

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Nifty Technologies, Inc. v. Mango Technologies, Inc.

No. 24-CV-194 JLS (AHG) (S.D. Cal. July 1, 2025) · No. 24-CV-194 JLS (AHG) · Decided July 1, 2025

OPINION

Nifty Technologies, Inc. v. Mango Technologies, Inc.

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 NIFTY TECHNOLOGIES, INC., a New Case No.: 24-CV-194 JLS (AHG) York
corporation, 12 Plaintiff,

13 ORDER GRANTING IN PART AND
v. DENYING IN PART DEFENDANT’S

14

MOTION TO DISMISS

MANGO TECHNOLOGIES, INC., a

15 PLAINTIFF’S FIRST AMENDED

Delaware corporation, d/b/a CLICKUP,

COMPLAINT

16 Defendant. 17

(ECF No. 37) 18 19 Presently before the Court are Defendant Mango Technologies, Inc. d/b/a
ClickUp’s 20 (“Defendant” or “ClickUp”) Motion to Dismiss Plaintiff’s First Amended Complaint
21 (“Mot.,” ECF No. 37) and Memorandum of Points and Authorities in Support thereof 22
23 (“Mem.,” ECF No. 48). Plaintiff Nifty Technologies, Inc. (“Plaintiff” or “Nifty”) filed an
Opposition to the Motion (“Opp’n,” ECF No. 49), and ClickUp filed a Reply (“Reply,” 24 ECF
No. 50). Having carefully reviewed Nifty’s First Amended Complaint (“FAC,” ECF

25 No. 26), the Parties’ arguments, and the law, the Court GRANTS IN PART and DENIES

26 IN PART ClickUp’s Motion. 27 / / / 28 / / /

1 BACKGROUND

2 According to Nifty, project management software allows businesses “to facilitate 3 and optimize
the planning, execution, monitoring, and successful completion of projects.” 4 FAC ¶ 26. Since
2016, Nifty has been a leader in the project management software 5 industry, having “successfully
created a cutting-edge, all-in-one collaboration software that 6 unites the functionality of project
management apps with other experiences such as chat, 7 document collaboration, file storage and

other customer needs.” Id. ¶ 17. The following 8 year, Nifty alleges that ClickUp opted to enter the industry as well but soon ran into 9 difficulties “with performance and scalability.” Id. ¶¶ 18, 20. These difficulties, according 10 to Nifty, influenced ClickUp to seek a merger between the two companies. Id. ¶ 26. 11 The initial approach for the merger came about during the summer of 2021 when 12 ClickUp’s Head of Business, Tommy Wang, requested a demonstration of Nifty’s software 13 through a link on Nifty’s website. Id. ¶ 26. That demonstration led to an introductory call 14 between Nifty’s CEO, Shiv Kapoor, and ClickUp’s CEO, Zeb Evans. Id. ¶ 27. By Nifty’s 15 account, Evans expressed optimism during the call that, together, the two companies could 16 “upend the market.” Id. ¶ 27. So with that, ClickUp began courting Nifty as a potential 17 partner in a merger, id. ¶ 28, and Nifty’s leaders reciprocated the warm sentiments having 18 found themselves impressed with ClickUp’s overtures, id. ¶ 29. 19 Merger negotiations then began in the usual course. The Parties entered into a 20 non-disclosure agreement (“NDA”) on September 7, 2021, providing for a controlled 21 exchange of confidential material so ClickUp’s team could conduct due diligence. Id. ¶ 29. 22 About two weeks later, the Parties executed a Letter of Intent (“LOI”) whereby ClickUp 23 memorialized its non-binding, tentative understanding that it would acquire Nifty’s assets 24 for \$3 million in cash plus \$16 million in ClickUp stock. Id. ¶ 31. The LOI also contained 25 an exclusivity clause prohibiting Nifty from considering any other acquisition proposals 26 through December 31, 2021. Id.; see also FAC, Ex. D (“LOI Contract”) at 3, ECF

27 No. 26-4. Soon thereafter, the due diligence period, which consisted of both a technical 28 portion and financial portion, began. 1 From ClickUp’s side, the technical portion was led by Senior Vice President of 2 Engineering Shailesh Kumar. FAC ¶ 33. Kumar orchestrated a deep-dive technical call, 3 in which he requested a two-and-a-half-hour call allowing him to vet Nifty’s product 4 philosophy, code, and product architecture. Id. In a September 29, 2021 email, Kumar 5 specifically solicited the following information: (1) an architecture deep dive; (2) a high 6 level code walkthrough; (3) technologies that Nifty uses; (4) open source libraries that 7 Nifty uses; (5) a high level walkthrough of code structure and code quality; (6) an 8 operational walkthrough of Nifty’s continuous integration and continuous deployment 9 (“CI/CD”), or how Nifty releases code; (7) automation gates in place; (8) how Nifty Scales; 10 (9) and challenges Nifty has faced. Id. ¶ 34. Kumar also requested one-on-one 11 conversations with Nifty’s engineers. Id. 12 The deep-dive technical call took place on October 5, 2021. Id. ¶ 36. Nifty alleges 13 that it “provided the specific information requested by Kumar in his September 29, 2021 14 email,” and that such information constituted “very closely held trade secrets that give 15 Nifty an economic advantage over its competitors.” Id. Attached to Nifty’s FAC is an 16 Exhibit B, which purportedly discloses in detail the asserted trade secrets. See FAC, Ex. B, 17 ECF No. 34. On October 6, 2021—the day after the deep-dive technical call—Kumar 18 hosted the requested one-on-one interviews with Nifty’s engineers, but by Nifty’s 19 recollection, the interviews “lasted only a few minutes and seemed perfunctory” FAC 20 ¶ 40. 21 The financial portion of the due diligence on

ClickUp's side was initiated by Wang 22 and then handled by a financial analyst by the name of Tyler Heffernan. Id. ¶¶ 32, 35. 23 Wang urged Nifty to set up a data room, where Nifty allegedly shared with ClickUp: 24 (1) Nifty's historical and current financial statements, (2) annual revenue rate by customer, 25 (3) monthly revenue rate by customer, (4) sales registered by customer, (5) historical 26 trends of daily average users, (6) historical trends of monthly average users, (7) lists of paid 27 customers, (8) lists of free customers, (9) an organization chart, (10) lists of employees, 28 (11) valuations of Nifty, and (12) Nifty's success rate with converting free users to paying 1 customers. Id. ¶ 32. Nifty alleges that it shared this information, all of which constitutes 2 protectable trade secrets, with ClickUp in the data room. Id. ¶ 38. Nifty further alleges 3 that it "shared that its conversion rate was well above the industry standard" in a separate 4 phone call between unidentified affiliates of Nifty and ClickUp. Id. The customer data 5 information is also disclosed in Exhibit B. 6 Following the due diligence period in October 2021, ClickUp allegedly tendered "a 7 few half-hearted offers . . . but none made economic sense to Nifty's founders." Id. ¶ 40. 8 The negotiations eventually fizzled, but Nifty soon suspected that ClickUp had been 9 improperly using Nifty's trade secrets to improve ClickUp's products. Id. ¶¶ 41–42. For 10 example, Nifty noticed that ClickUp had "changed its pricing page—for the first time since 11 its launch in 2017—to a design that was remarkably similar to Nifty's page." Id. ¶ 41. 12 Moreover, Kumar boasted publicly in early 2023 about ClickUp's "transition to a 13 service-based architecture," which Nifty alleges was undertaken at a rapid pace only made 14 possible with access to Nifty's proprietary architecture. Id. ¶ 42. Nifty also learned in 15 2023 that ClickUp had made several false claims about Nifty's software in product reviews 16 of Nifty's product in 2021. Id. ¶ 43. Nifty alleges that it lost potential customers as a result 17 of the false blog posts. Id. ¶ 44. 18 Nifty brought this action on January 30, 2024, alleging: (1) the misappropriation of 19 trade secrets under the federal Defend Trade Secrets Act and the California Uniform Trade 20 Secrets Act, (2) the violation of Section 17200 of California's Business and Professions 21 Code ("Unfair Competition Law" or "UCL"), (3) breach of contract, and (4) breach of the 22 implied covenant of good faith and fair dealing. See ECF No. 1. The Court previously 23 dismissed all claims in the Complaint other than the breach of contract claim, ECF No. 25 24 ("MTD Order"), prompting Nifty to file the FAC on October 8, 2024, see FAC. The FAC 25 renews Nifty's trade secret misappropriation, UCL, and breach of contract claims, though 26 it drops the breach of the implied covenant of good faith and fair dealing claim. ClickUp 27 filed the instant Motion on December 13, 2024, seeking dismissal of all but the breach of 28 contract claim. See Mot.

