The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE CHRISTENSEN FIRM, Plaintiff, v. CHAMELEON DATA CORPORATION, and DEREK S. DOHN, Defendants.	Case No. 06-cv-00337-TSZ **DEFENDANTS' TRIAL BRIEF**

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I. INTRODUCTION

This is a trial that need never have taken place. Plaintiff Colleen Christensen d/b/a "The Christensen Firm" retained Defendants Derek Dohn ("Dohn") and Chameleon Data Corporation ("Chameleon") (together, "Defendants") to perform various services for her solo law practice as independent contractors. These services included the management of four domain names: <christensenfirm.com>, <thechristensenfirm.com>, <thechristensenfirm.net>, and <cc-lawfirm.com> (collectively, the "Domain Names").

Defendants performed the agreed services in the months that followed, although they had difficulty collecting payment from Christensen, and to this day Christensen still owes them approximately ten thousand dollars ($10,000.00) in unpaid fees. While Defendants were performing services for Christensen, she harassed Defendant Dohn with repeated sexual advances. The parties' business relationship deteriorated after Dohn rejected those unwanted advances. Defendants subsequently modified some information relating to the Domain Name registrations to prevent Christensen from accessing Defendants' proprietary and technical information.

Out of spite, Christensen refused to pay for Defendants' services, and Defendants did what any vendor would do under the circumstances – stop performing the services. Christensen sent a letter indicating that she wished to transition to another service provider on or before March 15, 2006. (Ex. A-24.) Defendants reasonably relied on that letter and awaited Christensen's further instructions.

Instead of working with Defendants to transition to another service provider, Christensen vindictively summoned Dohn into *ex parte* court without notice. At the *ex parte* hearing which began this lawsuit, Christensen made the baseless argument that the Domain Names contained protectable trademarks, which Defendants had allegedly infringed upon. This Court dismissed that argument on summary judgment.

Two of Christensen's causes of action remain. First, she claims Defendants breached a fiduciary duty to her by transferring the Domain Names to themselves. This is

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completely meritless. Defendants were independent contractors, and the parties did not have any kind of extraordinary relationship which might result in a fiduciary duty. Further, even if this nonexistent duty were real, Defendants never transferred the Domain Names to themselves, and even if they had, Christensen suffered no damage. Nor did Defendants ever violate the confidentiality of any information Christensen provided them. Her fiduciary duty claim is so baseless, Defendants respectfully ask this Court to conserve judicial resources by dismissing it prior to the jury's deliberations.

Christensen's second cause of action is for conversion. This claim also fails. Defendants never interfered with Christensen's possession of any property belonging to her, willfully or otherwise. (And even if they did, it would have been justified.) Moreover, she was never deprived of the possession of any property. The Court should dismiss this cause of action as well.

Defendants' claims are straightforward and reasonable. They request a judgment for the approximately ten thousand dollars ($10,000.00) which remains due and owing under the parties' contract. Defendants also request their reasonable attorneys' fees and costs pursuant to 15 U.S.C. § 1117. Christensen's trademark claims were so meritless, and were prosecuted with such malevolence, that this is clearly an "exceptional" case pursuant to the Lanham Trademark Act.

II. FACTS

The evidence at trial will show the following:

A. Plaintiff's False Statements Regarding Her Engagement of Defendants.

As Defendant Dohn will testify, Plaintiff retained Defendant Chameleon in May 2005 to provide document management and web development services for her solo law practice. The services provided included designing and developing an extranet web application, designing a corporate website, and furnishing document imaging and other data management support. (Exs. A-37, A-28.) Later, Plaintiff requested that Chameleon expand the scope of work to include domain and email management support.

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Plaintiff has made numerous misrepresentations to this Court regarding Defendants' alleged statements to her before she engaged Chameleon's services. She claims "Chameleon... advertised itself to the legal community as providing "security" on the Internet. At trial, Defendants will show that the document she previously relied upon to show this alleged fact, emphasizes "litigation support services", not "security". (Dkt. #81 ¶ 4 Ex. A.) Christensen has falsely claimed Dohn "frequently mentioned the high level of security required" by his firm's work on the Green River case, but the exhibits she provided in support of this allegation do not contain any quotes by Dohn regarding security. (Id. ¶¶ 6, 7 Exs. C, D.)

B. Plaintiff Failed to Pay Defendants for the Services They Provided.

As Dohn will testify, in July 2005, Christensen requested that Chameleon register three domain names on her behalf: <christensenfirm.com>, <thechristensenfirm.com>, and <thechristensenfirm.net>. Chameleon registered them. During the following month, Christensen requested that Chameleon manage the domain name <cc-lawfirm.com> within the account that had recently been created to manage the other Domain Names. Christensen indicated she did not want any responsibility for managing her own domain names or email. Subsequently, she transferred access and contact rights for <cc-lawfirm.com> to Chameleon, which in turn transferred <cc-lawfirm.com> to the same account (the "Christensen Account") containing the other three Domain Names. (Ex. A-6.)

During the following seven months, from August 2005 to March 2006, Defendants performed substantial amounts of work for Plaintiff. Defendants' services included document imaging, extranet development, email management and troubleshooting, among other services. Defendants honored Christensen's request that they administer all web hosting and email management tasks associated with her business. With Christensen's consent, and to promote efficient administration of Christensen's technology matters, Defendants merged the Christensen Account into Chameleon's master/organizational

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Network Services, Inc. ("NSI") account (the "Organizational Account"). (Ex. A-5.)

