

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

PARTNERS COFFEE COMPANY, LLC, a
Delaware limited liability company,

Plaintiff,

v.

OCEANA SERVICES AND PRODUCTS
COMPANY, a Georgia corporation, and
JAMES S. GILSON, an individual,

Defendants.

Civil Action No. 2:09cv236

Judge William L. Standish

Electronically filed

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants Oceana Services and Products Company ("Oceana") and James S. Gilson ("Mr. Gilson"), by and through their attorneys, Morella & Associates, a Professional Corporation, submit this *Brief in Support of Defendants' Motion to Dismiss*.

I. INTRODUCTION

The gist of the instant action is contractual. On May 2, 2008 Oceana and Mr. Gilson entered into an Asset Purchase Agreement and Consulting Agreement (collectively, the "Agreements") with Partners Coffee Company, LLC ("Partners"). Defendants agreed to sell and Partners agreed to purchase substantially all of Oceana's assets and to have Oceana, through Mr. Gilson, provide various consultation services to Partners. See Exhibits "A" & "B". All of the rights and obligations pursuant to this transaction for both Plaintiff and Defendants are located in the Agreements.

Partners alleges that Oceana engaged in multiple tortious activities after the parties entered into the Agreements, including fraud, conversion, tortious interference with business relations, improper procurement of information, and trespass. Partners' tortious claims for fraud, conversion, tortious interference with business relations, improper procurement of information,

and trespass are based on the rights and obligations located in the Agreements and are barred by the gist-of-the-action doctrine as duplicative of the breach of contract claims. Partners' claims for tortious interference with business relations and improper procurement of information should also be dismissed for failure to state a claim upon which relief can be granted.

II. LEGAL STANDARD

A motion to dismiss based on Rule 12(b)(6) allows the Court to dismiss a suit for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). See also, Cortes v. R.I. Enterprises, Inc., 95 F. Supp. 2d 255, 258 (M.D. Pa. 2000). When considering a district court's grant of a motion to dismiss under Rule 12(b)(6), "we accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff." Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006). We "determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim upon which relief can be granted. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 29 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice to survive a motion to dismiss." Fowler v. UPMC Shadyside, No. 07-4285 2009 WL 2501662, at *4 (3d Cir. 2009) (citing Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948, 173 L.Ed.2d 868 (2009)). To prevent dismissal, all civil complaints must now set out "sufficient factual matter" to show that the claim is facially plausible. Fowler, 2009 WL 2501662, at *4. This then "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing

Ashcroft, 129 S.Ct. at 1948). The Supreme Court’s ruling in Ashcroft emphasizes that a plaintiff must show that the allegations of his or her complaint are plausible. Id. (citing Id.).

“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atlantic Corp., 550 U.S. at 555. See also, Fowler, 2009 WL 2501662, at *4 (“pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.”).

III. ARGUMENT

A. The Gist-of-the-Action Doctrine Precludes the Allegation of Tort Claims that Merely Restate Breach of Contract Claims.

The “gist of the action” doctrine prevents a plaintiff from bringing a tort claim that merely restates a breach of contract claim. Werwinski v. Ford Motor Co., 286 F.3d 661, 680 n.8 (3d Cir. 2002) (citing Phico Ins. Co. v. Presbyterian Med. Serv. Corp., 663 A.2d 753, 757 (Pa. Super. Ct. 1995)). “When a plaintiff alleges that the defendant committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the ‘gist’ or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is ‘collateral’ to conduct that is primarily tortious.” Werner Kammann Maschnefabrik, GmbH v. Max Levy Autograph, Inc., No. 01-1083, 2002 WL 126634, at *6 (E.D. Pa. 2002) (quoting Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F.Supp.2d 644, 651 (W.D. Pa.1999)). The gist of the action test requires the court to determine the essential nature of the claim alleged by distinguishing between contract and tort claims on the basis of the

source of the duties allegedly breached. Id. Where the duties essentially flow from an agreement between the parties, the claim is deemed contractual in nature, whereas if the duties breached were of a type imposed on members of society as a matter of social policy, the claim is deemed essentially based in tort. Id.

The Pennsylvania Superior Court delineated four circumstances where the doctrine has been applied to tort claims ““(1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.”” Lombardi v. Allstate Ins. Co., No. 08-949, 2009 WL 1811540, at *7 (W.D. Pa. 2009) (citing Reed v. Dupuis, 920 A.2d 861, 864 (Pa. Super. Ct. 2007)).

