IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

EVENTS MEDIA NETWORK, INC.	:	
	:	
Plaintiff	:	**CIVIL ACTION**
	:	**NO. 1:13-CV-00003-RBK-AMD**
v.	:	
	:	
THE WEATHER CHANNEL INTERACTIVE, INC., THE WEATHER CHANNEL INTERACTIVE, LLC, AND THE WEATHER CHANNEL, LLC	:	
	:	
Defendants	:	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR RENEWED MOTION TO DISMISS COUNTS I, II, III AND IV OF THE AMENDED COMPLAINT

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Defendants, The Weather Channel Interactive, Inc., The Weather Channel Interactive, LLC, and The Weather Channel, LLC, by their attorneys, Duane Morris LLP, respectfully submit the following Memorandum of Law in Support of Their Renewed Motion to Dismiss Counts I, II, III and IV of the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

I. INTRODUCTION

This matter arises from a contract dispute about the terms under which Plaintiff provided publicly available information to Defendants, "TWCi."[1] Plaintiff contends that, after the parties' relationship ended, TWCi has continued to use the information in breach of the post-termination provisions of one agreement between the parties.

Plaintiff's Amended Complaint improperly attempts to expand this simple contract dispute into a tort action for conversion (Count I) and misappropriation of trade secrets (Counts II, III and IV). Under well-settled Georgia law, Plaintiff cannot convert its breach of contract claim into a claim for conversion. If an agreement required TWCi to delete the information, then Plaintiff has stated a claim for breach of contract. If there was no such agreement, then there can be no conversion of information TWCi was entitled to keep. Either way, this is an issue of contract interpretation, not conversion.

Moreover, the Georgia Trade Secrets Act ("GTSA") preempts Plaintiff's conversion claims. Plaintiffs cannot avoid the rigorous demands of the GTSA by simply pleading alternative claims for conversion which do not require the same showing. Any rule to the contrary would provide greater protection and lower burdens to information not rising to the

[1] Plaintiff treats all three defendants as the same entity, which it defines as TWCi. For consistency and clarity, this motion also refers to all three defendants collectively as "TWCi" or "Defendants."

level of a trade secret than the law provides for trade secrets. That approach would undermine the GTSA.

Plaintiff's claims for misappropriation of trade secrets also must fail. The Agreement permitted TWCi to publish and display the Information in any format throughout the world, including over the internet. Indeed, the very purpose of the Agreement was for TWCi to use and publicly display the data Plaintiff provided. Because Plaintiff made no efforts for years to maintain the secrecy of the Information, much less the reasonable efforts required for a trade secret, Plaintiff's misappropriation claim cannot stand based on Plaintiff's own allegations.

II. ALLEGED FACTS

Plaintiff collects, reviews and distributes information about local and national events. (Am. Compl. ¶ 8). Plaintiff gathers this information for its clients and distributes it to them in data format. Defendant, The Weather Channel LLC, is a leading provider of weather-related news through cable television and over the internet. (Am. Compl. ¶ 13).

Plaintiff and TWCi entered a Content License Agreement, which was effective as of May 1, 2008 (the "Agreement"). (Am. Compl. ¶ 14). Under the Agreement, Plaintiff agreed to provide TWCi with certain information, which consisted of publicly available information such as the name, location, date, time, and ticket information for local and national events (the "Information"). (Am. Compl. ¶ 15). Plaintiff agreed to provide this data to TWCi on a daily basis. (Am. Compl. ¶ 15).[2]

[2] In the Amended Complaint, Plaintiff defines "Information" very broadly. (Am. Compl. ¶ 8). Plaintiff appears to argue that the 2008 Agreement covers all data provided by Plaintiff to TWC, including data provided before 2008 that was not part of the daily data feeds for national and local events. (Am. Compl. ¶¶ 25-27, 34-36). The Agreement does not support Plaintiff's position.

The Agreement provided TWCi with broad rights to use and distribute the data. For example, the Agreement permitted TWCi to "use, exploit, copy, reproduce, publish, transmit, exhibit, broadcast, advertise, publicly perform and display" the data "throughout the world by any and all means" including over the internet. (Am. Compl. Ex. A at ¶ 3, pp. 3-4).

