

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

KIPU SYSTEMS LLC,
a Florida limited liability company,

Case No.1:17-cv-24733-KMW-EGT

Plaintiff,

v.

ZENCHARTS LLC, a Florida limited liability company, ZEN MEDICAL, LLC, an administratively dissolved Florida limited liability company, SOLUTIONS RECOVERY CENTER, LLC, a Florida limited liability company, SOLUTIONS RECOVERY, LLC, an administratively dissolved Florida limited liability company, WEBSITE CONSULTANTS INC., a Florida corporation, CALLAHAN HOLDINGS, INC., an administratively dissolved Florida corporation, RICHARD 'RICK' GLASER, an individual, KEITH HOUILHAN a/k/a KEITH HOOTIE, an individual, SEAN CALLAHAN, an individual, DANIEL J. CALLAHAN, an individual, SEAMUS CALLAHAN, an individual, YANKO KARKALICHEV, an individual, and ANTON ALADZHOV, an individual,

Defendants.

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Plaintiff Kipu Systems, LLC's Motion for Preliminary Injunction

Plaintiff, KIPU SYSTEMS LLC (“Kipu” or the “Plaintiff”), moves for preliminary injunction under Federal Rule 65 against Defendants, ZENCHARTS LLC (“ZenCharts”), ZEN MEDICAL, LLC (“Zen Medical”), SOLUTIONS RECOVERY CENTER, LLC (“Solutions Recovery”), SOLUTIONS RECOVERY LLC (“SRL”), WEBSITE CONSULTANTS INC. (“Website Consultants”), CALLAHAN HOLDINGS, INC. (“Callahan Holdings”), RICHARD ‘RICK’ GLASER (“Glaser”), KEITH HOULIHAN a/k/a KEITH HOOTIE (“Houlihan”), SEAN CALLAHAN (“Sean Callahan”), DANIEL J. CALLAHAN (“Dan Callahan”), SEAMUS CALLAHAN (“Seamus Callahan”), YANKO KARKALICHEV (“Karkalichev”), and ANTON ALADZHOV (“Aladzhov”) (ZenCharts, Zen Medical, Solutions Recovery, SRL, Website Consultants, Callahan Holdings, Glaser, Houlihan, Sean Callahan, Dan Callahan, Seamus Callahan, Karkalichev, and Aladzhov are collectively referred to as the “Defendants”) for: (a) Violations of Florida’s Computer Abuse and Data Recovery Act (Fla. Stat. § 668.801 *et al*); (b) Counterfeiting of a Registered Trademark (15 U.S.C. § 1116(d)(1)); (c) Willful Infringement of a Registered Trademark (15 U.S.C. § 1114(1)); (d) Federal Unfair Competition (15 U.S.C. § 1125(a)); (e) Violations of the Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. § 501.201 *et al*); and (f) Violations of the Defend Trade Secrets Act of 2016 (18 U.S.C. § 1836(b) *et al*).

In support of its Motion for Preliminary Injunction, Kipu states as follows:

I. INTRODUCTION AND BACKGROUND

Defendants engaged in an extensive and well-orchestrated fraudulent scheme to steal Kipu’s valuable trade secrets and intellectual property. These actions were taken to misappropriate Kipu’s industry-leading, proprietary electronic medical records (EMR) software called the “Kipu EMR System”¹ and develop copycat software, called “ZenCharts,” to unfairly compete with Kipu.

¹ “EMR” refers to electronic medical record. While ZenCharts attempts to disguise its infringement by referring to its system as an “EHR” (electronic health record) the terms are synonymous and interchangeable.

After thousands of hours (culminating in millions of dollars) spent on industry specific research, system design, software programming, and related development, Kipu created the Kipu EMR System – a first of its kind, unique, cloud-based EMR system that improves addiction patient care through the innovative use of technology. Prior to the revolutionary Kipu EMR System, no such cloud-based EMR technology was available in the addiction treatment industry.

The Kipu EMR System automates substance abuse treatment by enabling addiction treatment centers to deliver improved quality care for patients suffering from drug and alcohol addiction. Kipu’s advanced EMR System automates the entire episode of care including detoxification, residential treatment, intensive outpatient treatment, as well as aftercare. The innovative technology eliminates paper medical forms, helping clinicians better treat patients by automating assessments, diagnosis, history and physicals as well as creating treatment plans.

Examples of such trade secrets include:

- The OTO® (One Time Only) Program: a proprietary algorithm for assisting in treating patients by identifying disruptive patients that negatively impact other patients’ recovery;
- The “Urgent Issue” feature, which easy laboratory ordering interface and related functionality; and
- The “Golden Thread” feature, which connects the entire patient treatment process.

In short, the Kipu EMR System allows clinicians to deliver better overall patient care by increasing productivity.

One of the many unique and proprietary programs within the Kipu EMR System is the aforementioned “One Time Only” algorithm, which is extensively marketed and promoted under the distinctive trade name OTO® and protected by United States Trademark Registration No. 5,127,508 (the “OTO Mark”). Clinicians in the drug and alcohol treatment industry have come to recognize and associate the OTO Program as an identifiable and beneficial protocol found in the Kipu EMR System.

ZenCharts (as well as its predecessor in interest Zen Medical) have adopted without authorization and are now using the OTO Mark on the same exact EMR related services, to drug and alcohol addiction treatment centers which previously licensed or would otherwise license the Kipu EMR Software.

A. Defendants' Illicit Scheme and Unauthorized Access

Dan Callahan (owner of Coconut Creek, Florida-based Solutions Recovery) hatched a plan with his son, Sean Callahan, and Glaser, the owners of Website Consultants (a software development and programming company). The plan was simple: first, approach Kipu under the false pretense that Dan Callahan's drug treatment center, Solutions Recovery, was interested in purchasing a license to use the Kipu EMR System; second, gain access to the Kipu EMR System; and last, create a copycat EMR product without having to spend millions of dollars (and thousands of hours) in order to develop the software.

The three would then engage Website Consultants' various international programmers – including Bulgarian-based Karkalichev and Aladzhov – to assist in their conspiracy to steal Kipu's trade secrets through improper logins to the Kipu EMR System.

In or about August 2013, Glaser and Sean Callahan were added as managing members to Solutions Recovery's publicly available corporate documents with the State of Florida. This deception served to legitimize all of Glaser and Sean Callahan's inquiries to Kipu through Solutions Recovery. However, Kipu was never made aware that Sean Callahan and Glaser were also the owners of an enterprise level software development company, Website Consultants.

A week after Kipu provided an in-person demonstration of the Kipu EMR System to Dan Callahan, Sean Callahan, and Glaser at Solutions Recovery, Solutions Recovery entered into a software license agreement with Kipu. This license agreement expressly stated that use of the Kipu EMR System was subject to Kipu's Terms of Service ("TOS"), which users acknowledge and accept each time they access the Kipu EMR System. The TOS specifically stated how the

“[s]tructure, organization, flows, processes, and source code of the Service (collectively, “Intellectual Property”) are the valuable trade secrets and confidential information of Kipu Systems, LLC.” Kipu’s TOS also identified that users were “authorized only to use the Service for *legitimate business purposes in relation to site-level administration of its facility.*” (emphasis added). Additionally, the TOS further prohibited users to:

reverse engineer, decompile, disassemble, or otherwise attempt to discover or reduce to human readable form the source code of the Service [nor could users] access the service for the purposes of copying the flow, process, or any other Intellectual Property belonging to Kipu Systems for the purposes of incorporating any such Intellectual Property into a competitive product.

After entering into the software licensing agreement with Kipu, Solutions Recovery received three “Super Admin” login credentials, and unbeknownst to Kipu, from October 10, 2013 until January 16, 2014, Dan Callahan, Sean Callahan and Glaser, with Website Consultants’ international programmers, engaged in a targeted mission to log into the Kipu EMR System an astonishing amount of times – *over 150 in total* – to review the architecture, functionality, process, flows, capabilities and advancements Kipu had developed.

On or about November 19, 2013, when it came time for Solutions Recovery to pay Kipu for the implementation of the Kipu EMR System, Solutions Recovery flatly stated that it would not be using the Kipu EMR System, and needed to pause the service and any bills relating to its use.

Despite this representation, on December 2, 2013, Solutions Recovery granted Karkalichev “Super Admin” credentials (through use of the email address yanko@solutionsrehab.com) to access the Kipu EMR System (the “Karkalichev Account”). From December 2, 2013 to January 16, 2014, Karkalichev used the “Super Admin” account to access the Kipu EMR System *fifty-six times*. Solutions Recovery never disclosed that Karkalichev was a software engineer working in Bulgaria, the “Silicon Valley of Eastern Europe”, for Sean Callahan and Glaser’s company, Website Consultants.

In fact, Karkalichev was not the only individual that continued to log into the Kipu EMR System for illicit purposes. Sean Callahan's last login was on January 19, 2014, and Glaser's last login was on January 15, 2014. Both came well after Solutions Recovery represented that it was no longer using the Kipu EMR System.

Kipu terminated Solution Recovery's access rights to the Kipu EMR System for nonpayment on January 19, 2014. After termination, in late January 2014, Karkalichev orchestrated three unauthorized attempts to improperly access the Kipu EMR System through a back-door via Solutions Recovery's root and sub-level URLs. Kipu's security systems thwarted these attempts without knowing their source. It was later discovered that these attempts emanated from Bulgaria.

Notably, in the approximate 100 days during which the Kipu EMR System was active at Solutions Recovery, its clinical director, Matthew Rosen, *only logged into the Kipu System once, and for less than a single minute*. It is highly unusual that a clinical director would not have the most logins of any user of the Kipu EMR System.

B. Defendants' Launch of Copy-Cat EMR System and Use of Kipu's Trademark

In January 2015, ZenCharts launched its copycat EMR system, (the "ZenCharts System"). Notably, ZenCharts brazenly misappropriated Kipu's OTO® program – calling its copy-cat system the "OTO option" – a counterfeit and willful infringement of Kipu's registered OTO Mark. As ZenCharts uses Kipu's exact registered mark – OTO – ZenCharts (as well as its predecessor in interest Zen Medical) created a "counterfeit mark" as defined by 15 U.S.C. 1116(d). This confusingly similar indicia and use of the term "OTO option" with related visual representations risks consumer confusion. In addition, it provides and/or suggests that ZenCharts is authorized and/or licensed to use the Kipu EMR System's OTO® Mark.

C. Defendants' Unauthorized Access and Misappropriation of Kipu's 2015 Updates

ZenCharts' initial launch of the ZenCharts System was only based on the information Defendants were able to access and misappropriate from the Solutions Recovery Kipu account and

did not include the numerous advancements Kipu incorporated into the Kipu EMR System through the remainder of 2014 and through 2015. Defendants' recognized the ZenCharts System was inferior to the Kipu EMR System and that further illicit access was needed to obtain Kipu's unique updates. Having already exhausted their use of Solutions Recovery, Defendants resorted to creating dummy accounts through other Kipu client accounts.