1 LEGAL STANDARD

2 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the 3 defense that the complaint "fail[s] to state a claim upon which relief can be granted." To 4 survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as 5 true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 6 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is 7 facially plausible when the facts

pled “allow[] the court to draw the reasonable inference 8 that the defendant is liable for the misconduct alleged.” Id. That is not to say that the claim 9 must be probable, but there must be “more than a sheer possibility that a defendant has 10 acted unlawfully.” Id. Facts “‘merely consistent with’ a defendant’s liability” fall short of 11 a plausible entitlement to relief. Id. (quoting *Twombly*, 550 U.S. at 557). 12 Though this plausibility standard “does not require ‘detailed factual 13 allegations,’ . . . it [does] demand[] more than an unadorned, the-defendant-unlawfully- 14 harmed-me accusation.” Id. (quoting *Twombly*, 550 U.S. at 555). In other words, a 15 complaint will not suffice “if it tenders ‘naked assertion[s]’ devoid of ‘further factual 16 enhancement.’” Id. (alteration in original) (quoting *Twombly*, 550 U.S. at 557). Put 17 differently, “a formulaic recitation of the elements of a cause of action will not do.” 18 *Twombly*, 550 U.S. at 555. 19 Review under Rule 12(b)(6) requires a context-specific analysis involving the 20 Court’s “judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. In performing 21 that analysis, “a district court must accept as true all facts alleged in the complaint, and 22 draw all reasonable inferences in favor of the plaintiff.” *Wi-LAN Inc. v. LG Elecs., Inc.*, 23 382 F. Supp. 3d 1012, 1020 (S.D. Cal. 2019). “[W]here the well-pleaded facts do not 24 permit the court to infer more than the mere possibility of misconduct, the complaint has 25 alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Iqbal*, 556 U.S. 26 at 679 (second alternation in original). If a complaint does not survive Rule 12(b)(6), a 27 court grants leave to amend unless it determines that no modified contention “consistent 28 / / / 1 with the challenged pleading could . . . possibly cure the deficiency.” *Schreiber Distrib. 2 Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

3 ANALYSIS

4 I. Trade Secret Misappropriation Claims 5 The Court first considers ClickUp’s arguments relating to Nifty’s trade secret 6 misappropriation claims. ClickUp raises multiple grounds upon which it believes the 7 claims fail, including both that Nifty fails to sufficiently identify the existence of a trade 8 secret and that Nifty fails to plausibly allege misappropriation of the customer data secrets.

9 Mem. at 3. Although Nifty asserts two trade secret misappropriation claims—one under 10 the federal Defend Trade Secrets Act (“DTSA”) and the other under the California Uniform 11 Trade Secrets Act (“CUTSA”)—the Court will analyze these claims together “because the 12 elements are substantially similar.” *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 13 978 F.3d 653, 657 (9th Cir. 2020). To sufficiently state a claim under either statute, “a 14 plaintiff must prove: (1) that the plaintiff possessed a trade secret, (2) that the defendant 15 misappropriated the trade secret; and (3) that the misappropriation caused or threatened 16 damage to the plaintiff.” Id. at 657–58. 17 A. Ownership of a Protectable Trade Secret 18 A trade secret is “(1) information, (2) that is valuable because it is unknown to 19 others, and (3) that the owner has attempted to keep secret” through reasonable measures.

20 Id. at 657, 660. ClickUp argues that Nifty does not plausibly allege any protectable trade

21 secrets because it fails to: (1) describe its trade secrets with sufficient particularity, 22 (2) distinguish its asserted secrets from publicly known information, and (3) sufficiently 23 identify its customer conversion rate trade secret. Mem. at 4–15. The Court addresses 24 these in turn, but it will combine its analysis of arguments (1) and (3) as they present largely 25 overlapping contentions. 26 1. Sufficient Particularity 27 To adequately identify a trade secret, the plaintiff must “describe the subject matter 28 of the trade secret with sufficient particularity to separate it from matters of general 1 knowledge in the trade or of special knowledge of those persons . . . skilled in the trade.” 2 *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1164–65 (9th Cir. 1998) (alteration in 3 original) (emphasis in original) (quoting *Universal Analytics, Inc. v. MacNeal-Schwendler 4 Corp.*, 707 F. Supp. 1170, 1177 (C.D. Cal. 1989), *aff’d*, 914 F.2d 1256 (9th Cir. 1990)). 5 “Plaintiffs may not simply rely upon ‘catchall’ phrases or identify categories of trade 6 secrets they intend to pursue at trial.” *InteliClear*, 978 F.3d at 658. However, “the 7 reasonable particularity standard is a flexible one that does not require explication of the 8 trade secrets ‘down to the finest detail or require a mini-trial on misappropriation before 9 [the] plaintiff is allowed discovery.’” *Alphonso Inc. v. Tremor Video, Inc.*, 10 No. 22-CV-03629-NC, 2022 WL 17968081, at *2 (N.D. Cal. Oct. 31, 2022) (quoting 11 *STEMCELL Techs. Can. Inc. v. StemExpress, LLC*, No. 21-CV-01594-VC (LB), 12 2022 WL 585668, at *4 (N.D. Cal. Feb. 24, 2022)). Nonetheless, “[i]dentifying trade 13 secrets with sufficient particularity is important because defendants need ‘concrete 14 identification’ to prepare a rebuttal.” *InteliClear*, 978 F.3d at 658 (quoting *Imax*, 152 F.3d 15 at 1167). 16 In Exhibit B, Nifty enumerates 44 specific trade secrets that it alleges are legally 17 protected. These 44 trade secrets are divided into five distinct categories: (1) Technical 18 Architecture Trade Secrets (Trade Secrets 1–15), (2) Real-Time Update Solution Trade 19 Secrets (Trade Secrets 16–21), (3) Platform Optimization Techniques Trade Secrets (Trade 20 Secrets 22–34), (4) Customer Conversion Metrics Trade Secrets (Trade Secrets 35–37), 21 and (5) Customer Data Trade Secrets (Trade Secrets 38–44). Because Exhibit B has been 22 filed under seal, see ECF No. 33, the Court takes care to conceal the specifics Nifty 23 provides therein. That said, the publicly filed FAC contains descriptive allegations that 24 cross-reference Exhibit B in such a way that allows the Court to discuss the purported trade 25 secrets in considerable detail. The Court finds that ClickUp’s arguments are best addressed 26 by marching through the groupings as shaped by the Parties, so it will proceed in that 27 fashion. 28 / / / 1 a. Technical Architecture Trade Secrets (Trade Secrets 1–15) 2 Nifty generally describes its Technical Architecture Trade Secrets as “the 3 development path undertaken to make the platform reliably scale . . . as well as relevant 4 platform code and its quality” FAC ¶ 50.a. In the FAC, Nifty offers illustrative 5 examples of said trade secrets, and then in Exhibit B, Nifty spells out in full detail what 6 those purported trade secrets are. As examples, Nifty alleges in its FAC that the following 7 are protectable trade secrets: 8 Nifty’s backend technical architecture, including what services to use and how many instances of each is configured to execute 9 and why; at precisely

