

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

**SEARCH ENERGY, LLC,  
Plaintiffs,**

**v.**

**Case No. 15-148425-CB  
Hon. James M. Alexander**

**THE DEACON GROUP, INC, ET AL,  
Defendants.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendant Kevin Mikula’s motion for summary disposition. Plaintiff is an energy services broker in Michigan’s Electric Choice Market, which effectively deregulates a portion of the energy sales market and makes it open for sale by private companies. Mikula is a sales representative who acquires and services the end client users of power.

One such user is Magna Services of America, who Mikula serviced for nearly four years while working at Glacial Energy. In early 2014, Glacial Energy filed for bankruptcy protection. While at Glacial, Mikula worked with Co-Defendant Robert Drohan, who is the owner and president of Co-Defendants Deacon Group and Core Energy.

Because he serviced Magna while with Glacial, Plaintiff claims that Mikula knew that its contract with Glacial was expiring in 2014. As a result, Plaintiff claims that Mikula set up meetings with Magna in an effort to secure a potential energy broker.

Mikula also agreed to share his commission with Drohan or his companies if Drohan was able to find a broker who could enter into a contract with Magna. Apparently, Drohan invited Plaintiff to provide bids as a potential broker for the Magna contract, and Magna signed such a contract with Search Energy that will expire in May 2016.

Plaintiff claims that Drohan, through The Deacon Group, acted as an independent agent for it under the terms of an August 9, 2012 Master Third-Party Sales Agreement. Under the Agreement, Drohan was prohibited from selling or attempting to sell energy products to any Plaintiff customer during the Agreement's term and for one year after its termination.

Plaintiff claims that, during its term and despite the Agreement, Drohan or his companies contacted a Plaintiff competitor, Brio Energy, and was instrumental in Brio obtaining a letter of exclusivity for two Magna locations allowing them to be exclusive Brio customers after their contracts with Plaintiff expired. This, Plaintiff alleges, is a violation of the Third-Party Sales Agreement.

And although it is undisputed that Mikula never signed such an agreement, Plaintiff bases its claims against Mikula on the allegation that he is or was an agent of Drohan or his companies. In support of this claim, Plaintiff points to the following.

First, Plaintiff claims that Drohan told Plaintiff that it should deal with him and "Mikula would fall under him." Plaintiff also cites to Mikula's Affidavit, which states that he "occasionally had oral agreements with Robert Drohan in which we agreed to equally share commissions on prospects that we had worked on together." Further, at an earlier evidentiary hearing, Drohan testified that there was an agreement between him and Mikula. On these allegations, Plaintiff alleges that Mikula was a Drohan agent, who should be bound by the terms of the Sales Agreement and acted wrongfully by causing Plaintiff to lose Magna to Brio.

On these allegations, Plaintiff asserts the following claims against Mikula: (Count I) fraudulent misrepresentation, (Count III) conspiracy, (Count IV) tortious interference with a business expectancy, (Count V) misappropriation of trade secrets, (Count VI) unfair competition, and (Count VII) tortious interference with a contract.

And Mikula now moves for summary disposition of each of these claims 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).

Mikula bases his motion on the argument that “[h]e is not a party to any agreement with Plaintiff containing any restrictive covenant(s) that would prohibit him from soliciting or competing for customers who are currently under contract with Search Energy.” Mikula further argues that “[h]e is not in possession of any trade secrets or confidential/proprietary information belonging to Search Energy.”

### **1. Agency**

With respect to Plaintiff's claims for fraudulent misrepresentation, conspiracy, tortious interference with a business expectancy, unfair competition, and tortious interference with a contract, Mikula argues that he is entitled to summary disposition because he is an independent third-party who owes no obligation or duty to Plaintiff.

Plaintiff responds that it bases its claims against Mikula on the allegation that he is or was **an agent of** Drohan or his companies. And as stated, Plaintiff cites Mikula's affidavit, Drohan's

testimony, and Drohan's comments to Plaintiff in support. Plaintiff further responds that discovery remains open and Drohan's deposition is scheduled for November 20, 2015, which stands a fair chance at discovering factual support for its position.

Indeed, summary disposition under (C)(10) is usually premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

Plaintiff's claims for fraudulent misrepresentation, conspiracy, tortious interference with a business expectancy, unfair competition, and tortious interference with a contract are all predicated on the allegation that Mikula was a Drohan agent. This remains disputed. Because discovery has a fair chance of uncovering factual support for Plaintiff's claims, the Court concludes that summary disposition of said claims under (C)(10) is premature and, therefore, DENIED.<sup>1</sup>

Further, with respect to said claims, summary disposition under (C)(8) is also inappropriate and DENIED. Accepting all well-pled factual allegations as true and construing them in a light most favorable to Plaintiff, the Court cannot conclude that no factual development could possibly justify Plaintiff's right to recovery. A careful examination of Plaintiff's Complaint reveals that Plaintiff has sufficiently pled said claims to survive summary under (C)(8).

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<sup>1</sup> The Court also notes that "When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact..." *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 556-557; 581 NW2d 707 (1998); quoting *Miskiewicz v Smolenski*, 249 Mich 63, 70; 227 NW 789 (1929).

## 2. Trade Secrets

With respect to Plaintiff's trade secrets claim, Mikula argues that Plaintiff has failed to identify what proprietary or confidential information is allegedly being misappropriated. And resolution of this issue does not hinge on whether Mikula was a Drohan agent.

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).

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).

With respect to customer information, "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. Further, "peculiar needs of particular client . . . is not a trade secret at common law." *Id.* at 183-184.

Plaintiff claims that "pricing structures from [its] supplier" related to Magna is its trade secret. As Mikula points out, however, Plaintiff is apparently claiming that a third-party's information (the supplier's pricing structure) is its trade secret.<sup>2</sup> This information, Mikula argues, is not owned by Plaintiff, and therefore, cannot be its trade secret. The Court agrees.

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<sup>2</sup> Although not dispositive in this case, the Court will note that it has previously reasoned that a plaintiff cannot claim that pricing was a secret when it is readily disclosed the same to customers without any confidentiality

The Court finds that Plaintiff has failed to identify “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.”

For the foregoing reasons, the Court GRANTS Mikula’s motion for summary disposition of Plaintiff’s trade secrets claim (Count V) – dismissing the same under (C)(8) – but only as to Defendant Mikula.

As stated, in all other respects, Defendant Mikula’s motion is DENIED.

**IT IS SO ORDERED.**

November 18, 2015

Date

/s/ James M. Alexander

Hon. James M. Alexander, Circuit Court Judge

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agreement. *Economation, Inc v Automated Conveyor 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”). It is unclear if these circumstances exist in this case.