



1 Support of their Motion for Summary Judgment against Plaintiff/Cross-Defendant LIFT, INC.

2 (“LIFT”).

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20 The Retirement Group v. Galante 176 Cal.App.4th 1226 (2009), ..... 4, 7, 9, 12, 15, 16

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1 **I. INTRODUCTION**

2 Defendants/Cross-Complainants JOHN DOE (“DOE”), RON ROE (“ROE”), and  
3 MANNY MOE (“MOE”) are former employees of Plaintiff/Cross-Defendant LIFT, INC.  
4 (“LIFT”). SSUMF 1. Without any warning, DOE, ROE, and MOE were all terminated on  
5 December 3, 2008. SSUMF 2.

6 In January, 2009, DOE, ROE, and MOE created COMPANY BUSINESS SOLUTIONS,  
7 INC. (“COMPANY”), a business, in which they provide technical support for a wide range of  
8 software and related applications and products, including, but by no means limited to, those sold  
9 by LIFT. SSUMF 3. DOE, ROE, MOE, and COMPANY will hereafter be referred to as  
10 (“DEFENDANTS”).

11 In March, 2009, LIFT contacted DEFENDANTS to threaten and advise them that  
12 offering complementary services was acceptable but offering competitive services was not.  
13 SSUMF 4.

14 Because LIFT offers its customers similar paid support services, it has chosen to  
15 improperly use the judicial process to eliminate competition and monopolize technical support  
16 related to its products. On July 16, 2009, LIFT filed the original Complaint in this action.

17 LIFT’s First Amended Complaint (“FAC”) lists a variety of causes of action, each of  
18 which lacks legal and evidentiary support.

19 As set forth below, LIFT has no factual basis for the allegations in its FAC and no legal  
20 basis for maintaining the instant action. DEFENDANTS hereby request that this Court grant the  
21 following Motion For Summary Judgment in its entirety.

22 **II. LEGAL ANALYSIS**

23 **A. Each Of LIFT’s Seven Causes Of Action Are Based On The Same False**  
24 **Allegation**

25 Each of LIFT’s seven (7) Causes of Action are based on the same fundamental allegation,  
26 namely that DEFENDANTS are using LIFT trade secret information which DOE, ROE, and  
27 MOE allegedly took or learned while working at LIFT. For point of reference, each cause of  
28 action will be quickly summarized:

1           The **First Cause of Action for Breach of Contract** is based on an alleged breach of the  
2 **Employee Proprietary Information Agreement**, while the **Second Cause of Action for**  
3 **Breach of Contract** is based on an alleged breach of the **Separation Letter Agreement** and the  
4 accompanying **Confidentiality Agreement**, which prohibit DOE, ROE, and MOE from taking  
5 or using LIFT trade secrets and other confidential and proprietary information for the benefit of  
6 themselves or others.

7           The **Third Cause of Action for Misappropriation of Trade Secrets** and the **Fourth**  
8 **Cause of Action for Statutory Unfair Competition** are also based on the allegation that  
9 DEFENDANTS misappropriated and are using LIFT trade secrets.

10           The **Fifth Cause of Action for Intentional Interference with Prospective Economic**  
11 **Advantage** and the **Sixth Cause of Action for Negligent Interference with Prospective**  
12 **Economic Advantage** are based on the allegation that DEFENDANTS are using LIFT trade  
13 secret information related to its customers to solicit those customers.

14           The **Seventh Cause of Action for Conversion** alleges that DEFENDANTS took LIFT  
15 trade secret information and have deprived LIFT the use thereof.

16           **B. Trade Secret Law**

17           California Civil Code § 3426.1 (d) defines trade secret information as that which:

18 1) derives independent economic value from not being generally known to the public or to other  
19 persons who can obtain economic value from its disclosure or use; and 2) is the subject of efforts  
20 that are reasonable under the circumstances to maintain its secrecy. *Id.*

21           Important factors to consider in determining whether information is trade secret include:

22 1) the extent to which the information is known outside of the business; 2) the extent of measures  
23 taken to guard the secrecy of the information; and 3) the ease or difficulty with which the  
24 information could be properly acquired or duplicated by others. Futurecraft Corp. v. Clary Corp.  
25 205 Cal.App.2d 279, 289 (1962).

