UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

QUALITE SPORTS LIGHTING, LLC,

Plaintiff,

v.

FRANCISCO ORTEGA, et al.,

Defendants.
_____/

CASE No. 1:17-CV-607

HON. ROBERT J. JONKER

OPINION AND ORDER

INTRODUCTION

Plaintiff Qualite Sports Lighting, LLC ("Qualite") thought it had a winning bid to install sports lighting fixtures at the United Sports Complex in Milton, Georgia. One of its employees, Defendant Francisco Ortega ("Ortega") knew the owners and managers of the complex and, after reviewing Qualite's proposed bid, told Qualite that it was "in good shape." But only a few days after submitting Qualite's bid, Ortega left his employment with Qualite and began working for one of its competitors, Defendant Global Synthetics, Environmental, LLC ("Geo-Surfaces"). Qualite soon learned that it had lost out on the lighting project to Geo-Surfaces.

Believing Ortega had diverted the project to his new employer, and suspecting that Ortega, Geo-Surfaces, and its Vice-President of Sports Lighting, Defendant Bill Smith, had misappropriated its trade secrets in the process, Qualite initiated this civil proceeding against the three parties on July 6, 2017. (ECF No. 1). The matter before the Court is on Defendants' Partial Motion for Summary Judgment, seeking the dismissal of Counts I through VI of the Second

Amended Complaint. (ECF No. 109).[1] The motion is fully briefed,[2] and the Court sees no need for oral argument on the motion. *see* W.D. MICH. LCIVR 7.2(d). Based on its review of the record, and for the reasons set out in detail below, Defendants' Partial Motion for Summary Judgment is **GRANTED in part** and **DENIED in part**.

FACTUAL BACKGROUND

1. Defendant Ortega's Employment at Qualite

Plaintiff Qualite provides sports lighting equipment and fixtures for schools, municipalities, and professional sports teams. (O'Malley Decl. ¶ 5, ECF No. 119-23, PageID.2879). It was formerly a subsidiary of Shane Group, LLC, and is now a subsidiary of Worth Holdings, LLC, the Shane Group's successor in interest. (*Id.* at ¶ 2). Qualite's principal place of business is in Michigan. (Bates Decl. ¶ 3, ECF No. 30-2, PageID.273).

In September 2013, Qualite hired Defendant Francisco Ortega as an employee. (O'Malley Decl. at ¶ 6). Ortega's job responsibilities focused on marketing, social media, and web development services. (*Id.*). The sports lighting industry is highly competitive (Bates Decl. at

[1]Counts I through VI are asserted against all the defendants. Counts VII, VIII, and IX are asserted against Defendant Ortega only. (ECF No. 41). Defendants do not seek summary judgment on the latter three counts.

[2] Qualite has filed a motion for leave to file a sur-reply brief to address what it says are new arguments raised in the reply brief about Qualite's photometric models as well as the preemption analysis related to its tort claims. (ECF No. 128). Qualite fails to demonstrate that a sur-reply is warranted. "As many courts have noted, '[s]ur-replies . . . are highly disfavored, as they usually are a strategic effort by the nonmoving party to have the last word on a matter.'" *Liberty Legal Found. v. Nat'l Democratic Party of the USA*, 875 F. Supp. 2d 791, 797 (W.D. Tenn. 2012) (quoting *In re Enron Corp. Secs.*, 465 F. Supp. 2d 687, 691 n. 4 (S.D. Tex. 2006)). Here, the arguments raised in Defendants' reply brief are not new arguments but are rather a responsive argument to Qualite's theories of the case as set out in its opposition brief. "This is entirely consistent with the proper purpose of a reply brief, to address the opposing party's arguments raised in a response brief." *Id.* at 797-98. Accordingly, the Court denies Qualite's motion for leave to file a sur-reply brief. That said, the Court has, of course, reviewed the motion for leave, which contains the arguments Qualite wishes to raise in response to the reply brief, and considered them in evaluating the parties' positions.

¶ 5), and Ortega's work gave him access to Qualite's "trade secrets, know-how, intellectual property [and] other confidential and proprietary information[.]" (Bates Decl. at ¶ 7). Accordingly, Qualite required Ortega to execute a Confidentiality and Non-Competition Agreement. (O'Malley Decl. at ¶ 8). The agreement included limitations on post-employment competition as well as restrictions on the release of the business's proprietary and confidential information. (Pl.'s Ex. 1, ECF No. 119-2). Ortega signed the agreement on November 13, 2013. (Pl.'s Ex. 1, ECF No. 119-2, PageID.2719). Then, in January 2014, Ortega was transferred from Qualite's payroll to the Shane Group payroll, but he continued to perform work for Qualite. (O'Malley Decl. at ¶ 7).[3]

2. Defendant Geo-Surfaces' Sports Lighting Business and Its Commercial Sales Representative Relationship with Qualite.

Around the same time that Defendant Ortega was beginning his work with Qualite (approximately 2013 and 2014) Charles Dawson, the President of Defendant Geo-Surfaces, was considering an entry into the sports lighting business. Up until this period, Geo-Surfaces had been primarily involved in the business of surfacing sports fields, but the company discovered that many of its clients also needed lighting for those fields. Mr. Dawson believed that sports lighting went "hand in hand" with its surfacing business, and that the company could garner a significant amount of income if it provided sports lighting services. (Dawson Dep. 16, ECF No. 109-4, PageID.2365).

[3] In their brief, Defendants characterize this move as a "transfer" from Qualite to the Shane Group that occurred in January of 2015. (Def. Br. 2-3, ECF No. 109, PageID.2286). Defendants' trial brief asserts that for this reason Qualite "was not a party to the employment agreement making up its breach of contract claim." (ECF No. 90, PageID.1851). While Ortega has not moved for summary judgment, the Court notes that for purposes of Rule 56, the Court accepts as true Qualite's version of events. Moreover, Defendants' trial brief fails to address the plain language of the employment agreement that it was "executed by the employee in consideration of their present and continuing employment by the Company," the latter term being defined as "The Shane Group LLC, together with all of its subsidiary companies[.]" (ECF No. 119-2, PageID.2716).

Mr. Dawson decided to reach out to Mike Kiker, an employee of a Qualite affiliate[4], to inquire into forming some sort of association. (*Id.* at 17). A relationship eventually developed, first between Geo-Surfaces and the affiliate, and then between Geo-Surfaces and Qualite directly. (*Id.* at 18). Under the agreement, Geo-Surfaces purchased the lighting equipment from Qualite, and then sold the equipment (at a markup) and installed it on the fields and complexes of its customers.

Though the defense disagrees, Qualite avers that the parties eventually reduced their relationship into a written outside sales agreement. (O'Malley Dep. 160, ECF No. 119-17, PageID.2788). It was the same agreement that all of Qualite's outside sales representatives were asked to sign. (*Id.* at 161).[5] Among other things, the sales representative agreement required Geo-Surfaces to keep Qualite's information confidential and to return this information to Qualite if and when the sales agreement terminated. (O'Malley Decl. ¶ 11). The parties' commercial relationship appears to have been successful, and Geo-Surfaces installed Qualite lighting fixtures and equipment on several projects.

As time went on, Geo-Surfaces says it wanted to expand its business further into sports lighting. After meeting Defendant Bill Smith (then a Vice President of Sales and Marketing at Qualite) at a sales conference, Mr. Dawson approached him later and inquired about the possibility of Defendant Smith leaving Qualite to work with Geo-Surfaces to grow the company's sports

[4] Mr. Dawson testified that he thought he was dealing directly with Qualite, but at this point he was communicating with Qualite Sports Lighting of Texas. (Dawson Dep. at 17).

[5] While Qualite maintains that an agreement between the parties was executed, only an unsigned copy appears in the materials accompanying its opposition brief. (ECF No. 119-3). In his deposition Mr. Dawson testified that he never signed an agreement with Qualite because he did not want to limit his company's business opportunities. (Dawson Dep at 22-24). While the Court accepts as true, for purposes of this motion, Qualite's contention that an agreement with Geo-Surfaces was executed, the Court observes that to the extent this will be an issue on those claims proceeding to trial, the best-evidence rule may apply on these facts to preclude testimony on the content of the agreement. FED. R. EVID. 1004.

lighting business. (Smith Dep. 114, 118, ECF No. 110, PageID.2434). Defendant Smith agreed with Mr. Dawson's proposal and in March of 2015 Defendant Smith left his role at Qualite to begin work with Geo-Surfaces. (Smith. Dep. at 113). Defendant Smith subsequently became Geo-Surfaces' Vice President of Sports Lighting. (Smith Dep. at 166-167).

The parties agree that Geo-Surfaces and Qualite's commercial relationship ended sometime in 2016. According to Geo-Surfaces, this was because Qualite increased the prices on its lighting fixtures, meaning that Geo-Surfaces was unable to submit competitive bids on lighting projects. (Dawson Dep. at 59-61). Instead of continuing with less profit margin, Geo-Surfaces decided to begin to produce its own sports lighting fixtures, and so the two companies became competitors. (Smith Dep. at 146-147).

