



1 in part and DENIES in part Plaintiff's motion for a temporary restraining order. The Court will  
2 hold a preliminary injunction hearing on August 1, 2011.

### 3 **I. Background**

#### 4 **A. The Parties**

5 Plaintiff Richmond Technologies, doing business as ePayware, is a company that provides  
6 enterprise resource planning ("ERP") software for financial service companies who provide credit  
7 card terminals to merchants. Compl. ¶ 1. ePayware originally existed as a corporation  
8 headquartered in San Jose, California. Compl. ¶ 23. However, on October 12, 2009, Plaintiff  
9 Richmond Technologies, Inc. acquired the assets of ePayware. Compl. ¶ 25. Plaintiff contends that  
10 pursuant to this acquisition, it became the successor in interest to ePayware's contracts and began  
11 doing business as ePayware. *Id.* Plaintiff Richmond Technologies is a Georgia corporation, with  
12 its principal place of business in Alpharetta, Georgia. Compl. ¶ 13.

13 Defendant Aumtech i-Solutions Pvt. Ltd. ("Aumtech India") is a corporation organized  
14 under the laws of India, with its principal place of business in New Delhi, India. Compl. ¶ 14.  
15 Plaintiff alleges that Defendants Shankar and Ila Bose, a married couple, own and manage Aumtech  
16 India. *Id.* Shankar Bose is Aumtech India's Chief Executive Officer, and Ila Bose is Aumtech  
17 India's Chief Technology Officer. *Id.* Both Shankar and Ila Bose are Indian nationals residing in  
18 India. Compl. ¶¶ 15-16.

19 Defendant Aumtech Business Solutions ("Aumtech America") is a recently formed  
20 company located in Ventura, California. Compl. ¶ 13. Plaintiff describes Aumtech America as "an  
21 unincorporated association consisting of Damien Joseph Polito, Jennifer Polito, and the principals  
22 of Aumtech i-Solutions Pvt. Ltd (Shankar Bose and Ila Bose)." Compl. ¶ 13. However, Defendants  
23 claim that Aumtech America is a newly formed limited liability company, of which Jennifer Polito  
24 is the President and Aumtech India is a member. *See* Decl. of Jennifer Polito ISO Mot. to Dismiss  
25 for Improper Venue ("Jennifer Polito Venue Decl.") ¶¶ 4-5, ECF No. 43; Decl. of Shankar Bose  
26 ISO Opp'n to Mot. for TRO ("Shankar Bose TRO Decl.") ¶ 4, ECF No. 52. Shankar Bose is  
27 Partner and Business Head of Aumtech America, and Ila Bose is Aumtech America's Chief  
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1 Technology Officer. Compl. ¶¶ 15-16. Aumtech America's fictitious business name statement,  
2 filed with the Ventura County Recorder, lists Defendant Damian Joseph Polito as owner. Compl.  
3 ¶ 13. Nonetheless, Damian Polito claims that he works as a prop maker for film production  
4 companies and does not hold a position with, or perform work on behalf of, Aumtech America.  
5 Decl. of Damian Joseph Polito ISO Mot. to Dismiss for Improper Venue ("Joseph Polito Venue  
6 Decl.") ¶¶ 4-5. Damian and Jennifer Polito are married and reside in Ventura, California.

### 7 **B. Contractual Relationships between the Parties**

8 On January 31, 2007, when it was still based in San Jose, ePayware entered into a  
9 Memorandum of Understanding ("MoU") with Aumtech India. Compl. ¶ 23; Decl. of Sandeep  
10 Menon in Supp. of Pl's Mot. for TRO ("Menon Decl.") ¶ 4 & Ex. A. The MoU created a "Teaming  
11 Agreement" pursuant to which Aumtech India developed enterprise resource planning software for  
12 ePayware and maintained the enterprise resource planning modules of ePayware's customers.  
13 Compl. ¶ 23; Menon Decl. ¶ 5 & Ex. A at 2-3. Under the terms of the MoU, ePayware agreed to  
14 pay Aumtech India a fee of \$4,000 per month, to be reassessed after six months, for leasing out the  
15 services of Shankar Bose. Menon Decl. Ex. A at 6. The MoU also required Aumtech India to  
16 provide weekly progress reports and monthly performance and expense reports to ePayware. *Id.*  
17 The terms of the MoU limit its scope to a "specific period of twenty-four months," which could be  
18 extended if both parties agreed in writing. *Id.* at 2.

19 On September 15, 2009, ePayware and Aumtech India entered into a second contract  
20 described as a Confidentiality and Non-Disclosure Agreement ("Non-Disclosure Agreement" or  
21 "NDA"). Menon Decl. ¶ 4 & Ex. B. The Non-Disclosure Agreement contains various provisions  
22 that prohibit Aumtech India from disclosing or using confidential information, soliciting  
23 ePayware's employees or consultants for one year following Aumtech India's term of employment,  
24 or entering into any agreement with ePayware's customers or clients for one year following the term  
25 of employment. Menon Decl. Ex. B at 2-3. The Non-Disclosure Agreement also contains a  
26 provision by which Aumtech India agreed not to compete with ePayware "with similar product and  
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1 or Service using its technology” for a period of one year following Aumtech India’s term of  
2 employment with ePayware. *Id.* at 3.

3 ePayware also had a contractual agreement with Defendant Jennifer Polito. According to  
4 the Complaint, Jennifer Polito joined ePayware as a customer support and help desk executive on  
5 January 17, 2007. Compl. ¶ 28. Plaintiff claims that on January 17, 2007, Ms. Polito signed a  
6 Confidentiality and Non-Disclosure Agreement that contained many of the same material terms as  
7 the Non-Disclosure Agreement signed by Aumtech India.<sup>1</sup> Compl. ¶ 29. Jennifer Polito terminated  
8 her employment with ePayware on March 18, 2011. Compl. ¶ 30.

### 9 **C. Plaintiff’s Allegations**

10 In its Complaint, Plaintiff alleges that, beginning sometime in 2010, Defendant Aumtech  
11 India “hatched a plan” with former ePayware employee Jennifer Polito and her husband Damian  
12 Polito to market Aumtech India’s software development and maintenance services directly to  
13 ePayware’s clients. Compl. ¶ 4. Plaintiff claims that the individual Defendants created Aumtech  
14 America in April 2010 and prepared to launch this competing venture over the following year.  
15 Compl. ¶¶ 4-5. As part of the preparations, Plaintiff alleges that Aumtech India employees ceased  
16 using their ePayware email addresses to correspond with ePayware’s customers and instead began  
17 using their Aumtech email accounts. Compl. ¶ 6. Plaintiff also contends that Jennifer Polito used  
18 three different programs to delete data from the hard drive of her ePayware-issued computer before  
19 returning the computer to Plaintiff. Compl. ¶ 30. After Jennifer Polito resigned from ePayware on  
20 March 18, 2011, Plaintiff alleges that she immediately joined Aumtech America as its President.  
21 Compl. ¶ 5. Thereafter, Aumtech America has allegedly offered the same services offered by  
22 ePayware and encouraged ePayware’s clients to terminate their contracts and sign up with Aumtech  
23 America. Compl. ¶ 7. Specifically, Plaintiff claims that Jennifer Polito contacted ePayware client  
24 FirstPay Solutions, LLC and encouraged FirstPay to switch to Aumtech America. Compl. ¶ 32.

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26  
27 <sup>1</sup> Although Plaintiff has submitted a copy of the Non-Disclosure Agreement signed by Aumtech  
28 India, it has not submitted a copy of Jennifer Polito’s Non-Disclosure Agreement in connection with  
the pending motions.

1 Aumtech America also marketed its services at a trade show in San Diego on May 10-12, 2011.  
2 Compl. ¶ 8.

3 On May 16, 2011, after learning of the alleged activities, Plaintiff terminated its software  
4 development and maintenance agreement with Aumtech India. Menon Decl. ¶ 7. Plaintiff then  
5 demanded that Aumtech India release its software source code to Plaintiff so that Plaintiff could  
6 transition its software support and development to another vendor. Compl. ¶ 36. Plaintiff claims  
7 that it has paid for the software development and maintenance provided by Aumtech India and that  
8 it needs the source code in order to fulfill its obligations to its customers. Compl. ¶ 37; Menon  
9 Decl. ¶ 11. According to Plaintiff, Aumtech India has refused to release the source code unless  
10 ePayware first provides a payment of \$20,000. Compl. ¶ 36; Menon Decl. ¶ 9.

11 On May 20, 2011, Plaintiff filed the instant action in the United States District Court for the  
12 Northern District of California. The Complaint asserts seven claims for relief: (1) breach of written  
13 contract against Aumtech India; (2) breach of written contract against Jennifer Polito; (3) violations  
14 of the California Unfair Competition Law, Cal. Bus. & Profs. Code § 17200; (4) intentional  
15 interference with contract; (5) negligent interference with contract; (6) declaratory relief against  
16 Jennifer Polito and Aumtech India; and (7) unjust enrichment. On May 23, 2011, Plaintiff filed an  
17 *ex parte* motion for a temporary restraining order that would (1) compel Defendant Aumtech India  
18 and its principals to release the source code to ePayware, and (2) enjoin Defendants from competing  
19 with ePayware in violation of the Non-Disclosure Agreement. The Court denied Plaintiff's motion  
20 without prejudice on grounds that Plaintiff had not satisfied the requirements of Federal Rule 65(b)  
21 for issuance of a TRO without notice to the adverse party. *See* Order Denying Ex Parte Motion for  
22 TRO Without Prejudice, ECF No. 17. Plaintiff has now provided notice to all parties, and on June  
23 3, 2011, Plaintiff renewed its motion for a TRO and preliminary injunction. Also on June 3, 2011,  
24 Defendants moved to dismiss for lack of personal jurisdiction and improper venue, and Plaintiff  
25 moved for an order permitting it to serve the India-based defendants by substituted service on their  
26 Los Angeles-based counsel. The Court held a hearing on all four motions on June 23, 2011, and  
27 will now consider each in turn.

## II. Motion to Dismiss for Lack of Personal Jurisdiction

### A. Legal Standard

Defendants Aumtech India, Shankar Bose, and Ila Bose (collectively, the “Indian Defendants”) move to dismiss pursuant to Rule 12(b)(2) on grounds that the Court lacks personal jurisdiction over each of them.<sup>2</sup> When a defendant moves to dismiss for lack of personal jurisdiction, “the plaintiff bears the burden of demonstrating that jurisdiction is appropriate.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Because this Court has not conducted an evidentiary hearing, Plaintiff “need only make a prima facie showing of jurisdictional facts.” *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). At this stage of the proceeding, uncontroverted facts contained in the Complaint are taken as true, and “[c]onflicts between parties over statements contained in affidavits must be resolved in the plaintiff’s favor.” *Schwarzenegger*, 374 F.3d at 800.

