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

SYENERGY ENGINEERING SERVICES, INC, a Michigan corporation,

Plaintiff,

v

Case No. 23-200902-CB
Hon. Michael Warren

CONTROL SOLUTIONS, INC, a Michigan corporation, BRENNAN TALKINGTON, JOSH ALLARD, MARK PAPARELLI, and IVY TALKINGTON, individually,

Defendants.

OPINION AND ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

At a session of said Court, held in the County of Oakland, State of Michigan
October 14, 2024

PRESENT: HON. MICHAEL WARREN

OPINION

I
Overview

The Plaintiff, SyEnergy Engineering Services, Inc., has filed this suit against four former employees and Defendant Control Solutions, Inc. ("Control Solutions"). Specifically, the Plaintiff alleges that individual Defendants Brennan Talkington, Josh

Allard, Mark Paperelli, and Ivy Talkington (collectively, the "Individual Defendants") conspired to steal its trade secrets and used that information and other means to interfere with its business for the benefit of the Defendants. In particular, the Plaintiff alleges Violation of Michigan Uniform Trade Secrets Act (Count I), Conversion and Statutory Conversion (Count II), Tortious Interference with Contract (Count III), Tortious Interference with Business Relationships or Expectancy (Count IV), Common Law Unfair Competition (Count V), Civil Conspiracy (Count VI), and Breach of Contract or Restrictive Covenants (Count VII).

Before the Court is the Defendants' Motion for Summary Disposition. Oral argument is dispensed as it would not assist the Court in its decision-making process.[1]

At stake is whether summary disposition of the Plaintiff's claim for violation of the Michigan Uniform Trade Secrets Act is warranted because the Plaintiff has not established the existence of its trade secrets or that the Defendants used the alleged trade secrets? Because there are genuine issues of material fact underlying the MUTSA claim,

[1] MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties have received the process due.

summary disposition pursuant to MCR 2.116(C)(10) is not warranted and the answer is "no."

Also at stake is whether summary disposition of the Plaintiff's claim for conversion is warranted because the Plaintiff has failed to present evidence to support this claim? Because the evidence submitted by the Plaintiff is sufficient to create a material issue of fact as to whether the Defendants committed conversion, the answer is "no."

Further at stake is whether summary disposition of the Plaintiff's tortious interference claims (Counts III and IV) is warranted because the Plaintiff has not demonstrated that there were contracts/relationships breached or that the Defendants were the cause of such breaches? Because the Plaintiff has presented direct evidence that its customer contracts and relationships were harmed and circumstantial evidence that the Defendants were the cause of the harm, there are genuine issues of material fact as to the tortious interference claims and the answer is "no."

Additionally at stake is whether summary disposition of the Plaintiff's common law unfair competition claim is warranted because the Plaintiff has failed to show that the Defendants acted unfairly or unethically? Because the evidence presented by the Plaintiff (specifically in the Gundlach affidavit) presents a genuine issue of material fact as to whether the Defendants engaged in acts of unfair competition, the answer is "no."

Also at stake is whether summary disposition of the Plaintiff's civil conspiracy claim is warranted due to the application of the intra-corporate conspiracy doctrine? Because the intra-corporate conspiracy doctrine provides that a corporation cannot conspire with its own employees and the Plaintiff has not presented any evidence that an exception applies, the answer is "yes."

Finally at stake is whether summary disposition of the Plaintiff's breach of contract claim is warranted because there was no enforceable contract between the parties? Because there are genuine issues of material fact as to whether the Handbook establishes contractual rights and whether the employees assented to the terms of the Handbook, the answer is "no."

II
The Controversy

The Plaintiff is a Michigan company that offers engineering services including consulting, design/build, and service of systems pertaining to HVAC and other building automation systems, as well as electrical and mechanical engineering.[2] Control Solutions provides building automation system services, and it is the Plaintiff's direct competitor for both products and services.[3] Each of the Individual Defendants worked for the Plaintiff at varying times.[4] Each then went to work for Control Solutions.[5] The Plaintiff

[2] First Amended Complaint ¶ 14.
[3] *Id.* ¶¶ 51-52.
[4] *Id.* ¶¶ 26, 30, 34, 38.
[5] *Id.* ¶¶ 29, 33, 37, 42.

alleges that each of the Individual Defendants had access to confidential business information during their employment, each took confidential information when they left the Plaintiff's employ, and each has used that confidential information for their own benefit and for the benefit of Control Solutions.[6]

The Plaintiff relies heavily on the affidavit of Julian Gundlach, a former Control Solutions employee, in which he says he was present for an outing on May 10, 2023 designed for existing Control Solutions employees to meet the new employees who had recently left the Plaintiff to join Control Solutions.[7] According to Gundlach, Brennan Talkington revealed at this meeting that his wife, Ivy Talkington, who was still employed with the Plaintiff, had shared confidential financial information with him.[8] Talkington also allegedly said that he had taken a flash drive containing a variety of the Plaintiff's engineering work product, including project submittals, engineering drawings, as well as information about the Plaintiff's clients and contracts.[9] According to Gundlach, "[m]ultiple CSI employees discussed a plan to use these documents and information to target [the Plaintiff's] customers, clients, and contracts."[10]

[6] *Id. passim*.
[7] Complaint, Exhibit A ¶ 4.
[8] *Id.* ¶ 5.
[9] *Id.* ¶ 8.
[10] *Id.* ¶ 10.

According to Ryan Phillips, the Plaintiff's president, at least five contracts were canceled by the Plaintiff's customers in the month following this meeting.[11]

While the Individual Defendants were employed by the Plaintiff, the Plaintiff maintained an employee handbook (the "Handbook") which had policies prohibiting the disclosure of confidential information, prohibiting the solicitation of the Plaintiff's employees and customers in the year following the employee's departure, and prohibiting the disparagement of the Plaintiff both during employment and following the employee's departure. There is no dispute that the Individual Defendants never signed the Handbook. The Individual Defendants swear that they were never asked to review the Handbook and were never provided a copy of the Handbook.[12] The Plaintiff's president, Ryan Phillips, states that when the revised version of the Handbook was implemented on November 21, 2020, it was distributed to all employees, as well as to new employees when hired.[13] He also states that the Handbook was distributed to the Individual Defendants when they were employed by the Plaintiff.[14]

The Defendants allege that the Plaintiff "conducted no discovery in this case" and now lacks evidentiary support for each of the seven claims in the First Amended

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[11] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) [*sic*], Exhibit 2 ¶ 21.
[12] Defendants' Motion for Summary Disposition under MCR 20116(C)(10), Exhibits A (¶¶ 3-8), B (¶¶ 2-8), C (¶¶ 2-6), and D (¶¶ 3-7).
[13] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) [*sic*], Exhibit 2 ¶ 9.
[14] *Id*. ¶ 10.

Complaint. Accordingly, the Defendants move for summary disposition of all claims pursuant to MCR 2.116(C)(10).

III
Standard of Review

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden,* 461 Mich at 119-120; MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto*, 451 Mich at 358. The moving party "must specifically identify the issues" as to which it "believes there is no genuine issue" of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Quinto*, 451 Mich at 361. If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the

motion. MCR 2.116(G)(4). See also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion, *Maiden*, 461 Mich at 121-120 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil*, 504 Mich at 160 (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows 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. *Quinto*, 451 Mich at 362-363.

IV
There are Issues of Material Fact that will Determine the Plaintiff's MUTSA Claim

A
The Arguments

The Defendants argue that Count I of the First Amended Complaint for Violation of the Michigan Uniform Trade Secrets Act ("MUTSA") fails for two independent reasons, namely (1) the Plaintiff cannot establish the existence of a trade secret because it failed to take reasonable efforts to maintain the secrecy of the alleged trade secrets, and (2) the Plaintiff does not have any evidence that the Defendants acquired or used the trade secrets at issue.

B
The Law

To successfully prove a claim for misappropriation of a trade secret under Michigan law, a plaintiff must prove: "1) the existence of a trade secret; 2) its acquisition in confidence; and 3) the defendant's unauthorized use of it." *Nedschroef Detroit Corp v Bemas Enterprises, LLC*, 106 F Supp 3d 874, 884 (ED Mich, 2015). See also *Theisen v Inventive Consulting, LLC*, unpublished per curiam opinion of the Court of Appeals, issued August 12, 2021 (Docket Nos. 352952 & 353990), p 3.

Under the MUTSA, a "'[t]rade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following: (*i*) [d]erives 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] *(ii)* [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." MCL 445.1902(d).

Whether something constitutes a trade secret requires an analysis of several factors regarding the method and means of protection used to safeguard the information. *Dura Global Tech, Inc v Magna Donnelly Corp,* 662 F Supp 2d 855 (ED Mich, 2009), citing *Wysong Corp v MI Ind,* 412 F Supp 2d 612, 626 (ED Mich, 2005). Ordinarily, the question of whether the measures taken by the trade secret owner are reasonable "is a question of fact for the jury" because "only in an extreme case can what is a 'reasonable' precaution be determined as a matter of law. . . ." *Giasson Aerospace Sci, Inc v RCO Eng'g, Inc*, 680 F Supp 2d 830, 840 (ED Mich, 2010) (citation and quotation omitted).

Under MCL 445.1902(b), misappropriation of a trade secret occurs under the following circumstances:

> (i) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.
>
> (ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:
>
> (A) Used improper means to acquire knowledge of the trade secret.
>
> (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret

> was derived from or through a person who had utilized improper means to acquire it, acquired it under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.
>
> (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. [MCL 445.1902(b)]

"The statute, therefore, contains two possible ways to misappropriate a trade secret: improper acquisition of a trade secret and disclosure or use of a trade secret." *Endoscopy Corp of America v Kenaan*, unpublished per curiam decision of the Court of Appeals, issued March 9, 2023 (Docket No. 359398), p 6.

C
Analysis

i
The Reasonableness of the Plaintiff's Trade Secret Protections is an Issue of Fact

The Defendants first argue that the MUTSA claim fails because the Plaintiffs have failed to demonstrate that there are "trade secrets" at issue. The Defendants argue that the Plaintiff did not take reasonable steps to protect its confidential and proprietary information, and so it cannot qualify as a trade secret. In support of their claim, the Defendants have submitted affidavits averring that the Plaintiff did not require employees to review and/or sign the Handbook, the Plaintiff did not require employees

to enter into non-solicitation or non-compete agreements, and the Plaintiff did not restrict access to confidential information within the company.[15]

In response, the Plaintiff argues that it has taken sufficient measures to protect its trade secrets, including circulating the Handbook (with included confidentiality provisions) to its employees and giving employees access only to the information necessary for job performance.[16]

As noted above, the reasonableness of the trade secret owner's protections is a highly fact-specific inquiry that depends on the costs and benefits for implementing such protections. "The precautions that are reasonable for a large commercial organization may be unreasonable for a smaller operation depending on the required cost benefit analysis." *Giasson Aerospace*, 680 F Supp 2d at 840. The failure to obtain a nondisclosure agreement before sharing the information does not preclude a determination that reasonable efforts were made to protect the secrecy of the information. *Theisen*, unpub. op. at 4. Generally, the determination of whether a trade secret owner's protections are reasonable must be made by a jury. *Giasson Aerospace*, 680 F Supp 2d at 840.

In the instant case, the parties disagree about whether the measures taken by the Plaintiff to protect its propriety engineering plans, specifications, drawings, customer lists, price lists, and other information was reasonable. There are conflicting affidavits

[15] Defendants' Motion for Summary Disposition under MCR 20116(C)(10), Exhibits A (¶¶ 3-8), B (¶¶ 2-8), C (¶¶ 2-6), and D (¶¶ 3-7).
[16] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) [*sic*], Exhibit 2 ¶¶ 3-9.

submitted by both parties. Michigan law is well-settled that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615 (2007). The *White* Court reasoned that, "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" *Id*. at 625, citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647 (2004) and *Foreman v Foreman*, 266 Mich App 132, 135-136 (2005).

Accordingly, summary disposition in favor of the Defendants is not warranted on this basis.

ii
The Defendants' Misappropriation is also a Question of Fact

Next the Defendants argue that the Plaintiff has not put forth any evidence showing actual unauthorized use of the alleged trade secrets at issue. Rather, the Individual Defendants have each submitted affidavits averring that they never used the Plaintiff's confidential information while employed by Control Solutions.[17] Additionally, the president of Control Solutions submitted an affidavit stating that the Individual Defendants never provided Control Solutions with any of the Plaintiff's confidential information and that Control Solutions prohibits any use of proprietary information from any employee's former employer.[18]

[17] Defendants' Motion for Summary Disposition under MCR 20116(C)(10), Exhibits A (¶ 13), B (¶ 16), C (¶ 10), and D (¶ 17).
[18] *Id.*, Exhibit G ¶¶ 5-6.

In response, the Plaintiff points to the testimony of Julian Gundlach, a former Control Solutions employee, who avers in his affidavit that he personally witnessed the Individual Defendants discussing their plans to use the Plaintiff's confidential information to target the Plaintiff's major clients.[19] Additionally, the Plaintiff argues that the fact that many such customers switched from the Plaintiff to Control Solutions around the time when the Individual Defendants left is circumstantial evidence that the Defendants did enact the plan that Gundlach described.[20]

Courts have recognized that trade secret misappropriation is rarely proven by convincing direct evidence because "[t]he plaintiff in a trade secret misappropriation action faces a difficult challenge in ferreting out evidence of misappropriation." *Veteran Med Prod, Inc v Bionix Dev Corp*, unpublished opinion of the United States District Court for the Western District of Michigan, issued March 13, 2008 (Case No. 1:05-CV-655), p 9. Indeed, "requiring direct evidence would foreclose most trade-secret claims from reaching the jury because corporations rarely keep direct evidence of their use ready for another party to discover." *Id.*

When viewed in the light most favorable to the non-moving party, the direct and circumstantial evidence indicates that the Individual Defendants discussed a plan to use the Plaintiff's confidential and proprietary information to take customers from the Plaintiff, and several of the Plaintiff's customers canceled their contracts immediately

[19] Complaint, Exhibit A.
[20] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) [sic], Exhibit 2 ¶¶ 21.

following the meeting in which the plan was discussed. This evidence is sufficient to create a genuine issue of material fact as to the Defendants' misappropriation of the Plaintiff's trade secrets. Accordingly, summary disposition of Count I is not warranted.

V
There are Genuine Issues of Material Fact as to the Conversion Claim

A
The Arguments

Next, the Defendants argue that the Plaintiff's conversion claim (Count II) fails because the Plaintiff has not provided any evidence to support this claim.

B
The Elements of Conversion and Statutory Conversion

Statutory conversion under MCL 600.2919a(l)(a), as amended in 2005, creates a remedy against a person who "steal[s] or embezzl[es] property or convert[s] property to the other person's own use." MCL 600.2919a. MCL 600.2919a provides as follows:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving,

> possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.
>
> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.
>
> [MCL 600.2919a.]

The statute does not define the term "conversion." "When a statute does not define a term, [Michigan courts] will construe the term according to its common and approved usage." *Nelson v Grays,* 209 Mich App 661, 664 (1995). "A legal term of art, however, must be construed in accordance with its peculiar and appropriate meaning." *Brackett v Focus Hope, Inc,* 482 Mich 269, 279 (2008). Because the term "conversion" has acquired a peculiar meaning under Michigan common law, the common law defines the term for both common-law and statutory purposes. *Victory Estates LLC v NPB Mortg LLC*, unpublished per curiam opinion of the Court of Appeals, issued November 20, 2012 (Docket No. 307457); p 2, quoting *Id*. (concluding that the common-law definition defines both common-law and statutory conversion under Michigan law). See also *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 223 (2009) ("Because the role of the judiciary is to interpret rather than to write law, courts lack authority to venture beyond a statute's unambiguous text. Undefined statutory terms are generally given their plain and ordinary meanings. Where words 'have acquired a peculiar and appropriate meaning in the law,' they should be construed according to that meaning" [footnotes omitted]).

Common-law conversion is defined as "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 351-352; 871 NW2d 136 (2015) (Aroma Wines II) (quotation marks and citation omitted). Statutory conversion under MCL 600.2919a is similar but includes the added element that property was converted to the defendant's "own use." *Id*. at 354-357.

Generally speaking, "[t]he doctrine of conversion has not extended beyond the kind of intangible rights which are customarily merged in, or identified with, some document or other tangible property." *Sarver v Detroit Edison Co*, 225 Mich App 580, 586 (1997) (citing Prosser & Keeton, Torts (5th ed.), § 15, p. 102). In Michigan, courts have recognized that certain intangible property can be the subject of a conversion suit where "the plaintiff's ownership interest in intangible property was represented by or connected with something tangible." *Id*.

C
Analysis

The Defendants argue that the evidence is insufficient to support the claim for conversion because the Plaintiffs have failed to supply any proof that they converted the

Plaintiff's property.[21] In response, the Plaintiff relies upon Gundlach's affidavit, which states in relevant part:

> 8. In addition, Brennan Talkington who was previously an engineer at SyEnergy stated that he had a flash drive containing a variety Sy Energy's engineering work product that he had taken when he left employment with the company, including project submittals, engineering drawings, as well as information about SyEnergy's clients and contracts.
>
> 9. At one point, Josh Allard stated that "I'm going to pretend that I didn't hear how you got this," in reference to SyEnergy's work product or confidential information that Brennan Talkington had taken from SyEnergy.
>
> 10. Multiple CSI employees discussed a plan to use these documents and information to target SyEnergy's customers, clients, and contracts.
>
> 11. For example, Brennan Talkington indicated that he had engineering drawings and systems for use specifically for new construction of grow houses for the cannabis industry that were developed at SyEnergy, which CSI could use to

[21] In this Court's May 15, 2024 Order regarding the Defendants' Motion for Summary Disposition under MCR 2.116(C)(8), summary disposition of Count II on the basis of MUTSA preemption was denied because the First Amended Complaint included allegations that the Individual Defendants took items in addition to the misappropriation of trade secrets, including allegations that the Individual Defendants took physical documents from the Plaintiff. May 15, 2024 Opinion and Order Denying Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8), p 14. As noted above, the Defendants have now raised a genuine issue of material fact as to whether the Plaintiff has established "the existence of a trade secret." Thus, the application of MUTSA displacement under MCL 445.1908 will also hinge on the establishment of a "trade secret" at issue in this case. *Planet Bingo, LLC v VKGS, LLC*, 319 Mich. App. 308, 322 (2017) (holding that "MUTSA does not preempt all common-law unfair-competition claims, only those that are based on misappropriation of 'trade secrets' as defined by MUTSA"). See also *Oldnar Corp v Panasonic Corp of N Am*, 766 F App'x 255, 268 (CA 6, 2019) (holding that "MUTSA's displacement provisions, in fact, do hinge on the 'status' of the information in a plaintiff's civil action" and whether it satisfies MUTSA's definition of a "trade secret").

> pursue those projects and use SyEnergy's engineered drawings as CSI's own work product.

Gundlach's affidavit provides evidence that the Individual Defendants took property from the Plaintiff, including a flash drive and documents, before leaving their employment and "converted it to their own use" by bringing it to their new employer. Likewise, the affidavit tends to show that Control Solutions received this converted property while knowing it had been improperly taken from the Plaintiff. This is sufficient to create a genuine issue of material fact on the Plaintiff's conversion claim. Accordingly, summary disposition is not warranted.

VI
There are Genuine Issues of Material Fact in Tortious Interference Claims

A
The Arguments

The Defendants argue that both of the tortious interference claims should be dismissed. As to the claim for tortious interference with contracts (Count III), the Defendants argue the Plaintiff has not established that it had a contract that was interfered with or that the Defendants improperly interfered. Similarly, as to the tortious interference with a business relationship or expectancy, the Defendants argue that there is no evidence that the Plaintiff had "a reasonable likelihood or probability" of a business relationship or expectancy, and that the Defendants did not improperly interfere with any such relationship.

B
The Law

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, (3) an unjustified instigation of the breach by the defendant, and (4) resulting damages. *Health Call v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 88-89 (2005).

To establish a prima facie claim of tortious interference with a business relationship or expectancy, a plaintiff must establish the following elements: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. *Hope Network Rehab Servs v Mich Catastrophic Claims Ass'n*, 342 Mich App 236, 245-246 (2022).

The Court of Appeals recently expanded upon the third required element:

> With respect to the third element, interference alone will not support a claim under this theory. [T]o satisfy the third element, the plaintiff must establish that the defendant acted both intentionally and either improperly or without justification. A tortious-interference-with-a-business-relationship claim requires an allegation of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another. If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference.

[*Id.* at 246 (citations and quotations omitted).]

Under Michigan law, "[c]ircumstantial evidence may be sufficient to establish a case." *Libralter Plastics, Inc v Chubb Grp of Ins Companies*, 199 Mich App 482, 486 (1993). The Michigan Supreme Court has explained:

> To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. In *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422 (1956), this Court highlighted the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof:
>
> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.[22]

[22] *Skinner v Square D Co*, 445 Mich 153, 164 (1994), overruled in part on other grounds in *Smith v Globe Life Inc Co*, 460 Mich 446, 455 n. 2 (1999).

C
Analysis

i
The Plaintiff has Raised Material Issues of Fact Regarding Tortious Interference with Contract

The Defendants argue that the claim for tortious interference with contract (Count III) cannot proceed because the Plaintiff has not submitted evidence that a contract was breached or that the Defendants' actions caused the breach.

As to the first point, the affidavit of Ryan Phillips demonstrates that at least five of the Plaintiff's contracts were canceled by its customers around the time of or shortly after the Individual Defendants left its employ and began working for Control Solutions.[23]

As to the second point, the affidavit of Gundlach alleges that the Defendants discussed a plan on May 10, 2023 to use the Plaintiff's confidential information and proprietary materials in order to take contracts and projects away from the Plaintiff.[24] Immediately thereafter, the Plaintiff lost five contracts.[25] While it is true that this is not definitive evidence that the contracts were lost due to the Defendants' improper interference, the circumstances surrounding the Defendants' exit and the cancellation of

[23] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) [*sic*], Exhibit 2 ¶¶ 21.
[24] Complaint, Exhibit A ¶ 6-7.
[25] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) [*sic*], Exhibit 2 ¶¶ 21.

the contracts are enough to support a reasonable inference of causation.[26] Consequently, the Plaintiff has raised a material issue of fact, and summary disposition of this claim is not warranted.

ii
The Plaintiff has Raised Material Issues of Fact Regarding the Tortious Interference with Business Relationships or Expectancy

Similar to the above claim, the Defendants allege that the Plaintiff has not provided evidence that it had any business relationship or expectancy that was interfered with or that the Defendants were the cause of such interference.

For the same reasons noted above, this argument lacks merit. The Phillips affidavit recounts that the Plaintiff's business relationships were damaged when several customers canceled their contracts. As noted above, the Gundlach affidavit supports the reasonable inference that the Defendants' improper interference (specifically through their use of the Plaintiff's confidential and proprietary information) was the cause of the breakdown in these relationships. Accordingly, material issues of fact exist and summary disposition is not warranted.

[26] The Phillips affidavit is sufficient to establish that several of the Plaintiff's contracts were canceled around the time of the Individual Defendants' departure, (see ¶ 21), but it is not direct evidence of causation because it relies on inadmissible hearsay when it recounts what customers said about why they canceled these contracts. See Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) [sic], Exhibit 2 ¶¶ 13-14; 23.

VII
The Common Law Unfair Competition Claim also Turns on Issues of Fact

A
The Arguments

The Defendants argue that the Plaintiff "has failed to present any evidence that Defendants engaged in improper or unlawful practices," and therefore, the common law unfair competition claim (Count V) should be dismissed.

B
The Law

"Michigan's common law of unfair competition prohibits unfair and unethical trade practices that are harmful to one's competitors or to the general public." *Atco Indus, Inc v Sentek Corp*, unpublished per curiam opinion of the Court of Appeals, issued July 10, 2003 (Docket No. 232055), p 3, citing Pappas and Steiger, Michigan Business Torts, pp 60-62 (citations omitted). An unfair competition claim "is determined upon its own facts and relief is based upon the principles of common business integrity." *Id*. Additionally, to establish a claim of unfair competition, a plaintiff must prove "actual competition. . . shown from specific instances or as a natural tendency of defendant's acts." *Ex-Cell-O Corp v Sage*, 347 Mich 210, 214 (1956).

The term "unfair competition" may encompass any conduct that is fraudulent or deceptive and tends to mislead the public. *Atco Indus*, unpub op, p 3. Although the term was originally intended to address palming off a rival's goods as one's own:

> Later, unfair competition was extended to outlawing "parasitism" under the principle that one may not appropriate a competitor's skill, expenditures, and labor. Today, the incalculable variety of illegal practices denominated as unfair competition is proportionate to the unlimited ingenuity that overreaching entrepreneurs and trade pirates put to use. It is a broad and flexible doctrine. Thus it is now said that the essence of unfair competition law is fair play.[27]

As one treatise describes it, the kind of unfair competition prohibited by law is "a level of rascality that would raise an eyebrow." *AirPro Diagnostics, LLC v Drew Techs, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued Sept. 21, 2023 (Case No. CV 22-12969) p 5, quoting 1 McCarthy on Trademarks & Unfair Competition § 1:9 (5th ed 2023).

C
Analysis

In the present case, the allegations in the Gundlach affidavit are sufficient to raise a genuine issue of material fact as to whether the Defendants committed the kind of unlawful, unethical, and parasitic competition that the unfair competition law seeks to

[27] *Primary Ins Agency Grp, LLC v Nofar*, unpublished per curiam opinion of the Court of Appeals, issued Mar. 17, 2015 (Docket No. 320039), p 5, quoting 54A Am Jur 2d, Monopolies, Restraints of Trade and Unfair Trade Practices, § 1066.

prevent. Specifically, the allegation that the Defendants stole the Plaintiff's confidential and proprietary information and then used it to lure the Plaintiff's customers away raises a material issue of fact as to whether the Defendants have engaged in unfair competition.

VIII
The Civil Conspiracy Claim is Barred by the Intra-Corporate Conspiracy Doctrine

A
The Arguments

The Defendants argue that the civil conspiracy claim must be dismissed for two reasons: (1) the underlying tort claims must be dismissed as a matter of law, and (2) the intra-corporate conspiracy doctrine prohibits liability.

B
The Law

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Swain v Morse*, 332 Mich App 510, 530 (2020) (citation omitted). "[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advoc Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384 (2003) (citation omitted). Proof of a civil conspiracy may be established through circumstantial evidence and may be premised on inference. *Temborius v Slatkin*, 157 Mich App 587, 600 (1986). Direct proof of an agreement need not

be shown, nor is it necessary to show a formal agreement. "It is sufficient if the circumstances, acts and conduct of the parties establish an agreement in fact." *Id*.

"The intra-corporate conspiracy doctrine provides that a corporation cannot conspire with its own agents or employees." *Mark v City of Flint*, unpublished per curiam opinion of the Court of Appeals, issued Feb. 18, 2014 (Docket No. 313399), p 3, citing *Hull v Cuyahoga Valley Joint Vocational Sch Dist Bd of Educ*, 926 F2d 505, 510 (CA 6, 1991). There is an exception to this rule, however where the employees have an "independent personal stake in a particular action and, therefore, are actually acting on their own behalf." *Blair v Checker Cab Co*, 219 Mich App 667, 674–75 (1996). Stated another way, "when employees act outside the course of their employment, they and the corporation may form a conspiracy." *Johnson v Hills & Dales Gen Hosp*, 40 F3d 837, 841 (CA 6, 1994).

C
Analysis

As an initial matter, the Defendants argument that the conspiracy claim fails because each of the underlying tort claims fail is not meritorious. Because there are issues of material fact underlying the claims as discussed above, dismissal of the underlying tort claims is not warranted, and a conspiracy could attach to the same.

However, the Defendants are correct that the intra-corporate conspiracy doctrine bars the Plaintiff's civil conspiracy claim. Here, the Plaintiffs have alleged that Control Solutions conspired with its employees (B. Talkington, Allard, and Paparelli). The

Plaintiff argues that its claim fits within the personal motivation exception highlighted in *Blair* because "as disgruntled former employees, the individual Defendants were motivated by a personal desire to damage SyEnergy."[28] The Plaintiff has offered no evidentiary support for this statement. "[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics*, 199 Mich App at 486. Here, the Plaintiff has failed to meet its burden, and summary disposition in favor of the Defendants is warranted.

IX
There are Issues of Material Fact Underlying the Breach of Contract Claim

A
The Arguments

The Defendants argue that the breach of contract claim that arises from the Handbook fails because (1) the Handbook expressly states that it does not create contract rights and (2) the Handbook was never signed/acknowledged by the Defendants.

B
The Law

In Michigan, the essential elements for contract formation are (1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality

[28] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) [sic], p 19.

of agreement; and (5) mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422 (1991). The Court of Appeals has held that where mutuality of assent is established, written agreements do not have to be signed in order for the agreement to be binding. *Green v Gallucci*, 169 Mich App 533, 538 (1988). Indeed, "whether a writing constitutes a binding contract even though it is not signed or whether the signing of the instrument is a condition precedent to its becoming a binding contract usually depends on the intentions of the parties. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways...." *Ehresman v Bultynck & Co*, PC, 203 Mich App 350, 354 (1994), quoting 17 CJS, Contracts, § 62, pp 731–733.

"It is well settled under Michigan law that an employer's statement of policy contained in a manual or handbook can give rise to contractual obligations in certain circumstances." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 213 (2019). Where the handbook indicates that it does not create a contract or the employer does not intend to be bound to any provision in the contract, it is not an enforceable agreement. *Heurtebise v Reliable Bus Computers*, 452 Mich 405, 413-414 (1996) (holding that an arbitration provision in an employee manual was not an enforceable arbitration agreement where the language in the manual demonstrated that the defendant employer did not intend to be bound by the manual). If, however, the manual purports to be binding, the employer's reservation of the right to modify the manual will not render the manual unenforceable. *Hicks v EPI Printers, Inc*, 267 Mich App 79, 86 (2005).

Under Michigan law "[a] party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178 (2014). A court's "goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself." *Wyandotte Elec Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 143-144 (2016). "[I]t has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200 (2008). See also *Kendzierski v Macomb County*, 503 Mich 296, 311-312 (2019) (emphasis in original) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*" and a court "will not create ambiguity where the terms of the contract are clear").

The question of whether contract language is ambiguous is a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463 (2003). A contract is ambiguous if there is an irreconcilable conflict between provisions in the contract or "when a term is equally susceptible to more than a single meaning." *Bodnar*, 327 Mich App at 220 (citation omitted). Under such circumstances, the ambiguous contract language presents a question of fact. *Klapp*, 468 Mich at 469. "[I]f a contract is ambiguous, then extrinsic evidence is admissible to determine the actual intent of the parties." *Shay*, 487 Mich at 667 (quotation marks and citation omitted). See also *Klapp*, 468 Mich at 469 ("In resolving

such a question of fact, i.e., the interpretation of a contract whose language is ambiguous, [trier of fact] is to consider relevant extrinsic evidence").

C
Analysis

i
The Plaintiff's Employee Handbook is Ambiguous

In the present case, the Defendants argue that the Plaintiff's employee Handbook cannot, as a matter of law, be contractually binding because the Handbook states that the provisions in the Handbook "do not establish contractual rights between Synergy Engineering Services and its team members." The Handbook at issue contains conflicting provisions in this respect. The first provision cited by the Defendants is clearly a disclaimer of contractual rights as to the "at will" provisions in the Handbook:

> **AT WILL Statement**
>
> Employment with Syenergy Engineering Services is not for any specified period and may be terminated at any time, with or without cause or advance notice by the employee or Syenergy Engineering Services. In connection with this policy, Syenergy Engineering Services reserves the right to modify or alter an employee's position, in its sole discretion, with or without cause or notice, through actions other than termination including demotion, promotion, transfer, reclassification or reassignment. No person other than the CEO of the company has the authority to change the terms, conditions, or enter into an agreement contrary to this statement, and it must be done in writing. Nothing in this manual is intended to or should be construed to modify or alter this at will statement.

> This handbook is not meant to be an exhaustive list and is presented for information purposes only. **It does not create any contractual rights or guarantee of employment between Syenergy Engineering Services and the team member for any specified period of time.** All team members of the Company are employed on an "At Will" basis, and both the team member and the Company will retain the right to exercise this "At Will" policy at any time irrespective of the policies or practices of the Company.[29]

Where the disclaimer relates only to the "at will" provisions in the policy, this will not render the entire agreement unenforceable. *Barkai v VHS of Michigan, Inc*, unpublished per curiam opinion of the Court of Appeals, issued Aug. 12, 2021 (Docket Nos. 35487 & 355607), p 8 (holding that the disclaimer of contract rights referred only to the "at will" provisions in the policy but the employer and employees were bound by the arbitration provision).

However, the other disclaimer of contractual rights in the Plaintiff's Handbook is less clearly tied to an "at-will" policy. It appears in a section entitled "Your SyEnergy Benefits," and simply provides, "The provisions of the Handbook do not establish contractual rights between Synergy Engineering Services and its team members."[30] Although the preceding paragraph mentions the employee benefits plan, it is unclear whether the disclaimer of contractual rights is limited to employee benefits, or whether it is applicable more generally.

[29] Defendants' Motion for Summary Disposition under MCR 2.116(C)(10), Exhibit E, pp 6-7 (emphasis added).
[30] Defendants' Motion for Summary Disposition under MCR 2.116(C)(10), Exhibit E, p 8.

This disclaimer stands in contrast to other provisions in the Handbook that assume it was intended to be an enforceable agreement. For example, the "Survival of Terms" and "Severability" provisions state that the Handbook is binding:

> **SURVIVAL OF TERMS**
>
> My obligations under this Agreement will survive the termination of my employment, regardless of the reason for such termination. This Agreement will inure to the benefit of and be binding upon the successors and assigns of the Company. I understand that the provisions of this Agreement are a material condition to my employment with the Company.
>
> **SEVERABILITY**
>
> If any provision of this Agreement should be found to be invalid or unenforceable, it shall be replaced by a provision which comes as close as possible to the intended result of the invalid provision, and the economic purposes thereof, and which is valid and enforceable. The invalidity or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision.[31]

These provisions in the Handbook present an irreconcilable conflict. The disclaimer on page 8 states that the Handbook does not create contractual rights between the Plaintiff and its employees. However, the provisions on page 48 state that the Handbook does create contractual obligations. Accordingly, the conflicting provisions render the Handbook ambiguous and the trier of fact must determine whether the parties

[31] Defendants' Motion for Summary Disposition under MCR 2.116(C)(10), Exhibit E, p. 48.

intended to be bound by the terms in the Handbook. Summary disposition is therefore unwarranted.[32]

ii
The Issue of Mutual Assent Must be Decided by a Trier of Fact

Assuming the Handbook was intended to create binding contractual obligations, the Individual Defendants argue that it is unenforceable *as to them* because they never signed it. Indeed, the fact that the Individual Defendants never signed the Handbook is a point on which both sides agree. However, the Plaintiff argues that even though the Individual Defendants never signed the Handbook's acknowledgment page, they agreed to its terms because they were informed of the existence of the Handbook and they never objected to its terms and continued to work for the Plaintiff thereafter.

In *Ehresman*, the Court of Appeals addressed this issue directly. The plaintiff in that case argued that the mandatory arbitration provisions in his stock redemption and employment agreements were not binding because he never signed either of those contracts. *Ehresman*, 203 Mich App at 353. The trial court found that, although he never signed the agreements, he "operated under the terms of the employment contract" during the time of his employment. The court noted that the plaintiff did not deny that he

[32] The Defendants also argue that because the Plaintiff reserved the right to unilaterally change the terms of the Handbook, this is further evidence that the Plaintiff did not intend to be bound by the Handbook. However, the reservation of the right to modify the Handbook does not, in and of itself, determine that the Handbook does not create enforceable contract rights. For example, the policies in *Hicks* were determined to be valid and binding despite the employer's reservation of the right to modify the manual. *Hicks*, 267 Mich App at 86.

intended to be bound by the contracts, and his intent to be bound by the agreements was "unequivocally manifested" by his conduct during the course of his employment. *Id.* Specifically, "he accepted the delivery of the agreements and operated under their terms by, for example, enjoying a leased automobile, an American Express credit card, reimbursement for expenses, and payment of compensation." *Id.* at 354-355.

Because the Individual Defendants in this case did not clearly indicate their assent to the terms of the Handbook by signing the final page in the document, their assent must be inferred. "[W]here there is no written evidence of mutual intention, whether the contract was formed, what its terms are, and whether the terms have been validly modified continue to be questions for the trier of fact." *Bullock v Auto Club of Michigan*, 146 Mich App 711, 719–20 (1985), aff'd and remanded, 432 Mich 472 (1989).

In the instant case, the Individual Defendants have each submitted affidavits attesting that they never agreed to be bound by any confidentiality, non-solicitation, or non-competition provisions.[33] Indeed, the Plaintiff asked two of the Individual Defendants (Josh Allard and Ivy Talkington) to sign either the Handbook or a separate non-solicitation agreement immediately before they left their employment, and they refused to do so.[34] However, the Plaintiff has provided competing evidence that the Handbook was provided to each of the four Individual Defendants when they were

[33] Defendants' Motion for Summary Disposition Under MCR 2.116(C)(10), Exhibits A (¶ 8), B (¶ 8), C (¶ 5), and D (¶ 11).
[34] Defendants' Motion for Summary Disposition Under MCR 2.116(C)(10), Exhibits B (¶¶ 10-11) and D (¶¶ 8-10).

employed with the Plaintiff and they "never objected to the Handbook or any provision of the Handbook, and all four employees continued with their employment with SyEnergy after receipt and an opportunity for review."[35] Because the record contains conflicting evidence as to the Individual Defendants' receipt of and assent to the Handbook, summary disposition is not warranted and this question must be reserved for the trier of fact.

ORDER

Based on the foregoing Opinion, the Court hereby orders as follows:

1) The Defendants' Motion for Summary Disposition Under MCR 2.116(C)(10) is DENIED as to Count I (Violation of the Michigan Uniform Trade Secrets Act).

2) The Defendants' Motion for Summary Disposition Under MCR 2.116(C)(10) is DENIED as to Count II (Conversion and Statutory Conversion).

3) The Defendants' Motion for Summary Disposition under MCR 2.116(C)(10) is DENIED as to Count III (Tortious Interference with Contract).

[35] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) [*sic*], Exhibit 2 ¶¶ 10-11.

4) The Defendants' Motion for Summary Disposition under MCR 2.116(C)(10) is DENIED as to Count IV (Tortious Interference with Business Relationships or Expectancy).

5) The Defendants' Motion for Summary Disposition under MCR 2.116(C)(10) is DENIED as to Count V (Common Law Unfair Competition).

6) The Defendants' Motion for Summary Disposition under MCR 2.116(C)(10) is GRANTED as to Count VI (Civil Conspiracy).

7) The Defendants' Motion for Summary Disposition under MCR 2.116(C)(10) is DENIED as to Count VII (Breach of Contract or Restrictive Covenants).

/s/ Michael Warren

_____

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE