

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

DECKER-THOMPSON, INC. TELEMARKETING SERVICES
d/b/a DECKER-THOMPSON, INC.

Plaintiff,

Case No. 20-183072-CB

v

Hon. Martha D. Anderson

KRASITY'S MEDICAL & SURGICAL SUPPLY, INC.,

Defendant.

_____ /

OPINION AND ORDER
DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION
AND GRANTING IN PART AND DENYING IN PART
DEFENDANT'S REQUEST FOR SUMMARY DISPOSITION UNDER MCR 2.116(I)(2)

This matter is before the Court on Plaintiff's Motion for Partial Summary Disposition under MCR 2.116(C)(10) and Defendant's request for summary disposition in its favor under MCR 2.116(I)(2). The Court, having reviewed the parties' respective submissions and pleadings, dispenses with oral argument under MCR 2.119(E)(3).

I.

Plaintiff Decker-Thompson, Inc. Telemarketing Services ("Decker-Thompson") is a medical and surgical sales and marketing company specializing in podiatry. Defendant Krasity's Medical & Surgical Supply, Inc. ("Krasity's") is a medical and surgical supply company.

On July 19, 2004, Decker-Thompson and Krasity's entered into an Independent Contractor Sales Agreement (the "Agreement") in which Decker-Thompson agreed to "solicit orders on behalf of Krasity's customers in the US podiatry and medical markets in exchange for "a commission of 33% of the gross profit of sales generated by the DTI accounts."¹ Relevant to this Motion, the Agreement contains the following provision:

Account Ownership: Prior to commencement of the sales efforts, DTI and Krasity's jointly will review a complete list of podiatry accounts. DTI and Krasity's will assign each of the accounts to either DTI or Krasity's. DTI will receive commission on DTI accounts only and not Krasity's accounts, but may

¹ Pl's Motion, Exhibit 1, Independent Contractor Sales Agreement.

service them should Krasity's accounts, but may service then should Krasity's handle a DTI account. A new account, defined as an account with zero sales, shall become the account of the organization obtaining the order. All accounts appearing on DTI's customer list will remain the sole property of DTI, including those account [sic] that have been mutually agreed upon to be handled by and paid commission to a Krasity's representative. Upon expiration of this agreement, the parties will each continue to sell their respective accounts and refrain from soliciting orders from accounts of the other for a period of 12 months.²

On September 30, 2019, Krasity's delivered a 120-day notice to terminate the Agreement, which would result in the termination of the Agreement on January 31, 2020; the parties extended the Agreement until February 28, 2020.³ On August 24, 2020 Decker-Thompson filed this action alleging that Krasity's breached the Agreement by "intentionally soliciting DTI's Customer Accounts and selling to restricted Customer Accounts during the 12-month restricted period."⁴ The Complaint alleges claims of Breach of Contract (Count I); Injunctive Relief (Count II); Tortious Interference with Business Relationships (Count III); Conversion-Misappropriation of Confidential and Trade Secret Information (Count IV); Violation of Michigan Uniform Trade Secret Act (Count V); and Count VI (Accounting).

Decker-Thompson filed a motion for a preliminary injunction, which the Court granted in part and denied in part on January 25, 2021, in relevant part as follows:

IT IS HEREBY ORDERED THAT Defendant Krasity's Medical & Surgical Supply, Inc., along with its agents, servants, or anyone acting in concert or participating with it, are enjoined and restrained from soliciting or selling to Decker-Thompson's customer accounts, as identified on the September 20, 2019 customer list "CUSTOMERLIST(15).XLSX" presented at the hearing in unreacted form as Exhibit 4, until and through February 28, 2021.⁵

Plaintiff now brings this motion for summary disposition pursuant to MCR 2.116(C)(10) as to Count I (Breach of Contract); Count II (Injunctive Relief); Count IV (Conversion-Misappropriation of Confidential and Trade Secret Information); and Count V

² *Id* (bold in original).

³ *Id.*, Addendum to Agreement, p 1.

⁴ Complaint, ¶ 26.

⁵ Stipulated Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction dated January 25, 2021.

(Violation of Michigan Uniform Trade Secrets Act). Defendant requests summary disposition on all counts of the Complaint under MCR 2.116(I)(2).

II.

The factual support for a claim is tested in a motion for summary disposition under MCR 2.116(C)(10). *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). The court, in reviewing a motion under MCR 2.116(C)(10), “considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion.” *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citation omitted). The motion may be granted “if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Id.* Pursuant to MCR 2.116(I)(2), “[i]f it appears to the court that the opposing party, rather than the moving party is entitled to judgment, the court shall render judgment without delay.”

III.

Count I – Breach of Contract

To support a claim for breach of contract a plaintiff must show “(1) that there was a contract, (2) that the other party breached the contract, and (3) that the party asserting breach of contract suffered damages as a result of the breach.” *Total Quality, Inc v Fewless*, 332 Mich App 681, 694; 958 NW2d 294 (2020).

Plaintiff argues Defendant breached the non-solicitation clause, which provides:

Upon expiration of this agreement, the parties will each continue to sell to their respective accounts and *refrain from soliciting orders from accounts of the other for a period of 12 months.*⁶

In response, Defendant asserts several defenses which it claims prevents Plaintiff from asserting its breach of contract claim.

A. Contract Defenses

Defendant presents several arguments against the breach of contract claim. Defendant first argues that Plaintiff cannot support a breach of contract claim because

⁶ Pl’s Motion, Exhibit 1, Independent Contractor Sales Agreement (emphasis added).

Plaintiff itself first breached the contract. Defendant is correct that, under Michigan law, “one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform.”⁷ *Skaates v Kayser*, 333 Mich App 61, 80; 959 NW2d 33 (2020) quoting *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). However, this rule only applies where the initial breach is substantial. *Id.* “To determine whether a substantial breach occurred, a trial court considers whether the nonbreaching party obtained the benefit which [it] reasonably expected to receive.” *Able Demolition, Inc v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007) (quotation marks and citation omitted).

Defendant argues that the Agreement requires that the parties must work together in the assignment of accounts and does not “envision an arbitrary and unilateral compilation of customers without reference to the other party.” In support, Defendant cites the provision in the Agreement stating “[a] new account, defined as an account with zero sales, shall become the account of the organization obtaining the order.”⁸ Defendant argues that Plaintiff breached this provision because DTI’s customer list at issue in this matter “contains over 3,000 customers, most having no history with DTI, in violation of the 2004 Agreement” and “DTI complied the customer list without Defendant’s participation, which the Agreement requires.”⁹ The Court finds Defendant’s argument to be without merit. First, the portion of the Agreement relied on by Defendant has no requirement that the customer list with regard to new accounts be complied jointly. Second, to the extent that Defendant is now claiming that the September 20, 2019 customer list does not reflect the actual accounts of Plaintiff, this argument is contrary to the Stipulated Order previously entered by this Court.¹⁰

⁷ Defendant states that the alleged breach by Plaintiff is a “complete defense” to all counts of the lawsuit, including the conversion/misappropriation of trade secrets claim and the violation of Michigan Uniform Trade Secrets Act claim. However, Defendant cites no authority for the position that a preemptive breach of contract affects any claims other than a breach of contract claim. Accordingly, the Court will only consider this defense as to the breach of contract claim.

⁸ Pl’s Motion, Exhibit 1, Independent Contractor Sales Agreement.

⁹ The customer list at issue in this case has been identified by the parties as “the September 20, 2019 customer list ‘CUSTOMERLIST (15).XLSX.’” Stipulated Order Granting in Part and Denying in Part Plaintiff’s Motion for Preliminary Injunction entered January 25, 2021.

¹⁰ *Id.* As noted above, the Stipulated Order states, in pertinent part:

IT IS HEREBY ORDERED THAT Defendant Krasity’s Medical & Surgical Supply, Inc., along with its agents, servants, or anyone acting in concert or participating with it, are enjoined and restrained from soliciting or selling to *Decker-Thompson’s customer accounts, as identified on*

Defendant also argues that the breach of contract claim fails because Plaintiff has not met a condition precedent of the Agreement. In support, Defendant does not rely on any one provision of the Agreement but argues that “the intent of the parties was that both parties would sit down and divide up the podiatry practices and create fair competition between the parties.”¹¹

“A ‘condition precedent’ is a condition that must be met by one party before the other party is obligated to perform” *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 411; 646 NW2d 402 (2002). “A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor.” *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953). “If the condition is not fulfilled, the right to enforce the contract does not come into existence.”¹² *Id.* “Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract.” *Id.* Courts are “disinclined” to construe contract language as imposing a condition precedent in the absence of express language imposing such condition. *MacDonald v Perry*, 342 Mich 578, 586; 70 NW2d 721 (1955).

Here, there is no express condition precedent in the Agreement. Moreover, Defendant’s argument that “the intent of the parties was that both parties would sit down and divide up the podiatry practices and create fair competition between the parties” relates to an alleged promise in the Agreement, rather than any condition precedent to performance. For these reasons, the Court rejects the argument that Plaintiff’s claims fail because of the failure to perform a condition precedent.

Additionally, Defendant argues that “it is absolutely essential to the enforcement of [the non-competition clause] that the court knows what accounts belonged to DTI and what accounts belonged to Krasity’s on July 9, 2004, the date of the Agreement. Only then can this

the September 20, 2019 customer list “CUSTOMERLIST(15).XLSX” presented at the hearing in unreacted form as Exhibit 4, until and through February 28, 2021.

¹¹ Def’s Response, p 7.

¹² Again, Defendant asserts that a failure to meet a condition precedent is fatal to all of Plaintiffs’ claims. However, Defendant cites no authority that the non-contract claims would be affected by any failure to satisfy a condition precedent in the Agreement.

court know whether Krasity's has invaded the accounts of DTI."¹³ The Court disagrees. The Agreement provides that initially, the parties will "review a complete list of podiatry accounts" and "DTI and Krasity's will assign each of the accounts to either DTI or Krasity's."¹⁴ However, the Agreement also provides that "[a] new account, defined as an account with zero sales, shall become the account of the organization obtaining the order."¹⁵ Thus, under the Agreement the accounts owned by the parties changed over time and were not limited to accounts owned on July 9, 2004. Although Defendant, in its response, argues that the September 20, 2019 DTI Customer list does not accurately reflect the customers that DTI actually had at that time, there is apparently no dispute that the September 20, 2019 DTI Customer list was generated by Defendant and sent to DTI.¹⁶ Under the terms of the Agreement "[a]ll accounts appearing on DTI's customer list will remain the sole property of DTI."¹⁷ Thus, under the plain language of the Agreement, the accounts on the September 20, 2019 DTI Customer List were the property of Plaintiff.¹⁸ Further, the identity of accounts owned by each party in 2004 is not necessary for a determination of the claims in this case.

Lastly, Defendant argues that the "covenant not to compete" is unreasonable given Plaintiff has no "reasonable competitive business interest" to protect. This Court disagrees. "A contract . . . between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." MCL 445.772. However, the Michigan Antitrust Reform Act ("MARA") authorizes certain agreements not to compete as follows:

An employer may obtain from an employee an agreement or covenant *which protects an employer's reasonable competitive business interests* and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances

¹³ Def's Response, p 7.

¹⁴ Pl's Motion, Exh 1, Independent Contractor Sales Agreement.

¹⁵ *Id.*

¹⁶ Def's Response, Exh 2, Affidavit of Tague, p 1.

¹⁷ Pl's Motion, Exh 1, Independent Contractor Sales Agreement.

¹⁸ Again, this is recognized in the Stipulated Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction entered January 25, 2021.

in which it was made and specifically enforce the agreement as limited.

MCL 445.774a(1) (emphasis added). This section “represents a codification of the common-law rule “that the enforceability of noncompetition agreements depends on their reasonableness.” *St Clair Med, PC v Borgiel*, 270 Mich App 260, 265-266; 715 NW2d 914 (2006) (citation omitted).

First, the Court notes that the clause at issue in this case is a non-solicitation clause rather than a non-compete clause. Thus, it is questionable whether MCL 445.774a(1) applies. *See Total Quality, Inc v Fewless*, 332 Mich App 681, 699; 958 NW2d 294 (2020) (“The provision at issue in this case is a nonsolicitation agreement and defendants have not cited authority in support of the contention that nonsolicitation agreements are subject to MCL 445.774a(1). The provision at issue does not prevent defendants from engaging in a ‘particular line of business’”) Moreover, even if MCL 445.774a(1) is applicable here, the Michigan Court of Appeals has recognized that “employers have legitimate business interests in restricting former employees from soliciting their customers.” *Id.* at 700.

For the above-stated reasons, the Court rejects Defendant’s arguments that the non-solicitation clause is not enforceable.

B. Breach of Non-Solicitation Clause

Plaintiff contends that summary disposition should be granted in its favor on the breach of contract claim because Defendant “breached the Agreement by soliciting and selling to the restricted customer accounts of [Plaintiff] during the 12-month restricted period.” The clause at issue states:

Upon expiration of this agreement, the parties will each continue to sell their respective accounts and refrain from *soliciting orders* from accounts of the other for a period of 12 months.¹⁹

The relevant inquiry is whether Defendant “solicited” orders from Plaintiff’s accounts during the restrictive period.²⁰ The Agreement does not define the term “solicit.” The

¹⁹ Pl’s Motion, Exh 1, Independent Sales Agreement.

²⁰ Plaintiff asserts that the Agreement provides that the parties, upon expiration of the Agreement will “only” make sales to their own accounts and therefore, any sale by Defendant to a customer of Plaintiff during the restrictive period is a violation of the Agreement. However, the Agreement does not state that the parties will “only” sell to their respective customers. Rather, it states that “[u]pon expiration of this agreement, the parties

Michigan Court of Appeals, in addressing a nonsolicitation clause has stated that the “plain and ordinary meaning” of the term “solicit” is “to make petition to” and “[t]o seek to obtain by persuasion, entreaty, or formal application.” *Fewless*, 332 Mich App at 695 citing *Merriam-Webster’s Collegiate Dictionary* (11th ed.) and *American Heritage Dictionary of the English Language* (4th ed.).

Plaintiff argues that it has presented evidence that Defendant has made sales to Plaintiff’s customers during the restricted period and that “where sales are made, the law considers a solicitation to have occurred.”²¹ In support, Plaintiff cites the Court of Appeals’ decision in *Fewless*. However, a reading of *Fewless* does not support Plaintiff’s argument.

In *Fewless*, the Court of Appeals considered whether a non-solicitation clause was breached. In that case, the defendants responded to the RFP (request for proposal) of one of the plaintiff’s customers by submitting a bid on work for that customer. *Id.* at 695. The defendants argued that this was not a violation of the nonsolicitation clause because the customer initiated the contact and merely accepting business from a customer does not constitute solicitation. *Id.* The Court of Appeal rejected this argument noting that:

[D]efendants did not merely accept business from [the customer] but, rather, responded to an RFP from [the customer] and submitted a bid for [work] that defendants knew [was being done by the plaintiff] before the RFP. [The Defendant] would not have been awarded any business, however, had it not submitted bids in response to [the customer’s] RFP. [*Id.* at 697.]

Plaintiff’s argument that solicitation is proven by the existence of sales alone is not supported by the decision in *Fewless* as there was no ruling by the Court of Appeals that merely accepting business constituted solicitation.²² And, Plaintiff has cited no other authority for its position. Accordingly, this Court will examine the question of whether Defendant breached the nonsolicitation clause by applying the definition of solicitation, “to make petition to” and “[t]o seek to obtain by persuasion, entreaty, or formal application,” applied by the Court of Appeals. *Fewless*, 332 Mich App at 695.

will each continue to sell to their respective customers and refrain from soliciting orders from accounts of the other for a period of 12 months.” Pl’s Motion, Exh 1, Agreement.

²¹ Pl’s Motion, p 13.

²² In fact, the issue in *Fewless* was whether merely accepting business *does not* constitute solicitation. The Court of Appeals found that, where defendants assumed an active role in submitting bids, an issue of fact exists as to whether solicitation occurred. *Total Quality, Inc v Fewless*, 332 Mich App 681, 697; 958 NW2d 294 (2020).

In this case Plaintiff argues that the following evidence is “conclusive” that Defendant breached the non-solicitation clause:

First, Plaintiff alleges that Defendant “solicited and sold to” at least nine of Plaintiff’s customers as it had the customers sign waivers to continue purchasing directly from Defendant.²³ However, the Court finds that these waivers are not “conclusive evidence” that Defendant solicited Plaintiff’s customers as the waivers specifically state that “no one from Krasity’s has solicited our business in any way. On the contrary – they have repeatedly rebuffed our request for service due to the legalities involved.”²⁴

Next, Plaintiffs argue that “[Defendant] produced sales records identifying sales to 16 Customer Accounts from January 2020 to January 2021. Each of the Customer Accounts had a sales ID 400-407, which was switched to [Defendant’s] ID after the Agreement terminated.” Additionally, Plaintiffs assert that customers contacted Plaintiff inquiring into orders that were being filled by Defendants and that Defendant “produced sheets confirming sales through DocShop Pro to Customer Accounts.”²⁵ This evidence goes only to sales allegedly made. As was noted, *Fewless* does not support the conclusion that a sale, without more, is a solicitation and Plaintiff does not cite any other authority for this position.

Plaintiff’s brief also references an “email blast” that was sent to Plaintiff’s customers, however, Defendant contends that the “email-blast” was inadvertent, something that was apparently recognized by Plaintiff at the time.²⁶ An inadvertent email blast does not appear to comport with the definition of “solicit” which, as noted above, is defined as “to make petition to” and “[t]o seek to obtain by persuasion, entreaty, or formal application.” *Fewless*, 332 Mich App at 695. Moreover, to the extent Plaintiff claims that the email blast was not inadvertent, this determination involves a question of fact.

Lastly, Plaintiff refers to an April 2, 2020 email from a representative at DocShop Pro on which representatives of Defendant are copied which states, in part:

²³ Def’s Motion, pp 12-13.

²⁴ Pl’s Motion, Exh 10, Waivers.

²⁵ DocShop Pro is allegedly a direct competitor of Plaintiff.

²⁶ See Pl’s Motion, Exh 9, Def’s Supplemental Discovery Response, ¶ 3 and Exh 8, 3/30/20 email from Plaintiff representative to Defendant’s representative.

Once you all green lighting [sic] us to launch. We'll wait for all three of you to say yes, then I'll unleash fury with 12 insides[sic] phone sales reps pounding this list to oblivion.²⁷

The Court cannot conclude that this email is “conclusive evidence” that Defendant breached the non-solicitation clause. First, it is an email sent by a third party. Second, contrary to Plaintiff's assertion, it is not self-evident that the email refers to Plaintiff's customer accounts. Lastly, the email itself is not evidence that sales representatives of DocShop Pro contacted Plaintiff's customers or that Defendant agreed to any solicitation that may have occurred.

For the above-stated reasons, the Court concludes that a question of fact exists as to whether Defendant breached the non-solicitation clause in the Agreement. The Court, therefore, denies Plaintiff's motion for summary disposition under MCR 2.116(C)(10) and Defendant's request for summary disposition under MCR 2.116(I)(2).

Count V – Michigan Uniform Trade Secrets Act

Under the Michigan Uniform Trade Secrets Act (MUTSA), MCL 445.1901 *et seq.*, misappropriation of a trade secret “includes the disclosure or use of a trade secret without consent.” *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 132; 649 NW2d 808 (2002) citing MCL 445.1902(b)(ii). “Trade secrets” are defined as “information, including a formula, pattern, compilation, program, device, method, technique, or process” that both: (1) “derives independent 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 (2) “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” MCL 445.1902(d).

Factors to be considered in determining whether particular information is a trade secret include:

“(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” [Hayes-

²⁷ Pl's Motion, Exh 15, April 2, 2020 email.

Albion v Kuberski, 421 Mich 170, 181; 364 NW2d 609 (1984) quoting Restatement of Torts § 757, comment b]

“A trade secret cannot consist of ‘information which is readily ascertainable, i.e., capable of being acquired by competitors or the general public without undue difficulty or hardship.’” *Wysong Corp v MI Indus*, 412 F Supp 2d 612, 627 (ED Mich 2005) quoting *Kubik, Inc v Hull*, 56 Mich App 335, 348; 224 NW2d 80 (1974).

“A plaintiff in a trade secrets case bears the burden of pleading and proving the specific nature of the trade secrets.” *Dura Glob Techs, Inc v Magna Donnelly Corp*, 662 F Supp 2d 855, 859 (ED Mich 2009) (quotation marks and citation omitted). “A party alleging trade secret misappropriation must particularize and identify the purported misappropriated trade secrets with specificity.” *Id.* (quotation marks and citation omitted).

Here, Plaintiff alleges that, during the relationship between the parties, Defendant: gained access to confidential information and trade secrets, including but not limited to information concerning [Plaintiff’s] customers, marketing information, strategies, promotional activities, customer needs, likes and dislikes, all of which constitute valuable information of [Plaintiff].²⁸

In its motion, Plaintiff asserts [Defendant] misappropriated the Customer Account information by continuing to procure its own direct sales and through disclosures to Docshop Pro.”²⁹ The only “customer account” information discussed in Plaintiff’s motion is the September 20, 2019 customer list.

In response, Defendant argues that Plaintiff has not specified the misappropriated trade secrets with specificity and that it has not alleged specific ways in which it has misappropriated trade secrets.³⁰

The Court concludes that Plaintiff has identified the purported trade secrets with specificity as the September 20, 2019 customer list. Defendant has cited no authority for the position that Plaintiff was required to identify in its Complaint every customer on the list. However, the Court finds that a question of fact exists as to whether there was any “misappropriation” of the alleged trade secrets. As previously discussed, although Plaintiff

²⁸ Complaint ¶ 67.

²⁹ Pl’s Motion, p 15.

³⁰ Defendant does not argue that the customer list is not a “trade secret” and therefore, the issue will not be addressed by the Court.

alleges Defendant made sales to Plaintiff's customers, a question of fact exists as to whether any sales were in violation of the non-solicitation agreement, that is whether Defendant "solicited orders from accounts" of Plaintiff. It follows that a question of fact exists as to whether Defendant obtained any sales through the "misappropriation" of the customer list.

Thus, the Court denies Plaintiff's motion for summary disposition on Count V under MCR 2.116(C)(10) and Defendant's request for judgment in its favor under MCR 2.116(I)(2).

Count IV – Conversion-Misappropriation of Confidential and Trade Secret Information

Plaintiff alleges a common law claim of conversion/misappropriation of trade secret information based upon the use of Plaintiff's customer account information.³¹ However, a common law claim for misappropriation of trade secrets is preempted by the MUTSA. *Wysong Corp*, 412 F Supp2d at 623. *See also CMI Intern, Inc*, 251 Mich App at 132 citing MCL 445.1908³² (The MUTSA displaces conflicting tort remedies for misappropriation of a trade secret.") Accordingly, the Court denies Plaintiff's motion for summary disposition on Count IV under MCR 2.116(C)(10) and grants Defendant's request for summary disposition in its favor on Count IV under MCR 2.116(I)(2).

Count II – Injunctive Relief

Plaintiff argues it is entitled to injunctive relief under MCR 3.310(H)³³ and MUTSA, MCL 445.1903(1)³⁴. Because this Court determined that Plaintiff's motion for summary disposition is denied on Plaintiff's breach of contract and violation of MUTSA claims, there is no basis to grant an injunction under either MCR 3.310(H) or MCL 445.1903(1) at this time.³⁵

Count III – Tortious Interference with Prospective Business Advantage and Relationships

Plaintiff does not seek summary disposition on Count III, but Defendant, in its response, asserts that it is entitled to summary disposition under MCR 2.116(I)(2). This

³¹ Complaint ¶¶ 63-64.

³² MCL 445.1908 states:

- (1) Except as provided in subsection (2), this act displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.
- (2) This act does not affect any of the following:
 - (a) Contractual remedies, whether or not based upon misappropriation of a trade secret.
 - (b) Other civil remedies that are not based upon misappropriation of a trade secret.
 - (c) Criminal remedies, whether or not based upon misappropriation of a trade secret.

³³ MCR 3.310(H) provides that "[a]n injunction may also be granted before or in connection with final judgment on a motion filed after an action is commenced."

³⁴ MCL 445.1903(1) states, in part, that "actual or threatened misappropriation may be enjoined."

³⁵ Additionally, given this Court's ruling it is not necessary to address Plaintiff's request for sanctions.

Court disagrees. MCR 2.116(I)(2) states “[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.” Plaintiff has not moved for summary disposition on Count III and is therefore, not a moving party and Defendant is not an “opposing” party under the rule. *See Church Mut Ins Co v Consumers Energy Co*, unpublished per curiam opinion of the Court of Appeals, issued Oct 30, 2003 (Docket No. 240571), p 2 (To the extent that the defendant’s response exceeded the scope of the plaintiff’s motion, summary disposition was not available under MCR 2.116(I)(2).) Accordingly, Defendant’s request for summary disposition on Count III under MCR 2.116(I)(2) is denied.

IV.

THEREFORE, IT IS HEREBY ORDERED that Plaintiff’s Motion for Partial Summary Disposition is **DENIED** under MCR 2.116(C)(10).

IT IS FURTHER ORDERED that Defendant’s request for summary disposition under MCR 2.116(I)(2) is **GRANTED** as to Count IV (Conversion-Misappropriation of Confidential and Trade Secret Information) and is **DENIED** as to all other counts.

IT IS SO ORDERED.

This Order does NOT resolve the last pending matter and does NOT close the case.

/s/ Martha Anderson

January 19, 2022

HON. MARTHA D. ANDERSON

CIRCUIT COURT JUDGE

Dated: 1/19/2022