

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN**

QUALITE SPORTS LIGHTING, LLC

Plaintiff

Case No. 1:17-cv-00607

-v-

Hon. Robert J. Jonker

FRANCISCO ORTEGA, GLOBAL
SYNTHETICS ENVIRONMENTAL
LLC, AND WILLIAM SMITH

Defendants

**DEFENDANTS' GLOBAL SYNTHETICS, WILLIAM SMITH, AND
RICHARD ORTEGA'S MOTION FOR SUMMARY JUDGMENT
AS TO COUNTS I THROUGH VI**

Defendants William Smith, Global Synthectics Environmental, LLC (Global Synthetics), and Richard Ortega move for Summary Judgment under Fed. R. Civ. P. 56(a) on Plaintiff's trade secret misappropriation claims under Federal and Michigan Law (Counts I and II, respectively), Common Law and Statutory Conversion (Counts III and IV, respectively), Tortious Interference with a Business Expectancy (Count V), and Civil Conspiracy (Count VI).

Respectfully submitted,

Shinn Legal, PLC

Dated: October 18, 2018

By: /s/ Jason M. Shinn
Attorney for Defendants

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**BRIEF IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED..... iii

LEGAL AUTHORITY.....iv

BRIEF IN SUPPORT OF MOTION.....1

STATEMENT OF ISSUE PRESENTED

1. Should Summary Judgment of Plaintiff's Federal and Michigan Trade Secret Claims (Count I and II) be granted?

Defendants say, "Yes."
Plaintiffs, say, "No."

2. Should a finding of Bad Faith under MCL MCL 445.1905 be made against Plaintiff for bringing a bad-faith trade secret claim?

Defendants say, "Yes."
Plaintiffs, say, "No."

3. Should Summary Judgment of Plaintiff's Statutory and Common Law Conversion Claims (Count III and IV) be granted?

Defendants say, "Yes."
Plaintiffs, say, "No."

4. Should Summary Judgment of Plaintiff's Tortious Interference Claim (Count V) be granted?

Defendants say, "Yes."
Plaintiffs, say, "No."

5. Should Summary Judgment of Plaintiff's Civil Conspiracy Claim (Count VI) be granted?

Defendants say, "Yes."
Plaintiffs, say, "No."

LEGAL AUTHORITY

Case Law

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)

Bliss Clearing Niagara, Inc. v. Midwest Brake Bond Co., 270 F. Supp. 2d 943, 946 (W.D. Mich. 2003)

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)

CMI Int'l, Inc. v. Internet Int'l Corp., 251 Mich. App. 125, 132, 649 N.W.2d 808, 812-13 (2002)

Compuware Corp. v. Intl. Business Machines, 259 F. Supp. 2d 597, 605 (E.D. Mich. 2002)

Feldman v. Green, 138 Mich. App. 360, 378, 360 N.W.2d 881 (1984)

Interactive Solutions Group, Inc. v. Autozone Parts, Inc., 2012 WL 1288173 (E.D. Mich. Apr. 16, 2012)

Int'l Tech. Consultants, Inc. v. Stewart, Case No. 07-13391, 2010 WL 3789831, at *11 (E.D. Mich. Sept. 22, 2010)

Mahrle v. Danke, 216 Mich. App. 343, 350, 549 N.W.2d 56 (1996)

Mike's Train House, Inc. v. Lionel, L.L.C., 472 F.3d 398, 410 (6th Cir. 2006)

Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co., 95 F. App'x 132, 135 (6th Cir. 2004)

Rothschild v. Ford Motor Co., 2 F.Supp.2d 941, 950 (E.D.Mich.1998)

Shatterproof Glass Corp. v. Guardian Glass Co., 322 F.Supp. 854, 867 (E.D. Mich.1970)

Skousen v. Brighton High Sch., 305 F.3d 520, 526 (6th Cir. 2002)

Statutes

MCL § 445.1902(d)

MCL §445.1903

MCL § 445.1904

Court Rules

Fed. R. Civ. P. 56(a)

Introduction and Summary of Defendants' Motion.

On July 17, 2017, Plaintiff sued Defendants Global Synthetics and its consultant and independent contractor, Bill Smith. The suit alleged trade secret misappropriation claims under Federal and Michigan Law (Counts I and II, respectively), Common Law and Statutory Conversion (Counts III and IV, respectively), Tortious Interference with a Business Expectancy (Count V), and Civil Conspiracy (Count VI).¹ Plaintiff alleged its claims against Defendants Global Synthetics and Mr. Smith derive out of actions taken by Mr. Ortega. See e.g., Amended Complaint, ECF No. 41, ¶¶57, 58.

Plaintiff failed to support its trade secret claims. The evidence shows any alleged acts causing Plaintiff's claims were not taken at the request, encouragement, benefit of or in concerted action by Defendants and Mr. Ortega. Specifically, (i) Defendant Global Synthetic did not know of Mr. Ortega's purported non-compete agreement or any documents or information Plaintiff claims Mr. Ortega wrongfully accessed (ii) such documents or information were not provided or otherwise used by Defendants; (iii) Defendants never profited from any claimed trade secret or confidential information; (iv) Defendants did not cause Plaintiff any damages; and

¹ Mr. Richard Ortega was also sued for the claims subject to this motion and other claims (Fraud (Count VII, Breach of Contract (Count VIII), and Breach of Fiduciary Duty (Count IX)), which are the subject of his own motion for summary judgment for those claims.

(v) Defendants did not tortiously interfere with Plaintiff's business expectancy.

These conclusions, were largely confirmed by the evidence described below and testimony from Plaintiff's corporate representative, Kyle O'Malley (Ex. A), and representatives from the non-party (United Futbol Academy) who accepted a quote from Defendant Global Synthetics over Plaintiff's quote (Ex. B: P. Broome Dep.)

FACTUAL BACKGROUND

I. The Parties.

Global Synthetics is a Louisiana limited liability company. Amended Complaint ¶ 6. Its sole owner and CEO is Charles Dawson. Ex. C: Dawson Dep. p. 12. Mr. Dawson has been working in the sports lighting business since 2013 or 2014. *Id*, p. 16. Prior to this, Mr. Dawson's company focused on sports field surfacing services. *Id*, p. 16.

Mr. Smith has and continues to be an independent contractor and provides consulting services to Global Synthetics. Ex. D: Smith Dep. p. 18.

Mr. Ortega earned a degree in Business Information Systems in 2011 and thereafter started a marketing company focused on website and graphic design, online and social media marketing services. Ex. E: Ortega Dep., p. 41. He provided these services as an independent contractor to several companies (*Id*, p. 42-43) before becoming employed by Plaintiff in 2013. *Id*, p. 33. This employment ended

in January 2015 when he was transferred to a company called The Shane Group.

Ex. A: Plaintiff Corporate Representative Dep. p. 46.

Plaintiff Qualite is a Delaware limited liability company with its principal place of business in Hillsdale County, Michigan. Amended Complaint, ¶ 1.

II. Bill Smith was employed by Plaintiff as its Vice-President of Sales. Even though Mr. Smith created and/or had access to information Plaintiff now claims to be trade secret or confidential information, he was not employed by Plaintiff under any non-compete restriction or other similar agreement that would have protected the secrecy of such information. And he went to work for Global Synthetics with the knowledge and encouragement of Plaintiff's President.

Mr. Smith was employed by Plaintiff (Amended Complaint, ¶ 8), as its Vice-President of Sales and Marketing. Ex. F: Plaintiff's Responses to Request to Admit, No. 5. This employment ended in March 6, 2015. Amended Complaint ¶ 35; Ex. D: Smith Dep. p. 30. He worked with Global Synthetics to take over its sports lighting business. Ex. C: Dawson Dep. p. 33, 36.

Before Mr. Smith left Plaintiff to work with Global Synthetics, Mr. Dawson asked Plaintiff's President, Dave Herman for permission to talk to Mr. Smith. Ex. C: Dawson Dep. p. 34, 36. He agreed and recognized the benefit of Mr. Smith leaving Plaintiff to work with Global Synthetics. *Id.*

Mr. Smith was not subject to any noncompete restriction or any other agreements intended to protect Plaintiff's purported trade secrets, confidential information, or proprietary information.

III. Global Synthetics had direct access to Plaintiff’s purported trade secrets and confidential information involved in the suit as prior Plaintiff’s sales agent, including direct access to the Dropbox folder.

Immediately before the issues causing this lawsuit, Global Synthetics had a sales representative relationship with Plaintiff (the “Sales Representative Relationship”). Ex. F: Plaintiff’s Responses to Request to Admit, No. 12.

This relationship was not subject to any confidentiality or other restrictions.² Ex. C: Dawson Dep. p. 23. Again, this is simply another example of Plaintiff failing to take basic, reasonable measures to protect the purported trade secrets or confidential information subject to this lawsuit.

Under this relationship, Global Synthetics Environmental sold and marketed products offered by Qualite. *Id.* Importantly, under its Sales Representative Relationship with Plaintiff, Global Synthetics, along with various other outside sales representatives were authorized to have direct, unfettered access to the electronic Dropbox folder and materials Plaintiff **now** claims to be “trade secrets” and confidential information. Ex. D: Smith Dep. p. 14, 50, 53, 72-73, 76-71, 82, 86, 88 (listing over 25 outside representatives with access). While this relationship ended

² Plaintiff has represented throughout this litigation, including to case evaluators that there was a written agreement between the parties. But no such agreement was agreed to or ever produced by Plaintiff. Instead, Plaintiff produced a document that Defendant Global Synthetics never signed and that was expressly only effective upon its signature.

in 2015 (Id) Plaintiff never restricted Defendants' access to the Dropbox Folder.

IV. The United Futbol Lighting Project.

The focal point for Plaintiff's claims against these Defendants is a quote and plan designs Plaintiff provided to non-party United Futbol Academy for the installation of sports lighting. Plaintiff's Amended Complaint, ECF No. 41, ¶¶40, 42-43, and 52. Plaintiff asserted both the quote and designs were "trade secrets" that Co-Defendant Mr. Ortega misappropriated and then provided to Defendants Bill Smith and Global Synthetics. Id, ¶¶ 65 and 67.

Plaintiff also asserted Defendants tortiously interfered with its business expectancy (no contractual expectancy was alleged, Amended Complaint, ¶ 95).

A. After almost a year of litigation, Plaintiff admits its trade secret designations as to the Quote and Designs were not accurate in that the information is not a "trade secrets."

The plot to Plaintiff's story quickly unraveled in discovery. Plaintiff admitted – almost a year after suing – that its quote and designs were not trade secrets. Ex. F: Plaintiff's Answers to Request to Admit, Nos. 34, 35, 36, and 37.

Plaintiff's corporate representative also confirmed as much on July 26, 2018. Ex. A: Qualite Corporate Representative, Kyle O'Malley Dep. Tran. p.169.

B. United Futbol's Representative testified that it provided the subject quote, designs, and pricing information to Global Synthetics and the recommendation for United to not choose Plaintiff and work with Global Synthetics was because of Plaintiff's poor customer service and inability to meet project requirements.

United Futbol Academy's representative, Philip Broome, testified Plaintiff's quote was not chosen because of various deficiencies concerning Plaintiff's product, sales, service, and inability to meet project deadlines. See Ex. B: P. Broome, Dep. Trans. p. 29, 117; See also Ex. G: Philip Broome Affidavit, ¶8. This testimony best sums up the true reasons Plaintiff's quote and "business expectancy" failed:

And I will tell you, it became very -- **it was a very easy decision for me to recommend [Geo-Surfaces over Qualite]**. And I called Pat Kinney [of Qualite] numerous times, and oftentimes, it was either early in the morning - - early in the morning or later in the afternoon because during the day I was out. And my specific words to Deo was, **it's very frustrating when we're trying to spend hundreds of thousands of dollars with somebody and I can't get a call back. And so -- and when we reached out and connected with Charlie, he was there within a couple of days.**

Ex. B: Broome Dep., p. 115 (Emphasis added).

Mr. Broome, on behalf of United Futbol Academy, also confirmed he provided the purported trade secret information consisting of Plaintiff's quote, pricing, and designs to Defendant Global Synthetics Ex. B: P. Broome, Dep. p. 29 and 49 and Ex. G: P. Broome Affidavit, ¶ 6. This information was not subject to any written non-disclosure agreement between Plaintiff and United Futbol. Ex. B: P. Broome Dep. p. 131.

Additionally, Plaintiff's representative also confirmed Plaintiff had no evidence to refute Mr. Broome's testimony about providing Defendant Global Synthetics with the quote and designs. Specifically Mr. O'Malley testified Plaintiff

had no evidence any Defendant misappropriated, accessed, or converted any “trade secret” or “confidential information.” Ex. A: Qualite Representative Dep., 216-217.

Additionally, Plaintiff’s representative also testified it could not identify the individuals or entities who purportedly accessed its claimed Dropbox file. *Id.*, p. 159, 186.³ Thus, Plaintiff leaves it to speculation on whether any Defendant wrongfully accessed the information within the file.

C. The Dropbox file involved in Plaintiff’s suit was registered and owned by Mr. Ortega. It did not contain trade secret or confidential information, and Plaintiff did not have measures protecting the secrecy of the information. Files put in the account were determined by Plaintiff’s then Vice President, Bill Smith and Director of HR – with the purpose of sharing files with customers, outside sales representatives, and the companies under the “Shane Group Umbrella.” Thus, the information was never “secret” or confidential.

Before being employed by The Shane Group, Mr. Ortega registered for his personal use Dropbox account.⁴ Ex. E: Ortega Dep., p. 58.

³ This testimony is as follows:

So we know employees of Qualite were - - had access, whether they accessed it or not I can't say, but they had access, and - - and, again, as we tried to gather, I guess, evidence for the case or litigation, we - - Qualite approach dropbox to get logs as to - - so we can see everyone who did do that, did go in, and not to my knowledge, we haven't been able to gather that information yet.

⁴ Dropbox is a digital file sharing service where account holders can “can store and share files, [or] collaborate on projects ...” <https://www.dropbox.com/features> (Last visited on 10/15/2018). Notably, among the terms users agree to in using Dropbox is unrestricted access by Dropbox to review any content stored in an account. See Terms, Your Responsibility, <https://www.dropbox.com/terms> (Last visited on 10/15/2018).

Mr Ortega was later directed by Plaintiff's Vice President Bill Smith and HR Director Marci to set up his Dropbox account to share information with customers, outside sales representatives, and within the company and its subsidiaries. Ex. E: Ortega Dep., p. 60.

Mr. Ortega testified about how this sharing occurred. He gave an example of on May 11, 2015 he shared files using the Dropbox service with Mr. Smith. Ex. E: Ortega Dep., p. 55. At that time, Mr. Smith was employed by Global Synthetics. *Id.* The file shared – similar to the allegations in the complaint – was a link to design documents identified as the “Duke Williams Field Q-LED.” *Id.*

V. Defendant Ortega testified he did not take any wrongful action alleged by Plaintiff with the knowledge, at the request of or in concerted action with Defendants Smith and Global Synthetic.

As the testimony from Mr. Broome clarifies, Plaintiff's first inclination has been to blame others for its business shortcomings (e.g., Qualite's sales representative didn't lose the United Futbol project, it was Defendant's fault).

In contrast, Mr. Ortega candidly admitted any alleged wrongful conduct Plaintiff alleges to have occurred, was not at the direction of or with knowledge by Defendants Smith or Global Synthetics. Specifically, Mr. Ortega testified:

- Before engaging in any business with Global Synthetic, its CEO, Charles Dawson, asked whether he had a noncompete restriction with his prior employer. Mr. Ortega testified he did not disclose it (because he did not know

or understand that one existed at the time). Ex. E: Ortega Dep., p. 239.

- Defendants Smith and Global Synthetic never asked him to provide any documents relating to the United Futbol Project. *Id*, 239-240;
- Defendants Smith and Global Synthetic never asked him to provide any links to access any of the claimed trade secret or confidential information. *Id*, 240; and
- Mr. Ortega understood Philip Broome had wanted him to share the design, quote, and pricing information it received from Qualite with Mr. Dawson's company, Global Synthetics. *Id*, 240.
- Mr. Ortega and his company, Grippa Consulting, have no agreements with Global Synthetics or companies related to it (Ex. E: Ortega Dep., p. 49) and the only services he has provided to Mr. Dawson's companies was website services, e.g., creating or redesigning an existing website. *Id*, p. 26.

LEGAL DISCUSSION

VI. Standard for Summary Judgment

Summary judgment is proper when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The court may not grant summary judgment if “the evidence is such that a reasonable jury could return a verdict for the nonmoving

party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court “views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party.” *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App’x 132, 135 (6th Cir. 2004) (citing *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526 (6th Cir. 2002)).

But even with this favorable perspective, the non-moving party “must present affirmative evidence to defeat a properly supported motion for summary judgment.” *Anderson*, 477 U.S. at 257. And a moving party is entitled to summary judgment when a non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A fact is material if it “might affect the outcome of the suit under the governing law[,]” and a dispute about a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

VII. Summary Judgment of Counts I through VI is appropriate because Plaintiff cannot offer any evidence that Defendants Smith or Global Synthetic misappropriated any trade secret or confidential information or otherwise engaged in any tortious conduct, because they did not.

At the outset, Plaintiff essentially admitted through Mr. O’Malley’s testimony it had no evidence Defendants misappropriated, accessed, or converted any “trade

secret” or “confidential information” by accessing Plaintiff’s claimed Dropbox folder. Ex. A: Qualite Representative Dep., 159, 186, 216-217.

And the uncontradicted evidence is that they did not: (i) Plaintiff admitted its trade secret assertions of the United Futbol Quote and Design were not trade secrets (Ex. F: Responses to Request to Admit); (ii) The United Quote and Designs were disclosed to Defendant Global Synthetic by United Futbol (Philip Broome); Ex. B: Broome Dep. p. and Defendants never asked Mr. Ortega to provide any Qualite documents, including the United Futbol Quote or Design (Ex. E: Ortega Dep., p. 239-240). As such, Summary Judgment as to Plaintiff’s Claims I through VI is appropriate.

VIII. Summary Judgment of Plaintiff’s Trade Secret Claims, Counts I and II.

A. Trade Secret Law applicable to Plaintiff’s claims.

To assert a trade secret misappropriation claim, a party must first demonstrate “the information at issue actually constitutes a trade secret.” *Mike’s Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 410 (6th Cir. 2006). To constitute a trade secret, the information must derive independent economic value from not being generally known or readily ascertainable by other persons, and it must be the subject of efforts to maintain its secrecy. MCL § 445.1902(d).

To prove a claim of misappropriation under Michigan law, a plaintiff must establish: (1) the existence of a trade secret; (2) its acquisition in confidence; and (3)

the defendant's unauthorized use. *Compuware Corp. v. Intl. Business Machines*, 259 F. Supp. 2d 597, 605 (E.D. Mich. 2002); citing *Rothschild v. Ford Motor Co.*, 2 F.Supp.2d 941, 950 (E.D.Mich.1998). Michigan courts define “trade secret” as that which “consists of any valuable formula, pattern, device, process, or other information that is used in one's business and gives the possessor a competitive advantage over those who do not know or use the information.” *Rothschild* at 950.

B. Plaintiff asserted documents consisting of its quote and designs (Amended Complaint, ¶ 65 and 77) were trade secrets. However, Plaintiff later admitted these assertions were not true and the quote and designs are not trade secrets.

On July 6, 2017, Plaintiff sued Defendants for trade secret misappropriation. ECF No. 1. In this initial complaint and the two subsequent amendments (ECF Nos. 12 and 41), Plaintiff asserted its Federal and Michigan Trade Secret Claims (Count I and II, respectively), were based, in part, on the misappropriation of its “Qualite United Sports Complex Quote” and “Qualite United Sports Complex Design.” See Complaint, ECF No. 1, ¶ 63 and 75; first amended complaint, ECF No. 12, ¶ 63 and 75; and third amended complaint, ECF No. 41, ¶ 65 and 77. Plaintiff shared both “trade secrets” with non-party United Futbol and without obtaining its agreement it would protect the “secrecy” of the information.

Plaintiff admitted, however, these assertions were not true. Ex. F: Plaintiff’s Answers to Request to Admit, Nos. 34, 35, 36, and 37. Plaintiff’s corporate

representative also confirmed as much at his July 26, 2018 deposition. Ex. D: Qualite Corporate Representative, Dep. Tran. p.169.

Based on Plaintiff's admissions and testimony of its corporate representative, Plaintiff had no factual or legal basis to assert its "Qualite United Sports Complex Quote" and "Qualite United Sports Complex Design," were trade secrets. Accordingly, Summary Judgment on these claims, ECF No. 41, ¶ 65 and 77 is appropriate.

C. Plaintiff did not identify any trade secrets.

The party claiming a trade secret "must particularize and identify the purportedly misappropriated trade secret with specificity." *Compuware Corp. v. Intl. Business Machines, supra*, 259 F. Supp. 2d at 605; *Shatterproof Glass Corp. v. Guardian Glass Co.*, 322 F.Supp. 854, 867 (E.D. Mich.1970); *Int'l Tech. Consultants, Inc. v. Stewart*, Case No. 07-13391, 2010 WL 3789831, at *11 (E.D. Mich. Sept. 22, 2010).

Here, Plaintiff alleged its trade secrets consisted of the "United Sports Complex Quote," "United Sports Complex Design," "Qualite Sales Material," and generically alleged its "trade secrets" also included "customer and supplier contact information, customer requirements, pricing information, technical data, product specifications, design plans, product development and production information. Amended Complaint (ECF No 41, ¶ 65 (Federal Trade Secret Claim) and ¶ 77

(Michigan Trade Secret Claim).

Despite being asked in written discovery and as required by the Stipulated Protective Order (ECF No. 50), Plaintiff failed to identify with specificity any information to substantiate its trade secret claims.

Specifically, Defendants requested in Interrogatories and Request to Produce Documents Plaintiff to specifically identify its purported trade secrets, but Plaintiff did not.⁵ Ex. H: Plaintiff's Responses to Discovery Requests served by Defendant Ortega and Ex. I: Plaintiff's Responses to Global Synthetics' Discovery Requests. The requested identification included:

- Ex. H and Ex. I, Interrogatory No. 2: (A) the specific trade secret that forms the basis of Plaintiff's lawsuit; (B) whether the trade secret is recorded or memorialized in a document and, if so, identify the document; (C) the extent to which the information is disseminated or otherwise known outside of Plaintiff's business; (D) the identities of employees within Plaintiff with access to the trade secret; (E) the identity of any entities outside of plaintiff or any other individuals with access to the trade secret; (F) the economic value of the trade secret; (G) the resources, effort, and money expended by Plaintiff

⁵ In fact, Plaintiff asserted a protective order was necessary before it would make any identification of its trade secrets.

in developing the trade secret; and (H) all witnesses with knowledge and information regarding the alleged trade secret.

- Ex. I, Interrogatory No. 3 (Responses to Global Synthetics' Discovery Requests) and Ex. H, Interrogatory No. 4 (Responses to Ortega's Discovery Requests) asked for details about every alleged misappropriation by any Defendant of any trade secret that forms the basis of Plaintiff's lawsuit including: (A) how defendants allegedly misappropriated the trade secret; (B) the date, time, and place of every alleged misappropriation of the trade secret; (C) any documents that evidence the alleged misappropriation; and (D) all witnesses with knowledge and information regarding the alleged trade secret misappropriation.
- Ex. I, Interrogatory No. 4 asked (A) Plaintiff to identify for each trade secret the basis upon which Plaintiff claimed ownership; and (B) all individuals or entities who were at any time an "owner" as that term is defined under the Defend Trade Secrets Act or MUTSA of the trade secret making up Plaintiff's lawsuit.

But Plaintiff provided no substantive responses about its alleged trade secrets,

the alleged misappropriation or its alleged damages during discovery.⁶ See Ex. H and I.

Instead, Plaintiff responded to Defendants' discovery requests that no trade secrets or related information would be produced without the entry of a protective order. Ex. H and I.

Plaintiff further insisted upon a requirement of limiting the disclosure of its "trade secrets" by identifying any such information as "ATTORNEYS EYES ONLY." See Doc. No. 50, ¶ 2. All other non-trade secret, but purportedly confidential information was to be identified as "CONFIDENTIAL." *Id.*

The differing designations made sense: Plaintiff was purportedly pursuing claims for trade secret misappropriation, but also represented it was pursuing claims for conversion of confidential information.

But Plaintiff produced no documents in discovery identified as "trade secrets," i.e., "ATTORNEYS EYES ONLY."

Plaintiff had the burden and obligation to identify its purported trade secrets but did not. Its abject failure to identify any trade secrets as required by the Stipulated Protective Order or in response to Defendants' Discovery Requests means summary

⁶ Discovery closed June 18, 2018 by a stipulated order. ECF No. 51.

judgment is appropriate.

D. Plaintiff failed to identify any damages – either through expert testimony or through information produced during discovery – showing any purported misappropriation of trade secrets caused it damages.

Plaintiff initially identified in its Rule 26 Disclosures that Russell Long and Andrew Malec of O’Keefe & Associates Consulting, LLC would provide expert testimony about its claimed damages caused by the alleged misappropriation. Plaintiff’s expert report was due on February 28, 2018 (See Case Management Order, ECF No. 21). Plaintiff provided no expert report from these experts or any report about its damages.

And Plaintiff provided no documents or other information prior to the close of discovery that substantiated the damages claimed by Plaintiff.⁷

While Plaintiff’s corporate representative testified about the calculation of Plaintiff’s damages, to say this testimony had no credibility is an understatement.

This is because the Representative testified Plaintiff’s trade secret damages were calculated based on two acquisitions: The Shane Group’s purchase price of Qualite and Qualite’s asset purchase of Universal Lighting. Ex. A: K. O’Malley

⁷ After the close of discovery, Plaintiff introduced, over the objection of counsel, a spreadsheet at the deposition of its corporate representative, Kyle O’Malley. Mr. O’Malley did not prepare the spreadsheet and testified he did not have knowledge about the underlying data making up the damages and spreadsheet (Ex. A: K. O’Malley Dep., p. 222-224) and his was not a duces tecum deposition.

Dep., p. 143-144, 187. He further testified that each transaction was valued at \$750,000.00 for a total trade secret damage claim of \$1.5 million. *Id.*, at 187.

Yet, after committing to this testimony, Plaintiff's Representative was shown the actual purchase agreement for the Universal Lighting transaction. *Id.*, at 147. Mr. That purchase agreement showed Mr. O'Malley's testimony had no factual basis about Plaintiff's damages. Specifically, per the purchase agreement, Plaintiff paid nothing for any trade secrets as no trade secrets were identified in the purchase agreement or the schedules for intellectual property. *Id.*, at 148-149, 151; Ex. J: Asset Purchase Agreement, Schedule D. Instead, Plaintiff actually paid \$346,755.93 for inventory (Ex. A: K. O'Malley Dep., p. 148), \$301,568 for jobs/contracts being purchased (*Id.*); and \$72,000.00 paid as a consulting agreement to the seller's owner (*Id.*, p. 152).

Even if Plaintiff's representative's testimony was accurate, Plaintiff failed to produce the very document it used to calculate its trade secret damages, which had been requested in discovery. See Exhs. H and I (Plaintiff's Responses to Discovery Requests discussed above in section IX(C)). Plaintiff's gamesmanship in discovery and outright misrepresentations about its damages come dangerously close, if not crosses, the frivolous or sanctionable foul-line.

IX. Plaintiff's non-trade secret claims against Defendants (Conversion Claims (Counts III and IV), Tortious Interference Claims and Civil

Conspiracy Claim (Count VI) are Preempted under MUTSA because they are based on information Plaintiff defined to include “trade secrets.”

Whether a tort is preempted is based on the allegations, and Plaintiff relies on the same allegations of fact for both claims. See, e.g., *Bliss Clearing Niagara, Inc. v. Midwest Brake Bond Co.*, 270 F. Supp. 2d 943, 946 (W.D. Mich. 2003).

MUTSA provides a statutory action and remedies for misappropriation of trade secrets. MCL §445.1903, MCL § 445.1904. The statute also displaces conflicting tort remedies for misappropriation of a trade secret. *Bliss Clearing Niagara, supra*, 270 F. Supp. 2d at 946 (W.D. Mich. 2003). In particular, Section 8 of MUTSA provides that the “act displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.” MCL § 445.1908(a). *Id*; *CMI Int'l, Inc. v. Intermet Int'l Corp.*, 251 Mich. App. 125, 132, 649 N.W.2d 808, 812-13 (2002) (per curiam). *Interactive Solutions Group, Inc. v. Autozone Parts, Inc.*, 2012 WL 1288173 (E.D. Mich. Apr. 16, 2012) (“By its terms, the MUTSA ‘displaces conflict tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.’”).

MUTSA preemption occurs whether the information allegedly taken actually

risers to the level of trade secrets. *Id.*⁸ *Bliss Clearing Niagara, supra*, 270 F. Supp. 2d at 949. And the disputed status of information as a trade secret does not preclude a court from determining whether the claims are displaced by the MUTSA. *Id.*

The *Bliss* Court in addressing MUTSA further noted that, “because the purpose of the UTSA is “to preserve a single tort cause of action under state law for misappropriation ... and thus to eliminate other tort causes of action founded on allegations of trade secret misappropriation ... allowing otherwise displaced tort

⁸ This is not only widely recognized, but it is also the overwhelmingly majority approach throughout the nation. See, e.g. *Embarcadero Techs., Inc. v. Idera, Inc.*, 2018 WL 315753 (W.D. Tex. Jan. 5, 2018):

“Most courts considering this question have determined UTSA was intended to preempt all claims based upon the unauthorized use of information.” *360 Mortgage Group, LLC v. Homebridge Financial Servs., Inc.*, No. A-14-CA-847- SS, 2016 WL 900577, at *8 (W.D. Tex. March 2, 2016); see also *New South Equipment Mats, LLC v. Keener*, 989 F. Supp. 2d 522, 534 (S.D. Miss. 2013) (“Most of the courts that have considered this issue hold that UTSA preemption extends to claims for the misappropriation of confidential or proprietary information that does not qualify as trade secrets.”); *Mattel, Inc. v. MGA Entertainment, Inc.*, 782 F. Supp. 2d 911, 987 (C.D. Cal. 2011) (“[T]he Court concludes that UTSA supersedes claims based on the misappropriation of confidential information, whether or not that information meets the statutory definition of a trade secret.”); *Ethypharm S.A. France v. Bentley Pharmaceuticals, Inc.*, 388 F. Supp. 2d 426, 433 (D. Del. 2005) (“Because all claims stemming from the same acts as the alleged misappropriation are intended to be displaced, a claim can be displaced even if the information at issue is not a trade secret. Thus, a determination of whether the information at issue constitutes a trade secret under the DUTSA need not be addressed prior to making a determination of displacement.”); *Bliss Clearing Niagara, Inc. v. Midwest Brake Bond Co.*, 270 F. Supp. 2d 943, 948–49 (W.D. Mich. 2003) (“[T]he Court concludes that the disputed status of information as a trade secret does not preclude a court from determining whether a claim or claims are displaced by the MUTSA.”). This has been referred to by legal scholars in the field as the “majority approach.” See Richard F. Dole, Jr., PREEMPTION OF OTHER STATE LAW BY THE UNIFORM TRADE SECRETS ACT, 17 SMU SCI. & TECH. L. REV. 95, 109 (2014) (“The majority approach preempts noncontractual legal claims protecting business information, whether or not the business information is a Uniform Act trade secret.”).

claims to proceed on the basis that the information may not rise to the level of a trade secret would defeat the purpose of the UTSA.” *Id* (internal citations omitted).

Turning to Plaintiff’s Amended Complaint, it asserts Mr. Ortega breached a certain agreement for protecting “Proprietary Information.” Amended Complaint, ¶ 26. Under that agreement, “Proprietary Information” was defined by Plaintiff to include non-trade secret and trade secret information. *Id*, ¶ 28.

Plaintiff further asserts it never gave Plaintiff permission to “download its Proprietary Information” or share it with the Co-Defendants. *Id*, ¶ 57. Plaintiff also asserts “[a]s the result of Defendants’ wrongful acts, [it] has suffered injury and damages, including loss of trade secrets, damage to trade secrets, loss of customer goodwill, loss of business and harm to its customer relationship. *Id*, ¶ 59. And Plaintiff alleges it incurred costs to investigate the claimed misappropriation of its “Proprietary Information.” *Id*, ¶ 60.

Plaintiff’s allegations clarify that its non-trade secret claims rest upon the alleged misappropriation of information Plaintiff defined to include trade secrets or incorporate the misappropriation of trade secrets. Amended Complaint, ¶ 28.

For example, in Counts III (common Law conversion) and IV (statutory conversion) Plaintiff expressly asserts Defendant Ortega had “access to [Plaintiff’s] non-trade secret property, including the Proprietary Information,” which was

converted by Defendants (*Id.*, ¶¶88-89). Plaintiff also alleged Defendants wrongfully converted Plaintiffs “nontrade secret property, including the proprietary information...” *Id.*, ¶ 91.

Similarly, Plaintiff’s tortious interference claim (Count V) alleges Defendants interfered with Plaintiffs business relationship by “misappropriating [Plaintiff’s] trade secrets and converting [Plaintiff’s] nontrade secret information.” *Id.*, ¶ 97.

Thus, Plaintiff’s non-trade secret claims in Counts III through VI relies on the same allegations of misappropriation of information that Plaintiff expressly defined to mean trade secrets. Summary Judgment should be granted.

X. Plaintiff’s Tortious Interference claim fails.

Plaintiff’s tortious interference claim is based solely on its “business relationship or expectancy” with United Futbol. Amended Complaint, ¶ 95.

Under Michigan law, for Plaintiff to assert a tortious with a business relationship, Plaintiff must establish 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.” *CMI Intl., Inc. v. Intermet Intl. Corp.*, 251 Mich. App. 125, 132, 649 N.W.2d 808, 812 (2002) (granting summary disposition of plaintiff’s tortious interference claims); citing *Feldman v. Green*, 138 Mich. App. 360, 378, 360 N.W.2d 881 (1984).

Plaintiff must also establish a defendant unjustifiably instigated a breach of contract or business relationship. *Mahrle v. Danke*, 216 Mich. App. 343, 350, 549 N.W.2d 56 (1996); *Admiral Ins. Co. v. Columbia Casualty Ins. Co.*, 194 Mich. App. 300, 312, 486 N.W.2d 351 (1992). If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference. *Feldman, supra* at 369-370. To raise a genuine issue and therefore escape summary judgment, a plaintiff must sufficiently demonstrate specific, corroborative acts of tortious interference. *Feldman, supra* at 369-370.

Here, the evidence shows United Futbol ended whatever “business relationship” Plaintiff alleges to have had because of Plaintiff’s mismanagement, sales incompetence, and its failure to meet project requirements. Ex. B: Broom Dep. 50-51, 115. In fact, United Futbol’s frustration with Plaintiff prompted Mr. Broome to contact Defendant Ortega for another referral, which lead to contacting Global Synthetics. *Id*, 27-28, 50-51. Plaintiff cannot argue around the facts showing that Defendants did nothing more than respond to a request for a referral for company other than Plaintiff or met with United Futbol and submitted a quote – both at the request of United Futbol. *Id*, p. 51-50, 115.

Thus, Plaintiff failed to sufficiently demonstrate specific acts corroborating

Defendants interfered, caused, or acted with an unlawful purpose, making Summary Judgment appropriate.

XI. Plaintiff's Civil Conspiracy Claim fails.

Plaintiff failed to demonstrate specific acts showing Defendants "combined" in concerted action to commit an unlawful or criminal purpose. Indeed, Mr. Ortega, testified that he took no action in concert or combination with Defendants. Ex. E: Ortega Dep., p. 239-241. Summary Judgment is, therefore, appropriate.

CONCLUSION

WHEREFORE, Defendants Global Synthetics, Mr. Bill Smith, and Mr. Ortega respectfully request Summary Judgment on Counts I through VII, with the reservation of an opportunity to notice for an evidentiary hearing and/or submit proofs for statutory damages and attorney fees under MCL 445.1905 for having to defend Plaintiff's bad faith trade secret misappropriation claim.

Respectfully submitted,

Shinn Legal, PLC

Dated: October 18, 2018

By: /s/ Jason M. Shinn
Attorney for Defendants

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that an accurate copy of the foregoing Motion was served on October 18, 2018 via the Court's CM/ECF system on all counsel of record who have consented to electronic service, with no counsel having opted out of such service.

/s/ Jason M. Shinn
Jason M. Shinn