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KING COUNTY  
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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

WHATCOUNTS INC., a Washington corporation,

Plaintiff,

v.

STEPHEN DeCOURCY and JANE DOE  
DeCOURCY, a marital community,

Defendants.

08-2-06074-8 SEA

Cause No. \_\_\_\_\_

COMPLAINT FOR BREACH OF  
CONTRACT

Plaintiff, WhatCounts Inc. ("WhatCounts"), by and through its attorneys Ryan, Swanson & Cleveland, PLLC, complains and alleges as follows:

**PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff WhatCounts is a Washington corporation doing business in King County, Washington.

2. Defendants Stephen DeCourcy and Jane Doe DeCourcy are husband and wife who reside in King County, Washington. All of Mr. DeCourcy's actions at issue in this case were done on behalf of the marital community.

3. Venue and jurisdiction over the parties and subject matter are proper in King County Superior Court.

**FACTS**

**WhatCounts hires Mr. DeCourcy**

COMPLAINT FOR BREACH OF CONTRACT - 1

ORIGINAL

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1           4.   WhatCounts is a Washington corporation that provides technology and  
2 services to businesses needing to communicate with their customers and audience through  
3 email. WhatCounts provides both a web-based service as an application service provider  
4 ("ASP") and a hardware solution.

5           5.   WhatCounts first interviewed Mr. DeCourcy for a sales position in late May  
6 2007, when Mr. DeCourcy responded to a job posting on Craigslist. At all relevant times,  
7 including currently, Mr. DeCourcy has resided in Kenmore, Washington.

8           6.   Ultimately, WhatCounts did not select Mr. DeCourcy for the position, but  
9 WhatCounts asked him to stay in touch. On July 25, Mr. DeCourcy reached out to  
10 WhatCounts asking if any new positions were available as the contract position he held with  
11 a different company was expiring on August 15. WhatCounts had just promoted a sales  
12 employee into a new Channel Sales position which created an opportunity for Mr.  
13 DeCourcy.

14           7.   Based on the earlier interview process, and despite the fact that Mr. DeCourcy  
15 had no experience in WhatCounts' industry, WhatCounts offered him employment with  
16 WhatCounts in a letter dated August 10, 2007 ("offer letter").

17           8.   As part of the employment offer, WhatCounts gave Mr. DeCourcy an  
18 Employment Agreement to sign. Mr. DeCourcy signed the WhatCounts Employee  
19 Agreement ("Agreement") on August 28, 2007.

20           9.   Paragraph 1 of the Agreement provides as follows:

21           I agree to keep confidential, and not to disclose, or make any use of except for  
22 the benefit of the Company or myself, at any time either during or subsequent  
23 to my employment, any trade secrets, patents or patent applications, works of  
24 authorship, inventions, algorithms, software programs, software source  
25 documents, confidential information, knowledge, data, or other information of  
26 the Company relating to products, processes, know how, designs, customer  
lists, business plans, marketing plans and strategies, and pricing strategies or  
any subject matter pertaining to any business of the company or any of its  
clients, licensees or affiliates (all of such items being defined as "Confidential  
Information"). . . .

1           10. Paragraph 2 of the Agreement provides, among other things:

2           I agree that during my employment with the Company and for a period of two  
3           (2) years thereafter, I will not engage in any other employment, occupation,  
4           consulting or other activity relating to the business in which the Company is  
            now or may hereafter become engaged, or which would otherwise conflict  
            with my obligations to the Company.

5           11. Paragraph 5 of the Agreement provides, among other things, "... during my  
6           employment and for two (2) years after the termination of my employment from the  
7           Company, I agree not to knowingly solicit or attempt to solicit any of the employees or  
8           contractors of the Company."

9           12. Paragraph 8 of the Agreement provides, among other things, "if any legal  
10          action or proceeding relating to this agreement or the enforcement of this agreement is  
11          brought by the Company against Employee, and the Company prevails in that legal action or  
12          proceeding, the Company shall be entitled to recover reasonable attorneys' fees, costs and  
13          disbursements, in addition to any other relief to which the Company is entitled."

14          13. Mr. DeCourcy began working at WhatCounts on August 27, 2008.  
15          WhatCounts trained Mr. DeCourcy in person on August 27 and 28, and on an ongoing basis  
16          in weekly telephone conversations and online training sessions that he had with his  
17          supervising manager in September and October.

18          **Mr. DeCourcy has access to extensive information about WhatCounts' business**

19          14. WhatCounts invested time and money to bring Mr. DeCourcy up to speed on  
20          WhatCounts' industry and the propriety information and services WhatCounts uses. Despite  
21          the fact that there are so many competitors in the permission email industry, WhatCounts is  
22          unique because its platform is architected in Java™, a highly-flexible programming language  
23          that allows WhatCounts to make its application "portable." It is this platform flexibility that  
24          allows WhatCounts to compete with much larger competitors, like StrongMail Systems, Inc.  
25          ("StrongMail"), who are better funded and much larger in size.  
26

1           15. During the period of time Mr. DeCourcy worked for WhatCounts, he was  
2 given complete access to all data, including information about sales, customers, prospects,  
3 pricing, account management and customer satisfaction, marketing plans and tools,  
4 tradeshow commitments, direct sales projections and success or failure for all lines of the  
5 business, the results of the 2007 Channel Sales program that WhatCounts launched, and the  
6 success of the Professional Services group.

7           16. Such information has been assembled and compiled by WhatCounts at  
8 substantial expense over many years, is maintained in confidence, and is of considerable  
9 economic value because it is not available to competitors. WhatCounts keeps all the  
10 information described confidential in order to compete in the market. The value of the  
11 pricing, sales, customer information, and its "go-to market strategies" is valuable to  
12 WhatCounts only if it is kept confidential and undisclosed to its competitors. WhatCounts  
13 ensures confidentiality through the confidentiality provisions in its contracts with employees,  
14 and makes sure that only those people who need the information have access to it through a  
15 password-enabled system.

16           **Mr. DeCourcy leaves WhatCounts and immediately begins work with biggest**  
17           **competitor, StrongMail**

18           17. Mr. DeCourcy's official last day of work for WhatCounts was January 18,  
19 2008. That same day, Mr. DeCourcy accepted employment with StrongMail, a direct  
20 competitor of WhatCounts. Mr. DeCourcy was speaking with StrongMail as early as  
21 January 15, 2008, and did not inform his new employer that he had a non-compete letter.

22           18. Despite Mr. DeCourcy's acceptance of employment with StrongMail on  
23 January 18, Mr. DeCourcy told Simon Mutlu, Vice President of Sales and Marketing of  
24 WhatCounts on January 25 that he had not found employment.

25           19. StrongMail is Palo Alto-based company and that Mr. DeCourcy is working  
26 for them out of his home in Kenmore, Washington.

20. Because of his employment at WhatCounts, and his move to WhatCounts' largest direct competitor in the email publishing industry, Mr. DeCourcy is uniquely positioned to harm WhatCounts. It is inevitable that, as he presents information to prospective customers, Mr. DeCourcy will use and disclose WhatCounts' confidential information to enhance StrongMail's – and detract from WhatCounts' – reputation with prospective customers.

## BREACH OF CONTRACT

21. Plaintiff realleges and incorporates by this reference all paragraphs above as if fully set forth herein.

22. The executed offer letter and Employee Agreement between WhatCounts and Mr. DeCourcy constitute legally binding contracts.

23. The WhatCounts Employee Agreement binds Mr. DeCourcy and precludes him from accepting any employment, occupation, consulting or any other activity relating to the business of WhatCounts for a period of two years.

24. Mr. DeCourcy has breached this agreement by accepting employment with Strongmail, a direct competitor of WhatCounts.

25. WhatCounts is entitled to pursue all legal and equitable remedies available.

26. Mr. DeCourcy's breaches of contract have damaged WhatCounts in an amount to be proven at trial.

27. WhatCounts is entitled to recover its reasonable attorneys' fees, costs, and expenses, as agreed to in the WhatCounts Employee Agreement.

## MISAPPROPRIATION OF TRADE SECRETS

25. Plaintiff realleges and incorporates by this reference all paragraphs above as if fully set forth herein.

26. Defendant has a statutory and common law duty to keep WhatCounts' trade

1 secrets confidential.

2 27. Trade secrets and confidential information include, but are not limited to,  
3 WhatCounts' management and economic policies, operating methods, technical information,  
4 computer programs, customer lists and related information, employees, pricing policies and  
5 information, know how, business, marketing and other plans, legal affairs and financial  
6 information, and current or future business opportunities.

7 28. Mr. DeCourcy had access to WhatCounts' trade secrets and confidential  
8 information while employed at WhatCounts.

9 29. Mr. DeCourcy has misappropriated WhatCounts' trade secrets and confidential  
10 information.

11 30. Mr. DeCourcy, in his capacity as an employee of WhatCounts, had complete  
12 access to WhatCounts' trade secrets and other confidential information that is of great value,  
13 and is using WhatCounts' trade secrets and confidential information in his capacity at  
14 StrongMail, a direct competitor of WhatCounts.

15 31. Mr. DeCourcy's misappropriation and use of WhatCounts' trade secrets has  
16 damaged WhatCounts in an amount to be proven at trial, but which damages include actual  
17 and potential economic harm.

18 **INJUNCTIVE RELIEF**

19 32. Plaintiff realleges and incorporates by this reference all paragraphs above as if  
20 fully set forth herein.

21 33. Because of Mr. DeCourcy's actions set forth above, and because WhatCounts  
22 will suffer substantial and irreparable damage and harm if it does not obtain injunctive relief,  
23 WhatCounts is entitled to injunctive relief preventing and prohibiting Mr. DeCourcy from  
24 improperly competing against WhatCounts by accepting employment with a direct  
25 competitor.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, having fully set forth its Complaint, plaintiff prays for judgment  
3 against Mr. DeCourcy as follows:

4 1. For a court order restraining and enjoining Mr. DeCourcy from competing with  
5 WhatCounts for a period of two years from the date of the termination of his employment at  
6 WhatCounts;

7 2. For a court order restraining and enjoining Mr. DeCourcy from inducing or  
8 attempting to influence directly or indirectly any of WhatCounts' customers or clients to  
9 reduce or terminate their business with Whatcounts;

10 3. For a court order restraining and enjoining Mr. DeCourcy from disclosing or  
11 imparting, directly or indirectly, taking, using, or in any way profiting, directly or indirectly,  
12 from the use of WhatCount's confidential and proprietary information including WhatCount's  
13 management and economic policies, operating methods, technical information, computer  
14 programs, customer lists and related information, employees, pricing policies and  
15 information, know how, business, marketing and other plans, legal affairs and financial  
16 information, and current or future business opportunities and/or any of WhatCount's trade  
17 secrets;

18 4. For damages in an amount to be proven at trial for breach of contract,  
19 misappropriation and misuse of trade secrets, and other grounds;

20 5. For judgment against defendants for plaintiff's attorneys' fees, costs, and  
21 expenses incurred in this action as are allowable under terms of the Employment Agreement  
22 and as are allowable by law;

23 6. For post-judgment interest at the maximum rate allowed by law; and

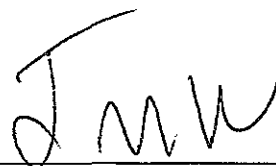
24 7. For such other and further relief as the Court may deem just and equitable.

25 DATED this 13<sup>th</sup> day of February, 2008.

26 RYAN, SWANSON & CLEVELAND, PLLC

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