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10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SANTA CLARA

13 APPLE INC.,
14 Plaintiff,
15 v.
16 GERARD WILLIAMS III,
17 Defendant.

CASE NO. 19-CV-352866
**DEFENDANT GERARD WILLIAMS III'S
NOTICE OF DEMURRER TO
PLAINTIFF APPLE INC.'S COMPLAINT
AND NOTICE OF MOTION TO STRIKE**
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: January 21, 2020
Time: 9:00 a.m.

Action Filed: August 7, 2019
Judge: Hon. Mark H. Pierce
Department: 2

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on January 21, 2020, at 9:00 a.m., or as soon thereafter as
3 the matter may be heard, before the Hon. Mark H. Pierce, in Department 2 of the Superior Court
4 of the State of California, County of Santa Clara, located at 191 North First Street, San Jose, CA
5 95113, Defendant Gerard Williams III (“Williams”) will, and hereby does, demur to Apple Inc.’s
6 (“Apple”) claims for (1) Breach of Contract, and (2) Breach of Duty of Loyalty, or, in the
7 alternative, move to strike certain paragraphs in Apple’s Complaint.

8 **DEMURRER**

9 Pursuant to Code of Civil Procedure section 430.10(e) and (f), Williams demurs to Apple’s
10 Complaint for: (1) breach of contract and (2) breach of duty of loyalty on the following grounds:

11 **GENERALLY**

12 Apple’s Complaint fails to tie its factual allegations to its causes of action in a manner
13 sufficient to permit Williams to meaningfully answer and adequately defend against the
14 allegations.

15 **FIRST CAUSE OF ACTION**

16 The first cause of action for alleged breach of contract against Williams fails to state a
17 claim on which relief can be granted because the underlying contractual provisions are illegal and
18 unenforceable.

19 **SECOND CAUSE OF ACTION**

20 The second cause of action for alleged breach of duty of loyalty against Williams is not
21 supported by sufficient actionable factual allegations to state a claim. In the alternative, the
22 second cause of action either is preempted by the California Uniform Trade Secrets Act
23 (“CUTSA”), Civil Code section 3426.7(b), or relies on the inevitable disclosure doctrine.

24 **MOTION TO STRIKE**

25 In the alternative, pursuant to Code of Civil Procedure section 436(a), Williams moves to
26 strike paragraphs 19, 21, 22, 27, 28, 38, 39, 40, 41, 45, 46, 48, 49, 50, and 55 of Apple’s
27 Complaint in their entirety, paragraph g of the Prayer for Relief in its entirety, and portions of
28 certain paragraphs set forth below, on the grounds that the contents sought to be stricken constitute

1 irrelevant and improper matter. Specifically, Williams moves to strike the portions of the
2 paragraphs set forth immediately below:

- 3 1. Paragraph 32 of the Complaint (at page 9, lines 1 through 5), language to be
4 stricken:

5 On January 28, 2019, Williams announced his departure to Apple
6 colleagues, claiming he was leaving to spend more time with family
7 and friends:

8 Colleague: So sad to see you go. Are you ‘retiring,’ or going to
9 work somewhere else?

10 Williams: Chill time for me. Maybe return in a little while. But
11 want to spend time with family.

- 12 2. Paragraph 34 of the Complaint (at page 9, lines 7 through 10; and/or lines
13 10-14), language to be stricken:

14 Based on statements made during NuVia’s solicitation of Apple’s
15 employees, NuVia plans to build CPU chips and SOCs that can be
16 used in servers. To do so, Williams will be leveraging almost a
17 decade of development work with Apple, with key Apple experts in
18 CPU and SOC technologies whom Williams and his co-founders
19 recruited before Williams left.

20 And/or:

21 And again, even though NuVia’s technology is tied to technologies
22 developed at Apple, Williams never afforded to Apple the chance to
23 exploit it. Notwithstanding his obligations to tell Apple about any
24 work that he did relating to Apple’s business, Williams never
25 disclosed to Apple his separate venture of the work on a competitive
26 project that he had performed.

- 27 3. Paragraph 41 of the Complaint (at page 11, lines 5 through 7), language to
28 be stricken (if not stricken in full):

While Apple continues to suffer harm, Williams is unjustly
enriched, realizing a tremendous head start from the sweat of
Apple’s brow for his business developing technology conceived
during his time at Apple that he never disclosed or offered to Apple.

4. Paragraph 51 of the Complaint (at page 12, lines 7 through 8; and/or lines 9
through 11), language to be stricken:

loss of profits from the chance to develop products being developed
by NuVia

And/or:

And Williams has been unjustly enriched, including by avoiding the
enormous risk and investment of time, resources, and money

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necessary to develop technologies and retain personnel critical to NuVia's success.

5. Paragraph 56 of the Complaint (at page 12, lines 24-25; and/or lines 26 through 28), language to be stricken:

loss of profits from the chance to develop products being developed by NuVia

And/or:

And Williams has been unjustly enriched, including by avoiding the enormous risk and investment of time, resources, and money necessary to develop technologies and retain personnel critical to NuVia's success.

Williams' demurrer and motion to strike are based on this notice; the supporting memorandum of points and authorities; the Complaint and all other pleadings and papers on file in this action; such declarations, evidence, and argument as may be presented at or before the hearing; and all other matters of which the Court may take judicial notice.

In accordance with Code of Civil Procedure section 435.5(a), and as indicated in the accompanying Declaration of Claude M. Stern, the parties met and conferred to determine whether an agreement could be reached to resolve the objections raised in this Motion. No agreement was reached during the meet and confer.

DATED: November 4, 2019

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By /s/ Claude M. Stern

Claude M. Stern

Attorneys for Gerard Williams III

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Apple, an early beneficiary of the creative forces that formed and continue to drive Silicon
4 Valley, has filed this lawsuit in a desperate effort to shut down lawful employment by a former
5 employee. Taken as true, Apple’s allegations would require *any employee*—not just an officer or
6 board member—to disclose to Apple his or her plan to form a new company, and a failure to make
7 this disclosure would be a breach of contract and a violation of the employee’s “duty of loyalty.”
8 Additionally, under Apple’s theory, if one Apple employee speaks to (or texts) another employee
9 conveying criticisms of Apple’s strategies or decisions, that discussion is itself a purportedly
10 unlawful “solicitation” to leave Apple. To further intimidate any current Apple employee who
11 might dare consider leaving Apple, Apple’s Complaint shows that it is monitoring and examining
12 its employees’ phone records and text messages, in a stunning and disquieting invasion of
13 privacy.¹ Apple’s claims must fail for at least the following reasons.

14 *First*, Apple cannot state a claim for breach of contract because the contractual provisions
15 underlying its claim are illegal. Specifically, they contravene Cal. Bus. & Prof. Code § 16600, as
16 they prohibit the planning of future employment, restrain Williams from offering jobs to his
17 former co-workers, and are unconscionable.

18 *Second*, Apple’s breach of contract claim fails because it seeks to hold Williams liable for
19 not disclosing inventions conceived *after Williams left Apple*. This violates Labor Code § 2870.

