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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUCCESSFACTORS, INC., a Delaware corporation,

Plaintiff,

v.

SOFTSCAPE, INC., a Delaware corporation; and DOES 1-10,

Defendants.

No. C 08-1376 CW

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY

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Plaintiff SuccessFactors, Inc. moves for a preliminary injunction enjoining Defendant from (1) disseminating, publishing, causing to be made available to the public, affirming the purported truth or accuracy of, or directing any person to disseminate, publish, cause to be made available to the public or affirm the purported truth or accuracy of a certain presentation; (2) disseminating, publishing, causing to be made available to the public, affirming, or directing any person to disseminate, publish, cause to be made available to the public or affirm the allegedly false or misleading statements set forth within that presentation; (3) representing or implying that a person or entity other than Defendant authored any statement in the presentation regarding

1 Plaintiff when such person or entity did not explicitly so author;  
2 (4) disseminating or making public use of Plaintiff's trade name,  
3 trademark or logo beyond that amount reasonably necessary to  
4 identify Plaintiff or its products and services; (5) accessing or  
5 obtaining data from any computer system or computer owned, operated  
6 or licensed by Plaintiff and subject to restrictions on access  
7 without Plaintiff's express written authorization; or  
8 (6) disclosing, publishing, reproducing or communicating any  
9 information or data received from such a restricted computer or  
10 computer system. Plaintiff also seeks an order allowing certain  
11 expedited discovery.

12 The Court issued a temporary restraining order on March 13,  
13 2008 and set a briefing schedule. Defendant has opposed both  
14 motions. The motions were heard on March 27, 2008. Having  
15 considered all of the papers filed by the parties and oral argument  
16 on the motion, the Court grants in part Plaintiff's motion for a  
17 preliminary injunction and denies it in part and grants in part  
18 Plaintiff's motion for expedited discovery.

19 BACKGROUND

20 Plaintiff is a publicly traded company that provides internet-  
21 based human resources management software. Defendant is one of  
22 Plaintiff's competitors. On or about March 24, 2008, hundreds of  
23 Plaintiff's actual or prospective customers received an email from  
24 "John Anonymous" with the email address hcmknowledg2008a@gmail.com.  
25 The subject line of the message is "SuccessFactors Failures and  
26 Problems" and the body reads, "If you are thinking about purchasing  
27 from SuccessFactors, please read the following document; it

1 provides information about Successfactors [sic] which they do not  
2 want you to know." Bernshteyn Decl., Ex. 1. Attached to the  
3 message was a forty-three page PowerPoint presentation titled "The  
4 Naked Truth." The presentation appears on a SuccessFactors  
5 template and includes SuccessFactor's trademarked logo at the top  
6 of each page. The presentation purports to be "a compilation of  
7 the facts from Successfactors [sic] customers" and states that the  
8 facts contained in the presentation "represent the measure of  
9 Successfactors' [sic] lack of corporate integrity and why many of  
10 us have left them." Id. In addition, Plaintiff alleges that the  
11 presentation includes screenshots from three areas of its website:  
12 (1) a publicly-available list of customers taken both before and  
13 after February 28, 2008, when the list was updated, (2) screens  
14 from several publicly available "webinars" and (3) screens from  
15 Plaintiff's ACE environment, a password-protected area which is  
16 accessible only to Plaintiff's employees, authorized customers,  
17 authorized prospective customers and partners.

18 After learning about the presentation and its contents,  
19 Plaintiff analyzed its computer logs to determine which IP  
20 addresses had accessed each of these three areas of its website  
21 between February 11, 2008 and March 4, 2008. Plaintiff states that  
22 only one IP address that is not associated with one of its own  
23 offices or employees accessed all three areas of the website. That  
24 IP address, 68.236.68.19 belongs to Defendant's Wayland,  
25 Massachusetts office. Plaintiff also determined that this IP  
26 address had accessed a specific ACE account, the ACE275 demo  
27 account, on February 19 and 21, 2008. One of the screenshots in  
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1 the presentation is taken from a customized goal included in the  
2 ACE275 demonstration.

3 Plaintiff also discovered that the ACE275 account was accessed  
4 without authorization from three additional IP addresses, two  
5 residential IP addresses located near Wayland, Massachusetts and  
6 one business address assigned to Defendant's London, England  
7 office. The ACE275 account was created for a purported prospective  
8 customer named Ely Valles on behalf of a company called New  
9 Millenium [sic] Shoe. At the hearing, Defendant disclosed that its  
10 CEO David Watkins is also the CEO of New Millenium [sic] Shoe.

11 Plaintiff also searched its Customer Relationship Management  
12 (CRM) database for any information associated with the IP addresses  
13 it identified. The CRM database is a repository of registration  
14 information from individuals who seek access to the publicly-  
15 available webinars, white papers and data sheets on Plaintiff's  
16 website. Plaintiff discovered nine entries in the CRM database,  
17 dating back to January, 2006, for the 68.236.68.19 IP address. The  
18 name and registration information provided by the person accessing  
19 Plaintiff's website from that IP address varied and Plaintiff  
20 suspects that many of the names were false. However, Plaintiff  
21 found information linking to Defendant two of the names provided.

22 Plaintiff alleges in the three days after the anonymous email  
23 was sent, it received numerous inquiries from concerned current and  
24 prospective customers. On March 7, 2008, JMP Securities, an  
25 investment bank that provides market analysis of securities,  
26 described the presentation as "highly critical of SuccessFactors."  
27 Bernshteyn Decl., Ex. 3. The JMP report contained this heading:

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1 "We maintain our Market Outperform rating on SuccessFactors, but  
2 reduce our price target from \$15 to \$12 in light of the compression  
3 in the on demand comparables." Id. Under this heading, and  
4 referring to the presentation, the JMP report stated, "While some  
5 of the critical claims certainly seem to be exaggerated or  
6 unfounded, the descriptions of specific customer problems are  
7 harder to dismiss without independent analysis." Id. Therefore,  
8 the report stated, "[W]e reserve final judgment until we have had a  
9 chance to conduct some independent due diligence." Id. On March  
10 10, JMP issued another report subtitled "Johnny Anonymous Loses  
11 Round One" and describing the "case studies regarding alleged  
12 problems with customer implementations" as "unfounded." Id. at Ex.  
13 4. Plaintiff also provides evidence that concerns about the  
14 presentation have been discussed on an internet message board  
15 related to SuccessFactors' stock. Id. at Ex. 5.

16 On March 11, 2008, Plaintiff filed a complaint, alleging  
17 claims of false and misleading statements under the Lanham Act and  
18 California Business and Professions Code § 17500; trademark  
19 infringement under the Lanham Act; damages under the Computer Fraud  
20 and Abuse Act (CFAA), 18 U.S.C. § 1030; unauthorized access to  
21 computers, computer system and computer data under California Penal  
22 Code § 502; defamation; trade libel; intentional interference with  
23 prospective economic relations; and unfair competition. On that  
24 date, Plaintiff also filed a motion for a temporary restraining  
25 order and application for expedited discovery, with notice to  
26 Defendant. Defendant opposed the motions, and, on March 13, 2008,  
27 the Court granted in part Plaintiff's motion for a temporary  
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1 restraining order and granted in part Plaintiff's motion for  
2 expedited discovery.

3 Defendant concedes that it created the presentation but argues  
4 that it was intended only for internal use by Defendant's sales  
5 force. Defendant states that it does not and will not use the  
6 presentation in any external sales or marketing efforts. It  
7 considers the presentation to be "its confidential strategic  
8 business information" and states that it does not know who  
9 distributed it outside the company. Response to Order to Show  
10 Cause (Response) at 2. Defendant asserts that, since the  
11 presentation's creation, it has instructed its employees that the  
12 document is strictly for internal use.

13 However, the only evidence Defendant presents in support of  
14 this assertion is two email messages from its CEO to its employees,  
15 each sent after the complaint was filed. Both of the email  
16 messages state that the presentation is only for internal use while  
17 maintaining that the presentation is based on "publicly available  
18 sources." Watkins Decl., Exs. A & B. One of the messages  
19 instructs that "[i]nformation contained in the document should be  
20 used judiciously in competitive situation [sic] as required."  
21 Watkins Decl., Ex. A. In addition to its internal reassurance that  
22 the information contained in the presentation was substantiated,  
23 Defendant issued a press release publicly affirming the veracity of  
24 the presentation. The press release states that the presentation  
25 "was based on substantiated facts." Id. at Ex. 3. Plaintiff  
26 provides evidence that Defendant has emailed a link to this press  
27 release to its potential customers who are also Plaintiff's  
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1 potential customers. Bernshteyn Reply Decl., Ex. 4.

2 LEGAL STANDARD

3 To obtain a preliminary injunction, the moving party must  
4 establish either: (1) a combination of probable success on the  
5 merits and the possibility of irreparable harm, or (2) that serious  
6 questions regarding the merits exist and the balance of hardships  
7 tips sharply in the moving party's favor. Rodeo Collection, Ltd.  
8 v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987).

9 The test is a "continuum in which the required showing of harm  
10 varies inversely with the required showing of meritoriousness."  
11 Id. (quoting San Diego Comm. Against Registration & the Draft v.  
12 Governing Bd. of Grossmont Union High Sch. Dist., 790 F.2d 1471,  
13 1473 n.3 (9th Cir. 1986)). The moving party ordinarily must show  
14 "a significant threat of irreparable injury," although there is "a  
15 sliding scale in which the required degree of irreparable harm  
16 increases as the probability of success decreases," United States  
17 v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174, 175 (9th Cir.  
18 1987), and vice versa. To overcome a weak showing of merit, a  
19 plaintiff seeking a preliminary injunction must make a very strong  
20 showing that the balance of hardships is in its favor. Rodeo  
21 Collection, 812 F.2d at 1217.

22 DISCUSSION

23 I. Probability of Success on the Merits

24 Plaintiff argues that there is a sufficient likelihood that it  
25 will succeed on the merits of three of its claims to support the  
26 grant of a preliminary injunction.

1 A. CFAA

2 Plaintiff first argues that it is likely to succeed on the  
3 merits of its claim under the CFAA, which creates liability for  
4 anybody who "intentionally accesses a computer without  
5 authorization or exceeds authorized access, and thereby obtains  
6 . . . information from any protected computer if the conduct  
7 involved an interstate or foreign communication." 18 U.S.C.  
8 § 1030(a)(2)(C). The CFAA further provides, "Any person who  
9 suffers damage or loss by reason of a violation of this section may  
10 maintain a civil action against the violator to obtain compensatory  
11 damages and injunctive relief or other equitable relief." Id.  
12 § 1030(g). For purposes of a civil action, the loss, including  
13 "any reasonable cost to any victim, including the cost of  
14 responding to an offense, conducting a damage assessment, and  
15 restoring the data, program, system, or information to its  
16 condition prior to the offense, and any revenue lost, cost  
17 incurred, or other consequential damages incurred because of  
18 interruption of service," must total at least \$5,000 in value.<sup>1</sup>  
19 Id. §§ 1030(a)(5)(B)(I); 1030(e)(11); 1030(g).

20 Plaintiff contends that it can prove that it suffered over  
21 \$5,000 in losses, citing the

22 analysis of which restricted environments had been  
23 accessed (to determine the extent of breach);  
24 collection and analysis of IP addresses accessing  
25 Plaintiff's network, to determine whether access was  
26 internal or hostile (to determine the appropriate  
27 response); and review of logs of documented users to

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28 <sup>1</sup>A civil action may also be maintained based on other types of  
damages not relevant to this case. See 18 U.S.C.  
§ 1020(a)(5)(B)(ii)-(v).

1 confirm conclusions.

2 Reply at 13. Plaintiff claims, "These reasonable responses took  
3 many hours of valuable time away from day-to-day responsibilities,  
4 causing losses well in excess of \$5,000." Id.

5 Defendant argues only that Plaintiff's CFAA claim will fail  
6 because Plaintiff's alleged cost of discovering the author of the  
7 presentation does not fit the definition of "loss" under the  
8 statute. Defendant cites Tyco International (U.S.) v. Does, 2003  
9 U.S. Dist. LEXIS 25136 (S.D.N.Y.), in support of its argument that  
10 the "cost of investigating and trying to locate the perpetrator is  
11 not included as a qualifying type of loss." Id. at \*8-9.

12 However, Tyco and the other cases upon which Defendant relies  
13 are neither controlling nor directly on point. In Tyco, the New  
14 York court addressed a CFAA claim against an individual who  
15 unsuccessfully attempted to damage Tyco's computers by sending  
16 spam. In that case, default entered against the defendant and Tyco  
17 argued that it was entitled to recover as damages the fees paid to  
18 its investigator to discover the identity of the unsuccessful  
19 spammer. The court acknowledged that "the CFAA allows recovery for  
20 losses beyond mere physical damage to property" but found that "the  
21 additional types of damages awarded by courts under the Act have  
22 generally been limited to those costs necessary to assess the  
23 damages caused to plaintiff's system or to resecure the system in  
24 the wake of a spamming attack." Id. at \*10.

25 However, in cases like this, where the offense involves  
26 unauthorized access and the use of protected information, the  
27 reasonable "cost of responding to [the] offense," 18 U.S.C.

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1 § 1030(a)(5)(B)(I), will be different from such cost in a case  
2 where the primary concern is the damage to the plaintiff's computer  
3 system itself. While discovering who caused the damage would be  
4 important to the plaintiff in a case such as Tyco to determine from  
5 whom it should seek relief, it is not essential to remedying or  
6 discovering the extent of the harm. In contrast, where the  
7 offender has actually accessed protected information, discovering  
8 who has that information and what information he or she has is  
9 essential to remedying the harm. In such cases courts have  
10 considered the cost of discovering the identity of the offender or  
11 the method by which the offender accessed the protected information  
12 to be part of the loss for purposes of the CFAA. See, e.g.,  
13 Shamrock Foods Co. v. Gast, 2008 U.S. Dist. LEXIS 15329, \*2-3  
14 (D. Ariz.) (finding that the cost the plaintiff incurred in  
15 conducting a forensic analysis of the defendant's computer was a  
16 loss where the defendant emailed the plaintiff's confidential  
17 information to himself before resigning from his position with the  
18 plaintiff).

19 The Court finds that Plaintiff has demonstrated a likelihood  
20 that it will prevail on its CFAA claim.

21 B. Trademark Infringement

22 Plaintiff also contends that it is likely to succeed on its  
23 trademark infringement claim, arguing that Defendant has used more  
24 of Plaintiff's trade name than necessary to criticize legitimately  
25 Plaintiff and its products and services. Defendant counters that,  
26 even if it has exceeded the nominative fair use to which it is  
27 entitled, it has only used Plaintiff's trademarks on internal  
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1 documents. Defendant further argues that, even if one of its  
2 employees distributed the presentation, Defendant would not be  
3 liable because any such action would be outside the scope of the  
4 individual's employment.

5 Defendant states, "At this stage, it cannot be disputed that  
6 the Presentation was intended for internal use at Softscape.  
7 Softscape did not distribute the Presentation to the public, and  
8 the disclosure of the Presentation was not authorized, ratified or  
9 condoned by Softscape."<sup>2</sup> Response at 11. However, as Plaintiff  
10 points out, whether or not Defendant authorized or condoned the  
11 distribution of the Presentation, it was distributed. Moreover,  
12 there is no evidence that anybody other than Defendant and its  
13 employees had access to the presentation. Therefore, based on the  
14 evidence currently available, and even accepting as true  
15 Defendant's position that it did not intend the presentation to be  
16 disseminated outside of the company, either Defendant or one of its  
17 employees must have distributed the presentation or provided the  
18 presentation to the individual who did so.

19 Defendant cites the Restatement of Agency § 7.03 in support of  
20 its position that even if the document were distributed by one of  
21 its employees, such distribution was unauthorized and therefore  
22 outside the scope of that individual's employment. However, as  
23 Plaintiff argues, the Restatement specifically states, "Conduct is  
24 not outside the scope of employment merely because an employee

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26 <sup>2</sup>It is notable that the only evidence Defendant provides in  
27 support of this contention is the declaration of its general  
28 counsel and emails regarding the confidentiality of the  
presentation sent by Defendant's CEO after this lawsuit was filed.

1 disregards the employer's instructions." Rest. (3d) Agency § 7.07  
2 cmt. c.

3 Even if Defendant did not intend to distribute the  
4 presentation containing Plaintiff's registered marks, the  
5 presentation was distributed and it is likely that Defendant can be  
6 held liable for any causes of action based on that distribution.  
7 Based on the evidence currently available, the Court finds that  
8 Plaintiff has established a likelihood of succeeding on the merits  
9 of its trademark infringement claim.

10 C. Lanham Act False Advertising Claim

11 Plaintiff next argues that it has established a likelihood of  
12 success on the merits of its Lanham Act false advertising claim.  
13 The Ninth Circuit has held that the elements of such a claim are:

14 (1) a false statement of fact by the defendant in a  
15 commercial advertisement about its own or another's  
16 product; (2) the statement actually deceived or has the  
17 tendency to deceive a substantial segment of its  
18 audience; (3) the deception is material, in that it is  
19 likely to influence the purchasing decision; (4) the  
20 defendant caused its false statement to enter interstate  
21 commerce; and (5) the plaintiff has been or is likely to  
22 be injured as a result of the false statement, either by  
23 direct diversion of sales from itself to defendant or by  
24 a lessening of the goodwill associated with its  
25 products.

26 Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th  
27 Cir. 1997).

28 Plaintiff argues that much of the information contained in the  
presentation is false or misleading, and provides declarations to  
support its arguments. The statements in the declarations  
submitted by Defendant are not sufficient to rebut Plaintiff's  
evidence.

1 In fact, Defendant does not argue directly that the statements  
2 are not false or misleading. Rather, Defendant argues that  
3 Plaintiff's false advertising claim fails because (1) Defendant did  
4 not use the presentation in commerce; (2) the presentation was not  
5 an advertisement; and (3) Defendant did not circulate the  
6 presentation in interstate commerce.

7 As Plaintiff notes, Defendant's argument that it did not use  
8 the presentation in commerce fails because Defendant admittedly  
9 continues to use information from the presentation in commerce. As  
10 described above, Defendant's CEO sent an email to Defendant's sales  
11 group instructing them to continue to use the information in the  
12 presentation "in competitive situations." Watkins Decl., Ex. A.  
13 Moreover, a press release posted on Defendant's website affirms the  
14 veracity of the information in the presentation. Defendant has  
15 emailed to its prospective customers a link to this press release.  
16 These acts are sufficient to establish that Defendant is continuing  
17 to represent the veracity of the contents of the presentation in  
18 commerce.

19 Defendant next argues that the presentation was not an  
20 advertisement. The Ninth Circuit has held that representations may  
21 be considered advertisements if they are

22 1) commercial speech; 2) by a defendant who is in  
23 commercial competition with plaintiff; 3) for the  
24 purpose of influencing consumers to buy defendant's  
25 goods or services. While the representations need  
26 not be made in a "classic advertising campaign," but  
27 may consist instead of more informal types of  
28 "promotion," the representations 4) must be  
disseminated sufficiently to the relevant purchasing  
public to constitute "advertising" or "promotion"  
within that industry.

1 Rice v. Fox Broad. Co., 330 F.3d 1170, 1181 (9th Cir. 2003)  
2 (quoting Coastal Abstract Serv. v. First Am. Title Ins. Co., 173  
3 F.3d 725, 735 (9th Cir. 1999)). Defendant asserts that Plaintiff's  
4 claim fails because the "speech," which it defines as "the  
5 circulation of the Presentation" was not conducted by Defendant.  
6 However, as discussed above, the evidence before the Court strongly  
7 suggests that Defendant can be held liable for any dissemination of  
8 the presentation. Moreover, Defendant's continuing affirmation of  
9 the veracity of the contents of the presentation constitutes  
10 ongoing speech.

11 Defendant's final argument, that it did not cause the  
12 presentation to enter interstate commerce, also relies on its  
13 assertion that it cannot be held liable for the dissemination of  
14 the presentation. Thus, this argument also fails. The Court finds  
15 that Plaintiff has demonstrated a fair likelihood of success on the  
16 merits of its Lanham Act false advertising claim. Because  
17 Defendant has not provided evidence that the statements in the  
18 presentation are true, the Court will enjoin Defendant from  
19 affirming the veracity of such statements to the extent that they  
20 purport to represent objective facts that can easily be proven true  
21 or false.

## 22 II. Likelihood of Irreparable Injury

23 Plaintiff argues that it has demonstrated a likelihood of  
24 irreparable injury because it will "continue to suffer immeasurable  
25 loss to its relationships with actual and prospective customers  
26 caused by the distribution of the Presentation if an injunction  
27 does not issue." Application for TRO at 8.

1 Defendant counters that Plaintiff has already suffered any  
2 harm stemming from the one-time distribution of the presentation.  
3 Defendant further argues that past conduct cannot alone suffice to  
4 establish the threat of irreparable injury. Finally, Defendant  
5 contends that its stated intent not to distribute the presentation  
6 in the future precludes the need for a preliminary injunction.  
7 However, as discussed above, Defendant has continued publicly to  
8 attest to the veracity of the material contained in the  
9 presentation. Moreover, there is no evidence that Defendant has  
10 publicly acknowledged that it, not Plaintiff's dissatisfied  
11 customers, created the presentation.

12 Based on the likelihood of success on Plaintiff's trademark  
13 infringement and false advertising claims discussed above, the  
14 Court grants in part Plaintiff's motion for a preliminary  
15 injunction.

16 III. Expedited Discovery

17 Plaintiff seeks expedited discovery with respect to two  
18 issues: how Defendant accessed the restricted portions of its  
19 computer system and which individuals were responsible for the  
20 creation and distribution of the presentation. As discussed at the  
21 hearing, by March 28, 2008, the parties were to have met and  
22 conferred along with their respective IT experts to determine a  
23 plan for preserving electronic evidence. Formal discovery may  
24 commence forthwith. In addition, the parties shall conduct their  
25 Federal Rule of Civil Procedure 26(f) conference on April 10, 2008  
26 to establish a mutually agreeable discovery plan. To the extent  
27 the parties are unable to agree, each party shall file a brief of  
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1 five pages or less stating its position on the disagreement by  
2 April 14, 2008.

3 CONCLUSION

4 The Court GRANTS in part Plaintiff's motion for a preliminary  
5 injunction. The injunction has entered as a separate order.  
6 Plaintiff's motion for expedited discovery is GRANTED in part.

7 IT IS SO ORDERED.

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9 Dated: 4/1/08



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10 CLAUDIA WILKEN  
11 United States District Judge

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**United States District Court**  
For the Northern District of California