what average CPU utilization is 10 autoscaling configured for each environment to manage the traffic and why; precisely how many in-memory data store and 11 cache service need to run in the production environment and how 12 each must be accessible and why; [and] precisely how many “cron” services and proxy services need to run in each server 13 instance and whether or not that instance needs to be configured 14 to be a part of any scaling group 15 FAC ¶ 50.a. The above list continues on in a similar manner through Trade Secret 14. 16 Exhibit B naturally begins with Trade Secret 1—which is described as Nifty’s 17 backend technical architecture—and it progresses sequentially through Trade Secrets 2–11 18 and 13 by incorporating Trade Secret 1 with a follow-on “wherein” clause that describes 19 selected features of the backend architecture. Whereas the allegations in the FAC describe 20 those architectural features in a general sense, Exhibit B fills in the specifics. By way of 21 example, the FAC alleges as a trade secret “precisely how many ‘cron’ services and proxy 22 services need to run in each server instance and whether or not that instance needs to be 23 configured to be a part of any scaling group,” id. ¶ 50.a., while Exhibit B, in paragraph 9, 24 states what was left unsaid, i.e., Exhibit B expressly discloses the number of cron and proxy 25 services that are configured by Nifty’s backend architecture. 26 Trade Secrets 12, 14, and 15 are a bit different. Trade Secret 12 claims the “code 27 structure (including the frameworks, libraries, plugins)” of ten different named 28 micro-structures, each of which is identified in Exhibit B. Trade Secret 14 claims the “code 1 structure and implementation details surrounding recent updates,” of which there are 2 eleven listed in paragraph 14 of Exhibit B. And Trade Secret 15 claims the generalized 3 knowledge that Trade Secrets 1–14 have value and importance. 4 With respect to Trade Secret 1, which claims “Nifty’s backend technical 5 architecture,” the Court agrees with ClickUp that such a description is too vague to warrant 6 trade secret protection. As the Court held in its previous dismissal Order, “[i]dentifying a 7 trade secret as server architecture clearly is far too general a description; more is needed to 8 identify the actual matter that is claimed to be a trade secret.” MTD Order at 15 (internal 9 quotation marks omitted) (quoting *Social Apps, LLC v. Zynga, Inc.*, 10 No. 4:11-CV-04910 YGR, 2012 WL 2203063, at *4 (N.D. Cal. June 14, 2012)). Nifty 11 resists this conclusion by arguing that, in Exhibit B, “Nifty set forth the blueprint for its 12 architecture,” Opp’n at 6, but as the Seventh Circuit observed in *IDX Systems Corporation v. Epic Systems Corporation*, “a plaintiff must do more than just identify a kind of 14 technology and then invite the court to hunt through the details in search of items meeting 15 the statutory definition,” 285 F.3d 581, 584 (7th Cir. 2002). Such a tactic amounts to little 16 more than, as ClickUp puts it, a “data dump[] of technical references to sift through.” 17 Reply at 4 (citing *Apple Inc. v. Allan & Assocs. Ltd.*, 445 F. Supp. 3d 42, 59 (N.D. Cal. 18 2020)). 19 However, Nifty’s failure to plead Trade Secret 1 with sufficient particularity does 20 not necessarily doom the remainder of the Technical Architecture Trade Secrets. Trade 21 Secrets 2–11 and 13 incorporate Trade Secret 1, but they claim specific individual 22 components of the incorporated backend architecture. Thus, those Trade Secrets start by 23

identifying a general category of information (i.e., the architecture) and then conclude by 24 qualifying those categories with the specific subject matter at issue (i.e., the information 25 contained in the “wherein” clauses). Such “subject matter qualifications . . . allow 26 defendants a level of detail that is sufficient to ascertain at least the boundaries within 27 which the secrets lie and the scope of appropriate discovery.” *Cisco Sys., Inc. v. Chung*, 28 462 F. Supp. 3d 1024, 1051 (N.D. Cal. 2020) (citation modified). 1 Citing *Zynga, ClickUp* argues that the “wherein” clauses “add[] little more than an 2 elaborate categorization scheme for a variety of related concepts,” *Mem.* at 7, but the 3 allegations here are much more refined than the ones in *Zynga*. There, the plaintiff failed 4 to “specifically identify[] and describe[e] the actual architecture that [the plaintiff] claims 5 was stolen.” *Zynga*, 2012 WL 2203063 at *4. But here, the “wherein” clauses add 6 substantial detail to put ClickUp on notice of which parts of Nifty’s architecture comprise 7 the trade secrets. *Zynga* is also distinguishable because, in that case, the plaintiff failed to 8 point out where the trade secrets “might be found in the information it turned over to [the 9 defendant] in the course of ‘due diligence.’” *Id.* Not so here. The FAC makes quite clear 10 that discovery revolving around the Technical Architecture Trade Secrets will be limited 11 exclusively to the October 5, 2021 deep-dive technical call conducted by Shailesh Kumar.¹ 12 See FAC ¶¶ 36, 50.a. Courts have consistently held that trade secrets “become sufficiently 13 particularized for purposes of stating a claim where the complaint alleges that [the trade 14 secrets] are contained within” a specified communication. *Beluca Ventures LLC v. Einride 15 Aktiebolag*, 660 F. Supp. 3d 898, 908 (N.D. Cal. 2023) (collecting cases). 16 The analysis of Trade Secrets 12, 14, and 15 follows in the same vein. Trade Secrets 17 12 and 14 begin by claiming a category (i.e., code structure and implementation details) 18 and then continue on by qualifying those categories with the specific subject matter to 19 which they pertain. ClickUp analogizes Nifty’s allegations to those from *Synopsys, Inc. v. 20 ATopTech, Inc.*, but the claimed trade secrets here are more polished than the ones in that 21 case. No. C 13-cv-02965 SC, 2013 WL 5770542, at *6 (N.D. Cal. Oct. 24, 2013) 22 (rejecting claimed trade secrets of “proprietary input and output formats, scripts, and 23 technical product documentation” as too conclusory). And unlike ClickUp’s other cited 24 cases, which rejected asserted trade secrets because they “identified the subject 25 matter . . . but failed to identify or define the category of information,” Nifty identified both 26 27 1 To the extent Nifty believes any of the Technical Architecture Trade Secrets may have been exchanged 28 at some point other than the October 5, 2021 deep-dive technical call, no such plausible allegations are 1 the relevant categories and the relevant subject matter. See *Creative Writer Software, LLC 2 v. Schechter*, No. CV 23-02471-MWF (MAAx), 2023 WL 6786796, at *4 (C.D. Cal.

3 Sept. 6, 2023). Finally, the Court finds that Nifty alleges Trade Secret 15 with sufficient 4 particularity given that the claimed secret is necessarily “circumscribed by the preceding 5 list[] of trade secrets.” *Masimo Corp. v. Apple Inc.*, No. SACV 20-48 JVS (JDEx), 6 2021 WL 925885, at *3 (C.D. Cal. Jan. 6, 2021). 7 In sum, Trade Secret 1 lacks the requisite specificity at the

pleading stage, but Nifty's 8 remaining Technical Architecture Trade Secrets are pled with sufficient particularity. 9 b. Real-Time Update Solution Trade Secrets (Trade Secrets 16–21) 10 and Platform Optimization Techniques Trade Secrets (Trade 11 Secrets 22–34)

12 The FAC and Exhibit B utilize a similar framework for the Real-Time Update 13 Solution Trade Secrets and Platform Optimization Techniques Trade Secrets as they do for 14 the just-discussed Technical Architecture Trade Secrets. Both sets of trade secrets begin 15 with a broader category—as described in Trade Secret 16 for the Real-Time Update 16 Solution Trade Secrets and Trade Secret 22 for the Platform Optimization Techniques 17 Trade Secrets—followed by a series of trade secrets incorporating the broader category, 18 each of which is narrowed by a “wherein” clause that focuses on a specific feature therein. 19 The two sets of trade secrets then conclude in the same manner as the Technical 20 Architecture Trade Secrets—that is, with an asserted trade secret claiming the generalized 21 knowledge that the preceding list of trade secrets has value and importance. 22 ClickUp's arguments with respect to the Real-Time Update Solution Trade Secrets 23 and Platform Optimization Techniques Trade Secrets mirror those challenging the 24 Technical Architecture Trade Secrets. The Court's conclusions likewise resemble those 25 from the above discussion. 26 Trade Secret 16 claims “the combinations of Nifty's frontend and backend technical 27 architecture,” FAC ¶ 50.b., but that asserted trade secret fails for the same reason as Trade

28 Secret 1. See Zynga, 2012 WL 2203063, at *4 (reasoning that “server architecture clearly 1 is far too general a description”). Trade Secrets 17–20, however, take the generalized 2 category of “frontend and backend technical architecture” from Trade Secret 16 and add 3 more color by claiming particular elements of that architecture through the use of 4 “wherein” clauses. Such an identification is sufficient at the pleading stage, particularly in 5 light of Plaintiff's allegation that the information was exchanged in a particular 6 communication, i.e., the October 5, 2021 deep-dive technical call.² FAC ¶ 50.b.; see Alta 7 Devices, Inc. v. LG Elecs., Inc., 343 F. Supp. 3d 868, 881 (N.D. Cal. 2018) (reasoning that 8 the defendant “can hardly claim it is unable to determine what trade secrets” were asserted 9 when the purported trade secrets were “exchanged pursuant to [a non-disclosure 10 agreement]”). And Trade Secret 21 is alleged with sufficient particularity for the same 11 reason as Trade Secret 15 above. See Masimo, 2021 WL 925885, at *3. 12 The Court's analysis of the Platform Optimization Techniques Trade Secrets is 13 exactly the same as that of the Real-Time Update Solution Trade Secrets with one 14 exception. Whereas the Court found in the preceding paragraph that Trade Secret 16 is not 15 described with sufficient particularity, the Court finds that Trade Secret 22 is satisfactorily 16 described. In its previous dismissal Order, the Court faulted Nifty for leaving vague which 17 product optimization methods and techniques were being claimed as trade secrets, MTD

18 Order at 17, but Nifty remedied that failure in the FAC by specifically identifying its CI/CD 19 technique as the claimed trade secret, FAC ¶ 50.c. In its Motion, ClickUp contends that 20

Nifty “fails to identify the particular ‘techniques’ at issue,” but that assertion is 21 demonstrably contradicted by the preceding sentence where ClickUp itself identifies the 22 CI/CD technique at issue. Mem. at 8. In fact, according to the allegations in the FAC, it 23 was ClickUp who specifically requested information pertaining to CI/CD on the October 5, 24 2021 deep-dive technical call, which ClickUp understood at the time to be Nifty’s 25 26 27 2 Again, to the extent Nifty believes any of the Real-Time Update Solution Trade Secrets may have been 28 exchanged at some point other than the October 5, 2021 deep-dive technical call, no such plausible 1 technique for releasing code. FAC ¶ 34. Accordingly, Trade Secret 22 is alleged with 2 sufficient particularity as are Trade Secrets 23–34, which derive therefrom. 3 c. Customer Conversion Metrics Trade Secrets (Trade Secrets 4 35–37) and Customer Data Trade Secrets (Trade Secrets 38–44) 5 Nifty also asserts as its Customer Conversion Metrics Trade Secrets its “unusually 6 high customer conversion metrics” as Trade Secret 35, its knowledge as to “how and why 7 Nifty obtained its above-market customer conversation rates” as Trade Secret 36, and its 8 generalized knowledge that the preceding two trade secrets have value and importance as 9 Trade Secret 37. See FAC ¶ 50.d. ClickUp challenges these Customer Conversion Metrics 10 Trade Secrets as insufficiently constrained because they are located in “some open-ended 11 set” due to Nifty’s use of the word “including” in its definitions of these trade secrets. See

12 Mem. at 9–10. Nifty counters by distinguishing ClickUps’s cited cases as analyzing 13 alleged trade secrets much broader and more generalized than those asserted by Nifty. 14 Opp’n at 17–18. The Parties rely on these same arguments when it comes to the Customer 15 Data Trade Secrets, which Nifty summarizes in the FAC as “customer information, 16 including information concerning customer’s specific needs and preferences.” FAC ¶ 50.e. 17 Nifty has the stronger of the arguments on this point. The Ninth Circuit in 18 InteliClear made clear that, at the pre-discovery stage, a plaintiff’s “burden is only to 19 identify at least one trade secret with sufficient particularity to create a triable issue.” 20 InteliClear, 978 F.3d at 659. True, certain of ClickUp’s cited cases could be interpreted as 21 having rejected trade secret classifications that left the plaintiff’s allegations open-ended 22 and undefined due to the presence of the word “including.” See, e.g., Becton, Dickinson & 23 Co. v. Cytex Biosciences Inc., No. 18-cv-00933-MMC, 2018 WL 2298500, at *3 n.6 24 (N.D. Cal. May 21, 2018) (“Further, the list of examples is preceded by the word ‘include,’ 25 leaving the allegation ambiguous as to whether [the plaintiff’s] claim is based on additional 26 information.”); see also Loop AI Labs Inc. v. Gatti, 195 F. Supp. 3d 1107, 1115 (N.D. Cal. 27 2016) (rejecting asserted trade secrets because they “contain[ed] ‘catchall’ wording such 28 as ‘including’ when describing the trade secrets” (citing Imax, 152 F.3d at 1167)). But to 1 the extent those district courts dismissed trade secret misappropriation claims because the 2 allegations identified some, rather than all, of the asserted trade secrets, those cases are 3 inconsistent with InteliClear, which was decided more recently and by a higher authority. 4 At any rate, in all of ClickUp’s cited cases, “use of the word ‘including’ alone was 5 never sufficient on its own for the court to find dismissal warranted.” Masimo Corp. v. 6 Apple Inc., No.