20 *Third*, Apple fails to state a claim for breach of the duty of loyalty because all Apple
21 alleges is that Williams made preparations to “compete” before resigning from Apple. The law is
22 clear that employees may undertake such preparations before leaving their employer without
23 breaching the duty of loyalty.

24 *Fourth*, Apple’s claim for breach of the duty of loyalty is preempted by the California
25 Uniform Trade Secret Act, as it is based on the same set of allegations that would support a claim
26

27 ¹ Ironically, Apple has recently launched its “Privacy: That’s iPhone” ad campaign.
28

1 for trade secret misappropriation.² Additionally, Apple’s breach of duty of loyalty claim relies on
2 the doctrine of inevitable disclosure of trade secrets, a doctrine that California has unambiguously
3 rejected.

4 *Fifth*, Apple’s demand for punitive damages must be stricken because Apple’s Complaint
5 is entirely devoid of allegations supportive of an inference of oppression, malice, or fraud, let
6 alone “firm allegations” as required to support a claim for punitive damages.

7 *Finally*, Apple fails to tie its factual allegations to its causes of action in a manner
8 sufficiently clear to provide notice to Williams. In its causes of action, Apple sets forth vague
9 descriptions of wrongdoing that track the elements of each claim. Meanwhile, Apple’s factual
10 allegations are largely irrelevant to these causes of action. Williams cannot adequately prepare a
11 defense without greater clarity regarding what Apple is contending he has done.

12 This demurrer and motion to strike does not address every shortcoming of Apple’s
13 Complaint, but for the present, Williams merely seeks the Court’s protection against the
14 allegations that are improper on their face.

15 STATEMENT OF FACTS

16 **A. Origins of the Dispute and Williams’ Departure from Apple**

17 Apple touts itself as a “world-renowned technology company” that has “revolutionized
18 computing time and again” and whose products have garnered “extraordinary acclaim and
19 success.” (Complaint, ¶¶ 10, 14.) Despite its claimed reputation, however, Apple was unable to
20 retain at least nine employees who departed in the first half of 2019. (*Id.*, ¶ 38.) This group
21 included defendant Gerard Williams III, who joined Apple in 2010 and for the next nine years was
22 “key to Apple’s technologies” relating to use of ARM architecture to implement systems-on-a-
23 chip technology. (*Id.*, ¶¶ 15-17.)

24 As a prerequisite to joining Apple, Williams was required to execute an Intellectual
25 _____

26 ² Although Apple has not asserted a claim for trade secret misappropriation, that is clearly
27 Apple’s intent. Apple’s Complaint is saturated with allegations that Williams will, at some
28 unknown point in the future, exploit or use Apple’s confidential information. Williams believes
that Apple intends to use discovery in this matter to support a later claim for misappropriation.

1 Property Agreement (“IPA”) that set forth a series of conditions pertaining to his employment.

2 (*Id.*, ¶ 18.) The IPA contained a provision purporting to bar Williams from:

3 *plan[ning]* . . . any other employment, occupations, consulting, or other business
4 activities or commitments competitive with or directly related to Apple’s business
5 or products, or to its actual or demonstrably anticipated research or development
6

7 (*Id.*, Ex. A, ¶ 3.0(a) (emphasis added)). The IPA also contained a non-solicitation provision,
8 which stated the following:

9 During your employment and for a period of one (1) year following your
10 termination date, you will not, directly or indirectly, solicit, encourage, recruit, or
11 take any action intended to induce Apple employees or contractors to terminate
12 their relationship with Apple.

13 (*Id.*, Ex. A, ¶ 3.0(d).)

14 Williams’ last day at Apple was February 1, 2019. (Complaint, ¶ 33.) Thereafter, he co-
15 founded NuVia, Inc. (“NuVia”). (*See* Ex. A.³) Drawn by Williams’ reputation, as well as the
16 promise of new opportunities and challenges, dozens of industry professionals joined NuVia over
17 the following months, including the aforementioned eight Apple employees. (Complaint, ¶ 38.)

18 **B. Apple Files Its Complaint**

19 Apple filed this lawsuit on August 7, 2019, bringing claims for breach of the IPA and
20 breach of the duty of loyalty. (Complaint.) In support of its claim for breach of the IPA, Apple
21 alleges that “[t]he IPA prohibits Williams from planning or engaging in any business activities . . .
22 competitive with or directly related to Apple’s business or products” and that during his time at
23 Apple, “Williams planned and developed a business called NuVia.” (*Id.*, ¶¶ 45-46.) Apple further
24 contends that “Williams’ activities and commitments in connection with NuVia were competitive
25 with and directly related to Apple’s business and products” because Williams “and his co-founders
26 recruited numerous Apple engineers and because NuVia is developing processor and SOC
27 technology for servers that utilizes design insights and innovations” Williams was exposed to at

28 _____
³ Articles of incorporation “are properly the subject of judicial notice as documents reflecting
official acts of the executive department” of a “state of the United States” *Friends of Shingle
Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal. App. 4th 1470, 1483-84; Cal.
Evid. Code § 452(c).

1 Apple. (*Id.*, ¶ 46.)

2 Additionally, Apple alleges that “[t]he IPA requires Williams to disclose and assign to
3 Apple all inventions” that “are developed using [Apple’s] equipment, supplies, facilities, or
4 Proprietary Information; that “result from or are suggested by work Williams performed for
5 Apple,” or “are conceived or reduced to practice during Williams’ employment by Apple” and
6 relate to Apple’s business and products. (*Id.*, ¶ 48.) Apple contends that Williams “is developing
7 products for NuVia based on work that results from or was suggested by Williams’ work at Apple
8 and that relate to its business, products, research, and development” and that Williams failed to
9 disclose and assign these inventions. (*Id.*, ¶ 49.)

10 In support of its claim for breach of the duty of loyalty, Apple alleges that Williams was
11 subject to a duty of loyalty that “forbade him from . . . competing with Apple or aiding its
12 competitors . . . and from using or disclosing Apple’s information for his or a third party’s
13 purposes.” (*Id.*, ¶ 54.) Apple claims Williams breached this duty by “starting a competitive
14 business, NuVia, and failing to disclose his work in the same space as Apple” during his
15 employment at Apple. (*Id.*, ¶ 55.)

16 **LEGAL STANDARD**

17 “A demurrer tests the legal sufficiency of the complaint.” *Hamilton v. Greenwich*
18 *Investors XVI, LLC* (2001) 195 Cal. App. 4th 1602, 1608. Because allegations must be “factual
19 and specific, not vague or conclusionary,” a court need only “treat[] the demurrer as admitting all
20 material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law.”
21 *Rakestraw v. Cal. Physicians’ Serv.* (2000) 81 Cal. App. 4th 39, 43-44. “[O]n demurrer, a court
22 will also consider judicially noticeable facts, even if such facts are not set forth in the complaint.”
23 *Cantu v. Resolution Trust Corp.* (1992) 4 Cal. App. 4th 857, 877.

24 A motion to strike permits the Court to eliminate any “irrelevant, false, or improper matter
25 inserted in any pleading.” Cal. Civ. Proc. Code § 436. This includes any portions of a complaint
26 that are “not drawn in conformity with the law.” *Quiroz v. Seventh Ave. Ctr.* (2006) 140 Cal. App.
27 4th 1256, 1281 (citing *Clements v. T.R. Bechtel Co.* (1954) 43 Cal. 2d 227, 242). A motion to
28 strike is appropriate when a “substantive defect is clear from the face of a complaint.” *PH II, Inc.*

1 v. *Superior Court* (1995) 33 Cal. App. 4th 1680, 1682.

