

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

**MIDWEST AIR FILTER, INC and
THE FILTER DEPOT, LLC,
Plaintiffs,**

v.

**Case No. 14-139638-CZ
Hon. James M. Alexander**

**DAVID CASTLE and
AERO FILTER, INC,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on three motions for summary disposition filed by Defendants. In sum, these motions cover all of Plaintiffs’ four-count Complaint. Plaintiff Midwest previously employed Defendant David Castle as a salesman out of its Detroit Office through Plaintiff Filter Depot. Mr. Castle also owned a minority interest in Filter Depot until he assigned that interest to another member on March 14, 2014 – two days before he resigned from Midwest to go work for Defendant Aero Filter (a competitor).

Plaintiffs paint this case as “a classic case of an employee’s premeditated, middle-of-the-night departure to work for a competitor.” Defendants, on the other hand, describe this case as “a dispute between competitors in the air filtration business.” It is undisputed that Mr. Castle was not bound by any non-compete or non-solicitation provision. As a result, Plaintiffs’ Complaint is founded on the allegation that Mr. Castle absconded with and “misused secret contact and pricing information . . . in order to take sales away from Plaintiffs.”

As a result, Plaintiffs allege substantial monetary damages for lost sales and filed their Complaint on claims of: (1) breach of fiduciary duty, (2) misappropriation of trade secrets, (3) unfair competition, and (4) conspiracy.

To their end, Defendants now move for summary disposition under MCR 2.116(C)(8) and (C)(10). A (C)(8) tests the legal sufficiency of the complaint. A motion under this subrule may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992). And a motion under (C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

In their Motion, Defendants seek several rulings. First, Defendants seek dismissal of Plaintiffs' trade secrets claim because Mr. Castle has not used any of Plaintiffs' trade secrets, and Plaintiffs' alleged "trade secrets" are not really secrets. Second, Defendants seek dismissal of Plaintiff's fiduciary duty, unfair competition, and conspiracy claims for various reasons. Finally, Defendants argue that Plaintiffs' claimed damages are speculative at best.

1. Trade Secrets.

Defendants first claim that Plaintiffs cannot succeed on their claim for misappropriation of trade secrets because: (1) the information is not secret, and (2) they are not using Plaintiffs' information.

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).

Plaintiffs claim that there are two types of confidential information in this case: customer information and pricing information.¹

A. Customer Information.

With respect to customer information, our Supreme Court has held, “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 v Kuberski*, 421 Mich 170, 183; 364 NW2d 609 (1984)

In their Response on this issue, Plaintiffs only offer non-binding and distinguishable, out-of-state caselaw to establish that some customer lists, *when specialized*, may constitute a trade secret. But Plaintiffs offer no evidence to support their contention that the alleged “customer list” at issue in this case is so specialized as to warrant protection.

Rather, by all appearances, the alleged “secret” customer list was simply compiled through Mr. Castle’s general skills as a salesman with 20 years of experience and knowledge about the air filtration business. In the absence of a non-compete or non-solicitation agreement, the Court finds that the alleged customer list was not a trade secret within the meaning of the statute.

B. Pricing.

With respect to Plaintiffs’ customer pricing, Defendants argue that Plaintiffs cannot claim that said pricing was a secret when it is readily disclosed to customers without any confidentiality agreement. In support Defendants cite *Economation, Inc v Automated Conveyor*

¹ The Court rejects the notion that memorization of a trade secret somehow removes otherwise “secret” information from the purview of the statute.

Systems, Inc., 694 F Supp 553, 556 (S.D. Ind. 1988) (reasoning “once information is known to the customers, that information is readily ascertainable and is not a trade secret”).

Defendants further argue that “[m]any of the customers . . . are public,” and when a salesperson goes on a sales call, the customer will often provide the competitor’s pricing to that salesperson. As a result, Defendants argue “there is really nothing that is secret in the air filtration business.”

In response, Plaintiffs argue that their “price multiplier” is the protected information. And by all appearances, this is different than the final price provided to a potential or actual customer. If shared, this information would provide Defendants with an unfair advantage when competing for the same customer because it represents “the special pricing that [Midwest] has been able to negotiate with its suppliers.”

“Armed with this information,” Plaintiffs argue, “Defendants can negotiate lower pricing from these same suppliers, in turn giving Defendants an unfair advantage in providing pricing to customers.” The Court agrees.

There is a difference between a customer’s disclosed final contract price, and the price multiplier that a wholesaler uses to arrive at that price. There is no reason to believe that the latter of these two things is disclosed to the customer.

Mr. Castle admitted at his deposition that he took the pricing multiplier in both physical and electronic formats. And a review of Mr. Castle’s deposition alone reveals sufficient questions to render summary disposition on this critical issue inappropriate.

This is so because Michigan courts have long held that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc.*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, “courts ‘may not resolve factual disputes or

determine credibility in ruling on a summary disposition motion” citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). *White, supra* at 625.

In *Vanguard Ins Co v Bolt*, 204 Mich. App. 271; 514 N.W.2d 525 (1994), the Court of Appeals held:

The granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent’s credibility is crucial. Accordingly, where the truth of a material factual assertion of a moving party depends upon a deponent’s credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted. *Vanguard Ins, supra* at 276 (internal citations omitted).

For all of the foregoing reasons, the Court finds that Plaintiffs’ pricing multiplier is a protected trade secret within the meaning of the statute, and viewing all evidence in the light most favorable to Plaintiffs, there remain sufficient questions of fact in dispute whether Defendants used said information to render summary disposition inappropriate.

2. Breach of Fiduciary Duty & Civil Conspiracy.

Defendants next move for summary disposition of Plaintiffs’ breach of fiduciary duty and conspiracy claims.²

A. Breach of Fiduciary Duty

With respect to Plaintiffs’ breach of fiduciary duty claim, Defendants claim that they are entitled to dismissal because Michigan’s Uniform Trade Secrets Act displaces any conflicting tort claim based on a misappropriation of a trade secret. Indeed, MCL 445.1908(1) provides: “this act displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.”

² Defendants also requested dismissal of Plaintiffs’ unfair competition claim, but Plaintiffs’ conceded dismissal of the same in their Response. As a result, Plaintiffs’ Count III for Unfair Competition is DISMISSED.

And the Court of Appeals has affirmed dismissal of a breach of fiduciary duty claim in just such a context in *CMI Int'l, Inc v Internet Int'l Corp*, 251 Mich App 125; 649 NW2d 808 (2002). In *CMI*, the plaintiff filed suit on numerous claims including “violation of the Uniform Trade Secrets Act . . . , inevitable breach of trust and fiduciary duty, and conspiracy.”

The *CMI* Court concluded that such claims were subject to dismissal because they “necessarily are based on Michigan’s UTSA, [and] that statute displaced conflicting tort remedies for misappropriation of a trade secret.” *CMI*, 251 Mich App at 132.

In Response, Plaintiffs conclude that Mr. Castle should be liable because he neglected his duties and actively spent time “while employed by Plaintiffs engaged in transmitting business information to Aero Filter and secretly planning to compete with Plaintiffs.”

But Plaintiffs offer very little reasoning to support this theory. And Michigan law is clear that “[a] party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

To the extent that Plaintiffs argue that Mr. Castle caused Plaintiffs to lose customers before he stopped working for Midwest, the Court finds that Plaintiffs offer nothing beyond mere speculation in support of this allegation. As noted by the Federal Court for the Eastern District of Michigan:

Preparations, of themselves, do not support a breach of fiduciary duty sufficient to support an injunction, given “the public policy of Michigan . . . of protecting and encouraging the right of the individual to pursue his livelihood in the vocation he chooses, including the right to migrate from one job to another.” *Raymond James & Assocs v Leonard & Co*, 411 F Supp 2d 689, 700 (ED Mich 2006); quoting *Hayes-Albion*, 421 Mich at 188.

For the foregoing reasons, the Court finds that Plaintiffs base their breach of fiduciary duty claim solely on claims that Mr. Castle misappropriated trade secrets. As a result, their exclusive remedy is founded on Michigan's Uniform Trade Secrets Act.

B. Civil Conspiracy.

Defendants next argue that a claim for civil conspiracy must be based on a separate actionable tort. Because Plaintiffs identify no valid underlying tort, Defendants argue that Plaintiffs' civil conspiracy claim must fail.

Indeed, Michigan law is well settled that "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003); quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

But, as stated, Defendants' argument is founded on the assumption that their trade secrets claim would also be dismissed, and it was not. Because neither party argues that a civil conspiracy claim cannot be based on an underlying statutory trade secrets claim, the Court finds that summary disposition of this claim is inappropriate.

3. Damages.

Finally, Defendants argue that Plaintiffs failed to provide "a meaningful damages calculation with backup documentation," and as a result, Defendants are entitled to summary disposition of each of Plaintiffs' claims because there is no evidence of damages beyond mere speculation. The Court disagrees.

Michigan's Uniform Trade Secrets Act provides:

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. MCL 445.1904.

The entirety of Defendants' motion on this issue is based on their interpretation of the evidence – mainly in the form of deposition testimony. This, in no way, may serve as the basis for a summary disposition ruling. There is more than sufficient evidence that pricing played a part in the defection of several customers from Plaintiffs to Defendant Aero Filter.

Viewing the evidence in the light most favorable to Plaintiffs, the Court finds that there are numerous material factual disputes regarding Plaintiffs' alleged damages to render summary disposition wholly inappropriate. As a result, Defendants' motion on this basis is DENIED.

4. Summary

Defendants' motion with respect to Plaintiffs' trade secrets claim is GRANTED IN PART. Plaintiffs may not base said claim on an allegation of misuse of customer information. Plaintiffs can, however, base their claim on an allegation of misuse of their pricing multiplier.

Defendants' motion with respect to Plaintiffs' breach of fiduciary duty claim is GRANTED, and the same is DISMISSED. Defendants' motion with respect to Plaintiffs' civil conspiracy claim, however, is DENIED.

Finally, Defendants' motion with respect to damages is DENIED.

IT IS SO ORDERED.

November 26, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge