

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

ELENZA, INC., a Delaware corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	C.A. No. N14C-03-185 MMJ CCLD
ALCON LABORATORIES HOLDING)	
CORPORATION, a Delaware)	
corporation, ALCON RESEARCH LTD,)	
a Delaware corporation, and NOVARTIS)	
AG, a Swiss corporation,)	

Defendants.

Submitted: December 30, 2014

Decided: March 11, 2015

Redacted: March 23, 2015*

On Defendants' Motion to Dismiss Amended Complaint

DENIED

OPINION

John G. Day, Esquire, Andrew D. Cordo, Esquire, Ashby & Geddes, PA, Timothy T. Scott, Esquire (Argued), Geoffrey M. Ezgar, Esquire, King & Spalding, Attorneys for Plaintiff.

Arthur G. Connolly III, Esquire, Ryan P. Newell, Esquire, Josiah R. Wolcott, Esquire, Connolly Gallagher LLP, Daniel P. Shanahan, Esquire (Argued), Heidi K. Hubbard, Esquire, Williams & Connolly LLP, Attorneys for Defendants.

* Opinion was originally Filed Under Seal. The Confidential material contained herein has been redacted.

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Plaintiff ELENZA, Inc. (“Elenza”), brought this action for misappropriation of trade secrets, among other things, against Defendants Alcon Laboratories Holding Corporation, Alcon Research Ltd., and Novartis AG (collectively “Alcon”).¹

Elenza is a Delaware corporation with its principal place of business in Roanoke, Virginia. Elenza is engaged in the development of intraocular accommodating lenses (“IOL”) for the treatment of cataracts and other serious eye conditions.

Defendants Alcon Laboratories Holding Corporation and Alcon Research Ltd. are Delaware corporations with principal places of business in Ft. Worth, Texas. Defendant Novartis AG is a Swiss corporation with its principal place of business in Basel, Switzerland. Alcon is a global leader in eye health technology.

Elenza and Alcon’s Relationship

Between 2008 and 2010 Elenza was developing technology that would adjust the focal length of an IOL through the application of an electrical impulse. Upon successful development of the technology, Elenza began looking for

¹ On April 8, 2011, Alcon Inc. and Novartis AG merged. Prior to the merger, Alcon Research Ltd. was a wholly-owned subsidiary of Alcon, Inc. Alcon Laboratories Holdings Corporation is an indirect subsidiary of Novartis AG. For purposes of this Motion, all aforementioned parties will be referred to as “Alcon.”

strategic investors to fund the manufacturing and clinical development for its IOLs. Alcon was one of the investors approached by Elenza.

On May 24, 2010, Elenza and Alcon executed a non-disclosure agreement (“NDA”) to facilitate an exchange of information. The NDA prohibited Elenza and Alcon from using or disclosing the exchanged information outside of the agreed upon circumstances. After executing the NDA, Alcon had access to Elenza’s confidential information and proprietary development partners to perform the necessary diligence to determine whether to invest in Elenza.

On February 7, 2011, Elenza, Alcon and several “follow-on investors” executed a Stock Purchase Agreement (“SPA”). Under the terms of the SPA, Alcon agreed to invest approximately \$15 million in two equal but separate tranches of financing. In exchange for the first tranche of financing, the SPA provided that Alcon would receive approximately 7.1 million shares of Elenza’s Series B stock, and become the holder of 24.3% of the outstanding shares of Elenza.

The SPA conditioned Alcon’s delivery of the second tranche of financing on: (1) the parties’ execution of Exhibit L - a development agreement,² and Exhibit

² Exhibit L provided for the creation of a Joint Scientific Advisory Board and addressed the rights that may arise out of any joint project. It also addressed certain procedures if Alcon did not fund the second tranche of financing.

M - a research licensing agreement;³ and (2) the successful completion of a clinical study, whereby a newly-created Joint Scientific Advisory Board would make a reasonable determination that Elenza's technology for pupil dilation could serve as a reliable indicator of attempted accommodation to serve as a physiological trigger for an IOL.

After executing the SPA, Elenza began conducting clinical trials. However, the Joint Scientific Advisory Board was never established. Instead, a "*de facto*" Joint Development Committee ("JDC") was formed to oversee the clinical trials.

In late 2011, Jonathan Prejean ("Prejean"), a lawyer for Alcon, began to raise concerns over the criteria the JDC was going to use to evaluate the success of the clinical trials. On the scheduled date the JDC was to vote on the success of the clinical trials, Prejean "refused to allow" the vote. Prejean also announced that Alcon had decided not to invest the second tranche of financing. Alcon and Elenza never executed Exhibit L or Exhibit M to the SPA.

On July 9, 2012, Alcon and Elenza entered into a Clarification Agreement ("Clarification Agreement"). The Clarification Agreement provided for, among other things, the dissolution of Alcon and Elenza's contractual relationship under

³ Exhibit M permitted Alcon to share Elenza's confidential information with certain development collaborators.

the SPA. The Clarification Agreement also required both Alcon and Elenza to continue to keep the information exchanged pursuant to the NDA confidential.

Unbeknownst to Elenza, Alcon had filed provisional patent application No. 61/602,281 with the U.S. Patent & Trademark Office on February 23, 2012, approximately seven months before executing the Clarification Agreement. Alcon's provisional application sought to patent an electro-active IOL. In August 2013, the provisional application was published as U.S. Patent Application No. 13/775,517 ("517 Patent Application"). The current litigation ensued.

Elenza's Complaint

On March 20, 2014, Elenza commenced this action against Alcon. On May 23, 2014, Elenza filed a First Amended Complaint ("Complaint") pursuant to a stipulation among the parties. On June 23, 2014, Alcon filed its Answer.

In Count I of the Complaint, Elenza alleges that Alcon misappropriated Elenza's trade secrets. Specifically, Elenza alleges that Alcon used the confidential information it received pursuant to the NDA to help develop its electro-active IOL. Elenza also alleges that Alcon disclosed Elenza's trade secret information in the '517 Patent Application.

To specify which trade secrets allegedly were misappropriated, Elenza filed a Designation of Trade Secrets ("TSD") on September 18, 2014, and served it upon Alcon. The TSD sets forth eight categories Elenza alleges are its trade secrets.

These trade secret categories include: (1) hermetic sealing of the lens; (2) haptics and injectors; (3) [REDACTED] (4) electronics (including ASICs, [REDACTED] and radio-frequency charging and communication technology); (5) photovoltaic cells; (6) etching processes; (7) batteries; and (8) supply chains.⁴

In Count II of the Complaint, Elenza alleges that Alcon breached the SPA by failing to invest the second tranche of financing after the successful completion of the clinical trials. Elenza also alleges that Alcon breached the NDA's and the Clarification Agreement's confidentiality obligations, and the Clarification Agreement provision that gave Elenza exclusive rights to develop an electro-active IOL resulting from the information obtained under the SPA. In Count III of the Complaint, pled as an alternative to Count II, Elenza alleges that Alcon breached the SPA's implied covenant of good faith and fair dealing when Prejean prevented the JDC from voting on the success of the clinical trials.

In Count IV and Count V of the Complaint, Elenza alleges intentional misrepresentation and affirmative misrepresentation. Elenza contends Alcon made an intentional misrepresentation when Alcon failed to disclose that it developed its own electro-active IOL using Elenza's trade secrets. Elenza also alleges Alcon made an affirmative misrepresentation when Alcon failed to inform Elenza that it

⁴ Elenza concedes that its trade secret claims are evolving, and may include trade secrets not specifically listed in the TSD.

had filed a provisional patent application for an electro-active IOL before the parties negotiated the Clarification Agreement.

On October 10, 2014, Alcon filed this Motion for Judgment on the Pleadings. Oral argument was heard on December 30, 2014.

STANDARD OF REVIEW

Superior Court Civil Rule 12(c) permits the Court to grant judgment on the pleadings “[a]fter the pleadings are closed but within such time as not to delay the trial.”⁵ In circumstances where the moving party seeks to dismiss portions of the plaintiff’s claims via Rule 12(c), the appropriate standard of review is that of a Rule 12(b)(6) motion to dismiss.⁶

Therefore, the Court must determine whether the claimant “may recover under any reasonably conceivable set of circumstances susceptible of proof.”⁷ The Court must accept as true all non-conclusory, well-plead allegations.⁸ Every reasonable factual inference will be drawn in favor of the non-moving party.⁹ If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.¹⁰

⁵ Super Ct. Civ. R. 12(c).

⁶ *Velocity Exp., Inc. v. Office Depot, Inc.*, 2009 WL 406807, at *3 (Del. Super.).

⁷ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

⁸ *Id.*

⁹ *Wilmington Sav. Fund. Soc’y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

¹⁰ *Spence*, 396 A.2d at 968.

ANALYSIS

The parties largely agree that the issue of misappropriation of trade secrets in Count I is controlling. All of the remaining claims are, to some degree, dependent on the survival of Count I. However, the extent of Count II's dependence on Count I is not clear. For purposes of this Motion, the Court will treat Count II as dependent on Count I.

Misappropriation of Trade Secrets

Under Delaware law, a trade secret is any information that “[d]erives independent economic value...from not generally being known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value for its disclosure or use.”¹¹ A trade secret also must be the subject of reasonable efforts to maintain its secrecy.¹²

A misappropriation of trade secrets can occur through the “[d]isclosure or use of a trade secret of another without express or implied consent,” if, “[a]t the time of disclosure or use [the party] knew or had reason to know that his or her knowledge of the trade was...[a]cquired under circumstances giving rise to a duty to maintain its secrecy of limit its use....”¹³

¹¹ 6 Del. C. § 2001(4).

¹² *Id.*

¹³ 6 Del. C. § 2001(2).

To determine if a plaintiff has established a *prima facie* trade secret misappropriation claim under the Delaware Uniform Trade Secrets Act (“DUTSA”), the Court makes the following inquiries:

(1) Does a trade secret exist; *i.e.*, have the statutory elements—commercial utility arising from secrecy and reasonable steps to maintain secrecy—been shown; (2) has the secret been communicated by plaintiff to the defendant; (3) was such communication pursuant to an express or implied understanding that the secrecy of the matter would be respected; and (4) has the secret information been improperly (e.g., in breach of that understanding) used or disclosed by the defendant to the injury of the plaintiff?¹⁴

For purposes of this Motion, the Court’s inquiry will be limited to whether the alleged secret information has been improperly used or disclosed by the defendant.

Parties’ Contentions

Alcon contends that Elenza has failed to plead a claim for misappropriation of trade secrets in Count I of the Complaint. First, Alcon asserts that it did not use Elenza’s alleged trade secrets because Alcon’s electro-active IOL is different than Elenza’s. Alcon argues that its electro-active IOL “automatically accommodates based on the movements of the eye’s ciliary muscle—[which is] a completely different concept using different parts of the eye than Elenza’s method of

¹⁴ *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at *5 (Del. Super.) (citing *Wilmington Trust Co. v. Consistent Asset Mgt. Co.*, 1987 WL 8459, at *3 (Del. Ch.)).

accommodating based on pupil dilation.” Alcon also asserts that Elenza’s “use” claim of misappropriation is not well-plead. Alcon argues that Count I fails to allege specific acts of use that could support an inference that Alcon used Elenza’s trade secrets in developing its electro-active IOL. Alcon argues Elenza plead only conclusory allegations to support the legal conclusion of misappropriation by use.

Second, Alcon asserts that the ‘517 Patent Application on its face does not disclose Elenza’s trade secrets. Alcon argues that at this stage in the proceedings the Court can compare the ‘517 Patent Application to the TSD to make a determination that Alcon did not disclose Elenza’s alleged trade secrets. Alcon also argues that to the extent the ‘517 Patent Application refers to some of Elenza’s alleged trade secrets it is because the trade secrets listed in the TSD are categories of technology that are generally used in the IOL field.

