

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

DIALOGDIRECT, LLC, et al.,

Plaintiffs/Counter-Defendants,

v

Case No. 16-151330-CB

Hon. Wendy Potts

VERIFI1, INC., et al.,

Defendants/Counter-Plaintiffs.

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR. 2.116(C)(7), (C)(8), AND (C)(10) and PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY DISPOSITION OF COUNTERCLAIM

At a session of Court
Held in Pontiac, Michigan

On

SEPTEMBER 1, 2016

Plaintiffs DialogDirect, LLC, DialogDirect, Inc., and Brian Unlimited Distribution Company (BUDCO) are in the business of providing dependent eligibility verification for insurance companies. Defendants Theresa Niles, David Chojnacki, and Steven Niemczewski are all former employees of Plaintiffs. Pursuant to their employment with Plaintiffs, Defendants signed various noncompetition and/or confidentiality agreements. Defendants allegedly left their employment with Plaintiffs and formed Defendant Verifi 1, Inc., a business that eventually could also perform dependent eligibility verification services. This matter is now before the Court on Plaintiffs/Counter Defendants' motion for partial summary disposition of the counterclaim as well as the Defendants' motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10).

Plaintiffs/Counter-Defendants' Motion for Partial Summary Disposition of Counterclaim

Plaintiffs/Counter-Defendants move for summary disposition on Count II of the counterclaim pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Plaintiffs allege summary disposition is appropriate because Defendants fail to state a claim for tortious interference.

Plaintiffs argue that in order to state a claim for tortious interference, Defendants must plead both improper interference as well as actual damages. Plaintiffs also assert that Defendants did not identify a single contract that was breached or a business opportunity that was lost or interfered with. In response, Defendants argue that Plaintiffs' attempt to enforce expired noncompetition agreements constitutes improper interference and state they have properly and sufficiently stated a claim for tortious interference. Defendants argue they will show that Plaintiffs are trying to wrongfully use the court system to monopolize the DEV marketplace and prevent fair competition.

“The elements of tortious interference are (1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant.” *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). “One 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.” *Badiee v Brighton Area School*, 265 Mich App 343, 366-367; 695 NW2d 521 (2005).

Additionally, “[t]he elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or

expectancy on the part of the defendant, an intentional interference by the defendant inducing or cause a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. To fulfill the third element, intentional interference inducing or causing a breach of a business relationship, a plaintiff must demonstrate that the defendant acted both intentionally and either improperly or without justification. To establish that a defendant's conduct lacked justification and showed malice, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Clinical Laboratories v BCBSM*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996).

"When reviewing a motion brought under MCR 2.116(C)(8), the court considers only the pleadings. Moreover, the court must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them. However, conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action." *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014).

Defendants' counterclaim asserts that Plaintiffs knew or should have known that their pursuit of the temporary restraining order and a groundless lawsuit would disrupt Defendants' business relationships. The asserted allegations do not set forth a claim for tortious interference with a business relationship. "In order to succeed under a claim of tortious interference with a business relationship, the [claimant] must allege that the interferer did something illegal, unethical or fraudulent. There is nothing illegal, unethical, or fraudulent in filing a lawsuit, whether groundless or not." *Dalley v Dykema Gossett*, 287 Mich App 296, 323-324; 788 NW2d 679 (2010) (internal citations and quotations omitted). Accordingly, reviewing only the pleadings, and viewing all well-pled factual allegations in a light most favorable to the

nonmovant, the Court finds that no factual development could possibly justify recovery. Thus, Plaintiffs/Counter-Defendants' motion pursuant to MCR 2.116(C)(8) is granted and Count II of the Defendants' counterclaim for tortious interference is dismissed.

Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10)

Defendants first argue that all of Plaintiffs' claims against Chojnacki are released and should be dismissed pursuant to MCR 2.116(C)(7). Summary disposition under MCR 2.116(C)(7) is appropriate where there exists a valid release of liability between the parties. *Wyrembelski v City of St Clair Shores*, 218 Mich App 125, 127; 55 NW2d 651 (1996). Further, a release is valid if it is fairly and knowingly made, and the scope is governed by the intent of the parties as expressed in the release. *Id.* Plaintiffs' claims against Chojnacki are for breach of contract regarding the Chojnacki separation agreement, breach of contract regarding the confidentiality obligations, tortious interference, misappropriation of trade secrets, fraud, and breach of fiduciary duty.

Chojnacki and Plaintiffs signed a separation agreement on July 17, 2015, wherein Plaintiffs knowingly and unambiguously agreed to release any and all claims against Chojnacki arising from his employment with them. Chojnacki's release states, in part: "In exchange for consideration stated above the Corporation knowingly and voluntarily (for itself, affiliates, successors and assigns) waives, releases, and forever discharges the Employee from any and all claims, actions, suits, charges, grievances and/or causes of action arising from the Employment Agreement or Employee's employment, whether in tort or contract, for damages of every type, costs and attorneys' fees which have or could have been asserted against Employee (all of the foregoing collectively referred to herein as the 'Claims')."'

Plaintiffs now argue that Chojnacki's release was procured by fraudulent activity and that Defendants concealed their activities in order to set up a competing company. Despite the assertion that there are issues of fact whether Chojnacki fraudulently induced Plaintiffs to enter into a Separation Agreement with Chojnacki, the Separation Agreement states "[t]his Agreement contains and comprises the entire understanding of the parties, and there are no additional promises, representations, terms or provisions." To the extent that the complained of activities took place prior to the date Chojnacki signed the release, those claims may be barred if the Release was not obtained as the result of fraudulent inducement. Nonetheless, the language in the release has no bearing on activities that Chojnacki undertook in violation of the separation agreement after the date of the release.

Plaintiff asserts that after Chojnacki signed the Release, he solicited Niemczewski to work for Verifi 1 and that he continued to disseminate confidential information. Defendants also argue that Plaintiffs' claims for fraud, Counts X and XI of the Complaint, fail as a matter of law and should be dismissed. They assert that Plaintiffs' fraud claim against Chojnacki is barred by the express merger clause in his separation agreement and also by the economic loss doctrine. Defendants argue that there can be no genuine dispute concerning the fact that any reliance upon statements not contained in the Separation Agreement itself would be unreasonable as a matter of law.

In response, Plaintiffs assert that there are genuine issues of material fact whether Chojnacki fraudulently induced Plaintiffs to enter into a separation agreement, sign a release, and pay him severance. Plaintiffs assert that Chojnacki made affirmative representations and deliberately concealed true facts in a way that made his statements false and misleading. In support of their arguments, Plaintiffs cite to emails showing there exists a genuine issue of

material fact whether Chojnacki fraudulently induced Plaintiffs to enter into a separation agreement. Accordingly, Defendants' motion for summary disposition of Plaintiffs' claims against Chojnacki based on the Release is denied.

Defendants next assert that Plaintiffs' claims for breach of contract, Counts I-VII of the Complaint, should be dismissed pursuant to MCR 2.116(C)(8) or (C)(10). Count I of Plaintiffs' complaint asserts a cause of action against Niles for breach of her stock purchase agreement. Count II of Plaintiffs' complaint asserts a cause of action against Nile for breach of the LLC agreements. Count III of Plaintiffs' complaint asserts a cause of action against Niles for breach of her employment agreement. Count IV of Plaintiffs' complaint asserts a cause of action against Niles for breach of her separation agreement. Count V of Plaintiffs' complaint asserts a cause of action against Niles for forfeiture under the option agreement. Count VI of Plaintiffs' complaint asserts a cause of action against Chojnacki for breach of his separation agreement. Count VII of Plaintiffs' complaint asserts a cause of action against Niles, Chojnacki, and Niemczewski for breach of their confidentiality obligations.

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 197; 702 NW2d 106 (2005), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). Where the contract language is unambiguous, the Court should effectuate the intent of the parties by applying the plain and ordinary meaning of the contract's terms. *Id* at 197-198.

When interpreting an agreement, the Court reads the agreement as a whole and gives effect to all of the words and phrases. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). A contract is ambiguous if its language is reasonably susceptible to

more than one interpretation. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). The interpretation of an ambiguous contract is a question for the trier of fact. *Klapp*, 468 Mich at 469. Further, a motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the pleadings and a motion under MCR 2.116(C)(10) tests the factual support for Plaintiff's claims. *Maiden*, 461 Mich at 120.

Defendants claim that they are no longer subject to any non-compete restrictions. They argue that Niemczewski never signed a non-compete agreement, that Chojnacki's restrictions expired on October 31, 2015, and that Niles' two year non-compete restrictions expired on April 22, 2015. Defendants further assert that they did not compete with Plaintiffs during the restrictive period and that there were no restrictions prohibiting them from preparing to start a business or preparing a business that may ultimately compete with Plaintiffs. Defendants claim there is no genuine issue of material fact that they never engaged in actual competition with Plaintiffs or solicited any of Plaintiff's customers during the relevant time period.

Plaintiffs argue that preparing to compete is not a valid defense under Michigan law. Plaintiffs further assert that Defendants still remain subject to their contractual obligations not to disclose Plaintiff's confidential information without authorization. Plaintiffs attach the deposition transcript of Chojnacki wherein they claim it shows that Defendants routinely disclosed Plaintiff's detailed financial information, customer information, and other critical business information without authorization in order to find someone to fund their business. Plaintiffs also attach the deposition transcript testimony of Niemczewski wherein they claim he admitted that the financial information and projections that were turned over to TAC and Mellos were confidential.

A genuine issue of material fact exists when reasonable minds could differ on a material issue. *Allison v. AEW Capital Mgt., LLP*, 481 Mich. 419, 425, 751 N.W.2d 8 (2008). Plaintiffs present evidence showing a factual dispute exists as to whether Defendants disseminated and used confidential information in breach of their confidentiality agreements. Whether an activity or several activities combined amounts only to preparing to compete or to competing in violation of a noncompetition agreement is a fact intensive question that cannot be resolved in a motion for summary disposition. In the present case, reasonable minds could differ on what actually constitutes competition in violation of a noncompetition agreement. For all of the reasons stated above, Defendants' motion for summary disposition on Plaintiffs' claims for breach of contract is denied.

Defendants argue in the alternative that Plaintiffs' lifelong non-competition/non-solicitation restriction in Niles' agreement is unreasonable and unenforceable on its face. Niles' agreement seeks to restrict her from working for any competitor in any capacity for as long as she owns one unit of the Company. Plaintiffs assert that Niles breached her stock purchase agreement when she solicited Chojnacki in early 2015 and formally hired him less than a month after he resigned, on August 28, 2015. Plaintiffs argue that Niles' agreement obligates her to abide by the restrictive covenants as long as she remains a shareholder of DialogDirect. Plaintiffs assert that they had neither the obligation nor the ability to accede to Niles' demand when she attempted to sell her stock back to the company. Because there were conflicting terms in Niles' employment agreement, Budco GC LLC agreement, and Stock Purchase Agreement, the parties executed a Letter Agreement wherein they expressly agreed that the two year noncompetition/nonsolicitation restrictions in Niles' employment agreement would control. On November 14, 2011, Niles signed a Letter Agreement, which stated "Notwithstanding the terms

of Section 6.1(b) and 6.1(c) of the LLC Agreement, the parties acknowledge and agree that Executive's non-competition and non-solicitation covenants set forth in that certain Employment Agreement, . . . shall control." Further, the Letter Agreement contained a clause stating that "This letter agreement, together with the LLC Agreement and the Employment Agreement constitutes the entire agreement of the parties with respect to the matters set forth herein. All prior agreements, understanding and arrangements among the parties are hereby superseded by this letter agreement and of no further force or effect."

Thus, Niles argues that she is not subject to the restrictive covenants in the Budco GC LLC Agreement or the Stock Purchase Agreement. When Niles resigned on April 10, 2013, she signed a separation agreement wherein she reaffirmed some of the restrictive covenant obligations in her employment agreement, LLC agreement, and option agreement. The separation agreement did not contain a merger clause, and Niles asserts that the provisions in the Letter Agreement remain in place. Niles' Employment Separation Agreement provided that "I agree and acknowledge that Sections 7 through 9 and Sections 12 through 27 of the Employment Agreement, Section 6.1 of the Amended and Restated Limited Liability Company Agreement of Budco GC Holdings, LLC, and section 6 of the Unit Option Grant Notification and Agreement dated November 14, 2011, remain in full force and effect, and that, as a condition of this Agreement, and of obtaining Severance Payments and other benefits under the Employment Agreement, I must continue to comply with all such provisions." The cited provisions in the Employment Agreement contain confidentiality, non-competition, non-solicitation, and non-disparagement terms. The cited provisions in the Amended and Restated Limited Liability Company Agreement of Budco GC Holdings, LLC address the confidentiality, non-competition, and non-solicitation covenants. In signing the separation agreement, Niles reaffirmed that she

would comply with the confidentiality, non-competition, and non-solicitation provisions in the Employment Agreement and the Amended and Restated Limited Liability Company Agreement of Budco GC Holdings, LLC.

“To be reasonable in relation to an employer’s competitive business interest, a restrictive covenant must protect against the employee’s gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill.” *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 158; 742 NW2d 409 (2007) (citations omitted). The Michigan Antitrust Reform Act (MARA) allows an employment-related noncompetition agreement if it “protects an employer’s reasonable competitive business interests” and “is reasonable as to its duration, geographical area, and the type of employment or line of business.” MCL 445.774a(1). The Court determines reasonableness if the relevant facts are undisputed. *Coates v Bastian Bros, Inc.*, 276 Mich App 498, 506; 741 NW2d 539 (2007).

Niles’ noncompetition agreement as stated in the Amended and Restated Limited Liability Company Agreement of Budco GC Holdings, LLC that prohibits competition for potentially an eternity is unreasonable in duration. The Amended and Restated Limited Liability Company Agreement of Budco GC Holdings, LLC provides “for so long as such Restricted Person [Niles] holds any Units of the Company, such Restricted Person shall not (and shall cause each of his or its Affiliates not to), directly or indirectly, own any interest in, manage, control, participate in (whether as an officer, director, employee, partner, agent, representative or otherwise), consult with, render services for, or in any other manner engage anywhere in the Restricted Territories in any business engaged directly or indirectly in any business that provides similar products or services to those provided by the Company or any of its Subsidiaries (the “Business”); provided, that nothing herein shall prohibit any of the Restricted Persons or their

Affiliates from being a passive owner of not more than 2% of the outstanding stock of any class of a corporation which is publicly traded so long as none of such Persons has any active participation in the business of such corporation.” The Court finds that that restriction on noncompetition contained in the Amended and Restated Limited Liability Company Agreement of Budco GC Holdings, LLC is overly broad and is unreasonable.

There exist many questions of fact as to Plaintiffs’ claims for breach of contract against Niles. Both Plaintiffs’ and Defendants’ submissions contain evidentiary support for their assertions – as well as challenges to the other’s credibility. The Court in *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007) reasoned that, “courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion” *Id* at 625. Accordingly, Defendants’ motion for summary disposition as to Counts I-V for breach of contract against Niles is denied. While Defendants generally request dismissal of Counts I-VII, they do not argue for dismissal of Count VII for Breach of Contract as to the confidentiality obligations of Niles, Chojnacki, or Niemczewski. 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). Thus, the Defendants’ motion for summary disposition of Count VII of Plaintiffs’ complaint is denied.

Defendants also assert that Plaintiffs’ claim for tortious interference fails as a matter of law and should be dismissed pursuant to MCR 2.116(C)(8) or (C)(10). In the Verified Complaint, Plaintiffs assert that “Verifi and Niles intentionally and wrongfully interfered with the Company’s contractual and economic relationship with Chojnacki by soliciting him for employment with Verifi and by hiring him to work at Verifi.” See paragraph 120 of Verified

Complaint. Plaintiffs further claim that “Verifi, Niles, and Chojnacki intentionally and wrongfully interfered with the Company’s contractual and economic relationship with Niemczewski by soliciting him for employment with Verifi and by hiring him to work at Verifi.” See paragraph 121 of Verified Complaint. Defendants claim, without attaching any evidence, that none of the acts or allegations rise to a level of tortious interference and that Plaintiffs have failed to present any evidence to support their claim that Defendants wrongfully solicited Chojnacki and Niemczewski to work for Verifi.

In response, Plaintiffs argue they have shown that there are issues of material fact for trial on their tortious interference claim. They claim that Defendants devised a plan to “extradite” Chojnacki from his employment agreement and then have Niemczewski join him at their new competing business. Plaintiffs do not argue which issues of material fact support their tortious interference claim; however, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court concludes that Plaintiffs’ claims for tortious interference are not so clearly unenforceable as a matter of law that no factual development could justify recovery.

In presenting a motion for summary disposition pursuant to (C)(10), the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). Further, pursuant to (C)(8), all well pled allegations are accepted as true. Thus, Defendants’ motion pursuant to MCR 2.116(C)(8) and (C)(10) is denied as Defendant has not demonstrated the that there are no genuine issues of material fact as it relates to Plaintiffs’ claims for tortious interference.

Defendants also assert that Plaintiffs' breach of confidentiality and Michigan Uniform Trade Secret Act claims (Counts VII and IX) fail and should be dismissed pursuant to MCR 2.116(C)(8) and/or (C)(10). Defendants claim that there is no evidence that they wrongfully used information in their possession to actually compete with Plaintiffs. In support of their arguments that the breach of confidentiality and MUTSA claims fail, Defendants attach evidence purporting to show the identity of Plaintiffs' customers on Plaintiffs' website. In further support of their arguments, Defendants filed supplemental exhibits that were obtained pursuant to a FOIA request to the State of New York. The documents received in response to the FOIA request included Plaintiffs' June 5, 2015 Proposal for New York State Dependent Eligibility Verification Services. As part of those documents, Defendants submitted Plaintiffs' Proposal, Administrative Proposal, Technical Proposal, and Cost Proposal. Defendants assert these documents support their claim that the information Plaintiffs claim to be confidential is publicly available. Defendants assert that the documents disclose the identity of Plaintiffs' customers, Plaintiffs' entire proprietary technology platform and process, Plaintiffs' entire cost proposal that includes a breakdown of flat fees for each phase of the project, and Plaintiffs' audited financial statements for 2013 and 2014. Plaintiffs present evidence in the form of the deposition testimony of Chojnacki and Niemczewski that creates a question of fact whether Defendants disclosed confidential information in violation of their confidentiality agreements. Thus, summary disposition on this claim is denied.

Defendants additionally argue that Plaintiffs' claim for breach of the fiduciary duty fails. Defendants assert that this claim is expressly barred by Chojnacki's separation agreement and that there is no evidence of a breach of the fiduciary duty. In support of their arguments, Defendants cite to *Raymond James & Associates, Inc v Leonard & Co*, 411 FSupp2d 689 (ED

Mich 2006) wherein the Court found that despite the existence of evidence showing defendant prepared solicitation letters before resigning, there was no evidence that the letters had been sent or that he otherwise engaged in competition while he worked there. In *Raymond James*, the Court determined that the evidence merely showed defendant was preparing to compete, which did not support a breach of the fiduciary duty. Defendants argue that they have not breached the fiduciary duty by preparing to compete. Defendants additionally assert that they still are not competing with Plaintiffs, despite their ability to legally do so.

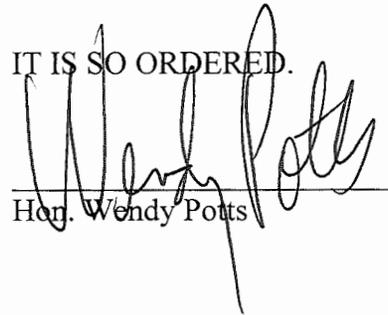
In response, Plaintiffs assert that Chojnacki went far beyond mere preparations in breaching his fiduciary duty, and that there remain questions of fact that should be resolved at trial. Plaintiffs present evidence that Chojnacki engaged in hundreds of hours of telephone conversations, meetings, and out of town travel during business hours. However, the only allegations to which Plaintiffs refer occurred prior to Chojnacki's release agreement. Since those claims are barred by his release, Plaintiffs' claim for breach of the fiduciary duty fails. Thus, Defendants' motion for summary disposition of Plaintiffs' claim for breach of the fiduciary duty is granted.

Plaintiffs generally assert that summary disposition is premature in the instant matter because discovery is not complete. Although summary disposition under (C)(10) is usually premature if granted before discovery on a disputed issue is complete, summary disposition may be proper before the close of discovery if further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566 (2000). Further discovery of Plaintiffs' claims for breach of fiduciary duty does not stand a fair chance of uncovering factual support for Plaintiffs' position. In sum,

Defendants' motion for summary disposition as to Plaintiffs' claim for breach of the fiduciary duty is granted. In all other respects, Defendants' motion for summary disposition is denied.

This Order does not resolve the last pending claim or close the case.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Wendy Potts", is written over a horizontal line. The signature is cursive and somewhat stylized.

Hon. Wendy Potts

Dated: SEPTEMBER 1, 2016