26           The “most important” factor in determining whether something qualifies as a trade secret  
27 is “whether the information is readily accessible to a reasonably diligent competitor”.

28 Hollingsworth Solderless Terminal Co v. Turley 622 F.2d 1324, 1332 (9<sup>th</sup> Cir. 1980); *citing*



1 Klamath-Orleans Lumber, Inc. v. Miller 87 Cal.App.3d 458, 464-65 (1978); Fortna v. Martin  
2 158 Cal.App.2d 634, 639-40 (1958); American Alloy Steel Corp. v. Ross 149 Cal.App.2d 215,  
3 219-20 (1957); and Alex Foods, Inc. v. Metcalfe 137 Cal.App.2d 415, 425 & 428 (1955).

4 As discussed below, documents and information made public by LIFT necessarily lose  
5 any potential trade secret status, because such materials have not been subject to extensive  
6 measures to guard their secrecy, they can be easily duplicated by LIFT's competitors, and, more  
7 often than not, were publicly available for years before LIFT filed the instant action (and for  
8 some time after that). See Futurecraft 205 Cal.App.2d at 289.

9 **C. LIFT Has Described Particular Types Of Trade Secret Information**

10 Paragraph 31 of the FAC lists all the alleged trade secret information that LIFT claims  
11 DEFENDANTS are using. These items can be sorted into three general categories:

12 **1. Customer Lists, Which DEFENDANTS Did Not Take**

13 Item (6) of FAC Paragraph 31 describes information related to LIFT customers that it  
14 claims DEFENDANTS have wrongfully acquired and used. Although LIFT alleges that DOE,  
15 ROE, and MOE took customer lists before they were fired, all evidence is to the contrary.

16 During the September 16, 2011 deposition of former LIFT employee, Tony Maroney, it  
17 was discovered that Maroney completely disabled DOE, ROE, and MOE's access to all of their  
18 LIFT computer accounts *prior* to their termination. SSUMF 5. DEFENDANTS have  
19 consistently maintained that they never took any customer lists or other alleged trade secret  
20 information from LIFT before they were terminated without any warning. SSUMF 6.

21 Maroney was subsequently asked by LIFT to determine whether there was any way to  
22 check whether DOE, ROE, or MOE took any information from LIFT prior to their departure, to  
23 which he responded "no". SSUMF 7. To date, LIFT has not provided any evidence to support  
24 its libelous allegation that such information was taken.

25 Moreover, LIFT handed MOE and DOE "leads", advising MOE to contact Tim Shim of  
26 Local Business (San Diego), and DOE to contact Distant Business of Alaska to inquire about  
27 working in-house or as a consultant on those companies' LIFT software-based systems. SSUMF  
28 8.

1 Former employees are can legally solicit customers whose identities are not trade secrets,  
2 like those their employer publicizes. Morlife, Inc. v. Perry 56 Cal.App.4th 1514, 1528 (1997).  
3 In this case, LIFT issues frequent Press Releases in magazines and journals such as Stuff Today  
4 which regularly publish the identities of its customers. SSUMF 9. LIFT also publishes the  
5 identity of many of its customers on its website. SSUMF 10.

6 It is also perfectly legal for DEFENDANTS to solicit businesses that are easily identified  
7 as potential customers for their skill set, namely furniture retailers. The Retirement Group v.  
8 Galante 176 Cal.App.4th 1226, 1238 (2009), *citing* Morlife 56 Cal.App.4th at pp. 1521-1522.  
9 To advertise their fledgling business, DEFENDANTS did not use or consult any LIFT customer  
10 lists, but instead, introduced itself to the board of a third-party association of furniture retailers  
11 which provided its membership list. SSUMF 11. DEFENDANTS then sent an email blast to  
12 members of the association. SSUMF 12.

13 Because LIFT has no proof of its allegations that DEFENDANTS misappropriated and  
14 are using any confidential customer lists, such allegations are insufficient to support any of its  
15 seven causes of action.

16 **2. Documents Provided By LIFT To Its Customers**

17 **a. LIFT's Technical Document Is No Entitled To Trade Secret**  
18 **Protection**

19 **i. LIFT Technical Documentation Was Freely Available**  
20 **On The Internet For Years**

21 As is standard practice in the software industry, for years leading up to the instant action,  
22 LIFT always made its technical documentation freely available online.

23 At his September 16, 2011 Deposition, former LIFT employee Tony Maroney testified  
24 that during his seventeen (17) years as an LIFT employee, he was always aware that the website  
25 hosting LIFT's technical documentation was not secured and that anyone who knew the web  
26 address could freely access those documents. SSUMF 13. Furthermore, Maroney had never  
27 been advised and was unaware of any LIFT policy preventing its employees from freely  
28 providing the unsecured web address to its technical documentation. SSUMF 14. In fact, the  
unsecured web address for LIFT documentation (*support.LIFT.com/documentation*) was

1 commonly known to its employees who would regularly give it to customers so they could  
2 access those documents. SSUMF 15.

3 John Rucker, Director of IT for LIFT customer Rucker's, states that his company has  
4 used LIFT software since 2008, and that he also used LIFT software while working at his former  
5 employer. SSUMF 16. Rucker states that for nearly nine (9) years between June, 2001 and  
6 May, 2010, he regularly accessed LIFT's technical documentation from its website without  
7 providing any password or other login credential. SSUMF 17.

8 On February 27, 2010, independent third-party Larry Lee was able to access, view, copy,  
9 and download LIFT's technical software documentation from its website without ever being  
10 prompted for login or password information. SSUMF18 In fact, Lee did not even see any place  
11 on the web pages where login or password information could be input or otherwise supplied.  
12 SSUMF 19.

13 Former LIFT employee Maroney is confident that Lee was able to access the documents  
14 without any login, as the website was still unsecure as of that date. SSUMF 20. In fact, the  
15 website was not secured until June or July of 2010, over a year after the FAC was filed. SSUMF  
16 21.

17 Because LIFT's technical documentation was freely available on the internet for years, it  
18 cannot retroactively gain trade secret protection. Futurecraft 205 Cal.App.2d at 289.

19 **ii. LIFT Customers Were Not Obligated To Keep**  
20 **Technical Documentation Confidential**

21 LIFT customers are given reference manuals and user guides that can be used to  
22 troubleshoot the system. SSUMF 22. Until very recently, LIFT customers were not advised that  
23 technical documentation needed to be kept confidential or was otherwise an LIFT "trade secret".

24 In response to Requests for Production of Documents, LIFT produced two copies of its  
25 Retail Software Download Terms and Conditions, (both signed by different customers in  
26 December, 2009) which identifies only the "Software" as trade secret and requires that Software  
27 to be held confidential, but not the associated technical documentation. SSUMF 23. LIFT also  
28

1 produced an online “checkbox” version of that document which contains very similar language.  
2 SSUMF 24.

3 Furthermore, Section 8 (F) of the fully-executed Sales and License Agreement produced  
4 by LIFT allows Buyers of the software to provide technical documentation to their agents or  
5 representatives.<sup>1</sup> SSUMF 25 In fact, LIFT confirmed that its Customers are allowed to let third-  
6 party consultants use those reference materials. SSUMF 27.

7 By allowing its customers’ third-party agents and consultants to access and utilize its  
8 technical documentation, LIFT has waived any trade secret protection related thereto.

9 **b. COMPANY Does Not Use LIFT Technical Documentation To**  
10 **Provide Services To LIFT Customers**

11 LIFT’s software is essentially an interface for entering, organizing and viewing  
12 information stored in an Oracle database, and was written using Oracle’s software for creating  
13 forms. SSUMF 28. As such, the underlying Oracle database is installed and operates on its own,  
14 irrespective of any LIFT software, which will not function without Oracle’s software. SSUMF  
15 29.

16 Former LIFT employee Maroney candidly admits that 80% of the software maintenance  
17 work he performed during his seventeen (17) years at LIFT related to generic work on Oracle’s  
18 database software, requiring no special understanding of LIFT software or LIFT technical  
19 documentation. SSUMF 30.

20 DEFENDANTS have consistently maintained that they never *need* to reference any LIFT  
21 technical documentation to perform maintenance and support on LIFT software and the  
22 underlying Oracle database. SSUMF 31. In spite of the fact that such documentation was freely  
23 available on the internet, DEFENDANTS instead have always used publicly available  
24 information from companies such as Oracle, IBM, and Symantec, together with information  
25 gleaned using third party software utilities, and their shared knowledge of retail operations,  
26 information technology, and accounting to perform all services. SSUMF 32.

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<sup>1</sup> Schedule III, Section B of that same Agreement describes third party “service agents”, making it clear that  
“agents” in (F) includes third party support companies SSUMF 26.

1 Because LIFT’s technical documentation was, until recently, freely available on the  
2 internet, because its customers were not required to keep it confidential, and because  
3 DEFENDANTS never even use that documentation, LIFT cannot properly rely upon such  
4 documentation to support any cause of action.

### 5 3. DOE, ROE, And MOE’s Knowledge

6 LIFT knows it lacks hard evidence and, through its counsel, has confirmed that the crux  
7 of its case against DEFENDANTS is that they are using alleged trade secret information that is  
8 stored in their heads. SSUMF 33.

9 The CA Supreme Court in Continental Car-Na-Var Corp. v. Moseley 24 Cal.2d 104  
10 (1944), articulated a balancing act for the competing interests of the employer and ex-employee:

11 “A former employee has the right to engage in a competitive business for himself and to  
12 enter into competition with his former employer, even for the business of those who had  
13 formerly been the customers of his former employer, provided such competition is fairly  
14 and legally conducted.” Id. at 110.

14 The Retirement Group v. Galante 176 Cal.App.4th 1226 (2009) is the most recent case  
15 that discusses the limits a former employer can legally place on its ex-employees:

16 “**a former employee may use general knowledge, skill, and experience acquired in**  
17 **his or her former employment in competition with a former employer**, [but] the  
18 former employee may not use confidential information or trade secrets in doing so.”  
Retirement Group v. Galante 176 Cal.App.4th 1226, 1237 (2009); *citing* Morlife, Inc. v.  
Perry 56 Cal.App.4th 1514, 1519-20 (1997) (*emphasis added*)

19 Furthermore, proving DEFENDANTS had *access* to alleged “trade secret” information  
20 during their employment is not enough. Retirement Group 176 Cal.App.4th at 1239. An  
21 employer must also prove that particular materials are entitled to trade secret protection, then it  
22 must prove that the former employee *misappropriated* those materials and used them to attain an  
23 unfair competitive advantage. Morlife 56 Cal.App.4th at 1523.

#### 24 a. COMPANY Does Not Perform Installation And Major 25 Revision Upgrades On LIFT Software

26 Item (1) of FAC Paragraph 31 describes trade secret information used to perform  
27 installation and upgrades of LIFT products, while Item (5) describes planning for such upgrades.  
28

1            COMPANY has never performed installation or major revision upgrades of LIFT  
2 software and, in spite of over 2 1/2 years of litigation, LIFT has no evidence to the contrary. The  
3 only upgrade COMPANY has performed of LIFT software was a minor patch revision which  
4 simply required executing a single script that was contained on the CD that was in possession of  
5 the customer. SSUMF 34. Therefore LIFT’s baseless allegations claiming COMPANY  
6 performs installation and upgrades of LIFT software cannot properly be considered.

