

**SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION: BERGEN COUNTY  
DOCKET NO.: C-268-12**

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**SCS HEALTHCARE MARKETING, LLC, a  
New Jersey Limited Liability Company,**

**CIVIL ACTION**

**Plaintiff,**

***OPINION***

**v.**

**ALLERGAN USA, INC., a Delaware  
Corporation, and CALL, INC. d/b/a  
MEDFORCE, a Pennsylvania Corporation,**

**Defendant.**

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**DECIDED: December 7, 2012**

**APPEARANCES: Anthony J. Marchetta and Jennifer Gorga Capone for plaintiff (Day  
Pitney LLC, attorneys).**

**Joseph J. Ortego and Craig R. Tractenberg for defendant Allergan USA,  
Inc. (Nixon Peabody LLP, attorneys).**

**Donald A. Robinson and Leda Dunn Wettre (Robinson, Wettre & Miller  
LLC, attorneys) and Steven Lieberman, Sharon L. Davis, C. Nichole  
Gifford and Neil B. McLaughlin (Rothwell Figg Ernst & Manbeck, P.C.,  
attorneys) for defendant Call, Inc. d/b/a MedForce.**

**CARROLL, J.S.C.**

The primary issue presented on defendants' motion to dismiss plaintiff's Complaint is the extent to which the recent adoption of the New Jersey Trade Secrets Act, N.J.S.A. 56:15-1, preempts common law causes of action which are based upon the same set of operable facts that are relied upon to support a claim for trade secret misappropriation under the Act. This issue appears to be one of first impression in New Jersey.

## I. Background and Procedural History

Plaintiff SCS Healthcare Marketing, LLC (“SCS” or “plaintiff”) provides promotional marketing services to the healthcare industry. Those services include organizing promotional meetings, developing telephone and web conferences, and providing its clients access to various technology platforms and portals which enable them to access presentations and manage activities of representatives who market their products on their behalf.

In or around January 2006, SCS and defendant Allergan USA, Inc. (“Allergan”) entered into a Master Services Agreement (the “MSA”), by which Allergan retained SCS for the purpose of having SCS perform certain services described therein, including managing Allergan’s speakers bureau program for its eye care products. The effective date of the MSA was September 1, 2005. Subsequent amendments to the MSA renewed and extended its term, so that the parties’ agreement is now set to terminate on December 31, 2012.

Defendant Call, Inc. d/b/a MedForce (“MedForce”) is a communications company that likewise provides services to pharmaceutical companies’ speakers bureau programs using web-based event planning and meeting logistics tools. SCS and MedForce are direct competitors, and one aspect of MedForce’s business also includes speakers bureau management.

In 2012 Allergan solicited bids from several companies to manage its eye care speakers bureau. On or about April 24, 2012 Allergan advised SCS that it had selected MedForce to manage its eye care speakers program at the conclusion of the December 31, 2012 contract term. On April 26, 2012 Allergan informed MedForce via email that Allergan had officially selected MedForce (instead of SCS) to manage the Allergan Eye Care Speakers Bureau Program.

The parties then began the transition process. SCS asserts that in connection with this transition, it was of the utmost importance that the confidentiality of its systems and information contained therein be maintained. SCS alleges that it specifically advised Allergan that the high-level administrator access to the CORE Speaker Portal<sup>1</sup>, which SCS had only provided to a single Allergan representative, Lori Bledsoe, would be allowed to continue on the condition that access to the CORE Speaker Portal, and SCS’s confidential and proprietary information contained thereon, not be provided to MedForce. SCS further alleges that Allergan then provided it with such assurance.

Predictably, then, the gravamen of the present action is SCS’s contention that MedForce thereafter accessed the CORE Speaker Portal on nine separate occasions, and that the only way that

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<sup>1</sup> CORE is an acronym used by Allergan to refer to its “Consortium of Research and Education.”

MedForce could have obtained such access was if Allergan provided MedForce with its administrator access information, contrary to SCS's specific direction not to do so. As a result MedForce, with Allergan's assistance, was then able to access the inner-workings of SCS's systems, such as the CORE Speaker Portal, including their design and how the various modules and systems function and their interplay with each other, which systems SCS keeps confidential and which it contends constitute trade secrets and proprietary or confidential information.

Plaintiff filed its Verified Complaint in this matter on September 6, 2012 asserting claims for Breach of the MSA (Count 1), Violation of the New Jersey Trade Secrets Act (Count 2), Misappropriation of Confidential Information in Violation of Common Law (Count 3), Conversion (Count 4), Trespass to Chattels (Count 5), Computer Offenses in Violation of N.J.S.A. 2A:38 (Count 6), Unfair Competition (Count 7), Inevitable Disclosure (Count 8), Tortious Interference with Contract (Count 9), Civil Conspiracy (Count 10), and Breach of Covenant of Good Faith and Fair Dealing (Count 11). Additionally by way of Order to Show Cause SCS sought the entry of temporary and preliminary restraints against both defendants. At a hearing on September 25, 2012, after considering the standards for injunctive relief set out in Crowe v. DiGioia, 90 N.J. 126, 134 (1982), the court declined to enter restraints against Allergan but did see fit to restrain MedForce from further accessing or using the CORE system information it had previously accessed. Additionally, in order to maintain the status quo and preserve evidence, the court restrained both defendants from deleting, destroying or otherwise removing information relating to plaintiff's systems from their computers, and allowed limited expedited discovery pending the return date.

Defendants now move to dismiss various counts of plaintiff's Complaint for failure to state a claim upon which relief can be granted.

## II. Analysis

### A. Standard on Motion for Failure to State a Claim

A motion to dismiss for failure to state a claim under R. 4:6-2(e) "should be granted only in the rarest of instances." Banco Popular North America v. Gandi, 184 N.J. 161, 165 (2005) (quoting Printing Mart-Morristown v. Sharp Electronics, 116 N.J. 739 (1989)). Moreover, in deciding whether a pleading is adequate, the test is "whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). The "inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). Furthermore, the Court should "search the

complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.” Di Cristofaro v. Laurel Grove Mem’l Park, 43 N.J. Super. 244, 252 (App. Div. 1957).

#### B. Preemption

The primary basis on which defendants seek dismissal of plaintiff’s Claim for Misappropriation of Confidential Information under New Jersey common law (Count 3) is that because it is based on the same common set of facts and occurrences on which plaintiff bases its claim for misappropriation under the New Jersey Trade Secrets Act (Count 2), it is therefore specifically preempted by N.J.S.A. 56:15-9, which provides that:

- b. This act shall supersede conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.

Similarly defendants argue that other claims asserted by plaintiff arise out of the same common or core set of facts and circumstances as Count 2, including Counts 4 (conversion), 5 (trespass to chattels), 7 (unfair competition), 9 (tortious interference) and 10 (civil conspiracy) and should also therefore be dismissed as preempted by the New Jersey Trade Secrets Act.

N.J.S.A. 56:15-1 et seq., commonly known and designated as the “New Jersey Trade Secrets Act”, became effective on January 5, 2012. As defendants correctly note, because of the Act’s recent adoption, courts in this state do not appear to have yet addressed what effect enactment of this legislation has on common law claims directed to misappropriation of trade secrets or confidential information. For guidance in answering this question this court thus looks to the express terms of the statutory language, the Act’s legislative history, and decisions of courts of other states that have adopted versions of the Uniform Trade Secrets Act (“UTSA”), upon which the New Jersey statute is based.

Pertinent then are the following provisions of the New Jersey Trade Secrets Act and the Senate Commerce Committee Statement which accompanies it:

56:15-1. Short title; New Jersey Trade Secrets Act

This act shall be known and may be cited as the "New Jersey Trade Secrets Act."

L.2011, c. 161, § 1, eff. Jan. 5, 2012.

SENATE COMMERCE COMMITTEE

STATEMENT TO Assembly Bill No. 921--L.2011, c. 161

DATED: SEPTEMBER 19, 2011

The Senate Commerce Committee reports favorably and with committee amendments Assembly Bill No. 921.

This bill, as amended, creates the “New Jersey Trade Secrets Act,” and is based on the “Uniform Trade Secrets Act” prepared by the National Conference of Commissioners on Uniform State Laws. The “Uniform Trade Secrets Act” has been adopted in 46 states and the District of Columbia. Many of those states have adopted the “Uniform Trade Secrets Act” with varying degrees of modification. The New Jersey Law Revision Commission has reviewed and modified the “Uniform Trade Secrets Act” to reflect this State's common law trade secret jurisprudence.

The amended bill sets forth the remedies that are available to the holder of a trade secret which has been misappropriated, which the bill defines as acquired by improper means or improperly disclosed. Those remedies include:

1. Damages for both the actual loss suffered by the plaintiff and for any unjust enrichment of the defendant caused by the misappropriation. Damages may also include the imposition of a reasonable royalty for unauthorized disclosure or use.

2. Injunctive relief for actual or threatened misappropriation of a trade secret. Under certain exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty.

3. In cases involving the willful and malicious misappropriation of a trade secret, punitive damages, if awarded by the court, in an amount not exceeding twice that awarded for actual damages and unjust enrichment.

4. The award of attorney's fees by the court if: (i) willful and malicious misappropriation exists; (ii) a claim of misappropriation is made in bad faith; or (iii) a motion to terminate an injunction is made or resisted in bad faith.

The amended bill also contains language indicating that if a public entity or employee is the defendant in any action brought for the misappropriation of a trade secret, the provisions of the ‘New Jersey Tort Claims Act’ would supersede any conflicting provision of the bill.

Committee Amendments

The committee amended the bill to remove the presumption, in actions brought under the act, in favor of granting protective orders in connection with discovery proceedings pursuant to section 4:10-3(g) of the Rules of Court. The amendment clarifies that the court shall preserve the secrecy of an alleged trade secret by reasonable means consistent with the Rules of Court.

. . . . .

56:15-9. Rights and remedies deemed supplemental; governing law

a. The rights, remedies and prohibitions provided under this act are in addition to and cumulative of any other right, remedy or prohibition provided under the common law or statutory law of this State and nothing contained herein shall be construed to deny, abrogate or impair any common law or statutory right, remedy or prohibition except as expressly provided in subsection b. of this section.

b. This act shall supersede conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.

c. In any action for misappropriation of a trade secret brought against a public entity or public employee, the provisions of the “New Jersey Tort Claims Act” (N.J.S.59:1-1 et seq.) shall supersede any conflicting provisions of this act.

Important in this court’s analysis is the distinction between the express language contained in N.J.S.A. 56:15-9 and the corresponding provision of the UTSA, which reads:

§7. Effect on Other Law.

(a) Except as provided in subsection (b), this [Act] displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.

(b) This [Act] does not affect:

(1) contractual remedies, whether or not based upon misappropriation of a trade secret; or

(2) other civil remedies that are not based upon misappropriation of a trade secret; or

(3) criminal remedies, whether or not based upon misappropriation of a trade secret.

14 U.L.A. § 7 at 651.

Notably, the UTSA does not contain a provision comparable to subsection (a) of N.J.S.A. 56:15-9, nor does it appear that the law of any state which has adopted the UTSA contains a variation comparable to N.J.S.A. 56:15-9(a). See, e.g., Colo. Rev. Stat. § 7-74-108; Ohio Rev. Code. Ann. § 1333.67; Mich. Comp. Laws § 445.1908; Cal. Civ. Code § 3426.7; N.H. Rev. Stat. Ann. § 350-B:7; 765 III. Comp. Stat. 1065/8; Wash. Rev. Code § 19.1108.900; Kan. Stat. Ann. § 60-3326; Del. Code Ann. tit. 6 § 2007; Idaho Code Ann. § 48-806; 12 Pa. Cons. Stat. § 5308; Va. Code Ann. § 59.1-341; Wis. Stat. § 134.90; Nev. Rev. Stat. Ann. § 600A.090; Ark. Code Ann. § 4-75-602; Md. Code Ann. Com. Law § 11-1207; Haw. Rev. Stat. § 482B-8; Tenn. Code Ann. § 47-25-1708; S.D. Codified Laws § 37-29-7; N.D.

Cent. Code § 47-25.1-07; Okla. Stat. tit. 78, § 92; Or. Rev. Stat. § 646.473; R.I. Gen. Laws § 6-41-7; Utah Code Ann. § 13-24-8; Vt. Stat. Ann. tit. 9, § 4607; Fla. Stat. § 688.008; W. Va. Code Ann. § 47-22-7.

The available legislative history reveals that the modification to the UTSA contained in N.J.S.A. 56:15-9(a) similarly appeared in the first version of the statute, introduced as Assembly Bill No. 4053 in the 2009 legislative session. The accompanying Senate Commerce Committee Statement notes that the New Jersey Law Revision Commission reviewed and modified the Act to reflect this State's common law jurisprudence. In turn the Law Revision Commission's Final Report, issued in December 2008, expressly indicates that the UTSA section was "altered to make the language consistent with other New Jersey statutory language, now providing for a cumulative remedy unless rights or remedies are specifically superseded."

Defendants' motion to dismiss is predicated on subsection (b) of N.J.S.A. 56:15-9, which as noted above provides that the New Jersey Trade Secrets Act shall supersede conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret. In this respect it is comparable to the language contained in §7(a) of the UTSA. Courts in jurisdictions which have enacted the same or substantially similar versions of §7 of the UTSA have "uniformly interpreted [it] to preempt previously existing misappropriation of trade secret actions, whether statutory or common law" Hauck Mfg. Co. v. Astec Indus., Inc., 375 F. Supp. 2d 649, 654 (E.D. Tenn. 2004); see also Allied Erecting & Dismantling Co., Inc. v. Genesis Equip. & Mfg, Inc., 649 F. Supp. 2d 702, 720 (N.D. Ohio 2009) (citing Hauck); BlueEarth Biofuels, LLC v. Hawaiian Electric Company, Inc., 123 Haw. 314; 235 P. 3d 310, 318 (2010).

Courts in these other jurisdictions have also been called upon to consider two further aspects of the scope of the UTSA's preemption: (1) whether the UTSA displaces non-contract civil claims, regardless of how the plaintiff has labeled them, when they are based on allegations of misappropriation of a trade secret; and (2) whether a non-contract civil claim is preempted when it is based on the misappropriation of confidential information that does not rise to the level of a statutorily-defined trade secret.

As to the first of these issues, a minority of courts have applied an "elements" test to determine preemption, whereby claims are preempted only if they have the same elements or same underlying duty as a misappropriation of trade secrets claim. See, e.g., Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 725 (D.S.C. 2007); Powell Products, Inc. v. Marks, 948 F. Supp. 1469, 1474 (D. Colo. 1996). However,

“the majority of courts have rejected the ‘elements’ test and have instead examined the factual allegations underlying each claim to determine whether a claim, whatever its label, is based upon misappropriation of a trade secret.” Blue Earth, supra, 123 Haw. at 316-317; 235 P.3d at 320-321.

With respect to the second of these issues concerning the scope of the UTSA’s preemption as it relates to a civil claim which is based upon “confidential” information which does not rise to the level of a statutorily defined trade secret, one line of cases holds that, until it is determined whether the allegedly misappropriated information constitutes a trade secret, the question of preemption cannot be addressed. See, e.g., Burbank Grease Servs., LLC v. Sokolowski, 2006 WI 103, 294 Wis. 2d 274, 717 N.W. 2d 781, 793 (Wis. 2006); Genzyme Corp. v. Bishop, 463 F. Supp. 2d 946, 949 (W.D. Wis. 2006). Courts which have held that non-contract claims based on “confidential” information are not preempted have generally stated that their analysis is based on the plain language of the UTSA’s preemption provision. See, e.g., Burbank Grease, supra; Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co., 191 F. Supp. 2d 652, 656-59 (E.D. Va. 2002). In contrast, however,

The majority of the courts to have considered the issue have held that the UTSA's preemption provision

abolish[es] all free-standing alternative causes of action for theft or misuse of confidential, proprietary, or otherwise secret information falling short of trade secret status (e.g. idea misappropriation, information piracy, theft of commercial information, etc.).

Hauck, 375 F.Supp.2d at 655. The rationale for these decisions has been explained as follows:

States adopting statutory provisions analogous to the UTSA's section 7 intend that at least some prior law relating to the protection of commercial information be displaced. Permitting litigants in UTSA states to assert information claims for the misappropriation or misuse of confidential data would reduce the UTSA to just another basis for recovery and leave prior law effectively untouched.

BlueEarth Biofuels, LLC v. Hawaiian Electric Company, Inc., supra, 123 Haw. at 322; 235 P.3d at 326.

Based then upon a review of controlling authority from those jurisdictions which have adopted UTSA provisions similar to N.J.S.A. 56:15-9(b), upon which defendants in this case base their

preemption argument, this court concludes that said statutory provision, standing alone, would likely bar plaintiff's claims for misappropriation of confidential information under New Jersey common law, and any other causes of action, however labeled, predicated thereon.

However, defendants argument ignores subsection (a) of N.J.S.A. 56:15-9. As earlier noted, that subsection, which unlike other states New Jersey alone appears to have uniquely adopted, expressly provides that the rights, remedies and prohibitions of the New Jersey Trade Secrets Act are "in addition to and cumulative of" any other right, remedy or prohibition provided under the common law or statutory law of this state (emphasis supplied.) It then goes on to further expressly add that "nothing within its provisions shall be construed to deny, abrogate or impair such a right, remedy or prohibition", except as expressly provided in subparagraph b.

The court concludes that subsection (b) of the statute cannot be read in isolation so as to reach the result which defendants urge. Rather, construing subsections (a) and (b) of N.J.S.A. 56:15-9 in pari materia leads this court to conclude that at the time of its enactment of the New Jersey Trade Secrets Act, our legislature was well aware of the rights and remedies afforded aggrieved litigants under our common law and expressly intended to preserve, rather than abrogate or preempt, those rights and remedies<sup>2</sup>. Any other construction would render N.J.S.A. 56:15-9(a) meaningless.

The court concedes that the statute is not the model of clarity and, at first blush, the provisions of subsection (a) and (b) appear to be inconsistent with each other. However, this court can conceive of instances where the Trade Secrets Act may conflict with common law, which must in turn then yield to the newly enacted statutory provisions. For example, the classic definition of a trade secret and the factors considered in determining whether proprietary information rises to the level of a trade secret, as set forth in Sun Dial Corp. v. Rideout, 16 N.J. 252, 257 (1954), may now conflict with and hence give way to the statutory definition of trade secret contained in N.J.S.A. 56:15-2. However that precise issue does not present itself on this motion to dismiss, and hence it is left for future determination. Suffice it to say, the court concludes that our statutory scheme reflects the legislature's intent that the rights and remedies afforded under the Trade Secrets Act be cumulative, rather than restrictive, of the rights and remedies provided under the common law. Accordingly for this reason defendants' motion to dismiss Counts 3, 4, 5, 7, 9 and 10 on the grounds that those claims are preempted by the Trade Secrets Act is hereby denied.

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<sup>2</sup> Indeed, the scope of protection afforded under the common law may be more expansive. See, e.g., LaMorte Burns & Co. v. Walters, 167 N.J. 285, 299 (2001) ("information not technically meeting the strict requirements of trade secrets may be protected as 'confidential information.'")

C. Miscellaneous Grounds for Dismissal

Alternatively defendants argue that various counts of plaintiff's Complaint are ripe for dismissal on other grounds, which the court next considers.

Conversion (Count 4) and Trespass to Chattels (Count 5). Defendants contend that New Jersey law requires that a party have converted tangible property and does not recognize conversion as a valid claim as it relates to intangible trade secrets (citing Premio Foods, Inc. v. Purdue Farms, Inc., 2012 U.S. Dist. LEXIS 107421, (D.N.J. July 30, 2012)). Additionally they argue that plaintiff has failed to allege what, if anything, was intentionally used or intermeddled with that constitutes a "trespass to chattels." However,

Several commentators have indicated the appropriateness of asserting trespass to chattel claims in the context of unauthorized computer access. One reason that an action for trespass to chattels is favored is that unauthorized access to a computer does not deprive the owner of the value and/or use of the computer, as is typically required to sustain an action in conversion. Courts have been reluctant to find conversion where there is no tangible property taken. Trespass to chattels has been analogized to trespass to land in that an intrusion which is sufficient to interfere with the owner's exclusive possession can give rise to a claim.

Rowe, N.J. Business Litigation (2d ed.), §16-5:2, at 420-421 (2006) (citations omitted.)

In the present case plaintiff alleges that defendants' access to its computer system was unauthorized and/or exceeded the scope of the access which plaintiff had previously authorized. Hence, on its face, the court at this juncture is unable to conclude that plaintiff's Complaint fails to state a cause of action for trespass to chattels and accordingly the motion to dismiss Count 5 is denied. Conversely, however, plaintiff has cited no authority which would allow its conversion claim to proceed as to intangible property such as trade secrets. While plaintiff argues that "discovery may well prove that tangible property was taken from SCS," no conversion of any of plaintiff's tangible property appears to be pleaded in its Complaint. Hence Count 4 is hereby dismissed without prejudice to plaintiff's right to amend the Complaint should further discovery demonstrate the defendants' conversion of plaintiff's tangible property.

Computer Offenses (Count 6). Defendant Allergan contends that the purpose of the New Jersey Computer Related Offenses Act, N.J.S.A. 2A:38A-3 ("CROA") was to address computer "hacking"

through unauthorized access. Here, Allergan had a password which authorized access to plaintiff's network and access to the Speaker Portal, and hence its access was not "unauthorized." Plaintiff in turn argues it has stated a viable claim under CROA against Allergan because Allergan exceeded the scope of its authorized use in accessing plaintiff's Speaker Portal for the improper purpose of misappropriating plaintiff's trade secrets, confidential and/or proprietary information for the benefit of MedForce.

N.J.S.A. 2A:38A-3 provides in relevant part that a person or enterprise damaged in business as a result of any of the following actions may sue the actor therefor:

- a. The purposeful or knowing, and... unauthorized...taking ...data, data base, computer program, computer software or computer equipment existing internally or externally to a computer, computer system or computer network; ...
- c. The purposeful or knowing, and unauthorized accessing or attempt to access any computer, computer system or computer network...

For purposes of this motion, and without ruling on the ultimate merits of plaintiff's claim, plaintiff's cause of action is predicated not on Allergan's original authorized access to plaintiff's Speaker Portal System but rather on Allergan's alleged subsequent unauthorized access for an improper purpose. As framed, plaintiff's pleadings suggest a fundament of a claim under the CROA and accordingly Allergan's motion to dismiss Count 6 is at this juncture denied.

Unfair Competition (Count 7). Defendants cite C.R. Bard, Inc. v. Wordtronics Corp., 235 N.J. Super. 168,172 (Law Div. 1989) for the proposition that New Jersey does not recognize unfair competition as a distinct cause of action but rather it is a general rubric which subsumes various other causes of action. However, Bard is a Law Division decision. In contrast the Supreme Court in Lamorte Burns & Co. v. Walters, 167 N.J. 285, 309 (2001), in concluding that plaintiff was entitled to summary judgment on its "tort claims, namely that defendants misappropriated plaintiff's confidential and proprietary information and committed unfair competition," appears to have expressly recognized it as a separate cause of action. Accordingly defendants' motion to dismiss Count 7 is denied.

Inevitable Disclosure (Count 8). Defendants similarly argue that New Jersey does not recognize the doctrine of inevitable disclosure as a viable cause of action. Plaintiff in its opposition cites no case law to the contrary. Rather, where the doctrine of inevitable disclosure has been discussed, it appears to have been as a factor guiding the court's determination as to whether injunctive relief is appropriate,

rather than as an independent cause of action. See, e.g., Nat. Starch & Chem. v. Parker Chem, 219 N.J. Super. 158, 162 (App. Div. 1987.) Therefore Count 8 is hereby dismissed.

Tortious Interference (Count 9). In moving for dismissal of this count defendant MedForce argues that plaintiff has not asserted a claim upon which relief can be granted because it admits that Allergan had decided not to renew its contract prior to any alleged act of misconduct by MedForce. Hence, MedForce submits, plaintiff is unable to establish a reasonable probability that the loss of contract or prospective economic advantage was a result of MedForce's alleged interference, which is an essential element of this cause of action.

Plaintiff contends that MedForce misunderstands the gravamen of its claim and that the Complaint specifically states that MedForce tortiously interfered with the MSA between plaintiff and Allergan by causing Allergan's breach of the confidentiality obligations contained therein and as to which plaintiff asserts a protectable interest.

The court agrees that at this pleading stage Count 9 of the Complaint sufficiently sets forth a claim upon which relief can be granted.

Civil Conspiracy (Count 10). Finally, defendants contend that a plaintiff alleging a claim for civil conspiracy must base that conspiracy on a separate actionable tort. Here defendants submit that plaintiff has pled no viable, separate intentional tort claim on which its conspiracy claim is based. This court for the reasons previously stated has found to the contrary. Hence the motion to dismiss Count 10 is denied.

#### Conclusion

Defendants' motion to dismiss is granted as to Counts 4 (conversion) and 8 (inevitable disclosure). As to all other counts it is hereby denied.

Dated: December 7, 2012

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HARRY G. CARROLL, J.S.C.