

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

EVENTS MEDIA NETWORK, INC.,	:	
	:	Case No.
Plaintiff,	:	1:13-cv-00003-RBK-AMD
	:	Camden Division
v.	:	
	:	
THE WEATHER CHANNEL	:	
INTERACTIVE, INC., et al.,	:	
	:	
Defendants.	:	

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' RENEWED
MOTION TO DISMISS**

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Plaintiff, Events Media Network, Inc. ["EMNI"], submits this memorandum of law in support of its opposition to the renewed motion to dismiss filed by defendants The Weather Channel Interactive, Inc. a/k/a The Weather Channel Interactive, LLC a/k/a The Weather Channel, LLC [collectively "TWCi"].

I. INTRODUCTION

EMNI's Amended Complaint sufficiently asserts a violation of the Georgia Trade Secrets Act ("GTSA") because EMNI took reasonable efforts to maintain the secrecy of the confidential information provided to TWCi pursuant to a Content License Agreement ("Agreement").¹

EMNI and TWCi entered into the Agreement pursuant to which EMNI agreed to supply TWCi with information in the nature of detailed schedules and related information for various local and national events ["Information"]. Pursuant to this Agreement, TWCi expressly agreed the Information was confidential and was EMNI's property. TWCi agreed it would not disclose the Information or give it to others. Moreover, TWCi agreed: (1) only its employees requiring the Information for purposes of performing the contract would have access to the Information; (2) to inform its employees with access to the Information that such information was confidential; (3) to prevent the use or disclosure of the confidential Information by its employees; and (4) to promptly inform EMNI if a use or disclosure of the Information occurred. TWCi also agreed it would use the Information only for events and attractions listings.

Accordingly, because TWCi agreed the Information was confidential and the Agreement establishes EMNI took reasonable efforts to maintain the Information's secrecy, the Information provided to TWCi by EMNI constitutes a trade secret under the GTSA.

¹ EMNI withdraws its Conversion Claim asserted against TWCi in Count I of the Amended Complaint.

II. FACTUAL AND PROCEDURAL BACKGROUND

EMNI is in the business of collecting, reviewing and distributing information in the nature of detailed schedules and related information for various local and national events and acting as a data provider of that Information to other companies. Amended Compl. ¶ 8. EMNI has the most comprehensive database of venue and event information available. EMNI's Information includes venue name, address, city/state, and zip codes collected by the EMNI team for various event venues nationwide. *Id.* at § 15. EMNI has its own team that gathers this Information, which is constantly updated. By virtue of its efforts and expenditures to compile such Information, EMNI has achieved competitive advantage over providers of similar services, by developing and preserving the confidentiality of certain proprietary information. *Id.* ¶ 9. This Information is not information that is known to its competitors and is not publicly known or available. *Id.* ¶ 11. Instead, to duplicate the efforts of EMNI to acquire, process and distribute such Information, significant staff and cost would be required to build and maintain an event venue and event information database from the ground up. As one consequence of this, although none of the individual bits of data gathered together by EMNI is confidential, once it is "gathered together" as a compilation from various sources into the format created by EMNI, such data constitutes trade secrets and confidential Information of EMNI and is proprietary information owned by EMNI. *Id.* ¶ 10.

Defendant is an entity known over the years by different names and corporate structures, including The Weather Channel Interactive, LLC, The Weather Channel, LLC, and The Weather Channel Interactive, Inc. [collectively "TWCi"]. TWCi maintains several websites on the World Wide Web, one being www.weather.com, wherein it provides current meteorological conditions and forecasts, and related maps, news, weather, travel and other information. Amended Compl.

¶ 13. TWCi was in need of the kind and variety of Information that EMNI was in a position to offer. But it was unwilling or unable to expend the necessary capital to assemble a team of employees and technology to gather the same or similar Information that EMNI was willing to license. It was both this initial list of venues/locations, as well as EMNI's ability to keep the events and venue information updated, that made EMNI as the data source for the Events product on www.weather.com attractive to TWCi.

EMNI and TWCi entered into a series of written licensing agreements spanning a time period of over a decade. Amended Compl. ¶ 14. The most recent of these agreements, although later extended, was entitled Content License Agreement, effective as of May 1, 2008. *Id.*, at Exhibit A. TWCi and EMNI entered into an amendment to that Agreement, made as of November 1, 2010, which extended that Agreement for six months. *Id.*, at Exhibit B. Because TWCi took no steps to renew the Agreement, it expired based upon its own terms, effective May 1, 2011. Amended Compl. § 23.

For TWCi to utilize EMNI's Information² did not merely require the "flip of a switch." TWCi was required to design a software product specifically to manage its development, launch,

² In the Agreement, as later extended, EMNI agreed to collect Information and make same, including updates, available to TWCi pursuant to a schedule. Pursuant to this and previous Agreements, EMNI had agreed to provide on a daily basis to TWCi the following Information:

Data Fields to be Provided for Each Event

All data fields that are gathered about each event, which includes, but is not limited to, the following:

Event_no, Event_name, *Location, *Address1, *Address2, City, State, Zip, Ethnicity, Category, *Attendance, *Description, Open_date, Close_date, Area1, Exchange1, Number1, *Fax_area1, *Fax_exchange1, *Fax_number1, *Area2, *Exchange2, *Number2, *Ticket_info, *Hours, Country, DMA, Home_Team, Away_Team

(fields marked with "*" are present if available, as often as possible, and when applicable on an event by event basis).

Amended Compl. § 15.

and maintenance of EMNI's Information in the nature of events and venue information. EMNI's Information became the sole source of events and venue information for TWCi. TWCi designed the geospatial methodologies that allowed weather observation stations and forecast points to be tied to new locations of interest, such as golf courses, ski resorts and national parks. Enabled by the licensing deal with EMNI, TWCi was allowed access to Information concerning special event and sporting event venues, which were previously not available to TWCi and, as a consequence, not available on its website, www.weather.com.

Pursuant to the Agreement, TWCi agreed the Information was confidential. Further, the Agreement governed the use of the Information and prevented the dissemination of the Information. Section 3 of the Content License Agreement provided that TWCi did not have the right without future consent of EMNI "to take the information or any part of it and incorporate it into other programs for uses other than event and attractions listings. To the extent any such use has been made of the information under any Agreement between the parties, [EMNI] consents to the continued use of such information for such purpose only and only so long as this Agreement remains in full force and effect." Amended Compl. ¶ 16. Moreover, Section 4 of the Agreement provides that "TWCi acknowledges and agrees the Information, and all right, title and interest therein, is and shall remain the exclusive property of [EMNI]. . . . The incorporation of the Information into a derivative work by TWCi shall accord no right to TWCi to use the Information, or the derivative work if that is dependent on the Information, subsequent to the termination of this Agreement, and subject to the provisions of Paragraph 10(d)." *Id.* at ¶ 17.

Importantly, section 6 governs the confidentiality of the Information, including limiting disclosure of the Information, and provides:

For purposes of this Agreement, the term "Confidential Information" shall mean all technical, business, and other

information of either Party or such Party's affiliates disclosed to or obtained by the other Party, whether prior to, on or after the date of this Agreement, that derives economic value, actual or potential, from not being generally known to others, including, without limitation, any technical or non-technical data, designs, methods, techniques, drawings, processes, products, inventions, improvements, methods or plans of operation, research and development, business plans and financial information of such Party. Confidential Information also includes the terms and conditions of this Agreement. **Each Party agrees that it will not use, except as may be required to perform under this Agreement, and will not disclose or give to others, any of the other Party's Confidential Information, except as contemplated by this Agreement.** Without limiting the generality of the foregoing, each Party will (a) restrict the disclosure of the Confidential Information to those of its employees who require such information for purposes of performing under this Agreement, (b) inform all of such employees of the obligations under this section, (c) prevent use or disclosure by its employees of the Confidential Information, except as provided herein, and (d) promptly inform the other Party of any use or disclosure of the Confidential Information, whether intentional or not, which violates the provisions of this section. The restrictions contained in this section shall survive any expiration or termination of this Agreement, but shall not apply to any information that does not constitute a trade secret under applicable law three years after the termination or expiration of this Agreement.

Amended Compl. at ¶ 18.

III. DISCUSSION

A. EMNI Withdraws its Conversion Claim

EMNI hereby withdraws its Conversion Claim.