7                            **b.      COMPANY Performs Support And Maintenance Without**  
8                            **Using To Any Trade Secret Information**

9            Item (3) of FAC Paragraph 31 describes trade secret “*knowledge*” allegedly necessary to  
10 perform support and maintenance of LIFT and third-party software.<sup>2</sup> As discussed in Section III  
11 (C)(2)(b), above, DEFENDANTS do not need to, and do not, reference any LIFT technical  
12 documentation or bona-fide trade secret information when performing their support and  
13 maintenance services.<sup>3</sup>

14            Further, this Court asked LIFT whether it is its “position that anybody -- if COMPANY  
15 touches the software, that’s a violation?”, to which it responded “No.” SSUMF 36.

16            LIFT admits that a competitor could perform competitive support and maintenance  
17 services by either reverse engineering the product, or by having experience working with the  
18 product. SSUMF 37. LIFT further admits that there is more than one way to troubleshoot  
19 problems with its software. SSUMF 38. More importantly, LIFT admits that some customers  
20 use LIFT software successfully without support contracts, proving that LIFT trade secrets are not  
21 required to make the software work. SSUMF 39.

22            DEFENDANTS are legally entitled to use their general knowledge, skill, and experience  
23 acquired while working for LIFT to compete with it. Retirement Group 176 Cal.App.4th 1237;  
24 Bus. and Prof. Code § 16600.

25            A fairly similar Federal District Court case, Excelligence Learning Corp. v. Oriental  
26 Trading Company, Inc. C-03-4947-JF (US Dist. Ct. N.D. Cal. 12/20/04), examined whether

27 \_\_\_\_\_  
28 <sup>2</sup> Clearly LIFT lack standing to argue that DEFENDANTS’s are prohibited from performing maintenance or support on third-party software.

1 “layout strategies” developed by defendant while at her former job were entitled to trade secret  
2 protection. Id. at 13 The court found that because those strategies were “apparent from a visual  
3 inspection”, they did not constitute trade secrets and the former employee could not be  
4 prohibited from using them to compete with plaintiff. Id.

5 Similarly, in this case, the organization and layout of the Oracle databases that underpin  
6 LIFT’s software are “apparent from a visual inspection” and are not entitled to trade secret  
7 protection. SSUMF 40.

8 Although this case has dragged on for almost 2 1/2 years, LIFT has yet to identify a  
9 single piece of “trade secret” information purportedly residing in DOE, ROE, and/or MOE’s  
10 head that DEFENDANTS necessarily use to perform support and maintenance services. As  
11 recently as April 27, 2011, LIFT told this Court “we don’t have any evidence.” SSUMF 41.

12 **c. Integration Of Third Party Software Is Performed Without**  
13 **Using LIFT Trade Secret Information**

14 Item (2) of FAC Paragraph 31 describes knowledge and trade secrets allegedly necessary  
15 to perform installation and upgrades of third party products in conjunction with LIFT products,  
16 while Item (4) of FAC Paragraph 31 describes knowledge and trade secrets allegedly necessary  
17 to support integration with third party software.

18 While it is obvious that LIFT lacks standing to assert any rights with respect to  
19 *maintenance* and *support* of third-party software, they claim to be able to prohibit  
20 DEFENDANTS from *integrating* any third party software with LIFT’s system. It is as if Toyota  
21 sued a former worker whose subsequent business installs after-market suspension on its  
22 dangerously unstable vehicles.

23 Prior to Blue Zone’s recent purchase of LIFT, LIFT would not *willingly* allow integration  
24 of its software with Blue Zone’s warehouse software module. SSUMF 42. In spite of this  
25 resistance, Blue Zone was able to reverse engineer LIFT’s software and integrate its third party  
26 system with LIFT’s software without breaking it. SSUMF 43. Blue Zone’s independent  
27

28 <sup>3</sup> LIFT’s former employee admitted that customers can install LIFT’s software without support from LIFT, as the  
installation scripts came on the CD. SSUMF 35.

1 integration proves that third party systems can be developed and integrated without using LIFT's  
2 trade secret information, and that LIFT's claims to the contrary are patently false.

3 As such, LIFT's reliance on this imaginary "trade secret" knowledge is insufficient to  
4 support any Cause of Action.

5 **d. An Analysis Of The All-Inclusive List Of "Trade Secret" Items**  
6 **That DEFENDANTS Have Allegedly Misappropriated Reveals**  
7 **A Complete Lack Of Admissible Evidence To Support Any**  
8 **Cause Of Action**

8 LIFT admits that, in spite of its 2 1/2 year fishing expedition, it is still unable to tie any  
9 specific "trade secret" information to any service provided by COMPANY. SSUMF 44. LIFT  
10 employee, and Person Most Knowledgeable regarding DEFENDANTS' alleged  
11 misappropriation of trade secrets, Terry Torry, was deposed on November 3, 2011, at which time  
12 he was given repeated opportunities and confirmed that he provided an *all-inclusive* list of trade  
13 secrets LIFT suspects DEFENDANTS *might* be using. SSUMF 45. As discussed above, such  
14 *conjecture* is insufficient to maintain the instant action and survive Summary Judgment, as LIFT  
15 must not only prove that DEFENDANTS had access to, or even learned trade secret information,  
16 by that they are illegally using it. Morlife 56 Cal.App.4th at 1523. For this reason alone,  
17 DEFENDANTS' Motion for Summary Judgment should be granted.

18 In any event, none of the other items identifies by LIFT can survive trade secret scrutiny  
19 and therefore cannot support any Cause of Action.

20 **i. LIFT Only Identified Two Specific Examples, Neither**  
21 **Of Which Survive Scrutiny**

22 LIFT only identified two arguably specific examples of tasks requiring use of its "trade  
23 secret" information:

24 The first specific task it identified is adding a printer to the system. SSUMF 46. Then,  
25 not 5 seconds later, LIFT admitted that information is provided to and documented for the  
26 customers. SSUMF 47. As discussed above, LIFT's technical documentation provided to the  
27 customer is not trade secret.









1 customers to keep the software functioning properly, many of which are intentionally left out of  
2 the customer's technical documentation.<sup>4</sup> SSUMF 67.

3         Regardless, let us give LIFT the benefit of the doubt and assume that its software errors  
4 are "one-of-a-kind". In that case, **there can be no trade secret protection for something that**  
5 **is not even known to LIFT.**

6         LIFT similarly claims trade secret protection for the steps one would go through to  
7 troubleshoot a problem. SSUMF 69. As discussed above, LIFT admits that it does not provide  
8 any training to its employees regarding troubleshooting its software. SSUMF 70

9         It further admits that all LIFT employees do not troubleshoot in the same way (*i.e.* there  
10 is more than one way to troubleshoot LIFT software). SSUMF 71

11         As such, knowledge of how to troubleshoot LIFT software errors cannot be considered  
12 trade secret and cannot support any cause of action.

13         **F.         Certain Causes Of Action Also Fail Against Particular Defendants**

14         There also exist reasons why certain Causes of Action against particular DEFENDANTS  
15 must fail, as set forth below.

16                 **1.         First Cause of Action for Breach of Contract**

17         LIFT's First Cause of Action for Breach of its Employee Proprietary Information  
18 Agreement necessarily fails against ROE because neither party signed that agreement, but  
19 instead ROE merely signed an acknowledgement of receipt. SSUMF 72.

20         LIFT's First Cause of Action for Breach of its Employee Proprietary Information  
21 Agreement necessarily fails against DOE because neither party signed that agreement, but  
22 instead DOE merely signed an acknowledgement of receipt. SSUMF 73.

23                 **2.         Second Cause of Action for Breach of Contract**

24         LIFT's Second Cause of Action is based on an alleged breach of the Separation Letter  
25 Agreement and the accompanying Confidentiality Agreement.

26  
27  
28 <sup>4</sup> In fact, the truth came out when LIFT's Person Most Knowledgeable testified at his deposition that a primary  
reason LIFT's support contracts are a valuable revenue stream is because they furnish opportunities to sell new  
modules and upgrades. SSUMF 68.