Christensen made increasingly unreasonable demands on Defendants' time and resources, and Defendants found it a continual challenge to collect payment from her, yet she assured them she would pay for all services rendered. Her first check failed to clear for lack of sufficient funds. A subsequent check did clear, but Defendants continued to experience difficulties in collecting payment from Christensen. By the time Christensen commenced this lawsuit, she had fallen approximately ten thousand dollars ($10,000.00) behind in her payments to Defendants. Additionally, Plaintiff agreed to pay additional amounts for Defendant Dohn's personal time spent consulting on and designing the business solutions and services provided to Plaintiff. However, Defendant Dohn elected not to pursue those fees, in an interest of avoiding further dealings with Colleen Christensen. Christensen never paid this debt for the services Defendants rendered, and it remains due and owing to this day. (Ex. A-20; Ex. A-35.)

C. The Parties' Relationship Worsened When Defendant Dohn Rejected Christensen's Sexual Advances.

As both David John Malcolm and Defendant Dohn testified over a year ago, and will testify again at trial, the relationship between Plaintiff and Defendants deteriorated after Defendant Dohn rejected Plaintiff's sexual advances:

> There was a period of time sometime late last year that Derek said he was getting uncomfortable because evidently Ms. Christensen had made several -- I'll call them romantic advances upon -- and actually, when he brought it -- primary time he brought it up was she had sort of said, "Hey" -- I'm paraphrasing, I don't recall exactly, but "do you like me or not"? Is this going to be a relationship or not?," at which time he said, "No, this is a business relationship," and -- after that happened, Derek explained to me the relationship was -- dramatically changed. [...] [E]ventually she pushed him to the point where he had to come out and tell her, "No, this is a business relationship. I don't want a romantic relationship."

(Deposition of David John Malcolm, October 2, 2006 at 9:15-25; 23:16-18 (Dkt. #101 Ex. A.)). Defendant Dohn testified similarly:

> Q: [by Plaintiff's counsel] [Why] was it your belief that Ms. Christensen had failed to pay your Invoice No. 71 because of some unreceived sexual or romantic overtures?

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> [...]
>
> A: Because that's the kind of treatment that began to emerge. As I said, and I characterized it in the last phrase, "I think your treatment has been nothing less than vindictive and personal."

(Deposition of Derek Stephen Dohn, May 31, 2006 at 203:9-24 (Dkt. #101 Ex. B)); *see also* Ex. A-27 ("I hope I didn't offend you on Saturday night – I got a little (or a lot) drunk and the subjects got a little crazy..."); Ex. A-22 ("Your treatment of me, and my company, since your outbursts stemming both from your repeated unreceived sexual and romantic overtures toward me... has been nothing less than vindictive and personal.").

In February 2006, Dohn became increasingly concerned that Christensen might attempt to take advantage of security vulnerabilities at NSI to obtain access to Chameleon's financial and other proprietary information in the Master Account. In fact, Christensen had requested Chameleon take such unethical action against her prior information technology vendor in August 2005. (*See* Ex. 29, email from Christensen to Dohn and Moeller: "So, can you...begin to do whatever you need to do to prepare to host my email once we wrest control from Acrosonic?") Moreover, Christensen had not paid for the domain name registration charges or email hosting charges Defendants had incurred on her behalf. Consequently, Defendants modified account information associated with the Domain Names to prevent Plaintiff from obtaining unauthorized access to Defendants' proprietary and technical information. Defendants never had any intention of transferring ownership of the Domain Names.

Christensen later made a partial payment for services rendered by Chameleon, but did not pay outstanding invoices for document hosting and email administration services. On February 22, 2006, Chameleon gave Christensen notice that it would terminate the services it was rendering to Christensen by the end of the day on March 1, 2006 unless payment was made before the deadline. On February 28, 2006, Christensen sent a letter to Defendants terminating all document hosting services "effective immediately". (Ex. A-24.) Christensen inquired as to why Defendants had "transferred the registrant" of the

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Domain Names, and further provided as follows:

> ...on or before March 15, 2006, I am transferring the handling of Network Solutions email accounts and domains to another vendor.

(Id.) Defendants believed, after reading this letter, that Christensen would notify them by March 15, 2006 that another vendor and account had been created to receive Plaintiff's email account and Domain Names.

Christensen's February 28 letter included only a nominal, paltry payment towards the amount then outstanding. As Dohn indicated to Christensen in an email he sent her later that day, Chameleon would not extend services to Christensen without payment in full. (Ex. A-23.) Dohn contacted Christensen several times on the following day, March 1, 2006, in an effort to resolve the dispute, reiterating the demand that she pay the outstanding invoice by the end of the day to avoid an interruption in service. Plaintiff did not pay the invoice, and on the evening of March 1, 2006, Defendants caused email service to be suspended for three of Plaintiff's email addresses which were managed by Defendants.

Before doing so, however, Chameleon Data sought advice from multiple parties: its accountant, Linda Little, Derek Dohn's friend, David Malcom, and Network Solutions. All advised Dohn to suspend services, including email services. In fact, Network Solutions advised Defendant Dohn that, under the same circumstances, Network Solutions would simply have terminated Plaintiff's email account, and allowed her domain names to lapse, causing them to fall into the public domain. Instead, Chameleon Data elected to prevent Plaintiff from irreparable harm by placing a freeze on its services to Plaintiff, and continuing to pay Network Solutions for them with Chameleon Data's corporate credit card.

Plaintiff has mischaracterized this as an interference with Plaintiff's access to email accounts instead of what it really was: a termination of services following notice. Defendants knew Plaintiff had other email addresses which she commonly used; when

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she had email service outages with her previous provider, she had relied on those other addresses to communicate via email. Additional, Plaintiff has admitted no emails were lost in the transaction.

D. Plaintiffs' False Allegations Regarding NSI.

Christensen claims that on March 1, 2006, Chameleon's employee, Darren Moeller, contacted NSI to prevent Christensen from accessing any information relating to the Domain Names. Moeller will testify at trial that he never made this alleged telephone call (and has previously denied making it). Defendant was not aware of such a call, and did not instruct Moeller to contact NSI. Indeed, the call may well have been made by Plaintiff or someone acting under her direction. Further, Plaintiff has never alleged she contacted NSI between March 1 and March 3, 2006, the day she obtained a temporary restraining order requiring an immediate transfer of control of all four Domain Names. Accordingly, Plaintiff has not alleged that Moeller's purported telephone call affected her in any way.

E. Defendants Did Not Exercise Control Over the Domain Names.

Defendants never exercised control over the Domain Names or held them as security for payment. They simply never had the opportunity to transfer them back to Plaintiff. According to NSI's internal policies, as Defendants understand them, a domain name transfer may only occur between two NSI accounts, or between NSI and another registrar. Defendants held the Domain Names in their NSI organizational account at Plaintiff's request, and funded their registration and renewal. Defendant could not transfer the Domain Names from their account to Plaintiff, unless she designated an account with NSI or some other registrar to receive them, which she said she would do by March 15, 2006. Instead, Plaintiff simply sued.

Defendants intended to hold the Domain Names until March 15, 2006, when Plaintiff designated an account for receipt. Plaintiff's lawsuit came as an absolute

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surprise to Defendants.

When Dohn decided to suspend Plaintiff's services for nonpayment, he worried Plaintiff would find a way to access Defendants' NSI account without authorization, in order to cause harm to that account. Defendants' Organizational Account contained Chameleon's corporate credit card information, which NSI charged for account activities, including domain renewal, and monthly charge for hosting Plaintiff's email. The account also held Defendants' own corporate domain names, and settings for account services.

On February 7, 2006, Dohn contacted NSI. He explained Defendants' dispute with Christensen to the NSI customer service representative he spoke to, and expressed his concern about unauthorized access.

The NSI representative advised Dohn that his concerns were well founded. She said although Christensen lacked Defendants' NSI password, Christensen could theoretically fool an NSI representative into believing she had simply forgotten her password, but that she had authority to access Defendants' NSI account. The representative suggested the field on the Domain Name registrations which identified The Christensen Firm as the account holder might aid Christensen in her deceit. On the NSI representative's instruction, Dohn changed the "account holder" designation to "Chameleon Data Corporation-ChrisFirm."

Defendants never considered who the "registrant" of the Domain Names was, since NSI's emails focus on "account holders" and "users". The emails from NSI reasonably convinced Dohn that Chameleon had the authority to manage the Domain Names.

According to NSI's internal policies, modifying the Domain Name registrations' "account holder" designation does not constitute a transfer or re-registration of them. NSI considers a domain name's owner or registrant to be the "Primary Contact" for the NSI account in which the domain registration is held. The "Account Holder" field on each domain registration is merely intended to allow the NSI account holder to associate a

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particular domain registration with a particular name. The "account holder" designation is totally optional (Ex. A-50).

According to NSI, re-registration or transfer of registration is a much more formal, legally binding process, which requires that both the old registrant and the new registrant execute a document entitled "Registrant Name Change Agreement." In fact, this is the same agreement that Dohn and Christensen executed to transfer the Domain Names to Christensen pursuant to the temporary restraining order issued in this matter. Transfer of ownership or registration of domains cannot take place within a single NSI account by merely updating or modifying a domain registration's "Account Holder" information.

Dohn understood these policies to be the case when he modified the Domain Names' account holder field to Chameleon Data Corporation-ChrisFirm. Moreover, Dohn recently confirmed this information in telephone and email communications with NSI. He therefore believed his modification did not constitute a re-registration or transfer of the Domain Names, and NSI would agree with him. Dohn merely believed he was preserving the status quo, and protecting Defendants from Christensen's machinations.

F. The TRO Hearing.

Christensen did not contact Defendants between February 28, 2006 and March 3, 2006. Without warning, just after 3 p.m. on March 3, 2006, while Dohn was presenting at a trade show, Christensen's lawyer called Dohn's cell phone and informed him that a hearing would take place at the King County Superior Court Ex Parte Department at 4 p.m. Dohn retrieved some papers from his office, then proceeded to the courthouse. At the courthouse, Christensen's lawyer handed Dohn some documents which he did not have time to review before the hearing. Dohn had no legal representation at the hearing, and Plaintiffs' surprise maneuver had insured Dohn would not have adequate time to retain counsel for the hearing.

At the TRO hearing, Dohn did not claim "possession is nine-tenths of the law" as Christensen has claimed, nor did he claim Defendant had a policy of "confiscating...

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clients' property". Defendant has never had such a policy, contrary to Plaintiff's false assertion. While it was operating,[1] Chameleon did have a policy of suspending web hosting services when customers failed to pay. Dohn clearly explained that policy to Christensen prior to Chameleon's engagement to perform services for Christensen, and she accepted the terms of that policy.

Further, Dohn does not recall hearing Commissioner Prochnau claim Defendants had "taken away the lifeblood" of Christensen's firm, as Plaintiff has also claimed. Dohn was surprised at Christensen's late-afternoon ambush, given her representation that Plaintiff would transition to a new service provider on or before March 15, 2006.

Later on March 3, 2006, Defendants complied fully with the terms of the court's TRO, restoring the email services for which Defendants still had not paid, and authorizing the required changes to NSI domain name records. Based on Plaintiff's misrepresentation that she would transfer the domain names and email accounts on or before March 15, 2006, Defendants had expected to take such actions even without a TRO. To Defendants' knowledge, Plaintiffs lost no emails as a result of the brief suspension of services. Defendants dispute Plaintiff's claim that as of February 28, 2006, Plaintiff "had paid for email service through at least May 2006." At trial, common sense will lead the jury to find that partial payments on an outstanding balance accrue to the then oldest receivable balances.

G. Plaintiff's Misrepresentations Concerning Billing Practices.

As Dohn will testify, Chameleon's employee Gabe Coyne was always instructed to keep track of his time spent on customer projects. At his deposition, Coyne testified that he could not remember whether Defendants asked him to keep track of time. (Dkt. #81 Ex. G at 15:15.) Coyne did not keep accurate time records, and so Dohn was required to undertake a lengthy process of reconstructing in good faith all aspects of the work Coyne had performed for Defendants. Indeed, Defendants wrote off a considerable amount of

[1] Chameleon has been driven out of business as a result of Plaintiff's abusive litigation tactics, and Dohn currently works as an independent contractor for Microsoft.

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Coyne's work, in a good faith attempt to present Plaintiff with a very conservative bill. In fact, the firm wrote off all Defendant Dohn's consulting time, in order to facilitate the severing of ties with Plaintiff. Defendants dispute Plaintiff's inaccurate claim that she was "overbilled" for service charges. To the best of Defendants' knowledge, all bills they submitted to Plaintiff were accurate.

H. Plaintiff's Lack of Damages.

Plaintiff admits suffering no compensable damages as a result of any of Defendants' alleged actions. In connection with Chameleon's extranet and email services, Christensen alleged various incidents she claimed were breaches of Defendants' duty to maintain the confidentiality of her documents. (Dep. at 84-96.)[2] However, when asked to describe the harm she allegedly suffered as a result of these claimed incidents, she claims only the following: her time "handling this litigation" and disputing payment of invoices (*See* Dep. at 96-98);

Christensen's counsel reiterated this position, both at the January 30, 2008 hearing on the parties' respective motions for summary judgment, and at the April 18, 2008 pretrial conference. Plaintiff consistently admits that her only alleged damages are the fees she has had to pay other lawyers to tend to her law practice while she pursues this lawsuit. Under that logic, all of Christensen's alleged damages relate to her own decision to file this lawsuit, and without this lawsuit she would have incurred no damages.

At her deposition, she admitted it was "very difficult" to describe the damages she allegedly suffered. (Dep. at 89:7-9.) She admitted she has no evidence of any lost client relationships or business expectancies resulting from Defendants' alleged actions. (Id. at 104:13-21.) She claimed she lives "under constant fear" that Defendants will improperly reveal confidential information, but cannot quantify her damages. (Id. at 89:2-18.) Plaintiff also fails to allege any damages resulting from Defendants' alleged breach of

[2] Colleen Christensen's deposition testimony cited herein (*e.g.*, "Dep. at") is attached as Ex. V to the Declaration of John Du Wors (Dkt. #80).

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confidentiality.

At the end of the deposition, Christensen and her counsel attempted to rehabiliate her testimony and restore her lost credibility regarding damages. She explained that what she had "meant" by "unquantifiable" was actually "quantifiable". (Dep. at 215:6-13.) However, during the redirect examination that followed, Christensen still could not identify any real damages, and again referred to the time she allegedly lost as a result of the lawsuit she decided to initiate. (Id. at 217:1-19.) She could not think of any other type of harm:

Q. Any other broad category of harm?

A. Not that I can think of right now.

(Id. at 218:8-9.) Should Christensen attempt to change her testimony at trial, her credibility will be further impeached by her inconsistent deposition statements.

Christensen's lack of damages has caused her to resort to blaming Defendants for her own personal failures, going so far as to indicate Defendants caused her to neglect her responsibility to report her CLE credits, a failure which resulted in her recent suspension from the practice of law. Christensen claims she has had to spend hundreds of hours dealing with this dispute, even though she is the plaintiff and could have dismissed the lawsuit a long time ago. During her deposition, after recounting the costs and alleged emotional trauma she had incurred as a result of bringing the present lawsuit, Plaintiff was asked about what she was looking for in a settlement:

Q. What could Derek Dohn do to make the whole thing go away and end for you right now?

A. There is -- I think you are asking for some settlement proposal. I'm not going to engage in that. I mean that's --

Q. Okay.

A. That's not appropriate for a deposition.

Q. It's just a question.

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(Dep. at 105:9-16.) However, in Plaintiff's Opposition to Defendant Dohn's Motion for Leave to Amend to Add a Claim for Attorney Malpractice (Dkt. #92), Plaintiff characterized Defendants' bona fide settlement inquiry–which she clearly recognized as such during the deposition–as part of a campaign to "smear" her and "pressure [her] into dropping the claims five days before Ms. Christensen's deposition." (Id. at 5, 6.) Plaintiff's failure to identify actual damages combined with her persistent prosecution of a lawsuit which she alleges has cost her both fiscally and emotionally reveal this suit is no more than a vengeance action brought by a scorned would-be lover.

III. LAW AND ANALYSIS

This Court previously dismissed all of Plaintiff's claims except for conversion and breach of fiduciary duty. (Dkt. #132.) Neither of Christensen's remaining claims has any credible basis in law or fact, and this Court should dismiss both before they reach the jury. Defendants' counterclaim for breach of contract is well founded, and Defendants are entitled to judgment for all amounts due and owing under the parties' service contract. Defendants also request their reasonable attorneys' fees and costs pursuant to 15 U.S.C. § 1117, given the meritlessness of Christensen's trademark claims.

A. Plaintiff Cannot Prove Conversion.

In this circuit, the law regarding conversion is as follows:

> To establish conversion, a plaintiff must show "ownership or right to possession of property, wrongful disposition of the property right and damages." G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Service, Inc., 958 F.2d 896, 906 (9th Cir. 1992).

Kremen v. Cohen, 337 F.3d 1024, 1029 (9th Cir. 2003). [etc.]

1. Plaintiff Did Not Suffer Damages.

Without damages, Plaintiff cannot establish liability for Defendants' alleged conversion. Rasmussen, supra. It is indisputable that Plaintiff suffered no damages resulting from Defendants' alleged actions with respect to the Domain Names, her email accounts, or anything else. Based on Plaintiff's representations concerning her intent to

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change service providers "on or before March 15, 2006", Defendants expected to resolve the parties' dispute in March 2006, without the Court's involvement. Consequently, Plaintiff was not required to file this lawsuit, and her decision to do so does not constitute damages. Defendants immediately complied with the unnecessary TRO, modified the NSI account information related to the Domain Names, and restored the email service for which Defendant had not paid.

Not only did Plaintiff suffer no harm, but she has also received possession of the Domain Names and emails she claimed were converted. A successful conversion claimant has three available remedies: 1) a return of the allegedly converted property, 2) the value of the property taken; and/or 3) the benefit derived by the party liable for conversion. Bill v. Gattavara, 34 Wash.2d 645, 649 (Wash. 1949); Martin v. Sikes, 38 Wash.2d 274, 287 (Wash. 1951) ("A judgment for conversion has normally no other consequence than to compel the defendant to buy the converted goods at what is in reality a forced sale"); Junkin v. Anderson, 12 Wash.2d 58, 63 (Wash. 1941) ("[T]he measure of damages in conversion is the value of the article converted at the time of the taking..."); Choice Hotels Int'l, Inc. v. Wright (In re Wright), 355 B.R. 192, 209 (Bankr. D. Cal. 2006). Plaintiff has obtained possession of the Domain Names involved in this litigation. She has testified that she has suffered no compensable harm. Further, she can produce no evidence that Defendants enjoyed any benefit from the Domain Names between February 7, 2006 and March 3, 2006 – the date of Defendants' compliance with the TRO. Since Plaintiff has no further available remedies, her conversion claim fails as moot.

2. Defendants Did Not Willfully Interfere with Plaintiff's Chattel or Deprive Her of Possession, and Their Actions Were Justified.

Judkins v. Sadler-MacNeil, 61 Wash.2d 1, 3, 376 P.2d 837 (1962) holds as follows: "A conversion is a willful interference with a chattel without lawful justification, whereby a person entitled thereto is deprived of the possession of it." In this case, Defendants never willfully interfered with Plaintiff's property, nor did they deprive her of possession of anything.

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Defendants were merely Plaintiff's service providers, not custodians of her property. After Defendants modified the Domain Name account information for security reasons as described above, Plaintiff indicated she would appoint a service provider to receive the domain names on or before March 15, 2006. Plaintiff testified at her deposition that she never appointed such a receiver. (Dep. 165:15-166:5.) Based on their understanding of NSI policies and procedures, Defendants did not believe their modification of account information had resulted in a transfer of property, and were satisfied to wait until Plaintiff contacted them to resolve the parties' outstanding issues. Accordingly, there was no "willful interference."

Assuming *arguendo* that Defendants "interfered" with Plaintiff's chattel, which they did not, the interference was justified. Defendants provided services to Plaintiff, and ceased to provide those services only after Plaintiff repeatedly failed to pay for them, and after notice to Plaintiff. When Plaintiff failed to pay her bills, there was a valid dispute over the extent of services Defendants were required to provide, if any, and over the amount of compensation Plaintiff was required to provide in exchange for those services. *Cf.* Olin v. Goehler, 39 Wash. App. 688, 694, 694 P.2d 1129 (Wash.Ct.App. 1995) ("[w]hen there is 'a valid dispute or conflicting claims to... personal property, possession [may be] denied... for so long as reasonably necessary to determine the identity of the rightful claimant' (citing W. Prosser & P. Keeton, Torts § 15, at 100 (5th ed. 1984)).

B. Plaintiff Cannot Prove Breach of Fiduciary Duty

To prevail on a breach of fiduciary duty claim in Washington, a plaintiff "must establish: (1) the existence of a duty owed [to it]; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury." Miller v. U.S. Bank of Wash., 72 Wash. App. 416, 426, 865 P.2d 536 (1994) (citing Hansen v. Friend, 118 Wash.2d 476, 479, 824 P.2d 483 (1992). Plaintiff cannot establish any of the required elements.

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1. Defendants Did Not Have a Fiduciary Duty to Plaintiff.

Plaintiff has grossly misrepresented the parties' communications leading up to her engagement of Chameleon to provide data management services to Christensen. Plaintiff's claimed fiduciary duty appears to be based on a claim that Dohn gave two interviews in which he allegedly mentioned that security of online data was a paramount concern. Unsurprisingly, a review of the articles based on those alleged interviews reveals Plaintiff has misstated the facts. Neither article mentions any comments by Dohn related to security concerns. (Dkt. #81 ¶¶ 6, 7 Exs. C, D.)

Plaintiff has no credible evidence that a fiduciary duty ever arose between her and Defendants. Defendants were independent contractors, and the parties' relationship did not even rise to the level of one between principal and agent. Even assuming *arguendo* that it did, Defendants were never Christensen's fiduciaries.

a. Defendants Were Independent Contractors, Not Agents

Washington courts have adopted the Restatement (Second) of Agency § 220(2) (1958) as the test for distinguishing between agents and independent contractors. *See* Hollingbery v. Dunn, 68 Wash.2d 75, 80-81, 411 P.2d 431 (Wash. 1966); Massey v. Tube Art Display, Inc., 15 Wash.App. 782, 786-87, 551 P.2d 1387 (1976). *See also* DeWater v. State, 130 Wash.2d 128, 139- 40, 921 P.2d 1059 (1996) (when interpreting the laws against discrimination, the proper test is an administrative regulation that is based on the Restatement section).

The Restatement provides the following factors for use in determining whether a party is an agent or independent contractor:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

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(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Restatement (Second) of Agency § 220(2) (1958) (cited in Massey, supra, 15 Wash.App. at 786-87). The testimony at trial will indicate Defendants were independent contractors, not agents, at all times. Christensen herself has previously admitted Defendants were vendors independent from her solo law practice:

Q. You said "vendor relationships." So Chameleon Data was essentially a vendor to The Christensen Firm?

A. Yes. It was a vendor. It wasn't an employee.

(Dep. at 79:22-80:1.; *see also* Dkt. # 65 ¶ 14: "Neither Chameleon DATA nor Derek Dohn have ever had any legal affiliation with my law firm or with Claflin & Christensen.") Analysis of the Restatement factors confirms Defendants' independent status. Defendants exercised independent control over their work performance, their business was distinct from Christensen's, and they performed entirely different services from those she offered to her clients (information technology vs. legal advice). Information technology service is often done without close supervision, at it was in this case. It involves a high level of skill. Defendants themselves supplied the technical equipment and specialized know-how for performing their services. Defendants had a number of other clients, and worked for Christensen only for several months. Their work was not part of Christensen's regular business. Dohn never believed the parties had created any relationship other than that between independent contractors and their

customer.

The Restatement factors overwhelmingly indicate Defendants were never anything more than independent contractors. They were never agents or fiduciaries. Christensen previously cited Liebergesell v. Evans, 93 Wash.2d 881, 890 (Wash. 1980) in support of her claim that Defendants owed her a fiduciary duty. However, Liebergesell (which affirmed the denial of summary judgment on the fiduciary duty issue; 93 Wash. 2d at 891) involved "a widowed school teacher with no expertise in business, investments, or lending practices relied on the superior knowledge of a person knowledgeable and skilled in accounting." Merrick v. Greear, 2004 Wash. App. LEXIS 1999, *10 (Wash.Ct.App. Aug. 31, 2004). The facts of that case are clearly distinguishable from this one, which involves an arms-length contractual relationship between a sophisticated litigator, Plaintiff, and a small business owner, Defendant Dohn. As the Merrick court further provided:

> Merrick relies heavily on Liebergesell for his argument that his contractual arrangement with Greear gave rise to a principal-agent relationship, which is necessarily a fiduciary relationship. But Liebergesell simply holds that contracting parties have a mutual duty to act in good faith and not to deceive one another. Liebergesell, 93 Wn.2d at 891-92. A mutual obligation of good faith and fair dealing is not a fiduciary duty. Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). Neither does one party's testimony that he trusted the other suffice to elevate a good faith relationship to a fiduciary one. Micro, 110 Wn. App. at 435.

See also Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, 110 Wash. App. 412, 434 (Wash.Ct.App. 2002) (placing trust and confidence in firm as independent advisor insufficient to create fiduciary duty) (citing Resolution Trust Corp. v. KPMG Peat Marwick, 844 F. Supp. 431, 436 (N.D. Ill. 1994)); Maginnis v. Simmons, 47 Wash.2d 19, 21 (1955) (under Washington law, no fiduciary duty arises where "the original transaction between the parties involved only a simple, ordinary business relationship..."); Goodworth Holdings, Inc. v. Suh, 239 F. Supp. 2d 947, 960 (N.D. Cal. 2002) ("A fiduciary relationship, however, does not arise simply because parties repose trust and confidence in each other").

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b. The Parties Never Transformed Their Interaction into a Fiduciary Relationship

Under Washington law, it is well established that an agent is not automatically a fiduciary. More is required to transform the agency relationship into a fiduciary one. In Moon v. Phipps, 67 Wash.2d 948, 956, 411 P.2d 157 (Wash. 1966) the court held as follows:

> When, therefore, by virtue of an agency relationship, an agent, without the knowledge and consent of his principal, acquires dominion over and control of his principal's property in such a way that the agent possesses a legal power to alienate the principal's interests in or possessory rights thereto, the agent has **transformed** the agency into a fiduciary relationship.

Id. (emphasis added); *see also* Crisman v. Crisman, 85 Wash. App. 15, 22, 931 P.2d 163 (Wash.Ct.App. 1997) (applying Moon test to determine whether agents were acting as fiduciaries); In re Estates of Palmer, 2008 Wash. App. LEXIS 789, *16 (Wash.Ct.App. Apr. 8, 2008) ("An attorney-in-fact is an agent to whom the principal has given authority to act in his or her stead for the purposes set forth in the power of attorney... In that role, the agent **becomes** a fiduciary who is bound to act with the utmost good faith and loyalty...") (emphasis added; cites omitted).

The Moon court emphasized that in Washington, "[a] simple reposing of trust and confidence in the integrity of another does not alone make of the latter a fiduciary. There must be additional circumstances, or a relationship that induces the trusting party to relax the care and vigilance which he would ordinarily exercise for his own protection." Moon v. Phipps, 67 Wn.2d 948, 954 (Wash. 1966) (citing Collins v. Nelson, 193 Wash. 334, 75 P.2d 570 (1938)). Plaintiff basically alleges she trusted Defendants and confided in them; however, the Washington Supreme Court specifically rejects a leap from "trust and confidence" to "fiduciary duty". *See* Moon, 67 Wn.2d at 954.

Other jurisdictions resoundingly agree that a mere confidentiality agreement, or nondisclosure agreement, does not create a fiduciary relationship, without express language to that effect. *See e.g.*, Goodworth Holdings, Inc. v. Suh, 239 F. Supp. 2d 947, 960 (N.D. Cal. 2002) ("A fiduciary relationship, however, does not arise simply because

parties repose trust and confidence in each other"); *accord,* Trumpet Vine Invs., N.V. v. Union Capital Partners I, 92 F.3d 1110, 1117 (11th Cir. 1996); Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co., 785 F. Supp. 411, 426 (D.N.Y. 1992).

Christensen's fiduciary duty claim rests entirely on the allegation that Christensen trusted Defendants – without any basis for elevating the parties' good faith relationship into a fiduciary one. (*See* Dep. at 111:7 - 112:11.) Under Washington law, this is insufficient. Christensen's placement of trust and confidence in Defendants, while justified, was not sufficient to create a fiduciary relationship.

2. Plaintiff Has No Evidence to Support Her Claims of Breach, Injury or Causation.

In addition to a fiduciary duty, nonexistent in this case, Plaintiff must prove breach, injury, and causation. Miller, supra, 72 Wash. App.at 426. Even assuming, *arguendo,* that a fiduciary duty existed, which it did not, Plaintiff cannot identify any actual breaches. Christensen previously claimed Defendants violated their alleged duty of loyalty to her by transferring the Domain Names to Chameleon. However, no transfer occurred. Defendants did not believe they were transferring anything when they modified account information related to the Domain Names. Nor did Defendants prevent Plaintiff from obtaining access to the Domain Names. The alleged facts do not indicate a breach, even assuming a fiduciary duty existed, which it did not.

Plaintiff also fails to identify any harm she allegedly incurred as a result of Defendants' alleged breaches of their purported fiduciary duty. Her damage claim centers on her misguided belief that time spent on a frivolous lawsuit, which she chose to file simply to harass Defendants, is compensable as damages. It is not. *See* Sign-O-Lite v. DeLaurenti Florists, 64 Wash.App. 553, 559, 825 P.2d 714 (Wash.Ct.App. 1992) ("DeLaurenti's mere involvement in having to defend against Sign's collection action and having to prosecute a CPA counterclaim is insufficient to show injury to her business or property, contrary to the trial court's conclusion"). Christensen may claim that she

suffered injury because she had to pay others to serve her clients while she pursued this lawsuit, but that is nothing more than a restatement of the argument rejected in Sign-O-Lite. If Christensen allegedly had to pay others to handle her business during this lawsuit, that is only because she chose to spend her time on this frivolous case instead of working for her clients. She did not have to make that choice, which was a bad one, and there is no reason to make Defendants pay for her unwise decision. (In the alternative, it is likely to be revealed at trial that Christensen actually profited from the use of her two contract attorneys.) Christensen is not entitled to reimbursement from Defendants for the expense of harassing them, either for her own time or for the time of others she paid to free herself to get involved in frivolous litigation. Since there are no damages, there can be no causation. The absence of injury or causation provides further reason for dismissing this cause of action.

C. Defendants Are Entitled to Damages for Plaintiff's Breach of Contract

A breach of contract is actionable if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. Larson v. Union Inv. & Loan Co., 168 Wash. 5, 10 P.2d 557 (1932); Alpine Indus., Inc. v. Gohl, 30 Wn. App. 750, 637 P.2d 998 (1981), *review denied*, 97 Wn.2d 1013 (1982). In this case, Christensen's breach of contract is straightforward and Defendants' entitlement to relief is clear. Defendants agreed to provide document management and web development services to Christensen in return for payment. Christensen had a duty to pay Defendants after they rendered those services. Defendants performed the services, and Christensen breached her duty to pay them. This caused damages to Defendants in the approximate principal amount of ten thousand dollars ($10,000.00). Defendants request an award of damages in that amount.

D. Defendants Are Entitled to their Reasonable Attorneys' Fees and Costs

The Lanham Act, at 15 U.S.C. §1117(a)(3), provides "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party". "While the term

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'exceptional' is not defined in the statute, generally a trademark case is exceptional for purposes of an award of attorneys' fees when the infringement is malicious, fraudulent, deliberate or willful." Lindy Pen Co., Inc. v. Bic Pen Corp., 982 F.2d 1400, 1409 (9th Cir. 1993). In the Ninth Circuit, a case is exceptional when it is either "groundless, unreasonable, vexatious, or pursued in bad faith." Cairns v. Franklin Mint Co., 292 F.3d 1139, 1156 (*citing* Avery Dennison Corp. v. Sumpton, 189 F.3d 868, 881 (9th Cir. 1999) (emphasis added) (*quoting* Stephen W. Boney, Inc. v. Boney Servs., Inc., 127 F.3d 821, 827 (9th Cir. 1997)). Thus, Christensen's case need only meet one of the Cairns standards to be "exceptional." It meets all of them.

The Ninth Circuit applies this standard to applies to both "prevailing plaintiffs and prevailing defendants seeking attorney's fees under the Lanham Act". Boney, supra, 127 F.3d at 827. When a plaintiff's case is groundless, unreasonable, vexatious, or pursued in bad faith, it is exceptional, and the district court may award attorney's fees to the defendant. Id; *see also* S Industries, Inc. v. Centra 2000, 249 F.3d 625, 627 (7th Cir. 2001) ("Where the defendant is the prevailing party, the standard is not whether the claimant filed suit in good faith but rather whether plaintiff's action was oppressive). A suit is oppressive if it lacked merit, had elements of an abuse of process claim, and plaintiff's conduct unreasonably increased the cost of defending against the suit. S Industries., *supra*, 249 F.3d at 627.

Defendants respectfully ask this Court to classify this case as exceptional, and to award Defendants their reasonable attorneys' fees and costs incurred defending against Christensen's baseless claims. Christensen's alleged CC-LAWFIRM and CHRISTENSEN marks (together, the "Alleged Marks") are generic terms not entitled to any kind of trademark protection. "A generic term is the common descriptive name of a class of goods or services, and, while it remains such common descriptive name, it can never be registered as a trademark . . ." H. Marvin Ginn Corp. v. International Asso. of Fire Chiefs, Inc., 228 U.S.P.Q. 528, 782 F.2d 987, 989 (Fed.Cir. 1986). "CC law firm" is

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commonly used as a generic reference for firms which handle condominium conversions, credit card disputes, or other matters which may be abbreviated with the term "CC". "Christensen firm" is a generic term referring to a firm owned by someone named Christensen. This Court agreed the Alleged Marks are generic when it summarily dismissed Christensen's trademark claims.

In K-Jack Engineering Company, Inc. v. Pete's Newsrack Inc., 209 U.S.P.Q. 386 (C.D.Cal. 1980), the court determined the defendant was entitled to its reasonable attorneys' fees in defending against baseless infringement claims when the alleged mark was generic:

> Plaintiff's actions in suing Defendant on its invalid registration of the mark PIGGY-BACK which, prior to its registration by Plaintiff, had already become the generic description for [a certain type of] newsracks... and further, Plaintiff's action in filing and asserting charges of infringement of its registered trademarks SUPER-VIEW and MINI-VIEW by Defendant without any basis of admissible evidence for a good faith belief that such infringement was occurring render this an exceptional case under 15 U.S.C. 1117. Accordingly, Defendant should be awarded its resonable attorney fees in defending against such trademark claims.

In this case, it was obvious that the Alleged Marks were generic, yet Christensen pursued her bogus trademark claims with full force. This alone warrants a determination that this case is exceptional and an award of Defendants' reasonable attorneys' fees and costs.

Further, Christensen never even produced any credible evidence that she had used the Alleged Marks as trademarks. Christensen is her surname, as well as the surname of numerous other people, all of whom have the right to use that name in connection with their own businesses. (Ex. A-59.) *See*, *e.g.*, Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U.S. 118, 140, 49 L. Ed. 972, 25 S. Ct. 609 (1905). "CC law firm" has a number of generic meanings as indicated above. During the course of this trial, Christensen never produced any evidence indicating the Alleged Marks were anything other than generic. She produced no evidence indicating consumers view either of the Alleged Marks as denoting her as the single source of services offered in connection with that mark. She admitted she has not used print advertising materials to promote the

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Alleged Marks in the last three years. The websites connected with the domain names incorporating the Alleged Marks do not provide any information about her services. (Exs. A-9, A-10, A-57, A-58.) Christensen's lack of evidence forced her to make frivolous arguments, such as her reliance on third-party registrations for yacht design and hog management facility construction as alleged evidence for the strength of her unrelated Alleged Marks.

Christensen's willful, malicious prosecution of her meritless claims is similar to the plaintiff's behavior in S Industries, *supra*:

> Judge Lindberg granted attorneys fees both because S Industries' trademark claims were meritless and because of the dilatory tactics it employed. Without having a federal registration for the "Sentra" mark for use on computer software, S Industries filed suit alleging infringement. Thus, from the outset, S Industries had no federally protected right to defend...It never produced product packaging bearing the "Sentra" mark on computer-related products, nor did it present evidence of advertising for "Sentra" brand computer software... So, there never was a threat that consumers would have confused Centra 2000's highly sophisticated, customized, data management software, which is licensed to institutions in the petrochemical, aerospace, and manufacturing industries, with over-the-counter, discount mouse pads and sporting goods bearing the "Sentra" mark.... Based solely on the weakness of S Industries' claims, Judge Lindberg acted well within his discretion in granting attorneys fees.

S Industries, *supra*, 249 F.3d at 627. Like S Industries, Christensen had no federal trademark registrations; indeed, she never had a chance of obtaining those since her Alleged Marks are generic. She never produced evidence that she used the Alleged Marks as trademarks. There never was a threat that Defendants' alleged misappropriation of the domain names incorporating the Alleged Marks would cause consumer confusion. Accordingly, this Court is well within its discretion in granting attorneys' fees to Defendants based on the weakness of Christensen's trademark claims. Defendants respectfully request this Court exercise that discretion and award their reasonable attorneys' fees.

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IV. CONCLUSION

Christensen never had to file this lawsuit, but she has relentlessly and aggressively pursued it for years despite the lack of any credible evidence to support her frivolous claims. She cannot prove her conversion claim since she did not suffer damages, Defendants did not wilfully interfere with any of her rights of possession, and Defendants' termination of services for nonpayment was justified. Further, the parties' relationship did not give rise to a fiduciary duty on Defendants' part and Plaintiff cannot establish breach, injury, or causation.

Christensen did, however, deprive Defendants of approximately ten thousand dollars ($10,000.00) in compensation for services they performed at her request. The Court should dismiss all of Christensen's claims, and grant judgment in Defendants' favor for the full amount due and owing under the parties' contractual agreement. In addition, the Court should award Defendants their reasonable attorneys' fees and costs as the prevailing parties in a meritless trademark dispute.

DATED this 2nd day of May, 2008.

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