Where, as here, there is no federal statute that governs personal jurisdiction, the Court must apply the law of the state in which it sits. *Schwarzenegger*, 374 F.3d at 800. In this case, “[b]ecause California’s long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same.” *Id.* at 800-01. That is, for this Court to exercise personal jurisdiction over the Indian Defendants, each Defendant “must have at least ‘minimum contacts’ with the relevant forum such that the exercise of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’” *Id.* at 801 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). A federal court may

<sup>2</sup> The Indian Defendants also moved to dismiss pursuant to Rule 12(b)(4) and (5) for insufficient process and insufficient service of process. The Indian Defendants claim that Plaintiff served them via email with a copy of the summons that did not contain the Clerk’s signature or the Court’s seal. However, Plaintiff served the Indian Defendants by email solely to give them notice of the pending motion for TRO and preliminary injunction. Plaintiff does not contend that such service is sufficient and instead seeks to serve the Indian Defendants pursuant to Rule 4(f)(3). If a district court determines that service of process is insufficient, the court may exercise discretion in determining whether to dismiss the action or simply quash service of process. *Stevens v. Security Pac. Nat. Bank*, 538 F.2d 1387, 1389 (9th Cir. 1976); *see also, e. g., Arasan Chip Systems, Inc. v. Sonix Technology Co. Ltd.*, No. 5:09-CV-02172 JF, 2010 WL 890424, at \*1 (N.D. Cal. Mar. 8, 2010). Because the Court has determined that service pursuant to Rule 4(f)(3) is proper, as discussed below, it is not appropriate to dismiss the action under Rule 12(b)(4) or (5) at this time. Additionally, as Plaintiff does not contend that the emailed documents constitute effective service, there is no need to quash service at this time.

1 exercise either general or specific jurisdiction over a non-resident defendant. General jurisdiction  
 2 exists where a defendant has “continuous and systematic” contacts with the forum state such that  
 3 the defendant may be “haled into court in the forum state to answer for any of its activities  
 4 anywhere in the world.” *Schwarzenegger*, 374 F.3d at 801. Specific jurisdiction is more limited in  
 5 scope and can be exercised where the defendant has sufficient minimum contacts with the forum  
 6 state, and the plaintiff’s claims arise out of those contacts. *Id.* at 801-02.

### 7 **B. Analysis**

8 In this case, Plaintiff does not allege that the Court has general personal jurisdiction over the  
 9 Indian Defendants. Accordingly, the Court need determine only whether it can exercise specific  
 10 personal jurisdiction over these Defendants. The Ninth Circuit has developed a three-prong test for  
 11 analyzing claims of specific personal jurisdiction:

- 12 (1) The non-resident defendant must purposefully direct his activities or  
 13 consummate some transaction with the forum or resident thereof; or perform  
 14 some act by which he purposefully avails himself of the privilege of conducting  
 15 activities in the forum, thereby invoking the benefits and protections of its laws;
- 16 (2) the claim must be one which arises out of or relates to the defendant’s forum-  
 17 related activities; and
- 18 (3) the exercise of jurisdiction must comport with fair play and substantial  
 19 justice, i.e. it must be reasonable.

20 *Schwarzenegger*, 374 F.3d at 802. The plaintiff bears the burden of establishing the first two prongs  
 21 of the test. *Id.* “If the plaintiff succeeds in satisfying both of the first two prongs, the burden then  
 22 shifts to the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be  
 23 reasonable.” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)).

#### 24 **1. Purposeful Availment**

25 The first prong of the Ninth Circuit’s test “ensures that a defendant will not be haled into a  
 26 jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral  
 27 activity of another party or a third person.” *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*  
 28 *L’Antisemitisme*, 379 F.3d 1120, 1124 (9th Cir. 2004) (quoting *Burger King*, 471 U.S. at 475).  
 Typically, a “purposeful availment” analysis is used in cases sounding in contract, while a  
 “purposeful direction” analysis is more often used in cases sounding in tort. *Schwarzenegger*, 374

1 F.3d at 802. Here, although some of Plaintiff’s claims sound in tort, they all arise out of the  
2 Defendants’ contractual relationship with ePayware. Accordingly, the Court will apply a  
3 purposeful availment analysis in evaluating Defendants’ contacts with California. *See Sher*, 911  
4 F.2d at 1362 (applying purposeful availment analysis where some of plaintiff’s claims sounded in  
5 tort, but all arose out of a contractual relationship).

6 **a. Aumtech India’s Contacts**

7 Plaintiff argues that Defendant Aumtech India purposefully availed itself of the privilege of  
8 conducting activities in California by entering into a continuing contractual relationship with  
9 ePayware, which was based in San Jose, California. The Court agrees that Aumtech India’s  
10 business relationship with ePayware establishes sufficient minimum contacts for the exercise of  
11 specific personal jurisdiction. Defendants are correct, of course, that a contract alone does not  
12 automatically establish minimum contacts supporting personal jurisdiction. *See Burger King*, 471  
13 U.S. at 478 (“If the question is whether an individual’s contract with an out-of-state party alone can  
14 automatically establish sufficient minimum contacts in the other party’s home forum, we believe the  
15 answer clearly is that it cannot.”). However, it is also true that jurisdiction “may not be avoided  
16 merely because the defendant did not *physically* enter the forum State.” *Id.* at 476. Rather, the  
17 Court must take a “highly realistic approach” and evaluate factors such as “prior negotiations and  
18 contemplated future consequences, along with the terms of the contract and the parties’ actual  
19 course of dealing” to determine whether the Aumtech India has sufficient contacts with California  
20 to support the exercise of specific personal jurisdiction. *Id.* at 479.

21 In this case, Aumtech India entered into a business relationship with ePayware that  
22 contemplated ongoing obligations to ePayware, its employees, and its customers in California.  
23 Although Aumtech India performed its obligations from its offices in New Delhi, India, the MoU  
24 required weekly and monthly reports to ePayware in California. Menon Decl. Ex. A at 6. The  
25 MoU also required Aumtech India to provide tech support its U.S.-based clients, *id.* at 5, and  
26 Defendants have acknowledged that at least some of ePayware’s clients are based in California. *See*  
27 Jennifer Polito Venue Decl. ¶ 11 (stating that ePayware had clients “in Southern California,  
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1 including Intuit, International Processing Solutions, Cardready and APPS”). Moreover, it appears  
2 that even after ePayware was acquired by Richmond Technologies, which is based in Georgia,  
3 Aumtech India continued to work closely with California-based ePayware employee Jennifer Polito  
4 to identify client needs and customize software accordingly. *See* Compl. ¶ 28 (noting that after the  
5 2009 acquisition, Jennifer Polito “interfaced with clients to gather their business and technical  
6 requirements and worked with Aumtech India to customize the software to fulfill these  
7 requirements”).

8 Additionally, the Non-Disclosure Agreement signed by Aumtech India in 2009 includes a  
9 choice-of-law clause providing that the agreement “is governed exclusively by and construed in  
10 accordance with the law of the State of California.” Menon Decl. Ex. A at 3, ¶ 11. While such a  
11 choice-of-law provision, standing alone, is not sufficient to confer jurisdiction, it lends further  
12 support to Plaintiff’s contention that Aumtech India deliberately affiliated itself with California and  
13 that the possibility of litigation in California should have been reasonably foreseeable. *See Burger*  
14 *King*, 471 U.S. at 482 (finding that a choice-of-law provision, when combined with a long-standing  
15 relationship with the forum state, “reinforced [the defendant’s] deliberate affiliation with the forum  
16 State and the reasonable foreseeability of possible litigation there”). Finally, it is significant that  
17 Aumtech India is alleged to have breached provisions of these contracts by joining with California  
18 resident Jennifer Polito to form a company organized under California laws. Based on these facts,  
19 the Court finds that Aumtech India purposefully availed itself of the privilege of conducting  
20 activities in California and created “continuing obligations” to California residents sufficient to  
21 establish the minimum contacts required for personal jurisdiction. *See Burger King*, 471 U.S. at  
22 475-76 (“where the defendant . . . has created ‘continuing obligations’ between himself and  
23 residents of the forum, he manifestly has availed himself of the privilege of conducting business  
24 there”) (citation omitted).

#### 25 **b. Shankar and Ila Bose’s Contacts**

26 As to Defendants Shankar and Ila Bose, Defendants are correct that generally an individual  
27 is not subject to personal jurisdiction based on acts undertaken in his or her corporate capacity.

1 *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 784 (11th Cir. 2004), *abrogated on*  
2 *other grounds as recognized by Diamond Crystal Brands, Inc. v. Food Movers Intern., Inc.*, 593  
3 F.3d 1249, 1258 & n.7 (11th Cir. 2010); *see also Davis v. Metro Productions, Inc.*, 885 F.2d 515,  
4 520 (9th Cir. 1989) (“a person’s mere association with a corporation that causes injury in the forum  
5 state is not sufficient in itself to permit that forum to assert jurisdiction over the person”).  
6 Defendants do not dispute that Shanka and Ila are the principals of Aumtech India. However, the  
7 corporation has approximately 10 employees, Compl. ¶ 14, and Plaintiff has not argued that  
8 Aumtech India has no separate existence such that it might be treated as the alter ego of Ila and  
9 Shankar. *See Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1393-94 (9th Cir. 1984)  
10 (indicating that where a corporation is the alter ego of its owners, jurisdiction over the corporation  
11 supports jurisdiction over the owners). Thus, the Court agrees with Defendants that, absent facts  
12 suggesting that Ila and Shankar’s contacts with ePayware went beyond their contacts as officers of  
13 Aumtech India, Ila and Shankar cannot be subject to personal jurisdiction based solely upon  
14 Aumtech India’s contractual relationship with ePayware. *See Club Car*, 362 F.3d at 784-85  
15 (finding personal jurisdiction over corporation’s president because his contacts “went beyond his  
16 visits to the state as CCQ president” and because he stood to gain personally from an agreement he  
17 induced by personally guaranteeing the corporation’s debts).

18 On the other hand, where individual defendants are “primary participants in an alleged  
19 wrongdoing,” their status as employees of a corporation “does not somehow insulate them from  
20 jurisdiction.” *Calder v. Jones*, 465 U.S. 783, 790 (1984); *see also Wolf Designs, Inc. v. DHR Co.*,  
21 322 F. Supp. 2d 1065, 1072 (C.D. Cal. 2004) (stating that the corporate form may be ignored for  
22 purposes of personal jurisdiction “by virtue of the individual’s control of, and direct participation in  
23 the alleged activities”). Here, Plaintiff has alleged that Shankar and Ila Bose were primary  
24 participants in orchestrating the alleged breach and interference with Aumtech India’s contracts.  
25 More importantly, Plaintiff has alleged that Shankar and Ila Bose affirmatively reached out to  
26 California in order to form a new business relationship with California resident Jennifer Polito and  
27 to organize a new company under California law. It is clear that Shankar and Ila hold “core  
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1 management” positions in Aumtech America as Partner/Business Head and Chief Technology  
2 Officer, respectively. *See* Decl. of Shirish Gupta ISO Mot. for TRO ¶ 4 & Ex. L. Defendants have  
3 not denied that Shankar and Ila were primary participants in creating Aumtech America. Thus, by  
4 taking the lead role in forming a business relationship with a California resident and forming a  
5 business entity organized under California law, Shankar and Ila Bose have purposefully availed  
6 themselves of the privilege of conducting activities in California and invoked the benefits and  
7 protections of its laws. Based on these facts, Plaintiff has made a prima facie showing sufficient to  
8 satisfy the first prong of the Ninth Circuit’s test for specific personal jurisdiction.

## 9 2. Arising Out of Forum-Related Activities

10 As to the second prong of the test, the Court finds that Plaintiff’s claims arise out of and  
11 relate to the Indian Defendants’ California-related activities. In determining whether a plaintiff’s  
12 claims arise out of the defendant’s forum-related activities, the Ninth Circuit applies a “but-for”  
13 test. *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007). That is, but for the Indian Defendants’  
14 contacts with California, would Plaintiff’s claims against Aumtech India have arisen? *See Mattel,*  
15 *Inc. v. Greiner and Hausser GmbH*, 354 F.3d 857, 864 (9th Cir. 2003). In this case, the majority of  
16 Plaintiff’s claims allege either breach of contract or tortious interference with contract. These  
17 claims are based on the contractual relationships described above and could not have arisen but for  
18 Aumtech India’s contacts with California residents ePayware, Jennifer Polito, and Aumtech  
19 America. Had Aumtech India not entered into contracts with then California-based ePayware, the  
20 basis for Plaintiff’s claims simply would not exist. Likewise, had Ila and Shankar Bose not availed  
21 themselves of California law in order to form a company with California resident Jennifer Polito,  
22 Plaintiff would have no claims against them. Thus, Plaintiff has shown that its claims arise out of  
23 the Indian Defendants’ contacts with California.

## 24 3. Reasonableness

25 Because Plaintiff has satisfied the first two prongs of the Ninth Circuit’s test for specific  
26 personal jurisdiction, the burden shifts to Aumtech India to present a compelling case that the  
27 exercise of personal jurisdiction would be unreasonable. *Schwarzenegger*, 374 F.3d at 802. In  
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1 evaluating the reasonableness of exercising jurisdiction, courts consider factors such as “the extent  
2 of defendant’s purposeful interjection into the forum state; the burden on the defendant; the  
3 plaintiff’s interest in convenient and effective relief; the most efficient forum for judicial resolution  
4 of the dispute; the forum state’s interest in adjudicating the dispute; and the extent of the conflict  
5 with the sovereignty of the defendant’s state.” *Sher*, 911 F.2d at 1364.

6 In arguing that the exercise of jurisdiction would be unreasonable, Defendants state only that  
7 their contacts with California are not sufficient to justify the “unreasonable burden” of requiring  
8 them to litigate 8,000 miles away from their place of residence. Reply ISO of Mot. to Dismiss for  
9 Lack of Personal Jurisdiction at 1. However, the Ninth Circuit has recognized that “modern  
10 advances in communications and transportation have significantly reduced the burden of litigating  
11 in another country.” *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988). Thus,  
12 in order to satisfy their burden to present a “compelling case” against jurisdiction, Defendants must  
13 do more than simply claim, without elaboration, that litigation in a distant country presents an  
14 unreasonable burden.<sup>3</sup> Defendants have not alleged that litigation in California would present a  
15 serious financial or physical hardship, nor have they suggested that India or some other state has a  
16 greater interest in the litigation or would provide a more efficient forum for resolving the dispute.  
17 Given the degree of purposeful interjection involved in starting a company in California, and  
18 Plaintiff’s claimed interest in avoiding immediate and irreparable harm, the factors in the  
19 reasonableness analysis appear to favor the exercise of jurisdiction in this case. Thus, the Court  
20 finds that Defendants have not satisfied their burden to “to ‘present a compelling case’ that the  
21 exercise of jurisdiction would not be reasonable.” *Schwarzenegger*, 374 F.3d at 802.

22 \_\_\_\_\_  
23 <sup>3</sup> Indeed, the Aumtech America website represents that its core team members, including Shankar  
24 and Ila Bose, “have been in the west coast of US . . . for the last three decades.” Decl. of Shirish  
25 Gupta ISO Mot. for TRO Ex. L. If this is true, it does not help Defendants’ argument that the  
26 exercise of personal jurisdiction would be unreasonable. Defendants cannot claim a 30-year  
27 presence on the West Coast on a public website, while also arguing to this Court that litigating in  
28 California would be unreasonably burdensome. The Court also notes that both Shankar and Ila  
Bose appear to use a phone number with a San Jose area code. *See* Menon Decl. Ex. G (email from  
Ila Bose listing a United States phone number with a “408” area code); Decl. of Shankar Bose in  
Opp’n to Renewed TRO Mot., Exs. A-I (numerous emails from Shankar Bose listing a United  
States phone number with a “408” area code). As Defendants pointed out at the motion hearing,  
however, given the existence of Internet-based calling, the significance of these phone numbers is  
not clear.

1 Based on the foregoing analysis, Plaintiff has made a prima facie showing that the Indian  
 2 Defendants are subject to personal jurisdiction in this Court. As the Indian Defendants have failed  
 3 to show that the exercise of personal jurisdiction would be unreasonable, the motion to dismiss for  
 4 lack of personal jurisdiction is DENIED.

### 5 **III. Motion to Dismiss for Improper Venue**

#### 6 **A. Legal Standard**

7 Under Federal Rule of Civil Procedure 12(b)(3), a defendant may move to dismiss a  
 8 complaint for improper venue. Once the defendant has challenged the propriety of venue in a given  
 9 court, the plaintiff bears the burden of showing that venue is proper. *Piedmont Label Co. v. Sun*  
 10 *Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). When considering a motion to dismiss  
 11 pursuant to Rule 12(b)(3), a court need not accept the pleadings as true and may consider facts  
 12 outside of the pleadings. *Murphy v. Schneider National, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004).  
 13 Pursuant to 28 U.S.C. § 1406(a), if the court determines that venue is improper, the court must  
 14 either dismiss the action or, if it is in the interests of justice, transfer the case to a district or division  
 15 in which it could have been brought. Whether to dismiss for improper venue, or alternatively to  
 16 transfer venue to a proper court, is a matter within the sound discretion of the district court. *See*  
 17 *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992).

#### 18 **B. Analysis**

19 Defendants Jennifer Polito, Damian Polito, and Aumtech America (collectively, the  
 20 “American Defendants”) have moved to dismiss, or in the alternative to transfer to the Central  
 21 District of California, for improper venue.<sup>4</sup> Because subject matter jurisdiction in this case is based  
 22 on diversity of citizenship, venue is governed by 28 U.S.C. § 1391(a). Under § 1391(a), a civil  
 23 action may be brought:

24  
 25 <sup>4</sup> Defendants also moved to transfer this case to the Central District of California for the  
 26 convenience of the parties and witnesses pursuant to 28 U.S.C. § 1404(a). The Court expedited the  
 27 hearing on Defendants’ motion to dismiss for improper venue in order to ascertain whether venue in  
 28 this District was proper before ruling on Plaintiff’s motion for temporary restraining order and  
 preliminary injunction. However, in order to narrow the issues considered on an expedited basis,  
 the Court chose to defer consideration of the § 1404(a) motion. Defendants are free to renew their  
 § 1404(a) motion for consideration on a non-expedited basis.

1 only in (1) a judicial district where any defendant resides, if all defendants reside  
 2 in the same State, (2) a judicial district in which a substantial part of the events or  
 3 omissions giving rise to the claim occurred, or a substantial part of property that is  
 4 the subject of the action is situated, or (3) a judicial district in which any  
 defendant is subject to personal jurisdiction at the time the action is commenced,  
 if there is no district in which the action may otherwise be brought.

5 In addition, § 1391(d) provides that “[a]n alien may be sued in any district.” This provision reflects  
 6 the “long-established rule” that suits against “aliens,” or persons not residing in the United States,  
 7 “are wholly outside the operation of all the federal venue laws.” *Brunette Mach. Works, Limited v.*  
 8 *Kockum Industries, Inc.*, 406 U.S. 706, 714 (1972). Accordingly, the residence of foreign  
 9 defendants, including the Indian Defendants in this case, is typically disregarded for purposes of  
 10 determining venue. *See* 14D Wright and Miller, Fed. Prac. & Proc. § 3810 (3d ed. 2011) (“If an  
 11 alien is joined as a defendant with one or more non-alien defendants, then venue is proper in any  
 12 district in which the suit could have been brought against the non-alien defendants alone.”); *see also*  
 13 *Samra v. Johal*, Nos. CIV. S-08-2587 LKK/GGH, CIV. S-08-2589 LKK/GGH, 2009 WL 306634,  
 14 at \*2 (E.D. Cal. Feb. 5, 2009); *International Flavors & Fragrances Inc. v. Van Eeghen Intern. B.V.*,  
 15 No. 06 Civ. 490(JFK), 2006 WL 1876671, at \*6 (S.D.N.Y. July 6, 2006); *In re Triton Ltd.*  
 16 *Securities Litigation*, 70 F. Supp. 2d 678, 683 (E.D. Tex. 1999).

17 Because Defendants Damian Polito, Jennifer Polito, and Aumtech America all reside in the  
 18 Central District of California, venue is proper in that district under § 1391(a)(1),<sup>5</sup> and § 1391(a)(3)  
 19 does not apply. Plaintiff does not claim that any of the defendants resides in the Northern District  
 20 of California, such that venue in this District would be proper under § 1391(a)(1). Rather, Plaintiff  
 21 claims that venue is proper because a substantial part of the events or omissions giving rise to the  
 22 claim occurred in this District, pursuant to § 1391(a)(2). Plaintiff argues that venue is proper under  
 23

24 <sup>5</sup> For purposes of venue, a corporation is deemed to reside in any district in which it is subject to  
 25 personal jurisdiction at the time the action was commenced. 28 U.S.C. §1391(c). Because  
 26 Aumtech America is headquartered Ventura, California, *see* Decl. of Jennifer Polito ISO Mot. to  
 27 Dismiss for Improper Venue ¶ 5, ECF No. 43, it would be subject to personal jurisdiction in the  
 28 Central District of California, which includes Ventura County. Thus, Aumtech America is deemed  
 to reside in the Central District for purposes of determining venue. Defendants claim that Aumtech  
 America does not have sufficient contacts with the Northern District of California to be subject to  
 personal jurisdiction in this district, as it has no clients or employees in this District and has not  
 solicited clients here.

1 § 1391(a)(2) for two reasons: (1) because the contracts underlying this action were entered into with  
 2 a corporation headquartered in this District and resulted in several years of substantial contacts with  
 3 this District, and (2) because Defendants are unfairly targeting Plaintiff's customers in this District.

4 Defendants make a number of arguments as to why the Court should find that venue in the  
 5 Northern District of California is improper. First, Defendants point out that Plaintiff alleges a  
 6 course of wrongful conduct that began in 2010 and took place in Southern California and in India.  
 7 Defendants claim that in 2007, ePayware closed its San Jose office, and of its four employees, three  
 8 worked out of their homes in Southern California or Nevada and only one worked out of his home  
 9 in San Jose. Jennifer Polito Venue Decl. ¶¶ 9-10. Thereafter, in October 2009, ePayware was  
 10 acquired by Richmond Technologies, a Georgia corporation with its principal place of business in  
 11 Alpharetta, Georgia. *Id.* ¶ 13; Compl. ¶ 12. Richmond Technologies' principals, Rajil Vohra and  
 12 Sandeep Menon, work out of offices in Alpharetta, and no one contends that Richmond  
 13 Technologies has offices or employees in the Northern District of California. Jennifer Polito Venue  
 14 Decl. ¶¶ 13-14. Thus, Defendants argue that by 2010, when Defendants' wrongful conduct  
 15 allegedly began, no party to this case or to the contracts at issue was located in the Northern District  
 16 of California.

17 The American Defendants also question the strength of Defendants' contractual ties to the  
 18 Northern District of California. Jennifer Polito claims that she signed her contract with ePayware in  
 19 Las Vegas, Nevada. *Id.* ¶ 7. Shankar Bose likewise claims that he wrote, negotiated, and signed the  
 20 Memorandum of Understanding from his office in New Delhi, India, and that he also signed the  
 21 Non-Disclosure Agreement in India. Decl. of Shankar Bose ISO Mot. to Dismiss for Lack of  
 22 Personal Jurisdiction ("Shankar Bose Jurisdiction Decl.") ¶¶ 7-8, ECF No. 40. It also appears that  
 23 Defendants performed their contractual obligations in Southern California, Nevada, and India, and  
 24 only traveled to San Jose once or twice in 2007. *See* Jennifer Polito Venue Decl. ¶¶ 8, 10; Shankar  
 25 Bose Jurisdiction Decl. ¶¶ 6, 9; Decl. of Ila Bose ISO Mot. to Dismiss for Lack of Personal  
 26 Jurisdiction ("Ila Bose Jurisdiction Decl.") ¶ 6, ECF No. 41. Finally, Jennifer Polito claims that, to  
 27 her knowledge, ePayware and Richmond Technologies did not have any clients within the Northern  
 28

1 District of California, but did have clients in Southern California, including Intuit, International  
2 Processing Solutions, Cardready, and APPS. Jennifer Polito Venue Decl. ¶¶ 11-12. Although Ms.  
3 Polito acknowledges that Intuit has an office in Northern California, she contends that ePayware  
4 interacted only with the merchant services department in Southern California. *Id.* ¶ 12. At the  
5 motion hearing, however, Defendants’ counsel conceded that ePayware’s contract was likely with  
6 Intuit’s headquarters in Northern California.

7 If § 1391(a)(2) authorized venue in the *single* district in which the *most* substantial part of  
8 the events or omissions giving rise to the claim occurred, the Court would agree with Defendants  
9 that venue in the Northern District of California is improper. However, under the current version of  
10 § 1391(a)(2), the circuits appear to agree that venue may be proper in multiple districts if a  
11 “substantial part” of the underlying events took place in each of those districts. *See Gulf Ins. Co. v.*  
12 *Glasbrenner*, 417 F.3d 353, 356 (2d Cir. 2005) (collecting cases from various federal courts of  
13 appeals). Thus, Plaintiff need not show that the Northern District of California has the *most*  
14 substantial relationship to the dispute, *Kirkpatrick v. Rays Group*, 71 F. Supp. 2d 204, 213  
15 (W.D.N.Y. 1999), or that it is the “best” venue. *Silver Valley Partners, LLC v. De Motte*, 400 F.  
16 Supp. 2d 1262, 1269 (W.D. Wash. 2005). Rather, “for venue to be proper, significant events or  
17 omissions material to the plaintiff’s claim must have occurred in the district in question, even if  
18 other material events occurred elsewhere.” *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d at 357. Where,  
19 as here, a case involves a contract dispute, courts have “looked to such factors as where the contract  
20 was negotiated or executed, where it was to be performed, and where the alleged breach occurred”  
21 to determine whether venue is proper. *Id.* (quotation mark and citation omitted); *see also*  
22 *Shropshire v. Fred Rappoport Co.*, 294 F. Supp. 2d 1085, 1094 (N.D. Cal. 2003) (finding venue  
23 proper in case turning on contract interpretation because contract was partially negotiated, signed,  
24 and substantially performed in the district).

25 The Ninth Circuit has not articulated a clear test for determining whether venue is proper  
26 under the current version of § 1391(a)(2). However, the Ninth Circuit’s decision in *Decker Coal*  
27 *Co. v. Commonwealth Edison Co.*, 805 F.2d 834 (9th Cir. 1986), provides helpful guidance. In  
28

1 *Decker Coal*, the Ninth Circuit considered the proper venue for an action alleging breach of  
2 contract. Although the case involved an earlier version of § 1391(a), the Court’s analysis focused  
3 on identifying the district “in which a substantial part of the acts, events, or omissions occurred that  
4 gave rise to the claim.” *Id.* at 842. The Ninth Circuit concluded that in a suit for breach of contract,  
5 venue is proper not in the place where the contract was repudiated, but in the place of intended  
6 performance. *Id.* In so concluding, the Ninth Circuit reasoned that “the place of performance is  
7 determined at the inception of the contract and therefore parties can anticipate where they may be  
8 sued.” *Id.*

9         Considering the facts of this case and the reasoning of *Decker Coal*, the Court finds that  
10 venue in the Northern District of California is proper. While the Defendants may have executed  
11 and performed their contracts in other locations, courts have recognized that modern technology  
12 permits the negotiation and performance of contracts without face-to-face contacts and have found  
13 venue proper in a district in which either party to a contract was located. *See, e.g., Kirkpatrick v.*  
14 *Rays Group*, 71 F. Supp. 2d at 213-14 (discussing cases finding venue proper in district where the  
15 defendant never set foot because “technology has advanced to the point that many contractual  
16 arrangements may, today, be made without face-to-face meetings”). The Court has already  
17 discussed the extent to which Aumtech India’s contract tied it to San Jose and required frequent  
18 communications with this District. Jennifer Polito similarly contracted with a San Jose-based  
19 corporation and performed services on behalf of the San-Jose based corporation for several years.  
20 The contracts entered into with San Jose-based ePayware form the basis for most of Plaintiff’s  
21 claims, and they ground this action in events that took place in, or in close connection with, the  
22 Northern District of California. Moreover, under the reasoning of *Decker Coal*, it is appropriate to  
23 lay venue in the District in which one party to the contract was located and to which obligations  
24 under the contract were due, for that location “is determined at the inception of the contract and  
25 therefore parties can anticipate where they may be sued.” *Decker Coal Co. v. Commonwealth*  
26 *Edison Co.*, 805 F.2d at 842. For these reasons, the Court finds that a substantial part of the events  
27  
28

1 giving rise to Plaintiff's claims arose in the Northern District of California. Accordingly, venue in  
2 this District is proper, and Defendants' motion to dismiss for improper venue is DENIED.

#### 3 **IV. Motion for Substituted Service**

4 Having determined that the Court can exercise personal jurisdiction over the Defendants and  
5 that venue is proper in this District, the Court turns to Plaintiff's motion for substituted service. At  
6 this time, the three United States-based Defendants – Aumtech America, Damian Polito, and  
7 Jennifer Polito – have been properly served. The India-based Defendants – Aumtech India, Shankar  
8 Bose, and Ila Bose – have been notified of the lawsuit by email, but all parties agree that this does  
9 not constitute proper service under the Federal Rules of Civil Procedure. Plaintiff has moved to  
10 serve the Indian Defendants by alternative means, pursuant to Rule 4(f)(3), by serving the summons  
11 and complaint on the Indian Defendants' counsel, Drew L. Alexis of the Kinaga Law Firm in Los  
12 Angeles, California.

13 Federal Rule of Civil Procedure 4(h)(2) provides for service of corporations in a foreign  
14 country “in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery  
15 under (f)(2)(C)(i).” Rule 4(f), in turn, provides several means by which a plaintiff may serve an  
16 individual “at a place not within any judicial district of the United States.” Pursuant to Rule 4(f)(1),  
17 an individual or corporation may be served in a foreign country “by an internationally agreed means  
18 of service that is reasonably calculated to give notice, such as those authorized by the Hague  
19 Convention on the Service Abroad of Judicial and Extrajudicial Documents.” Rule 4(f)(3) further  
20 provides for service “by any other means not prohibited by international agreement, as the court  
21 orders.” Fed. R. Civ. P. 4(f)(3).

22 In this case, the unserved Defendants are located in India, which is a signatory to the Hague  
23 Convention referenced in Rule 4(f)(1). The Hague Convention requires signatory countries to  
24 establish a Central Authority to receive requests for service of documents from other countries and  
25 to serve those documents by methods compatible with the internal laws of the receiving state. *See*  
26 *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698-99 (1988). Service through a  
27 country's Central Authority is the principal means of service under the Hague Convention. Article  
28

1 10 of Convention also permits other forms of service, such as service “by postal channels” or  
 2 through judicial officers, provided that the state of destination does not object.<sup>6</sup> *See* Convention on  
 3 Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15,  
 4 1965 (“Hague Convention”), [1969] 20 U.S.T. 361, T.I.A.S. No. 6638, 1969 WL 97765, Art. 10.  
 5 However, because India has objected to Article 10, service by mail or through judicial officers is  
 6 not available.

7 Here, Plaintiff contends that service through the Central Authority in India would take  
 8 between six and eight months and requests an order under Rule 4(f)(3) permitting substituted  
 9 service on the Indian Defendants’ attorney in Los Angeles. In *Rio Properties, Inc. v. Rio Intern.*  
 10 *Interlink*, the Ninth Circuit characterized the scope of Rule 4(f)(3) as follows:

11 As obvious from its plain language, service under Rule 4(f)(3) must be (1)  
 12 directed by the court; and (2) not prohibited by international agreement. No other  
 13 limitations are evident from the text. . . .

14 By all indications, court-directed service under Rule 4(f)(3) is as favored  
 15 as service available under Rule 4(f)(1) or Rule 4(f)(2). . . . Rule 4(f)(3) is not  
 16 subsumed within or in any way dominated by Rule 4(f)’s other subsections; it  
 17 stands independently, on equal footing. Moreover, no language in Rules 4(f)(1) or  
 18 4(f)(2) indicates their primacy, and certainly Rule 4(f)(3) includes no qualifiers or  
 19 limitations which indicate its availability only after attempting service of process  
 20 by other means.

21 284 F.3d 1007, 1014-15 (9th Cir. 2002). Under the Ninth Circuit’s analysis, Rule 4(f)(3) is “neither  
 22 a ‘last resort’ nor ‘extraordinary relief.’ It is merely one means among several which enables  
 23 service of process on an international defendant.” *Id.* (citation omitted).

24 The question in this case is whether service of the Indian Defendants by substituted service  
 25 on their attorney under Rule 4(f)(3) comports with the Hague Convention. Although the Supreme  
 26 Court has stated, in dicta, that “compliance with the Convention is mandatory in all cases to which  
 27 it applies,” *Volkswagenwerk*, 486 U.S. at 705, it has not provided clear guidance as to how the  
 28

<sup>6</sup> Article 10 reads: “Provided the State of destination does not object, the present Convention shall not interfere with - (a) the freedom to send judicial documents, by postal channels, directly to persons abroad, (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination, (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.” Hague Convention, 20 U.S.T. 361, T.I.A.S. No. 6638, Art. 10.

1 requirements of the Hague Convention interact with a court’s authority to order alternative service  
2 under Rule 4(f)(3). It is clear that a federal court cannot order service under Rule 4(f)(3) “in  
3 contravention of” the Hague Convention. *See Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d  
4 1007, 1015 n.4 (9th Cir. 2002) (“A federal court would be prohibited from issuing a Rule 4(f)(3)  
5 order in contravention of an international agreement, including the Hague Convention referenced in  
6 Rule 4(f)(1).”). However, numerous courts have authorized alternative service under Rule 4(f)(3)  
7 even where the Hague Convention applies. This is true even in cases involving countries that, like  
8 India, have objected to the alternative forms of service permitted under Article 10 of the Hague  
9 Convention. *See, e.g., In re LDK Solar Securities Litigation*, No. C 07-05182 WHA, 2008 WL  
10 2415186, at \*3 (N.D. Cal. June 12, 2008) (permitting service of Chinese defendants under Rule  
11 4(f)(3), despite China’s objections to Article 10, because the service requested did not involve  
12 service by “postal channels”); *Williams-Sonoma Inc. v. Friendfinder Inc.*, No. C 06-06572 JSW,  
13 2007 WL 1140639, at \*2 (N.D. Cal. Apr. 17, 2007) (permitting service by email, but not by  
14 international mail, for defendants in countries that objected to Article 10 of the Hague Convention).  
15 *But see Agha v. Jacobs*, No. C 07-1800 RS, 2008 WL 2051061, at \*1-2 (N.D. Cal. May 13, 2008)  
16 (finding email and fax indistinguishable from “postal channels” and denying motion to serve  
17 German defendants by email or fax based on Germany’s objection to Article 10).

18 Some courts have reasoned that alternative service may be ordered pursuant to Rule 4(f)(3)  
19 as long as the alternative method of service is not expressly prohibited by the Convention or  
20 objected to by the receiving state. *See, e.g., In re LDK Solar Securities Litigation*, 2008 WL  
21 2415186, at \*3-4 (permitting service of Chinese subsidiary and individual officers by service on  
22 parent company in California because such service is not barred by the Hague Convention);  
23 *Williams-Sonoma*, 2007 WL 1140639, at \*2 (permitting service by email because Hague  
24 Convention does not expressly prohibit email service). Other courts have reasoned that because the  
25 Hague Convention only applies if the law of the forum state requires service of documents abroad,  
26 *Volkswagenwerk*, 486 U.S. at 700, the Hague Convention is not a barrier to any alternative service  
27

1 that will be performed domestically.<sup>7</sup> *See FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 534-  
 2 35 (E.D. Va. 2005) (ordering service on domestic counsel under Rule 4(f)(3) and finding that Hague  
 3 Convention would not apply because service would be effected in the United States).

4 The Advisory Committee Notes to the 1993 Amendment of Rule 4(f)(1) state that when a  
 5 signatory state to the Hague Convention is “dilatory or refused to cooperate for substantive reasons .  
 6 . . . resort may be had to the provision set forth in subdivision (f)(3).” The Advisory Committee  
 7 Notes also indicate that Rule 4(f)(3) is appropriately used in “in cases of urgency if convention  
 8 methods will not permit service within the time required by the circumstances.” In this case,  
 9 Plaintiff counsel states that he has researched the Hague Convention requirements for serving  
 10 Indian nations and has been informed that the process can take six to eight months to complete.  
 11 Decl. of Shirish Gupta ISO Pl.’s Mot. for Substituted Service ¶ 6, ECF No. 34; *see also Marlabs*  
 12 *Inc. v. Jakher*, No. 07-cv-04074 (DMC)(MF), 2010 WL 1644041 (D. N.J. Apr. 22, 2010) (ordering  
 13 service on Indian defendants’ counsel after plaintiff advised that service in India could take in  
 14 excess of six months and attempted without success to serve defendants). Plaintiff also claims that  
 15 it faces a threat of immediate, irreparable harm if it cannot obtain preliminary relief in this action.  
 16 Defendants have offered no evidence suggesting that service through Hague Convention methods is  
 17 likely to be completed more efficiently, and, as discussed below, the Court has found that Plaintiff’s  
 18 claims of urgency have merit. Thus, Plaintiff has presented issues that require resolution with  
 19 greater urgency than the Hague Convention process can accommodate, and alternative service under  
 20 Rule 4(f)(3) is warranted.

21 Service upon a foreign defendant’s United States-based counsel is a common form of  
 22 service ordered under Rule 4(f)(3). *See Knit With v. Knitting Fever, Inc.*, Nos. 08-4221, 08-4775,

23 \_\_\_\_\_  
 24 <sup>7</sup> *Volkswagenwerk* actually states that “[w]here service on a domestic agent is valid and complete  
 25 under both state law and the Due Process Clause, our inquiry ends and the Convention has no  
 26 further implications.” 486 U.S. at 707. It is possible that service of Shankar and Ila Bose by service  
 27 on their attorney would be valid under California law. *See Warner Bros. Records, Inc. v. Golden*  
 28 *West Music Sales*, 36 Cal. App. 3d 1012, 1018, 112 Cal. Rptr. 71 (Cal. Ct. App. 1974) (finding that  
 if an individual’s relationship with his attorney is “sufficiently close and enduring to make it  
 reasonably certain that [he] would be apprised of the service,” the attorney may be considered a  
 person authorized to receive service of process under California Code of Civil Procedure § 416.90).  
 However, many district courts simply order appropriate domestic service pursuant to Rule 4(f)(3)  
 without considering the service rules of the forum state.

2010 WL 4977944, at \*4 (E.D. Pa. Dec. 7, 2010) (“Repeatedly, courts around the country have found that service upon a foreign defendant through counsel is appropriate to prevent further delays in litigation.”). Nothing in the Hague Convention prohibits such service. *See RSM Production Corp. v. Fridman*, No. 06 Civ. 11512(DLC), 2007 WL 2295907, at \*3 (S.D.N.Y. Aug. 10, 2007) (“The Hague Service Convention does not prohibit an order pursuant to Rule 4(f)(3) permitting service through American counsel.”). However, “the method of service crafted by the district court [under Rule 4(f)(3)] must be ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Rio Properties*, 284 F.3d at 1016-17 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). In this case, the Court is confident that service upon Mr. Alexis of the Kinaga Law Firm is reasonably calculated to apprise the Indian Defendants of the pendency of the action and afford them an opportunity to present their objections. The Indian Defendants already have actual notice of the action, and Mr. Alexis is already representing them for the purpose of contesting personal jurisdiction and opposing substituted service. Mr. Alexis has also stated that he will be filing an action against Plaintiff for non-payment of services rendered by Defendant Aumtech India. Decl. of Andrew L. Alexis in Opp’n to Renewed Mot. for TRO ¶ 7, ECF No. 55. Considering that Shankar and Ila Bose are the principals of Aumtech India, it appears that their relationship with Mr. Alexis is intended to be ongoing. Accordingly, service upon Mr. Alexis in Los Angeles accords with the requirements of due process.

For the reasons discussed above, Plaintiff’s motion for substituted service upon the Indian Defendants’ counsel pursuant to Rule 4(f)(3) is GRANTED.

#### **V. Renewed Motion for Temporary Restraining Order**

On May 25, 2011, the Court denied Plaintiff’s motion for a temporary restraining order (“TRO”) without prejudice on grounds that Plaintiff had not satisfied the requirements of Federal Rule 65(b) for issuance of a TRO without notice to the adverse party. *See Order Denying Ex Parte Motion for TRO Without Prejudice*, ECF No. 17. Having served the American Defendants and provided notice by email to the Indian Defendants, Plaintiff now renews its motion for a TRO and

1 preliminary injunction. Specifically, Plaintiff seeks preliminary injunctive relief compelling  
 2 Defendants to turn over Plaintiff's source code and license keys,<sup>8</sup> and enjoining Defendants from  
 3 further breaching, or assisting in the breach of, the Non-Disclosure Agreement signed by Aumtech  
 4 India.

### 5 **A. Legal Standard**

6 The standard for issuing a TRO is identical to the standard for issuing a preliminary  
 7 injunction. *Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D.  
 8 Haw. 2002); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323  
 9 (N.D. Cal. 1995). A plaintiff seeking a preliminary injunction must make a four-fold showing: (1)  
 10 that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the  
 11 absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an  
 12 injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct.  
 13 365, 374 (2008); *Amer. Trucking Assocs., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.  
 14 2009). The Ninth Circuit has also indicated that a preliminary injunction may issue in cases where  
 15 the plaintiff shows (1) serious questions going to the merits; (2) a hardship balance that tips sharply  
 16 towards the plaintiff; (3) a likelihood of irreparable injury; and (4) that the injunction is in the public  
 17 interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Under  
 18 either standard, however, preliminary injunctive relief is "an extraordinary remedy that may only be  
 19 awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 129 S.Ct. at 376.

