE 204 at 25-26).²² Plaintiff obtained a Certificate of Registration (“Registration”) for the work titled “2010 HTML Source Code” with an effective date of May 29, 2015. (P.E. 153 d, filed at 08 DE 193-20). Plaintiff acknowledges it is not automatically entitled to the presumption of validity as its Registration was made more than five years after initial publication. (P.P. 08 DE 204 at 25); (P.E. 153 d, filed at 08 DE 193-20) (listing date of first publication as January 31, 2010). Thus, the “evidentiary weight to be accorded the certificate of [] registration” is “within the discretion of th[is] [C]ourt.” *See* 17 U.S.C. § 410(c).

The fact that Plaintiff missed the five-year window by less than one year weighs in favor of extending the presumption of validity. *See Telerate Sys., Inc. v. Caro*, 689 F. Supp. 221, 227 (S.D.N.Y. 1988) (five-year requirement was added because “the longer the lapse of time between publication and registration the less likely to be reliable are the facts stated in the certificate”). *Cf. Brown v. Latin Am. Music Co.*, 498 F.3d 18, 24-25 (1st Cir. 2007) (approving of district court’s decision to afford copyright registration “little or no weight” where decision was based, in part, on fact that twenty years had passed between first publication and registration). Further, Plaintiff presented evidence of its ownership in the copyright. Bruner testified that he wrote the code for Plaintiff as an employee of Plaintiff. (Tr. 42 DE 192 at 31:13-17). *See* 17 U.S.C. § 201(b)

22. Plaintiff’s Proposed Findings of Fact and Conclusions of Law are cited as P.P followed by a citation to its location on the docket. The Court refers to the page numbers found at the top of each page in the Court’s header.

Appendix D

(“Works Made for Hire. – In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”). Moreover, Bruner testified that he assigned ownership in the copyright for the 2010 HTML Source Code to Plaintiff, (Tr. 42 DE 192 at 10:10-20),²³ and the Registration reflects that the transfer was by written agreement, (P.E. 153 d, filed at 08 DE 193-20). *See* 17 U.S.C. § 201(d)(1) (“ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law”); § 204(a) (“A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”). Defendants do not dispute that Bruner authored the 2010 HTML Source Code or that Plaintiff owns the copyright in that code.

The Court finds that Plaintiff’s Registration for the 2010 HTML Source Code is entitled to a presumption of validity. *See Lifetime Homes, Inc. v. Residential Dev. Corp.*, 510 F. Supp. 2d 794, 800-01 (M.D. Fla. 2007) (finding that plaintiff, who obtained certificate of registration more than 5 years after first publication, established ownership of a valid copyright where defendants failed to point to any

23. Although Bruner identified Plaintiff’s Exhibit 153 d as the registration certificate for the main source code, the Certificate of Registration found in Exhibit 153 d reflects that it is for the 2010 HTML Source Code.

Appendix D

evidence indicating that the registration was not valid or that plaintiff did not own the copyright). The Registration thus “constitutes *prima facie* evidence of the author’s originality.”²⁴ See Nimmer § 12.11 [B][1][a].

Thus, “the burden shifts to [] defendant[s] to demonstrate why the claim of copyright is invalid” by “prov[ing] that the *portion of the* copyrighted work actually taken is unworthy of copyright protection.” *Bateman*, 79 F.3d at 1541. Defendants assert that because “the variables used to input into the quote engine and the names and products created are based upon life insurance industry standards,” Plaintiff “has not met the first element of originality for its copyright claims.” (D.P. 08 DE 203 at 9).²⁵ It is unclear whether Defendants claim that Plaintiff copied these portions of the code or whether, instead, Defendants assert that these portions

24. Even without this presumption, Plaintiff established the originality of the 2010 HTML Source Code *as a whole*. Bruner testified that he wrote the 2010 HTML Source Code and did not copy it from anyone else. (Tr. 42 DE 192 at 5:2-10). Miracle testified that the 2010 HTML Source Code contained numerous creative elements, including the values used to denote the term of the policy and those used to limit the number of results returned. (Tr. 42 DE 192 at 54:13-56:21). See *Feist*, 499 U.S. at 345 (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”).

25. Defendants’ Proposed Findings of Fact and Conclusions of Law are cited as D.P followed by a citation to its location on the docket. The Court refers to the page numbers found at the top of each page in the Court’s header.

Appendix D

are not entitled to copyright protection because they are “methods of operation, processes, [or] the like.” *Bateman*, 79 F.3d at 1541 n.21 (quotations omitted). *See Harvester, Inc. v. Rule Joy Trammell + Rubio, LLC*, 716 F. Supp. 2d 428, 435 (E.D. Va. 2010) (“The burden on the defendant to rebut the presumption varies depending on the issue bearing on the validity of the copyright. Where, for example, the issue is whether the copyrighted article is original, the presumption will not be overcome unless the defendant offers proof that the plaintiff’s product was copied from other works or similarly probative evidence as to originality. On the other hand, where the issue is whether particular articles with certain undisputed characteristics are copyrightable, the defendant need not introduce evidence but instead must show that the Copyright Office erroneously applied the copyright laws in registering plaintiff’s articles.”) (quotations and citations omitted).

Defendants’ assertion, made without reference to any factual or legal support, is insufficient to rebut the presumption. *See, e.g., Fodere v. Lorenzo*, No. 09-CV23120, 2011 U.S. Dist. LEXIS 10908, 2011 WL 465468, at *3 (S.D. Fla. Feb. 4, 2011) (“Defendants misunderstand the nature of the evidence required to rebut the presumption of validity. A defendant must come forward with some evidence or proof to dispute that the copyrighted work was not copyrightable in the first instance. . . . Here, [d]efendants have not alleged that the [] photograph is not eligible for copyright protection. They have alleged only that the registration of the copyright in [a certain plaintiff’s name] was improper, without explaining how it

Appendix D

was improper or citing any law to support that position.”), *aff’d*, 441 F. App’x 666 (11th Cir. 2011); *Blazon, Inc. v. DeLuxe Game Corp.*, 268 F. Supp. 416, 421 (S.D.N.Y. 1965) (“Mere denial by the defendant, unsupported by evidence, is not sufficient to overcome the prima facie presumption of plaintiff’s originality. And proof that plaintiff copied from prior works should involve the same elements as are required to establish copying by the defendant, i.e., access and similarity.”) (quotations and citations omitted). Plaintiff has satisfied the first *Feist* prong.

Feist’s Second Prong

Under *Feist’s* second prong, Plaintiff must prove “copying of constituent elements of the work that are original.” *Bateman*, 79 F.3d at 1541 (quoting *Feist*, 499 U.S. at 361). “This [] involves two separate inquiries: 1) whether the defendant, as a factual matter, copied portions of the plaintiff’s program; and 2) whether, as a mixed issue of fact and law, those elements of the program that have been copied are protected expression and of such importance to the copied work that the appropriation is actionable.” *MiTek*, 89 F.3d at 1554 (quotation omitted).

“As a factual matter, a proof of copying may be shown either by direct evidence, or, in the absence of direct evidence, it may be inferred from indirect evidence demonstrating that the defendant had access to the copyrighted work and that there are probative similarities between the allegedly infringing work and the copyrighted work.” *Id.* However, “[e]ven if the court finds that the putative infringer copied portions of the

Appendix D

copyright owner's program, that is not the end of the inquiry." *Id.* "Copyright infringement occurs only if one copies *protected elements* of a copyrighted work; in other words, the portion of the copyrighted work that is copied must satisfy the constitutional requirement of originality as set forth in Article I, § 8, cl. 8." *Id.* (quotation omitted). "As the Court in *Feist* noted, 'the mere fact that a work is copyrighted does not mean that every element of the work may be protected.'" *Id.* (quoting *Feist*, 499 U.S. at 348). "Significantly, the Copyright Act expressly states that: 'In no case does copyright protection for an original work of authorship extend to any *idea, procedure, process, system, method of operation, concept, principle, or discovery*, regardless of the form in which it is described, explained, illustrated, or embodied in such work.'" *Id.* (emphasis supplied by court) (quoting 17 U.S.C. § 102(b)). "Thus, in order for a plaintiff to prevail on a claim of copyright infringement, the court must find not only that the portion of the work copied is original and thus protectable but also that the copying of copyrighted material was so extensive that it rendered the offending and copyrighted works substantially similar." *Id.* (quotation omitted).