Conversely, Elenza contends that Count I states a valid claim for misappropriation based on Alcon’s alleged use and disclosure of Elenza’s trade secrets. First, Elenza argues that Count I is well-plead because several paragraphs allege that Alcon used Elenza’s trade secrets to develop its electro-active IOL. Elenza also argues that it is reasonable to infer that Alcon used Elenza’s alleged trade secrets given the timing and circumstances of the ‘517 Patent Application.

Second, Elenza claims that Alcon disclosed Elenza’s trade secrets by publishing the ‘517 Patent Application. Elenza argues that at the motion to dismiss

stage, it is improper for the Court to engage in a technical analysis to determine whether the ‘517 Patent Application discloses the technologies discussed in the TSD. Further, Elenza claims that Alcon’s argument—that the ‘517 Patent Application may potentially disclose some of the trade secrets listed in the TSD—essentially concedes there are factual disputes, which makes discovery necessary.

Delaware Pleading Standard

Alcon relies on *Accenture Global Services GMBH v. Guidewire Software Inc.*,¹⁵ in support of the proposition that Elenza’s failure to allege specific acts of use of the trade secrets requires dismissal of the misappropriation claim.

In *Accenture*, the United States District Court for the District of Delaware reviewed a trade secret misappropriation claim under DUTSA.¹⁶ The District Court found that the plaintiff’s complaint presented nothing more than conclusions and a “formulaic recitation of elements of a cause of action.”¹⁷ Upon review of the complaint, the District Court found there were no allegations that the defendant disclosed or used the plaintiff’s secrets in developing its own software.¹⁸ The District Court noted the plaintiff only alleged “that [the defendant] ‘seemed to’ develop its product ‘surprisingly quickly’ in [plaintiff’s] opinion, which is of no

¹⁵ 581 F. Supp. 2d 654 (D. Del. 2008).

¹⁶ *Id.* at 662.

¹⁷ *Id.* at 662-63.

¹⁸ *Id.* at 663.

import.”¹⁹ The District Court ultimately dismissed the plaintiff’s misappropriation claim, holding that the plaintiff was not “entitled to conduct a fishing expedition based upon such bare allegations.”²⁰

The Court finds *Accenture* distinguishable from the current circumstances. The plaintiff in *Accenture* was required to plead facts under the *Twombly* and *Iqbal* “plausibility” standard of the Federal Rules of Civil Procedure.²¹ As explained by the District Court, *Twombly*’s concept of “plausibility,” “calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.”²²

Delaware has not adopted the federal “plausibility” pleading standard.²³ The pleading standard governing a motion to dismiss in Delaware is still “**reasonable conceivability**.”²⁴ The Delaware Supreme Court has explained that Delaware’s “conceivability” standard is more akin to possibility, while the federal “plausibility” standard falls somewhere beyond possibility, but short of probability.²⁵

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 660.

²² *Id.* at 661.

²³ *Cambium Ltd. v. Trilantic Capital Partners III L.P.*, 2012 WL 172844, at *1 (Del.).

²⁴ *Id.*

²⁵ *Cambium*, 2012 WL 172844, at *1 (citing *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, A.3d 531, 537 n. 13).

Distinguishable Federal Patent Case Law

Alcon cites several federal patent cases in support of its argument that at the motion to dismiss stage the Court can determine whether the ‘517 Patent Application discloses Elenza’s trade secrets. Among the cases cited are *Anderson v. Kimberly Clark Corp.*;²⁶ *Cumberland Pharmaceuticals Inc. v. Sagent Agila LLC*;²⁷ *In re Bill of Lading Transmission & Processing System Patent Litigation*;²⁸ and *Desenberg v. Google, Inc.*²⁹ The Court finds each of these decisions to be distinguishable from the instant case.

In *Anderson*, the court dismissed a patent infringement claim using the “ordinary observer” test.³⁰ This test required the court to determine whether “an ordinary observer, familiar with the prior art designs, would be deceived into believing that the accused product is the same as the patented design.”³¹ Here, the Court is not using the “ordinary observer” test to determine if Alcon misappropriated Elenza’s trade secrets. Nor is the Court being asked to review prior art designs to determine deception. The Court only must determine whether it is reasonably conceivable that Alcon misappropriated Elenza’s trade secrets based on Alcon’s development and publication of the ‘517 Patent Application.