SACV 20-48 JVS (JDEx), 2020 WL 6653652, at *3 (C.D. Cal. Oct. 13, 7 2020). In Becton, for instance, the court rejected the asserted trade secrets because the 8 plaintiff's allegations mentioned only the general categories of information that were 9 misappropriated while failing to limit the allegations to a specific product. 10 2018 WL 2298500, at *3. Similarly, in Loop AI Labs, the court rejected the asserted trade 11 secrets because the plaintiff merely "list[ed] general concepts or categories of information" 12 without offering the defendant "a reasonably concrete definition of the purported secrets." 13 195 F. Supp. 3d at 1114–15. Unlike those cases, Nifty describes its Customer Conversion 14 Metrics Trade Secrets and Customer Data Trade Secrets as discrete, particularized data 15 points, putting ClickUp on clear notice of the outer bounds of its allegations. Such 16 descriptions are sufficiently detailed such that ClickUp can "ascertain at least the 17 boundaries within which the secret lies."3 Pellerin v. Honeywell Int'l, Inc., 18 877 F. Supp. 2d 983, 988 (S.D. Cal. 2012) (quoting Diodes, Inc. v. Franzen, 19 67 Cal. Rptr. 19, 24 (Ct. App. 1968)). Accordingly, Nifty's Customer Conversion Metrics 20 Trade Secrets and Customer Data Trade Secrets are defined with sufficient particularity. 21 Still, a question does arise with respect to Trade Secret 36, which the Court construes 22 as the sole secret in the crosshairs of ClickUp's argument that Nifty fails to identify its 23 customer conversion rate "secret." See Mem. at 13–15. In the FAC, Nifty describes this 24 secret as "how and why Nifty obtained its above-market customer conversion rates—i.e., 25 converted a free user to a paying customer." FAC ¶ 50.d. In the corresponding paragraph 26 27 28 3 In Reply, ClickUp perplexingly states that "trade secret no. 35 does not even identify a 'rate,'" Reply 1 36 of Exhibit B, Nifty alleges that the "how and why" behind the high customer conversion 2 rate has something to do with its pricing landing page. ECF No. 34 ¶ 36. Nifty's position 3 takes a strange detour in its Opposition, however, in arguing that the "how and why" is 4 actually "the result of Nifty's proprietary process for analyzing and optimizing customer 5 behavior over several years." Opp'n at 8. Nifty then goes on to describe that proprietary 6 process—filed under seal—wherein the process has, by the Court's review, nothing at all 7 to do with its pricing landing page. Id. Instead, Nifty argues its proprietary process 8 involves a method for analyzing customer patterns and behavior in such a way as to 9 optimize conversion rates and customer retention. Id. Nothing in the sealed portion of 10 page 8 of Nifty's Opposition bears on the pricing landing page, thus shattering the Court's 11 understanding of what Trade Secret 36 encompasses. Because the Court emerges from the 12 Parties' briefing thoroughly puzzled by the contours of Trade Secret 36, that secret is not 13 adequately pled.4 See Creative Writer, 2023 WL 6786796, at *4 (holding that a trade 14 secret lacked sufficient particularity where the court was "not entirely sure" about what the 15 trade secret was). 16 2. Distinguishing Trade Secrets from Publicly Known Information 17 ClickUp raises a second argument, independent of the first, that Nifty fails to 18 plausibly allege ownership of a protectable trade secret because Nifty fails to allege that its 19 trade secrets are not "widely known" in the industry. Mem. at 12. This argument is 20 directed specifically to Nifty's asserted Technical Architecture Trade Secrets, Real-Time 21 Update Solution Trade Secrets, and Platform

Optimization Techniques Trade Secrets. Id. 22 at 11–12. In general, ClickUp contends that the FAC contains only conclusory language 23 regarding the secrecy of those trade secrets such that Nifty’s misappropriation claims must 24 be dismissed. 25 26 27 4 The Court reiterates the conclusion from its prior dismissal Order that, to the extent Nifty alleges publicly 28 accessible features and characteristics of its pricing landing page are trade secrets, such an “argument is a 1 This argument relies primarily on Agency Solutions.Com v. TriZetto Group, Inc., but 2 that case is easily distinguishable. See 819 F. Supp. 2d 1001 (E.D. Cal. 2011). There, key 3 to the court’s decision to reject several groups of alleged trade secrets was the plaintiff’s 4 failure to demonstrate why the information exchanged with the defendant “did not merely 5 reflect facts that would be known to any other software company designing front-end 6 software for the small business market or that [the information] would not be manifest in 7 the operation of the finished program.” Id. at 1020. Put differently, the court understood 8 the alleged trade secrets to “prescribe a particular, and perhaps even proprietary, way of 9 doing something that would (1) be done in a similar if not identical way by someone else 10 in the same field and (2) would be evident to a person using the program for its intended 11 purpose.” Id. at 1021 (emphasis added) (citing Silvaco Data Sys. v. Intel Corp., 12 109 Cal. Rptr. 3d 27 (Ct. App. 2010)). Whereas ClickUp primarily focuses on the first 13 feature of the alleged trade secrets in Agency Solutions.Com, it declines to grapple with the 14 second. 15 Yes, ClickUp touches on this second feature in asserting that “Nifty has failed to 16 explain how these asserted ‘trade secrets’ did not merely reflect information that would be 17 known to any other company in the productivity management industry, or manifest in the 18 operation of the program.” Mem. at 12. But saying as much does not make it so; rather, 19 the FAC contains specific factual allegations plausibly showing that the back-end and 20 front-end architecture asserted by Nifty as trade secrets are not known to others in the 21 industry and do not manifest in the operation of the program. For example, in the section 22 of the FAC describing the Technical Architecture Trade Secrets, Nifty alleges that “the 23 code structure for Nifty’s microservices . . . was maintained in code repositories, access to 24 which was restricted.” FAC ¶ 50.a. Nifty further alleges that the individuals “with access 25 to those trade secrets were instructed to keep it confidential and were otherwise subject to 26 obligations to keep the material secret.” Id. And with respect to the Real-Time Update 27 Solution Trade Secrets and Platform Optimization Techniques Trade Secrets, Nifty alleges 28 that none of the trade secrets “manifested in the public facing aspects of Nifty’s platform.” 1 Id. ¶¶ 50.b.–50.c. These allegations, thus, go beyond those in Agency Solutions.Com, 2 where the court found that the information asserted as trade secrets would be “evident to 3 any member of the public that uses the program.” 819 F. Supp. 2d at 1021. 4 To be sure, the burden is on Nifty to establish that its asserted trade secrets are not 5 “publicly available or widely known in a given industry.” Prostar Wireless Grp., LLC v. 6 Domino’s Pizza, Inc., 360 F. Supp. 3d 994, 1013 (N.D. Cal. 2018) (citing Walker v. Univ. 7 Books, Inc., 602 F.2d 859, 865 (9th Cir. 1979)). But making that determination often 8 requires establishing a factual record from which to deduce

