

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

FIRE 'EM UP, INC.,	)	
	)	
	Plaintiff,	)
v.	)	
	)	
TECHNOCARB EQUIPMENT (2004)	)	No. 10 CV 08050
LTD, et al.,	)	
	)	Judge Norgle
	Defendants.	)
	)	

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS  
COUNTS V-VIII OF PLAINTIFF'S AMENDED COMPLAINT**

Fire 'Em Up, Inc's ("FEU") state law tort claims -- Counts V, VI, VII, and VIII -- should be dismissed because they are fundamentally flawed and deficient.

Furthermore, Counts VI and VII are preempted by the Illinois Trade Secret Act and should be dismissed with prejudice, for that additional reason.

**BACKGROUND**

FEU filed an amended complaint on December 28, 2010, pleading claims for patent infringement (Counts II, III, and IV), breach of contract (Count I), trade secret misappropriation (Count V), conversion (Count VI), fraud (Count VII), and an accounting (Count VIII). Since filing its amended complaint, FEU has dismissed four of the defendants - Intigreen Technologies, Inc., David Shea, Peter Gordon, and Jeffrey Buechler. (Dkts. 10, 15.) Thus only Technocarb Equipment (2004) Ltd. ("Technocarb") and Aurora Electronics, Ltd. ("Aurora") remain as defendants in this action. The claims for trade secret misappropriation, conversion, fraud, and an

accounting should be dismissed as insufficiently pled. Additionally, FEU's claims for fraud and conversion are preempted by the Illinois Trade Secret Act, and should be dismissed with prejudice.

### LEGAL STANDARD

Fed. R. Civ. P. 12(b)(6) motions challenge the sufficiency of the complaint. *U.S. v. Midwest Generation, LLC*, 694 F. Supp. 2d 999, at 1002 (N.D. Ill. 2010) When ruling on a motion to dismiss, the Court accepts as true all of the factual allegations in the complaint. *Id.* "A complaint will survive a motion to dismiss only if it states a facially plausible claim for relief." *Brodsky v. Humanadental Ins. Co.*, No. 10-C-3233, 2011 WL 529302, at \*5 (N.D. Ill. Feb. 8, 2011).<sup>1</sup> The facts alleged in the complaint "must raise a right to relief above the speculative level and cross the line between the possibility and plausibility of entitlement to relief." *Id.* (internal quotations omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950-51 (2009). A complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Chicago School Reform Bd. of Trustees v. Substance, Inc.*, 79 F. Supp. 2d 919, 924 (N.D. Ill. 2000) (internal citations and quotations omitted).

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<sup>1</sup> A copy of all unpublished cases are attached as Exhibit 1.

## ARGUMENT

### I. FEU Failed to Properly Plead a Claim for Trade Secret Misappropriation (Count V).

FEU's trade secret claims is made up of nothing more than bare legal conclusions. And even its bare legal conclusions fail to plead the required elements of trade secret misappropriation. To state a claim for trade secret misappropriation under Illinois law, FEU must assert that the information at issue was (1) a trade secret, (2) misappropriated, and (3) used in the Defendant's businesses. *Abbott Labs. v. Chiron Corp.*, No. 97 C 0519, 1997 WL 208369, at \*3 (N.D. Ill. Apr. 23, 1997) (noting that claim for trade secret misappropriation was improperly pled). Trade secret is information that is (1) sufficiently secret to derive economic value from not being generally known to others who could derive economic value from its disclosure, and (2) is the subject of reasonable efforts to maintain the secrecy or confidentiality of the information. *Id.*

The Seventh Circuit requires specificity when defining the alleged trade secrets: "It is not enough to point to broad areas of technology and assert that something there must have been secret and misappropriated. The plaintiff must show concrete secrets." *Thermal Zone Prod. Corp. v. Echo Eng., Ltd.*, No. 93 C 0556, 1993 WL 358148, at \*5 (N.D. Ill. Sept. 14, 1993) (citing *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1266 (7th Cir. 1992)). The plaintiff cannot simply point to broad areas of information, forcing "the court to

hunt through the details in search of items meeting the statutory definition." *IDX Systems Corp. v. Epic Systems Corp.*, 285 F.3d 581, 584 (7th Cir. 2002).

FEU has failed to specify with any exactitude what pieces of information actually constitute trade secrets. In place of the required specific allegations, FEU includes a laundry list of possible trade secrets included within the definition of trade secret under the ITSA. (Dkt. 6, ¶66.) By merely repeating the types of information the ITSA allows trade secret protection for, FEU has pled bare -- and insufficient -- legal conclusions. *IDX Sys. Corp.*, 285 F.3d at 584.

Furthermore, FEU fails to plead any facts that demonstrate that FEU attempts to maintain the secrecy or confidentiality of the information it lists as its trade secrets. (Dkt. 6, Count V.) "A complaint without any factual allegations regarding the plaintiff's efforts to maintain the confidentiality of their alleged trade secret cannot withstand a motion to dismiss." *Abbott Labs.*, 1997 WL 208369, at \*3.

Because FEU has not sufficiently identified its trade secrets or set forth its efforts to maintain their secrecy, Count V of FEU's complaint should be dismissed.

## **II. FEU's Conversion Claim (Count VI) Fails as a Matter of Law.**

FEU's minimal allegations do not plead conversion. To assert a claim for conversion, plaintiff must show: (1) plaintiff has a right to the property at issue, (2) plaintiff has an absolute and unconditional right to the immediate possession of the property, (3) plaintiff has made a demand for possession of the property, and (4) that the defendant has wrongfully assumed control, dominion, or ownership of the

property without authorization. *Song v. PIL, LLC*, 640 F. Supp. 2d 1011, 1017 (N.D. Ill. 2009). FEU claims that Technocarb "is marketing and selling rights and benefits arising out of the technology" belonging to plaintiff, and has committed conversion by this alleged use. (Dkt. 6, ¶¶72, 73.) These allegations cannot meet the requirements to assert a claim for conversion under Illinois law. *See Ho v. Taflove*, 696 F. Supp. 2d 950, 956-57 (N.D. Ill. 2010).

As the Seventh Circuit has noted, "[t]he gravamen of the tort of conversion is the deprivation of the possession or use of one's property." *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 304 (7th Cir. 1990) (emphasis in original). Under Illinois law, the subject of conversion must be an identifiable object of property, and must be tangible or represented by something tangible. *Song*, 640 F. Supp. 2d at 1017; *Richmond v. Nat'l Institute of Certified Estate Planners*, No. 06 C 1032, 2006 WL 2375454, at \*7 (N.D. Ill. Aug. 15, 2006) (dismissing a claim for conversion of a federal trademark). FEU identifies no tangible property that was allegedly taken.

Further, a complaint fails to state a claim for conversion where it alleges only that the defendant is using a copy of plaintiff's works or property, and not that the defendant ever prevented the plaintiff from accessing or using that property. *Ho*, 696 F. Supp. 2d at 956-57; *FMC Corp.*, 915 F.2d at 303-04 ("[i]n cases where the alleged converter has only a copy of the owner's property and the owner still possesses the property itself, the owner is in no way being deprived of the use of his property. The only rub is that someone else is using it as well.").

FEU alleges only that Technocarb is "marketing and selling rights and benefits arising out of the technology" that belongs to plaintiff. (Dkt. 6, ¶72.) Notably, FEU does not allege that Technocarb has ever prevented plaintiff from using or accessing its alleged technology. The alleged unauthorized copying or use of plaintiff's technology is insufficient to sustain a claim for conversion. *Ho*, 696 F. Supp. 2d at 956-57; *FMC Corp.*, 915 F.2d at 303-04. Thus, even assuming these allegations are true, FEU's alleged facts cannot sustain a claim for conversion under Illinois law. *Id.*

**III. FEU Has Failed to Meet the Heightened Pleading Standard Required to Sustain a Cause of Action for Fraud (Count VII).**

FEU's fraud claim does not come close to complying with the heightened pleading standards of Federal Rule of Civil Procedure 9(b) ("the circumstances constituting fraud...shall be stated with particularity."). In order to plead fraud, a plaintiff must plead "the who, what, when, where and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990); *see also Zoghlin v. Renaissance Worldwide, Inc.*, No. 99 C 1965, 1999 WL 1004624, at \*4 (N.D. Ill. Nov. 4., 1999).

To plead fraud under Illinois law, FEU must allege: (1) a false statement of material fact, (2) defendant's knowledge that the statement was false, (3) defendant's intent that the statement induce plaintiff to act, (4) plaintiff's reliance on the truth of the statement, and (5) plaintiff's damages resulting from reliance on the statement. *Zvunca v. Motor Coach Indus. Int'l, Inc.*, No. 08 C 4507, 2009 WL

483867, at \*4 (N.D. Ill. Feb. 26, 2009) (dismissing a claim for fraud for failure to plead the proper elements and meet the heightened pleading requirement of Rule 9(b)).

FEU failed to allege even a single misrepresentation with sufficient particularity. FEU only states generally that two individuals "acted in concert and individually to convince FEU that they were working to expand the Plaintiff's corporation" and "engaged employees of FEU in several conversations and communications[.]" (Dkt. 6, ¶¶76, 81.) These allegations are insufficient to meet Rule 9(b)'s heightened pleading standards. *See Korean Am. Broadcasting Co., Inc. v. Korean Broadcasting Sys.*, No. 09 C 6665, 2010 WL 3075566, at \*7 (N.D. Ill. Aug. 4, 2010) ("But this alleged misrepresentation is not alleged with sufficient particularity; stating that [defendant] made it to 'plaintiffs' without specifically identifying to whom it was made and where, and stating generally that it was made 'repeatedly over the course of several years,' is insufficient.") (internal citation omitted). FEU's allegations fail to include the time, place, or content of any alleged misrepresentations, nor do they identify the method by which the misrepresentation allegedly was communicated. (*See* Dkt. 6.); *Zvunca*, 2009 WL 483867, at \*4. The complaint also fails to identify to whom any defendant made a fraudulent statement. *Id.* at \*5; *Ungaretti & Harris, LLP v. ServiceMaster Co.*, No. 09 C 4994, 2010 WL 2167532, at \*4 (N.D. Ill. May 27, 2010) ("[P]laintiff must specify the identity of the person to whom the misrepresentation was communicated.") "Such facts are *essential* to pleading fraud under Rule 9(b) and their absence renders...the

claims insufficient." *Zvunca*, 2009 WL 483867, at \*5. Perhaps most significantly, FEU fails to even identify what the alleged false statement of material fact was. (See Dkt. 6.) This alone is grounds for dismissing FEU's fraud count. *See id.* (noting that the plaintiff must include the content of the misrepresentation).

Moreover, FEU never alleges that any of the statements defendants supposedly made were *false*, a requirement for fraud. *See Zvunca*, 2009 WL 483867, at \*4 (noting that a false statement of material fact is a required element of fraud). Also missing from the complaint are allegations that any defendants intended for their statements to induce FEU to take some action, or that FEU relied on a false statement. *Zvunca*, 2009 WL 483867, at \*5. These are required elements for a claim of fraud under Illinois law. *Id.* at \*4. Because of these multiple deficiencies, FEU's fraud claim (Count VII) should be dismissed against all Defendants.

#### **IV. FEU's Fraud (Count VII) and Conversion (Count VI) Claims Should be Dismissed Because as Preempted by the Illinois Trade Secret Act.**

Even if FEU had properly plead claims for conversion and fraud, these claims are preempted by the Illinois Trade Secret Act ("ITSA"), and must be dismissed. Section 8(a) of the ITSA states that: "this Act is intended to displace conflicting tort, restitutionary, unfair competition, and other laws of this State providing civil remedies for misappropriation of a trade secret." 765 ILCS 1065/8; *Cardionet Inc. v. Lifewatch Corp.*, No. 07 C 6625, 2008 WL 567223, at \*2 (N.D. Ill. Feb. 27, 2008) (noting that the ITSA abolishes claims of fraud and conversion arising from the



misappropriation of trade secrets). Misappropriation is defined under the ITSA to include acquisition by improper means, including misrepresentation. 765 ILCS 1065/8(a); *Woodard v. Harrison*, No. 08-2167, 2008 WL 4724370, at \*3 (C.D. Ill. Oct. 24, 2008). The Seventh Circuit has noted the ITSA has "abolished all common law theories of misuse of [secret] information." *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1265 (7th Cir. 1992). And, "the ITSA was meant to 'codify all the various common law remedies for theft of ideas.'" *Master Tech Products v. Prism Enterprises, Inc.*, No. 00 C 4599, 2002 WL 475192, at \*3 (N.D. Ill. Mar. 27, 2002). Because FEU's claims for fraud and conversion rest on the alleged misappropriation of trade secrets, these claims are preempted.

**A. FEU's Claim for Fraud is Preempted by the ITSA and Must be Dismissed With Prejudice.**

FEU's fraud claim alleges that the defendants acquired trade secrets that were the subject of a confidentiality agreement based upon misrepresentation. (Dkt. 6, ¶¶36, 76.) In fact, the remedy FEU seeks for its fraud claim is an order "[d]irecting the defendants to cease making, using, disclosing, producing, marketing, selling, and/or licensing the Plaintiff's *trade secrets*[]" (Dkt. 6, ¶90(a) (emphasis added).)

In *Master Tech Products*, the plaintiff's complaint alleged that the defendant committed fraud by representing that it was interested in acquiring plaintiff or its trade secrets, and represented that it would use the information disclosed by the plaintiff solely to evaluate the possible acquisition. *Master Tech*, 2002 WL 475192,

at \*3. The court found that "[a]ll of these allegations amount to a claim that [the defendant] misrepresented, concealed and lied about the taking and use of [the plaintiff's] confidential information[.]" and that as such, they simply restated the plaintiff's claim for misappropriation of trade secrets. *Id.* (granting summary judgment in favor of the defendant on the preempted claim for fraud).

Similarly, in *Woodard*, the court dismissed the plaintiff's claim for fraud where the claim "indicate[d] that Defendants acquired the trade secrets that were the subject of the Confidential Agreement based on misrepresentation and the fraud resulted in or furthered Defendants' misappropriation of trade secrets." *Woodard*, 2008 WL 4724370, at \*4.

Just as in *Master Tech Products* and *Woodard*, FEU's fraud claim simply alleges that the defendants committed fraud by misappropriating FEU's trade secrets. FEU claims that the defendants convinced FEU that they were working to expand FEU's corporation, that they entered into a contractual relationship with FEU, and used that contractual relationship to misappropriate trade secrets. (Dkt. 6, ¶¶75-90.) Accordingly, FEU's claim for fraud is preempted by the ITSA, and should be dismissed with prejudice.

**B. FEU's Claim for Conversion is Preempted by the ITSA and Must be Dismissed With Prejudice.**

Where a conversion claim alleges conversion of confidential, proprietary, and trade secret information, that claim is preempted by the ITSA. *Cardionet*, 2008 WL 567223, at \*3. FEU alleges that its software technology is a trade secret, and its

claim for conversion alleges only that the defendants have converted this technology by "marketing and selling rights arising out of the technology[.]" (Dkt. 6, ¶¶67, 72, 73.) Because FEU claims solely that the Defendants converted FEU's trade secret, the conversion claim (Count VI D) is subject to ITSA Preemption, and should be dismissed with prejudice. *Cardionet*, 2008 WL 567223, at \*3.

**V. FEU Has Failed to Adequately Plead a Claim for an Accounting (Count VIII).**

By failing to allege that no adequate remedy at law exists, and actually seeking a legal remedy in this lawsuit, FEU essentially concedes that Count VIII for an accounting has no basis and should be dismissed. To state a claim for an accounting under Illinois law, FEU must allege the absence of an adequate remedy at law and either a breach of fiduciary duty relationship, a need for discovery, fraud, or the existence of mutual accounts that are complex in nature. *Sefton v. Toyota Motor Sales U.S.A.*, No. 09 C 3787, 2010 WL 1506709, at \*6 (N.D. Ill. Apr. 14, 2010). The "lack of an adequate legal remedy is the *essential prerequisite* to an accounting claim." *3Com Corp. v. Elect. Recovery Specialists, Inc.*, 104 F. Supp. 2d 932, at 941 (N.D. Ill. 2000) (emphasis added). The only exception to this rule is where the accounting claim is based on breach of fiduciary duty. *Id.* Because FEU has not alleged a breach of fiduciary duty, this exception does not apply. (See Dkt. 6.)

As an initial matter, FEU's complaint does not specifically allege the absence of an adequate remedy at law. (See Dkt. 6, Count VIII.) On that basis alone, Count

VIII should be dismissed. *VW Credit, Inc. v. Friedman & Wexler, LLC*, No. 09 C 2832, 2010 WL 2330364, at \*2 (N.D. Ill. June 7, 2010) (dismissing with prejudice an accounting claim where the plaintiff failed to adequately allege the absence of an adequate remedy at law). Moreover, FEU is specifically seeking a *legal remedy* in this lawsuit - Count I of the complaint alleges a breach of contract. (Dkt. 6, Count I.). And advancing a breach of contract claim alone is grounds for dismissing FEU's accounting claim. *3Com Corp.*, 104 F. Supp. 2d at 941 (noting that by alleging a breach of contract in an additional count, the plaintiff "appears to have conceded that an adequate legal remedy exists[.]"). "Courts have dismissed accounting claims where breach of contract has also been alleged." *Id.* By alleging a breach of contract, FEU concedes that it is not entitled to an accounting. *See id.*

Finally, FEU's claim for accounting is based upon the allegations in its claims for fraud. Because its claim for fraud has been improperly pled, and should be dismissed, FEU's claim for accounting should also be dismissed. *See* Section II, *supra*.

## CONCLUSION

For the foregoing reasons, Technocarb and Aurora respectfully request that Counts V, VI, VII, and VIII of FEU's amended complaint be dismissed for failure to state a claim, that Counts VI and VII be dismissed with prejudice as preempted by the Illinois Trade Secret Act, and for such other relief as the Court deems proper.

Respectfully submitted,

By: /s/Anna Z. Krasinski  
One of their attorneys

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on **April 11, 2011** the foregoing **Memorandum in Support of Defendants' Motion to Dismiss Counts V-VIII of Plaintiff's Complaint** was filed with Clerk of the Court for the Northern District of Illinois using the CM/ECF System, which automatically transmitted a Notice of Electronic Filing to all ECF registrants.

/s/Anna Z. Krasinski