²⁶ 570 F. App’x 927 (Fed Cir. 2014) (*per curiam*).

²⁷ 2013 WL 5913742, at *2 (D. Del.).

²⁸ 681 F.3d 1323 (Fed. Cir. 2012).

²⁹ 392 F. App’x 868 (Fed. Cir. 2010).

³⁰ 570 F. App’x at 933-34.

³¹ *Id.* at 933.

In *Cumberland Pharmaceuticals*, the court determined that the language of the plaintiff's patent prevented any claims of infringement against the defendant.³² The court found that the plaintiff's patent was self-limiting, in that the patented formulation specifically stated it was "free from a chelating agent."³³ However, when reviewing the plaintiff's complaint, the court found that the plaintiff admitted that the defendant's product included EDTA, which plaintiff also admitted was a chelating agent.³⁴ Accordingly, the court found it was not reasonable to infer that the defendant's product infringed on the plaintiff's patent because the defendant's product included the chelating agent EDTA.³⁵

Here, unlike the circumstances in *Cumberland Pharmaceuticals*, the '517 Patent Application does not include a self-limiting clause about the technologies used in Alcon's electro-active IOL. The Court is not limited by the terms of the '517 Patent Application in making a reasonable inference of misappropriation, given the proper factual support.

In *Desenberg*, the court was presented with an infringement claim based on a patent for a method of performance.³⁶ The court dismissed the infringement claim because the plaintiff did not sufficiently allege that the defendant had performed every step of the patented method either directly or indirectly, as

³² 2013 WL 5913742, at *2.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 3.

³⁶ 392 F. App'x at 870.

required by law.³⁷ Here, the Court is not presented with a patent for a method of performance. Nor is there a dispute about whether Alcon directly or indirectly misappropriated Elenza's alleged trade secrets.

Interestingly, Alcon presents the *In re Bill of Lading Transmission & Processing System Patent Litigation* case to persuade the Court that it may dispose of Elenza's misappropriation claim at this stage in the proceeding. However, in that case, the court inferred that the defendant was inducing infringement on the patented method.³⁸ The court found that it was not proper to look at the individual facts of the complaint in isolation, without reference to the background of the invention.³⁹ Further, when discussing what facts could support a reasonable inference, the court noted: "[W]hat is necessary is that facts, when considered in their entirety and in context, lead to the common sense conclusion that a patented method is being practiced."⁴⁰

Here, the Court is presented with a similar situation. Elenza urges the Court to look at the circumstances surrounding the '517 Patent Application to make a reasonable inference that Alcon misappropriated Elenza's trade secrets. On the other hand, Alcon essentially argues that the facts alleged in the Complaint, in isolation, do not support a reasonable inference of misappropriation.

³⁷ *Id.* at 871.

³⁸ 681 F.3d at 1343.

³⁹ *Id.*

⁴⁰ *Id.*

Court's Findings

"Use" Claim

For purposes of this Motion to Dismiss, the Court finds that Elenza's Complaint has demonstrated that it is reasonably conceivable that Alcon used Elenza's trade secrets to help develop its electro-active IOL. Count I alleges: (1) in Paragraph 19, "at the time [Alcon] was preventing the vote regarding the success of the clinical study, it had already commenced its own internal development effort to develop and exploit the technologies invented by Elenza..."; (2) in Paragraph 22, "[Alcon] is now actively involved in the exploitation of Elenza's trade secrets and other confidential information..."; and (3) in Paragraph 27, "[w]ithout the express or implied consent of Elenza, [Alcon] continued to use all or a portion of the trade secrets it acquired under the circumstances alleged above."

In addition, right around the time Elenza was concluding its clinical trials is when Prejean began to raise doubts about the criteria the JDC would use to vote on the success of the clinical trials. Soon thereafter, the JDC's scheduled vote was cancelled, and Alcon decided not to invest the second tranche of financing. No more than three months later, in late February 2012, Alcon filed a provisional patent application for an electro-active IOL without informing Elenza.

