

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**PHOENIX ENGINEERING INC,
Plaintiff,**

v.

**Case No. 17-157035-CB
Hon. James M. Alexander**

**WILLIAM POPP and
WM J POPP COMPANY, LLC,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

For the third time, this matter is before the Court on Defendant’s motion for summary disposition. The Court previously described this case as follows:

Plaintiff filed this lawsuit generally on claims that Popp misappropriated Plaintiff’s confidential and trade secret information and started a competing company – Defendant WM J Popp Company.

On October 20, 2016, Plaintiff fired Popp, which triggered Plaintiff’s obligation to buy back Popp’s stock shares in Plaintiff. But the parties disagreed about how to value said shares under the terms of the parties’ written agreements. As a result, in the prior summary ruling, the Court interpreted the written contract and concluded:

Because the parties unambiguously contracted to incorporate **all terms** of the 1984 Redemption Agreement into their 2006 Purchase Agreement, the Court will enforce this agreement and find that the term “fair market value” is contractually defined as provided in the Redemption Agreement’s Section 6.

In the prior summary ruling, the Court also dismissed Plaintiff’s original conversion and unjust enrichment claims.¹

¹ Plaintiff renewed these claims in its Amended Complaint, but the Court again dismissed the same in its July 26, 2017 Opinion and Order re: Summary Disposition.

In any event, Plaintiff's First Amended Complaint now alleges claims for (Count I) Breach of Shareholder Agreement; (Count II) Misappropriation of Trade Secrets; (Count III) Breach of Fiduciary Duty; and (Count VI) Tortious Interference.

Defendant now seeks dismissal of each of these claims under MCR 2.116(C)(10), which motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).² Defendant also seeks reimbursement of attorney fees under MCR 2.306(D)(2) for opposing counsel's actions at the deposition of John Emig.

The Court will note that Defendant first seeks dismissal of Plaintiff's breach of shareholder agreement claim. But in its Response, Plaintiff does not address said claim, and as a result, the Court finds that Plaintiff concedes dismissal of the same. As a result, Plaintiff's Count I alleging a breach of the shareholder agreement is DISMISSED.

I. Trade Secrets (Count II)

Defendant next argues that Plaintiff can identify no information that is a protectable trade secret to support such a claim.

Under the Michigan Uniform Trade Secrets Act (MUTSA), "Trade secrets" are defined as information that both: (1) "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use;" and (2) "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." MCL 445.1902(d).³

² In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden*, 461 Mich at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

³ Michigan's Uniform Trade Secrets Act, at MCL 445.1904, provides:

Our Supreme Court has explained, “a trade secret is ‘a secret formula or process not patented but known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on.’” *Hayes-Albion v Kuberski*, 421 Mich 170, 181; 364 NW2d 609 (1984).

But “a trade secret **cannot** consist of ‘information which is readily ascertainable, i.e., capable of being acquired by competitors or the general public without undue difficulty or hardship.’” *Wyson Corp v MI Indus*, 412 F Supp 2d 612, 627 (ED Mich 2005) (emphasis added); quoting *Kubik, Inc v Hull*, 56 Mich App 335, 348; 224 NW2d 80 (1974).

“A plaintiff in a trade secrets case bears the burden of pleading and proving the specific nature of the trade secrets.” *Dura Glob. Techs., Inc v Magna Donnelly Corp*, 662 F Supp 2d 855, 859 (ED Mich 2009), quoting *Wilson v. Continental Dev. Co.*, 112 F.Supp.2d 648, 662 (W.D.Mich.1999). “A party alleging trade secret misappropriation must particularize and identify the purported misappropriated trade secrets with specificity.” *Id.* quoting *Compuware Corp. v. Int'l Business Machines*, 2003 WL 23212863, *6 (E.D.Mich. Dec. 19, 2003).

Defendant argues that Plaintiff has failed to describe any alleged trade secret with any specificity. Instead, Plaintiff simply alleges that Defendant downloaded certain files onto a personal thumb drive, and each and every file he downloaded constitutes a trade secret.

Indeed, Plaintiff’s Amended Complaint is devoid of any identification of any specific trade secret. And consistently, Plaintiff’s Response to the current motion fails in the same way. Rather than identify anything in particular, Plaintiff simply argues that Defendant took files that

Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator’s unauthorized disclosure or use of a trade secret.

“contain or include information consisting of formulas; compilations; programs, methods, techniques, or process, which derives independent economic value, actual and potential, because such information is generally unknown and not readily ascertainable through ordinary and proper means by [Plaintiff’s] competitors or would be competitors.”

But there are no specifics. Instead, Plaintiff appears more concerned with pleading the legal conclusion that certain, general classes of information qualify as trade secrets – rather than describing with specificity how certain information qualifies as a trade secret.

The Court is frustrated with Plaintiff’s failure to (1) plead the specific nature of the trade secrets, and (2) particularize and identify the purported misappropriated trade secrets with specificity (particularly when faced with a summary motion seeking dismissal of a claim) so the Court can make a reasoned decision. Plaintiff’s failure to do so is fatal to its claim.

For this reason, the Court GRANTS Defendant’s motion for summary with respect to Plaintiff’s Count II, which is hereby DISMISSED.

II. Breach of Fiduciary Duty (Count III)

Defendant next argues that it is entitled to summary of Plaintiff’s breach of fiduciary duty claim because Plaintiff’s allegations supporting the same are demonstrably wrong. Plaintiff’s Complaint alleges that Defendant worked for it until October 20, 2016. (Amended Complaint, at ¶ 20). And, while still working for it, Plaintiff claims that Defendant set up a competing business starting on September 30, 2016. (Amended Complaint at ¶¶ 27-34). These actions appears to be the basis for Plaintiff’s breach of fiduciary duty claim – that he was creating a competitive business while employed with Plaintiff through October 20.

But Defendant argues that his last day working for Plaintiff was actually September 28, which was confirmed by Plaintiff's President, Terry Broemer. In his deposition, Broemer consistently testified that Defendant resigned on September 28. (Broemer Deposition, at 23, 31, 34, 35). In fact, despite what the Complaint alleges, Broemer specifically testified that Defendant was not working for the company as of October 20. (Broemer Deposition, at 35).

As a result, Defendant argues that his actions starting September 29 – after his resignation – could not possibly serve as the basis for a breach of fiduciary duty claim because he was not bound by any non-compete.

In response, Plaintiff argues that Defendant admitted being a part of the leadership group while employed with it. But Plaintiff does not explain how this fact would affect its allegations of breaches tied to wrongs allegedly committed while employed. Rather, it appears that Defendant did not attempt to set up the competing business until after Broemer claims Defendant resigned.

Plaintiff also cites to *Nedschroef Detroit Corp v Bemas Enterprises LLC*, 106 F Supp 3d 874, 878 (ED Mich 2015) for the proposition that a former employee can be liable for a breach of fiduciary duty. But *Nedschroef* is distinguishable because it involved a situation where the defendants “had formed a competing company . . . **while still working for [the plaintiff].**” *Id.* at 878 (emphasis added).

And, in our case, Plaintiff's President claimed that Defendant resigned on September 28 – before he allegedly set up the competing company.

Because Plaintiff offers no other argument why its breach of fiduciary duty claim remains valid, summary of this claim under (C)(10) is appropriate, and Plaintiff's Count III is DISMISSED.

III. Tortious Interference (Count VI)

Finally, Defendant seeks summary disposition of Plaintiff's tortious interference with contracts and advantageous business relationships claim.

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, . . . (3) an unjustified instigation of the breach by the defendant [and (4) damages].

The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.

Health Call of Detroit v Atrium Home & Health Care Services, Inc, 268 Mich App 83, 89-90; 706 NW2d 843 (2005) (internal citations omitted) (paragraph breaks added for clarity).

Further, "[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

Further, Michigan Courts have long held that "defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship]." *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988); citing *Christner v Anderson, Nietzke & Co, PC*, 156 Mich App 330, 348-349; 401 NW2d 641 (1986).⁴

⁴ See also *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552

Defendant claims that Plaintiff's tortious interference claim fails because it cannot be based on allegations that Defendant simply contacted two Plaintiff customers to inquire about the possibility of doing work for them.

Indeed, our Supreme Court has reasoned: "In general, there is nothing improper in an employee establishing his own business and communicating with customers for whom he had formerly done work in his previous employment." *Hayes-Albion*, 421 Mich at 183. This is so (partly) because "a customer has a right to deal with the person he chooses." *Hayes-Albion*, 421 Mich at 184.

Plaintiff responds with general law on tortious interference claims and argues that Defendant concealed his downloading of trade secrets, which he used to contact Plaintiff's clients.

But, as outlined above, Plaintiff could not specifically identify any recognizable trade secret. And Defendant was not bound by any non-compete. As a result, Defendant's action in contacting former Plaintiff clients was not wrongful act per se or unjustified under any circumstances to support a tortious interference claim.

For the foregoing reasons, Defendant's motion for summary disposition of Plaintiff's Count VI for tortious interference is GRANTED, and the same is DISMISSED.

NW2d 919 (1996) ("Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.").

IV. Summary/Conclusion

To summarize, Defendant's motion for summary disposition is GRANTED, and Plaintiff's remaining claims (Counts I, II, III, and VI) are hereby DISMISSED under (C)(10).

IT IS SO ORDERED.

November 15, 2017

Date

/s/ James M. Alexander

Hon. James M. Alexander, Circuit Court Judge