In Lombardi, the district court cited eToll, Inc. v. Elias/Savion Advertising, Inc.:

As a practical matter, the doctrine precludes plaintiffs from recasting ordinary breach of contract claims into tort claims. Thus, although mere non-performance of a contract does not constitute a fraud, it is possible that a breach of contract also gives rise to an actionable tort. To be construed in tort, however, the wrong ascribed to the defendant must be the gist of the action, the contract being collateral. The important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus. In other words, a claim should be limited to a contract claim when the parties’ obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts.

Id. at *8 (citing eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. Ct. 2002)).

- 1. The Gist-of-the-Action Doctrine Bars Partners’ Tortious Claims for Fraud, Conversion, Tortious Interference with Business Relations, Improper Procurement of Information, and Trespass.**

Claims of fraud based on misrepresentations as to a party's subjective competency to perform services or provide goods pursuant to an agreement are barred by the gist of the action doctrine. KSM Associates, Inc. v. ACS State Healthcare, LLC, No. 05-4118, 2006 WL 847786, at * 4 (E.D. Pa. 2006). See also, Advanced Tubular Prods., Inc. v. Solar Atmospheres, Inc., No. 03-0946, 2004 WL 540019, at *7 (E.D. Pa. 2004) (gist of the action doctrine barred fraud claim based on breaching party's representation that it could perform heat treatment services in compliance with contractual specifications); Caudill Seed & Warehouse Co., Inc. v. Prophet 21, Inc., 123 F. Supp. 2d 826, 833-34 (E.D. Pa. 2000) (gist of the action doctrine barred fraud claim against software company that provided software that failed to work as promised).

The gist of the action doctrine precludes a claim for fraud if the fraudulent statement became the basis for a contractual duty. Owen J. Roberts School District v. HTE, Inc., No. 02-7830, 2003 WL 735098, at *3 (E.D. Pa. 2003). See also, Factory Market, Inc. v. Schuller Int'l, Inc., 987 F. Supp. 387, 395 (E.D. Pa. 1997) (fraud claim was dismissed as the claim was grounded on defendant's failure to perform its contractual obligation to plaintiff); Galdieri v. Monsanto Co., No. 00-1113, 2002 U.S. Dist. LEXIS 11391, at *34 (E.D. Pa. 2002) (plaintiffs claimed that defendants induced them to enter into employment agreements and failed to perform, and the judge held that the gist of the action doctrine barred the fraud claim).

Courts have applied the "gist-of-the-action" doctrine to conversion claims when entitlement to the chattel is predicated solely on the agreement between the parties. Rahemtulla v. Hassam, 539 F.Supp.2d 755, 777 (M.D. Pa. 2008). In Rahemtulla, the gist of the plaintiffs' conversion claim lied in contract, not tort, because it arose out of one of the defendant's alleged nonperformance of contractual obligations set forth in a partnership agreement. Rahemtulla, 539

F.Supp.2d at 777. See, e.g., Murphy v. Mid East Oil Co., No. 06-1343, 2007 WL 527715, at *5-6 (W.D. Pa. 2007) (dismissing conversion claim because it was dependent on the defendant's noncompliance with the terms of the agreements); Montgomery v. Fed. Ins. Co., 836 F.Supp. 292, 301-02 (E.D. Pa. 1993) (dismissing conversion claim because of, *inter alia*, the “firmly accepted ... doctrine that an action for conversion will not lie where damages asserted are essentially damages for breach of contract”); Pittsburgh Const. Co. v. Griffith, 834 A.2d 572, 584 (Pa. Super. Ct. 2003) (stating that where success of the conversion claim “depend[s] entirely on the obligations as defined by the contract, the gist of the action doctrine applies.”).

The gist of tortious interference with a business relationship is the intent to destroy plaintiff's good will and reputation. Chrysler Credit Corp. v. B.J.M., Jr., Inc., 834 F. Supp. 813, 843 (E.D. Pa. 1993). Where a defendant's breach of his contract with the plaintiff has only an incidental consequence of affecting plaintiff's business relationships with third persons, an action lies only in contract for defendant's breaches, including any recoverable consequential damages. Chrysler Credit Corp., 834 F. Supp. at 843 (citing DiCesare-Engler Productions, Inc. v. Mainman, Ltd., 81 F.R.D. 703, 710 (W.D. Pa. 1979)).