For purposes of this Motion, the Court finds the timing of Alcon's '517 Patent Application permits the reasonable inference that Alcon misappropriated

Elenza's trade secrets. Count I's allegations of "use" satisfy the liberal notice pleading standards governing this Motion.⁴¹

The timing of the '517 Patent Application also raises genuine issues of material fact about whether Alcon actually believed Elenza's clinical trials were unsuccessful. If Alcon actually believed the testing was successful, another question of fact exists as to whether Prejean's alleged prevention of the JDC's vote was a pretextual excuse to avoid investing the second tranche, and to use Elenza's trade secrets. The Court finds the questions of fact surrounding Elenza's "use" claim make discovery necessary. For purposes of a motion to dismiss, it is a reasonable inference to consider the timing of the patent application.

"Disclosure" Claim

The Court also finds it is reasonably conceivable that Alcon disclosed Elenza's trade secrets in the '517 Patent Application. Alcon fundamentally argues that Alcon did not use Elenza's trade secrets in developing its electro-active IOL. Therefore, Alcon could not have disclosed Elenza's trade secrets in its '517 Patent Application. Alternatively, Alcon argues that if the '517 Patent Application does refer to some of Elenza's trade secrets it is because the alleged trade secrets are categories of technology generally known in the IOL field.

⁴¹ See *Savor*, 812 A.2d at 897.

Considering TSD⁴² along with the Complaint, the Court finds the existence of genuine issues of material fact about whether Alcon disclosed Elenza's trade secrets. These questions of fact include: (1) whether Alcon's microcircuit resembles Elenza's microcircuit; (2) whether Alcon's lens uses the same etching process as Elenza's lens; (3) whether Elenza's [REDACTED] had been disclosed in a prior Alcon patent; (4) whether Alcon's techniques for hermetically sealing the liquid-crystal enclosure are similar to Elenza's sealing technique; (5) whether the haptics in the '517 Patent Application are sufficiently described to constitute a disclosure of Elenza's proprietary haptics and vaulting research; (6) whether Elenza's sealing method the only sealing method that works; and (7) whether [REDACTED] and [REDACTED] are generally used in the specific context of electro-active accommodative IOLs. The question of general *use* is narrower than whether the [REDACTED] and [REDACTED] concept are generally *known* in the industry.

Unlike the circumstances in *Cumberland Pharmaceuticals*, the '517 Patent Application does not include self-limiting language that would allow the Court to make the factual determination at this stage in the proceeding that Alcon did not

⁴² See *SmithKline Beecham Pharm. Co. v. Merck & Co., Inc.*, 766 A.2d 442, 447-48 (Del. 2000) (finding that disclosures of alleged trade secrets are intended to clarify the issues in dispute, as well as ensuring that the defendant is put on notice of the claimed trade secrets early in the litigation); see also *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 755 F. Supp. 635, 636 (D. Del. 1991) (“[Plaintiff’s] Complaint and its recently furnished itemization of trade secrets...are sufficient to meet the notice pleading standard....”).

disclose Elenza's alleged trade secrets. Questions of fact about whether trade secrets are generally known are not properly decided on a motion to dismiss.⁴³

CONCLUSION

At this stage in the litigation, the Court finds that it cannot dismiss Elenza's claim for misappropriation of trade secrets. Viewing the facts alleged in Count I in the light most favorable to Elenza, the Court finds it is reasonably conceivable that Elenza may succeed on its misappropriation claim. There are genuine issues of material fact that require discovery. Because all of the remaining claims are to some extent dependant on Count I, dismissal of any portion of the Complaint is not appropriate.

THEREFORE, Defendants Alcon Laboratories Holding Corporation's, Alcon Research Ltd's, and Novartis AG's Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston

⁴³ See *Savor*, 812 A.2d at 897 (finding that the determination of whether components of a trade secret were well known cannot be resolved on a motion to dismiss); see also *SmithKline*, 766 A.2d at 448 (“Whether the trade secrets were generally known or readily ascertainable...is a question of fact.”).