3. Qualite's United Sports Complex Bid

In 2015, United Athletics purchased the United Sports Complex in Milton, Georgia. (Broome Dep. 15-17, ECF No. 119-20, PageID.2840). Soon after the purchase, United Athletics determined that it needed to upgrade the lighting at that complex. (*Id.* at 16-17). During the discussions about upgrading the facility's fixtures, Deo Moleka, a United Athletics board member, mentioned that Defendant Ortega, who was also a coach for the program, worked with a sports lighting company and might be able provide a quote for installing lighting fixtures in the complex. (*Id.* at 19-20).

Defendant Ortega became involved in the project, and subsequently represented Qualite in connection with preparing its bid. (O'Malley Decl. at ¶¶ 13-14). Kyle O'Malley, who was interim Qualite CEO during this period, testified that Ortega wanted to do some sales work for Qualite, in addition to his social media and web work, and that Defendant Ortega was excited about the United

Sports project. (O'Malley Dep. at 39-40). In his communications with United Sports, Defendant Ortega dealt mostly with Phillip Broome, a United Sports branch manager.

On July 25, 2016, Defendant Ortega reviewed Qualite's proposal for the project. In an e-mail to Patrick Kinney, Qualite's Southeast Region Sales Manager, Defendant Ortega remarked that the draft's proposed costs were "[n]ot bad numbers at all" and that "[i]f we can keep installation at a decent price, we are in good shape." (ECF No. 119-4, PageID.2729). Then, on August 1, 2016, Defendant Ortega e-mailed Qualite's bid to Mr. Broome. (ECF No. 119-5). He asked that United Sports place the order as soon as possible in order to meet a shipping deadline. (*Id.* at PageID.2733).

Qualite contends that while Defendant Ortega was preparing Qualite's bid, he was covertly engaged in conversations with Defendant Smith at Geo-Surfaces about leaving Qualite to work at Geo-Surfaces. Indeed, Defendant Smith had spoken with Defendant Ortega in July 2016 (if not earlier) about updating Qualite's website and social media pages. (Smith Dep. 188-190). Defendant Ortega then agreed to travel to Louisiana to meet with Mr. Dawson about a position with the company, and Geo-Surfaces purchased a plane ticket for Defendant Ortega. The meeting date was for August 2, 2016. (*Id.* at 191-192).

On the morning of August 2, 2016, Defendant Ortega sent an e-mail to Defendant Smith with two attachments. (ECF No. 119-7). The attachments contained Qualite's quote and design plans for the United Sports Complex. (ECF No. 119-7, PageID.2742; Ortega Dep. 162-168, ECF No. 111, PageID.2515-2516). Defendant Ortega, having flown to Louisiana, then met with Mr. Dawson. During the meeting, Mr. Dawson asked if Defendant Ortega would be willing to work on the websites and social media pages for his companies, including the pages for Geo-Surfaces. Defendant Ortega responded that he would be willing to do so as a contractor, because

he wanted to be able to build his own business over time. (Ortega Dep. 146-149, ECF No. 119-19, PageID.2820). Following the meeting, Mr. Dawson sent an e-mail to Defendant Ortega stating that he had enjoyed discussing vision and strategy with him, and Mr. Dawson welcomed Defendant Ortega to the "tea." The e-mail further contained information on accessing Geo-Surfaces' website. (ECF No. 119-8). Later that evening, Defendant Ortega sent another e-mail to Defendant Smith. This e-mail included a link to a DropBox account containing Qualite's confidential sales materials. (ECF No. 119-9).[6] Mr. O'Malley testified that this account contained Qualite's photometric models, maps, technical information, and sales information. (O'Malley Dep. at 15).

The following day, August 3, 2016, Defendant Ortega informed his superiors that he was resigning from the Shane Group, effective August 12, 2016. (ECF No. 119-10). In the following days, while he was still employed with the Shane Group, Qualite says that Defendant Ortega e-mailed Mr. Broome at United Sports on several occasions. The first was to introduce him to Geo-Surfaces; the second was to arrange a meeting between United Sports and Geo-Surfaces; and the third e-mail was sent to provide a copy of Geo-Surfaces' design for the United Sports project. (ECF No. 119, PageID.2692-2693). Defendant Ortega did not tell Qualite, during this period, about this new position with Geo-Surfaces.

In his declaration, Mr. O'Malley stated that on August 10, 2016 he learned that Qualite had lost the United Sports Complex project to Geo-Surfaces. He suspected that Defendant Ortega may

[6] "DropBox is a cloud storage product that allows a user to create an account to save and store digital content, including images and videos, in folders, and to share that content by providing others with the email address and password used to log in to the account." *United States v. Wilson*, 217 F. Supp. 3d 165, 169 (D.D.C. 2016).

have diverted the project to Geo-Surfaces. (O'Malley Decl. at ¶¶ 20-21). Geo-Surfaces secured the project even though its bid had a higher cost than Qualite's proposal. (*Id.* at ¶ 20).

PROCEDURAL BACKGROUND

Qualite initiated this civil action against Defendants Ortega, Geo-Surfaces, and Smith on July 6, 2017. (ECF No. 1). In its Second Amended Complaint, Qualite alleges a violation of the Defend Trade Secrets Act, 18 U.S.C. § 1836, *et seq.* (Count I) as well as state law claims for misappropriation of Michigan's Trade Secrets Act, MICH. COMP. LAWS § 445.1902-1904 (Count II); Common Law Conversion (Count III); Statutory Conversion (Count IV); Tortious Interference (Count V); and Civil Conspiracy (Count VI). These counts are raised against all three defendants. The Second Amended Complaint next raises three further counts against Defendant Ortega only, asserting Fraud (Count VII); Breach of Contract (Count VIII); and Breach of Fiduciary Duty (Count IX). (ECF No. 41).

Defendants filed the pending motion for partial summary judgment seeking dismissal of the first six counts of the Second Amended Complaint only. The parties have submitted briefs, and the matter is ready for decision.

LEGAL STANDARDS

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). Material facts are facts which are defined by substantive law and are necessary to apply the law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. In deciding a motion for summary judgment, the court must draw all inferences in a light most favorable to the non-moving party, but may grant

summary judgment when "'the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

DISCUSSION

1. Misappropriation of Trade Secrets (Counts I and II).

In Counts I and II, Qualite alleges a claim for misappropriation of trade secrets under the Defend Trade Secrets Act "DTSA," 18 U.S.C. § 1836, *et seq.*, and the Michigan Uniform Trade Secrets Act "MUTSA," MICH. COMP. LAWS § 445.1901, *et seq.* Defendants contend that Qualite has failed to identify any trade secrets that have been misappropriated. The Court agrees.[7]

A. Applicable Law

A plaintiff alleging a violation of the DTSA must establish "an unconsented disclosure or use of a trade secret by one who used improper means to acquire the secret; or, at the time of the disclosure, knew or had reason to know that the trade secret was acquired through improper means, under circumstances giving rise to a duty to maintain the secrecy of the trade secret." *Ford Motor Co. v. Launch Tech. Co. Ltd.*, No. 17-12906, 2018 WL 1089276, at *16 (E.D. Mich. Feb. 26, 2018) (citing 18 U.S.C. § 1839(5)). The first element a plaintiff alleging misappropriation of trade secrets must prove, then, is that 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) (citing *Stromback v. New Line*

[7] The Court evaluates the federal and state trade secrets claims together because the elements of misappropriation under both the federal and state statutes are substantially similar. *See Radiant Global Logistics, Inc. v. Furstenau*, No. 18-cv-12783, 2019 WL 697004, at *8 n.2 (E.D. Mich. Feb. 20, 2019) (Borman, J); *see also Kondash v. Kia Motors America, Inc.* 767 F. App'x 635, 647 (6th Cir. Mar. 28, 2019) (observing "the Defend Trade Secrets Act and the Uniform Trade Secrets Act define 'trade secret' similarly: both refer to similar types of information; both require the information to be subject to reasonable measures to keep it secret; and both require the information to derive value from not being generally known").

Cinema, 384 F.3d 283, 302 (6th Cir. 2004); *Rothschild v. Ford Motor Co.*, 2 F. Supp. 2d 941, 950 (E.D. Mich. 1998)).

The DTSA provides that information is a "trade secret" if:

> (A) the owner thereof has taken reasonable measures to keep such information secret; and
>
> (B) The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

18 U.S.C. § 1839(5).

The MUTSA similarly defines "trade secret" as:

> (d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:
>
> *(i)* Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> *(ii)* Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

MICH. COMP. LAWS § 445.1902. "For information to constitute a trade secret under Michigan law, the information must (1) derive economic value from the fact that it is not known to others who could make use of it, and (2) be the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Mike's Train House, Inc.*, 472 F.3d at 410 (citing MICH. COMP. LAWS § 445.1902(d)).