In Chemtech International, Inc. v. Chemical Injection Technical, Inc., 170 Fed. Appx. 805, 809 (3d Cir. 2006), the Third Circuit affirmed the dismissal of a tortious interference based on the gist of the action doctrine. In Chemtech, plaintiff's tortious interference claim alleged that defendant dealt directly with plaintiff's customers and induced distributors not to deal with plaintiff but to deal with them directly, all without regard to plaintiff's agreements with the distributors and in breach of the agreement between plaintiff and defendant. Id. The Third Circuit held that plaintiff did “not have a right to be free from competition and [defendant] has no duty ‘imposed by law as a matter of social policy’ not to compete with [plaintiff]. Only a

contract can confer such a right and impose such a duty” Id. See also, Sheinman Provisions, Inc. v. National Deli, LLC, No. 08-453, 2008 WL 2758029, at *5 (E.D. Pa. 2008) (The plaintiff claimed that defendant intentionally interfered with plaintiff’s business and contractual relationships to cause its customers, vendors and suppliers to discontinue purchasing from plaintiff and deal directly with defendant. The court found that the duties allegedly breached by defendant were not imposed as a matter of social policy, but rather flowed from the asset rental agreement, and therefore the gist of the action doctrine barred the plaintiff’s tortious interference claim as the duties allegedly breached were grounded in the contract between the parties.).

Pennsylvania courts have recognized actionable conduct prohibited under Section 759 of the Restatement of Torts. Ideal Aerosmith, Inc. v. Acutronic USA, Inc., No. 06-4688, 2007 WL 4394447, at *9 (E.D. Pa. 2007). Section 759, titled *Procuring Information by Improper Means*, provides: “One who, for the purpose of advancing a rival business interest, procures by improper means information about another’s business is liable to the other for the harm caused by his possession, disclosure or use of the information.” Ideal Aerosmith, Inc., 2007 WL 4394447, at *9.

In Wilmington Trust Co. v. County of Allegheny, No. 05-1737, 2009 WL 904698, at *4-5 (W.D. Pa. 2009), plaintiff alleged an action in trespass against defendant based on the terms in various leases. The court held that if, “defendants owed any duty to plaintiff based upon plaintiff’s alleged interest in the premises and facilities at issue in this action, such duties clearly arise out of the myriad of transactions and written agreements set forth in the complaint, particularly the lease agreements. Any claims plaintiff may have against the defendants must arise from a breach of duties imposed as a matter of contract.” Wilmington Trust Co., 2009 WL 904698, at *4-*5. Therefore, plaintiff’s tort claim was found to be “inextricably intertwined”

with the alleged failure to perform certain obligations under the terms of the leases. Id. The court did not find the contracts to be merely collateral, but rather found that contract issues are at the heart of the tort claim, which was barred by the gist of the action doctrine. Id.

In the instant action, all of the rights and obligations of the parties were found in the Agreements. See Exhibits “A” & “B.” On page 2 of the Second Amended Complaint, Partners identifies ¶¶ 8 through 26 under the heading “Facts Common to All Counts.” C., p. 2. Partners then expressly incorporates all of these paragraphs into each and every count, contract and tort claim alike. C., pp. 5-12. In addition, Partners incorporates into Count II (Fraud) all of the allegations consisting of its Count I (Breach of Contract regarding the Asset Purchase Agreement). C, ¶33. Partners incorporates into Count IV (Conversion) both Count I and Count III (Breach of Contract regarding the Consulting Agreement). C, ¶47. Partners does the same thing for Counts V (Tortious Inteferece with Business Relations), Count VIII (Improper Procurement of Information), and Count IX (Trespass). C, ¶¶54, 71, & 75. More particularly, the allegations that Partners made against Defendants for fraud, conversion, tortious interference with business relations, improper procurement of information, and trespass, dealt with breach of contract claims.

All of the rights and obligations of both Plaintiff and Defendants are located in the terms of the Agreements, and all of the allegations made by Plaintiff against Defendants were governed by these terms. To wit, ¶2.1.2 of the Asset Purchase Agreement deals with equipment and machinery. See Ex. “A.” ¶2.1.6 deals with trade secrets. Id. ¶2.1.7 deals with intellectual property. Id. ¶2.1.8 deals with the accounting books (*i.e.*, financial statements) of the company. Id. ¶2.2 deals with accounts receivables; specifically their exclusion from the transaction. Id. In addition, ¶5.2.2 deals with a bill of sale for the transfer of, *inter alia*, the equipment and

machinery. Id. ¶¶5.2.6 & 5.4.6 referred to the Consulting Agreement. Id. ¶5.2.7 referred to a “Restrictive Covenants Agreement.” Id.

More specifically, the “**REPRESENTATIONS AND WARRANTIES OF SELLER AND THE SHAREHOLDER**” in Article VI of the Asset Purchase Agreement corresponds directly to all of the claims, tort claims included, raised by Partners. See Ex. “A.” ¶6.5 deals with “Financial Statements” and their accuracy. Id. ¶6.6 deals with “Accounts Receivables.” Id. ¶6.16 deals with “financial” records of Oceana and their completeness and correctness. Id. ¶6.23 deals with the “Condition of Assets” which includes representations that the “tangible assets” are in “good operating condition and repair.” Id. Finally, ¶6.29 deals with the “Completeness and Accuracy” of all representations made by Defendants in the Asset Purchase Agreement. Id.

In addition, Article VIII sets forth the “**COVENANTS**” of Defendants. See Ex. “A.” ¶8.1.3 refers to maintaining the assets in good repair and condition. Id. ¶8.1.4 refers to maintaining the books and records of the company in the regular and usual course of business. Id.

Article X sets forth the “**CONDITIONS PRECEDENT TO OBLIGATIONS OF PURCHASES.**” See Ex. “A.” ¶10.1 deals with the “Accuracy of Representations and Warranties” made by Defendants. Id. ¶10.6 deals with “Compliance With Bulk Sales Law” and requires Oceana to have complied with this law. Id.

Article XI sets forth the “**OBLIGATIONS AFTER THE CLOSING DATE.**” See Ex. “A.” ¶11.1 deals with “Confidentiality” of, *inter alia*, trade secrets, customer information, financial information, etc. Id. ¶11.4 deals with accounts receivables and the payment by either side of receivables rightly due the other party. Id.

Section 6 of the Consulting Agreement deals with confidentiality and non-compete issues. See Ex. “B.” ¶6.1 deals with “Confidentiality” by Defendants of, *inter alia*, trade secrets. Id. ¶6.2 deals with “Non-Compete Provisions.” Id.

In comparing these provisions of the Agreements to the allegations leveled by Partners at Defendants, it is revealed that all of the claims raised by Partners directly arise from these contractual provisions. The Second Amended Complaint can be summarized in the following manner: Partners alleges that Defendants:

- overstated Oceana’s accounts receivables (C, ¶14);
- overstated Oceana’s revenue (C, ¶14);
- misrepresented the condition of the equipment and machinery (C, ¶16);
- failed to comply with the Bulk Sales Law (C, ¶17);
- intercepted post-closing customer payments (C, ¶21);
- improperly competed with Partners by contacting its customers, C, ¶¶19 & 22.
- Improperly obtained and disclosed Partners’ trade secrets by installing a wireless router in Partners’ computer network (C, ¶¶19 & 23).

All of the claims, contract and tort alike, are based on these facts. See Second Amended Complaint. All of these allegations refer or relate to duties or obligations expressly identified in the Agreements.

The gist of the action doctrine prevents a plaintiff from bringing a tort claim that merely restates a breach of contract claim. These tortious claims alleged by Plaintiff are merely duplicative of the breach of contract claims brought by Plaintiff in Counts I and III of the Second Amended Complaint.

Therefore, Counts II, IV, V, VIII, and IX are barred by the gist-of-the-action doctrine where the essential ground of the lawsuit is contract.

B. Partners' Claim for Tortious Interference with Business Relations Fails to State a Claim Upon Which Relief Can be Granted.

Count V of Partners' Second Amended Complaint fails to allege the essential elements of a tortious interference claim. To state a cause of action of interference with existing or prospective contractual relations, four elements must be pled:

- (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;
- (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
- (3) the absence of privilege or justification on the part of the defendant; and
- (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Pelagatti v. Cohen, 536 A.2d 1337, 1343 (Pa. Super. Ct. 1987). See also, ClubCom, Inc. v. Captive Media, Inc., No. 07-1462, 2009 WL 249446, at *6 (W.D. Pa. 2009)).

Plaintiffs must identify with sufficient precision the contracts with which the defendant purportedly interfered. Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1015 (3d Cir. 1994) (granting summary judgment for defendant where plaintiff failed to identify any contract terminated due to defendant's conduct and to demonstrate with reasonable probability that it would have entered into a contract but for defendant's interference). "A prospective contract is something less than a contractual right, something more than a mere hope; it exists if there is a reasonable probability that a contract will arise from the parties' current dealings." Alvord-Polk, Inc., 37 F.3d at 1015. Alleging only existing business relationship or past dealings does not

reach the requisite level of probability. Gen'l Sound Tel. Co., Inc. v. AT&T Communications, Inc., 654 F. Supp. 1562, 1565-66 (E.D. Pa. 1987).

Partners' claim fails with regard to the first prong because it does not sufficiently identify any existing or prospective contracts that were interfered with or harmed by Defendants' actions. Instead, Partners merely alleges that it "had certain business relations with third parties and Mr. Gilson and Oceana acted with the intent to harm those relationships by directing third parties not to make payments to Partners and not to do business with Partners." Second Amended Complaint, ¶¶ 55&56. Federal courts routinely dismiss interference with existing and prospective contract claims which make generalized allegations such as the claims made by Partners against Defendants. See Accord McMillian v. Phil. Newspapers, Inc., No. 99-2949, 1999 U.S. Dist. LEXIS 18526, at *12-13 (E.D. Pa. 1999) (dismissing claim where plaintiff failed to "identify any third party with whom he had dealings or any particular contracts which would have arisen absent interference"); Accord Frempong-Atuahene v. Redevelopment Autho. Of Phil., No. 98-0825, 1999 U.S. Dist. LEXIS 3608, at *18 (E.D. Pa. 1999) (dismissing claim where plaintiff "failed to state, with any particularity or specificity, what particular contractual relationship, actual or prospective, was interfered with and how such interference occurred"); Allstate Trans. Co., Inc. v. Southeastern Pa. Trans. Auth., No. 97-1482, 1997 U.S. Dist. LEXIS 16638, at *34-36 (E.D. Pa. 1997) (dismissing claim where plaintiff failed to identify with sufficient precision which existing contracts were hindered and which prospective contracts it would have entered into but for defendant's alleged interference).

Count V that makes generalized allegations that Partners had certain business relationships with third parties and Defendants interfered with those relationships, is not actionable and should be dismissed for failure to state a claim upon which relief can be granted.

C. Partners Claim for Improper Procurement of Information Fails to State a Claim Upon Which Relief Can be Granted.

Count VIII of Plaintiff's Second Amended Complaint is titled "Procuring Information by Improper Means" and should be brought under Count VII, titled "Misappropriation of Trade Secrets." The paragraphs of this allegation indicate that Plaintiffs are attempting to bring a claim for "Misappropriation of Trade Secrets" under the Restatement of Torts § 757. That section prohibits the use of trade secret information if it has been "discovered...by improper means." *Id.* According to the Pennsylvania Uniform Trade Secrets Act (the "Act"), 12 Pa. Cons. Stat. § 5308, however, any such claim for misappropriation of trade secrets must be brought under the ambit of the Act. The Act "displaces conflicting tort, restitutionary and other law of this Commonwealth providing civil remedies for misappropriation of a trade secret." 12 Pa. Cons. Stat. § 5308(a). See also, Binary Semantics Ltd. v. Minitab, Inc., No. 07-1750, 2008 WL 763575, at *9 (M.D. Pa. 2008).

Plaintiff has already brought a claim under this Act under Count VII. Count VII should be dismissed for failure to state a claim upon which relief can be granted.

IV. CONCLUSION

The Court should grant *Defendants' Motion to Dismiss* and enter judgment in favor of Defendants, Oceana Services and Products Company and James S. Gilson, and against Plaintiff, Partners Coffee Company, LLC, as to Counts II, IV, V, VIII, and IX of the Complaint.

Respectfully submitted,

MORELLA & ASSOCIATES
A PROFESSIONAL CORPORATION

Date: September 8, 2009

/s/ Albert N. Peterlin, Esquire
PA84180
706 Rochester Road
Pittsburgh, PA 15237
(412) 369-9696
(412) 369-9990 fax
anpeterlin@morellalaw.com

*Attorneys for Defendants, Oceana Services and
Products Company and James S. Gilson*