"Two works are substantially similar if an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Palmer v. Braun*, 287 F.3d 1325, 1330 (11th Cir. 2002) (quotation omitted). "Both literal and nonliteral similarities can warrant a finding of substantial similarity." *Id.* "Literal similarity is the verbatim copying of a copyrighted work." *Id.* "In many cases, an allegedly infringing work will evince 'fragmented literal similarity.'" *Id.* (citing

Appendix D

4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[A][2] (2001) [hereinafter Nimmer 2001]. “In other words, the work may copy only a small part of the copyrighted work but do so word-for-word.” *Id.* “If this fragmented copy is important to the copyrighted work, and of sufficient quantity, then it may support a finding of substantial similarity.” *Id.* “Nonliteral similarity is more difficult to define.” *Id.* “A work may be deemed substantially similar to another work when it evinces what Nimmer calls ‘comprehensive nonliteral similarity.’” *Id.* (citing Nimmer 2001 at § 13.03[A][1]). “This comprehensive nonliteral similarity is evident where ‘the fundamental essence or structure of one work is duplicated in another.’” *Id.* (quoting Nimmer 2001 at § 13.03[A][1]).

Although Plaintiff presented evidence that Defendants copied the parameters from its 2010 HTML Source Code, Plaintiff has failed to prove that “th[e] elements of the program that have been copied are protected expression and of such importance to the copied work that the appropriation is actionable.” *See MiTek*, 89 F.3d at 1554 (quotation omitted). The 2010 HTML Source Code fills just over nine pages; each of the initial nine pages is filled with between twenty-five (page 1) and fifty-six (page 5) lines of text. (P.E. 542, filed at 08 DE 195-20). Plaintiff made no attempt to identify the protectable elements of the 2010 HTML Source Code. Moreover, Plaintiff failed to provide any basis on which to conclude that the copied portions of the 2010 HTML Source Code, assuming they are protectable, are “important to the [2010 HTML Source Code], and of sufficient quantity” or duplicate “the fundamental essence or structure” of the 2010 HTML

Appendix D

Source Code. *See Palmer*, 287 F.3d at 1330. Plaintiff does not acknowledge the *Altai* test, which “is critical to the determination of substantial similarity between the allegedly copyrighted code and the offending use and thus also to the determination of infringement.”²⁶ *See Indyne*,

26. It is possible that the *Altai* test does not apply to the 2010 HTML Source Code because it is HTML code instead of a source code or computer program. Although the title of the work indicates that it is an “HTML Source Code,” it is unclear whether an HTML code can also be considered a source code or computer program. Compare *The Compendium of U.S. Copyright Office Practices* § 721.10(A) (3d ed. 2017) (revised Sept. 29 2017) [hereinafter *Compendium*] (“HTML is not a computer program or source code.”), with *Schultz v. Lost Nation Booster Club*, No. 3:13-CV-68-RAW, 2014 U.S. Dist. LEXIS 184318, 2014 WL 10038777, at *1 (S.D. Iowa Oct. 14, 2014) (stating that “[b]y definition HTML code is a ‘computer program’”) (citing 17 U.S.C. § 101, which defines a computer program as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result”). Indeed, while the copyright application reflects that Plaintiff sought protection for “text, computer program” – as evidenced in the “author created”, “material excluded from this claim,” and “new material included in claim” fields, (P.E. 153 d at 3, filed at 08 DE 193-20) – the Certificate of Registration shows that these fields were changed to state “text, HTML code,” (P.E. 153 d at 1, filed at 08 DE 193-20). The *Compendium* further notes that while copyright protection for a computer program generally extends to the screen displays generated by that program, this rule does not apply to HTML “unless the applicant submits a copy of the website content and expressly asserts a claim in that material.” *See Compendium* § 721.10(A). It is unclear whether these distinctions render the *Altai* test inapplicable in this instance. *See Bateman*, 79 F.3d at 1545 (assessing application of *Altai* test to computer program; noting that “[i]t is undeniable that the *Altai* court formulated its test to address nonliteral copying of computer code”) (emphasis added). However, even if this test

Appendix D

Inc. v. Abacus Tech. Corp., 876 F. Supp. 2d 1278, 1285 (M.D. Fla. 2012), *aff'd*, 513 Fed. Appx. 858 (11th Cir. 2013).

In summarily asserting that the 2010 HTML Source Code is substantially similar to the HTML source code found on the www.naaip.org agent's website, Plaintiff relies on Miracle's comparison of the two codes. (P.P. 08 DE 204 at 26). When asked whether the code from the www.naaip.org agent's website was a copy of portions of Plaintiff's HTML code, Miracle answered "yes, of course" and stated that the "parameters have to be exact." (Tr. 42 DE 192 at 59:10-12). Miracle's demonstrative slide show includes a comparison of an excerpt of about 20 lines of text from each of the codes. (P.E. 550 at p. 9, filed at 08 DE 195-27).²⁷ While the comparison reveals the exact copying of two parameters – each of which constitutes a portion of one line of text – the two excerpts are not identical. (P.E. 550 at p. 9, filed at 08 DE 195-27). *See TracFone Wireless, Inc. v. Technopark Co.*, 281 F.R.D. 683, 688 (S.D. Fla. 2012) ("[W]hen the defendant has engaged in literal or verbatim copying of all of the protected source code, there is sufficient evidence to authorize a finding of infringement."). And Plaintiff provided no basis on which to evaluate what quantity of the HTML code from the www.naaip.org agent's website, which spans twenty-five

does not apply, Plaintiff's claim still fails as it did not identify the protectable portions of its 2010 HTML Source Code or show that Defendants' allegedly infringing code was substantially similar.

27. As previously noted, *supra* note 14, although Slide 9 of Miracle's slide show cites to Exhibit 426 for the code found on www.naaip.org website of agent "TMattteson77," it appears that the correct exhibit is Plaintiff's Exhibit 149.

Appendix D

pages, is copied from Plaintiff's 2010 HTML code, which spans just over nine pages. *See MiTek, Holdings, Inc. v. Arce Eng'g Co.*, 864 F. Supp. 1568, 1575 (S.D. Fla. 1994), *aff'd*, 89 F.3d 1548 (11th Cir. 1996) (plaintiff conceded that literal elements of two codes were not substantially similar where plaintiff's expert testified that only two percent of the literal elements were substantially similar). Plaintiff likewise provided no basis on which to evaluate the importance of the copied parameters to the 2010 HTML Source Code as a whole. *See Peter Letterese And Assocs., Inc. v. World Inst. Of Scientology Enterprises*, 533 F.3d 1287, 1307 (11th Cir. 2008) ("The extent of copying must be assessed with respect to both the quantitative and the qualitative significance of the amount copied to the copyrighted work as a whole.").

Likewise, while Bruner testified that the parameters in the Get Commands matched the parameters in the HTML code, (Tr. 42 DE 192 at 16:8-14, 20:22-21:10), Plaintiff failed to provide any basis on which to evaluate the quantity of the 2010 HTML Source Code that was copied by the Get Commands or the importance of the copied parameters to the 2010 HTML Source Code as a whole. "The burden is on the copyright owner to demonstrate the significance of the copied features, and, in this case, [Plaintiff] has failed to meet that burden." *MiTek*, 89 F.3d at 1560.

B. CONTRIBUTORY COPYRIGHT INFRINGEMENT
(Count II in 08 case; Count III in 42 case)

Because Plaintiff did not prove direct copyright infringement, its contributory copyright infringement

Appendix D

claims fail. *See Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845 (11th Cir. 1990) (“Contributory infringement necessarily must follow a finding of direct or primary infringement.”).

**C. MISAPPROPRIATION OF TRADE SECRETS
IN VIOLATION OF THE DEFEND
TRADE SECRETS ACT AND
FLORIDA UNIFORM TRADE SECRETS ACT**
(Defend Trade Secrets Act: Count IV in 08 case;
Count I in 42 case)
(Florida Uniform Trade Secrets Act:
Count V in 08 case; Count V in 42 case)

Plaintiff claims that Defendants violated the Federal Defend Trade Secrets Act (“DTSA”) and the Florida Uniform Trade Secrets Act (“FUTSA”) in both the 08 and 42 cases.

1. Effective Date of the DTSA

“On May 11, 2016, the Defend Trade Secrets Act, Publ. L. 114-153, 130 Stat. 376, conferred on U.S. district courts subject matter jurisdiction over civil actions pertaining to the theft of trade secrets used in interstate or foreign commerce.”²⁸ *M.C. Dean, Inc. v. City of Miami Beach, Florida*, 199 F. Supp. 3d 1349, 1353 (S.D. Fla. 2016) (citing 18 U.S.C. § 1836(c)). Generally, “[t]he statute only applies to conduct occurring on or after its effective date, May 11,

28. The parties stipulated to the fact that Plaintiff promoted the Program in interstate commerce. (S.F. 08 DE 177 at ¶ 22).

Appendix D

2016.” *Yager v. Vignieri*, No. 16CV9367(DLC), 2017 U.S. Dist. LEXIS 169241, 2017 WL 4574487, at *3 (S.D.N.Y. Oct. 12, 2017). But “while this may be the case under an ‘acquisition’ theory of liability, under a ‘disclosure’ theory of liability a DTSA claim is actionable when the disclosure or use continued to occur after the effective date.” *God’s Little Gift, Inc. v. Airgas, Inc.*, No. 317CV00004FDWDSC, 2017 U.S. Dist. LEXIS 162701, 2017 WL 4366751, at *2 (W.D.N.C. Oct. 2, 2017).

In the 08 case, Plaintiff alleges that Rutstein’s unauthorized access to its Transformative Database through MBM’s VAM DB account constituted misappropriation. (P.P. 08 DE 204 at 32-34). It is undisputed that Defendants’ access through MBM’s VAM DB account was terminated in April of 2015. (Tr. 42 DE 195 at 45:2-21; DE 197 at 69:12-21). However, Plaintiff alleges that Defendants continued to use the acquired information after May 11, 2016. Plaintiff can prevail on its DTSA claim in the 08 case only if it can prove this continuing use. *See Airgas*, 2017 U.S. Dist. LEXIS 162701, 2017 WL 4366751 at *2.

2. Merits of DTSA and FUTSA Claims

“To prevail on [its] claim for misappropriation of trade secrets, Plaintiff[] must demonstrate that (1) Plaintiff[] possessed a trade secret; and (2) Plaintiff[‘s] trade secret information was misappropriated, either by one who knew or had reason to know that the secret was improperly obtained or by one who used improper means to obtain it.” *Heralds of Gospel Found., Inc. v. Varela*,

Appendix D

No. 17-22281-CIV, 2017 U.S. Dist. LEXIS 98513, 2017 WL 3868421, at *4 (S.D. Fla. June 23, 2017) (quotation omitted) (evaluating misappropriation claims brought under DTSA and FUTSA).

Trade Secret

“The DTSA²⁹ and FUTSA³⁰ similarly define[] a ‘trade secret’ as (1) any type of information, (2) that derives economic value from being secret, and (3) that is kept secret.” *Id.* “Information that is generally known or readily accessible to third parties cannot qualify for

29. *See* 18 U.S.C. § 1839(3) (“‘trade secret’ means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if – (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information”).

30. *See* Fla. Stat. § 688.002(4) (“‘Trade secret’ means information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”).

Appendix D

trade secret protection” *Primo Broodstock, Inc. v. Am. Mariculture, Inc.*, No. 2:17-CV-9-FTM-29CM, 2017 U.S. Dist. LEXIS 64886, 2017 WL 1502714, at *11 (M.D. Fla. Apr. 27, 2017) (quoting *Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998)).

Plaintiff asserts that its Transformative Database constitutes a trade secret. Both the DTSA and FUTSA provide that compilations may constitute trade secrets. *See* 18 U.S.C. § 1839(3) (“‘trade secret’ means all forms and types of . . . information, including . . . compilations”); Fla. Stat. § 688.002(4) (“‘Trade secret’ means information, including a . . . compilation”). Although the rate tables from which Barney pulls the information that he inputs into the Transformative Database are publicly attainable, Barney uses his decades of experience in the industry to obtain the rate tables in advance of their public release, distill the information, and develop the formula for how that information is used to calculate premiums. (Tr. 42 DE 195 at 19:5-22, 20:12-15, 22:9-23:4, 23:11-24:3). And while Defendants made much of the fact that the rate tables are publicly available, Defendants presented no evidence of their ability to replicate Plaintiff’s Transformative Database using only the rate tables. Indeed, the Transformative Database cannot be replicated using only the publicly-available rate tables as the distillation method and the calculation formula are not known to anyone other than Barney and Bruner. (Tr. 42 DE 192 at 34:3-4; DE 195 at 21:21-22). Moreover, Plaintiff maintains the secrecy of the Transformative Database through various security features, including encryption of the data. (Tr. 42 DE 192 at 7:7-21; DE 195 at 23:5-8); (S.F. 08 DE 177

Appendix D

at ¶ 12). Plaintiff's Transformative Database constitutes a trade secret. *See Unistar Corp. v. Child*, 415 So. 2d 733, 734 (Fla. Dist. Ct. App. 1982) (customer lists were trade secrets where they were a distillation of a larger list that “reflect[ed] considerable effort, knowledge, time, and expense on the part of the plaintiff); *Compass iTech, LLC v. eVestment All., LLC*, No. 9:14-CV-81241-KAM, 2017 U.S. Dist. LEXIS 128960, 2017 WL 5153210, at *4 (S.D. Fla. Aug. 11, 2017) (rejecting assertion by allegedly misappropriating party that database was not a trade secret because it “could have compiled the data from public sources” where there was insufficient evidence of its ability to do so; noting that allegedly misappropriating party could not “show that it had any capability to compile this vast amount of data on its own”).

However, in the 42 case Plaintiff asserts misappropriation based on the 871,055 “accesses” to the www.term4sale.com website³¹ from September 1 to September 6 of 2016. (P.P. 08 DE 204 at 34). Although not entirely clear, it appears that Plaintiff seeks to assert misappropriation based on the acquisition of term life insurance quotes via the Get Commands. Plaintiff acknowledges that any individual can visit www.term4sale.com to obtain a quote and that, prior to September 7, 2016, there was no restriction on how an individual could use a quote obtained from www.term4sale.com. (S.F. 08 DE 177 at ¶ 5, 53); (Tr. 42 DE 192 at 4:18-20, 32:16-33:5). Likewise, any member of the public can visit the website

31. As previously noted, *supra* note 15, it is not clear whether Get Commands spoke to the server serving wwwv.term4sale.com or the website itself.

Appendix D

of a Compulife customer to obtain a quote and there is no restriction on how an individual uses such a quote. (Tr. 42 DE 192 at 40:22-41:6). These quotes do not constitute trade secrets. *See Primo*, 2017 U.S. Dist. LEXIS 64886, 2017 WL 1502714 at *11 (“Information that is generally known or readily accessible to third parties cannot qualify for trade secret protection.”). Thus, Plaintiff’s FUTSA and DTSA claims in the 42 case, alleging misappropriation of these quotes, necessarily fail. *See Heralds*, 2017 U.S. Dist. LEXIS 98513, 2017 WL 3868421 at *4 (to prevail on claim for misappropriation of trade secrets plaintiff must demonstrate both that plaintiff possessed a trade secret and that plaintiff’s trade secret was misappropriated). *Cf. Physicians Interactive v. Lathian Sys.*, No. CA-03-1193-A, 2003 U.S. Dist. LEXIS 22868, at *25 (E.D. Va. Dec. 5, 2003) (stating that there was “no doubt that the use of a computer software robot to hack into a computer system and to take or copy proprietary information is an improper means to obtain a trade secret” where the information obtained was not available to the public).