B. EMNI's Amended Complaint Sufficiently States A Violation of the Georgia Trade Secrets Act

TWCi maintains the Information provided to it by EMNI under the Agreement, which defined the Information as confidential and which provided for limited disclosure of the Information, is not a trade secret because EMNI did take reasonable efforts to maintain its

secrecy.³ Although TWCi now alleges the Information became non-confidential the moment the parties entered the Agreement, its argument is belied by the Agreement. TWCi not only agreed the Information was confidential, but it also paid for the use of the allegedly public information for over a decade. Further, pursuant to the Agreement, TWCi agreed the Information was EMNI's property, agreed it would use the Information only for events and attractions listings, and agreed to take steps to maintain the confidentiality of the Information.

The GTSA provides defines "trade secret" as:

[I]nformation, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information:

(A) Derives 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; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

O.C.G.A. § 10-1-761(4). EMNI compiles Information for schedules and related information for various local and national events. Such compilations are trade secrets pursuant to the GTSA.

O.C.G.A. § 10-1-761(4); accord *Essex Grp., Inc. v. Southwire Co.*, 501 S.E.2d 501, 503 (Ga. 1998) (noting "[t]he fact that some or all of the components of the trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual elements" (quoting Restatement (Third) of Unfair Competition § 39(f) (1995))).

³ To the extent TWCi maintains EMNI's violation of the GTSA claim is barred by the gist of the action doctrine, its argument fails. The GTSA provides that the Act shall not affect "[c]ontractual duties or remedies, whether or not based upon misappropriation of a trade secret . . ." O.C.G.A. § 10-1-767(b)(1); see, e.g., *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322, 1348 (N.D. Ga. 2007) (addressing both plaintiff's GTSA claim and breach of contract claim and noting defendant's argument that plaintiff's breach of contract claims is superseded by the GTSA is "foreclosed by the language of the GTSA").

Moreover, EMNI made reasonable efforts to maintain the secrecy of its trade secrets. It provided the Information only pursuant to the Agreement, which defined the Information as confidential, limited the Information's use, and provided steps to maintain the Information's secrecy.

In support of its contention that EMNI failed to take reasonable efforts to maintain the Information's secrecy, TWCi relies on distinguishable and inapposite case law. *See Bacon v. Valvo Serv. Ctr. Inc.*, 597 S.E.2d 440, 443-44 (Ga. Ct. App. 2004) (finding customer list not a trade secret where the information was on both computers, the information was not password protected, the information was available to technicians through repair orders and employees were not informed the information was confidential); *Servicetrends, Inc. v. Siemens Med. Sys., Inc.*, 870 F. Supp. 1042, 1073-74 (N.D. Ga. 1994) (finding wide distribution of alleged confidential data removed legal protection where the alleged data was provided to customers as well as the field engineers and the plaintiff provided training to customers based on the allegedly proprietary manuals); *Infrasource, Inc. v. Hahn Yalena Corp.*, 613 S.E.2d 144, 149 (Ga. Ct. App. 2005) (finding information not a trade secret where plaintiff knew the information regarding the bid would be provided to other sources, testified the information was public information, and no nondisclosure or confidentiality agreement existed).

In the cases cited by TWCi, the allegedly confidential information was not covered by a confidentiality agreement. Moreover, the information was widely disseminated to employees and customers or disseminated by defendant to individuals the plaintiff was aware would receive the information. Further, the employees were not informed the information was confidential. Here, the information was disclosed only after the parties entered into the Agreement, which protected the information's confidentiality. Pursuant to this Agreement, TWCi agreed the

Information provided by EMNI was confidential and agreed to disclose the Information only to employees who required the information for performance of the Agreement. In addition, TWCi was to inform any employee receiving the Information of his or her obligation to maintain the Information's confidentiality and was to prevent use or disclosure by its employees of the Information. TWCi agreed the Information was EMNI's property and agreed it would use the property only for events and attractions listings. Unlike the cases cited by TWCi, the compiled Information's use was limited, the Information was not widely disseminated, and it was not publicly available.

Further, "[t]he disclosure of a trade secret to persons with whom the plaintiff has a confidential business relationship . . . generally does not destroy trade secret protection." *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322, 1333 (N.D. Ga. 2007) (citing *Monumental Props. of Ga., Inc. v. Frontier Disposal, Inc.*, 282 S.E.2d 660, 663-64 (Ga. Ct. App. 1981)); *Monumental Props. of Ga., Inc.*, 282 S.E.2d at 663-64 ("One who by reason of a confidential business relationship with the discoverer has gained possession of his trade secret, will be restrained from betraying the trust reposed in him by using the knowledge he has thus acquired for his own gain.").

In *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396, 1400, 1410 (11th Cir. 1998), the plaintiff was a franchise of defendant and the plaintiff provided confidential information to the defendant for defendant's reservation system, including occupancy levels, average daily rates, discounting policies, rate levels, long-term contracts, marketing plans, and operating expenses. The United States Court of Appeals for the Eleventh Circuit found whether the plaintiff took reasonable steps to protect the information's secrecy was a question for the trier of fact. The Court reasoned the plaintiff undertook reasonable efforts to

maintain the information's secrecy, even though it provided the information to the defendant, where the information was provided pursuant to the Reservation Agreement and "on the apparently mutual understanding that it would be kept confidential." *Camp Creek Hospitality Inns, Inc.*, 139 F.3d at 1411; *accord Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1291-92 (11th Cir. 2003) (finding the plaintiff's insistence on a confidentiality agreement and the written non-disclosure agreement were reasonable efforts to maintain the secrecy of the information); *Amedisys Holding, LLC v. Interim Healthcare of Atlanta, Inc.*, 793 F. Supp. 2d 1302, 1310-11 (2011) (finding the plaintiff took reasonable efforts to maintain the confidentiality of the referral log and workbook because it transmitted the material only through its protected computer network and email system, made geographically specific materials available only to the account executives responsible for that area, and marked each page "confidential property"); *Avnet Inc. v. Wyle Labs., Inc.*, 437 S.E.2d 302, 304 (Ga. 1993) (finding plaintiff took reasonable steps to maintain secrecy where the customer lists were not freely or widely disseminated and certain employees were required to sign agreements to keep the information secret); *Paramount Tax & Accounting, LLC v. H & R Block E. Enters., Inc.*, 683 S.E.2d 141, 148 (Ga. Ct. App. 2009) (finding H & R Block made a reasonable effort to maintain the secrecy of its client list, reasoning H & R Block did not publish the list, had company-wide policies to protect the information from disclosure to third parties, counseled its employees regarding the policies, limited access to the list to certain employees, protected the list with a password, and prohibited employees with access from printing the list or from taking the list home).

As in *Camp Creek Hospitality Inns*, EMNI provided the Information to TWCi pursuant to an Agreement and pursuant to the mutual understanding the Information would be kept confidential. Moreover, EMNI took steps beyond those taken in *Camp Creek Hospitality Inns*.

The Agreement provided the Information was confidential and was the property of EMNI, limited TWCi's use of the Information to events and attractions listings, and provided measures TWCi must undertake to ensure the disclosure of the Information to only employees required to have such Information.

Accordingly, EMNI's Amended Complaint sufficiently alleges a violation of the GTSA and sufficiently alleges it took reasonable steps to maintain the Information's secrecy. EMNI alleged TWCi agreed the Information was confidential. Moreover, EMNI alleged the parties entered into an Agreement by which EMNI would provide confidential Information to TWCi and pursuant to which TWCi agreed such Information was EMNI's property, would be used only for events and attractions listings, and would not be disclosed unless disclosure was required under the Agreement. Such allegations sufficiently allege EMNI took reasonable efforts to maintain the secrecy of its Information. *See, e.g., Camp Creek Hospitality Inns*, 139 F.3d at 1411.

IV. CONCLUSION

For the foregoing reasons, Plaintiff, Events Media Network, Inc. prays that Your Honorable Court deny the renewed motion to dismiss filed by defendants, The Weather Channel Interactive, Inc. a/k/a The Weather Channel Interactive, LLC a/k/a The Weather Channel, LLC in the form of the attached proposed order.

ECKERT SEAMANS CHERIN
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Dated: February 26, 2013

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CERTIFICATE OF SERVICE

Michael Kinkopf, Esquire, hereby certifies that on this 26th day of February, 2013, he caused a true and correct copy of the foregoing Plaintiff's Memorandum in Opposition to Defendants' Renewed Motion to Dismiss to be filed electronically with the Court and served via United States Mail, first class, postage prepaid, upon the following parties:

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/s/ Michael P. Kinkopf
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