2 **ARGUMENT**

3 **I. APPLE CANNOT STATE A CLAIM FOR BREACH OF CONTRACT BECAUSE**
4 **THE UNDERLYING CONTRACTUAL PROVISION IS ILLEGAL**

5 Much of Apple’s breach of contract claim is premised entirely on Section 3.0 of the IPA.
6 Section 3.0 purports to bar employees from undertaking conflicting obligations during
7 employment, including “plan[ning] or engag[ing] in any other employment” competitive with
8 Apple and “solicit[ing] . . . Apple employees” during employment and for a period of one year
9 afterward. (Complaint, Ex. A, ¶ 3.0.) Apple alleges Williams breached the IPA by “planning and
10 developing a business called NuVia” and “recruit[ing] numerous Apple engineers.” (*Id.*, ¶ 46.)
11 Section 3.0, however, cannot form the basis of a claim for relief, as it is illegal and thus void and
12 unenforceable. Cal. Civ. Code §§ 1598 (“Where a contract has but a single object, and such object
13 is unlawful, whether in whole or in part, . . . the entire contract is void.”); 1599 (“Where a contract
14 has several distinct objects . . . and one at least is unlawful . . . the contract is void” as to the
15 unlawful portion); 1608 (“If any single part of consideration for one or more objects . . . is
16 unlawful, the entire contract is void.”). Specifically, Section 3.0 violates Cal. Bus. & Prof. Code §
17 16600, as it is a contract in restraint on engagement in lawful profession, and Cal. Civ. Code §
18 1670.5, because its terms are unconscionable.⁴

19 **A. IPA Section 3.0 Is Illegal Because It Violates Cal. Bus. & Prof. Code § 16600**

20 California has a “strong public policy of protecting the right of its citizens to pursue any
21 lawful employment and enterprise of their choice.” *AMN Healthcare, Inc. v. Aya Healthcare*

22 _____
23 ⁴ Notably, Apple makes a number of factual allegations without any clear relationship to its
24 claim for breach of contract. Nevertheless, Apple incorporates all of these factual allegations into
25 its cause of action, (Complaint, ¶ 42), without any explanation how to how these facts support its
26 claim. For example, Apple describes Williams’ work at Apple, including his oversight of teams
27 working on ARM architecture and the discretion inherent in Williams’ “high-ranking” role. (*Id.*,
28 ¶¶ 23-26.) But Williams’ role at Apple, or the discretion he exercised, is unrelated to Apple’s
claim for breach of contract. Similarly, Apple never alleges that Williams invented anything
either before or after his departure from Apple, yet Apple premises its breach of contract claim in
part on Williams’ alleged failure to assign those nebulous inventions.

1 *Servs., Inc.* (2018) 28 Cal. App. 5th 923, 935. In furtherance of this policy, “[t]he interests of the
2 employee in his [or her] own mobility and betterment are **deemed paramount to the competitive**
3 **business interests of the employers.”** *Id.* at 935-36 (quoting *Dowell v. Biosense Webster, Inc.*
4 (2009) 179 Cal. App. 4th 564, 575 (internal quotation marks omitted) (alteration in original)
5 (emphasis added). In recognition of this fundamental public policy, Cal. Bus. & Prof. Code
6 § 16600 specifies that with few exceptions,⁵ “every contract by which anyone is restrained from
7 engaging in a lawful profession, trade, or business of any kind is to that extent void.” *AMN*
8 *Healthcare*, 28 Cal. App. 5th at 935. This statute was designed to repudiate the common law rule
9 that reasonable restraints on practice of a profession, business, or trade were permitted. *Id.*

10 IPA Section 3.0 violates § 16600 in at least two respects. **First**, Section 3.0(a) bars
11 employees from “plan[ning] . . . any other employment, occupations, consulting, or other business
12 activities or commitments competitive with or directly related to Apple’s business.” **Second**,
13 Section 3.0(d) bars former Apple employees from soliciting other Apple personnel even after the
14 former employees’ employment at Apple has terminated.

15 **1. IPA Section 3.0(a) Violates Cal. Bus. & Prof. Code § 16600 Because It**
16 **Prohibits “Planning” Alternative Employment**

17 In California, it is well established that employees have a right to seek employment
18 elsewhere before resigning from their current employer. *See Huong Que, Inc. v. Luu* (2007) 150
19 Cal. App. 4th 400, 417 (“California law permit[s] an employee to seek other employment and
20 even to make some ‘preparations to compete’ before resigning” (quoting *Fowler v. Varian*
21 *Assocs., Inc.* (1987) 196 Cal. App. 4th 34, 41) (internal quotation marks omitted)). Additionally,
22 employees have a right to **plan** to compete with their employers prior to terminating their
23 employment. *See Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal. App. 4th 686, 719 (citing
24 Williston on Contracts for the proposition that “[e]mployees whose contracts are terminable at will
25 have a **right to . . . plan and prepare to create a competitive enterprise** prior to their termination,

26 ⁵ These exceptions are (1) sale of goodwill or interest in a business, (2) dissolution of a
27 partnership, and (3) dissolution or sale of a limited liability company. *AMN Healthcare*, 28 Cal.
28 App. 5th at 935 (citing Cal. Bus. & Prof. Code §§ 16601–16602.5). None applies in this case.

1 without revealing their plans to their employer” (emphasis added)); *Huong Que*, 150 Cal. App. 4th
2 at 417 (accepting defendants’ argument that they were permitted to meet with other persons
3 regarding plans for formation of a competitive business prior to resigning from their current
4 employer). Section 16600 aims to protect these rights through its promotion of employee
5 mobility, and accordingly broadly bars *all* non–statutorily excepted restraints, “even if narrowly
6 drawn.” *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 955.

7 Section 3.0(a) of the IPA, which broadly prohibits Apple employees from “*plan[ning]* . . .
8 any other employment . . . competitive with or directly related to Apple’s business or products,” is
9 a restraint on engagement in lawful profession and thus is illegal and unenforceable. (Complaint,
10 Ex. A, ¶ 3.0(a) (emphasis added).) Indeed, any person who merely interviews for a job with a
11 competitor would fall within the broad scope of this provision. Such a sweeping prohibition,
12 subjecting an employee to liability merely for planning to switch employers, clearly amounts to a
13 restraint on engagement in lawful profession. Moreover, Section 3.0(a)’s apparent expectation—
14 that an employee will leave a company without any plans for the future, and only then begin
15 preparing to engage in a potentially competitive enterprise—ignores the reality of how startups
16 originate. Were Section 3.0(a)’s anti-planning provision permissible, it would not only inhibit
17 employee mobility but stifle innovation itself. Accordingly, under § 16600, Section 3.0(a) of the
18 IPA is illegal and unenforceable, and Apple’s claims premised on it must fail.

19 2. IPA Section 3.0(d) Violates Cal. Bus. & Prof. Code § 16600 Because It 20 Prohibits Solicitation

21 Apple alleges that Williams breached the IPA by soliciting employees both before and
22 after his resignation from Apple. (Complaint, ¶¶ 36-40.) For example, Apple contends that
23 “[t]hroughout 2018,” a co-founder of NuVia “called Williams and thereafter called Employee 1”
24 and that Williams “held long calls with Employee 2” on various dates in December 2018 and
25 January 2019. (*Id.*, ¶¶ 36-37.) Apple further alleges that Williams “continued” these calls in
26 February 2019, “after Williams left.” (*Id.*) These allegations fail to state a claim, however,
27 because the IPA’s non-solicitation provision is illegal insofar as it applies to post-termination
28 solicitation. Section 16600 should be understood to invalidate the non-solicitation provision as to

1 its bar on pre-termination solicitation as well.

2 California courts have recognized that § 16600 renders non-solicitation agreements illegal
3 and unenforceable, at least to the extent that they prohibit solicitation after an employee’s
4 termination date. *AMN Healthcare*, 28 Cal. App. 5th at 935-37; *see also WeRide Corp. v. Kun*
5 *Huang* (2019) 379 F. Supp. 3d 834, 851 (“The Court finds WeRide cannot show it is likely to
6 succeed on its claim for breach of [the non-solicitation provision] because ***the clause is void under***
7 ***California law.***” (emphasis added)); *Barker v. Insight Global, LLC* (2019) Case No. 16-cv-07186-
8 BLF, 2019 WL 176260, at *3 (“[T]he Court is convinced by the reasoning in *AMN* that California
9 law is properly interpreted . . . to ***invalidate employee nonsolicitation provisions.***” (emphasis
10 added)).

11 In *AMN Healthcare*, for example, the plaintiff, a provider of travel nursing staffing
12 services, filed suit against a competitor as well as several former employees who had joined the
13 competitor, bringing allegations including breach of contract arising from violation of a non-
14 solicitation provision in the former employees’ contracts. 28 Cal. App. 5th at 927-30. The non-
15 solicitation provision stated:

16 Employee covenants and agrees that during Employee’s employment with the
17 Company and for a period of [one year or] eighteen months after the termination of
18 the employment relationship with the Company, Employee shall not directly or
19 indirectly solicit or induce, or cause others to solicit or induce, any employee of the
20 Company or any Company Affiliate to leave the service of the Company or such
21 Company Affiliate.”

22 *Id.* at 929-30. The trial court granted summary judgment for the defendants on the basis of
23 § 16600, holding that the non-solicitation provision was an “unlawful restraint on trade . . .
24 because it prevented individual defendants from engaging in their lawful trade or profession.” *Id.*
25 at 933. The Court of Appeal affirmed, recognizing that the California Supreme Court has held that
26 § 16600’s prohibition of restraints is absolute. *Id.* at 938-39 (“Because the *Edwards* court found
27 section 16600 ‘unambiguous’, it noted that ‘if the Legislature intended the statute to apply only to
28 restraints that were unreasonable or overbroad, it could have included language to that effect.’”
(quoting *Edwards*, 44 Cal. 4th at 950) (citations omitted)).

The non-solicitation provision in Williams’ IPA is nearly identical to that at issue in *AMN*

1 *Healthcare*. It bars Williams from “directly or indirectly, solicit[ing], encourag[ing], recruit[ing],
2 or tak[ing] any action intended to induce Apple employees or contractors to terminate their
3 relationship with Apple” during employment and for a period of one year afterward. (Complaint,
4 Ex. A, ¶ 3.0(d).) Thus, as in *AMN Healthcare*, this provision is void and unenforceable to the
5 extent that it bars solicitation after employment terminates.

6 Furthermore, § 16600 should be interpreted to invalidate pre-termination non-solicitation
7 provisions. By its plain meaning, the statute absolutely bars an employer from contracting to
8 “restrain a former employee from engaging in his or her profession, trade, or business unless the
9 agreement falls within one of the exceptions to the rule.” *Edwards*, 44 Cal. 4th at 946-47; *see also*
10 *AMN Healthcare*, 28 Cal. App. 5th at 935 (recognizing that § 16600 represents an “absolute bar on
11 contractual restrictions”). And beyond those statutorily recognized, there are ***no exceptions***:
12 “Section 16600 is unambiguous, and if the Legislature intended the statute to apply only to
13 restraints that were unreasonable or overbroad, it could have included language to that effect.”
14 *Edwards*, 44 Cal. 4th at 950. The statute “represents a strong public policy of the state which
15 ***should not be diluted by judicial fiat.***” *Id.* at 949 (quoting *Scott v. Snelling & Snelling, Inc.*
16 (1990) 732 F. Supp. 1034, 1042) (internal quotation marks omitted) (emphasis added). The *AMN*
17 *Healthcare* court recognized that a non-solicitation provision amounts to a restraint on
18 employment. 28 Cal. App. 5th at 936. Reading this holding as limited to post-termination
19 application would “dilute[] by judicial fiat” § 16600’s plain language. Accordingly, the non-
20 solicitation provision is illegal under § 16600 as it applies to pre-termination solicitation as well as
21 post-termination solicitation.

22 **B. Section 3.0(a) Is Illegal Because Its Terms Are Unconscionable**

23 Under Cal. Civ. Code § 1670.5, a court may refuse to enforce an unconscionable contract
24 provision. A contract is unconscionable when it arises from “an absence of meaningful choice on
25 the part of one of the parties” and contains terms “unreasonably favorable to the other party.”
26 *Sanchez v. Valencia Holding Co.* (2015) 61 Cal. 4th 899, 910 (quoting *Sonic-Calabasas A, Inc. v.*
27 *Moreno* (2013) 57 Cal. 4th 1109, 1133 (*Sonic II*)) (internal quotation marks omitted). This
28 definition contains both a procedural and a substantive element, and a greater showing of one

1 necessitates a lesser showing of the other. *Id.* The unconscionability doctrine aims to ensure that
2 contracts, and especially contracts of adhesion, “do not impose terms that [are] . . . unfairly one-
3 sided.” *Id.* The doctrine applies to employment agreements. *See, e.g., Armendariz v. Found.*
4 *Health Psychcare Servs., Inc.* (2000) 24 Cal. 4th 83, 114-15; *Gelow v. Cent. Pac. Mortg. Corp.*
5 (2008) 560 F. Supp. 2d 972, 980. Courts may resolve issues of unconscionability on demurrer or
6 similar procedural phases. *See Kinney v. United HealthCare Servs., Inc.* (1999) 70 Cal. App. 4th
7 1322, 1327-28 (finding an arbitration provision unconscionable in the context of a motion to
8 dismiss); *Net Global Marketing, Inc. v. Dialtone, Inc.* (2007) 217 Fed. App’x 598, 601-02 (same).

9 Section 3.0(a) is both procedurally and substantively unconscionable. A procedurally
10 unconscionable contract “generally takes the form of a contract of adhesion,” which is imposed
11 and drafted by the party with superior bargaining power, with the counterparty having an
12 opportunity only to adhere to the contract or reject it. *Sonic II*, 57 Cal. 4th at 1133. “[C]ontract
13 terms imposed as a condition of employment are particularly prone to procedural
14 unconscionability.” *Id.* at 1134. This is especially so when the contract must be assented to
15 before employment has commenced. *Id.* Apple, a trillion-dollar company, indisputably had vastly
16 superior bargaining power relative to Williams, an individual. Additionally, the IPA is a contract
17 of adhesion. *First*, the only indication that it is specific to Williams is a stamp bearing his name
18 and employee number on the first page; the remainder of the agreement discusses obligations in
19 general terms. (Complaint, Ex. A, at 1.) *Second*, the IPA by its terms specifies that Williams’
20 assent to it is a condition of his employment, and Williams’ signature on the document’s final
21 page shows that he agreed to it before his employment at Apple commenced. (*Id.* at 1 (“Apple has
22 agreed to employ you . . . **on the condition that you agree** to and will abide by the following terms
23 and conditions” (emphasis added)), 4.) *And third*, Apple has not alleged that Williams was
24 permitted to negotiate the IPA’s terms, and the general nature of the document itself indicates that
25 no negotiation was anticipated. Accordingly, the IPA is a contract of adhesion and thus weighs
26 strongly in favor of a finding of procedural unconscionability.

27 Due to the high degree of procedural unconscionability, a lesser showing of substantive
28 unconscionability is required, but the IPA is substantively unconscionable nonetheless. *Sanchez*,

1 61 Cal. 4th at 910. A contract is substantively unconscionable if it is “‘overly harsh’ or ‘one-
2 sided.’” *Armendariz*, 24 Cal. 4th at 114. In *Chavarria v. Ralphs Grocery Co.*, for example, the
3 Ninth Circuit affirmed a finding of unconscionability with respect to an arbitration clause that
4 gave the defendant employer essentially unilateral power to select an arbitrator. *Chavarria* (2013)
5 733 F.3d 916, 923-26. As discussed above (*see* Section I.A.1, *supra*), Section 3.0(a) of the IPA
6 gives Apple unilateral power over whether to allow an employee to seek employment at a
7 competitor without litigation. Section 3.0(a) applies to planning “*any other employment*,” and
8 applying for a job at a different company necessarily entails some degree of planning. Apple’s
9 ability to dictate the difficulty with which its employees may leave the company is extremely
10 “harsh” and “one-sided” and thus is substantively unconscionable. *Armendariz*, 24 Cal. 4th at
11 114. Section 3.0(a), therefore, is an unconscionable contract term, and the Court should refuse to
12 enforce it.

13 Because Apple’s breach of contract claim is premised on illegal contractual provisions,
14 Apple’s claim must fail, and the Court should sustain Williams’ demurrer to Apple’s first cause of
15 action. In the alternative, the Court should strike paragraphs 19, 38, 39, 40, 45, and 46 of the
16 Complaint in their entirety and portions of paragraph 51 as set forth in the Notice of Motion.

17 **II. APPLE CANNOT STATE A CLAIM FOR BREACH OF CONTRACT BECAUSE**
18 **IT FAILS TO OVERCOME LABOR CODE § 2870**

19 Apple alleges that “Williams is developing products for NuVia” and that “Williams has
20 failed to disclose and assign these inventions to Apple.” (Complaint, ¶ 49.) Apple fails, however,
21 to allege that Williams has invented anything. Furthermore, to the extent that paragraph 49 is
22 premised on a purported failure to assign inventions conceived or reduced to practice *after*
23 Williams’ departure from Apple, it cannot support a claim, as Apple does not allege that Williams
24 has failed to assign any invention that “relate[s] to ideas and concepts” that were based on
25 Apple’s “secrets or confidential information.” *Applied Materials, Inc. v. Advanced Micro-*
26 *Fabrication Equipment (Shanghai) Co.* (2009) 630 F. Supp. 2d 1084, 1090 (quoting *Armorlite*
27 *Lens Co. v. Campbell* (1972) 340 F. Supp. 273, 275) (internal quotation marks omitted).

28 Under Cal. Labor Code § 2870, employment agreement provisions purporting to require an

1 employee to assign all rights in an invention that the employee developed on his or her own time
2 and without use of employer resources to his or her employer are void and unenforceable, unless
3 the invention “[r]elate[s] at the time of conception or reduction to practice of the invention to the
4 employer’s business, or actual or demonstrably anticipated research or development of the
5 employer” or “[r]esults from any work performed by the employee for the employer.” An
6 assignment clause is generally regarded as an “unlawful non-compete provision[.]” when it
7 “require[s] an employee to assign an invention conceived after departing from an employer’s
8 service.” *Applied Materials*, 630 F. Supp. 2d at 1090. The sole exception to this rule applies
9 when the assignment provision “relate[s] to ideas and concepts which were based upon secrets or
10 confidential information of the employer.” *Id.* (quoting *Armorlite Lens*, 340 F. Supp. at 275)
11 (internal quotation marks omitted). Apple has not made any such allegations, so it cannot state a
12 claim for Williams’ failure to disclose any inventions developed after his departure from Apple.

13 Additionally, Apple does not allege that Williams has invented anything. California law
14 requires that a plaintiff plead “ultimate facts”—that is, “sufficient facts to apprise the defendant of
15 the basis upon which the plaintiff is seeking relief”—to state a claim, and Apple’s failure to
16 describe any invention it contends Williams did not disclose fails to meet this standard. *Doheny*
17 *Park Terrace Homeowners’ Ass’n, Inc. v. Truck Ins. Exch.* (2005) 132 Cal. App. 4th 1076, 1099
18 (quoting *Perkins v. Superior Court* (1981) 117 Cal. App. 3d 1, 6) (internal quotation marks
19 omitted); *cf. Silvaco Data Sys. v. Intel Corp.* (2010) 184 Cal. App. 4th 210, 221 (“It is critical to
20 any CUTSA cause of action . . . that the information claimed to have been misappropriated be
21 clearly identified.”), disapproved of on other grounds, *Kwikset Corp. v. Superior Court* (2011) 51
22 Cal. 4th 310; *Wise v. S. Pac. Co.* (1963) 223 Cal. App. 2d 50, 60 (“[A] bare allegation without
23 more, that said defendant ‘breached’ or ‘violated’ its contract, . . . would clearly be conclusionary
24 and insufficient.”), disapproved of on other grounds, *Applied Equip. Corp. v. Litton Saudi Arabia*
25 *Ltd.* (1994) 7 Cal. 4th 503. Only two paragraphs of the Complaint conceivably relate to this
26 allegation—paragraphs 34 and 41—and neither gives rise to a cognizable claim. Specifically,
27 paragraph 34 relates to potential *future* inventions (“Williams *will be leveraging* almost a decade
28 of development work at Apple . . .”), and paragraph 41 makes a general allegation about the

1 technology NuVia is *developing* (“Williams . . . realiz[es] a tremendous head start from the sweat
2 of Apple’s brow for his business developing technology conceived during his time at Apple . . .
3 .”). These allegations are insufficient to support a claim that Williams has invented something
4 specific that should be assigned to Apple.

5 Apple’s interpretation of the IPA suggests that Williams is obligated to disclose *any*
6 invention he has developed or will develop for NuVia that is conceivably related to any aspect of
7 Apple’s business, without temporal limitation, and without regard to whether Apple confidential
8 information was used. If Apple’s interpretation of the IPA is correct, then no former employee
9 would ever be able to generate inventions for another entity without disclosing those innovations
10 to Apple. This is not the law. Accordingly, Apple’s claim for breach of contract is defective to
11 the extent that it relies upon a purported failure to assign any “inventions,” and the Court should
12 sustain Williams’ demurrer on this basis. Alternatively, the Court should strike paragraphs 21, 22,
13 48, 49, and 50 of the Complaint in their entirety and portions of paragraphs 34, 41, and 51 as set
14 forth in the Notice of Motion.

15 **III. APPLE CANNOT STATE A CLAIM FOR BREACH OF THE DUTY OF**
16 **LOYALTY BECAUSE EMPLOYEES ARE PERMITTED TO MAKE**
17 **PREPARATIONS TO COMPETE**

18 Apple alleges that Williams breached his duty of loyalty by, “while employed by Apple,
19 starting a competitive business, NuVia, and failing to disclose his work in the same space as
20 Apple.” (Complaint, ¶ 55.) Apple further alleges that Williams “planned and developed a
21 business called NuVia” during his employment at Apple. (*Id.*, ¶ 46.) But Williams did not “start”
22 a “competitive” business while employed at Apple, as NuVia was not founded until after Williams
23 left Apple (*see* Ex. A), so to the extent that Apple’s allegation is premised on such conduct, it is
24 defective. Additionally, planning and developing a “competitive” business prior to terminating
25 employment cannot give rise to a claim for breach of the duty of loyalty.

26 It is well established in California that an employee may make preparations to compete
27 with his or her employer prior to terminating employment without breaching the duty of loyalty.
28 *See, e.g., Thomas Petroleum LLC v. Lloyd* (Oct. 2, 2012) No. 1:11–CV–00902–LJO–JLT, 2012
WL 4511369, at *6 (“An employee may set up a competing organization without breaching the

1 duty of loyalty.”); *Bancroft-Whitney Co. v. Glen* (1966) 64 Cal. 2d 327, 345-47. Additionally, an
2 employee is generally under no duty to disclose his or her intent to enter into competition with the
3 principal prior to resigning, except under limited circumstances. *What 4 LLC v. Roman &*
4 *Williams, Inc.* (2012) No. C-12-0784 EMC, 2012 WL 1815629, at *5; Restatement (Third) of
5 Agency, § 8.04, cmt. c (Am. Law Inst. 2006) (stating, as an example, that an employee’s
6 knowledge that the employer is about to commence a major project in which the employee will
7 play a crucial role might require the employee to disclose his or her intentions).

8 Apple’s claim for breach of the duty of loyalty is premised on precisely these actions.
9 (Complaint, ¶ 46 (“Williams *planned and developed* a business called NuVia.” (emphasis added).)
10 But Williams was permitted to plan and develop a business during his employment at Apple—
11 such preparations do not breach the duty of loyalty. *See W. Air Charter, Inc. v. Schembari* (2017)
12 Case No. CV 17-00420-AB (KSx), 2017 WL 10638759, at *5 (finding no breach of the duty of
13 loyalty when defendant registered a domain name for his competitive enterprise, notarized its
14 articles of incorporation, and organized a parent company prior to resigning).

15 Accordingly, Apple’s allegations are insufficient as a matter of law to support a claim for
16 breach of the duty of loyalty, and the Court should sustain Williams’ demurrer. In the alternative,
17 the Court should strike paragraph 55 of the Complaint in its entirety.

18 **IV. APPLE CANNOT STATE A CLAIM FOR BREACH OF THE DUTY OF**
19 **LOYALTY BECAUSE IT IS PREEMPTED BY THE CALIFORNIA UNIFORM**
20 **TRADE SECRETS ACT OR, IN THE ALTERNATIVE, RELIES ON THE**
21 **INEVITABLE DISCLOSURE DOCTRINE**

22 With few exceptions, the California Uniform Trade Secrets Act (“CUTSA”) provides the
23 exclusive remedy for claims arising from a nucleus of fact that would support a claim for trade
24 secret misappropriation. As a result, other claims premised on such conduct are superseded.
25 Apple’s allegations in support of its breach of duty of loyalty claim include various contentions
26 that support a trade secret misappropriation claim. Accordingly, because Apple’s breach of duty
27 of loyalty claim could be pleaded as a CUTSA claim, it is preempted.

28 Even if the Court finds that Apple’s cause of action is not preempted under CUTSA—and
it should—Apple’s claim for breach of the duty of loyalty is barred to the extent that it depends on

1 the inevitable disclosure doctrine, which California has unequivocally rejected.

2 **A. California’s Uniform Trade Secrets Act Supersedes Other Civil Remedies**
3 **Based upon Misappropriation of a Trade Secret**

4 California enacted CUTSA to “occup[y] the field” of common law claims that could
5 previously be based on the misappropriation of a trade secret. *K.C. Multimedia, Inc. v. Bank of*
6 *America Tech. & Operations, Inc.* (2009) 171 Cal. App. 4th 939, 954. Thus, “CUTSA provides
7 the exclusive civil remedy for conduct falling within its terms, so as to supersede other civil
8 remedies ‘based upon misappropriation of a trade secret.’” *Silvaco*, 184 Cal. App. 4th at 236
9 (quoting Cal. Civ. Code § 3426.7(b)). As courts consistently recognize, “[t]he stated purpose of
10 the UTSA is to provide ‘unitary definitions of trade secret and trade secret misappropriation’” so
11 as to subsume “‘the various property, quasi-contractual, and violation of fiduciary relationship
12 theories of noncontractual liability utilized at common law.’” *K.C. Multimedia*, 171 Cal. App. 4th
13 at 958 (quoting Comrs. Prefatory Note to Uniform Trade Secrets Act, 14 West’s U. Laws Ann.
14 (1980) Trade Secrets 537-38); *accord American Credit Indemnity Co. v. Sacks* (1989) 213 Cal.
15 App. 3d 622, 630.

16 Specifically, CUTSA “preempts common law claims that are based on the same nucleus of
17 facts as the misappropriation of trade secrets claim for relief.” *K.C. Multimedia*, 171 Cal. App.
18 4th at 958 (quotation marks omitted). This is true even when a claim under CUTSA is not alleged.
19 *Mattel, Inc. v. MGA Entm’t, Inc.* (2011) 782 F. Supp. 2d 911, 961 (“An allegation of trade secret
20 misappropriation is not a prerequisite to UTSA supersession.”). As a consequence, “claims [that]
21 are not more than a restatement of the same operative facts supporting trade secret
22 misappropriation” are preempted. *SunPower Corp. v. SolarCity Corp.* (Dec. 11, 2012) No. 12-
23 CV-00694, 2012 WL 6160472, at *3. The duty of loyalty claim need not share the same elements
24 as the trade secret claim to be preempted. *Id.* at *12-13; *Mattel*, 782 F. Supp. 2d at 986 (“It’s no
25 longer the case in California that a claim for breach of fiduciary or breach of duty of loyalty based
26 upon the misappropriation of trade secrets would survive even though both claims require proof of
27 ‘additional elements’ like a relationship of trust or confidence.” (citing *K.C. Multimedia*, 171 Cal.
28 App. 4th at 960)).

1 Courts applying California law routinely find duty of loyalty claims preempted by
2 CUTSA. *See, e.g., Mattel*, 782 F. Supp. 2d at 997-98; *Pyro-Comm Sys. Inc. v. W. Coast Fire &*
3 *Integration Inc.* (Apr. 2, 2015) Case No. SACV 14-2028-JLS (RNBx), 2015 WL 12765143, at *7-
4 8; *Jun-En Enter. v. Lin* (June 17, 2013) Case No. CV 12-2734 PSG (SSx), 2013 WL 12126115, at
5 *3-4.

6 **B. Apple’s Breach of Duty of Loyalty Claim Is Preempted by CUTSA**

7 To state a claim under CUTSA, the plaintiff must allege facts showing (1) existence of a
8 trade secret and (2) misappropriation of that trade secret. Cal. Civ. Code § 3426.1. Apple alleges
9 that “Williams will be leveraging almost a decade of development work at Apple” and that
10 “Williams was working on [technology] at Apple [] that he wanted to keep exploiting for NuVia.”
11 (Complaint, ¶¶ 34, 38.)⁶ Apple further contends that Williams “realiz[es] a tremendous head start
12 from the sweat of Apple’s brow for his business developing technology conceived during his time
13 at Apple” and that Williams’ work for NuVia is “competitive with and directly related to Apple’s
14 business and products” by virtue of Williams’ and his cohorts’ association with Apple and the
15 products NuVia is developing. *See id.*, ¶¶ 41, 46; *see also ReadyLink Healthcare v. Cotton* (2005)
16 126 Cal. App. 4th 1006, 1017 (recognizing that under CUTSA, one has a right “to have the
17 ingenuity and industry one invests in the success of the business or occupation protected from the
18 gratuitous use of that ‘*sweat-of-the-brow*’ by others” (emphasis added) (quoting *Morlife, Inc. v.*
19 *Perry* (1997) 56 Cal. App. 4th 1514, 1520)).

20 If Apple’s insinuations are actionable, the technology that Apple alleges Williams is
21 leveraging in his work for NuVia *must* include Apple’s trade secrets. *See Silvaco*, 184 Cal. App.
22 4th at 238. Furthermore, Apple claims damages in the form of Williams’ alleged unjust
23 enrichment from “avoiding the enormous risk and investment of time, resources, and money
24 necessary to develop technologies and retain personnel critical to NuVia’s potential success.”
25 (Complaint, ¶ 56.) Such damages—which, in essence, amount to a purported head start derived

26 _____
27 ⁶ As with its First Cause of Action, Apple incorporates the entirety of its Complaint into its
28 Second Cause of Action.

1 from Apple’s labors—are classic trade secret misappropriation damages and rely on Williams’
2 alleged misappropriation of Apple’s secret technologies and research. *See, e.g., Altavion, Inc. v.*
3 *Konica Minolta Sys. Lab., Inc.* (2014) 226 Cal. App. 4th 26, 66 (citing Cal. Civ. Code § 3426.3).

4 Apple’s claim for the breach of the duty of loyalty is indistinguishable from a claim for
5 trade secret misappropriation and thus is preempted. *K.C. Multimedia*, 171 Cal. App. 4th at 958.
6 It is immaterial that this claim might “require proof of ‘additional elements.’” *Mattel*, 782 F.
7 Supp. 2d at 986. Accordingly, it is preempted, and the Court should sustain Williams’ demurrer to
8 Apple’s second cause of action. In the alternative, the Court should strike paragraphs 34, 41, and
9 46 of the Complaint in their entirety and portions of paragraphs 38, 51, and 56 as set forth in the
10 Notice of Motion.

11 **C. Even If the Court Finds that Apple’s Claim Is Not Preempted, It Is Defective**
12 **Because It Relies on the Inevitable Disclosure Doctrine**

13 In California, claims premised on inevitable disclosure of trade secrets solely on the basis
14 of the similarity of a defendant’s work for a new employer are not actionable. Unlike many states,
15 California has rejected the inevitable disclosure doctrine. *See Whyte v. Schlage Lock Co.* (2002)
16 101 Cal. App. 4th 1443, 1463 (“[O]ur rejection of the inevitable disclosure doctrine is complete.”).
17 Under the inevitable disclosure doctrine, “a plaintiff may prove a claim of trade secret
18 misappropriation by demonstrating that defendant’s new employment will inevitably lead him to
19 rely on the plaintiff’s trade secrets.” *Id.* at 1458 (quoting *PepsiCo, Inc. v. Redmond* (1995) 54
20 F.3d 1262, 1269) (internal quotation marks omitted). Recognizing that the doctrine “creates a de
21 facto covenant not to compete” and “runs[s] [sic] counter to the strong public policy in California
22 favoring employee mobility,” as well as inserts an unbargained-for, after-the-fact term into
23 employment contracts, California courts have spurned it, instead requiring plaintiffs to prove
24 actual or threatened misappropriation to sustain a claim for trade secret misappropriation. *Id.* at
25 1461-63.

26 Apple’s claim for breach of the duty of loyalty relies on the inevitable disclosure doctrine
27 and thus is not cognizable. For example, Apple alleges that Williams “*will be* leveraging almost a
28 decade of development work at Apple” in his work for NuVia and that Williams will enjoy a

1 “tremendous head start” due to Apple’s labors and research. (Complaint, ¶¶ 34, 41 (emphasis
2 added).) Apple further contends that because Williams’ activities at NuVia are “directly related to
3 Apple’s business and products” and research and development, and because other engineers at
4 NuVia previously worked for Apple, NuVia’s technology necessarily “utilizes design insights and
5 innovations Williams and his cohort were exposed to” at Apple. (*Id.*, ¶ 46.)

6 Through these allegations Apple suggests that, because Williams worked at Apple for
7 nearly a decade and acquired deep knowledge of Apple’s trade secrets, Williams inevitably will
8 rely on those trade secrets in developing products for NuVia. Apple’s claimed damages—unjust
9 enrichment from avoidance of the time and expense involved in developing technologies—offer
10 further support for this, as they suggest that Williams will rely on his experience at Apple to avoid
11 the dead ends Apple already discovered during earlier research and development. California does
12 not recognize such a theory of liability. *Whyte*, 101 Cal. App. 4th at 1463. Accordingly, Apple’s
13 claim for breach of the duty of loyalty must fail, and the Court should sustain Williams’ demurrer.
14 In the alternative, the Court should strike paragraphs 34, 41, and 46 of the Complaint in full and
15 portions of paragraphs 38, 51, and 56 as set forth in the Notice of Motion.

16 **V. APPLE’S USE OF TEXT MESSAGES IN THE COMPLAINT VIOLATES PENAL**
17 **CODE § 632**

18 Section 632 of the California Penal Code provides for criminal liability for any person who
19 “intentionally and without the consent of all parties to a confidential communication”
20 electronically records or eavesdrops on that communication. Cal. Penal Code § 632(a). “Persons”
21 include business entities. *Id.* § 632(b). A “confidential communication” is “any communication
22 carried on in circumstances as may reasonably indicate that any party to the communication
23 desires it to be confined to the parties thereto.” *Id.* § 632(c). Except as proof of violation of
24 § 632, communications recorded in contravention of this section are not admissible in any judicial
25 proceeding. *Id.* § 632(d).

26 The typical text message is a confidential communication by any metric. Indeed, the
27 contents of a person’s text messages expose a “wealth of detail about [a person’s] familial,
28 political, professional, religious, and sexual associations.” *State v. Hinton* (2014) 319 P.3d 9, 13

1 (quoting *United States v. Jones* (2012) 565 U.S. 400, 415 (Sotomayor, J., concurring)). While
2 California courts have not yet addressed whether text messages are confidential, various other
3 jurisdictions have determined that they are. *See, e.g., Hinton*, 319 P.3d at 11 (Washington); *U.S.*
4 *v. Zavala* (2008) 541 F.3d 562, 577 (5th Circuit: “[C]ell phones contain a wealth of private
5 information, including . . . text messages [and] call histories”); *State v. Clampitt* (2012) 364
6 S.W. 3d 605, 611 (Missouri: “Cell phone providers have the ability to access their subscribers’
7 text messages; however, the providers’ ability to access those messages does not diminish
8 subscribers’ expectation of privacy in their text message communications.”); *see also City of*
9 *Ontario v. Quon* (2010) 560 U.S. 746, 760 (“Cell phone and text message communications are so
10 pervasive that some persons may consider them to be essential means or necessary instruments for
11 self-expression, even self-identification. That might strengthen the case for an expectation of
12 privacy.”). California is a leader in data privacy, *see* California Consumer Privacy Act of 2018,
13 A.B. 375, 2018-2019 Sess. (Cal. 2018) (providing for expansive data privacy rights and set to take
14 effect in January 2020), and it is inconceivable that it could provide anything less than the full
15 measure of protection to communications containing a “wealth” of personal and private
16 information. This Court should find that Apple’s employees’ text messages are confidential
17 communications under § 632.

18 Apple has provided no indication that any of its employees have consented to electronic
19 recordation of their text messages. Indeed, the Complaint is entirely devoid of allegations of
20 consent or of facts supportive of an inference of consent. Thus, on the face of the Complaint,
21 Apple’s collection of its employees’ text messages runs afoul of § 632, and the messages cannot
22 be relied upon as evidence. Cal. Penal Code § 632(d). Each paragraph containing or relying upon
23 text messages is therefore improper. Accordingly, the Court should strike paragraphs 27, 28, 39,
24 and 40 of the Complaint in full and portions of paragraph 32 as set forth in the Notice of Motion.

25 **VI. APPLE’S REQUEST FOR PUNITIVE DAMAGES MUST BE STRICKEN**
26 **BECAUSE APPLE FAILS TO PLEAD FACTS SUPPORTIVE OF OPPRESSION,**
FRAUD, OR MALICE (PRAYER FOR RELIEF, ¶ G)

27 Under Section 3294 of the California Civil Code, a claim for punitive damages must state
28 specific facts sufficient to support a finding of “oppression, fraud, or malice.” The statute defines

1 “malice” in part as “conduct which is intended . . . to cause injury to the plaintiff.” Cal. Civ. Code
2 § 3294(c)(1). “Oppression” is defined as “despicable conduct that subjects a person to cruel and
3 unjust hardship in conscious disregard of that person’s rights,” and “fraud” is “intentional
4 misrepresentation, deceit, or concealment of a material fact known to the defendant with the
5 intention . . . of thereby depriving a person of property or legal rights or otherwise causing injury.”
6 *Id.* § 3294(c)(2)-(3). Furthermore, the statute expressly precludes recovery of punitive damages in
7 connection with liability in contract. *Id.* § 3294(a).

8 California courts recognize that pleadings seeking punitive damages “demand firm
9 allegations” and must establish that “the wrong was committed willfully or with a design to
10 injure.” *Smith v. Superior Court* (1992) 10 Cal. App. 4th 1033, 1041 (quoting *G.D. Searle & Co.*
11 *v. Superior Court* (1975) 49 Cal. App. 3d 22, 29) (internal quotation marks omitted). “When a
12 defendant must produce evidence in defense of an exemplary damage claim; fairness demands that
13 he receive adequate notice of the kind of conduct charged against him.” *Id.* (quoting *G.D. Searle,*
14 49 Cal. App. 3d at 29) (internal quotation marks omitted).

15 Apple’s allegations fail to provide specific facts supporting oppression, fraud, or malice.
16 Apple alleges these elements in only a conclusory fashion, stating in the final paragraph of the
17 Complaint that “Williams’s breaches of his duty of loyalty were done with malice and
18 oppression.” (Complaint, ¶ 57.) Nowhere in the Complaint does Apple describe *how* Williams’
19 alleged conduct was “*intended* . . . to cause injury” to Apple or *how* that alleged conduct was
20 “despicable” in a way that “subjected [Apple] to cruel and unjust hardship.” Accordingly, Apple
21 does not even come close to sufficiently alleging facts necessary for punitive damages, and ¶ g of
22 Apple’s Prayer for Relief must be stricken.

23 CONCLUSION

24 For the reasons stated above, the Court should sustain Williams’ demurrer or, in the
25 alternative, grant Williams’ motion to strike.

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DATED: November 4, 2019

Respectfully submitted,

By /s/ Claude M. Stern

QUINN EMANUEL URQUHART &
SULLIVAN, LLP
Claude M. Stern
David Eiseman

Attorneys for Gerard Williams III

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PROOF OF SERVICE

3 I am employed by Quinn Emanuel Urquhart & Sullivan in the County of San Mateo, State of
4 California. I am over the age of 18 and not a party to this action. My business address is: 555
5 Twin Dolphin Drive, 5th Floor, Redwood Shores, CA 94065. On November 4, 2019, I served the
6 following document(s):

7 **DEFENDANT GERARD WILLIAMS III’S NOTICE OF DEMURRER TO PLAINTIFF
8 APPLE INC.’S COMPLAINT AND NOTICE OF MOTION TO STRIKE**

9 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

10 **DECLARATION OF CLAUDE M. STERN IN SUPPORT OF DEFENDANT GERARD
11 WILLIAMS III’S DEMURRER TO PLAINTIFF APPLE INC.’S COMPLAINT AND
12 MOTION TO STRIKE**

13 **[PROPOSED] ORDER GRANTING DEFENDANT GERARD WILLIAMS III’S
14 DEMURRER TO PLAINTIFF APPLE INC.’S COMPLAINT AND MOTION TO STRIKE**

X	By electronic service. Based on a court order, an agreement of the parties to accept service by electronic transmission and/or pursuant to CRC 2.251(b)(1)(B), I caused the above-referenced document(s) to be sent to the person(s) at the electronic address(es) listed below.
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Attorneys for Plaintiff
Apple Inc.

22 I declare that I am employed in the office of a member of the bar of this court whose direction the
23 service was made. I declare under penalty of perjury under the laws of the State of California that
24 the above is true and correct. Executed on November 4, 2019, at Redwood Shores, California.

25 _____
26 */s/ Alex Wolinsky*
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