Misappropriation

“Liability under either [the DTSA or FUTSA] requires an act of misappropriation.” *M.C. Dean*, 199 F. Supp. 3d at 1353. Both the DTSA and FUTSA contemplate three possible theories of misappropriation: (1) acquisition; (2) disclosure; (3) or use. *See Yager*, 2017 U.S. Dist. LEXIS 169241, 2017 WL 4574487 at *3 (“The DTSA provides a remedy for the owner of a trade secret that is ‘misappropriated.’ ‘Misappropriation’ is defined to mean either ‘acquisition of a trade secret . . .’ or

Appendix D

‘disclosure or use of a trade secret. . . .’) (citing 18 U.S.C. § 1839(5)); *Equitrac Corp. v. Delaney*, No. 09-60629-CIV, 2009 U.S. Dist. LEXIS 139192, 2009 WL 10667046, at *7 (S.D. Fla. Aug. 31, 2009) (stating, in evaluating FUTSA claim, that “[m]isappropriation can be broken down into misappropriation by improper acquisition or misappropriation by unauthorized disclosure or use”) (quotation omitted). Plaintiff alleges misappropriation through both use and acquisition of its Transformative Database.³²

Use

Plaintiff alleges that Defendants used its Transformative Database without consent although Defendants knew or had reason to know that their knowledge of the Transformative Database was either – (1) “acquired under circumstances giving rise to a duty to” or (2) “derived from a person who owed a duty to” – maintain the secrecy of the trade secret or limit the use of the trade secret. (P.S.P. 08 DE 222 at 10).³³ See 18 U.S.C. § 1839(5)(B)(ii)(II) and (III) (“(5) the term ‘misappropriation’ means – . . . (B) disclosure or use of a trade secret of another without express or implied consent by a person who – . . . (ii) at the time of disclosure or use,

32. Although Plaintiff specified its theories of liability for only its FUSTA claims, this Court assumes that Plaintiff asserts liability under the same theories for its DTSA claims.

33. Plaintiff’s Supplemental Proposed Findings of Fact and Conclusions of Law are cited as P.S.P followed by a citation to its location on the docket. The Court refers to the page numbers found at the top of each page in the Court’s header.

Appendix D

knew or had reason to know that the knowledge of the trade secret was – . . . (II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret”); Fla. Stat. § 688.002(2)(b)2.b and c (“Misappropriation’ means: . . . (b) Disclosure or use of a trade secret of another without express or implied consent by a person who: . . . 2. At the time of disclosure or use, knew or had reason to know that her or his knowledge of the trade secret was: . . . b. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or c. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use”).

Plaintiff asserts that “the circumstances of Defendants’ acquisition of Compulife’s database gave rise to a duty in [Plaintiff’s] licensing agreements with McSweeney to maintain the secrecy of the [Transformative Database].” This assertion combines the alternately alleged bases of use of a trade secret acquired under circumstances giving rise to a duty, pursuant to 18 U.S.C. § 1839(5)(B)(ii)(II) and Fla. Stat. § 688.002(2)(b)2.b, and use of a trade secret that was derived from or through a person who owed such a duty, pursuant to 18 U.S.C. § 1839(5)(B)(ii)(III) and Fla. Stat. § 688.002(2)(b)2.c. Plaintiff does not specify on whom the duty was allegedly imposed. However, Plaintiff identifies no source of any such duty on Defendants. *Cf. All Leisure Holidays Ltd. v. Novello*, No. 12-62328-CIV, 2012 U.S. Dist. LEXIS 168774, 2012 WL 5932364, at *5

Appendix D

(S.D. Fla. Nov. 27, 2012) (noting, in evaluating trade secret misappropriation claim, that “the fact that *an employee* did not sign a non-disclosure or confidentiality agreement is not dispositive” because “[t]he law will import into every contract of employment a prohibition against the use of a trade secret by the employee for his own benefit, to the detriment of his employer, if the secret was acquired by the employee in the course of his employment”) (emphasis added) (quotation omitted); *Advantor Sys. Corp. v. DRS Tech. Servs., Inc.*, 678 F. App’x 839, 856-59 (11th Cir. 2017) (evaluating language in applicable defense regulations to determine whether non-party, which released allegedly trade secret manuals to defendant, owed plaintiff a duty to keep the manuals secret or limit their use; determining that the inquiry was “intensely factual, technical, and legal in nature” and remanding to district court to address the issue in the first instance; also evaluating whether former employee of plaintiff owed plaintiff the same duty regarding emails, finding that former employee, whose employment agreement contained a confidentiality provision, owed such a duty to plaintiff). As for any duty allegedly imposed on McSweeney pursuant to his licensing agreements with Compulife, Plaintiff fails to identify these licensing agreements or the language within the agreements that does so. Plaintiffs point to Plaintiff’s Exhibit 537, which is a blank “Internet Engine License Agreement” dated July 31, 2015. (P.E. 537, filed at 08 D.E. 195-18). However, Plaintiff makes no effort to establish that McSweeney was subject to this agreement.³⁴ Plaintiff

34. During his testimony, McSweeney acknowledged that he agreed to “Compulife’s licensing agreement” when he became a customer of Compulife. (Tr. 42 DE 194 at 5:6-10) It is not

Appendix D

has failed to prove the existence of the duty critical to its claims of trade secret misappropriation through use pursuant to 18 U.S.C. § 1839(5)(B)(ii)(II) and (III) and Fla. Stat. § 688.002(2)(b)2.b and c. Because Plaintiff was required to prove use occurring after May 11, 2016 in order to prevail on its DTSA claim in the 08 case, this claim fails.

The Court further notes that the evidence Plaintiff offered to prove continuing use after the DTSA's effective date falls short of doing so. In the Evidentiary Hearing held on January 24, 2018, Plaintiff introduced five exhibits. One of those exhibits, Plaintiff's Exhibit 288, was a printout of life insurance quotes from the www.term4sale.com website from June 11, 2015. (P.E. 288, filed at 08 DE 218-2). The other four exhibits were printouts of life insurance quotes from the www.naaip.org website from June 19, 2015, (P.E. 291 and 292, filed at 08 DE 218-3 and -4), DE 218-5), and June 6, 2016, (P.E. 1S, filed at 08 DE 218-1). When presented with Plaintiff's Exhibits 291,

clear when McSweeney (on behalf of himself or MBM) became a customer and agreed to any licensing agreement(s). However, it appears to have been well before 2015 and, in any case, before July of 2015. (Tr. 42 DE 194 at 17:14-18:20) (discussing email from McSweeney to Barney, dated April 10, 2015, in which McSweeney discusses Rutstein's access to MBM's Compulife Website Quoter). Although Plaintiff introduced 2010 versions of its other two license agreements (the standard and personal use agreements) and introduced testimony regarding the similarity between the earlier and current versions of those agreements, Plaintiff did not introduce an earlier version of the internet engine license agreement, which Kuhn stated "was something different" from the standard license agreement. (Tr. 42 DE 193 at 45:9-48:16).

Appendix D

292, and 309, Barney compared each of them to Plaintiff's Exhibit 288, noting that the Company Names, Product Names, and Health Categories in the two exhibits were the same. (H-Tr. 08 DE 221 at 14:21-17:24).

