

1 JOSEPH S. LEVENTHAL (221043)
2 joseph.leventhal@dinsmore.com
3 JOSHUA M. HEINLEIN (239236)
4 joshua.heinlein@dinsmore.com
5 DINSMORE & SHOHL LLP
6 655 West Broadway, Suite 840
7 San Diego, CA 92101
8 Ph: (619) 356-3518
9 Fx: (619) 615-2082

10 Attorneys for Plaintiff
11 UNDERGROUND ELEPHANT, INC.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 UNDERGROUND ELEPHANT,
12 INC., a California corporation,

13 Plaintiff,

14 v.

15 INSURANCE ZEBRA, INC., a
16 Delaware corporation,

17 Defendants.

Case No. '16CV2215 GPC NLS

COMPLAINT FOR:

- (1) **BREACH OF CONTRACT;**
- (2) **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING;**
- (3) **FRAUD;**
- (4) **NEGLIGENT MISREPRESENTATION;**
- (5) **VIOLATION OF CAL. BUS. & PROF. CODE § 17200, ET SEQ.;**
- (6) **MISAPPROPRIATION OF TRADE SECRETS; AND**
- (7) **DECLARATORY RELIEF**

1 Plaintiff UNDERGROUND ELEPHANT, INC. (“UE”) hereby alleges as
2 follows:

3 1. This action seeks to recover damages for defendant INSURANCE
4 ZEBRA, INC.’s (“Insurance Zebra”) deceitful and unfair business practices. In
5 2015, UE and Insurance Zebra entered into a contract whereby Insurance Zebra
6 promised to provide leads to UE and UE paid for those leads in exchange.
7 Recently, UE learned that the overwhelming majority of the leads provided by
8 Insurance Zebra were fraudulent; the leads were incentivized and do not comply
9 with the terms of the parties’ agreement or industry standards. Over the last 18
10 months, UE has paid Insurance Zebra nearly \$2.3 million and Insurance Zebra is
11 demanding that UE pay it an additional \$575,699 for thousands of other fraudulent
12 leads. Accordingly, UE is forced to file this action to recover the millions it has
13 already paid Insurance Zebra and to enjoin Insurance Zebra from engaging in
14 further fraudulent conduct.

15 **PARTIES**

16 2. UE is a corporation organized and existing under the laws of the State
17 of California, with its principal place of business in San Diego, California.

18 3. Defendant Insurance Zebra is a corporation organized and existing
19 under the laws of the State of Delaware with its principal place of business in
20 Austin, Texas. UE is informed and believes and on that basis alleges that Insurance
21 Zebra is not registered as a foreign corporation in the State of California.

22 **JURISDICTION AND VENUE**

23 4. The Court has jurisdiction over this claim under 28 U.S.C. § 1332
24 because there is complete diversity of citizenship between the parties and the
25 amount in controversy exceeds \$75,000. The Court also has jurisdiction over this
26 claim under 28 U.S.C. § 1331 because this action arises under a federal statute, 18
27 U.S.C. § 1836.


1 9. To maximize its revenues and use of the leads it collects, UE will
2 sometimes purchase leads from trusted third parties. Insurance Zebra was one of
3 those trusted third parties. In fact, on October 4, 2013, UE and Insurance Zebra
4 entered into a Marketing Agreement under which Insurance Zebra paid UE for
5 leads. Consistent with industry standards, the Marketing Agreement provided that
6 invalid leads include leads that are incentivized. An incentivized lead is a lead
7 generated from a contest or sweepstakes. For example, Publisher's Clearing House
8 ("PCH") is a well-known contest used to generate invalid leads. A consumer will
9 see an ad for PCH asking the customer to "click here" or "Enter Now!" to enter a
10 contest to win \$7,000 per week for life. A screen shot of a sample ad is below:



20 The customer will click on the ad and fill out a form with their contact information
21 to be entered into the contest:

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It's FREE - Enter Now
Simply submit this Official Registration form then continue on to enter by the deadline posted in the [Official Rules](#).

Title:
Select ▾

First Name: **Last Name:**

Street Address:

Zip Code:

Date of Birth:
Month ▾ Day ▾ Year ▾

Email:

Confirm Email:

Remember Me Gwy. No. 6900

11 This information will then be sent as a “lead” even though the consumer is not
12 interested in the product being sold; they simply want to enter the contest. For
13 these reasons, incentivized leads are rarely, if ever, converted into sales, and are
14 considered fraudulent or invalid leads.

15 **INSURANCE ZEBRA BEGINS PROVIDING LEADS TO UE**

16 10. Beginning in May 2015, UE and Insurance Zebra began discussing the
17 possibility of Insurance Zebra placing ads and selling leads to UE. During these
18 conversations, Insurance Zebra Chief Operating Officer (“COO”) Joshua Dziabiak
19 told UE that Insurance Zebra does not use incentivized ads to gather leads. Based
20 on this representation and others, UE entered into an agreement with Insurance
21 Zebra whereby UE agreed to purchase leads from Insurance Zebra at a price of
22 \$6.25 - \$8.00 per lead (“Agreement”). The initial price was set at \$6.50 per lead,
23 but the price per lead varies daily.

24 11. Since entering into the Agreement, UE has paid Insurance Zebra
25 approximately \$2.3 million and Insurance Zebra claims that UE owes it an
26 additional \$575,699 for the months of April-July, 2016 (“Outstanding Amount”).
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INSURANCE ZEBRA HIRES JESSIE MCDOWELL

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2 12. In March 2016, one of UE's account managers, Jessie McDowell,
3 resigned from her employment at UE. At the time of her resignation, Ms.
4 McDowell had been employed by UE for three years and had been promoted more
5 than once. At the time she originally applied to work for UE, Ms. McDowell
6 signed a confidentiality agreement, a true and correct copy of which is attached
7 hereto as Exhibit A.

8 13. Upon being hired, Ms. McDowell signed an Employee Confidential
9 Information and Invention Assignment Agreement ("ECIIA"), a true and correct
10 copy of which is attached hereto as Exhibit B. By agreeing to both the
11 confidentiality agreement and the ECIIA, Ms. McDowell agreed to keep "in
12 strictest confidence" all UE confidential information, which includes trade secret
13 information.

14 14. On March 17, 2016, Ms. McDowell resigned from UE. At the time
15 she resigned, Ms. McDowell executed a Separation Agreement, a true and correct
16 copy of which is attached hereto as Exhibit C. In the Separation Agreement, Ms.
17 McDowell acknowledged that she had received UE confidential information,
18 including trade secret information, and promised not to use or disclose that
19 information to third parties.

20 15. After resigning from UE, Ms. McDowell went to work for Insurance
21 Zebra. On information and belief, Ms. McDowell disclosed UE trade secret
22 information to Insurance Zebra and Insurance Zebra is using that trade secret
23 information for its own benefit.

UE DISCOVERS INSURANCE ZEBRA IS PROVIDING FRAUDULENT LEADS

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25 16. After entering into the Agreement, UE received several complaints
26 from its clients that the leads UE provided to its clients that originated from
27 Insurance Zebra were incentivized. For example, on April 20, 2016, UE sent
28 Insurance Zebra COO Dzabiak an email stating: "I just received a call compliant

1 from one of our clients regarding a lead that was generated off the Zebra site. By
2 the sound of the call it appears the consumer was filling out a sweepstakes for 7k a
3 week for life. Does Zebra use incentivized means to gain traffic?” That same day,
4 Dzabiak responded: “We do not use incentivized ads to drive traffic to our site.”

5 17. Similarly, on July 14, 2016, UE sent an email to Dzabiak and new
6 Insurance Zebra Vice President of Strategic Partnerships (and former UE
7 employee) Jessie McDowell stating: “I just got two back-to-back quality complaints
8 from leads generated from the zebra placement. Both were complaining that the
9 leads said they filled out the form to win prizes. Can you confirm that your traffic
10 is not incentivized?” Similar to Dzabiak’s statement less than three months prior,
11 McDowell responded that same day stating: “Our traffic is not incentivized.”

12 18. Subsequent to these communications, UE investigated the source of
13 Insurance Zebra’s leads using third party reports. UE was shocked by what it
14 discovered: 68% of the leads generated by Insurance Zebra were incentivized! UE
15 is in possession of numerous recorded phone calls with consumers that were
16 “leads” provided by Insurance Zebra during which the consumers reported that they
17 were not interested in the product being offered; they just filled out the form to
18 enter the contest being advertised.

19 19. In addition to the funds it has already paid Insurance Zebra, UE’s
20 goodwill and reputation in the industry has been damaged because UE has provided
21 the fraudulent leads sold by Insurance Zebra to UE’s clients. This has damaged
22 UE’s relationship with its clients and has caused some of UE’s clients to reduce the
23 amount of business they do with UE and in some cases stop doing business with
24 UE altogether.

25 20. UE promptly reported its findings to Dzabiak, demanded a refund of
26 the \$2.3 million it has already paid, and demanded a cancellation of the Outstanding
27 Amount Insurance Zebra claims UE currently owes. Dzabiak again denied
28 providing incentivized leads and rejected UE’s demands. On August 30, 2016,

1 Insurance Zebra again demanded payment of the Outstanding Amount from UE for
2 the months of April-July, 2016. Accordingly, UE was forced to file this lawsuit.

3 **FIRST CLAIM FOR RELIEF**

4 **BREACH OF CONTRACT**

5 **(Against All Defendants)**

6 21. UE hereby realleges and incorporates by reference the paragraphs
7 above as though fully set forth herein.

8 22. In 2015, UE and Insurance Zebra entered into the Agreement.

9 23. UE has performed all of the terms and conditions required to be
10 performed under the Agreement and/or is otherwise excused from performance
11 because of the conduct of Defendants or others.

12 24. UE is informed and believes and based thereon alleges that Insurance
13 Zebra breached the Agreement as a result of the conduct alleged herein including,
14 but not limited to, providing UE with thousands of incentivized leads.

15 25. As a direct and proximate result of Insurance Zebra's breaches of the
16 Agreement, UE has been damaged in an amount to be determined at trial, but in no
17 event less than \$2,300,000.

18 **SECOND CLAIM FOR RELIEF**

19 **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

20 **(Against All Defendants)**

21 26. UE hereby realleges and incorporates by reference the paragraphs
22 above as though fully set forth herein.

23 27. Under the Agreement, Insurance Zebra agreed to sell valid leads to
24 UE.

25 28. The Agreement contains an implied covenant of good faith and fair
26 dealing that obligated Insurance Zebra to perform the terms and conditions of the
27 Agreement fairly and in good faith and to refrain from doing any act that would
28 prevent or impede UE from receiving the benefits of the Agreement.

1 29. UE has performed all of the terms and conditions required to be
2 performed under the Agreement and/or is otherwise excused from performance
3 because of the conduct of Insurance Zebra or others.

4 30. By providing UE with thousands of incentivized leads, Insurance
5 Zebra unfairly interfered with UE's right to receive the benefits of the Agreement.
6 Also, by deploying its services in a manner materially different from the way in
7 which it was represented to UE, Insurance Zebra unfairly interfered with UE's right
8 to receive the benefits of the Agreement.

9 31. As a direct and proximate result of Insurance Zebra's conduct as
10 alleged herein, UE has been damaged in an amount to be determined at trial, but in
11 no event less than \$2,300,000.

12 **THIRD CLAIM FOR RELIEF**

13 **FRAUD**

14 **(Against All Defendants)**

15 32. UE hereby realleges and incorporates by reference the paragraphs
16 above as though fully set forth herein.

17 33. Prior to and at the time of entering into the Agreement, Insurance
18 Zebra represented to UE that it did not use incentivized leads. Insurance Zebra
19 repeated these assertions after entering into the Agreement and after UE raised
20 questions about the quality of Insurance Zebra's leads.

21 34. When Insurance Zebra made these representations, it knew them to be
22 false.

23 35. Insurance Zebra made these representations with the intent to induce
24 UE to enter into the Agreement, and in reliance upon those promises, UE entered
25 into the Agreement with Insurance Zebra and continued to abide by the Agreement.
26 Insurance Zebra made these subsequent representations with the intent to obtain
27 substantially more revenue from UE than it otherwise would have.
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FIFTH CLAIM FOR RELIEF

VIOLATION OF CAL. BUS. & PROF. CODE § 17200, ET SEQ.

(Against All Defendants)

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4 43. UE hereby realleges and incorporates by reference the paragraphs
5 above as though fully set forth herein.

6 44. The acts of Insurance Zebra as alleged above constitute a pattern
7 and/or course of conduct which is unlawful and/or unfair and therefore constitutes
8 an unfair business practice in violation of California Business and Professions Code
9 Section 17200 et seq. Such acts and omissions further constitute unfair competition
10 under California statutory and common laws.

11 45. Under the terms of Business and Professions Code section 17200, et
12 seq., any business practice that violates a civil, criminal, state, federal, municipal, or
13 court-made law is actionable as unfair competition. In addition, any business
14 practice that offends an established public policy or is immoral, unethical,
15 oppressive, unscrupulous, or is substantially injurious to consumers is actionable as
16 unfair competition.

17 46. Section 17200 creates a statutory basis upon which a lawsuit may be
18 brought to obtain an injunction or other equitable relief where there has been an act
19 involving “unfair competition.” The term “unfair competition” as defined by
20 section 17200 includes any unlawful, unfair, or fraudulent business act or practice
21 and any unfair, deceptive, untrue, or misleading advertising.

22 47. Insurance Zebra has engaged in and/or is continuing to engage in acts
23 and/or practices of unfair competition and/or unlawful, unjust, or unfair business
24 practices.

25 48. UE has sued to remedy the unfairly competitive acts and unfair
26 business practices noted above that were and continue to be undertaken by
27 Insurance Zebra. In addition to other remedies, UE is entitled to temporary,
28 preliminary and permanent injunctive relief under California Business and

1 Professions Code section 17203 to enjoin and to restrain Insurance Zebra from
2 engaging in unlawful, unfair, or deceptive business practices and unfair competition
3 including an order restraining, enjoining, and prohibiting Insurance Zebra, its
4 agents, servants, employees, and all persons acting under, for, and/or in concert
5 with them from engaging in the improper, unlawful, and deceptive acts of unfair
6 competition noted above.

7 49. Plaintiff UE also seeks restitution, including disgorgement of
8 Insurance Zebra's profits, under California Business and Professions Code section
9 17203.

10 **SIXTH CLAIM FOR RELIEF**

11 **MISAPPROPRIATION OF TRADE SECRETS**

12 **(Against All Defendants)**

13 50. UE hereby realleges and incorporates by reference the paragraphs
14 above as though fully set forth herein.

15 51. UE has spent significant resources developing its processes and
16 technology. UE's processes, technology and related data are trade secrets of UE as
17 such information has an independent economic value because they are not generally
18 known to the public or to other persons who could obtain economic value from its
19 disclosure or use. UE takes reasonable steps to safeguard the secrecy of such
20 information including, but not limited to, requiring employees to sign non-
21 disclosure agreements, implementing password protections on electronic files,
22 implementing firewalls to shield its data, requiring keycard access to its premises,
23 and limiting access rights to its confidential, proprietary and trade secret
24 information based on an employee's role with the company.

25 52. UE is informed and believes that Insurance Zebra has obtained UE's
26 trades secrets by improper means such as through apparent theft and/or in breach of
27 Ms. McDowell's obligations under the confidentiality agreements she entered into
28 with UE.

1 Outstanding Amount and is entitled to a refund of the \$2.3 million it already paid
2 Insurance Zebra.

3 61. UE desires a judicial determination of its rights to the Outstanding
4 Amount and the \$2.3 million it previously paid, and a declaration that it is entitled
5 to retain the entirety of the Outstanding Amount and a refund of the \$2.3 million it
6 previously paid Insurance Zebra.

7 62. A judicial declaration is necessary and appropriate at this time under
8 the circumstances in order that the parties may ascertain their rights to the above-
9 referenced funds.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, UE prays for judgment against Insurance Zebra as follows:

12 1. For an award of general and special damages according to proof, but in
13 an amount of not less than \$2.3 million;

14 2. For restitution, including an award of Insurance Zebra's profits;

15 3. For punitive damages in an amount sufficient to deter future willful
16 misconduct by Insurance Zebra;

17 4. For injunctive relief preventing Insurance Zebra from engaging in the
18 conduct alleged herein, including preventing Insurance Zebra from using UE's
19 trade secrets and mandating that all such trade secrets be returned to UE and/or
20 destroyed;

21 5. For a declaration of the parties' rights to the Outstanding Amount and
22 the amounts UE previously paid Insurance Zebra;

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