STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

BLUE WATER SPORTS MANAGEMENT, LLC
d/b/a, MICHIGAN ELITE VOLLEYBALL ACADEMY
a Michigan Limited Liability Company,

Plaintiff,

vs. Case No. 2013-4805-CZ

ULTIMATE VOLLEYBALL GROUP, LLC a/k/a
TEAM DETROIT VOLLEYBALL a/k/a
VOLLEYMASTERS TRAINING SYSTEMS, a
Michigan Limited Liability Company, JEFFREY D.
GABEL, PAIGE GABEL, LAWRENCE WYATT,
AMBER WYATT, EDWARD RUHL, BRANDON
PARSLEY, JOHN KALUGAR, and SHILO STEWART,
jointly and severally,

Defendants.
_____/

OPINION AND ORDER

Defendants have moved for summary disposition pursuant to MCR 2.116(C)(8). Plaintiff has filed a response and requests that the motion be denied.

Facts and Procedural History

In 2010, Elite Sports Center, Inc. ("Elite Sports") defaulted on certain financial obligations to Ellmor properties II, LLC ("Ellmor"). In June 2010, Ellmor foreclosed on all of Elite Sports' assets. In July 2010, Ellmor sold the assets to Plaintiff pursuant to an asset purchase agreement ("Purchase Agreement"). Pursuant to the Purchase Agreement, Ellmor retained a security interest in the subject assets. After purchasing the assets Plaintiff began operating its own volleyball and athletic training facility in Warren, MI.

Plaintiff hired Defendants Lawrence Wyatt, Amber Wyatt, Edward Ruhl, Brandon Parsley, John Kalugar and Shilo Stewart as coaches/employees ("Employee Defendants"). In 2013, the Employee Defendants allegedly began working on setting up Team Detroit Volleyball. Plaintiff also alleges that the Employee Defendants used its client and player information lists and email lists to build their new business and to take away Plaintiff's customers.

On December 4, 2013, Plaintiff filed its complaint in this matter against Defendants alleging: Count I- Civil Conspiracy; Count II- Concert of Action; Count III- Conversion; Count IV- Business Defamation; Count V- Misappropriation of Trade Secrets; Count VI- Tortious Interference with an Advantageous Business Relationship of Expectancy, and; Count VII- Preliminary Injunction. On January 9, 2014, Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(8). Plaintiff has since filed a response. On February 10, 2014, the Court held a hearing in connection with the motion. At the conclusion of the hearing the Court took the matter under advisement. The Court has reviewed the pleadings, as well as the arguments advanced at the hearing, and is now prepared to make its decision.

Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

Arguments and Analysis

(1) Conversion

Defendants first contend that Plaintiff has failed to properly state a claim for conversion. Common law conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Statutory conversion is governed by MCL 600.2919a, which provides, in pertinent part:

> (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.

Defendants contend that Plaintiff has failed to allege that they wrongfully exerted a distinct act of domain over any particular asset that it owned. Plaintiffs have alleged that the Employee Defendants have removed, and that the other Defendants have received, its equipment and proprietary, confidential and business information and/or business assets without its permission. (Complaint, at ¶68.) Defendants contend that the above allegation does not provide enough specificity/explanation as to what items/information was converted. However, Defendants have failed to support their contention in any way. Moreover, Defendants, through discovery have been/will be given an opportunity to get additional clarity as to what assets have allegedly been converted. Accordingly, the Court is satisfied the Plaintiff has properly plead a claim for conversion.

(2) Business Defamation

Defendants also contend that Plaintiff failed to state a claim for business defamation where it has failed to provide the exact statements at issue, how those statements were published and how Defendants are at fault.

To state a claim for defamation, a plaintiff must establish: (1) a false and defamatory statement concerning them; (2) unprivileged publication of the statement to third parties; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement regardless of whether there is a special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). *Rouch v Enquirer & News*, 440 Mich 238; 487 NW2d 205(1992) (citations omitted). A plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Thomas M Cooley Law School v Doe 1*, 300 Mich App 245, 262; 833 NW2d 331 (2013).

In this case, Plaintiff alleges that Defendants Amber and Lawrence Wyatt made "defamatory statements to coaches, players, parents and other business associates regarding Plaintiff and/or Plaintiff's business, including but not necessarily limited to the following:

a. That [Plaintiff] was in financial distress;

b. That [Plaintiff] was about to close its business, although it continued to accept payments from customers; and

c. That [Plaintiff] had hired substandard coaches and staff."

(Complaint at ¶74). In addition, Plaintiff contends that Defendant Ultimate Volleyball, through Defendants Jeffrey and Paige Gabel and Defendants Lawrence and Amber Wyatt contacted Plaintiff's customers and players indicating that they should begin playing at Ultimate

Volleyball and Team Detroit. (Complaint at ¶75.) Further, Plaintiff alleges that Defendants "generated statements and text messages falsely accusing Plaintiff of unethical and potentially unlawful behavior, poor business practices, and business cessation, and attempted to coerce players into terminating their dealings with Plaintiff and beginning business with Defendants." (Complaint at ¶76.)