When presented with the only exhibit dated after May 11, 2016, Plaintiff's Exhibit 1S, Barney testified only that it "show[ed] that [Defendants] were continuing to use information taken from my software." (H-Tr. 08 DE 221 at 26:10-12). Barney did not provide the basis for his conclusion. The Court infers that Barney was again referring to the considerable similarities³⁵ between the Company Names, Product Names, and Health Categories in Exhibits 288 and 1S. However, Barney acknowledged that these Company Names, Product Names, and Health Categories are all available on www.term4sale.com, which is a public website. (H-Tr. 08 DE 221 at 27:15-18). Moreover, a comparison of the quotes in Exhibit 288 to those in Exhibit 1S reveals substantial differences in both the annual and monthly quotes. For example, while Exhibit 288 states that the United of Omaha Life

35. There are some differences between the two quotes as it relates to these three categories. Despite the fact that the www.term4sale.com example (Plaintiff's Exhibit 288) contains fifty quotes in comparison to the twenty-eight quotes included in the www.naaip.org example (Plaintiff's Exhibit 1S) two of the companies listed in Exhibit 1S do not appear at all in Exhibit 288 – Security Mutual Life Insurance Co of NY and Motorists Life Insurance Company. There are additionally a few minor differences in the product names. For example, while the product name for American National Insurance Company in Exhibit 288 is "ANICO Signature Term 20," the product name for the same company in Exhibit 1S is "Signature Term 20."

Appendix D

Insurance Company's "Term Life Answers 20" product for the "Preferred Plus Non-Tobacco" category would be \$477.50 annually and \$41.78 monthly, Exhibit 1S quotes the same policy at \$617 annually and \$54 monthly. And although Plaintiff's Supplemental Findings of Fact and Conclusions of Law assert that Barney testified to seeing Plaintiff's watermarks in the quotes from www.naaip.org, this was not the case. (P.S.P. 08 DE 222 at 2-3). Barney did not mention the watermark feature and a review of all five exhibits shows an absence of the watermark feature.³⁶ Exhibit 1S and the testimony presented in relation fail to establish continuing use of any information acquired through MBM's VAM DB account. *See also* (Tr. 42 DE 195 at 57:14-25) (Barney, testifying that about two or three weeks after the middle of May (of 2015) Barney "saw [his] stuff showing up on their website again," but was and remains "bamboozled" as to where the information was coming from).

Acquisition

Liability for acquisition occurs when the acquirer "knows or has reason to know that the trade secret was acquired by improper means." *See* 18 U.S.C. § 1839(5)(A) ("the term 'misappropriation' means – (A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means"); Fla. Stat. § 688.002(2)(a) ("'Misappropriation' means: (a) Acquisition of a trade secret of another by a

36. *Compare* (P.E. 1S, 288, 291, 292 and 309, filed at 08 DE 218-1, -2, -3, -4, and -5) (lists of quotes without watermark feature) *with* (P.E. 550 at 13) (example of watermark in quote).

Appendix D

person who knows or has reason to know that the trade secret was acquired by improper means”). Both the DTSA and FUTSA define improper means to include “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” 18 U.S.C. § 1839(6)(A); Fla. Stat. § 688.002(1). However, the DTSA excludes “reverse engineering, independent derivation, or any other lawful means of acquisition.” 18 U.S.C. § 1839(6)(B).

Plaintiff asserts that David “obtained access” to the Transformative Database “through an integration with Brian McSweeney’s VAM DB account” and that “Defendants used this access to put a quote engine on [www.naaip.org.” (P.S.P. 08 DE 222 at 9). It appears that Plaintiff equates access with acquisition. However, Plaintiff provides no legal basis for doing so. *See DynCorp Int’l v. AAR Airlift Grp., Inc.*, 664 F. App’x 844, 848-49 (11th Cir. 2016) (finding that district court did not err in concluding that complaint, which alleged facts sufficient to show that defendant had “obtained” alleged trade secrets, did not sufficiently allege that defendant had misappropriated that information through disclosure or use, further concluding that complaint failed to allege facts that constituted acquisition of allegedly trade secret information). Moreover, it is unclear what data source www.naaip.org was linked to. Plaintiff’s allegation of access to the Transformative Database – stored on one of Plaintiff’s servers – is at odds with the testimony of Barney that www.naaip.org was communicating with

Appendix D

the VAM DB database³⁷ and not a Compulife server. (Tr. 42 DE 196 at 25:8-19). *See also* (Tr. 42 DE 193 at 81:2-8) (Kuhn, when asked whether www.naaip.org users spoke to the trade secret data compilation on Compulife’s server, stating that www.naaip.org users never called Compulife’s server). This lack of clarity is likely due to the fact that, as Plaintiff’s counsel candidly acknowledged, Plaintiff “still [does not] know exactly how the misappropriation through acquisition occurred. . . .” (H-Tr. 08 DE 221 at 23:23-25). Plaintiff has failed to meet its burden of proving that Defendants acquired its trade secret, the Transformative Database, through improper means. *Cf. VAS Aero Servs., LLC v. Arroyo*, 860 F. Supp. 2d 1349, 1355-56, 1360-62 (S.D. Fla. 2012) (plaintiff established substantial likelihood of success on the merits of misappropriation through acquisition claim where computer forensic investigator’s investigation of defendant’s work-issued laptop and cell phone showed that defendant had copied multiple files containing plaintiff’s confidential information onto a USB device and sent emails containing plaintiff’s confidential information to email addresses not affiliated with plaintiff-company).

37. As an Internet Engine customer, VAM DB received a database from Compulife that VAM DB installed on its server. (Tr. 42 DE 192 at 50:21-51:9) (discussing P.E. 550 at 5, filed at 08 DE 195-27). However, it is unclear how this database compares to the Transformative Database on Plaintiff’s server. Moreover, it is unclear what steps are taken to maintain the secrecy of this data. *See* (Tr. 42 DE 196 at 27:23-28:7) (Barney, testifying that licensees of Internet Engine can accept data feeds from other providers and that users of VAM DB “hypothetically” have access to data from both Compulife and other providers).

Appendix D

**D. UNFAIR COMPETITION IN VIOLATION
OF THE LANHAM ACT AND
FLORIDA COMMON LAW**

(Lanham Act: Count III in 08 case; Count IV in 42 case)
(Florida Common Law: Count VII in 08 case;
Count VII in 42 case)

Plaintiff claims that Defendants violated the Section 1125(a) of the Lanham Act and Florida's common law prohibition on unfair competition in both the 08 and 42 cases. Plaintiff presents the same argument in support of all of its unfair competition claims. (P.P. 08 DE 204 at 37-39).

1. Lanham Act Unfair Competition

“Section 1125(a) [] creates two distinct bases of liability: false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B).” *Black Diamond Land Mgmt. LLC v. Twin Pines Coal Inc.*, 707 F. App'x 576, 579 (11th Cir. 2017). Neither of Complaint specifies which type of Lanham Act claim Plaintiff purports to bring. (08 DE 8 at 9-10); (42 DE 24 at 17). However, the sole legal citation Plaintiff provides in support of its Lanham Act claim reveals that Plaintiff asserts a false advertising claim. (P.P. 08 DE 204 at 37-38).

“To succeed on a false advertising claim under [] the Lanham Act, a plaintiff must establish that (1) the advertisements of the opposing party were false or misleading; (2) the advertisements deceived, or had the capacity to deceive, consumers; (3) the deception

Appendix D

had a material effect on purchasing decisions; (4) the misrepresented product or service affects interstate commerce; and (5) the movant has been – or is likely to be – injured as a result of the false advertising.” *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1260 (11th Cir. 2004). “The first element of the Lanham Act test requires that the plaintiff show that the statements at issue were either (1) commercial claims that are literally false as a factual matter or (2) claims that may be literally true or ambiguous but which implicitly convey a false impression, are misleading in context, or likely to deceive consumers.” *Id.* at 1261 (quotation omitted). “The classification of an advertisement as literally false or true but misleading affects [plaintiff’s] burden with respect to the element of consumer deception.” *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1318-19 (11th Cir. 2010). “If the court deems an advertisement to be literally false, then the movant is not required to present evidence of consumer deception.” *Id.* at 1319. “If, on the other hand, the court deems the advertisement to be true but misleading, then the movant is required to present evidence of deception.” *Id.*

Plaintiff does not explicitly identify which advertisements form the basis of its unfair competition claims. (P.P. 08 DE 204 at 37-38). *See, e.g., Schütz Container Sys., Inc. v. Mauser Corp.*, No. 1:09-CV-3609-RWS, 2012 U.S. Dist. LEXIS 44012, 2012 WL 1073153, at *6 (N.D. Ga. Mar. 28, 2012) (party bringing Lanham Act false advertising claim identified five statements it asserted were actionable under the Lanham Act). However, in combing through the record citations Plaintiff provides in support of its unfair competition claims, this Court found

Appendix D

discussion of one statement made in an email from David Gordon to about 400 Compulife customers. *See* (P.P. 08 DE 204 at 38-39) (citing to Tr. 42 DE 195 at 77:5-11). Mr. Barney testified that in this email David Gordon warned these customers to beware of a security flaw, telling them that their back office³⁸ was not password protected. (Tr. 42 DE 195 at 77:5-11) (discussing P.E. 273, filed at 08 DE 194-20). The email also included a link to the www.naaip.org website and indicated that the email recipient could go to that website and get term life quote engines and websites for free. (Tr. 42 DE 195 at 77:5-11).³⁹

These statements were not literally false. Barney acknowledged that the lack of password protection on the back office “was a weakness,” (Tr. 42 DE 195 at 79:7-12), which he quickly fixed after this email was sent, (Tr. 42 DE 195 at 80:1-10). And there is no dispute that visitors to the www.naaip.org and beyondquotes.com websites could obtain free websites with access to a life term quote engine. Thus, the success of Plaintiff’s unfair competition claim depends on it being able to show the statements are literally true but misleading. “A plaintiff attempting to establish . . . that an advertisement is literally true

38. An agent’s back office, often called a control panel, is a place the agent can go to customize their settings. (Tr. 42 DE 195 at 79:8-17).

39. Although Plaintiff cited this portion of the transcript for the proposition that “Defendants have compared NAAIP and BeyondQuotes.com to Compulife, called Compulife inferior, and attempted to get Compulife users to switch to NAAIP and BeyondQuotes.com,” the testimony reveals no comparisons or allegations of inferiority.

Appendix D

but misleading, must present evidence of deception in the form of consumer surveys, market research, expert testimony, or other evidence. Consumer survey research often is a key part of a Lanham Act claim alleging that an advertisement is misleading or deceptive.” *See Hickson*, 357 F.3d at 1261 (quotation and citation omitted). Plaintiff does not point to any evidence of deception and “the Court is not under any obligation to search the record to find evidence supporting Plaintiff’s position.” *Keaton v. Cobb Cty.*, 545 F. Supp. 2d 1275, 1309 (N.D. Ga. 2008), *aff’d* No. 08-11220, 2009 U.S. App. LEXIS 1962, 2009 WL 212097 (11th Cir. Jan. 30, 2009). Thus, even assuming that the email in question constitutes “commercial advertising or promotion,”⁴⁰ Plaintiff has failed to prove its Lanham Act false advertising claims.

The Court reaches this conclusion without reaching the remaining elements of a Lanham Act false advertising claim. However, the Court notes that Plaintiff likewise failed to point to any evidence showing that the alleged deception “had a material effect on purchasing decisions.” *See Hickson*, 357 F.3d at 1260. Plaintiff must establish materiality regardless of whether the advertisement is literally false or instead literally true but misleading. *See Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts*,

40. *See Schütz Container Sys.*, 2012 U.S. Dist. LEXIS 44012, 2012 WL 1073153 at *7 n.6 (“[A] claimant has the threshold burden of showing that the allegedly false or misleading statements were made in ‘commercial advertising or promotion.’”) (quoting 15 U.S.C. § 1125(a)(1)(B)); *Suntree Techs., Inc. v. Ecosense Int’l, Inc.*, 693 F.3d 1338, 1349 (11th Cir. 2012) (detailing test for determining whether something is “commercial advertising or promotion”).

Appendix D

Inc., 299 F.3d 1242, 1250-51 (11th Cir. 2002). “In order to establish materiality, the plaintiff must demonstrate that the defendant’s deception is likely to influence the purchasing decision.” *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1319 (11th Cir. 2010) (quotation omitted). “The materiality requirement is based on the premise that not all deceptions affect consumer decisions.” *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1226 (11th Cir. 2008) (quotation omitted). Even assuming that the statements in the emails from David Gordon were false or misleading, Plaintiff points to no evidence regarding the effect these statements had on purchasing decisions.

2. Florida Common Law Unfair Competition

For the same reasons Plaintiff’s Lanham Act claims fail, its Florida Common Law Unfair Competition claims also fail. See *Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes & of Malta v. Florida Priory of Knights Hospitallers of Sovereign Order of Saint John of Jerusalem, Knights of Malta, Ecumenical Order*, 702 F.3d 1279, 1296 (11th Cir. 2012) (“The success of [plaintiff’s] state unfair competition . . . claim[] is tied to the federal Lanham Act claims for infringement and false advertising.”).

E. FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

(Count VIII in 08 case)

To the extent that Plaintiff’s Florida Deceptive and Unfair Trade Practice (“FDUTPA”) claim mirrors its

Appendix D

failed Lanham Act claims, those claims fail. *See Sovereign Military*, 702 F.3d at 1296 (“The success of [plaintiff’s] . . . FDUTPA claims is tied to the federal Lanham Act claims for infringement and false advertising.”); *Crystal Entm’t & Filmworks, Inc. v. Jurado*, 643 F.3d 1313, 1323 (11th Cir.2011) (“The legal standards we apply to [the FDUPA] claim are the same as those we have applied under section 43(a) of the Lanham Act.”) (quotation omitted). Indeed, in Plaintiff’s proposed findings of fact and conclusions of law, it asks the Court to find a violation of FDUPA “for the same reasons the Court determined that the defendant’s acts constituted unfair competition and false advertising.” (P.P. 08 DE 204 at 40).

However, Plaintiff appears to assert three additional bases for its FDUTPA claim that are not premised on false advertising: (1) “offering a free competing product containing Compulife’s trade secrets”; (2) the scraping attack on www.term4sale.com; and (3) “offering life insurance quotes for all states using only the data for New York or Florida,” which is “unquestionably deceptive to the public.” (P.P. 08 DE 204 at 40). To the extent Plaintiff seeks to prove a FDUTPA claim based on misappropriation of Plaintiff’s trade secrets, this claim is preempted by Plaintiff’s FUTSA claim. *See Supercase Enter. Co. v. Marware, Inc.*, No. 14-CV-61158-CIV, 2015 U.S. Dist. LEXIS 192156, 2015 WL 11622424, at *8 (S.D. Fla. Oct. 26, 2015) (“[FUTSA] displaces all ‘conflicting tort, restitutory, and other [Florida law] providing civil remedies for misappropriation of a trade secret.’”) (quoting Fla. Stat. § 688.008(1)). As for the scraping attack – which refers to the use of Get Commands – that conduct is at issue only

Appendix D

in the 42 case; Plaintiff did not bring a FDUTPA claim in that case. As to Plaintiff's last basis, even assuming that Plaintiff has proven deception of customers, it fails to prove (or even allege) the latter two elements of injury and causation. *See NACM Tampa, Inc. v. Sunray Notices, Inc.*, No. 8:15-CV-1776-T-33TGW, 2017 U.S. Dist. LEXIS 25770, 2017 WL 2209970, at *7 (M.D. Fla. Feb. 8, 2017), *report and recommendation adopted sub nom. NACM Tampa, Inc. v. Mensh*, No. 8:15-CV-1776-T-33TGW, 2017 U.S. Dist. LEXIS 25100, 2017 WL 711243 (M.D. Fla. Feb. 23, 2017) ("In order to prove a FDUTPA violation, the plaintiffs must establish: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages."); *SMS Audio, LLC v. Belson*, No. 9:16-CV-81308, 2017 U.S. Dist. LEXIS 218543, 2017 WL 1533941, at *4 (S.D. Fla. Mar. 9, 2017) (Plaintiff "must prove that *there was an injury or detriment to consumers* in order to satisfy all of the elements of a FDUTPA claim.") (emphasis in original) (quoting *Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cty., Inc.*, 169 So. 3d 164, 169 (Fla. Dist. Ct. App. 2015)). Plaintiff offers no evidence of injury or detriment to customers.

**F. FLORIDA COMPUTER ABUSE AND
DATA RECOVERY ACT**

(Count VI in 42 case)

The Computer Abuse and Data Recovery Act ("CADRA") imposes civil liability on any "person who knowingly and with intent to cause harm or loss: (1) Obtains information from a protected computer without authorization and, as a result, causes harm or loss; (2)

Appendix D

Causes the transmission of a program, code, or command to a protected computer without authorization and, as a result of the transmission, causes harm or loss; or (3) Traffics in any technological access barrier through which access to a protected computer may be obtained without authorization.” Fla. Stat. § 668.803(1)-(3). Plaintiff does not specify under which of these theories it seeks to establish liability. However, while Plaintiff does not mention any transmission or trafficking in technological access barriers, Plaintiff does refer to the information obtained via the Get Commands in September of 2016. (P.P. 08 DE 204 at 37). Thus, the Court proceeds under the assumption that Plaintiff seeks to impose liability pursuant to Fla. Stat. § 668.803(1). A “protected computer” is “a computer that is used in connection with the operation of a business and stores information, programs, or code in connection with the operation of the business in which the stored information, programs, or code can be accessed only by employing a technological access barrier.” Fla. Stat. § 668.802(6). A “[t]echnological access barrier” is “a password, security code, token, key fob, access device, or similar measure.” Fla. Stat. § 668.802(7).

Plaintiff asserts that the September 2016 use of Get Commands constitutes a CADRA violation because these commands obtained information through an unauthorized access to Plaintiff’s Transformative Database. However, Plaintiff fails to address several key issues with this assertion. First, Plaintiff fails to address how the Defendants are subject to CADRA liability for the use of the Get Commands when there is no evidence that any Defendant sent the Get Commands at issue. Instead,

Appendix D

Plaintiff asserts, (P.P. 08 DE 204 at 30), and the evidence points to the fact that it was a woman named Natal who sent the Get Commands. Plaintiff asserts that Defendants “paid for, received, and used [] the information obtained” from the Get Commands and that “these acts are sufficient to provide a violation of CADRA by the Defendants.” However, Plaintiff provides no legal support for its conclusion that these allegations, even if true, subject the four Defendants in this case to CADRA liability and it is not apparent from the face of the CADRA statute. *See* Fla. Stat. §§ 668.803(1) (imposing liability on “[a] person who knowingly and with intent to cause harm or loss [] [o]btains information from a protected computer without authorization and, as a result, causes harm or loss”); 668.802(9) (defining “without authorization” to mean “access to a protected computer by a person who . . .”) (emphasis added).

Second, the evidence in this case does not show that the Get Commands accessed the Transformative Database. Indeed, it is not clear to this Court what exactly the Get Commands interfaced with, but it appears to have been the server that interfaces with www.term4sale.com. *See, e.g.*, (Tr. 42 DE 192 at 16:2-7; 17:5-17) (Bruner, testifying that a Get Command is a request to a server and discussing requests made to term4sale.com server that are logged in Plaintiff’s Exhibit 200); (Tr. 42 DE 193 at 7:9-8:3) (Miracle, discussing hits on server); (Tr. 42 DE 193 at 9:19-21) (Miracle, referring to her analysis of the “attack” on the Compulife website); (Tr. 42 DE 193 at 24:15-18) (Miracle, stating that a get command has “nothing to do with the website; it has to do with the host”); (P.P. 08 DE 204 at 37)

Appendix D

(referring to “attack” on www.term4sale.com website in asserting CADRA liability). It is further unclear whether the server that speaks to the www.term4sale.com website is the server on which the Transformative Database is stored.

Third, Plaintiff makes no effort to establish that the computer that responded to the Get Commands was accessible only by employing a technological access barrier. In fact, any person can obtain a quote by visiting www.term4sale.com. Indeed, the log of hits on the server included both the Get Commands and the Post requests coming from www.term4sale.com, which indicates that the accesses by the Get Commands were no different than the access available to any member of the general public. (Tr. 42 DE 192 at 17:5-17; 21:11-20); (P.E. 200, filed at 08 DE 194-5 through -8). Plaintiff has failed to prove that Defendants violated CADRA.

G. PERMANENT INJUNCTIVE RELIEF

Plaintiff states only that “Compulife is entitled to entry of a permanent injunction against defendants.” (P.P. 08 DE 204 at 50) Plaintiff has not met its burden of proving entitlement to permanent injunctive relief. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 1839, 164 L. Ed. 2d 641 (2006) (“According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary

Appendix D

damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”).

III. FINAL CONCLUSIONS

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED AND ADJUDGED** that Final Judgment shall enter in favor of Defendants David Rutstein and Binyomin Rutstein as to all Counts in the 08 case and in favor of Defendants Moses Newman, Aaron Levy, David Rutstein, and Binyomin Rutstein as to all Counts in the 42 case. In accordance with Federal Rule of Civil Procedure 58, a separate Final Judgment will be entered consistent with the Court’s Findings of Fact and Conclusions of Law.

DONE AND ORDERED in Chambers on this 12th day of March, 2018, at West Palm Beach in the Southern District of Florida.

/s/ James M. Hopkins
JAMES M. HOPKINS
UNITED STATES MAGISTRATE JUDGE

**APPENDIX E —
RELEVANT STATUTORY PROVISIONS**

18 USCS § 1836

Current through Public Law 118-106,
approved October 4, 2024.

***United States Code Service > TITLE 18. CRIMES
AND CRIMINAL PROCEDURE (§§ 1–6005) >
Part I. Crimes (Chs. 1–123) > CHAPTER 90.
Protection of trade secrets (§§ 1831–1839)***

§ 1836. Civil proceedings

(a) The Attorney General may, in a civil action, obtain appropriate injunctive relief against any violation of this chapter [18 USCS §§ 1831 et seq.].

(b) Private civil actions.

(1) In general. An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.

(2) Civil seizure.

(A) In general.

(i) Application. Based on an affidavit or verified complaint satisfying the requirements of this paragraph, the court may, upon ex

Appendix E

parte application but only in extraordinary circumstances, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.

(ii) Requirements for issuing order. The court may not grant an application under clause (i) unless the court finds that it clearly appears from specific facts that—

(I) an order issued pursuant to Rule 65 of the Federal Rules of Civil Procedure or another form of equitable relief would be inadequate to achieve the purpose of this paragraph because the party to which the order would be issued would evade, avoid, or otherwise not comply with such an order;

(II) an immediate and irreparable injury will occur if such seizure is not ordered;

(III) the harm to the applicant of denying the application outweighs the harm to the legitimate interests of the person against whom seizure would be ordered of granting the application and substantially outweighs the harm to any third parties who may be harmed by such seizure;

(IV) the applicant is likely to succeed in showing that—

215a

Appendix E

(aa) the information is a trade secret;
and

(bb) the person against whom seizure
would be ordered—

(AA) misappropriated the trade
secret of the applicant by improper
means; or

(BB) conspired to use improper
means to misappropriate the trade
secret of the applicant;

(V) the person against whom seizure would
be ordered has actual possession of—

(aa) the trade secret; and

(bb) any property to be seized;

(VI) the application describes with
reasonable particularity the matter to be
seized and, to the extent reasonable under
the circumstances, identifies the location
where the matter is to be seized;

(VII) the person against whom seizure
would be ordered, or persons acting in
concert with such person, would destroy,
move, hide, or otherwise make such matter
inaccessible to the court, if the applicant

Appendix E

were to proceed on notice to such person;
and

(VIII) the applicant has not publicized the requested seizure.

(B) Elements of order. If an order is issued under subparagraph (A), it shall—

(i) set forth findings of fact and conclusions of law required for the order;

(ii) provide for the narrowest seizure of property necessary to achieve the purpose of this paragraph and direct that the seizure be conducted in a manner that minimizes any interruption of the business operations of third parties and, to the extent possible, does not interrupt the legitimate business operations of the person accused of misappropriating the trade secret;

(iii)

(I) be accompanied by an order protecting the seized property from disclosure by prohibiting access by the applicant or the person against whom the order is directed, and prohibiting any copies, in whole or in part, of the seized property, to prevent undue damage to the party against whom the order has issued or others, until such

217a

Appendix E

parties have an opportunity to be heard in court; and

(II) provide that if access is granted by the court to the applicant or the person against whom the order is directed, the access shall be consistent with subparagraph (D);

(iv) provide guidance to the law enforcement officials executing the seizure that clearly delineates the scope of the authority of the officials, including—

(I) the hours during which the seizure may be executed; and

(II) whether force may be used to access locked areas;

(v) set a date for a hearing described in subparagraph (F) at the earliest possible time, and not later than 7 days after the order has issued, unless the party against whom the order is directed and others harmed by the order consent to another date for the hearing, except that a party against whom the order has issued or any person harmed by the order may move the court at any time to dissolve or modify the order after giving notice to the applicant who obtained the order; and

Appendix E

(vi) require the person obtaining the order to provide the security determined adequate by the court for the payment of the damages that any person may be entitled to recover as a result of a wrongful or excessive seizure or wrongful or excessive attempted seizure under this paragraph.

(C) Protection from publicity. The court shall take appropriate action to protect the person against whom an order under this paragraph is directed from publicity, by or at the behest of the person obtaining the order, about such order and any seizure under such order.

(D) Materials In custody of court.

(i) In general. Any materials seized under this paragraph shall be taken into the custody of the court. The court shall secure the seized material from physical and electronic access during the seizure and while in the custody of the court.

(ii) Storage medium. If the seized material includes a storage medium, or if the seized material is stored on a storage medium, the court shall prohibit the medium from being connected to a network or the Internet without the consent of both parties, until the hearing required under subparagraph (B)(v) and described in subparagraph (F).

Appendix E

(iii) Protection of confidentiality. The court shall take appropriate measures to protect the confidentiality of seized materials that are unrelated to the trade secret information ordered seized pursuant to this paragraph unless the person against whom the order is entered consents to disclosure of the material.

(iv) Appointment of special master. The court may appoint a special master to locate and isolate all misappropriated trade secret information and to facilitate the return of unrelated property and data to the person from whom the property was seized. The special master appointed by the court shall agree to be bound by a non-disclosure agreement approved by the court.

(E) Service of order. The court shall order that service of a copy of the order under this paragraph, and the submissions of the applicant to obtain the order, shall be made by a Federal law enforcement officer who, upon making service, shall carry out the seizure under the order. The court may allow State or local law enforcement officials to participate, but may not permit the applicant or any agent of the applicant to participate in the seizure. At the request of law enforcement officials, the court may allow a technical expert who is unaffiliated with the applicant and who is bound by a court-approved non-disclosure agreement to participate in

Appendix E

the seizure if the court determines that the participation of the expert will aid the efficient execution of and minimize the burden of the seizure.

(F) Seizure hearing.

(i) Date. A court that issues a seizure order shall hold a hearing on the date set by the court under subparagraph (B)(v).

(ii) Burden of proof. At a hearing held under this subparagraph, the party who obtained the order under subparagraph (A) shall have the burden to prove the facts supporting the findings of fact and conclusions of law necessary to support the order. If the party fails to meet that burden, the seizure order shall be dissolved or modified appropriately.

(iii) Dissolution or modification of order. A party against whom the order has been issued or any person harmed by the order may move the court at any time to dissolve or modify the order after giving notice to the party who obtained the order.

(iv) Discovery time limits. The court may make such orders modifying the time limits for discovery under the Federal Rules of Civil Procedure as may be necessary to prevent the frustration of the purposes of a hearing under this subparagraph.

Appendix E

(G) Action for damage caused by wrongful seizure. A person who suffers damage by reason of a wrongful or excessive seizure under this paragraph has a cause of action against the applicant for the order under which such seizure was made, and shall be entitled to the same relief as is provided under section 34(d)(11) of the Trademark Act of 1946 (15 U.S.C. 1116(d)(11)). The security posted with the court under subparagraph (B)(vi) shall not limit the recovery of third parties for damages.

(H) Motion for encryption. A party or a person who claims to have an interest in the subject matter seized may make a motion at any time, which may be heard *ex parte*, to encrypt any material seized or to be seized under this paragraph that is stored on a storage medium. The motion shall include, when possible, the desired encryption method.

(3) Remedies. In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may—

(A) grant an injunction—

(i) to prevent any actual or threatened misappropriation described in paragraph (1) on such terms as the court deems reasonable, provided the order does not—

Appendix E

(I) prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows; or

(II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business;

(ii) if determined appropriate by the court, requiring affirmative actions to be taken to protect the trade secret; and

(iii) in exceptional circumstances that render an injunction inequitable, that conditions future use of the trade secret upon payment of a reasonable royalty for no longer than the period of time for which such use could have been prohibited;

(B) award—

(i)

(I) damages for actual loss caused by the misappropriation of the trade secret; and

(II) damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss; or

Appendix E

(ii) in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret;

(C) if the trade secret is willfully and maliciously misappropriated, award exemplary damages in an amount not more than 2 times the amount of the damages awarded under subparagraph (B); and

(D) if a claim of the misappropriation is made in bad faith, which may be established by circumstantial evidence, a motion to terminate an injunction is made or opposed in bad faith, or the trade secret was willfully and maliciously misappropriated, award reasonable attorney's fees to the prevailing party.

(c) Jurisdiction. The district courts of the United States shall have original jurisdiction of civil actions brought under this section.

(d) Period of limitations. A civil action under subsection (b) may not be commenced later than 3 years after the date on which the misappropriation with respect to which the action would relate is discovered or by the exercise of reasonable diligence should have been discovered. For purposes of this subsection, a continuing misappropriation constitutes a single claim of misappropriation.

224a

Appendix E

18 USCS § 1839

Current through Public Law 118-106,
approved October 4, 2024.

***United States Code Service > TITLE 18. CRIMES
AND CRIMINAL PROCEDURE (§§ 1-6005) >
Part I. Crimes (Chs. 1-123) > CHAPTER 90.
Protection of trade secrets (§§ 1831-1839)***

§ 1839. Definitions

As used in this chapter [18 USCS §§ 1831 et seq.]—

(1) the term “foreign instrumentality” means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government;

(2) the term “foreign agent” means any officer, employee, proxy, servant, delegate, or representative of a foreign government;

(3) the term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or

Appendix E

intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information;

(4) the term “owner”, with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed;

(5) the term “misappropriation” means—

(A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) disclosure or use of a trade secret of another without express or implied consent by a person who—

(i) used improper means to acquire knowledge of the trade secret;

Appendix E

(ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—

(I) derived from or through a person who had used improper means to acquire the trade secret;

(II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(iii) before a material change of the position of the person, knew or had reason to know that—

(I) the trade secret was a trade secret; and

(II) knowledge of the trade secret had been acquired by accident or mistake;

(6) the term “improper means”—

(A) includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means; and

227a

Appendix E

(B) does not include reverse engineering, independent derivation, or any other lawful means of acquisition; and

(7) the term “Trademark Act of 1946” means the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes, approved July 5, 1946 (15 U.S.C. 1051 et seq.) (commonly referred to as the ‘Trademark Act of 1946’ or the ‘Lanham Act’”).