1                                   **a.       Separation Letter Agreement**

2           The Separation Letter Agreement (“SLA”) does not cover or even refer to alleged trade  
3 secret materials and the “Confidentiality” section only seeks to maintain the confidentiality of  
4 that same letter. SSUMF 74. The only items the SLA covers are company documents and tools,  
5 neither of which DEFENDANTS took before they were terminated without notice. SSUMF 75.  
6 LIFT has yet to provide a shred of evidence that DEFENDANTS took or failed to return any  
7 company documents or tools. As such, DEFENDANTS’ Motion for Summary Judgment related  
8 to LIFT’s Second Cause of Action for breach of the SLA must be granted.

9                                   **b.       Confidentiality “Agreements”**

10          Paragraph 21 of LIFT’s FAC alleges that:

11           “At or around the time of termination of employment with LIFT, DOE, ROE, and MOE,  
12 each was provided and executed an Employee Separation Form which included a further  
13 Confidentiality Agreement. Attached hereto as Exhibit 2 and incorporated herein by  
reference is a copy of the Employee Separation Form for each [sic] DOE, ROE, and  
MOE.”

14          What LIFT fails to mention is that it never signed the Confidentiality “Agreements”.  
15 SSUMF 76. Further, the Confidentiality “Agreement” is not a contract at all, as LIFT has neither  
16 incurred any obligations nor provided consideration thereunder. These missing facts provide a  
17 basis for granting COMPANY’s Motion for Summary Judgment related to the LIFT’s Cause of  
18 Action for breach of the Confidentiality “Agreements” must be granted.

19          “At least since 1872, a noncompetition agreement has been void unless specifically  
20 authorized by sections 16601 or 16602.”<sup>5</sup> Retirement Group 176 Cal.App.4th at 1233, *citing*  
21 Bosely Medical Group v. Abramson 161 Cal.App.3d 284, 286 (1984).

22          Even assuming, *arguendo*, that the Confidentiality “Agreements” are enforceable, they  
23 are void because they are thinly disguised noncompetition agreements, forbidding DOE, ROE,  
24 and MOE from ever again using their information or knowledge which they acquired during their  
25 employment that LIFT (in its sole discretion) considers “proprietary”. SSUMF 77. LIFT cannot  
26 sprinkle a noncompetition with trade secret language to avoid the statutory prohibition on  
27  
28

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<sup>5</sup> Bus. & Prof. Code §§ 16601 and 2 deal exclusively with partner responsibilities and sale of a business.

1 noncompetition agreements. Retirement Group 176 Cal.App.4th at 1233; Bus. & Prof. Code §  
2 16600.

3 Based on the foregoing, DEFENDANTS' Motion for Summary Judgment related to  
4 LIFT's Second Cause of Action for breach of the Confidentiality Agreements must be granted.

5 **3. Third Cause of Action for Misappropriation of Trade Secrets Fails**  
6 **Because LIFT Did Not Identify The Materials As "Trade Secret"**

7 With respect to the Misappropriation of Trade Secrets claim, LIFT has failed to explain  
8 how a list of items given to DOE, ROE, and MOE *following termination* proves that they had  
9 knowledge that any particular items were considered "trade secrets" during employment.

10 Paragraph 46 of the FAC alleges that "LIFT has made reasonable efforts to ensure [its]  
11 trade secret information remains secret..." At paragraph 49, LIFT alleges that DEFENDANTS  
12 had "reason to know that their knowledge of LIFT's trade secrets was acquired under  
13 circumstances creating a legal obligation limiting the use of such trade secrets". However, the  
14 FAC does not identify any facts showing DEFENDANTS had any "reason to know" that any  
15 particular materials were considered "trade secrets", other than LIFT's very general list of items  
16 in the Confidentiality "Agreement" given to DEFENDANTS *after* they were fired. Further, as  
17 discussed above, LIFT admits that it does not provide any training to its employees regarding  
18 troubleshooting its software and that there are multiple ways to perform this task.

19 "[A] party seeking to protect trade secrets must 'describe the subject matter of the trade  
20 secret with sufficient particularity to separate it from matters of general knowledge in the trade  
21 or of special knowledge of those persons who are skilled in the trade, and to permit the defendant  
22 to ascertain at least the boundaries within which the secret lies.'" Whyte v. Schlage Lock Co.  
23 101 Cal.App.4th 1443, 1453 (2002); *quoting* Diodes, Inc. v. Franzen (1968) 260 Cal.App.2d 244,  
24 253 (1968)

25 Because during their employment, LIFT never provided DOE, ROE, and MOE with any  
26 description of the allegedly "trade secret" subject matter, and because LIFT has yet to provide  
27 any evidence to the contrary, any related baseless allegations cannot properly be considered, and  
28 LIFT's Third Cause of Action necessarily fails.

1                   **4. Fourth Cause of Action for Statutory Unfair Competition**

2                   LIFT’s Fourth Cause of Action for Statutory Unfair Competition relies on the same facts  
3 as the Third, and therefore fails for the reasons set forth in the preceding section.

4                   **5. Fifth and Sixth Causes of Action for Intentional and Negligent**  
5                   **Interference with Prospective Economic Advantage**

6                   LIFT’s Fifth and Sixth Causes of Action allege that DEFENDANTS “wrongfully  
7 advise[d], counsel[ed], persuade[d], or otherwise induce[d] various LIFT clients to suspend  
8 and/or disrupt their business relationships or potential future business relationships with LIFT.”  
9 SSUMF 78. What LIFT fails to allege is any wrongful act in connection with such “persuasion”.

10                   **Soliciting a former employer’s customers, in and of itself, is never “wrongful”.**

11 Rigging Int’l Maintenance Co. v. Gwin 128 CA3d 594 (1982); A.B.C Distrib. Co. v. Distillers  
12 Distrib. Corp. 154 CA2d 175 (1957). (*emphasis added*) “[A]n act [of economic interference]  
13 must be wrongful by some legal measure, rather than merely a product of an improper, but  
14 lawful, purpose or motive.” San Jose Construction, Inc. v. S.B.C.C., Inc. 155 Cal.App.4th 1528,  
15 1544–1545 (2007), (*internal citations omitted*).

16                   Furthermore, LIFT cannot bootstrap other allegedly tortious conduct discussed in the  
17 FAC, as “[i]t is insufficient to allege the defendant engaged in tortious conduct distinct from or  
18 only tangentially related to the conduct constituting the actual interference.” Limandri v. Judkins  
19 52 Cal.App.4th 326, 342 (1997); *see also* Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla  
20 Village Square Venture Partners 52 Cal.App.4th 867, 881 (1997) [Plaintiff has the burden of  
21 proving, as an element of the cause of action itself, that the defendant’s conduct was  
22 independently wrongful].

23                   Because LIFT has failed to allege any independently unlawful act, it has failed to state a  
24 cause of action for either Intentional or Negligent Interference with Prospective Economic  
25 Advantage.

26                   **6. Seventh Cause of Action for Conversion**

27                   With regard to LIFT’s Seventh Cause of Action for Conversion, it is black-letter law that  
28 an essential element of the strict liability tort of Conversion is that the owner is deprived of

1 possession or use of the property. Fearon v. Department of Corrections 162 Cal.App.3d 1254,  
2 1257 (1984). Defendants' Sixth Cause of Action for Conversion fails because LIFT cannot, and  
3 does not, identify any items of *tangible property*, of which DEFENDANTS took *exclusive*  
4 possession, thereby denying LIFT use of said property.

5 Even assuming, *arguendo*, that they took *copies* of documents, which they did not,  
6 DEFENDANTS would not have obtained *exclusive* possession. As such, DEFENDANTS'  
7 Motion for Summary Judgment on LIFT's Cause of Action for Conversion should be granted for  
8 this reason as well.

9 **III. CONCLUSION**

10 For the reasons set forth hereinabove, COMPANY respectfully requests that this Court  
11 grant this Motion for Summary Judgment in its entirety

12  
13 DATED: November \_\_\_\_, 20xx

14 By: \_\_\_\_\_

15 Attorney for Defendants/Cross-  
16 Complainants, COMPANY BUSINESS  
17 SOLUTIONS, INC., JOHN DOE,  
18 RON ROE, and MANNY MOE