The Agreement expired on May 1, 2011. (Am. Compl. ¶ 23). Plaintiff contends that the Agreement required TWCi to stop using the Information and to erase it from TWCi computers after the Agreement terminated. (Am. Compl. ¶ 35). Plaintiff further contends that TWCi has breached the Agreement by continuing to use the Information and by failing to delete it. (Compl. ¶¶ 24, 34, 35). Although the Information was publicly available and there were no restrictions on TWCi's distribution of it during the Agreement, Plaintiff contends that the Information is a "trade secret" that TWCi has somehow misappropriated. (Am. Compl. Counts II, III, IV). Further, Plaintiff claims that TWCi's use of the Information in breach of the Agreement's post-termination provisions constitutes conversion. (Am. Compl. Count I).

III. STANDARD OF REVIEW

To state a claim upon which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 570 (2007)). The complaint must allege adequate facts "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

"While a court will accept well-pled allegations as true for purposes of the motion, it will not accept bald assertions, unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations." *Esposito v. I-Flow Corp.*, 2011 U.S. Dist. LEXIS 122570, at *6 (E.D. Pa. Oct. 24, 2011). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation

of the elements of a cause of action will not do." *Id.* In addition to the allegations of the Complaint, the Court may also consider a document upon which the plaintiff relies in the Complaint. *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196-97 (3d Cir. 1993).

IV. ARGUMENT

A. Plaintiff's cause of action for conversion (Count I) fails as a matter of law.

1. Plaintiff's conversion claim is barred by the gist of the action doctrine.

Under the "gist of the action doctrine," applied under both Georgia and Pennsylvania law, the mere failure to perform a contract is not a tort.[3] *Swyters v. Motorola Employees Credit Union,* 535 S.E.2d 508, 510 (Ga. App. 2000) ("If no liability is claimed except that arising out of a breach of the express terms of a contract, the action lies in contract alone; an action in tort will not lie."). "A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law." *ServiceMaster Co., L.P. v. Martin*, 556 S.E.2d 517, 521 (Ga. App. 2001).

In *ServiceMaster*, the Georgia Court of Appeal reversed a judgment in favor of the plaintiff and held that the trial court erred by failing to dismiss the plaintiff's tort claims, which sounded in contract. *ServiceMaster,* 556 S.E. at 521-22. As the court explained, "an action in tort may not be maintained for what is a mere breach through non-action or through ineffective performance (which is the same thing) of a contract duty - - the duty must arise independent of contract to constitute a tort." *Id.* at 522-23. Georgia courts have repeatedly applied this

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[3] Georgia law applies to Plaintiff's claims because the Agreement contains a choice of law clause requiring that "[t]his Agreement shall be governed by the laws of the State of Georgia, without regard to its conflict of law rules." (Am. Compl. Ex. A at ¶ 11(i)). Further, the alleged proprietary and trade secret information was sent to Georgia and is allegedly being used in Georgia.

principle. *See Worsham v. Provident Cos., Inc.*, 249 F. Supp. 2d 1325, 1334 (N.D. Ga. 2002) (granting summary judgment on insured's tortious interference claim based on bad-faith denial of benefits because insured failed to "specify facts which would support a finding that [the insurer] owed her any duty independent of those created by the written insurance contract"); *Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.*, 136 F. Supp. 2d 1340, 1354-55 (N.D. Ga. 2001) (granting summary judgment on insured's negligence claims where insurer alleged negligence in processing of claim because the claims "raise[d] only breach of contract issues" and insured did not show a special relationship creating an independent duty); *Wallace v. State Farm Fire & Cas. Ins. Co.*, 247 Ga. App. 95, 539 S.E.2d 509, 512 (Ga. Ct. App. 2000).

In this case, Plaintiff alleges that it provided Information to TWCi under the Agreement. Plaintiff alleges that TWCi was required to erase all of the Information after the parties' Agreement. (Am. Compl. ¶ 35). Plaintiff alleges that TWCi converted Plaintiff's Information by continuing to use it, and by failing to erase it, after the Agreement terminated. (Am. Compl. ¶ 47).

Plaintiff's allegations amount to no more than a breach of contract claim. Indeed, Plaintiff repeats the same allegations in Counts V, VI, and VII of the Amended Complaint alleging that the same conduct constitutes a breach of contract. Accepting Plaintiff's allegations as true for purposes of this motion, either TWCi was required to erase the Information from its system or it was not. But this duty arises, if at all, by contract, not under tort law. There is no independent duty to erase Information provided by another under a contract. Accordingly, Plaintiff's attempt to convert its contract claim into a tort claim should be dismissed.

Two cases from the Western District of Pennsylvania applied this principle to allegations similar to those raised by Plaintiff in this case. In *FedEx Ground Package System, Inc. v.*

Applications International Corp., the counterclaim plaintiff (AIC) alleged that it had developed a software and database product to manage certain FedEx reporting functions. AIC alleged that FedEx breached an agreement and converted a software program by keeping possession of it after the parties' agreement terminated. The court explained that "[t]he validity of AIC's conversion claim depends on whether FedEx had a right to keep the computer program, which depends on the terms and performance of the contract." *FedEx*, 2008 U.S. Dist. LEXIS 107896, at *28-29. Accordingly, the court granted summary judgment against AIC's claim and held that AIC's conversion claim failed as a matter of law under the gist of the action doctrine. *Id*. at *30.

Similarly, in *Clarity Software v. Allianz Life Ins. Co.*, 2006 U.S. Dist. LEXIS 56217 (Aug. 11, 2006), the plaintiff developed marketing software for the defendant. The plaintiff alleged that the defendant converted the plaintiff's software by continuing to use it as part of the defendant's software after the parties' agreement terminated. The court found that the gist of the action was for breach of contract or a copyright violation and therefore granted summary judgment against plaintiff's conversion claim. *Clarity Software*, 2006 U.S. Dist. LEXIS 56217, at *37.

Plaintiff's conversion claim, just like the claims in *FedEx* and *Clarity Software*, is just an attempt to recast a breach of contract claim as conversion. Just as in those cases, it fails as a matter of law and should be dismissed.

2. Plaintiff's Conversion claim is preempted by the Georgia Trade Secrets Act.

The Georgia Trade Secret Act ("GTSA") strikes a balance between society's interest in the free flow of information and a property owner's interest in protecting the value of her trade secrets. Accordingly, "the GTSA preserves a single tort cause of action under state law for misappropriation and eliminates other state causes of action founded on allegations of trade

secret misappropriation. . . . [T]he GTSA is the exclusive remedy for misappropriation of trade secrets, and plaintiff cannot plead an alternative theory of recovery should the information ultimately not qualify as trade secrets." *Opteum Financial Services, LLC v. Spain*, 406 F. Supp. 2d 1378, 1380 (N.D. Ga. 2005).

While the Georgia Supreme Court has not yet ruled on whether the GTSA preempts tort claims for information that does not rise to the level of a trade secret, several courts have found that it does. *Diamond Power International, Inc. v. Davidson*, 540 F. Supp. 2d 1322 (N.D. Ga. 2007); *Opteum*, 406 F. Supp. 2d at 1380; *PHA Lighting Design, Inc. v. Kosheluk*, 2010 U.S. Dist. LEXIS 30752 (N.D. Ga. Mar. 30, 2010). As the court in *Diamond Power International* explained:

> If a plaintiff could alternatively recover for misappropriation of non-proprietary information or misappropriation of unguarded proprietary information, the legislative judgment contained in the GTSA - - that such information should otherwise flow freely in the public domain - - would be subverted. And it would make little sense to go through the rigamorole of proving information was truly a trade secret if a plaintiff could alternatively plead claims with less burdensome requirements of proof.

Diamond Power International, 540 F. Supp. 2d at 1345.

In *Diamond Power International*, the plaintiff alleged that the defendant-competitor wrongfully obtained and used confidential information from the plaintiff's former employee. Just as in this case, the plaintiff alleged that defendant's conduct constituted conversion and misappropriation of trade secrets. The court held that certain information constituted trade secrets while other information did not. Nonetheless, plaintiff's conversion claims were preempted as to all of the alleged confidential information because the conversion claim was based on the same conduct as the misappropriation claim. *Diamond Power Int'l*, 540 F. Supp. 2d at 1344-45.

Similarly, in *PHA Lighting Design, Inc. v. Kosheluk*, 2010 US. Dist. LEXIS 30752, the plaintiff alleged that the defendant converted intangible proprietary information. The plaintiff admitted that this proprietary information did not rise to the level of a trade secret and sought to recover damages for conversion of the information. The court granted summary judgment against plaintiff's claims by finding, as a matter of law, that the GTSA preempted plaintiff's conversion claim. The court explained:

> While Plaintiff admits that its information is not protected by the GTSA because the information does not rise to the level of a trade secret, the proprietary information allegedly misappropriated by Defendant Kosheluk does come within the types of intangible information that may be protected as trade secrets. . . . "[A] plaintiff surely cannot use general tort causes of action to revive claims which would otherwise not be cognizable in light of the UTSA." *Hauck*, 375 F. Supp. 2d at 655. Allowing Plaintiff to bring a claim for unjust enrichment and conversion based on Defendant Kosheluk's conduct would subvert the purpose of the GTSA because plaintiff would not have to prove that the information taken by Defendant Kosheluk was a trade secret, yet could still recover for misappropriation of intangible, proprietary information.

PHA Lighting Design Inc., 2010 U.S. Dist. LEXIS 30752, at *38.

Plaintiff claims that Defendants converted intangible, allegedly proprietary Information. Because the Information is the type of property covered by the GTSA, Plaintiff's conversion claim is preempted by the GTSA. *See Opteum*, 406 F. Supp. 2d 1378 (granting judgment on the pleadings against claim for conversion of confidential information); *PHA Lighting Design Inc.*, 2010 U.S. Dist. LEXIS 30752; *Diamond Power International*, 540 F. Supp. 2d at 1344-45.

Plaintiff's allegations only confirm that Plaintiff's conversion and misappropriation claims are based on the same conduct. In Count I, Plaintiff alleges "TWCi has since the termination of the Content License Agreement and, based upon information and belief, continues to use [Plaintiff's] trade secret and confidential information without its authority." (Am. Compl.

¶ 47). In Count II, Plaintiff alleges that this very same conduct constitutes a misappropriation of trade secrets. (Am. Compl. ¶ 62). Plaintiff cannot avoid the GTSA and the balance it strikes between the free flow of information and the protection of proprietary information by attempting to re-cast its misappropriation of trade secret claim as a claim for conversion. *See Opteum*, 406 F. Supp. 2d 1378; *PHA Lighting Design Inc.*, 2010 U.S. Dist. LEXIS 30752; *Diamond Power International*, 540 F. Supp. 2d at 1344-45.

3. Plaintiff's conversion claim fails as a matter of law because Defendants did not deprive Plaintiff of its property.

Under Georgia law, "conversion involves an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to her rights." *Habel v. Tavormina*, 597 S.E.2d 645 (Ga. Ct. App. 2004) (quoting *Kline v. Atlanta Gas Light Co.*, 538 S.E.2d 93 (Ga. App. 2000)). "Conversion is not available as a cause of action with respect to intangible property" such as an interest in a business unless the intangible right is merged into a document. *Southern Cellular Telecom Inc. v. Banks*, 431 S.E.2d 115, 120 (Ga. App. 1993); *see also Monterrey Mexican Restaurant v. Leon*, 638 S.E.2d 879, 885-86 (Ga. App. 2006) (noting Georgia does not recognize a claim for conversion of intangible business interests unless those interests are merged in one or more documents).

In *Glades Pharmaceuticals, LLC v. Murphy*, 2005 U.S. Dist. LEXIS 36198 (N.D. Ga Dec. 16, 2005), the plaintiff alleged that the defendant-employee converted a presentation that included the plaintiff's sales strategy. In that case, the defendant had copied and distributed the plaintiff's presentation. The court granted summary judgment against the plaintiff's conversion claim because "making an unauthorized copy does not constitute conversion because it does not deprive the Plaintiff of its property." *Id.* at *23; *see also Clarity Software*, 2006 U.S. Dist. LEXIS 56217, at *37 (granting summary judgment against claim for conversion of software and

expressing doubt that images from software could be considered chattel or that acts of copying software somehow deprive plaintiff of the use of his own software).

In this case, Plaintiff does not allege that Defendants deprived Plaintiff of its use of the Information. Rather, Plaintiff complains that Defendants continue to use the information in breach of the Agreement. Thus, based on Plaintiff's own allegations, Defendants have not converted the Information and Plaintiff's conversion claim must fail as a matter of law.

B. Counts II, III and IV fail as a matter of law because Plaintiff failed to make reasonable efforts to maintain the secrecy of the alleged trade secret.

In Counts II, III and IV of the Amended Complaint, Plaintiff once again attempts to convert its contract claim into tort claims by alleging that Defendants misappropriated a trade secret. Dismissal of Counts II, III and IV is appropriate because it is clear from the face of the Complaint that Plaintiff did not make reasonable efforts to protect the confidentiality of the alleged trade secret.

It is axiomatic that a plaintiff cannot maintain a claim for misappropriation of trade secrets unless the plaintiff has made reasonable efforts to maintain the secrecy of the alleged trade secret. *See* O.C.G.A. § 10-1-761(4)(B) (the information must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."). In its Complaint, Plaintiff makes the conclusory and boilerplate allegation that "Pursuant to OCGA § 10-1-761(4)(B), EMNI has made reasonable efforts to maintain the secrecy of the information." (Am. Compl. ¶ 58). Plaintiff does not even attempt to plead specific facts in support of this allegation, and, therefore, Plaintiff has failed to state a claim that is plausible on its face. *Ashcroft*, 129 S. Ct. 1937, 1949 (2009).

Moreover, the Agreement, attached to the Complaint, establishes that Plaintiff's alleged trade secret was no secret at all. To the contrary, the very purpose of the Agreement was for

Defendants to publish Plaintiff's "secret information" on the internet. Specifically, Plaintiff collects, reviews and distributes publicly available information about local and national events. (Am. Compl. ¶ 8). For example, Plaintiff collects information about the events that will occur at the Wells Fargo Center in Philadelphia. Plaintiff then records that information in a data file, which it transmits to its clients. Putting aside whether this publicly available information could ever qualify as a trade secret, Plaintiff made no effort to treat it as a trade secret in the Agreement. The Agreement provides Defendants with the following broad rights to use and display the Information:

> Supplier grants TWCi and its affiliates (now existing or hereafter organized or acquired), a non-exclusive, worldwide, non-transferable right and license to **use, exploit, copy, reproduce, publish, transmit, exhibit, broadcast, advertise, publicly perform and display**, modify, edit, reformat, synchronize, combine and create abstracts and derivative works of the Information and any portion thereof, **in any form or format, in any manner whatsoever throughout the world by any and all means**, platforms, technologies, devices or media now known or hereafter developed, whether owned or operated by TWCi, its affiliates, or any third party or parties, including, without limitation, on or as part of a network of websites, on or as part of any electronic "on-line" service or other computer network (**including, without limitation, on the Internet**, on proprietary networks, or on computer "web" pages), through direct delivery via electronic mail services or "push" technologies, through personal computers, voice delivery and/or wireless devices, and/or through cable systems, satellite networks or broadcast television stations. . . . TWCi shall have sole, full and complete editorial control over the implementation and placement of the Information on its web site or other relevant media.

(*See* Am. Comp. Ex. A, at ¶ 3, pp. 3-4).

"Georgia courts have long held that trade secrets are protectable only when they truly are secrets." *Servicetrends, Inc. v. Siemens Medical Sys., Inc.*, 870 F. Supp. 1042, 1047 (N.D. Ga. 1994) (citing *Textile Rubber & Chem. Co. v. Shook*, 243 Ga. 587, 589, 255 S.E.2d 705 (1979)) ("Georgia's definition of trade secret requires that it is 'known only to its owner and those of his

employees to whom it must be confided in order to apply it to the uses intended.'"). The failure to maintain the secrecy of the information removes any legal protection it might otherwise have as a trade secret. *See, e.g.*, *Infrasource, Inc. v. Hahn Yalena Corp.*, 272 Ga. App 703, 709-10, 613 S.E.2d 144, 149 (Ga. App. 2005) (affirming trial court's grant of summary judgment where plaintiff knew that the information would be submitted to third parties and, therefore, did not undertake reasonable efforts to maintain secrecy as a matter of law); *Bacon v. Volvo Serv. Ctr., Inc.*, 266 Ga. App. 543, 545, 597 S.E.2d 440, 443-44 (Ga. App. 2004) (holding customer lists were not trade secrets where lists were on computers that were not password protected, the same information in those lists was available to technicians through repair orders that the technicians were permitted to retain indefinitely, and employees were not informed that the information was confidential); *Servicetrends Inc.*, 870 F. Supp. at 1074 (finding former employee not guilty of misappropriation of trade secrets and confidential information where the allegedly confidential technical data provided to the employee was also distributed to the company's customers).

Therefore, as a matter of law, Plaintiff cannot now maintain that the "Information" constituted a trade secret because Plaintiff expressly permitted Defendants to "use, exploit, copy, reproduce, publish, transmit, exhibit, broadcast, advertise, publicly perform and display" the Information "in any form or format . . . throughout the word by any and all means" including

through the internet. (*See* Am. Compl. Ex. A, at ¶ 3, pp. 3-4).

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