Furthermore, in order to be actionable, there must be a "misappropriation" of the trade secret. The MUTSA defines "misappropriation" as follows:

> (b) "Misappropriation" means either of the following:

> (i) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.
>
> (ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:
>
> (A) Used improper means to acquire knowledge of the trade secret.
>
> (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.
>
> (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

MICH. COMP. LAWS § 445.1902(b).[8]

B. Qualite Fails to Demonstrate Misappropriation of a Trade Secret

With respect to the first element of its DTSA and MUTSA claims (that of the existence of a trade secret), Qualite's Second Amended Complaint alleged that Defendants misappropriated a range of its commercial and technical trade secrets through the two e-mails that Defendant Ortega sent to Defendant Smith on August 2, 2016. Qualite has since admitted that the materials on the first e-mail do not rise to the level of trade secrets. As to the materials on the second e-mail, there has been little effort by Qualite to identify these materials as trade secrets. The Court concludes,

[8] The DTSA's definition of misappropriation is nearly identical. *See* 18 U.S.C. § 1839(5).

however, that even if the materials qualify as trade secrets there is no genuine issue of material fact that these materials were not misappropriated by the defendants.

1. Trade Secrets

The materials in the first email are Qualite's quote and design for the United Sports Complex. The defense avers that Qualite has failed to identify any trade secrets from this first email, and there appears to be no dispute that this is so. Indeed, Qualite agrees in its response brief that the quote and design for the Untied Sports Complex are not trade secrets. (ECF No. 119, PageID.2700 n.8). Accordingly, these materials cannot support Qualite's misappropriation of trade secrets claims.

Qualite contends however, that this does not defeat its trade secrets claim because the sales materials and photometric models contained in the DropBox link found in Defendant Ortega's second e-mail are trade secrets, and those materials "have always been the focus on the trade secrets claim." (*Id.*). This characterization, however, is not supported by the record. Indeed, this case has always centered on the United Sports Complex project, Qualite's designs and bid for the project, and Defendants' alleged diversion of that project through improper means. The focus of the originally pleaded claims has now been admitted away.

To the extent there are any other asserted trade secrets still outstanding, the Court agrees with Defendants that Qualite has done little to identify these materials in discovery. Even Mr. O'Malley, in his declaration, does not explicitly assert that the materials the defense allegedly misappropriated are "trade secrets." (*See generally* O'Malley Decl. ECF No. 119-23). "A party alleging trade secret misappropriation must particularize and identify the purported misappropriated trade secrets with specificity." *Dura Global Techs., Inc. v. Magna Donnelly*

Corp., 662 F. Supp. 2d 855, 859 (E.D. Mich. 2009). The largely undefined models in this case fail to meet this standard.[9]

2. Misappropriation

But even if the materials in the DropBox account do amount to trade secrets, no reasonable jury could find that these materials were misappropriated by the Defendants. Qualite only contends that it may be "inferred" that Geo-Surfaces accessed, and so misappropriated, the materials in the DropBox account because Defendant Ortega sent an email to Defendant Smith containing a weblink to those materials. (ECF No. 119, PageID.2700). It points out that to show misappropriation, it need only show that the Defendants acquired the DropBox materials, either by improper means or by knowledge that the acquisition was through improper means. (*Id.* at n. 9). Neither the DTSA nor the MUTSA expressly define the word "acquisition." A look at the definition of the word "acquire" in secondary sources, however, demonstrates that term contemplates more than what is alleged here. It means, "[t]o gain possession of through skill or effort; to obtain, develop, or secure in a careful, concerted, often gradual manner." *Oxford English Dictionary* (online ed. 2019), http://www.oed.com (last visited May 20, 2019); *see also Merriam-Webster Unabridged* (online ed. 2019), http://unabridged.merriam-webster.com/unabridged/acquire ("to come into possession, control, or power of disposal of often by some uncertain or unspecified means.")

Qualite has not established that Defendants gained possession, control, or power of the asserted trade secrets. The most it has demonstrated is that Defendant Ortega gave the other defendants an opportunity to acquire the materials contained within the online account. But that

[9] Based on the Court's conclusion that Qualite has failed to identify its trade secrets, the Court dismisses as moot Defendants' motion in limine seeking to exclude certain exhibits relating to those sales materials and undefined models.

is not the same as acquisition. And Qualite points to nothing, circumstantial or otherwise, to demonstrate that Defendants actually opened the account and acquired its contents. To the contrary, Mr. O'Malley testified that Qualite could not verify whether Defendant Smith ever used the link. (O'Malley Dep. 216, ECF No. 109-2, PageID.2319). Qualite points to no record evidence to indicate (either directly or circumstantially) that these materials were ever obtained or possessed by Defendants.[10] For this reason, and on this record, the complained of conduct with respect to the DropBox materials fails to amount to misappropriation, and this constitutes an alternative basis for dismissing Counts I and II.[11]