### 20 **B. Analysis**

#### 21 **1. Likelihood of Success on the Merits**

##### 22 **a. Source Code**

23 In its renewed TRO motion, Plaintiff seeks an injunction compelling Aumtech India and its  
 24 principals, Shankar and Ila Bose, to turn over the source code and license keys developed for  
 25

26 <sup>8</sup> In its renewed motion, Plaintiff also requests an order compelling Defendants to turn over certain  
 27 hardware, apparently consisting of six computers provided to Aumtech India. Suppl. Decl. of  
 28 Sandeep Menon ISO Renewed TRO Mot. ¶ 30. However, Plaintiff has not adequately explained  
 why it is entitled to this hardware or why it would suffer irreparable harm if it is not returned to  
 Plaintiff. Accordingly, Plaintiff's motion is denied with respect to the requested hardware.

1 Plaintiff, and enjoining all Defendants from further breaching, or assisting in the breach of, the non-  
 2 compete covenants contained in the Non-Disclosure Agreement between ePayware and Aumtech  
 3 India. As to the source code, the parties appear to agree that under the terms of the MoU, the source  
 4 code developed for ePayware and its clients belongs to ePayware. However, Aumtech India  
 5 contends that because it has not been fully compensated for its software development services,  
 6 Plaintiff is not entitled to obtain the source code until it pays Aumtech India the money owed. In  
 7 support of this contention, Shankar Bose has submitted a series of emails documenting ePayware's  
 8 financial difficulties and its repeated underpayment of invoices issued by Aumtech India. *See* Decl.  
 9 of Shankar Bose in Opp'n to Renewed TRO Mot. ("Shankar Bose TRO Decl."), Exs. A-I. Mr. Bose  
 10 also submits an email sent from Richmond Technologies principal Rajil Vohra on March 7, 2011, in  
 11 which Vohra provides a payment plan that would "bring [Plaintiff's] payments back on track in a  
 12 phased manner in the next 3-4 months time frame." *Id.* Ex. J. The payment plans provides for a  
 13 payment of \$15,000 in March 2011, \$20,000 in April 2011, \$20,000 in May 2011, and \$17,000 in  
 14 June 2011. *Id.* Plaintiff contends, and Defendants do not appear to dispute, that it made the  
 15 \$15,000 and \$20,000 payments for March and April 2011. Menon Decl. ¶ 6 & Ex. C. No payment  
 16 was made in May, however, and on May 16, 2011, Plaintiff terminated the software development  
 17 and maintenance agreement with Aumtech India. *Id.* ¶ 7.

18 Although Aumtech India has not identified the precise amount it believes Plaintiff owes,  
 19 Shankar Bose has indicated that he would be willing to turn over the source code in exchange for a  
 20 \$20,000 payment. *Id.* ¶ 9. Plaintiff, for its part, states that it has paid Aumtech India over \$173,000  
 21 for its development and maintenance services since January 2010, *id.* ¶ 6, and claims that it owes no  
 22 further payments due to Aumtech India's breach of the Non-Disclosure Agreement. Indeed, in its  
 23 Complaint, Plaintiff claims that Aumtech India owes a refund of \$156,437 for the payments  
 24 Plaintiff made after March 5, 2010, the date when Damian Polito filed the fictitious business name  
 25 statement for Aumtech America.<sup>9</sup> Compl. ¶ 43. Thus, the parties' dispute over the source code

26  
 27 <sup>9</sup> Although it appears that Damian Polito filed the fictitious business name statement on March 5,  
 28 2010, Compl. ¶¶ 13, 43, elsewhere in the Complaint Plaintiff identifies April 2010 as the  
 approximate date that Defendants created Aumtech America. Compl. ¶ 4.

1 centers on whether Plaintiff has performed its financial obligations under the parties' agreement,  
 2 which in turn depends on whether Aumtech India's alleged breach of the Non-Disclosure  
 3 Agreement excused Plaintiff from making payments. Because the Court finds below that Plaintiff  
 4 has demonstrated a likelihood of success on at least some of its contract claims, the Court finds that  
 5 Plaintiff is also likely to succeed in establishing an entitlement to the source code.

6 **b. Non-Compete Agreements**

7 Plaintiff claims that by teaming up with Jennifer Polito to form a competing venture,  
 8 Aumtech India has breached the non-compete provisions of the Non-Disclosure Agreement.  
 9 Plaintiff also contends that the remaining Defendants have aided in this breach, and that the  
 10 Defendants' actions constitute an unfair, deceptive, or fraudulent business practice under the  
 11 California Unfair Competition Law, Cal. Bus. & Profs. Code § 17200 *et seq.* Although Defendants  
 12 vehemently deny that they have used the source code or modules developed for Plaintiff in  
 13 Aumtech America's merchant services products, they do not deny that Aumtech America directly  
 14 competes with ePayware. The question, therefore, is whether Plaintiff is likely to prevail on its  
 15 claim that this competition constitutes a breach of enforceable contractual provisions or a violation  
 16 of the California Unfair Competition Law.

17 The Non-Disclosure Agreement between ePayware and Aumtech India contains a number of  
 18 provisions that bar Aumtech India from competing with ePayware or soliciting its employees,  
 19 consultants, customers, accounts, or clients within a year after Aumtech India's term of employment  
 20 with ePayware ends.<sup>10</sup> *See* Menon Decl. Ex. B at ¶¶ 4-6. These provisions read as follows:

21 4. Non-Solicitation. During the Term of this Employment (a[s] hereinafter defined),  
 22 and for a period of one year thereafter, Recipient [shall not] directly or indirectly,  
 23 initiate any contact or communication with, solicit or attempt to solicit the employee  
 24 of, or enter into any agreement with any employee, consultant, sales representative, or  
 25 account manager of EPI [ePayware] unless such person has ceased its relationship  
 with EPI for a period of not less than six months. Similarly EPI shall not solicit the  
 employment of, or enter into any agreement with any employee, consultant or  
 representative of AISPI [Aumtech India].

26 <sup>10</sup> The Non-Disclosure Agreement defines the "Term" of the agreement as commencing on  
 27 February 16, 2007 and extending until "six months after Recipient no longer has possession of, or  
 28 access to, Confidential Information." Menon Decl. Ex. B ¶ 7. As Aumtech India still has  
 possession of ePayware's source code, it would seem that the term of the agreement has not yet  
 expired.

1           5. Non-Interference. During the Term of this Employment, and for a period of one  
 2 year thereafter, Recipient will not initiate any contact or communication with, solicit  
 3 or attempt to solicit, or enter into any agreement with, any account, acquiring bank,  
 4 merchant, customer, client, or vendor of EPI in the products created and serviced by  
 5 EPI, unless (a) such person has ceased its relationship with EPI for a period of not  
 6 less than six months, or (b) Recipient's relationship and association with such person  
 7 both (i) pre-existed the date of this Agreement and (ii) does not directly or indirectly  
 8 conflict with any of the current or reasonably anticipated future business of EPI.

6. Non Compete and Non Circumvent. Recipient will not compete with EPI with  
 similar product and or Service using its technology for a period of one year thereafter.  
 Recipient will not use any of the EPI's technical knowhow or Source Code for the  
 personal benefit other than the employment and to meet the customer needs defined  
 by EPI.

9 *Id.* The Non-Disclosure Agreement also contains a provision that bars Aumtech India from  
 10 disclosing or using confidential information used in ePayware's business. *Id.* ¶ 3. Confidential  
 11 information is defined to include "Proprietary Data," such as "know-how," contract terms and  
 12 conditions with merchants, technical data, and source code; "Business and Financial Data";  
 13 "Marketing and Developing Operations"; and "Customers, Vendors, Contractors, and Employees,"  
 14 including their names and identities, data provided by customers, and information on the products  
 15 and services purchased by customers. *Id.* ¶ 1. Confidential information does not include any  
 16 information that is publicly known, becomes publicly known through no wrongful act of Aumtech  
 17 India, or is disclosed to Aumtech India by a third-party having a right to do so. *Id.* ¶ 2.

18           Defendants argue that Plaintiff is not likely to prevail on its contract claims because the non-  
 19 solicitation, non-interference, and non-compete provisions in the Non-Disclosure Agreement are  
 20 unenforceable under California Business and Professions Code § 16600. Pursuant to Section  
 21 16600, "every contract by which anyone is restrained from engaging in a lawful profession, trade,  
 22 or business of any kind is to that extent void," subject to statutory exceptions not relevant here. Cal.  
 23 Bus. & Profs. Code § 16600; *see also* Cal. Bus. & Profs. Code § 16601-07 (codifying exceptions for  
 24 non-compete agreements associated with the sale or dissolution of certain businesses and addressing  
 25 other special circumstances). In its recent decision in *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th  
 26 937, 189 P.3d 285 (2008), the California Supreme Court confirmed the continued viability and  
 27 breadth of Section 16600. The Court explained that by enacting Section 16600, the California  
 28 legislature rejected the "rule of reasonableness" applied to non-compete agreements at common

1 law. *Edwards*, 44 Cal. 4th at 945. As a result, “[t]oday in California, covenants not to compete are  
2 void, subject to several exceptions,” and the California Supreme Court “generally condemns  
3 noncompetition agreements.” *Id.* at 945-46.

4 In discussing the scope of Section 16600, the *Edwards* Court considered a judicially created  
5 exception to Section 16600 for limited or narrow restraints applied in several Ninth Circuit cases.  
6 *Id.* at 948. Under this “narrow-restraint” exception, a number of Ninth Circuit cases upheld non-  
7 compete agreements that did not entirely preclude a party from pursuing its chosen profession,  
8 trade, or business, but only barred the party from pursuing a small or limited part of its business. *Id.*  
9 at 948-49. After considering the Ninth Circuit decisions and their support in California law, the  
10 California Supreme Court rejected the narrow-restraint exception, finding that “California courts  
11 have been clear in their expression that section 16600 represents a strong public policy of the state  
12 which should not be diluted by judicial fiat.” *Id.* at 949. The Court concluded that “Section 16600  
13 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were  
14 unreasonable or overbroad, it could have included language to that effect.” *Id.* at 950. Accordingly,  
15 Section 16600 stands as a broad prohibition on “every contract by which anyone is restrained from  
16 engaging in a lawful profession, trade, or business of any kind.” Cal. Bus. & Profs. Code § 16600.

17 Because the Non-Disclosure Agreement is governed by California law, Menon Decl. Ex. B  
18 ¶ 12, Section 16600 would seem to apply and render void any clause that has the effect of  
19 restraining Defendants from lawful engagement in the merchant services business. In its reply  
20 brief, Plaintiff argues that Section 16600 does not apply to the Non-Disclosure Agreement because  
21 Section 16600 bars only restrictions on employees, or that impact employees, and has no effect on  
22 dealings between companies. The Court, however, finds no support for this proposition in either the  
23 statutory language or the case law. Section 16600 addresses “every contract by which *anyone* is  
24 restrained from engaging in a lawful profession, trade, or business of *any* kind.” Cal. Bus. & Profs.  
25 Code § 16600 (emphasis added). It is true that *Edwards* distinguished two earlier California cases  
26 on grounds that the cases did not provide “any guidance on the issue of noncompetition agreements,  
27 largely because neither involved noncompetition agreements in the employment context.”

1 *Edwards*, 44 Cal. 4th at 950 n.5. However, the *Edwards* Court further explained that these two  
2 cases were inapposite because one involved a covenant in a deed to a parcel of land, and the other  
3 involved a case “in which the court applied a trade secret exception to the statutory rule against  
4 noncompetition clauses.” *Id.* at 949. Contrary to Plaintiff’s argument, the *Edwards* Court did not  
5 suggest that Section 16600 applies only in the narrow context of an employer-employee  
6 relationship. Nor do the other cases cited by Plaintiff suggest such a rule. *See General*  
7 *Commercial Packaging, Inc. v. TPS Package Engineering, Inc.*, 126 F.3d 1131, 1132-34 (9th Cir.  
8 1997) (upholding a non-solicitation agreement under the “narrow-restraint” exception to Section  
9 16600); *Southern California Institute of Law v. TCS Educ. System*, No. CV 10–8026 PSG (AJWx),  
10 2011 WL 1296602, at \*3 & n.2 (C.D. Cal. Apr. 5, 2011) (permitting claims of misuse of  
11 confidential information to go forward and noting that the statutory exception to § 16600 for  
12 agreements in the sale of corporations applied). In fact, the *General Commercial Packaging* case  
13 cited by Plaintiff explicitly applied Section 16600 to a contract between two corporations that  
14 restrained one of the corporations from dealing directly with a third corporation. *See General*  
15 *Commercial Packaging*, 126 F.3d at 1132-34. *See also VL Systems, Inc. v. Unisen, Inc.*, 152 Cal.  
16 App. 4th 708, 61 Cal. Rptr. 3d 818 (Cal. Ct. App. 2007) (applying § 16600 to a contract between a  
17 corporation and a company that provided computer consulting services to the corporation). Thus,  
18 the Court finds that Section 16600 is applicable to the facts of this case.

19 The applicability of Section 16600 does not automatically undermine Plaintiff’s likelihood  
20 of success on the merits, however. Although California courts have consistently “condemn[ed]”  
21 agreements that place restraints on the pursuit of a business or profession, *Edwards*, 44 Cal. 4th at  
22 946, “[a]n equally lengthy line of cases has consistently held former employees may not  
23 misappropriate the former employer’s trade secrets to unfairly compete with the former employer.”  
24 *Retirement Group v. Galante*, 176 Cal. App. 4th 1226, 1237, 98 Cal. Rptr. 3d 585 (Cal. Ct. App.  
25 2009). Accordingly, “courts have repeatedly held a former employee may be barred from soliciting  
26 existing customers to redirect their business away from the former employer and to the employee’s  
27 new business *if the employee is utilizing trade secret information to solicit those customers.*”  
28

1 *Retirement Group*, 176 Cal. App. 4th at 1237 (emphasis in original). At times, courts have applied  
2 this principle to create a “trade secret exception” to Section 16600, pursuant to which a non-  
3 compete or non-solicitation clause may be valid under Section 16600 if it is necessary to protect a  
4 trade secret. *See Asset Marketing Systems, Inc. v. Gagnon*, 542 F.3d 748, 758 (9th Cir. 2008)  
5 (“Under California law, non-competition agreements are unenforceable unless necessary to protect  
6 an employer’s trade secret.”); *Edwards*, 44 Cal. 4th at 946 n.4 (noting but declining to address the  
7 “so-called trade secret exception to section 16600”). Other cases suggest that case law protecting  
8 trade secrets does not actually create an exception to Section 16600, but instead enables courts to  
9 enjoin the misuse of trade secrets as an independent wrong, either as a tort or a violation of the  
10 Unfair Competition Law. *See Retirement Group*, 176 Cal. App. 4th at 1238; *Dowell v. Biosense*  
11 *Webster, Inc.*, 179 Cal. App. 4th 564, 577, 102 Cal. Rptr. 3d 1 (Cal. Ct. App. 2009).

12 Applying these principles to the instant action, the Court finds that the non-solicitation and  
13 non-interference provisions in the Non-Disclosure Agreement are likely to be found unenforceable  
14 under California law. These provisions are more broadly drafted than necessary to protect  
15 ePayware’s trade secrets, and would have the effect of restraining Defendants from pursuing their  
16 chosen business and professions if enforced. *See Dowell*, 179 Cal. App. 4th at 577 (finding clauses  
17 void as a matter of law because they were “not narrowly tailored or carefully limited to the  
18 protection of trade secrets, but are so broadly worded as to restrain competition”). For instance, the  
19 non-solicitation and non-interference provisions broadly prohibit Aumtech India from “enter[ing]  
20 into any agreement” with ePayware’s clients or employees, regardless of whether Aumtech India  
21 initiated the contact or whether the contact resulted in any misuse of trade secrets. Menon Decl. Ex.  
22 B ¶¶ 4-5. California law simply does not countenance such broad restraints on competition. *See*  
23 *Thompson v. Impaxx, Inc.*, 113 Cal. App. 4th 1425, 1429, 7 Cal. Rptr. 3d 427 (Cal. Ct. App. 2003)  
24 (“Antisolicitation covenants are void as unlawful business restraints except where their enforcement  
25 is necessary to protect trade secrets.”); *Robinson v. Jardine Ins. Brokers Intern. Ltd.*, 856 F. Supp.  
26 554, 558-59 (N.D. Cal. 1994) (clause “prohibit[ing] Plaintiff from doing any business with  
27 Defendant’s clients, regardless of who initiates contact” is likely invalid under § 16600).

1 As to the non-compete clause, the scope of the prohibitions on “compet[ing] with EPI with  
2 similar product and or Service using its technology” and using “technical knowhow” is not entirely  
3 clear. *See Menon Decl. Ex. B. ¶ 6*. However, if the clause is construed to bar only the use of  
4 confidential source code, software, or techniques developed for ePayware products or clients, it is  
5 likely enforceable as necessary to protect ePayware’s trade secrets. *See Whyte v. Schlage Lock Co.*,  
6 101 Cal. App. 4th 1443, 1456, 125 Cal. Rptr. 2d 277 (Cal. Ct. App. 2002) (stating that a company’s  
7 technological methods and technical “know-how” are “quintessential” trade secrets); Cal. Civ. Code  
8 § 3426.1 (defining “trade secret” to include programs, methods, and techniques that derive  
9 independent economic value from not being generally known to the public, provided they are  
10 subject to reasonable efforts to maintain their secrecy). Similarly, the clause prohibiting use of  
11 confidential information is likely enforceable to the extent that the claimed confidential information  
12 is protectable as a trade secret.

13 Based on the facts provided and the limited briefing of the issue, the Court finds that there  
14 are at least serious questions going to the merits of Plaintiff’s claims for breach of the non-compete  
15 and confidential information clauses and for violations of the Unfair Competition Law. Plaintiff  
16 alleges that Jennifer Polito worked directly with ePayware’s clients “to gather their business and  
17 technical requirements.” Compl. ¶ 28. It seems that in her role as Business Analyst, Ms. Polito  
18 identified specific client needs and then worked with Aumtech India to develop software tailored to  
19 each client. *Id.* While Plaintiff has conceded that its client list is publicly available and does not  
20 constitute a trade secret, the information gathered by Ms. Polito regarding customer preferences and  
21 “specialized requirements” may be protected as a trade secret under California law. *See Courtesy*  
22 *Temporary Service, Inc. v. Camacho*, 222 Cal. App. 3d 1278, 1288, 272 Cal. Rptr. 352 (Cal. Ct.  
23 App. 1990) (finding that sophisticated customer information, such as “billing rates, key contacts,  
24 specialized requirements and markup rates” constitutes a trade secret); *Lillge v. Verity*, No. C 07-  
25 02748 MHP, 2008 WL 906466, at \*5 (N.D. Cal. Apr. 1, 2008) (“knowledge of customer  
26 preferences and characteristics that would aid the plaintiff in securing and retaining business” may  
27 constitute a trade secret). Information about the technical and business needs of ePayware’s clients  
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1 is valuable information that is not likely to be publicly available, and it seems that ePayware took  
2 steps to protect this information by requiring its employees and contractors to sign non-disclosure  
3 agreements. *See* Cal. Civ. Code § 3426.1. Similarly, as discussed above, the source code, software,  
4 or other technical methods or process developed for ePayware are likely protectable trade secrets  
5 that ePayware has taken steps to keep secret.

6 Moreover, Plaintiff has presented evidence suggesting that Defendants may be making use  
7 of this trade secret information. First, Plaintiff makes the basic claim that the KARES software  
8 suite marketed by Aumtech America is very similar in structure and function to ePayware's  
9 software suite. Menon Decl. ¶ 17 & Ex. H. The Court agrees with Defendants that the mere  
10 similarity between the parties' products is not sufficient to show that Defendants have used  
11 ePayware source code or other trade secrets to develop the KARES software. *See* Shankar Bose  
12 TRO Decl. ¶ 29 (explaining that merchant service providers follow a standard process and therefore  
13 software suites may look similar). However, Plaintiff has submitted evidence of more than mere  
14 product similarity. For instance, Plaintiff makes persuasive allegations that Defendants have taken  
15 steps to make it appear as though they, rather than ePayware, directly serve ePayware's clients. In  
16 particular, Plaintiff alleges sometime before the launch of Aumtech America, Aumtech India  
17 employees began corresponding with ePayware clients using their Aumtech email accounts, rather  
18 than ePayware addresses. Compl. ¶ 6; Menon Decl. ¶ 20. Plaintiff also claims that the Aumtech  
19 America website lists ePayware clients as though they were clients of Aumtech America. Compl.  
20 ¶ 32. As to client solicitation, Plaintiff alleges that Aumtech America has directly targeted  
21 ePayware's clients, and, in particular, that Jennifer Polito contacted ePayware client First Pay  
22 Solutions, LLC, and encouraged it to switch to Aumtech America. Compl. ¶ 32.

