SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TECHNOLOGY ASSOCIATION OF AMERICA, Plaintiff, - vs - INFORMATION TECHNOLOGY INDUSTRY COUNCIL, INC., *et al.*, Defendants.	Civil Action No.: 2013 CA 007598 B Hon. John M. Mott Next Event: Initial Conference; February 7, 2014

INFORMATION TECHNOLOGY INDUSTRY COUNCIL, INC.'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant, Information Technology Industry Council, Inc. ("ITI"), moves, pursuant to Rule 12(b)(6) of the Superior Court Civil Procedure Rules, to dismiss the complaint for failure to state a claim upon which relief can be granted.

The Complaint fails as a matter of law because: (1) it does not contain any facts showing that the alleged interference was improper or that TechAmerica has incurred any damages; (2) civil conspiracy is not an independent claim in the District of Columbia and is preempted; (3) the claim for misappropriation of trade secrets fails to allege sufficient facts to support that the allegedly misappropriated information is protected as trade secrets; and (4) the conversion claim does not allege denial of property, as required to plead a cognizable claim.

In support of this motion, ITI relies on the attached Memorandum of Law.

Dated: November 27, 2013

Respectfully submitted,

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RULE 12-I CERTIFICATION

On November 27, 2013, I contacted Christine Nicolaides Kearns, counsel for TechAmerica, to ascertain if it would consent to the relief sought by this motion. Ms. Kearns indicated that TechAmerica did not consent, necessitating this motion.

/s/ Leslie Paul Machado
Leslie Paul Machado

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2013, I filed a copy of the foregoing with the Court using Case Express, which will serve all counsel of record, and that I separately served the foregoing on the following counsel via electronic mail:

Christine Nicolaides Kearns
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INFORMATION TECHNOLOGY INDUSTRY COUNCIL, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiff Technology Association of America, Inc. ("TechAmerica") has filed this lawsuit in an attempt to prevent lawful competition by three of its former employees and a competitor: the Information Technology Industry Council, Inc. ("ITI"). The gravamen of the suit is that, after three former TechAmerica employees began working for ITI, those employees contacted some of TechAmerica's members in an effort to convince them to join ITI.

Notably, the Complaint *does not* allege that the three former employees were bound by a non-solicitation clause. The Complaint *does not* allege that the former employees were bound by a restrictive covenant. And the Complaint *does not* allege that TechAmerica, in fact, suffered any loss of members as a result of ITI action.

Instead, the Complaint attempts to restrict its former employees and ITI by asserting a variety of nebulous claims. These efforts fail as a matter of law. Specifically, TechAmerica's claim for tortious interference with prospective business advantage (Count 1) must be dismissed because the Complaint does not contain any facts showing that the alleged interference was improper or that

TechAmerica has incurred any damages. Next, TechAmerica's claim for civil conspiracy (Count 2) must be dismissed because it is not an independent claim in the District of Columbia and is preempted. Third, TechAmerica's claim for misappropriation of trade secrets (Count 3) must be dismissed because TechAmerica fails to allege sufficient facts to support that the allegedly misappropriated information is protected as trade secrets. Finally, TechAmerica's claim for conversion (Count 4) must be dismissed because the Complaint does not allege that it was denied use of its property.

LEGAL STANDARD

To survive a motion to dismiss, a complaint "must set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist." *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007) (internal quotation omitted). However, the "'[f]actual allegations must be enough to raise a right to relief above the speculative level . . . .'" *Clampitt v. Am. Univ.*, 957 A.2d 23, 29 (D.C. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007)). While the court must accept factual allegations in the complaint, the complaint must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *See Murray v. Motorola, Inc.*, 982 A.2d 764, 783 n.32 (D.C. 2009) (quoting *Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007)).

As shown below, the Complaint fails these basic and fundamental rules: it repeatedly fails to allege *facts* sufficient to support the material elements of TechAmerica's putative causes of action, instead relying upon recitations of the elements of a claim or omitting elements completely.

ARGUMENT

I. THE TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE CLAIM (COUNT I) MUST BE DISMISSED BECAUSE THE COMPLAINT DOES NOT ALLEGE FACTS SHOWING IMPROPER INTERFERENCE OR RESULTING DAMAGES

The Court should dismiss the tortious interference with prospective business advantage claim (Court I) because it fails to allege facts showing any intentional, wrongful conduct by defendants that interfered with TechAmerica's relationship with its members.

To establish a claim for tortious interference, TechAmerica must show "(1) the existence of a business relationship; (2) defendants' knowledge of the business relationship; (3) intentional interference with the relationship by defendants; and (4) resulting damages." *Furash & Co., Inc. v. McClave*, 130 F. Supp. 2d 48, 55-56 (D.D.C. 2001) (citing *Mercer Management Consulting v. Wilde*, 920 F. Supp. 219, 239 (D.D.C. 1996)). "'[A] plaintiff must show that the interference was intentional and that there was resulting damage.'" *Kreuzer v. George Washington Univ.*, 896 A.2d 238, 247 (D.C. 2006) (citation omitted).

TechAmerica alleges that its relationship with its members constituted a prospective business advantage and that defendants interfered with its prospective business advantage by inducing its members to join ITI. Complaint ¶¶ 32-33. Conspicuously missing from the Complaint, however, is any allegation of improper interference or resulting damages; instead, the Complaint alleges only that one of the defendants (Ms. Henton) allegedly contacted TechAmerica members to inform them of her move to ITI, and to ask them to become members of ITI (Complaint ¶ 22).

"'Competitive activity does not by itself constitute intentional interference with prospective business advantage, unless accomplished by wrongful or improper means, such as fraud. . . .'" *Mercer Management Consulting v. Wilde*, 920 F. Supp. 219, 239 (D.D.C. 1996) (quoting *International City Mgt. Ass'n Ret. Corp. v. Watkins*, 726 F. Supp. 1, 6 (D.D.C. 1989)); *see also Dyer v. William S. Bergman & Associates, Inc.*, 657 A.2d 1132, 1139 n.10 (D.C. 1995) ("In order to establish tortious interference

with contract, the plaintiff must show that the defendant's procurement of the breach was intentional and without legal justification").

The requirement that a plaintiff plead facts showing that the interference was *intentional and wrongful* is understandable because "'[l]awful competition does not constitute unjustifiable interference.'" *Modis, Inc. v. Infotran Systems, Inc.*, 893 F. Supp. 2d 237, 241 (D.D.C. 2012) (citation omitted). Accordingly, "[t]o establish a claim of improper interference with contract or business relations, the plaintiff must demonstrate that the defendant engaged in conduct that is 'egregious; for example, it must involve libel, slander, physical coercion, fraud, misrepresentation, or disparagement.'" *Id.* (citation omitted).

Thus, in *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F. Supp. 2d 27 (D.D.C. 1999), the court granted a motion to dismiss a claim alleging interference with prospective business relations where the complaint did not plead facts showing intentional or wrongful conduct:

> plaintiff's complaint is silent as to defendants' intent to interfere with plaintiff's future business relations or to any statements that constitute slander, libel, or misrepresentations or that disparage plaintiff in his search for new employment. Therefore, plaintiff cannot sustain a claim that defendants terminated him with the specific intent to interfere with "future contractual relations" or the "prospect of obtaining employment."

Id. at 34.

The same is true here. TechAmerica's Complaint fails to allege any intentional, wrongful conduct on the part of the defendants that lead to the interference with TechAmerica's relationship with its members: it does not allege that ITI or any of the individual defendants engaged in libel, slander, physical coercion, fraud, misrepresentation, or disparagement.

This failure is unsurprising. Ms. Henton (and indeed, any of the three former employees) could lawfully contact TechAmerica's members *because they were not bound by a non-solicitation clause or non-compete agreement.* As such, TechAmerica has not alleged – and cannot allege – that her contact

was improper, because it was not. This failure, however, dooms its claim. *See Modis,* 893 F. Supp. 2d at 242 (granting motion because party could not show "that the communications complained of were anything more than competitive activity that cannot form the basis of a tortious interference claim").

In addition, even if improper means can be established, the Complaint is devoid of any factual allegations related to the alleged damage caused by the purported interference. Instead the Complaint specifically acknowledges that TechAmerica has not incurred damage by stating that "the injury [to TechAmerica] includes . . . the revenue from membership dues that TechAmerica *will lose when* TechAmerica members that previously utilized TechAmerica's Public Sector Services join ITI and decline to renew their TechAmerica memberships." Complaint ¶ 34 (emphasis added). As TechAmerica has failed to allege any resulting damages from even one membership relationship that was allegedly wrongfully interfered with, this claim must be dismissed.

II. THE CLAIM FOR CIVIL CONSPIRACY (COUNT II) FAILS TO STATE A CLAIM BECAUSE IT IS NOT AN INDEPENDENT CAUSE OF ACTION IN THE DISTRICT OF COLUMBIA AND BECAUSE IT IS PREEMPTED BY COUNT III

TechAmerica's civil conspiracy claim (Count II) fails to state a claim because it does not exist as an independent cause of action in the District of Columbia and because, as pled here, it is preempted by Count III.

"Civil conspiracy, of course, is not actionable in and of itself but serves instead 'as a device through which vicarious liability for the underlying wrong may be imposed upon all who are a party to it, where the requisite agreement exists among them.'" *Hall v. Clinton*, 285 F.3d 74, 82 (D.C. Cir. 2002) (citation omitted). *See also Meng v. Schwartz*, 305 F. Supp. 2d 49, 60 (D.D.C. 2004) ("there is no independent cause of action for civil conspiracy under D.C. law"). Here, TechAmerica has improperly asserted civil conspiracy as an independent cause of action. Under controlling DC law, it cannot stand alone and must be dismissed as a matter of law.

In addition, TechAmerica's claim that the alleged conspiracy included misappropriation of trade secrets, *see* Complaint ¶ 37, means that the civil conspiracy claim is preempted by the D.C. Uniform Trade Secrets Act ("DCUTSA"). *See DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 84 (D.D.C. 2007) (holding that common law conspiracy claims are preempted by the D.C. Uniform Trade Secrets Act). Accordingly, Count II fails to state a claim and must be dismissed with prejudice.

III. TECHAMERICA'S MISAPPROPRIATION OF TRADE SECRETS CLAIM (COUNT III) FAILS AS A MATTER OF LAW BECAUSE THE COMPLAINT FAILS TO ALLEGE SUFFICIENT FACTS TO SHOW THAT THE ALLEGED INFORMATION IS PROTECTED AS TRADE SECRETS

Count III fails to state a claim because TechAmerica does not plead any facts showing that any of the information allegedly accessed improperly by the former employees was a "trade secret" or that it took steps to maintain its secrecy. Instead, its trade secrets claim is little more than a formulaic recitation of the statute's language, without the required factual support.

In the District of Columbia, a trade secret misappropriation claim requires a party to show "(1) the existence of a trade secret; and (2) acquisition of the trade secret by improper means, or improper use or disclosure by one under a duty not to disclose." *DSMC,* 479 F. Supp. 2d at 77 (citations omitted). Under the DCUTSA, a "trade secret" is defined as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (A) Derives actual or potential independent economic value, from not being generally known to, and not being readily ascertainable by, proper means by another who can obtain economic value from its disclosure or use; and (B) Is the subject of reasonable efforts to maintain its secrecy.

D.C. Code § 36-401(4).

Here, the Complaint fails to allege any specific facts showing that the alleged information is valuable due to it not being generally known to, and not being readily ascertainable by, proper means by another who can obtain economic value from its disclosure or use, and is the subject of reasonable efforts to maintain its secrecy.

Instead, TechAmerica merely provides a bare recitation of the text of the DCUTSA. Complaint ¶ 21 (stating that "the information in the TechAmerica Spreadsheet is the subject of reasonable efforts to maintain its secrecy," but not providing any factual support for the conclusory statement); ¶ 28 (stating that "this membership information is the subject of reasonable efforts to maintain its secrecy," but not providing any factual support for the conclusory statement). Markedly missing from the Complaint is any indication how the alleged trade secrets are valuable due to its secrecy.[1]

It is well established that "trade secret law does not protect information that is 'easily ascertainable by the public,' or 'generally known within an industry.'" *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 78 (D.D.C. 2007) (citations omitted). Here, it is far from clear whether the well-known identity of members of an industry trade organization, like TechAmerica, qualify as "trade secrets" within meaning of the DCUTSA. *See, e.g., Government Relations Inc. v. Howe*, 2007 WL 201264, *12 (D.D.C. Jan. 24, 2007) (holding that client list of registered lobbyist was not a trade secret because information was publicly available).

In addition, a plaintiff must plead that the information is the subject of efforts to maintain its secrecy "such as password protection, physical locks, limited access, and non-disclosure agreements." *S&S Computers & Design, Inc. v. Paycom Billing Servs., Inc.*, 2001 WL 515260, *2 (W.D. Va. Apr. 5, 2001) (analyzing claim under Virginia UTSA).[2] Although TechAmerica alleges that there was a confidentiality obligation contained within the Handbook provided to all employees of

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[1] TechAmerica's misappropriation of trade secrets claim only appears to rely upon the alleged spreadsheet. *See* Complaint ¶ 40. However, even if TechAmerica now claims that the trade secret count is also premised on the membership information alleged in paragraphs ¶¶ 28-29 of the Complaint, these allegations fail for the same reasons as the spreadsheet allegations.

[2] "[B]ecause the D.C. Trade Secrets Act is based on the Uniform Trade Secrets Act, 14 U.L.A. 437 (amended 1985), as are the trade secrets statutes of several states, it is appropriate to consider how the courts in those states have interpreted their states' trade secret acts when interpreting the D.C. trade secrets statute." *Catalyst & Chemical Services, Inc. v. Global Ground Support*, 350 F. Supp. 2d 1, 7 n.3 (D.D.C. 2004) (citations omitted).

TechAmerica, the language quoted within the Complaint does not make reference to purported "trade secrets" or identify what information might be covered by this confidentiality obligation. *See* Complaint ¶12.

Because TechAmerica fails to specify any efforts it made to protect the secrecy of its alleged trade secrets, and instead simply asserts, in a conclusory manner, that the information is the subject of reasonable efforts to maintain its secrecy, it fails to state a claim and must be dismissed. *See, e.g., Deegan v. Strategic Azimuth LLC*, 768 F. Supp. 2d 107, 112-13 (D.D.C. 2011) (granting motion to dismiss a claim under the DCUTSA where the complaint did not allege specific facts showing that the plaintiff took any reasonable steps to maintain the secrecy of the alleged trade secret).

IV. THE CONVERSION CLAIM (COUNT IV) FAILS TO STATE A CLAIM BECAUSE TECHAMERICA WAS NOT DENIED OWNERSHIP, DOMINION AND CONTROL OVER ITS PROPERTY

To state a claim for conversion, a plaintiff must allege "an unlawful exercise of ownership, dominion, and control over the personalty of another in denial or repudiation of his right to such property." *Baltimore v. Dist. of D.C.*, 10 A.3d 1141, 1155 (D.C. 2011). However, a plaintiff cannot state a claim for conversion if it retains the original or copies of a document, because the owner has not been deprived of its use. *Government Relations Inc. v. Howe*, 2007 WL 201264, *13 (D.D.C. Jan. 24, 2007).

A review of the Complaint shows that the conversion count fails to state a claim, and must be dismissed, because TechAmerica was not denied ownership, dominion and control over its property. Instead, as the Complaint implicitly concedes, TechAmerica retained the ability to access the information allegedly converted by its former employees. *See, e.g.,* Complaint ¶¶ 20, 22 (alleging only that former employee accessed copies of documents and emails), ¶ 25 (referring to the spreadsheet at issue as a "copy"). Because TechAmerica has not alleged that it was denied

ownership, dominion, and control over its property as a result of ITI's actions, its conversion claim must be dismissed.

CONCLUSION

For the foregoing reasons, ITI respectfully requests that the Court grant its motion and dismiss the Complaint with prejudice.

Dated: November 27, 2013

Respectfully submitted,

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Counsel for Information Technology Industry Council, Inc.

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I hereby certify that on November 27, 2013, I filed a copy of the foregoing with the Court using Case Express, which will serve all counsel of record, and that I separately served the foregoing on the following counsel via electronic mail:

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ORDER

Upon consideration of Defendant Information Technology Industry Council, Inc.'s Motion to Dismiss, Memorandum in Support thereof, any opposition, and reply thereto, it is hereby this _____ day of _____, _____;

ORDERED that Information Technology Industry Council, Inc.'s motion is **GRANTED;** and it is further

ORDERED that Plaintiff's Complaint is **DISMISSED WITH PREJUDICE** as to Defendant Information Technology Industry Council, Inc.

SO ORDERED.

_____
Hon. John M. Mott
Superior Court of the District of Columbia
Civil Division

Copies to:

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