The Michigan Court of Appeals has held that a plaintiff claiming defamation must plead exact words that are allegedly defamatory. *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245; 833 NW2d 331 (2013). While Plaintiff has plead the nature of the statements and in some cases the categories of individuals to whom they made the statements, it has failed to identify the exact defamatory words and the exact people that they alleged statements were made to. Consequently, the Court is convinced that Plaintiff has failed to sufficiently plead a claim for business defamation. Accordingly, Defendants' motion for summary disposition of Plaintiff's business defamation claim must be granted.

(3) Misappropriation of Trade Secrets

Defendants also contend that Plaintiff has failed to identify an item/asset that has been misappropriated that constitutes a trade secret. Under MUTSA:

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:
>
> (i) 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.
>
> (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [MCL 445.1902(d).]

A claim for misappropriation of trade secrets under this act requires the following:

> (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 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); see also *McKesson Medical–Surgical, Inc v Micro Bio–Medics, Inc,* 266 F Supp 2d 590, 596–597 (ED Mich 2003).]

In its complaint, Plaintiff alleges that the following constitute trade secrets that have been misappropriated: customer contact lists, business plans, trade names, coaching plans, specific brochures and printed literature, specific marketing language and advertising. (Complaint, at ¶84, 89.)

With respect to the customer lists, Defendant cites that "[c]ustomer lists developed by a former employee and information relating to a customer's needs are not 'trade secrets' under MUTSA, unless the employee is bound by a confidentiality agreement." *Hayes–Albion v Kuberski,* 421 Mich 170, 183; 364 NW2d 609 (1984). However, the Court in *Hayes-Albion* also noted that the customer list at issue had been compiled by the defendant and that defendant had not stolen a list of customers that plaintiff had kept secret. *Id.* at 183. In this case, unlike in *Hayes-Albion,* Plaintiff alleges that it maintained a list of customers and their contact information and that such information was protected by restricting access to the information to certain employees. Accordingly, the Court is convinced that the allegations in this case are distinguishable from those presented in *Hayes-Albion*, and that Plaintiff has stated a claim for misappropriation.

With respect to the brochures, other printed materials and advertising tools and schedules, the Court is satisfied that such materials do not qualify as trade secrets. While the materials at issue were generated by Plaintiff, Plaintiff did not seek to maintain their secrecy; Indeed, the advertising materials/brochures/other printed materials were disseminated by Plaintiff in an effort to build its customer base. While Plaintiff could have potentially protected its materials through copyright or trademarks, it does not appear that it chose to do so. For these reasons, the Court is convinced that these materials do not constitute trade secrets under MUTSA.

The remaining categories of items at issue are Plaintiff's trade names, team names and coaching plans. Based on the pleadings alone, the Court is unable to determine the extent to which Plaintiff sought to keep these material/names a secret and the degree to which they are readily available. However, based on the face of Plaintiff's complaint alone, the Court is satisfied that these items could potentially form the basis for a viable misappropriation claim. Accordingly, this portion of Defendant's motion must be denied.

(4) Tortious Interference

Defendants contend that Plaintiff's tortious interference claims are insufficiently pled as it has failed to identify any specific acts that corroborate the improper motive of the alleged interference. The requisite elements for tortious interference with a contract or business expectancy are: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectation of the relationship by the interferer, (3) an intentional interference causing termination of the relationship or expectation, and (4) resulting in damages to the complaining party. *Badiee v Brighton Area Schools*, 265 Mich App 343, 365-366; 695 NW2d 521 (2005); *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 255; 673 NW2d 805 (2003).

In this case, Plaintiff alleges that Defendants acted wrongfully/in a tortious manner by, *inter alia*, converting its customer lists and other proprietary information and used those assets to steal its customers (element 1). Further, Plaintiff alleges that Defendants, as former employees and individuals/companies working with its former employees, knew of Plaintiff's business relationships/expectancies (element 2), and intentionally used the information taken to take Plaintiff's customers (element 3), to Plaintiff's detriment (element 4). The Court is satisfied that such allegations, if proven, are sufficient to sustain a tortious interference claim.

(5) Civil Conspiracy and Concert of Action

Defendants contend that Plaintiff may not maintain a conspiracy and/or concert of action claim without an independent tort. However, as discussed above, Plaintiff has stated several tort claims that, if proven, could also form the basis for a conspiracy/concert of action claim. Consequently, Defendants' contention is without merit.

(6) Preliminary Injunction

Plaintiff's request for a preliminary injunction is a remedy rather than an independent cause of action and will be addressed at the upcoming evidentiary hearing.

Conclusion

For the reasons set forth above, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) is GRANTED IN PART AND DENIED IN PART. Defendants' motion for summary disposition of Plaintiff's business defamation claims is GRANTED. Defendants' motion for summary disposition of Plaintiff's misappropriation claims related to brochures, other printed materials and advertising tools and schedules is GRANTED. The remainder of Defendants' motion is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim or closes this case.

IT IS SO ORDERED.

/s/ John C. Foster
John C. Foster, Circuit Judge

Dated: March 4, 2014

JCF/sr

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