2. Common Law and Statutory Conversion (Counts III and IV)

Qualite next alleges the Defendants converted its proprietary information for their own use. It points out that Defendant Ortega testified, during his deposition, that Geo-Surfaces was able to prepare the drawings for its United Sports Complex design because he had e-mailed Qualite's designs to Defendant Smith. (Ortega Dep. 201, ECF No. 111, PageID.2524). Defendants respond that Qualite's claims for common law and statutory conversion are preempted under the MUTSA and move for summary judgment on that basis. Qualite resists the defense argument because, it avers, the conversion claims are not based solely on the misappropriation of a trade secret.

Common law conversion under Michigan law is defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Thoma v. Tracy Motor Sales, Inc.*, 360 Mich. 434, 438 (1960); *El Camino Res., LTD. v.*

[10] To be sure, Qualite contends that Defendants used its United Sports Complex quote and designs to prepare its competing bid. By its own admission, however, those materials do not qualify as trade secrets.

[11] Based on this conclusion, it is not necessary to consider the defense's alternative argument that Qualite failed to identify any damages stemming from the alleged misappropriation of trade secrets. (*See* ECF No. 109, PageID.2300).

Huntington Nat. Bank, 722 F. Supp. 2d 875, 915 (W.D. Mich. 2010), *aff'd*, 712 F.3d 917 (6th Cir. 2013) (same). It "may occur when a party properly in possession of property uses it in an improper way, for an improper purpose, or by delivering it without authorization to a third party." *Karmol v. Ocwen Loan Servicing, LLC*, No. 1:17-cv-262, 2017 WL 3071496, at *4 (W.D. Mich. July 19, 2017) (quoting *Dep't of Agric. v. Appletree Mktg., LLC*, 475 Mich. 1, 13-14 (2010). "To recover on its statutory conversion claim, Plaintiff must also show Defendants had 'actual knowledge of the converting activity.'" *Tiffany Florist, Inc. v. Citizens Fin. Grp., Inc.,* No. 17-10551, 2017 WL 3224470, at *3 (E.D. Mich. July 11, 2017) (quoting *Nedschroef Detroit Corp. v. Bemas Enterprises LLC,* 106 F. Supp. 3d 874, 886 (E.D. Mich. 2015). A reasonable jury could not find Qualite has demonstrated a claim for conversion under Michigan law here and accordingly Qualite's common law and statutory conversion claims fail.

First of all, Qualite's claims of conversion, to the extent they rest on the materials in the DropBox account, cannot succeed. As the Court found above, Qualite fails to demonstrate that Defendants acquired these materials and only asks for a speculative conclusion that defendants accessed these materials. For the same reason a reasonable jury could not find Defendants acquired these materials, a jury could not find any distinct act of dominion. Rather, a jury could only conclude that Qualite did not demonstrate Defendants exercised dominion or possessed those materials, a crucial element for any claim of conversion.

While the materials in the DropBox account cannot support the conversion claims, there are still the materials contained in the first e-mail, namely Qualite's quote and designs for the United Sports Complex. The parties have a factual dispute relating to how this material made its way to Geo-Surfaces. The defense contends that the materials came from United Sports. They say that by that point United Sports had grown dissatisfied with Qualite's performance including,

among other things, a lack of timely responses to its communications. The defense points to an affidavit from Mr. Broome, who states that United Sports gave Qualite's proposal to Geo-Surfaces. (Broome Aff. ¶ 6, ECF No. 133). At this stage, however, the Court assumes the facts in Qualite's favor. The problem for Qualite is that the United Sports Complex Quote and Design, even if conveyed in the manner it asserts, cannot establish a cause of action for conversion under Michigan law.

The quotes and designs alleged to have been converted amount to intangible property. *Cf. Intellectual Property*, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining intellectual property as "[a] category of intangible rights protecting commercially valuable products of the human intellect."). "Although other jurisdictions have liberalized the bar to actions for conversion of intangible property, Michigan jurisprudence has long held that intangible property cannot be converted." Anthony P. Patti, *Intentional Torts*, *in* TORTS: MICHIGAN LAW & PRACTICE § 3.104 (Linda Miler Atkinson, Hon. Helene N. White & Noreen L. Slank ed., Sept. 2014). In fact, "[m]ost states . . . have rejected or at least qualified intangible conversion, as do most states in the Sixth Circuit." *J & J Sports Prods., Inc. v. Jaschkowitz*, No. 5:14-cv-440-REW, 2016 WL 2727015, at *3 (E.D. Ky. May 6, 2016) (Wier, M.J.) (collecting cases).

True, some Michigan courts have held that intellectual property may, in circumstances, be converted and give rise to a conversion cause of action. But what is common across these cases is that an "*idea* is not subject to conversion unless it is expressed in a legally protected manner by patent, trademark, or copyright, for example." Patti, *supra*, at § 3.104 (emphasis in original); *accord Powers v. Fisher*, 279 Mich. 442 (1937); *Sarver v. Detroit Edison Co.*, 225 Mich. App. 580 (1997); *see also Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609, 618 (S.D.N.Y 2003) (copyrighted and trademarked website subject to conversion claim under New York law).

Here Qualite has not alleged its quote and designs for the United Sports Complex were expressed in a legally protected manner. This is fatal to its conversion claims.[12]

3. Tortious Interference (Count V)

In Count V, Qualite alleges Defendants tortiously interfered with the business relationship it had with the United Sports Complex, and this interference led to the termination of that relationship. Defendants assert this claim is preempted or, alternatively, that no jury could find they tortiously interfered with Qualite's relationship with United Sports. The Court disagrees.

"The elements of tortious interference with a business relationship are: (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy by the defendant; (3) intentional interference by the defendant which induces or causes a breach or termination of the relationship or expectancy; and (4) damage to the plaintiff." *Bliss Clearing Niagara, Inc.*, 270 F. Supp. 2d at 949 (citing *BPS Clinical Labs v. Blue Cross & Blue Shield of Mich.*, 217 Mich. App. 687, 698, 552 N.W.2d 919, 925 (1996) (per curiam)). "An act does not constitute improper motive or interference '[w]here the defendant's actions were motivated by legitimate business reasons.'" *Id.* (quoting *BPS Clinical Labs*, 217 Mich. App. at 699, 552 N.W.2d at 925). "However, where a defendant's actions overreach the bounds of permissible interference

---

[12] The only remaining question on the conversion claims is whether the Michigan Uniform Trade Secrets Act ("MUTSA") displaces the conversion claims, as the defense avers. The MUTSA displaces claims that are "based solely upon the misappropriation of a trade secret." *Bliss Clearing Niagara, Inc. v. Midwest Brake Bond Co.,* 270 F. Supp. 2d 943, 946 (W.D. Mich. 2003) (Quist, J.). There is some force to the defense argument that the conversion claims relate entirely to Qualite's misappropriation of a trade secret claim. Both Qualite's United Sports Complex quote and designs were listed in the Second Amended Complaint as trade secrets. (Second Am. Compl. ¶ 65, ECF No. 41, PageID.505). While Plaintiffs have since abandoned its argument that those materials are trade secrets, generally a party may not avoid preemption by arguing that some of the converted confidential information may later be found not to constitute a trade secret. *Konica Minolta Bus. Sols, USA, Inc.,* 2016 WL 6828472, at *6 (citing *Bliss*, 270 F. Supp. 2d at 948-49). The Court finds this a separate and independent ground for dismissing the conversion claims.

and improperly sabotage the contractual agreements of others, a defendant is not immune from liability." *Id.* (quoting *Kavanaugh v. VMC Indus., Inc.*, No. 213219, 2000 WL 33400199, at *3 (Mich. App. Nov. 1, 2000) (per curiam)).

Qualite has alleged conduct in support of this count that is distinctly independent of its misappropriation claim. Among other things, Qualite asserts that after Defendant Ortega had agreed to work at Geo-Surfaces, but before his resignation date, he effectively thwarted any chance Qualite had of securing the project by sending several communications to Phillip Broome at the United Sports Complex, including communications containing Geo-Surfaces competing bid. Qualite says the Defendants got a leg up by looking at Qualite's quote and designs to frame their own competitive offer. It notes that as late as August 1, 2016, Phillip Broome told Qualite that he was "happy" to complete paperwork to move Qualite's project forward. (ECF No. 119-6). This conduct is entirely separate from the asserted conduct surrounding Qualite's misappropriation claim and furthermore, if believed, this conduct could establish a tortious interference of Qualite's business relationship.

The defense responds that Geo-Surfaces was already dissatisfied with Qualite before any of the Defendants had anything to do with United Sports, but this misses the mark for purposes of summary judgment review. A jury will be necessary to sort out the competing versions. Accordingly, the Court will deny Defendants' motion with respect to this Count.

4. Civil Conspiracy (Count VI)

In the last count raised against all the defendants, Qualite contends the defendants are liable for a civil conspiracy. More specifically, it alleges the defendants "engaged in concerted action when they misappropriated Qualite's trade secrets, converted Qualite's non-trade secret information and tortuously interfered with Qualite's business relationships or expectancies."

(Second Am. Compl. ¶ 102, ECF No. 41, PageID.512). In its motion, the defense contends that Qualite has failed to establish the defendants combined in concerted action to commit an unlawful act. (ECF No. 109, PageID.2307). Qualite responds that a jury could find a civil conspiracy because Defendant Ortega "met secretly with Dawson and Smith, subsequently shared the Dropbox information with Smith and then met with Broome and Dawson to discuss the United Sports project." (ECF No. 119, PageID.2705).

In Michigan, the elements of civil conspiracy are: (1) a concerted action (2) by a combination of two or more persons (3) to accomplish an unlawful purpose or a lawful purpose by unlawful means. *Mays v. Three Rivers Rubber Corp.*, 352 N.W.2d 339, 341 (Mich. Ct. App. 1984). A plaintiff alleging civil conspiracy, however, must allege more than a mere conspiracy; the plaintiff must allege a wrong resulting in damages. *Magid v. Oak Park Racquet Club Assoc.*, 269 N.W.2d 661, 664 (Mich. Ct. App. 1978). If the plaintiff cannot show that a wrongful act entitles it to damages, then it cannot demonstrate civil conspiracy because a civil conspiracy is not itself a cause of action. *Roche v. Blair*, 9 N.W.2d 861, 863-64 (Mich. 1943); *see also Early Detection Center, PC v. N.Y. Life Ins. Co.*, 403 N.W.2d 830, 836 (Mich. Ct. App. 1986) ("[A] claim for civil conspiracy may not exist in the air; rather it is necessary to prove a separate, actionable, tort.").

A claim for civil conspiracy thus works to broaden the claim of alleged wrong to bring in actors who may have had one part of a wrongful pattern and tag them with liability for the actions of other people that are a part of the conspiracy. For this reason, it is not an independent wrong; rather it is more of an independent remedy. *See Lidochem, Inc. v. Stoller Enterprises*, 1:09-cv-204 (W.D. Mich. Apr. 22, 2010) (ECF No. 75). Here, there is an underlying cause of action, namely tortious interference, that survives summary judgment and would serve to constitute the requisite

separate, actionable, tort in support of a civil conspiracy claim. A reasonable jury could, furthermore, conclude that the defendants engaged in a concerted action to accomplish this tort.[13] Accordingly, the civil conspiracy claim will go forward only as a potential basis for holding alleged co-conspirators responsible for the underlying tort of tortious interference.

5. Remaining Counts

The final three Counts in the Second Amended Complaint (ECF No. 41) are for Fraud, Breach of Contract, and Breach of Fiduciary Duty. They are raised against Defendant Ortega only. The defense motion does not seek summary judgment on these counts. (ECF No. 109, PageID.2278). While Defendants' brief mentions a separate motion seeking summary judgment on the three counts raised specifically against Defendant Ortega (ECF No. 109, PageID.2285 n.1), no such motion has been filed.

CONCLUSION

ACCORDINGLY, IT IS ORDERED that the Defendants' Partial Motion for Summary Judgment (ECF No. 109) is **GRANTED in part** and **DENIED in part.**

IT IS FURTHER ORDERED that Counts I, II, III, and IV of the Second Amended Complaint (ECF No. 41) are **DISMISSED IN THEIR ENTIRETY;**

IT IS FURTHER ORDERED that Defendants' Motion in Limine Regarding Trade Secrets (ECF No. 95) is **DISMISSED AS MOOT;**

[13] A reasonable jury could not, on the other hand, find a civil conspiracy based on Defendant Ortega's alleged breach of his employment agreement with the Shane Group. There is no evidence available on this record that Defendant Ortega ever told the other defendants about his agreement with the Shane Group.

IT IS FURTHER ORDERED that Count VI of the Second Amended Complaint is **DISMISSED** only to the extent it raises an independent cause of action, but remains viable as to a potential additional remedy against co-conspirators for the underlying wrong alleged in Count V;

IT IS FURTHER ORDERED that all other claims and counts will proceed to trial.

IT IS FURTHER ORDERED that Qualite's Motion for Leave to File a Sur-Reply Brief (ECF No. 128) is **DENIED.**

Dated: September 10, 2019

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE