

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PALOGIX SUPPLY CHAIN
SERVICES, LLC

Plaintiffs,

Case No. 2015-991-CB

vs.

MICHAEL MEIR and
CHRISTOPHER WILLIAMS,

Defendants.

OPINION AND ORDER

Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Plaintiff was formed in 2012 as a subsidiary of Palogix International USA, LLC ("PAL"). Defendant Michael Meier ("Defendant Meier") was hired as Plaintiff's president in 2012, and Defendant Christopher Williams ("Defendant Williams") was hired as senior VP of operations in October 2012.

As part of their duties, Defendants were allegedly responsible for briefing PAL regularly and providing its owners with information regarding Plaintiff's financial condition. As part of the briefing, Defendants prepared weekly profit/loss statements, prospective business forecasts, and presentations regarding Plaintiff's performance (collectively, "Briefing Materials"). At the time they were hired, Defendants executed

employment agreements with Plaintiff ("Agreements"). The Agreements each contained identical confidentiality and non-competition provisions. In 2014 Defendants' employment with Plaintiff ended. Shortly after Defendants' employment with Plaintiff ended, Defendants allegedly became employed by TransCorr Global Solution ("TGS").

On April 30, 2015, Plaintiff filed its complaint in this matter against Defendants. In its complaint, Plaintiff purports to state the following claims against Defendants: Count I- Breach of Contract; Count II- Breach of Fiduciary Duty; Count III- Tortious Interference; Count IV- Misappropriation of Trade Secrets under the Michigan Uniform Trade Secret Act ("MUTSA"); Count V- Conversion; Count VI- Embezzlement; Count VII- Fraud; Count VIII- Negligence; Count IX-Unjust Enrichment, and Count X- Conspiracy. On May 4, 2015, Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff has filed a response and requests that the motion be denied. On June 29, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Id.* If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. *Id.* Further, a court may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9). *Id.*

A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

A. Breach of Contract

Plaintiff's breach of contract claim is based on its allegations that Defendants have breached the terms of the Agreements by accepting employment with TGS, by soliciting Plaintiff's customers and employees on behalf of TGS, and by disclosing Plaintiff's confidential information to TGS and using that information to solicit Plaintiff's customers and prospective customers. (See Complaint, at ¶¶47-49.)

Defendants first contend that they did not breach the Agreements because TGS is not a "Competitive Business" as defined by the Agreements because it "does not rent reusable containers to businesses in the automotive and heavy industry industries, is not engaged in the business of container asset management, and is not a "start-up" business funded by a private equity or venture capital firm." (Plaintiff's Brief, at p.5; Exhibits A & B to Complaint, at ¶ 5(b)). In support of their position, Defendants' rely on their own testimony in which they state that TGS is not a competitive business within the

meaning of the Agreements. (See Defendants' Exhibits 2 & 3.) However, the Michigan Supreme Court has made clear that conclusory statements in an affidavit do not satisfy the legal standard for summary disposition under MCR 2.116(C)(10). *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 470; 646 NW2d 455 (2002). In this case, Defendants filed their instant motion in lieu of filing an answer and discovery is still in its infancy. Given the limited evidence presented in support of Defendants' position, as well as the early stage of this matter, the Court is convinced that Defendants' motion for summary disposition of the portion of Plaintiff's breach of contract claim related to breach of the non-compete provision within the Agreements must be denied without prejudice.

Defendants also contend that they have not solicited Plaintiff's customers and employees on behalf of TGS in violation of paragraph 5 of the Agreements. Specifically, Defendants contend that their actions have not violated paragraph 5 because (1) TGS is not a "Competitive Business" and (2) Plaintiff has not alleged and cannot show that Defendants have solicited, interfered with, or endeavored to entice away from Plaintiff a customer, supplier or other person with whom Plaintiff has a contractual relationship.

With respect to whether TGS is a "Competitive Business," the Court has already held that neither side has provided sufficient evidence to establish whether TGS is a "Competitive Business." Consequently, Defendants' motion must be denied without prejudice to the extent it is based on that contention.

With regards to whether Defendants have solicited, interfered with, or endeavored to entice away from Plaintiff a customer, supplier or other person with

whom Plaintiff has a contractual relationship, it appears that Plaintiff's claim is based on its assertion that Defendants solicited Magna as well as "other potential targets" on behalf of TGS. (Plaintiff's Brief in Opposition, at 10.) Plaintiff alleges among other things, that Defendants began soliciting Magna while still employed by Plaintiff (and prior to the assignment of the contracts to Protrans.) (Plaintiff's Brief in Opposition, at 7.) While Defendants appear to concede that they solicited Magna on behalf of TGS, they contend that their actions were not barred by paragraph 5 of the Agreements because Magna did not have a contractual relationship with Plaintiff at the time that they solicited Magna due to an assignment of the contracts to Protrans. Plaintiff contends in response that such a reading of the Agreements is too narrow and further while it assigned its contractual rights and obligations with respect to Magna to Protrans, it retained an interest in Magna and Protrans' business relationship.

Generally a motion under MCR 2.116(C)(10) is premature prior to the completion of discovery. *Colista v Thomas*, 241 Mich App 529; 616 NW2d 249 (2000). Given the allegations as to this claim and the early stage of discovery in this matter, the Court finds that Defendants' request is premature. Furthermore, Defendants' contention that Magna did not have a contractual relationship with Plaintiff due to the assignment of contracts is without merit. Pursuant to the assignment agreement, Plaintiff assigned to Protrans "all rights and obligations under the Assumed Contracts accruing on or after [October 31, 2014]." (See Exhibit F to Complaint.) Both Magna and Plaintiff are parties to the assignment agreement which continued to govern the parties' relationship with respect to the assigned contracts. While the basis of Magna and Plaintiff's contractual relationship had changed, they continued to have a contractual relationship.

Defendants also contend that they did not violate paragraph 5 of the Agreements by soliciting Plaintiff's employees. Specifically, Defendants contend that they did not breach paragraph 5 because the two employees in question had been terminated by Plaintiff before they were solicited. Paragraph 5(a) precludes Defendants from employing, retaining, or having or causing "any other person or entity to employ or retain, any person who was employed or retained by [Plaintiff] while Employee was employed by [Plaintiff]." (See Exhibit A to Complaint, emphasis added.) Consequently, the key inquiry is whether the individuals Defendants allegedly solicited were employed by Plaintiff during the period of time in which Defendants were employed by Plaintiff. Consequently, and contrary to Defendants' position, it does not matter whether the individual who was solicited was employed by Plaintiff at the time the solicitation took place. As a result, Defendants' contention is without merit.

Finally, Defendants assert that they did not violate the Agreements' confidential provisions or misappropriate any trade secrets. Paragraph 4 of the Agreements provides that Defendants shall not "directly or indirectly, disclose any secret or confidential information that [they] may learn or has learned by reason of his association with [Plaintiff]." (See Exhibits A & B to the Complaint.) In their motion, Defendants contend that Plaintiff has failed to allege the existence of any trade secret(s), and has failed to present any evidence that they have disclosed a trade secret or other confidential information to TGS.

In its complaint, Plaintiff alleges that Defendants have taken its pricing models, strategies and analysis for seeking new customers, knowledge and analysis regarding Plaintiff customers, and knowledge about Plaintiff's employees' performance,

experience and skill sets. (See Complaint, at ¶¶60-64.) While the issue of whether such knowledge constitute one or more trade secrets has yet to be determined, and the extent to which Defendants disclosed such knowledge to TGS is unknown, the Court recognizes that discovery is ongoing. A grant of summary disposition is premature if granted before discovery on a disputed issue is complete. *Mackey v Department of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994). Given the fact that this matter is in its early stages, and the parties dispute whether any trade secrets were misappropriated and/or disclosed, the Court is convinced that summary disposition of Plaintiff's misappropriation claim is premature at this time.

B. Breach of Fiduciary Duty

Count II of Plaintiff's complaint purports to state a claim against Defendants for breach of fiduciary duty. A fiduciary relationship...exists when there is a reposing of faith, confidence, and trust and the placing of reliance by one on the judgment and advice of another." *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998). A person who is in a fiduciary relationship with another is under a duty to act for the benefit of the other person regarding matters within the scope of the relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999). "Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 508; 536 NW2d 280 (1995).

In its complaint, Plaintiff alleges that Defendants breached their fiduciary duty by misrepresenting and artificially inflating Plaintiff's apparent financial performance in order to obtain higher performance bonuses. (See Complaint, at ¶52.) In their motion,

Defendants first contend that they did not owe Plaintiff a duty with respect to the financial reporting because PAL handled all of Plaintiff's accounting and appointed a CFO. In response, Plaintiff asserts that Defendants were responsible for accounting and financial reporting functions. In support of its position, Plaintiff relies on the affidavit of Robert Liebesman, PAL's CEO, in which he stated that Defendants were responsible for briefing him regularly and providing him with information regarding Plaintiff's financial condition. (See Plaintiff's Exhibit 1, at ¶ 4.) Further, Mr. Liebesman stated that Defendants were entirely responsible for Plaintiff's financial team and functions, including generating, reviewing, and producing weekly profits and losses statements, pipeline reports and presentations, and that Defendants had final authority to approve Plaintiff's financial documents before they were provided to PAL. (Id. at ¶¶5-6.) Moreover, Mr. Liebesman testified that PAL's CFO did not prepare Plaintiff's financial data. (Id. at ¶5.) While Defendants have both testified that they were not responsible for the accounting and financial reporting functions of Plaintiff (See Defendants' Exhibits 2 & 3, at ¶5.), such testimony merely creates an issue of fact to be determined by the trier of fact. Consequently, Defendants motion must be denied to the extent they contend that they were not responsible for Plaintiff's financial accounting.

Next, Defendants contend that even if they did owe Plaintiff a duty to prepare and report Plaintiff's financials, there is no evidence that they breached that duty. In response, Plaintiff again relies on Mr. Liebesman's affidavit. Specifically, Mr. Liebesman specifically identified multiple misrepresentations Defendants allegedly made with respect to Plaintiff's financial condition. (See Plaintiff's Exhibit 1, at ¶¶8-20.) Based on Mr. Liebesman's testimony, the Court is convinced that Plaintiff has

established that there is a genuine issues of material fact as to whether Defendants breached their fiduciary duties to Plaintiff. Consequently, Defendants' motion for summary disposition of the portion of Plaintiff's breach of fiduciary duty claims based of financial reporting must be denied.

In its complaint, Plaintiff also alleges that Defendant Meier breached his fiduciary duty of loyalty by soliciting Defendant Williams to work for TGS. In their motion, Defendants contend that Defendant Meier did not solicit Defendant Williams. Specifically, Defendants testified that Defendant Williams was terminated by Plaintiff and began working for TGS before Defendant Meier left Plaintiff and began working for TGS. (See Defendants' Brief in Opposition, Exhibit 2 at ¶¶11-12 and Exhibit 3, at ¶7.) In response, Plaintiff contends that Defendants conspired to leave Plaintiff to work for TGS while still employed by Plaintiff, and that they planned to have Defendant Meier terminated so that he could receive a severance. The Court is convinced that summary disposition pursuant to MCR 2.116(C)(10) on this issue is premature at this time.

Generally a motion under MCR 2.116(C)(10) is premature prior to the completion of discovery. *Colista v Thomas*, 241 Mich App 529; 616 NW2d 249 (2000). In this case, it is undisputed that Defendant Meier was terminated shortly before Defendant Williams' employment also ended. Moreover, it is undisputed that Defendants commenced their co-worker relationship with TGS shortly after their employment with Plaintiff ended. Based on these circumstances, the Court is satisfied that summary disposition on this issue is premature and that Plaintiff is entitled to engage in discovery regarding the circumstances surrounding the end of Defendants' employment with Plaintiff and the beginning of their employment with TGS.

C. Tortious Interference

In their response, Plaintiff concedes that its tortious interference claim, as pled, fails to state a claim upon which relief can be granted. Consequently, Defendants are entitled to summary disposition of Plaintiff's tortious interference claims pursuant to MCR 2.116(C)(8), but it requests leave to amend its tortious interference claim to include allegations that Defendants tortiously interfered with its contracts and business relationships with Magna and Protrans. However, Plaintiff has failed to provide the Court with its proposed amended tortious interference claim, and has failed to provide Defendants with an opportunity to respond to the request to amend. While the Court notes that leave to amend is freely granted, particularly in a case that is new such as this matter, it is convinced that such a request is more properly made by filing an independent motion for leave. Consequently, Plaintiff's request for leave to file an amended tortious interference claim is hereby denied without prejudice.

D. Conversion and Embezzlement

The tort of conversion is defined as "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). "The gist of conversion is the interference with control of the property." *Sarver v Detroit Edison Co*, 225 Mich App 580, 585; 571 NW2d 759 (1997) (internal citation omitted). Similarly, the elements of an embezzlement claim are: 1) the money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must

come into the defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant intended to defraud or cheat the principal. *Cabala v Allen*, unpublished per curiam opinion of the Court of Appeals, decided September 27, 2012 (Docket No. 305250.).

In their motion, Defendants contend that Plaintiff has failed to identify specific, identifiable money that Defendants have converted/embezzled. To support an action for conversion of money, the defendant "must have obtained the money without the owner's consent to the creation of a debtor-creditor relationship" and "must have had an obligation to return the specific money entrusted to his care." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111-112, 593 NW2d 595 (1999). In this case, Mr. Liebesman has testified that Plaintiff paid Defendants \$145,000.00 in bonuses as a result of their alleged wrongful actions. (See Plaintiff's Exhibit 1, at ¶11.) The Michigan Court of Appeals has held that the term "specific money" should be read to mean the specific amount of money to make it identifiable, as opposed to the identical money. See *People v Mason*, 247 Mich App 64, 77; 634 NW2d 382 (2001). Accordingly, because Plaintiff has identified a specific amount of money that Defendants have allegedly wrongfully obtained and retained, Plaintiff adequately identified the allegedly converted property. Consequently, Defendants' assertion is without merit.

Defendants also contend that Plaintiff's conversion and embezzlement claims fail because Plaintiff consented to the payment. However, consent obtained by fraud is no consent at all. *Austin v Ancient Order of Gleaners*, 268 Mich 568, 569; 256 NW2d 550

(1934.) Consequently, the fact that Plaintiff consented to the payments in question is immaterial if Defendants obtained such consent as a result of their fraudulent conduct. Consequently, Defendants' position is without merit.

E. Fraud

To assert an actionable fraud claim, the plaintiff must demonstrate that: (1) the defendant made a material representation; (2) it was false; (3) when the defendant made it, the defendant knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) the defendant made it with the intention that it should be acted upon by the plaintiff; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff thereby suffered injury. *Cooper v Auto Club Ins Association, supra; Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Trial courts must carefully examine whether alleged fraudulent statements are "statements of past or existing fact, rather than future promises or good-faith opinions" and whether the alleged statements "are objectively false or misleading." *Cooper, supra* at 416.

In their motion, Defendants contend that Plaintiff has failed to plead its fraud claim with the particularity required by MCR 2.112(B)(1). MCR 2.112(B)(1) provides that "[i]n allegations of fraud or mistake, the circumstances constituting fraud or mistake must be state with particularity." "Facts showing the time, place, contents of the misrepresentation or nature of the misleading act, facts misrepresented, and identification of what was obtained thereby, should be sufficient." Robert Dean & Ronald S. Longhofer, *Michigan Court Rules Practice* §2112.3, at 291 (4th ed 1998); 5 Charles A. Wright, *Federal Practice & Procedure* §1298 (2d ed 1990); *Churchhill v Palmer*,

unpublished opinion of the Court of Appeals, decided December 5, 1975 (Docket No. 18663.)

In this case, Plaintiff has laid out multiple potential bases for its fraud claim, all of which reference documents in which it alleges Defendants made fraudulent misrepresentations. (See Complaint, at ¶¶20-26.) Further, Plaintiff alleges that Defendants made the false misrepresentations knowingly or recklessly without knowledge of its truthfulness, and with the intent that Plaintiff rely on them. (See Complaint, at ¶76.) Moreover, Plaintiff alleges that it relied on the false misrepresentation, and that such reliance has caused it to suffer damages. (See Complaint, at ¶¶77-78.) Based on these allegations, the Court is convinced that Plaintiff has pled its fraud claim with the requisite particularity.

Defendants also contend that a portion of Plaintiff's fraud claim is premised on promises as to the future of Plaintiff's future performance. While some of Plaintiff's allegations provide that it took actions based on the misrepresentations, none of the purportedly false statements at issue appear to be of the nature of a promise of future performance. Consequently, the Court is satisfied that Defendants' contention is without merit.

F. Negligence

In order to prevail on a negligence claim, a plaintiff must prove: (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) causation, and (4) damages. *Quinto v Woodward Detroit CVS, LLC*, 305 Mich App 73, 76; 850 NW2d 642 (2014).

In their motion, Defendants contend that Plaintiff's negligence claim fails because they did not owe Plaintiff a duty. In its response, Plaintiff contends that employees owe their employer to use ordinary care in the performance of their job functions. However, the case relied upon by Plaintiff does not stand for that position. Accordingly, Plaintiff has failed to properly support its response. Consequently, the Court is convinced that Defendants' motion for summary disposition of Plaintiff's negligence claim must be granted.

G. Unjust Enrichment

To establish a claim of unjust enrichment, the plaintiff must prove: 1) Receipt of a benefit by the defendant from the plaintiff; and 2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). In their motion, Defendants contend that Plaintiff has failed to allege that they received payments they should not have received. However, Plaintiff has alleged that Defendants have received performance bonuses and that the bonuses were higher than they should have been as a result of Defendants' wrongful conduct, and that it would be inequitable to allow Defendants to retain the payments. (See Complaint, at ¶¶84-85.) The Court is convinced that such allegations are sufficient to plead a claim for unjust enrichment. Accordingly, Defendants' motion for summary disposition of Plaintiff's unjust enrichment claim must be denied.

H. Conspiracy

A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose

by criminal or unlawful means." *Admiral Ins Co v Columbia Cas Ins Co.*, 194 Mich App 300, 313, 486 NW2d 351 (1992). In their motion, Defendants contend that Plaintiff has failed to sufficiently plead its conspiracy claim. Specifically, Defendants contend that Plaintiff has failed to allege that they conspired with each other. However, Plaintiff has alleged that Defendants agreed to engage in certain concerted actions. (See Complaint, at ¶87.) The Court is convinced that such allegations are sufficient to plead a conspiracy claim.

In addition, Defendants also assert that Plaintiff's conspiracy claim fails because there is no independent underlying tort. However, for the reasons set forth above, Defendants are not entitled to summary disposition of many of Plaintiff's tort claims. Consequently, Defendants' position is without merit.

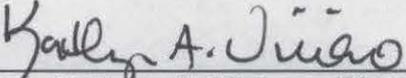
IV. Conclusion

For the reasons set forth above, Defendants' motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. The portions of Defendants' motion requesting summary disposition of Plaintiff's tortious interference (Count III) and negligence (Count VII) claims is GRANTED. The remainder of Defendants' motion is DENIED. Further, Plaintiff's request for leave to amend to file an amended claim for tortious interference is DENIED, WITHOUT PREJUDICE.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

Date: SEP 04 2015



Hon. Kathryn A. Viviano, Circuit Court Judge