From September 10, 2015 to early October 2015 Sean Callahan created a user name ("scallahan"), which was registered to a third party Kipu client. The scallahan account was used to access real patient health information without the patients' knowledge or consent. Once Kipu discovered the "scallahan" account, Kipu checked the IP address through which the access was made. Incredibly, the IP address emanated from Bulgaria. However, the IP address was not merely located in Bulgaria, *it was the exact IP address previously used to attempt to access the Kipu EMR System through Solutions Recovery's root and sub-level URLs.* The scallahan account logged into the Kipu EMR System from the same Bulgarian IP address some *20 times* and spent a total of seven hours in the Kipu EMR System.

The reason for the September - October 2015 unauthorized access is clear. After developing a copycat system in 2013-2014, ZenCharts needed to study and replicate new functionalities, technical improvements, and updates Kipu programmed into the Kipu EMR System – all of which was borne from significant investment and development. The Defendants' unauthorized access not only constitutes a misappropriation of Kipu's valuable trade secrets and a violation of Florida's Computer Abuse and Data Recovery Act (CADRA), but allowed unfettered access into hundreds of real patient medical records.

The Defendants improperly used and employed the Kipu EMR System in an unauthorized manner that violated the Kipu TOS, as the Defendants' unauthorized access did not have a legitimate business purpose related to the site-level administration of an addiction treatment center.

II. LIKELIHOOD OF SUCCESS ON THE MERITS

Kipu is entitled to injunctive relief under its CADRA claim, trademark infringement

claims, and Federal trade secrets misappropriation claim and is likely to succeed on the merits of each claim, which are discussed in turn below.

A. Computer Abuse and Data Recover Act (CADRA)

Kipu is entitled to seek injunctive relief under CADRA to prevent the Defendants' future unauthorized access to the Kipu EMR System. Fla. Stat. § 668.804(1)(c). The purpose of CADRA is to safeguard information stored on protected computers in the operation of a business from unauthorized access and “shall be construed liberally.” *Id.* § 668.801(2).

CADRA prohibits persons from knowingly and with intent to cause harm or loss from obtaining information from a protected computer without authorization or trafficking in any technological access barrier through which access to a protected computer may be obtained without authorization. Fla. Stat. § 668.803.²

The Kipu EMR System operates through servers that meet the definition of “Computer” and “Protected Computer” because the Kipu EMR System servers are high speed data processing devices that perform logical and storage functions. Further the Kipu EMR System servers require users to enter a user name and password (a technological access barrier) to access the Kipu EMR System. Kipu’s use of user names and passwords is sufficient to effectively control access to Kipu’s protected computer because the user names and passwords are individually created and not publicly available information.

² A technological access barrier is defined as “a password, security code, token, key fob, access device, or similar measure.” *Id.* § 688.802(7).

A computer is defined as “an electronic, magnetic, optical, electrochemical, or other high-speed data processing device that performs logical, arithmetic, or storage functions and includes any data storage facility, data storage device, or communications facility directly related to, or operating in conjunction with, the device.” *Id.* § 688.802(3).

A protected computer is defined as “a computer that is used in connection with the operation of a business and stores information, programs, or code in connection with the operation of the business in which the stored information, programs, or code can be accessed only by employing a technological access barrier.” *Id.* § 688.802(6).

CADRA further defines “traffic” as “means to sell, purchase, or deliver.” *Id.* § 688.802(8)

1. *Defendants' Access Without Authorization*

Defendants' access to the Kipu EMR System constituted unauthorized access to Kipu's protected computers because such access exceeded the scope of authorized use as defined in the Kipu TOS. D.E. 1-3 (2014 TOS). The Kipu TOS only permitted users to "grant access to a Third-Party to serve the legitimate, site-level administration business needs of its Facility, in accordance with HIPPA requirements." *Id.* Thus, because Sean Callahan (and the Bulgarian based programmers who also used the scallahan user name), were not employees of the third-party Kipu client or performing site-level administration for the third-party Kipu client, their access to the Kipu EMR System was not authorized within the meaning of CADRA. *See*, § 668.801(9) ("Without authorization' means access to a protected computer by a person who is not an authorized user").

2. *Trafficking of Technological Access Barriers*

Defendants also trafficked Kipu's technological access barriers in that Defendants delivered Kipu user names and passwords to individuals that were not authorized to access Kipu's protected computers – namely Website Consultants' Bulgarian based programmers. Further, if any of the Defendants obtained login credentials to the Kipu EMR System and provided those credentials to any other person, defendant or not, such disclosure would be a trafficking of a technological access that could be used to obtain access to Kipu's protected cloud-based servers without authorization.

3. *Kipu's Harm and/or Loss*

As a result of Defendants' unauthorized access, and the unauthorized access of those who received trafficked Kipu user names and passwords, Defendants operated with knowledge and intent to cause harm or loss to Kipu. Defendants' intent is evidenced by the numerous and repeated attempts to gain unauthorized access to the Kipu EMR System. These known attempts include the clandestine operation through Solutions Recovery, back-door access attempts to sub URLs for the Solutions Recovery buildout after access rights had been terminated, and subsequent use of user names and passwords through third-party Kipu clients.

Kipu's harm includes Defendants' access to Kipu's EMR System software and the proprietary information contained therein, which Defendants' then used to develop the copy-cat ZenCharts System. Kipu's loss also includes lost profits from addiction recovery centers that would have signed up for Kipu's services because Kipu was the only EMR product for addiction treatment prior to the copy-cat ZenCharts System, existing clients that switched to the ZenCharts System, and the estimated \$787,520 in profits Defendants earned from the ZenCharts System in 2016 alone.

B. Trademark Infringement

Kipu's claims for counterfeiting (Count VIII, 15 U.S.C. § 1114(1)), infringement of registered trademark (Count IX, 15 U.S.C. § 1114(1)), and Federal unfair competition (Count X, 15 U.S.C. § 1125(a)), all derive from the Lanham Act and involve the same general issues: 1) whether Kipu possess valid rights in the OTO Mark, 2) whether Defendants have adopted Kipu's mark or a similar iteration thereof, and 3) whether consumers are likely to be confused by Defendants' use of Kipu's mark.³ Accordingly, it is appropriate to consider the issues pertaining thereto as a cohesive unit. *See, Case Dimitri Corp v. Invicta Watch Co. of Am.*, 2017 U.S. Dist. LEXIS 151082, at * 28-29 (S.D. Fla. Sept. 15, 2017) ("The same set of facts enabling [a plaintiff] to prevail under Section 1114(1)(a) will result in recovery pursuant to Section 1125 . . . because 1125(a) is broader than Section 1114 in that it covers false advertising or description whether or not it involves trademark infringement") (*quoting Babbit Elec., Inc. v. Dynascan Corp.*, 38 F.3d 1161, 1181 (11th Cir. 1993)). Moreover, the "same facts support a cause of action for unfair

³ For its trademark infringement and counterfeiting claims, Kipu must show "(1) that it had prior rights to the mark at issue and (2) that the defendant had adopted a mark or name that was the same, or confusingly similar to its mark, such that consumers were likely to confuse the two." *Chanel, Inc. v. Chanel255.org*, 2012 U.S. Dist. LEXIS 73894, at *9 (S.D. Fla. May 29, 2012) (*quoting Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1193 (11th Cir. 2001) (internal citation omitted)).

Kipu must prove three elements to be successful for its Federal unfair competition and FDUTPA claim: 1) that Kipu possesses valid mark or name, 2) Defendants have used the mark or name in commerce in connection with the sale or advertisement of goods, and 3) that consumers are likely to be confused by use of the name or mark. *Knights Armament Co. v. Optical Sys. Tech., Inc.*, 647 F. Supp. 2d 1321, 1328 (M.D. Fla. 2009).

competition as for trademark infringement; if there is no genuine issue of fact as to trademark infringement, there is none as to unfair competition, either.” *Chanel, Inc. v. Italian Activewear, of Fla. Inc.*, 931 F.2d 1472, 1475 n.3 (11th Cir. 1991).

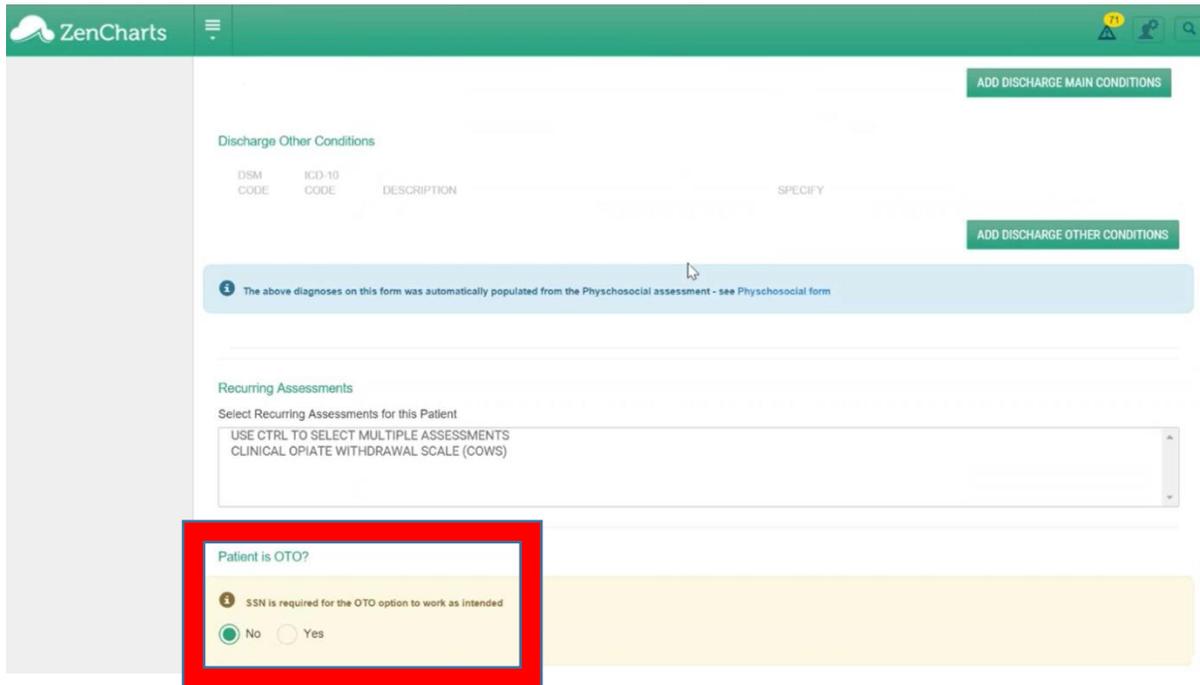
Likewise, Kipu’s FDUTPA claim (Count XII) involves the same issues and the same analysis as under the Lanham Act. *See, Suntime Techs, Inc. v. Ecosense Int’l, Inc.* 802 F. Supp. 2d 1273, 1279 (M.D. Fla. 2011) (a FDUTPA claim based on infringement rises and falls on the success of the trade mark claim). Thus, Kipu’s claims for counterfeiting, trademark infringement, Federal unfair competition, and FDUTPA should be analyzed concurrently to confirm the substantial likelihood that Kipu will succeed on the merits.

1. Kipu has Enforceable Rights to its Registered Trademark

"Section 43(a) of the Lanham Act forbids unfair trade practices involving infringement of trade dress, service marks, or trademarks, even in the absence of federal trademark registration." *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1193 (11th Cir. 2001). Here Kipu’s OTO Mark has been registered since January 24, 2017 and trademark registrations are presumed valid. D.E. 1-1 (trademark registration and prosecution history); 15 U.S.C. § 1057(b) (a trademark registration is “prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate”). Accordingly, Kipu has enforceable trademark rights in the OTO Mark for “non-downloadable due diligence patient admission check/flag feature of a web application for storage and management of electronic health records, document management, forms processing, custom coding, billing, workflow, business management, and facility operations for addiction treatment facilities and other healthcare related facilities;” satisfying the first prong requiring enforceable rights for its trademark infringement, counterfeiting, Federal unfair competition, and FDUTPA claims.

2. *Defendants Have Adopted Kipu’s OTO Mark in Commerce*

Defendants have sold and offered for sale access rights to the ZenCharts System, which incorporates Kipu’s OTO Mark:



3. *Defendants’ Mark is Likely to Cause Consumer Confusion*

The Eleventh Circuit’s likelihood of confusion analysis examines seven factors: 1) strength of the infringed mark; 2) similarity of the infringed and infringing marks; 3) similarity of the goods and services; 4) similarity of trade channels and customers; 5) similarity of advertising media used by the parties; 6) intent of the infringer; and, 7) instances of actual confusion. *Tana v. Dantanna’s*, 611 F.3d 767, 774-75 (11th Cir. 2010). The Eleventh Circuit stresses that "application of the [seven] factors entails more than the mechanistic summation of the number of factors on each side; it involves an evaluation of the 'overall balance.'" *Custom Mft. & Eng/g, Inc. v. Midway Servs. Inc.*, 508, F.3d 641, 649 (11th Cir. 2007). However, the most important factors are the strength of the mark and the presence of actual confusion. *Frehling Enters., Inc. v. Int'l Select Grp., Inc.*, 192 F.3d 1330, 1335 (11th Cir. 1999). As shown below, the factors in the likelihood of confusion

analysis weigh heavily in Kipu's favor, which is indicative of Kipu's meritorious claims and the substantial likelihood Kipu will prevail in this action.

a) Strength of the Mark

In determining the strength of a mark, the Court weighs three factors: (1) the distinctiveness of the mark; (2) whether the mark has been declared as "incontestable" under 15 U.S.C. § 1065(3); and (3) the extent of third-party use of the mark. *Eli Research, LLC v. Must Have Info Inc.*, 2015 U.S. Dist. LEXIS 136149, at *11 (M.D. Fla. Oct. 6, 2015).

When determining whether a particular mark is suggestive or descriptive, courts have used the "imagination test" and the "competitor use" test. *Gulf Coast Commercial Corp. v. Gordon River Hotel Assocs.*, Case No. 2:05-564-FtM-33SPC, 2006 U.S. Dist. LEXIS 30492, 2006 WL 1382072, at *4 (M.D. Fla. May 18, 2006). The "imagination test" asks whether a "customer who observes the term can readily perceive the nature of plaintiff's services, without having to exercise his imagination." *Id.* (quoting *Investacorp, Inc. v. Arabian Inv. Banking Corp.*, 931 F.2d 1519, 1524 (11th Cir. 1991)). If no imagination is needed, the term is considered merely descriptive. *Id.* The "competitor use" test asks "whether competitors would be likely to need the terms used in the trademark in describing their products." *Homes & Land Affiliates*, 598 F.Supp.2d at 1259 (citing *Vision Center*, 596 F.2d at 116 (citation and internal quotation omitted)). *Id.* at *12-13.

Kipu's OTO Mark is a strong mark and inherently distinctive because "OTO" has no association with cloud-based patient admissions features in the addiction treatment industry. *See, Coach House Restaurant, Inc. v. Coach & Six Restaurants, Inc.*, 934 F.2d 1551, 1560 (11th Cir. 1991) ("arbitrary" or "fanciful" marks bear no relationship at all to the product or service, and thus, are inherently distinctive). As a fall back, the OTO Mark is a suggestive mark, which also renders it inherently distinctive. *Id.* Based on the imagination test above, a customer could not readily perceive the nature of the goods and services Kipu offers under the OTO Mark without having to utilize their imagination. Upon viewing the OTO Mark one does not immediately think of a "non-downloadable due diligence patient admission check/flag feature of a web application for storage and management of electronic health records, document management, forms processing, custom

coding, billing, workflow, business management, and facility operations for addiction treatment facilities and other healthcare related facilities.”

b) Similarity of the Marks

To determine the similarity of the marks, "the court compares the marks and considers the overall impressions that the marks create, including the sound, appearance, and manner in which they are used." *Homes & Land Affiliates, LLC v. Homes & Loans Magazine, LLC*, 598 F. Supp. 2d 1248, 1261-62 (M.D. Fla. 2009). As shown above, Defendants have blindly employed slavish copies of the OTO Mark. Defendants' use of an identical mark is more than sufficient to conclusively establish this factor in the likelihood of confusion analysis, because courts have found that even when a defendant adds numerous embellishments or modifications to a mark there can still be a high likelihood of confusion. *See, id.* (Despite the defendant's addition of a stylized chimney, door, and roof in its mark, the overall impression of defendant's mark was similar to plaintiff's mark such that it weighed strongly in favor of likelihood of confusion).

c) Similarity of the Goods

"That the products involved are similar is evidence tending to prove the existence of a likelihood of confusion." *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1541 (11th Cir. 1986). Defendants offer the exact type of goods and services Kipu offers, namely a "non-downloadable due diligence patient admission check/flag feature of a web application for storage and management of electronic health records . . . for addiction treatment facilities." Defendants themselves tout how their product operates in the same space as the Kipu EMR System, "ZenCharts is the most intelligent EHR [electronic health record] the addiction treatment industry has ever seen." **Ex. A** (Screen shot of ZenCharts Homepage).

By Defendants' own statements, the ZenCharts System and its use of Kipu's OTO Mark exactly match the goods and services the USPTO reserved for Kipu's exclusive use of the OTO Mark, making the likelihood of confusion between Defendants' copy-cat product and the Kipu EMR System with the OTO Mark highly likely. *See, John H. Harland Co. v. Clarke Checks, Inc.*,

711 F.2d 966, 976 (11th Cir. 1983) (the greater the similarity between the products and services, the greater the likelihood of confusion).

d) Similarity of Customers

Both Kipu and Defendants market their software exclusively to addiction treatment centers.

e) Similarity of Advertising Media

Both Kipu and Defendants extensively utilize social media to advertise and promote their products and attend the same trade shows.

f) Defendants' Intent

Defendants' had familiarity with the Kipu EMR System as former users, blatantly copied the OTO Mark, used the mark on identical goods and services, and targeted of Kipu's preexisting customer base. These actions all point to one thing – Defendants' obvious goal to capitalize on the goodwill associated with Kipu and its OTO Mark. *See, Tancogne v. Tomjai Enters. Corp.*, 408 F. Supp. 2d 1237, 1249-50 (S.D. Fla. Nov. 15, 2005) (finding that the defendants' familiarity with the plaintiff's product and copying of the plaintiff's trademark supported that the defendant exercised bad faith and intended to capitalize on the goodwill and reputation associated with the plaintiff's mark.)

Defendants' plainly intended to capitalize on the goodwill associated with the OTO Mark that Kipu has worked hard to accumulate. Defendants recognized that selling products that incorporated Kipu's exact trademark would vastly increase their profits versus independently developing their own functionalities and source identifying features. *See, John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 977, 1983 (11th Cir. 1983) (if "a plaintiff can show that a defendant adopted a mark of the plaintiff with the intent of deriving benefit from the reputation of the plaintiff, that fact alone may be sufficient to justify the inference that there is confusing similarity") (citation omitted).

4. *Kipu has a Substantial Likelihood of Success on its Trademark Claims*

Because Kipu has enforceable trademark rights, Defendants have adopted Kipu's OTO Mark for use in commerce, and the likelihood of confusion analysis weighs heavily in Kipu's favor, Kipu has a substantial likelihood of success on the merits for its trademark infringement, counterfeiting, Federal unfair competition, and FDUTPA claims. *Cf., Nassau v. Unimotorcyclists Soc'y of Am., Inc.*, 59 F. Supp. 2d 1233, 1241 (M.D. Fla. 1999) ("Because Plaintiff's claim of trademark infringement fails, his claim of unfair competition based on his trademark infringement claim fails as well").

C. Misappropriation of Trade Secrets

The Defend Trade Secrets Act ("DTSA") affords a trade secret owner a Federal civil remedy if its trade secrets are used in interstate or foreign commerce. *Agilsys, Inc. v. Hall*, 2017 U.S. Dist. LEXIS 111824, at *27 (N.D. Ga. May 25, 2017) (citing 18 U.S.C. § 1836(b)(1)). The DTSA's definitions and remedies are "substantially similar" to the Florida Trade Secrets Act. *Adams Arms, LLC v. Unified Weapon Systems Inc.*, 2016 U.S. Dist. LEXIS 132201, at * 14 (M.D. Fla. Sept. 27, 2016). To prove liability under the DTSA, a plaintiff must establish ownership of: (a) a trade secret, (b) used in interstate or foreign commerce, that was (c) misappropriated. *RealPage, Inc. v. Enter. Risk Control, LLC*, 2017 U.S. Dist. LEXIS 122004, at * 24 (E.D. Tx. Aug. 3, 2017). Kipu's trade secrets include the OTO program, the OTO algorithm, Kipu EMR System workflows, and Kipu EMR System architecture.

1. *Kipu's Information Qualifies as Trade Secret Subject Matter, Derives Independent Economic Value from not Being Generally Known, and is Used in Commerce*

A "trade secret" is defined under 18 U.S.C. § 1839(3) to include all types and forms of techniques, processes, procedures, programs or codes not generally known to competitors where such information derives economic value. *Chubb INA Holdings, Inc. v. Chang*, 2017 U.S. Dist. LEXIS 16744, at *23 (D. N.J. Feb. 7, 2017); *Trulite Glass & Aluminum Solutions LLC v. Smith*, 2016 U.S. Dist. LEXIS 142827, at * 1 (E.D. Cal. Oct. 6 2016) (business forms qualify under 18 U.S.C. § 1839(3) as "trade secrets").

Kipu's trade secrets, embodied in the Kipu EMR System, enable addiction treatment providers to automate the entire episode of patient care, which creates efficiencies and improves overall patient care and clinical outcomes. Defendants have shown that Kipu's trade secrets derive independent economic value through their employ of improper means, via unauthorized access, to replicate the Kipu EMR System and monetize their copy-cat system. *See, Heralds of the Gospel Found., Inc. v. Varela*, 2017 U.S. Dist. LEXIS 98513, at *14 (S.D. Fla. June 23, 2017) (attempts to profit from the use of claimed trade secret information indicates that the information derives independent economic value; further when the information helps improve efficiency it likewise demonstrates independent economic value).

As another matter, Kipu's trade secrets are not generally known because Defendants would not have gone to great lengths to gain unauthorized access to the Kipu EMR System if such information was readily available.

2. *Kipu Employed Reasonable Measures to Protect its Trade Secrets*

Kipu's trade secrets are not readily accessible because access to Kipu's EMR System, and the trade secrets embodied therein, is carefully restricted. Examples of reasonable measures under the DTSA include password protection for computers, network servers, and other databases – as well as limiting “access to certain databases to individuals who require the information they contain.” *Chevron U.S.A., Inc. v. Guajardo*, 2017 U.S. Dist. LEXIS 79860 at * 4 (S.D. Tx. May 24, 2017). Kipu has taken reasonable measures to protect its trade secrets by requiring users to agree to the TOS which restrict the use of the Kipu EMR System and effectively operate as a non-compete, requiring unique usernames and passwords that are only to be used by clients, and further limiting access to the Kipu EMR System based on the user's credentials.

The Kipu EMR System is not publicly accessible. Potential clients must first demonstrate an interest in the Kipu EMR System and request a high level demonstration. Should the potential client agree to go forward, the client must execute a services agreement and the services agreement specifically identifies that any use of the Kipu EMR System is also subject to the TOS. D.E. 1-2

(services agreement). Users must accept and agree to the TOS *each and every time* they login to the Kipu EMR System.

As mentioned above in the Introduction section, the TOS contain a number of provisions that restrict the use of the Kipu EMR System, including 1) that users are only allowed to use the product for site-level administration business needs; 2) that the structure organization, flows, processes, and source code are the trade secrets of Kipu; and 3) that users are prohibited from accessing the system for the purposes of copying the flow, processes or intellectual property of Kipu and incorporating that information into a competitive product. *See, T&S Brass & Bronze Works, Inc. v. Slanina*, 2016 U.S. Dist. LEXIS 186427, *21-22 (D.S.C. Dec. 20, 2016) (“use of . . . IT policies and procedures designed to protect information” as “reasonable measures”).

Further, once a client is signed up for the Kipu EMR System unique user names and passwords must be created to access Kipu’s cloud-based server system. *Prot. Techs., Inc. v. Ribler*, 2017 U.S. Dist. LEXIS 33200, *4-6 (D. Nev. Mar. 8, 2017) (“the court finds that Protech took reasonable measures to keep this information secure by . . . limiting access to the data to password-protected entry points”); *Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Group*, 2016 U.S. Dist. LEXIS 130918, at *19-20 (SDNY Sept. 23, 2016) (finding “reasonable measures” as “making [trade secret information] accessible through strictly controlled servers[.]”).

The access credentials to the Kipu EMR System also vary in scope and function with low level access provided to health care technicians and extensive access provided for “Super-Admin” accounts. The Super-Admin accounts are intended to be used solely by the client’s management team, typically the addiction recovery center’s medical director, and enable the medical director to tailor the input and treatment options within the Kipu EMR System to the protocols the client uses.

The combination of Kipu’s TOS, its employ of unique user names and passwords, as well as its tiered access within user accounts demonstrates that Kipu has employed reasonable measure to safeguard its trade secrets.

3. *Defendants' Misappropriation of Kipu Trade Secrets*

“Under the DTSA, ‘misappropriation’ is defined in several different ways.” *Brand Energy & Infrastructure Servs. v. Irex Contracting Group*, 2017 U.S. Dist. LEXIS 43497, at * 8 (E.D. Pa. Mar. 24, 2017) (under 18 U.S.C. § 1839(5)(B), “[t]he ‘use’ of another’s trade secrets explicitly qualifies as an act of misappropriation under the DTSA.”). Also, even though a trade secret may have been acquired prior to the DTSA’s effective date of May 11, 2016, its later use still qualifies as a misappropriation under the DTSA. *Adams Arms, LLC v. Unified Weapon Systems Inc.*, 2016 U.S. Dist. LEXIS 132201, at *17-19 (M.D. Fla. Sept. 27, 2016).

Misappropriation occurs in at least two instances. First, misappropriation can occur through mere “acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by ‘improper means.’” *Id.* at *15. Second, is through disclosure or use of another’s trade secret without consent of the trade secret owner. *Syntel Sterling*, 2016 U.S. Dist. LEXIS 130918, at *6.

Here, Defendants have engaged in a trifecta of misappropriation. Defendants not only misappropriated Kipu’s trade secrets via improper means through unauthorized access, but Defendants also knew the information received from codefendants was to serve as the basis for the ZenCharts System was obtained through improper access, and Defendants then used that information to create the copy-cat ZenCharts System. 18 U.S.C. § 1839(5).

4. *Kipu’s Substantial Likelihood of Success on the Merits*

Kipu has demonstrated that it owns its trade secrets, has used them in commerce, that the trade secrets derive independent economic value from not being generally known, that reasonable measures were employed to safeguard the trade secrets, and the Defendants misappropriated Kipu’s trade secrets, which leads to Kipu’s substantial likelihood of success on the merits for this claim.

III. IRREPARABLE INJURY

Kipu has demonstrated a substantial likelihood of success on its numerous Lanham Act claims and once a plaintiff establishes a likelihood of success on the merits of a trademark infringement claim, there is a presumption of irreparable harm. *Commodores Ent. Corp. v. McClary*, 2014 WL 5285980, *4 (M.D. Fla., October 15, 2014) (citing *Tally-Ho*, 889 F.2d at 1029; *Processed Plastic Co. v. Warner Commc'n*, 675 F.2d 852, 858 (7th Cir.1982) ("[I]nfringement by its nature causes irreparable harm.")); *Delta Sigma Theta Sorority, Inc. v. Bivens*, Case No. 2:14--CV-147-FTM-38CM, 2014 WL 1330018 (M.D. Fla., April 1, 2014).

Further, "the loss of customers and goodwill is an 'irreparable' injury." *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (citing *Spiegel v. City of Houston*, 636 F.2d 997 (5th Cir. 1981)); *see also Arthur J. Gallagher Serv. Co. v. Egan*, 514 F. App'x 839, 843 (11th Cir. 2013) (citing *Ferrero*, 923 F.2d at 1449) ("The loss of longstanding clients and goodwill is an irreparable injury."). It also follows that because Defendants have built their copy-cat ZenCharts System through the unauthorized access to the Kipu EMR System to misappropriate Kipu's trade secrets as the foundation for their competing product, the only reason Kipu has lost clients to Defendants is because of their violations of CADRA and the DTSA.

Additionally, Kipu has promptly brought this motion for preliminary injunction upon effectuating service on the majority of Defendants. *Cf.*, *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014) (quoting *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005) ("Courts have found that 'an unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm'").

IV. BALANCE OF HARMS AND PUBLIC INTEREST

The Court should further enter an injunction against Defendants because protecting consumers from confusion and deception is in the public interest. Defendants have haplessly tricked numerous consumers into thinking the ZenCharts System has Kipu's OTO feature when in

fact it does not. *Teledyne Indust., Inc. v. Windmere Prod., Inc.*, 433 F. Supp. 710, 740 (S.D. Fla. 1977) (stating "customer confusion is by its very nature against the public interest").

As an additional matter, Defendants cannot claim prejudice when they have built their business around a misappropriated and infringing item. *Suzuki Motor Corp. v. Jiujiang Hison Motor Boat Mfg. Co., Ltd.*, No. 1:12-cv-20626, 2012 U.S. Dist. LEXIS 20366, 2012 WL 640700, at *5 (S.D. Fla. Feb. 27, 2012) (In the context of trade mark infringement "[Defendant] will suffer no hardship in the event a preliminary injunction is issued, because [Defendant] has no right to engage in infringing activities"); *Windsurfing Int'l. Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir.), cert. denied, 477 U.S. 905, (1986) (in the context of patent infringement, "one who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against a continuing infringement destroys the business so elected").

Conversely, Kipu faces the very realistic and damaging prospect that Defendants' continued use of the OTO Mark will cause a loss of goodwill with the public that Kipu is unlikely to recoup. *See, Edge Sys. LLC*, 2015 U.S. Dist. LEXIS 145268, at *42 ("The harm in allowing Defendant to continue exploiting Plaintiffs' investment, coupled with the probable loss of consumer goodwill and damage to Plaintiffs' reputation, outweighs the harm to Defendant if a preliminary injunction is entered. Therefore, I conclude that the balance of hardships weighs in favor of Plaintiffs"). Furthermore, Defendants' continued use would diminish the source identifying function of the OTO Mark because consumers would cease to identify the mark solely with Kipu.

V. CONCLUSION

Kipu has demonstrated that it is substantially likely to succeed on the merits for its CADRA, trademark, and trade secret misappropriation claims, that it will suffer irreparable injury unless an injunction is issued, that the issuance of an injunction will not unfairly prejudice Defendants, and that an injunction is in the public interest because it will protect consumers.

Kipu respectfully requests that the Court grant this motion for preliminary injunction to prevent the Defendants, and all those acting in concert with the Defendants, from selling or

offering for sale any goods that infringe on Kipu's trademark rights, gaining unauthorized access to the Kipu EMR System, and offering the ZenCharts System that is based on Kipu's misappropriated trade secrets.

WHEREFORE, Kipu respectfully requests that this Court grant Kipu's Motion for Preliminary Injunction.

DATED this 2nd day of March, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 2, 2018, I presented the foregoing to the Clerk of the Court for uploading to the Case Management/Electronic Case Files (“CM/ECF”) System, which will send a Notice of Electronic Filing to:

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