

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
14 CVS 9922

SITELINK SOFTWARE, LLC, )  
)  
                  *Plaintiff,* )  
)  
                  v. )  
)  
RED NOVA LABS, INC., )  
)  
                  *Defendant.* )  
\_\_\_\_\_ )

**MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO DISMISS  
COUNTERCLAIMS**

**INTRODUCTION**

Defendant Red Nova Labs, Inc. (“RNL”) characterizes this case as one between an innovative, new player in the self-storage business management software (“BMS”) industry, RNL, and the has-been player, SiteLink Software, LLC (“SiteLink”), who is attempting to retain its dominant position through anti-competitive measures. *See* Counterclaims, ¶¶ 1-2. RNL’s complaint boils down to a single provision in SiteLink’s licensing agreements with its customers and their service providers who access SiteLink’s software through a proprietary application programming interface (“API”).<sup>1</sup> This provision prohibits customers or their service providers from competing with SiteLink *while they are using* SiteLink’s software and accessing its proprietary information.

While RNL incants the “magic words” for virtually every recognized antitrust theory, there are no factual allegations to support any of these theories.<sup>2</sup> RNL claims that SiteLink’s

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<sup>1</sup> This API allows other service providers’ software programs (such as for on-line reservations, credit card processing and websites) to integrate (*i.e.*, communicate) with SiteLink’s BMS.

<sup>2</sup> Indeed, the few *factual* allegations set forth by RNL demonstrate that it is RNL that seeks an unfair advantage. RNL could not have designed an integrated website for customers who use SiteLink’s BMS absent SiteLink’s license of its API to RNL. *See* Counterclaims, ¶ 29. RNL has succeeded as a web designer, in large part, because of this license – 40% of its customers use SiteLink’s BMS. *Id.* at ¶ 22. Now, RNL wants to force SiteLink to help

API License is an illegal restraint on trade that not only knocks RNL out of the running as a BMS provider but also “harms the competitive process” itself and, therefore, BMS consumers.

First, SiteLink’s API License does not knock RNL, or anyone else, out of the running as a BMS provider – the restriction on competition lasts only as long as RNL is using SiteLink’s API. RNL need only stop accessing SiteLink’s API to begin competing with SiteLink.

Second, SiteLink’s API License does not prevent customers from freely deciding amongst many different BMS providers. And, if a customer chooses SiteLink’s BMS, it can then choose freely amongst many service providers who do not compete with SiteLink. There is nothing illegal about SiteLink refusing to sell its product (and thus give access to proprietary information) to customers who compete with it, or refusing to allow competitors indirect access to SiteLink’s proprietary information under the guise of a service provider.

This Court should dismiss each of RNL’s claims based on North Carolina’s antitrust statutes (N.C. Gen. Stat. §§ 75-1, 75-2 and 75-2.1 (the “Antitrust Laws”)) and RNL’s unfair competition claim (N.C. Gen. Stat. § 75-1.1), to the extent it is based on SiteLink’s API License, because it is not an *unreasonable* restraint (and, even if it was, because RNL has failed to allege facts supporting a conclusion that it forecloses RNL from selling its BMS to a substantial number of BMS customers (*i.e.*, anticompetitive harm)). Similarly, this Court should dismiss RNL’s tortious interference claim to the extent it is based on SiteLink’s enforcement of its API License - SiteLink was legally justified in enforcing its own contracts even if it knew that this could result in RNL’s inability to perform contracts RNL entered into with customers in knowing violation of its contract with SiteLink. Likewise, this Court should dismiss RNL’s anticipatory repudiation claim where RNL fails to allege any obligation under the API License that SiteLink

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RNL succeed in the *BMS* industry by allowing RNL to continue accessing SiteLink’s API to design integrated websites while *simultaneously* “building a better [BMS] mousetrap.”

repudiated (*i.e.*, SiteLink was not obligated to license its API to RNL for any period of time and was free to terminate RNL’s license for any reason).

This Court should also dismiss RNL’s claims arising out of SiteLink’s alleged smear campaign (defamation, tortious interference and unfair competition) because RNL fails to allege sufficient facts to support them (*e.g.*, by whom was a statement made, to whom, when and where).

### **RNL’S ALLEGATIONS**<sup>3</sup>

SiteLink is the dominant player in the BMS market, with 35-40% of the addressable market of self-storage facilities in the United States. *See* Counterclaims, ¶ 12. In addition to BMS, self-storage facility operators oftentimes desire internet-based services, such as lead generation, lead tracking and online reservations. *Id.* at ¶ 16. In order for these services, offered to customers by independent service providers (“Service Providers”), to communicate with SiteLink’s BMS, an API is necessary. *Id.* at ¶ 29. SiteLink’s API License states, in part:

ATTENTION: READ THESE TERMS CAREFULLY BEFORE USING THIS SERVICE. USING THIS SERVICE INDICATES THAT YOU ACCEPT THESE TERMS. *IF YOU DO NOT ACCEPT THESE TERMS, DO NOT USE THIS SERVICE.* BY INTERACTING IN ANY WAY WITH SITELINK OR ITS API, INCLUDING BUT NOT LIMITED TO MAKING API CALLS, YOU OR THE ENTITY OR COMPANY THAT YOU REPRESENT (“USER”) UNCONDITIONALLY CONSENTS AND AGREES TO BE BOUND BY AND A PARTY TO THESE TERMS AND CONDITIONS.

*See* API License (emphasis added), attached to MTD as Exhibit 1. SiteLink’s API License contains a provision that states a user shall “[n]ot compete directly, or through an affiliate company, or through [a] related third party with SiteLink. . . . ‘related third party’ shall include, but not be limited to, [u]ser’s other vendors or service providers.” *Id.* at ¶ 3(R).

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<sup>3</sup> SiteLink accepts RNL’s allegations as true, as it must, solely for purposes of this Motion to Dismiss (“MTD”). SiteLink reserves the right to dispute these allegations in any future proceedings.

RNL began offering lead generation for the self-storage industry in 2009 and web design services for the self-storage industry in 2011. *See* Counterclaims, ¶¶ 14, 16. For those RNL customers who were also SiteLink customers, RNL necessarily needed to access SiteLink’s API. *Id.* at ¶¶ 23, 29. As a web designer for BMS customers, RNL identified shortcomings in the available BMS products and, in the fall of 2012, began exploring the possibility of developing a BMS solution with SiteLink. *Id.* at ¶¶ 17-21. SiteLink was not interested in this proposed venture so RNL decided to “go forward on its own,” seeking product input from customers in the latter part of 2012 and beginning development in approximately April 2013. *Id.* at ¶¶ 21, 24. All the while, RNL continued to access SiteLink’s API to provide its lead generation and web design services. *Id.* at ¶¶ 23, 26.

Upon learning of RNL’s development of a BMS, SiteLink sent a letter to RNL that purported to terminate RNL’s API License. *See* Counterclaims, ¶ 35. Around the same time, SiteLink began contacting mutual customers to inform them that SiteLink intended to prevent them from using the API unless they agreed to stop using RNL as a web designer and switch to one who had agreed not to develop a competing BMS product. *Id.* at ¶¶ 35-36. SiteLink also told mutual customers that RNL knowingly violated contracts with SiteLink, engaged in “shameless theft and abuse” by incorporating SiteLink’s proprietary information into RNL’s competing BMS and that customers search engine rankings would be unaffected by switching website vendors (even offering financial incentives to these customers to leave RNL). *Id.* at ¶¶ 38-40.

#### **STANDARD FOR RULING ON MOTION**

Dismissal for failure to state a claim is proper if: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts

sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). “[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.” *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). Thus, a court may consider documents provided by the moving party that are the subject of the non-moving party's claims and may reject allegations that are contradicted by these documents. *Wachovia Capital Partners, LLC v. Frank Harvey Invest. Family Ltd. P'ship*, No. 05CVS20568, 2007 WL 2570838, \*3 (N.C. Super. Ct. Mar. 5, 2007) (citation omitted), attached to MTD as Exhibit 2.

## **ARGUMENT**

### I. RNL Has Failed To State A Claim Under the Antitrust Laws

RNL's Fourth Claim is for a violation of the Antitrust Laws.<sup>4</sup> *See* Counterclaims, ¶¶ 60-86. As discussed below, RNL fails to state a claim under the Antitrust Laws based on the API License because, *inter alia*: (1) SiteLink has done nothing more than choose with whom it will do business, which is lawful under the Antitrust Laws; (2) the API License prevents RNL from competing with SiteLink only if RNL seeks to simultaneously use SiteLink's API – RNL need only stop doing so to compete with SiteLink; (3) there are no allegations supporting RNL's conclusory assertion that SiteLink's API License forecloses RNL from a significant share of the BMS market; and (4) there are no allegations that RNL faces any barrier to entry in the BMS marketplace that was not faced by incumbent BMS providers.

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<sup>4</sup> North Carolina's Antitrust Laws are based on federal antitrust laws and, therefore, North Carolina courts have looked to federal decisions for instruction on the proper application of North Carolina's Antitrust Laws. *See, e.g., DKH Corp. v. Rankin-Patterson Oil Co.*, 131 N.C. App. 126, 129, 506 S.E.2d 256, 258 (1998); *Cameron v. New Hanover Mem'l Hosp., Inc.*, 58 N.C. App. 414, 442, 293 S.E.2d 901, 918 (1982); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973).

A. RNL Has Failed To State A Claim Under Section 75-1 or 75-2

Section 75-1 of the Antitrust Laws states:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. . . .

Section 75-2 of the Antitrust Laws states:

Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of G.S. 75-1.

However, because every contract by its “very essence” restricts trade,<sup>5</sup> the Antitrust Laws “[are] understood to prohibit only *unreasonable* restraints of trade.”<sup>6</sup>

1. SiteLink Has The Right To Control Who Can Use Its BMS

As a general matter, antitrust laws do not “restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise [its] own independent discretion as to parties with whom [it] will deal”<sup>7</sup> and “the terms on which it will transact business.”<sup>8</sup> SiteLink’s API License does just that. It merely provides that SiteLink will not give competitors access to its software. The relief that RNL is seeking through its Counterclaims – a court-mandated contract among competitors – is the antithesis of the Antitrust Laws. *Trinko*, 540 U.S. at 407-08, 124 S. Ct. at 879 (“[e]nforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion”).

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<sup>5</sup> *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 244 (1917).

<sup>6</sup> *Id.* (citation omitted) (emphasis added).

<sup>7</sup> *Verizon Commc’n, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407-08, 124 S. Ct. 872, 879 (2004) (quotation omitted).

<sup>8</sup> *Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1077-78 (S.D. Cal. 2012).

## 2. SiteLink's API License Is Not An Invalid Non-Compete Provision

RNL nonetheless attempts to characterize SiteLink's API License as an invalid non-compete provision ("non-compete"). It is not. Rather than prohibiting competition *in the future* after accessing SiteLink's proprietary software, the API License provides only that SiteLink will not license its product (or continue to do so) to a user who is currently competing with SiteLink. While its language is similar to a non-compete, it does nothing more than restrict use of SiteLink's API to non-competitors. There is simply nothing wrong with SiteLink choosing not to do business with competitors.<sup>9</sup> *See, e.g., Sambreel*, 906 F. Supp. 2d at 1075.

Even if the API License were a non-compete, RNL's claims fail. Non-competes do not run afoul of the Antitrust Laws if they are: (1) ancillary to the main business purpose of a lawful contract; and (2) necessary to protect legitimate property interests, which requires that they be as limited as is reasonable to protect these interests.<sup>10</sup> *See, e.g., Baker's Aid, A Division Of M. Raubvogel Co., Inc. v. Hussmann Food Serv. Co.*, 730 F. Supp. 1209, 1214 (E.D.N.Y. 1990).

The non-compete here is ancillary to the main business purpose of the API License, which is to allow customers and Service Providers to use SiteLink's proprietary API to enable other products to communicate with SiteLink's BMS. *See* Counterclaims, ¶¶ 29-30. SiteLink has a legitimate interest in guarding against competitors taking a free ride on its substantial investment in its BMS. The API License only prevents companies with access to SiteLink's proprietary information from simultaneously selling a competing BMS and is as narrowly drawn

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<sup>9</sup> In fact, prior to April 28, 2014, SiteLink's API License did not reference competition at all; instead, it required a user to disclose to SiteLink any conflicts of interest. *See* API License (Version 1), attached to MTD as Exhibit 3. This API License also allowed SiteLink to terminate a user's access to the API with or without cause. *Id.* RNL does not argue that this API License is an illegal restraint on trade. The fact that SiteLink had the right to terminate the license of a user with conflicts all along belies RNL's contention that SiteLink's revision to its API License was part of a "highly organized and tightly coordinated" conspiracy to destroy RNL, rather than an innocuous clarification that SiteLink does not deal with competitors.

<sup>10</sup> The reasonableness of a non-compete is a question of law for the court to decide. *See, e.g., Keith v. Day*, 81 N.C. App. 185, 192, 343 S.E.2d 562, 567 (1986).

as possible in time and scope – ending the second the potential competitor stops accessing SiteLink’s proprietary information.

3. SiteLink’s API License Does Not Give Rise To Any Antitrust Violation

RNL suggests that SiteLink should not be able to refuse to deal with RNL because SiteLink is the leading BMS provider and its refusal to share its ongoing software updates somehow prevents RNL from competing in marketing its BMS. This is inane. RNL is free to compete for every BMS customer in the country on the merits of its own BMS offering. What RNL cannot do is continue to provide other ancillary services that require access to SiteLink’s BMS. Apparently recognizing the disconnect between the facts and cognizable legal theories, RNL peppers its counterclaims with buzzwords from myriad antitrust theories (*i.e.*, monopoly, vertical restraint, horizontal restraint, tying, group boycott, etc.) but invokes no particular theory, hoping “something will stick.” This only highlights that SiteLink’s API License is not the type of agreement that courts condemn. There are over twenty competitors offering BMS and innumerable Service Providers. The agreement of a few Service Providers not to compete with one BMS provider, SiteLink, while using SiteLink’s BMS does not foreclose RNL from selling its BMS to a substantial number of BMS consumers through any channel of distribution – SiteLink’s API License neither impedes RNL from selling its BMS directly to consumers nor indirectly by, for instance, convincing Service Providers that its BMS is superior and Service Providers should recommend it to their customers. There is no legitimate concern that BMS consumers have been “denied the benefits of a free and competitive market,” only RNL’s irritation that it cannot maintain its access to SiteLink’s software in its role as a web designer while simultaneously developing BMS.

a. RNL Fails To Sufficiently Allege That SiteLink's API License Is An Unreasonable Vertical Restraint

RNL's counterclaims are couched in the language of monopoly power and suggest that SiteLink is causing stagnation in the BMS industry and preventing all competition. *See* Counterclaims, ¶¶ 2, 5, 46, 65, 73, 74. RNL's few factual allegations do not support these conclusory accusations.

First, RNL attempts to limit the number of potential BMS customers by excluding a substantial number of self-storage facilities that do not currently use any BMS, presumably relying on paper records or using software that is not specifically tailored to the self-storage market like Quicken or Excel. This does not mean that these self-storage operators are not potential customers for RNL, SiteLink or any other BMS developer.

Second, even among this limited universe of current BMS customers, RNL alleges that only 35-40% use SiteLink's BMS. This is a far cry from monopoly power. *See, e.g., R.J. Reynolds Tobacco Co. v. Philip Morris, Inc.*, 199 F. Supp. 2d 362, 398 (M.D.N.C. 2002) (70-75% generally considered the minimum for existence of monopoly power).

Third, RNL conspicuously fails to allege the number of other BMS providers, their market share, when they entered the market or anything about their BMS programs. RNL avoids these allegations because it knows that there are more than twenty competing BMS providers, including some with substantial financial backing like the BMS offering of e-Move, a wholly-owned subsidiary of U-Haul, that have had success in creating and marketing competing BMS despite the existence of SiteLink's API.

In addition to failing to accurately define the BMS market, RNL conflates legal concepts to confuse the relevant markets examined under the Antitrust Laws. RNL's counterclaims relate to the sale of BMS to self-storage owners and operators. RNL then makes allegations about its

competitors *in ancillary services* for the same customers, such as providing website design or lead generation. RNL admits that SiteLink does not even offer these services and is, thus, not a player in that market. *See, e.g., Counterclaims*, ¶¶ 5, 27. And, these Service Providers are not in the BMS distribution chain, only offering programs or services that may be used by some of the same customers. Even then, RNL fails to allege how many companies provide ancillary services. As an example, for web design, RNL suggests that the relevant market is those who market themselves as specialists to the self-storage industry. But, self-storage businesses may choose to use a particular web designer for a variety of reasons (*e.g., pre-existing business relationship, personal relationship, cost, etc.*) and there are no allegations supporting a conclusion that these web designer's services are not interchangeable on price, use and quality. *See, e.g., RealPage, Inc. v. Yardi Sys., Inc.*, 852 F. Supp. 2d 1215, 1224 (C.D. Cal. 2012) (*quoting United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 406, 76 S. Ct. 994 (1962)). RNL's attempt to conflate the BMS industry and the ancillary Service Provider industry only weakens its claims – given the breadth of BMS providers and the breadth of ancillary Service Providers, both of whom share customers but do not compete for customers, RNL's conclusion of law that SiteLink's API has any impact on either marketplace is completely divorced from factual reality.

It is in this artificial context that RNL appears to assert a claim that SiteLink's API is an unreasonable vertical restraint. A vertical restraint addresses agreements between parties at different levels of a distribution chain, like a manufacturer and distributors or a distributor and wholesalers. Here, the purported vertical restraint involves SiteLink, a BMS provider, and companies that provide services that integrate with BMS. While these parties may target the same potential customers, they are not part of the same distribution chain. Thus, the vertical restraint proscriptions are simply inapplicable.

Even if that were not the case, the reasonableness of a vertical restraint “is evaluated based on its impact on competition as a whole within the relevant market.” *Dickson v. Microsoft*, 309 F.3d 193, 206 (4<sup>th</sup> Cir. 2002) (quotation omitted). This evaluation requires an examination of possible impairments to competition and whether those possible impairments are “likely and significant.” *Id.* Allegations relating to the market power of *all parties* to the agreement are required because the “relevant focus of the inquiry is the anticompetitive effects of the conspiracy qua conspiracy; therefore, the plaintiff must demonstrate that the conspiratorial agreement itself affected competition in ways that would not have obtained absent the agreement.” *Id.* at 210 (citing *Spectators’ Commun’c Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 225 (5<sup>th</sup> Cir. 2001) (the issue is “whether the combination or conspiracy, not each individual conspirator, has the [market] power to hurt competition in the relevant market.”); *Federal Trade Comm’n v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460, 106 S. Ct. 2009, 2019 (1986) (“[T]he purpose of the inquiries into market definition and market power is to determine whether *an arrangement* has the potential for genuine adverse effects on competition.” (emphasis added))).

In *Dickson*, the facts of which parallel those few alleged here, plaintiff alleged that Microsoft and computer manufacturers Compaq Computer Corporation (“Compaq”) and Dell Computer Corporation (“Dell”) violated the Sherman Act by entering into licensing agreements that included, *inter alia*, exclusive dealing provisions. *Dickson*, 309 F.3d at 199-200. The Fourth Circuit found that, even though the licensing agreement at issue could have impaired competition, the plaintiff failed to allege facts supporting a conclusion that Dell and Compaq had any power in the PC marketplace that could make potential competitive impairments “likely and significant.” *Id.* at 207-08.

For instance, without having alleged Compaq’s or Dell’s power or share in the PC market, [plaintiff] is unable to demonstrate that rival software firms’ access to Compaq or Dell was an important component of those firms’ potential ability to compete in the software markets, or that Microsoft’s agreements with Compaq and Dell substantially hindered the entrance or operation of these rivals in the software markets or denied them access to a significant number of consumers of software. . . . Consequently, assuming that Compaq and Dell each possessed an insignificant portion of the PC market (as is proper in light of [plaintiff]’s failure to allege market share or any other facts demonstrating market power), the two licensing agreements – considered individually<sup>11</sup> – would be incapable of succeeding in maintaining or leveraging Microsoft’s alleged monopolies, in that neither agreement could substantially reduce the usage share of, or prevent the promotion of, rival browsers, rival operating system software manufacturers, or rival applications software manufacturers.

\* \* \*

Moreover, with respect to the exclusive dealing component of [plaintiff]’s claim, absent an allegation regarding Compaq’s or Dell’s power or share in the PC market, there is no basis in [plaintiff]’s complaint for concluding that either of the two licensing agreements at issue, when considered individually, are likely to foreclose a significant share of the relevant software markets. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S. Ct. 623, 5 L.E.2d 580 (1961) (holding that an exclusive contract does not violate the Clayton Act unless its probable effect is to “foreclose competition in a substantial share of the line of commerce affected”); [U.S. v.] *Microsoft*, 253 F.3d [34] at 68-70 (discussing the exclusive dealing aspects of Microsoft’s agreements and concluding that, even when the cumulative effect of Microsoft’s agreements were considered, the agreements did not foreclose enough of the relevant browser market to constitute a § 1 violation).

*Id.* at 208-209. Further, even if an exclusive dealing agreement can theoretically impair competition, a short “duration and easy terminability of [these] agreements negate substantially their potential to foreclose competition.” *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163-64 (9<sup>th</sup> Cir. 1997) (*citing Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F. 2d 227, 237 (1<sup>st</sup> Cir. 1983) (two-year contracts reasonable)); *see also W. Parcel Exp. v. United Parcel Serv. Of*

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<sup>11</sup> There were no allegations in *Dickson* that Microsoft, Dell and Compaq acted in concert such that it might have been appropriate to look at the effect of *all* the licensing agreements collectively. Similarly, RNL does not allege that all the Service Providers who have agreed to the terms of the API License acted in concert with each other and SiteLink – to the contrary, RNL alleges that the provision at issue was unilaterally imposed upon each Service Provider by SiteLink. *See Counterclaims*, ¶ 46.

*Am., Inc.*, 65 F. Supp. 2d 1052, 1064 (N.D. Cal. 1998) (three years a “relatively short duration”). And, “[i]f competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition *any* part of the relevant market.” *Id.*

SiteLink’s restriction is short in duration, lasting only as long as a Service Provider accesses SiteLink’s API. *See* Exhibit 1. Equally important, RNL fails to:

- allege that it cannot reach BMS consumers via alternative channels of distribution – (a) RNL was free to approach any BMS consumer directly, or through any distribution channel, to offer its competing BMS as soon as RNL’s API License with SiteLink ended; and (b) SiteLink’s API License does not prohibit Service Providers from working with RNL, or touting RNL’s product to their customers, as RNL is not an “affiliate company” or “related third party” of other Service Providers.
- identify a single Service Provider (other than itself), much less how many there are in the self-storage industry.
- allege how many of these Service Providers have agreed to SiteLink’s API License.
- allege, for each Service Provider that has agreed to SiteLink’s API License, that Service Provider’s market share.

Without such allegations, RNL is unable to support the conclusion that SiteLink’s API License forecloses RNL from a significant share of the BMS market. Accordingly, this Court should dismiss RNL’s Section 75-1 and 75-2 claims to the extent they are based on an unreasonable vertical restraint theory.

b. SiteLink’s API License Is Not An Illegal Group Boycott

In order to establish an unlawful group boycott, a plaintiff must plead that there was an agreement among horizontal competitors to jointly participate in a boycott of a competitor. *See Nynex Corp. v. Discon, Inc.* 525 U.S. 128, 134–36, 119 S. Ct. 493, 497-98 (1998). Here, there are no allegations relating to BMS providers other than SiteLink. Thus, the “horizontal” restraint apparently asserted is against the Service Providers who have agreed to the terms of SiteLink’s API. The “crucial question,” then, is whether the Service Provider’s agreement to the terms of SiteLink’s API “stem[s] from independent decision or from an agreement, tacit or express” among them to eliminate RNL as an BMS provider. *See Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S. Ct. 257, 259 (1954). “[W]hen allegations of parallel conduct are set out in order make an [illegal boycott] claim, they must be placed in a context that raises a suggestion of a preceeding agreement, not merely parallel conduct that could just as well be independent action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 1965 (2007). A complaint should allege “parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.” *Twombly*, 550 U.S. at 556, n. 4, 127 S. Ct. at 1965, n. 4 (quotation omitted).

SiteLink’s API License does not require Service Providers to “boycott” RNL at all (*i.e.*, it is not an exclusive dealing provision). A Service Provider is free to provide services to customers who use RNL’s BMS, assuming RNL allows it to access its API.

Even if SiteLink’s API was in the nature of an exclusive dealing provision, there are no allegations to suggest that the Service Providers’ actions were “not merely parallel conduct that could just as well be independent action.” The theory asserted in *Sambreel, supra*, is similar to

that advanced by RNL - Sambreel alleged that Facebook's terms of use, which required each third party application developer to use only advertising partners approved by Facebook, constituted an illegal agreement among horizontal competitors to boycott Sambreel. *Sambreel*, 906 F. Supp. 2d at 1076.

The district court found that Sambreel had failed to plead facts to support a violation:

At most, Sambreel has alleged independent agreements between each Application Developer and Facebook that the Application Developers will only use Facebook's approved Advertising Partners [ ], and in turn agreements between Facebook Advertising Partners, reserving the right to limit or prohibit Advertising Partners' operation of Facebook Platform if they "associate . . . in any manner with a company that Facebook has prohibited from operating on Facebook Platform." . . . . Beyond the agreements which Facebook unilaterally imposes upon companies that utilize the Facebook Platform, there are no allegations that any of the Application Developers themselves agreed with one another. . . .

*Id.* at 1076-77. The district court further held that Sambreel failed to allege sufficient facts to support its conclusion that Facebook's conduct "caused substantial actual anticompetitive effects in the market for internet display advertising" as opposed to the market for advertising on Facebook itself. *Sambreel*, 906 F. Supp. 2d at 1078.

Setting aside the fact that SiteLink and Service Providers are not horizontal competitors, RNL has alleged only the existence of independent agreements between SiteLink and certain Service Providers reserving SiteLink's right to terminate a provider's access to its API if the provider, or its affiliate/third party vendor, competes with SiteLink. Beyond these agreements (the terms of which, RNL admits, are unilaterally imposed by SiteLink), there are no allegations that any of the Service Providers agreed with one another to "boycott" RNL, expressly or implicitly.

Further, while RNL makes conclusory statements that SiteLink’s actions caused antitrust injury to the self-storage market as a whole,<sup>12</sup> as in *Sambreel*, there are no allegations showing how SiteLink’s unilateral limitations regarding access to its own product reduces consumer choice or diminishes the quality of other offerings in the market. SiteLink’s API License does not: (1) restrict a Service Provider from competing with SiteLink after termination of its relationship with SiteLink; (2) preclude a Service Provider from providing services to RNL or RNL’s customers; (3) dictate to customers with whom they can deal after termination of their relationship with SiteLink; and (4) prevent RNL from providing services, competing or non-competing, to non-users of SiteLink.

This Court should dismiss RNL’s Section 75-1 and 75-2 claims to the extent they are based on an illegal group boycott theory.

c. SiteLink’s API License Is Not An Illegal Tying Agreement

A tying arrangement is ‘an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product [a positive tying arrangement], or at least agrees that he will not purchase that product from *any* other supplier [a negative tying arrangement].

*Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 461-62, 112 S. Ct. 2072, 2079 (1992) (quotation omitted) (emphasis added). “Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product.” *RealPage, Inc. v. Yardi Sys., Inc.*, 852 F. Supp. 2d 1215, 1222 (C.D. Cal. 2012) (quoting *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 912 (9<sup>th</sup> Cir. 2008)). A plaintiff must allege: (1) a tie-in between two products or services sold in separately defined product markets; (2) sufficient market power in the tying product market to affect the tied product market; and (3) an effect on a not

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<sup>12</sup> See, e.g., Counterclaims, ¶ 74.

insubstantial volume of commerce. *RealPage*, 852 F. Supp. 2d at 1222-23 (citing *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1423-24 (9<sup>th</sup> Cir. 1995)).

SiteLink does not condition the sale of its BMS on the purchase of any other product or service, thus it engages in no “positive tying.” And, SiteLink does not dictate which of the myriad Service Providers its customers may use (whether or not identified as “Partners”) or preclude its customers from using any BMS provider, thus it engages in no “negative tying.”

Again, *Sambreel* is instructive. The district court in *Sambreel* found that the allegations of the complaint did not support a tying arrangement:

Specifically, the claim is factually limited to an interaction between Facebook and Sambreel, alleging that Facebook prohibited its users from accessing their respective Facebook accounts if they had downloaded Sambreel products. . . . Indeed, there are no allegations that Facebook precluded its users from maintaining Sambreel applications for use on other websites. And to the extent that the alleged gating campaign collaterally prohibited such use by requiring that its users uninstall the entire [ ] platform, Facebook users have a choice; they can comply with Facebook’s terms and uninstall the software, or they can maintain Sambreel’s applications and opt to use other social networking sites.

*Id.* at 1080 (citation omitted). “Nor did the complaint allege that Facebook precluded the use of any enhancement products except Sambreel’s in the alleged ‘tied’ market for applications and add-ons that enhance social networking services. *Cf. Kodak*, 504 U.S. 451, 112 S. Ct. 2072 (alleging Kodak had tied equipment repair services to repair parts available only from it); *RealPage*, 852 F. Supp. 2d at 1224 (interpreting *Kodak* and finding that plaintiff had adequately alleged a “negative tie” where defendant’s licensing agreement for accounting software barred use of cloud hosting services from *any* competing companies).” RNL’s allegations are likewise inadequate.

This Court should dismiss RNL’s Section 75-1 and 75-2 claims to the extent they are based on an illegal tying arrangement theory.

B. RNL Has Failed To State A Claim Under Section 75-2.1

Because RNL has failed to state a claim under Section 75-1, it has necessarily failed to state a claim under Section 75-2.1. *See, e.g., R.J. Reynolds Tobacco Co. v. Philip Morris, Inc.*, 199 F. Supp. 2d 362, 395 n. 24 (M.D.N.C. 2002). RNL's failure to identify barriers to entry in the BMS industry that were not faced by incumbent BMS providers is an independent basis for dismissing this claim:

Section 75-2.1 states:

It is unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina.

N.C. Gen. Stat. § 75-2.1. As discussed above, the counterclaims fail to allege that SiteLink has monopoly power and, indeed, admit that its market share falls well below that threshold.

“An attempted monopolization offense consists of: (1) the use of anticompetitive conduct; (2) with specific intent to monopolize; and (3) a dangerous probability of success.” *E. I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 441 (4<sup>th</sup> Cir. 2011) (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91 (1993); *Advanced Health-Care Servs., Inc. v. Radford Cnty. Hosp.*, 910 F.2d 139, 147 (4<sup>th</sup> Cir. 1990)). Demonstrating a dangerous probability of monopolization “requires inquiry into the relevant product . . . and the defendant’s economic power in that market.” *Spectrum Sports*, 506 U.S. at 459, 113 S. Ct. at 892 (1993). Market power can be shown “by the defendant’s dominant market share and barriers to entry in the relevant market.” *Rebel Oil, Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9<sup>th</sup> Cir. 1995). Entry barriers are “additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants.” *Id.*

Here, RNL fails to allege what other incumbent providers of BMS exist, when they entered the market and what their market shares are, much less what barriers to entry existed when they introduced their products. Without this, RNL cannot meet the pleading requirements for attempted monopolization. Moreover, the conclusory allegations RNL does make about market barriers are applicable to all BMS providers:

There are significant and high barriers to the relevant market entry that prevent other manufacturers from meaningfully entering or expanding in the relevant market, including the onerous contract provisions in the SiteLink License Agreements that prevent other software companies in the self-storage industry from creating competing management software offerings; customer investment in learning the functions of the management software; high costs of moving from one management software solution to another, including data conversion costs; and high monetary and time investment required to build a competing BMS offering.

*See* Counterclaims, ¶ 67. First, SiteLink’s license may be terminated by a customer and Service Provider alike with no notice and, therefore, is no barrier whatsoever to entry. *Western Parcel Exp. v. United Parcel Serv. of Am., Inc.*, 190 F.3d 974, 975-76 (9<sup>th</sup> Cir. 1999). Second, each BMS provider, including SiteLink, has expended a great deal of time and money to create their BMS. Third, each BMS provider faced the challenge of teaching customers how to use their product. Fourth, with the exception of the very first BMS provider, each incumbent BMS provider competing for business has had to convince customers to surmount the costs associated with moving from one BMS to another.

This Court should dismiss RNL’s claim under Section 75-2.1 where it has failed to sufficiently allege either anticompetitive conduct or a dangerous probability of success.

C. RNL Has Failed To State A Claim For Unfair Competition

RNL’s Section 75-1.1 claim is based upon: (1) the same “anticompetitive” API License; and (2) the alleged defamatory statements made by SiteLink. *See* Counterclaims, ¶¶ 64-86.

Because the API License is not, in fact, anti-competitive, it is not an unfair method of competing as a matter of law. *See, e.g., R.J. Reynolds*, 199 F. Supp.2d at 396. RNL’s Section 75-1.1 claim should be dismissed to the extent it is based on the API License.<sup>13</sup> RNL’s Section 75-1.1 claim based on alleged defamatory statements also fails where, as discussed below, RNL has failed to state a claim for defamation.

## II. RNL Has Failed To State A Claim For Defamation

RNL’s Third Claim is for defamation *per se*. *See* Counterclaims, ¶¶ 56-59. The alleged defamatory statement:

(1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business. . . .it is not enough that the words used tend to injure a person in his business. To be actionable *per se*, they must be uttered of him in his business relation.

*Johnson v. Bollinger*, 86 N.C. App. 1, 10, 356 S.E.2d 378, 384 (1987) (*quoting Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955)). Additionally, North Carolina Rule of Civil Procedure 9(f) requires a plaintiff to plead the time and place of any alleged defamatory statement. *See Reid Pointe, LLC v. Stevens*, No. 08CVS4304, 2008 WL 3846174, \*11 (N.C.B.C. Aug. 18, 2008), attached to SiteLink’s MTD as Exhibit 4.

RNL alleges that SiteLink advised some unspecified RNL customers at some unspecified time that: (a) RNL’s continuing to access SiteLink’s API was in “knowing violation of preexisting contractual provisions;” (b) RNL engaged in “shameless theft and abuse” of SiteLink property, including having taken SiteLink’s proprietary information and incorporated it into a competing product,” and (c) “the impact that the change in website/e-commerce vendors

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<sup>13</sup> Similarly, to the extent that RNL’s claim for tortious interference of contract rests upon SiteLink’s alleged “anticompetitive” conduct, this claim should be dismissed. SiteLink’s API License is not an unlawful anti-competitive agreement as a matter of law and, therefore, SiteLink had a legitimate business purpose when enforcing it. *See, e.g., Embree Constr. Grp. v. Rancor, Inc.*, 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992).

will have on customers' businesses" would have minimal effect. *See* Counterclaims, ¶¶ 38-39, 56-58.

SiteLink's alleged statement to customers that switching to another provider would not affect their internet search engine rankings (the "SEO Statement") is not a statement that "impeaches" RNL as a web designer – it says nothing at all about RNL's abilities as a web designer. Because the SEO Statement is not defamatory as a matter of law, RNL's defamation claim should be dismissed to the extent it is based on it. Even if the SEO Statement could be defamatory, RNL's defamation claim should nevertheless be dismissed to the extent the SEO Statement was made on or before August 14, 2014 as time-barred.<sup>14</sup> N.C. Gen. Stat. § 1-54(3).

Moreover, RNL has failed to allege the time and place of any of the purportedly defamatory statements as required by Rule 9(f) and, as such, RNL's defamation claim should be dismissed.<sup>15</sup> *See, e.g., Reid Pointe* 2008 WL 3846174 at \*11.

### III. RNL Has Failed To State A Claim For "Anticipatory Repudiation"

RNL's Second Claim is for breach of contract in the form of anticipatory repudiation. *See* Counterclaims, ¶¶ 53-55. The elements of a claim for breach of contract are (1) the existence of a valid contract; and (2) breach of the terms of that contract. *See, e.g., Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000).

While it is somewhat unclear what contract SiteLink purportedly repudiated (and RNL further misstates the contents of the letter on which its repudiation claim relies),<sup>16</sup> it can only be

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<sup>14</sup> Because RNL's original Counterclaim did not give notice of this statement as a basis for its defamation claim (*see* original Counterclaim, ¶ 6), it does not relate back to the time the original Counterclaim was filed. *See, e.g., Price v. J.C. Penney Co., Inc.*, 26 N.C. App. 249, 253, 216 S.E.2d 154, 156 (1975) ("[w]hen plaintiff attempts to allege an entirely different transaction by amendment, as, for example, the separate publication of a libelous statement . . . the new claim will be subject to the defense of statute of limitations") (quotation omitted).

<sup>15</sup> In the alternative, SiteLink respectfully moves for a more definite statement pursuant to N.C. Gen. Stat. § 12(e).

<sup>16</sup> The January 13, 2014 letter does not advise RNL that SiteLink will not allow its customers to access data through use of the API; rather, the letter advised only that RNL will not be allowed to access SiteLink's BMS through the API. *See* January 13, 2014 Letter, attached to SiteLink's MTD as Exhibit 5.

its contracts with customers or Service Providers. If RNL is referring to SiteLink's contracts with customers, RNL is neither a party to these contracts nor an intended third party beneficiary and, therefore, does not have standing to sue.<sup>17</sup> If RNL is referring to SiteLink's API License, RNL does not allege that it is a valid contract. To the contrary, RNL has affirmatively denied that SiteLink's API License is a valid contract. *See* Answer, ¶ 123. Further, RNL has not alleged any obligation SiteLink promised to undertake in the API License that it repudiated. SiteLink never promised to provide RNL with an indefinite license to use SiteLink's API. Indeed, SiteLink's API License allowed it to terminate the API at "any time, for any reason, with or without notice." *See* Exhibit 3. Thus, notifying RNL of its intent to terminate RNL's access is not a breach of the API License (indeed, it was more than SiteLink was contractually obligated to do).

### **CONCLUSION**

For the reasons set forth herein, SiteLink respectfully requests that this Court enter an order dismissing: (1) RNL's Antitrust Laws claims; (2) RNL's unfair competition and tortious interference claims to the extent they arise out of SiteLink's API License or the SEO Statement; and (3) RNL's defamation claim.

Respectfully submitted,

Dated: September 11, 2015

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<sup>17</sup> *See, e.g. Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991).

**CERTIFICATE OF COMPLIANCE**

Pursuant to B.C.R. 15.8, counsel for Plaintiff SiteLink Software, LLC certifies that the foregoing Memorandum of Law is fewer than 7,500 words, including headings, footnotes, quotations and citations, as reported by word-processing software.

/s/ Luther D. Starling, Jr. \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing Plaintiff SiteLink Software, LLC's Memorandum of Law in Support of Motion to Dismiss Counterclaims on the following by depositing a copy enclosed in a first-class, postage pre-paid wrapper into a depository under the exclusive care and custody of the United States Postal Service this 11<sup>th</sup> day of September, 2015: W. Swain Wood, WOOD JACKSON PLLC, 1330 St. Mary's Street, Suite 460, Raleigh, NC 27605.

/s/ Luther D. Starling, Jr. \_\_\_\_\_