23 In addition, Plaintiff also contends that both Jennifer Polito and Shankar Bose took measures  
24 to conceal their activities from ePayware and to delete data needed by ePayware to maintain its  
25 relationships with its clients. Specifically, Plaintiff alleges that after Jennifer Polito resigned from  
26 ePayware, she used three different programs ("CCleaner," "Active KillDisk Free Suite," and "R-  
27 Wife & Clean 9.3") to delete data from the hard drive of her ePayware-issued laptop before  
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1 returning it to Plaintiff. Compl. ¶ 30; Suppl. Decl. of Sandeep Menon ISO Renewed TRO Mot.  
2 (“Suppl. Menon Decl.”) ¶ 28, ECF No. 35. Plaintiff claims that these programs “wiped all of the  
3 slack space on the hard drive and wrote over the areas repeatedly with patterned hex data,” such that  
4 no Word, Excel, or PowerPoint files could be recovered. Suppl. Menon Decl. ¶ 28. Although  
5 Jennifer Polito claims that she provided Plaintiff all of her work-related files, Plaintiff maintains  
6 that she did not provide her ePayware emails and that at least some document files were destroyed.  
7 Reply Br. ISO Renewed TRO Mot. at 2, ECF No. 57. Similarly, it appears that Shankar Bose  
8 deleted all of the emails in his ePayware account. Suppl. Menon Decl. ¶ 29. Plaintiff claims that  
9 the loss of these emails will make it more difficult for Plaintiff to transition its customers to a new  
10 vendor, as these emails contained a history of the issues each customer faces and the responses  
11 provided by Aumtech India. *Id.*

12 Although this evidence is certainly not dispositive, when considered as a whole, it is  
13 suggestive of deceptive activity and supports an inference that Defendants sought to appropriate  
14 confidential information for their own use and to interfere with Plaintiff’s access to that  
15 information. Accordingly, based on this information, and subject to new information or arguments  
16 that may be presented in opposition to a preliminary injunction, the Court finds that Plaintiff has  
17 established at least serious questions going to the merits of its claims that Defendants have engaged  
18 in unfair competition and breach, or interfered with, the non-compete and confidential information  
19 provisions of the Non-Disclosure Agreement.

## 20 2. Irreparable Harm

21 The Court also finds that Plaintiff has demonstrated that it is likely to suffer irreparable harm  
22 in the absence of a temporary restraining order. Ordinarily, economic injury is not considered  
23 irreparable, as it may be remedied by monetary damages. *Rent-A-Center, Inc. v. Canyon Television*  
24 *and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). However, the Ninth Circuit has  
25 recognized that “intangible injuries, such as damage to ongoing recruitment efforts and goodwill,  
26 qualify as irreparable harm.” *Id.*; *see also MySpace, Inc. v. Wallace*, 498 F. Supp. 2d 1293, 1305  
27  
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1 (C.D. Cal. 2007) (“Harm to business goodwill and reputation is unquantifiable and considered  
2 irreparable.”).

3 Here, as to the source code and licensing keys, Plaintiff has submitted declarations stating  
4 that it requires the code and keys in order to fulfill its maintenance obligations to its clients. Menon  
5 Decl. ¶¶ 11-12; Suppl. Menon Decl. ¶¶ 24-27. Plaintiff represents that since May 23, 2011, at least  
6 four of its customers, including two of its largest customers, have complained about the lack of  
7 support and maintenance for their ePayware modules, and that others have been asking for their  
8 license keys. Suppl. Menon Decl. ¶¶ 24-25. Plaintiff also states that approximately 85% of its  
9 revenue over the past year has come from its enterprise resource planning software, and that it has  
10 had to furlough staff due to its inability to maintain this software without the source code. Third  
11 Decl. of Sandeep Menon INSO Renewed TRO Mot. (“Third Menon Decl.”) ¶¶ 33-34. There is  
12 some dispute as to whether the source code is required to provide routine maintenance to ePayware  
13 customers, or whether it is only required to make amendments or changes to a client’s system.  
14 Shankar Bose TRO Decl. ¶ 13. Even if the code is required only for modifications, however, the  
15 Court is persuaded that Plaintiff requires immediate access to the code and keys in order to respond  
16 quickly to its clients’ needs. The Court finds it quite likely that if Plaintiff is continually unable to  
17 provide a license key or make modifications to a client’s software when requested, Plaintiff will  
18 lose the good will of its clients, and its business reputation will suffer.

19 Similarly, to the extent that Defendants are using Plaintiff’s trade secrets to compete with  
20 Plaintiff and to encourage Plaintiff’s customers to switch their accounts to Aumtech America, the  
21 Court agrees that Plaintiff has shown a likelihood of irreparable harm. Plaintiff represents that the  
22 enterprise resource planning software market is quite competitive, Menon Decl. ¶ 21, and suggests  
23 that it may have already lost a customer to Aumtech America. *Id.* ¶ 15. Moreover, to the extent  
24 that Aumtech America’s website lists ePayware customers as if they were Aumtech America  
25 customers, Plaintiff faces likely damage to its business reputation and confusion in the marketplace  
26 that may be difficult to remedy. If Defendants are permitted to compete with Plaintiff, over the  
27 course of this lawsuit, through the misuse of trade secret information, the Court must agree that this  
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1 would likely result in some loss of clients to Plaintiff and a decline in business reputation and  
2 goodwill that is sufficient to establish irreparable harm.

### 3 **3. Balance of Equities**

4 As to the balance of equities, if the Court imposes only a narrow temporary restraining  
5 order, the balance of equities will tip significantly in favor of Plaintiff. The Court has already found  
6 that Plaintiff is likely to suffer irreparable harm in the absence of a temporary restraining order.  
7 Because of the restrictions of California Business and Professions Code § 16600, any TRO imposed  
8 by the Court would be narrowly tailored to prohibit only the misuse of trade secrets and would  
9 permit Defendants to compete, in a lawful manner, with Plaintiff. Such an order would not cause  
10 any hardship to Defendants, beyond the basic requirement that they comply with laws prohibiting  
11 unauthorized use of another's trade secrets. Defendants would be free to market any products not  
12 based upon Plaintiff's source code or other trade secrets, and could enter into agreements with  
13 Plaintiff's existing customers, so long as they did not solicit those agreements using confidential  
14 client information. Such a narrow injunction should permit Defendants to pursue a lawful  
15 competing enterprise without undue restrictions. As to the source code, Defendants concede at the  
16 motion hearing that turning it over would cause them no harm, and they are merely concerned with  
17 obtaining the funds they contend Plaintiff owes them. Accordingly, assuming a narrow injunction  
18 with an appropriate bond, the Court finds that the equities tip significantly in favor of Plaintiff.

### 19 **4. Public Interest**

20 Finally, as to the public interest, the Court finds this factor to favor a narrowly tailored  
21 temporary restraining order. As discussed above, California has a "settled legislative policy in  
22 favor of open competition and employee mobility." *See Edwards*, 44 Cal. 4th at 946. At the same  
23 time, the State also has a strong history of protecting trade secrets from misuse. *See Retirement*  
24 *Group*, 176 Cal. App. 4th at 1237. Although a broad injunction would clearly intrude upon the  
25 policy in favor of open competition, the Court believes that a narrowly tailored injunction will serve  
26 the policy of protecting Plaintiff's trade secrets, while permitting Defendants to compete within the  
27 bounds of the law.

**C. Scope of Temporary Restraining Order and Bond**

Based on the above analysis, the Court finds that issuance of a temporary restraining order is warranted. However, in light of the restrictions of Section 16600 and California's policy in favor of open competition, the Court will issue only a narrow TRO, as follows:

- (1) After Plaintiff deposits \$20,000 with the Court as bond, Defendants shall turn over all of the current source code and license keys developed for ePayware clients that have not yet been released to Plaintiff.
- (2) Defendants are temporarily enjoined from listing current ePayware customers on the Aumtech America website in a manner that suggests those customers are Aumtech America customers.
- (3) Defendants are temporarily enjoined from initiating contact with current ePayware customers or clients regarding Aumtech America's enterprise resource planning software, unless none of the Defendants had knowledge of or contact with those customers during their terms of employment with ePayware. However, Defendants may engage in marketing efforts directed at the merchant services market as a whole, such as attending trade shows.
- (4) Defendants are temporarily enjoined from using ePayware's information about its customers' technical and business requirements, or other confidential client information, to solicit or obtain agreements with those customers. However, Defendants may enter into agreements with ePayware's customers if the customer initiates the contact and none of ePayware's confidential information will be used in negotiating, executing, or performing the agreement.
- (5) Defendants are temporarily enjoined from using any of ePayware's source codes, software, methods, techniques, or other trade secret information in Aumtech America's products or services. However, Defendants may provide and market similar, competing products and services, so long as none of ePayware's trade secrets are used in those products or services.

1 **D. Preliminary Injunction Hearing**

2 Because issues of personal jurisdiction, venue, and service remained uncertain at the time of  
 3 the June 23, 2011 hearing, the Court indicated that any injunctive relief would be ordered as a  
 4 temporary restraining order, with further briefing regarding a preliminary injunction to follow. At  
 5 the hearing, Defendants indicated that they would like two weeks after the issuance of a TRO to  
 6 brief Plaintiff's motion for a preliminary injunction. The parties indicated that they would be  
 7 amenable to holding the preliminary injunction hearing on August 1, 2011. Pursuant to Federal  
 8 Rule of Civil Procedure 65(b)(2), a TRO issued without notice to the adverse party expires after 14  
 9 days, unless the court extends the TRO for good cause or the adverse party consents to an extension.  
 10 Here, the TRO was issued with notice, and the adverse party has consented to an extension of the  
 11 14-day period.

12 Accordingly, the Court hereby ORDERS Defendants to show cause why a preliminary  
 13 injunction should not issue. Defendants' opposition is due July 15, 2011. Plaintiff's reply is due  
 14 July 22, 2011. The Court will hold a hearing on August 1, 2011 at 2 p.m. Although the Court has  
 15 only required a \$20,000 bond in conjunction with the TRO, the Court anticipates that additional  
 16 bond may be appropriate if a preliminary injunction issues. The parties are instructed to fully brief  
 17 the issue of an appropriate bond amount, as well as any other issues that may affect the Court's  
 18 analysis.

19 **VI. Conclusion**

20 For the foregoing reasons, the Court GRANTS Plaintiff's motion for substituted service,  
 21 DENIES Defendants' motions to dismiss, and GRANTS in part and DENIES in part Plaintiff's  
 22 motion for a temporary restraining order. Defendants are ORDERED to show cause why a  
 23 preliminary injunction should not issue. The Court will hold a hearing on Plaintiff's motion for  
 24 preliminary injunction, including the issue of bond, on August 1, 2011 at 2:00 p.m.

25 **IT IS SO ORDERED.**

26 Dated: July 1, 2011

*Lucy H. Koh*

27 LUCY H. KOH  
 28 United States District Judge