whether the information is, in 9 fact, publicly available or widely known. See *Copart, Inc. v. Sparta Consulting, Inc.*, 10 277 F. Supp. 3d 1127, 1154 (E.D. Cal. 2017) (recognizing that “[w]hether information 11 constitutes a trade secret is a fact-intensive determination” (citing *In re Providian Credit 12 Card Cases*, 116 Cal. Rptr. 2d 833 (Ct. App. 2002))). Here, at the pleading stage, Nifty 13 has done enough to plausibly allege that the Technical Architecture Trade Secrets, 14 Real-Time Update Solution Trade Secrets, and Platform Optimization Techniques Trade 15 Secrets are secret. See *Bos. Sci. Corp. v. Nevro Corp.*, No. 16-1163-CFC-CJB, 16 2020 WL 6261624, at *4 n.7 (D. Del. Oct. 19, 2020) (suggesting that inquiring into 17 “whether plaintiff’s asserted trade secrets were publicly available or widely known in a 18 given industry” might be better suited for summary judgment (citing *Prostar*, 19 360 F. Supp. 3d at 1013)). 20 B. Misappropriation 21 To plead misappropriation under the DTSA and CUTSA, the plaintiff must show 22 “the ‘(1) [a]cquisition of a trade secret by another person who knows or has reason to know 23 that the trade secret was acquired by improper means;’ or the ‘(2) [d]isclosure or use of a 24 trade secret of another without express or implied consent.’” *Alta Devices*, 343 F. Supp. 3d 25 at 882 (first citing 18 U.S.C. § 1839(5); and then citing Cal. Civ. Code § 3426.1(b)). 26 Though “[a]llegations of similarity, without more, do not support a claim of 27 misappropriation of trade secrets,” *Brown v. Adidas Int’l*, 938 F. Supp. 628, 634 (S.D. Cal. 28 1996), “allegations of similarities . . . when accompanied by allegations of exactly how 1 defendants improperly obtained the alleged trade secrets” is sufficient, *Alta Devices*, 2 343 F. Supp. 3d at 883. The plaintiff “need not be clairvoyant and allege exactly how [the 3 defendant] is improperly using its trade secrets,” *Space Data Corp. v. X*,

4 No. 16-cv-03260-BLF, 2017 WL 5013363, at *2 (N.D. Cal. Feb. 16, 2017), but it must do 5 more than allege facts that are “merely consistent with” a theory of innocent behavior, 6 *Veronica Foods Co. v. Ecklin*, No. 16-cv-07223-JCS, 2017 WL 2806706, at *14 7 (N.D. Cal. June 29, 2017) (first citing *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 8 751 F.3d 990, 997 (9th Cir. 2014); and then citing *In re Century Aluminum Co. Secs. Litig.*, 9 729 F.3d 1104, 1108 (9th Cir. 2013)). 10 ClickUp argues—specifically with respect to the Customer Data Trade Secrets 11 (Trade Secrets 38–44)—that Nifty fails to plausibly allege misappropriation. Said trade 12 secrets were allegedly shared with ClickUp pursuant to the NDA, but ClickUp contends 13 that the FAC contains no allegations raising the plausible inference that the Customer Data 14 Trade Secrets were improperly acquired, disclosed, or used. Mem. at 15. 15 In response, Nifty focuses on the “use” prong of misappropriation (as opposed to 16 acquisition or disclosure) by highlighting modifications that ClickUp made to its pricing 17 page. Nifty’s theory of the claim goes something like this: Pursuant to the NDA, Nifty 18 shared with ClickUp data that “includes lists of paid customers, lists of free customers, 19 historical trends of daily and monthly users, and, critically, the sales and annual and 20 monthly revenue rate broken down by those customers.” Opp’n at 21 (internal quotation 21 marks omitted). ClickUp, after obtaining these metrics as well as the knowledge that Nifty 22 has obtained a high customer conversion rate,

“changed the pathway to its pricing pages 23 [by] . . . adopting a design that mirrored Nifty’s approach by bringing previously hidden 24 pricing details to the forefront.” *Id.* at 22. In Nifty’s view, by taking this action, ClickUp 25 improperly used the Customer Data Trade Secrets that were exchanged under the NDA. 26 *Id.* 27 The Court is not persuaded that it can plausibly draw Nifty’s desired inference from 28 these alleged facts. There is no dispute that Nifty’s pricing landing page, which ClickUp 1 purportedly copied after receiving Nifty’s customer information, was publicly available for 2 all to see prior to the exchange of information under the NDA. See FAC ¶¶ 41, 55. Nifty 3 insinuates that, because ClickUp changed its pricing page “within days” of reviewing 4 Nifty’s customer data under the NDA, the logical inference is that somewhere within the 5 customer data was a kernel of insight prompting the change. *Id.* ¶ 55. Missing from the 6 FAC, however, is any semblance of a relationship between the customer data and the 7 location of ClickUp’s pricing page. Nifty fails to show how ClickUp’s decision to pull its 8 pricing page out from behind a landing page link could have been a result of ClickUp 9 misusing Nifty’s customer data. 10 Unlike the quintessential case of customer information misappropriation recognized 11 by the Ninth Circuit, where “information from a customer database is used to solicit 12 customers,” Nifty’s allegations lack any nexus between the asserted trade secret and the 13 action constituting misappropriation. See *MAI Sys. Corp. v. Peak Comput., Inc.*, 14 991 F.2d 511, 521 (9th Cir. 1993) (citing *Am. Credit Indem. Co. v. Sacks*, 15 262 Cal. Rptr. 92, 99–100 (Ct. App. 1989)). That principle permeates through even Nifty’s 16 own cited cases and is fatal to the misappropriation claim as it pertains to the Customer 17 Data Trade Secrets. See, e.g., *Gatan, Inc. v. Nion Co.*, No. 15-cv-01862-PJH, 18 2017 WL 1196819, at *6 (Mar. 31, 2017) (concluding that improper use “includes 19 situations where the defendant built upon or modified the trade secret” (internal quotation 20 marks and citation omitted)); *Autodesk, Inc. v. ZWCAD Software Co.*, No. 5:14-cv-01409- 21 EJD, 2015 WL 2265479, at *1 (May 13, 2015) (finding plausible allegations of 22 misappropriation where the defendant “engaged in wholesale copying of large portions of 23 [the plaintiff’s] source code in order to create its software program,” which “display[ed] 24 identical idiosyncrasies and bugs that could have been introduced only through the 25 wholesale copying of significant portions of” the stolen code (internal quotation marks 26 omitted)). Simply put, that ClickUp changed its pricing page to mirror that of Nifty’s bears 27 little relevance, if any at all, to the question of whether ClickUp used Nifty’s customer 28 / / / 1 information in a way that exceeded Nifty’s express or implied consent. See *Alta Devices*, 2 343 F. Supp. 3d at 877. 3 Before proceeding, the Court briefly pauses to address footnote four of Nifty’s 4 Opposition, in which Nifty asserts that the “Court already found Nifty sufficiently alleged 5 misappropriation by misuse.” *Opp’n* at 21 n.4 (citing *MTD Order* at 22–23). Ostensibly, 6 Nifty is under the impression that the Court’s analysis of improper use as alleged in the 7 original Complaint should control the analysis of improper use as alleged in the FAC. But 8 that understanding is not quite right. The Court’s prior analysis considered a Complaint 9 with different factual allegations than those presented in the FAC, many of which are no 10 longer present. For instance, in its

Complaint, Nifty touted its “‘revolutionary’ 11 document-tagging feature,” ECF No. 1 ¶ 50, but that feature is mentioned nowhere in the 12 FAC. Thus, the Court’s prior comments on Nifty’s allegations related to improper use of 13 the document-tagging feature have no applicability to the instant Motion. Similarly, the 14 Court’s prior analysis assumed *arguendo* (after deciding otherwise) that Nifty had plausibly 15 alleged the existence of a trade secret pertaining to its pricing page, but Nifty expressly 16 disclaims such a trade secret in its Opposition. See Opp’n at 21 (“ClickUp suggests Nifty 17 is claiming its pricing page is the trade secret. It is not.”). “[I]t is well-established that an 18 amended pleading supersedes the original pleading and renders it of no legal effect,” so the 19 factual basis of Nifty’s claims is now tied to the FAC rather than the Complaint. See 20 *Williams v. County of Alameda*, 26 F. Supp. 3d 925, 936 (N.D. Cal. 2014). While dicta in 21 the Court’s original dismissal Order was intended to guide the course of this suit’s pleading 22 stage, the Parties should be cautious in relying on statements by the Court that are 23 inapposite to the factual allegations presently at issue. 24 C. Trade Secret Misappropriation Summary 25 In sum, the Court resolves Nifty’s trade secret misappropriation claims (Claims 1 26 and 2) as follows. Nifty fails to identify Trade Secrets 1, 16, and 36 (and Trade Secrets 15, 27 21, and 37, to the extent they rely on Trade Secrets 1, 16, and 36, respectively) with the 28 requisite specificity to survive dismissal. And Nifty fails to plausibly allege 1 misappropriation of the Customer Data Trade Secrets (Trade Secrets 38–44). Accordingly, 2 consistent with this summary, ClickUp’s Motion is GRANTED IN PART and DENIED 3 IN PART. See *Citcon USA, LLC v. RiverPay Inc.*, 2018 WL 6813211, at *7 (N.D. Cal.

4 Dec. 27, 2018) (dismissing trade secret misappropriation claims only as to some of the 5 asserted trade secrets while sustaining the trade secret misappropriation claims as to 6 others), rev’d on other grounds, No. 20-16929, 2022 WL 287563 (9th Cir. Jan. 31, 2022). 7 II. Unfair Competition Law (“UCL”) Claim 8 The Court finally turns to ClickUp’s arguments that Nifty’s UCL claim should be 9 dismissed. Section 17200 of the California Business and Professions Code “broadly 10 proscribes ‘unfair competition,’ including ‘any unlawful, unfair or fraudulent business act 11 or practice.’” *Waymo LLC v. Uber Techs., Inc.*, 256 F. Supp. 3d 1059, 1062 (N.D. Cal. 12 2017) (quoting *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539 (Cal. 13 1999)). Nifty accuses ClickUp of violating this broad proscription by “misrepresenting 14 Nifty’s product through false blog posts.” FAC ¶ 71. On Nifty’s version of events, current 15 and potential Nifty customers exposed to the false posts opted to use ClickUp’s product 16 instead of Nifty’s. Id. ¶ 72. Nifty, on that basis, asserts a single UCL claim under the 17 fraudulent and unfair prongs of the UCL, both of which ClickUp maintains should be 18 dismissed for lack of statutory standing and the latter of which ClickUp argues should be 19 dismissed for failure to state a claim. Mem. at 16–19.5 20 The UCL protects against three distinct business practices—those “that are 21 (1) unlawful, (2) unfair, or (3) fraudulent.” *Backhaus v. Apple, Inc.*, 74 F. Supp. 3d 1033, 22 1050 (N.D. Cal. 2014) (citing Cal. Bus. & Prof. Code § 17200). “Each of these prongs ‘is 23 a separate and distinct basis for liability,’” *Snapkeys, Ltd. v. Google LLC*,

24 No. 19-CV-02658, 2020 WL 6381354, at *3 (N.D. Cal. Oct. 30, 2020) (quoting *Lozano v.*
25 26 27 5 ClickUp additionally argues that Nifty fails to state a claim under the unlawful prong
of the UCL, Mem. 28 at 18, but Nifty confirms in its Opposition that it “is not bringing its UCL
claim under the unlawful prong,” 1 *AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir.
2007)), with California courts 2 having set forth different standards depending upon which theory
the plaintiff embraces. 3 Under any prong, however, the UCL requires a showing that the plaintiff
“has 4 suffered injury in fact and has lost money or property as a result of the unfair competition.”
5 Cal. Bus. & Prof. Code § 17204 (emphasis added). This “as a result of” language was 6 added to
the UCL in 2004 in an effort to curb abuses of private enforcement actions that 7 had previously
been available to “any person acting for the general public” 8 *Californians for Disability Rts.*
v. Mervyn’s, LLC, 138 P.3d 207, 209 (Cal. 2006). 9 Following the 2004 amendment, standing
under the UCL was “confine[d] . . . to those 10 actually injured by a defendant’s business
practices” *Kwikset Corp. v. Superior Ct.*, 11 246 P.3d 877, 884 (Cal. 2011). For the last two
decades, courts have struggled to interpret 12 the scope of the amendment’s impact on the
statutory standing requirement, particularly 13 when it comes to fraud-based UCL claims. 14 As
to the substance of a fraud-based claim, the “fraudulent business practice prong 15 of the UCL has
been understood to be distinct from common law fraud” to “reflect[] the 16 UCL’s focus on the
defendant’s conduct, rather than the plaintiff’s damages.” *In re 17 Tobacco II Cases*, 207 P.3d 20,
29–30 (Cal. 2009) (“*Tobacco II*”); see also *Berger v. Home 18 Depot USA, Inc.*, 741 F.3d 1061,
1068 (9th Cir. 2014) (first citing *Tobacco II*, 207 P.3d 19 at 29–30; and then citing *Stearns v.*
Ticketmaster Corp., 655 F.3d 1013, 1020–21 (9th Cir. 20 2011)), abrogated on other grounds by,
Microsoft Corp. v. Baker, 582 U.S. 23 (2017). But 21 as to the necessary standing requirement to
assert a fraud-based claim under the UCL, the 22 California Supreme Court has espoused “well-
settled principles regarding the element of 23 reliance in ordinary fraud actions” to impose an
“actual reliance” standard for a plaintiff 24 “proceeding on a claim of misrepresentation as the
basis of his or her UCL action”

25 *Id.* at 26. California courts have extended the “actual reliance” requirement to UCL claims
26 brought under the other two prongs when the nature of the claim is based upon 27
misrepresentation or consumer deception. See, e.g., *Durell v. Sharp Healthcare*, 28 108 Cal. Rptr.
3d 682, 694 (Ct. App. 2010) (reasoning that a plaintiff’s “burden of pleading 1 causation in a UCL
action should hinge on the nature of the alleged wrongdoing rather than 2 the specific prong of the
UCL the consumer invokes”). 3 As this Court held in its prior dismissal Order, Nifty’s UCL claim
is based on 4 purportedly false statements in online blog posts, which “is fundamentally ‘a fraud
theory 5 involving false advertising and misrepresentation to consumers.” MTD Order at 27 6
(quoting *Tobacco II* at 39). Thus, Nifty must allege “actual reliance” because its UCL 7 claim
“sounds in fraud.” See *Hale v. Sharp Healthcare*, 108 Cal. Rptr. 3d 669, 679 8 (Ct. App. 2010).
But the Court also recognized in its prior dismissal Order that there is a 9 split in authority as to
whether a competitor-plaintiff, like Nifty, must plead its own reliance 10 or whether a competitor-

plaintiff can merely plead consumer reliance. MTD Order at 28. 11 The Court had no occasion to weigh in on the schism during the last go-around because 12 Nifty's UCL claim failed either way. Id. (concluding that Nifty failed to plausibly allege 13 actual reliance by anyone, even a consumer). This time, however, the Court must pick a 14 side because Nifty now plausibly alleges that consumers did indeed change their behavior 15 as a direct result of the purportedly false blog posts. See FAC ¶ 44. 16 The Parties unsurprisingly cite to cases supporting their respective positions, but 17 they do not otherwise forcefully advocate for why either position is correct. ClickUp just 18 notes that the "weight of authority holds that a competitor plaintiff 'must be able to allege 19 its own reliance rather than the reliance of third parties.'" Mem. at 16 (first quoting A 20 *White & Yellow Cab, Inc. v. Uber Techs., Inc.*, No. 15-cv-05163-JSW, 2017 WL 1208384, 21 at *8 (N.D. Cal. Mar. 31, 2017); and then citing *Zest Anchors, LLC v. Geryon Ventures, 22 LLC*, No. 22-CV-230 TWR (NLS), 2023 WL 2903668, at *7 n.3 (S.D. Cal. Apr. 10, 23 2023)). Meanwhile, Nifty simply cites to a few of the California district courts that have 24 held "that competitor-plaintiffs can establish standing under the UCL by alleging consumer 25 reliance alone." Opp'n at 23 (first citing *Scilex Pharms. Inc. v. Sanofi-Aventis U.S. LLC*, 26 No. 21-cv-01280-JST, 2021 WL 11593043, at *7 (N.D. Cal. Aug. 16, 2021); then citing 27 *Allergan USA Inc. v. Imprimis Pharms., Inc.*, No. SA CV 17-1551-DOC (JDEx), 28 2017 WL 10526121, at *13 (C.D. Cal. Nov. 14, 2017); and then citing *Jerome's Furniture 1 Warehouse v. Ashley Furniture Indus., Inc.*, No. 20CV1765-GPC(BGS), 2 2021 WL 1541649, at *8 (S.D. Cal. Apr. 20, 2021)). In the absence of controlling 3 authority from a California court, the Court must determine for its own which position is 4 more persuasive. 5 Having reviewed the pertinent case law, the Court sides with ClickUp and the 6 majority of courts to have considered the question. In justifying its imposition of the 7 "actual reliance" standing requirement for fraud-based UCL claims in *Tobacco II*, the 8 California Supreme Court emphasized common-law fraud principles. See *Tobacco II*, 9 207 P.3d at 309. For example, the court led off its discussion of reliance by citing to the 10 1993 case of *Mirkin v. Wasserman*, 858 P.2d 568 (Cal. 1993), id., which goes into an 11 extensive discussion of how the common law of deceit requires the plaintiff to, him or 12 herself, rely on the misrepresentation, *Mirkin*, 858 P.2d at 570. The *Tobacco II* court then 13 moved on to discuss various features of the "actual reliance" doctrine, each of which is 14 premised upon the plaintiff's own reliance on the alleged misrepresentation. See *Tobacco 15 II*, 207 P.3d at 39 (citing *Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903 (Cal. 1997), 16 for the proposition that the fraudulent misrepresentation need only play a substantial part 17 in the plaintiff's injury-producing conduct); see also id. at 40 (citing *Boeken v. Philip 18 Morris, Inc.*, 26 Cal. Rptr. 3d 638 (Ct. App. 2005), and *Whiteley v. Philip Morris, Inc.*, 19 11 Cal. Rptr. 3d 807 (Ct. App. 2004), for the proposition that the plaintiff's 20 injury-producing conduct need not be demonstrated on the basis of "individualized reliance 21 on specific misrepresentations"). Two years later, the California Supreme Court in *Kwikset 22* doubled down and similarly explained that the "actual reliance" standing requirement finds 23 its genesis in "the ordinary fraud context."

Kwikset, 246 P.3d at n.10 (“It follows that a 24 UCL fraud plaintiff must allege he or she was motivated to act or refrain from action based 25 on the truth or falsity of a defendant’s statement, not merely on the fact it was made.” 26 (citing *Buckland v. Threshold Enters., Ltd.*, 66 Cal. Rptr. 3d 543 (Ct. App. 2007))). Thus, 27 like the other courts to have landed on the majority rule, the Court finds the “explanation[s] 28 / / / 1 of the reliance requirement” in *Tobacco II* and *Kwikset* uniquely instructive. See *A White 2 and Yellow Cab*, 2017 WL 1208384, at *9. 3 Make no mistake; the Court appreciates the well-reasoned and compelling opinions 4 that distinguish a competitor-plaintiff case, like this one, from the consumer-plaintiff cases 5 like *Tobacco II* and *Kwikset*. See, e.g., *Allergan*, 2017 WL 10526121, at *13–14. And the 6 California Supreme Court certainly gave mixed signals in those two seminal cases as to 7 whether a competitor-plaintiff can depend solely on consumer reliance, such as by 8 emphasizing that the UCL’s purpose is to serve both consumers and competitors alike. See 9 *Kwikset*, 246 P.3d at 883 (“Its purpose ‘is to protect both consumers and competitors by 10 promoting fair competition in commercial markets for goods and services.’” (internal 11 quotation marks and citations omitted)). But at the end of the day, the Court circles back 12 to the introductory paragraphs of *Tobacco II*, where that court stated in no uncertain terms 13 that a plaintiff “proceeding on a claim of misrepresentation as the basis of his or her UCL 14 action must demonstrate actual reliance . . . in accordance with well-settled principles 15 regarding the element of reliance in ordinary fraud actions.” 207 P.3d at 26. Because those 16 well-settled principles counsel against authorizing third-party reliance to serve as the basis 17 for a fraud-based UCL claim, the Court concludes that California law requires a 18 competitor-plaintiff to allege its own reliance. See *L.A. Taxi Coop., Inc. v. Uber Techs., 19 Inc.*, 114 F. Supp. 3d 852, 867 (N.D. Cal. 2015) (“Furthermore, in general, outside the 20 context of the UCL, “a fraud action cannot be maintained based on a third party’s reliance.” 21 (quoting *City and Cnty. of S.F. v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 22 1997))). 23 Applying the “actual reliance” standard here is straightforward. Nifty alleges no 24 facts that plausibly show its own reliance on the purported false blog posts serving as the 25 basis of the UCL claim. Instead, Nifty relies exclusively on the theory that consumers 26 relied on the false representations. See FAC ¶¶ 44, 72. Because it fails to allege its own 27 reliance on the blog posts, Nifty fails to state a claim under either the unfair or fraudulent 28 prong of the UCL. Accordingly, Claim III is DISMISSED. The Court need not reach 1 ClickUp’s alternative argument that the UCL claims fails on the merits under the unfair 2 || prong.

3 CONCLUSION

4 In light of the foregoing, the Court GRANTS IN PART and DENIES IN PART 5 || Defendant’s Motion to Dismiss (ECF No. 37). Consistent with this Order, Claims □□□□ are 6 || DISMISSED IN PART, and Claim III is DISMISSED. Dismissal of Claims I-III is 7 || WITHOUT PREJUDICE. 8 As the Court cannot definitively conclude doing so would be futile, the Court will 9 || provide Nifty the opportunity to amend. See *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 10 2000). Within twenty-one (21) days of this Order, Nifty either (1) SHALL FILE an 11 || amended

complaint, or (2) SHALL INDICATE to the Court that it will not do so. Failure 12 ||to timely select either of the above options may result in the dismissal of Claims □□□□ 13 ||pursuant to Federal Rule of Civil Procedure 41(b). See *Applied Underwriters, Inc. v. 14 || Lichtenegger*, 913 F.3d 884, 890-91 (9th Cir. 2019) (explaining that courts may dismiss 15 || an action under Rule 41(b) when a plaintiff fails to comply with a court order requiring the 16 filing of an amended complaint). Any amended complaint must be complete in and of 17 itself without reference to Nifty’s FAC; claims not realleged in the amended complaint will 18 ||be considered waived. See S.D. Cal. CivLR 15.1; *Lacey v. Maricopa County*, 19 || 693 F.3d 896, 928 (9th Cir. 2012) (noting claims dismissed with leave to amend that are 20 realleged in an amended pleading may be “considered waived”). 21 IT IS SO ORDERED. 22 |Dated: July 1, 2025 jae Lb monaitenus- 23 on. Janis L. Sammartino United States District Judge 25 26 27 28