

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

INCYTE CORPORATION) C.A. No. N15C-09-055 MMJ CCLD
)
Plaintiff,)
)
v.) TRIAL BY JURY OF TWELVE
) DEMANDED
)
FLEXUS BIOSCIENCES, INC.,)
TERRY ROSEN, and JUAN JAEN,) **FILED UNDER SEAL**
)
Defendants.)

Submitted: October 11, 2017

Decided: November 1, 2017

OPINION

Michael P. Kelly, Esq., Andrew S. Dupre, Esq. (Argued), J. Wylie Donald, Esq. (Argued), David A. Schlier, Esq., McCarter & English, LLP, Attorneys for Plaintiff Incyte Corporation

Jonathan A. Patchen, Esq. (Argued), Max B. Twine, Esq., Taylor & Patchen, LLP, Attorneys for Defendants Terry Rosen and Juan Jaen

James F. Hurst, Esq., Patricia A. Carson, Esq. (Argued), Daniel Forchheimer, Esq., Ashley Borom, Esq., Kirkland & Ellis LLP, Attorneys for Defendant Flexus Biosciences, Inc.

Gregory V. Varallo, Esq., C. Malcolm Cochran, IV, Esq., Katharine Lester Mowery, Esq., Richards, Layton & Finger, P.A., Attorneys for All Defendants

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

This is a trade secret misappropriation case. Plaintiff Incyte Corporation (“Incyte”) and Defendant Flexus Biosciences, Inc. (“Flexus”), are competing

biopharmaceutical companies specializing in the development and production of cancer treatment drugs. At the time of the alleged misconduct, Defendant Terry Rosen (“Dr. Rosen”) was Flexus’s CEO, and Defendant Juan Jaen (“Dr. Jaen”), was Flexus’s President and Head of Research and Development.¹ Incyte alleges that the Defendants induced a former Incyte employee, Jordan Fridman (“Dr. Fridman”), to divulge Incyte’s confidential clinical data that showed that the inhibition of the IDO-1 enzyme could form the basis of an effective, safe cancer treatment. Incyte alleges this misappropriation of Incyte’s clinical data directly led to Bristol-Meyers Squibb’s (“BMS”) subsequent \$1.25 billion acquisition of Flexus.

In its original complaint, filed September, 4 2015, Incyte alleged misappropriation of trade secrets, tortious interference with contract, unjust enrichment, conspiracy, and aiding and abetting. By Memorandum Opinion, dated April 19, 2016, this Court dismissed the tortious interference with contract and aiding and abetting claims because of lack of subject matter jurisdiction.² This Court held the two claims arose out of and related directly to a confidentiality agreement between Incyte and Dr. Fridman that contained an arbitration clause.³ The remaining claims did not relate to the confidentiality agreement and were not

¹ The Court will refer to Flexus and Drs. Rosen and Jaen collectively as “Defendants.”

² *Incyte Corp. v. Flexus Biosciences, Inc.*, 2016 WL 1735485, at *10 (Del. Super.).

³ *Id.*

dismissed. The Court also held Dr. Fridman was neither a necessary nor indispensable party to the remaining claims, and allowed the case to proceed in his absence.⁴

That ruling, however, was not the final word on the claims that will be brought to trial. In the two motions now pending before the Court, the Defendants seek dismissal of two more causes of action, while Incyte seeks to supplement its existing claims and add a new one. The Defendants request a partial judgment on the pleadings, arguing that the Delaware Uniform Trade Secrets Act (“DUTSA”),⁵ displaces Incyte’s unjust enrichment and conspiracy claims. In a cross motion to amend its complaint, Incyte requests leave to add to the factual bases for its misappropriation of trade secrets, unjust enrichment, and civil conspiracy claims. It also seeks to add trade libel, a new claim, to its complaint.

ANALYSIS

Defendants’ Motion for Partial Judgment on the Pleadings

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.”⁶ In circumstances where the moving party seeks to dismiss portions of the

⁴ *Id.*

⁵ 6 *Del. C.* §§ 2001–2009.

⁶ *Super. Ct. Civ. R.* 12(c).

plaintiff's claims via Rule 12(c), the appropriate standard of review is that of a Rule 12(b)(6) motion to dismiss.⁷

Therefore, the Court must determine whether the claimant “may recover under any reasonably conceivable set of circumstances susceptible of proof.”⁸ The Court must accept as true all non-conclusory, well-plead allegations.⁹ Every reasonable factual inference will be drawn in favor of the non-moving party.¹⁰ If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.¹¹

Claim Displacement Under DUTSA

DUTSA “displaces conflicting tort, restitutionary and other law of this State providing civil remedies for misappropriation of a trade secret.”¹² DUTSA does not, however, displace contractual or criminal remedies.¹³ DUTSA also does not have any effect on “[o]ther civil remedies that are not based upon misappropriation of a trade secret.”¹⁴ DUTSA displaces common law causes of action arising under “other law” when the claims are “based on the same alleged wrongful conduct as

⁷ *Velocity Exp., Inc. v. Office Depot, Inc.*, 2009 WL 406807, at *3 (Del. Super.).

⁸ *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978).

⁹ *Id.*

¹⁰ *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)).

¹¹ *Spence*, 396 A.2d at 968.

¹² 6 Del. C. § 2007.

¹³ *Id.*

¹⁴ *Id.*

the trade secret claims.”¹⁵

The resolution of Defendants’ motion turns on whether Incyte’s Count III (Unjust Enrichment) and Count IV (Conspiracy) are “based on the same alleged wrongful conduct” as Incyte’s trade secret claims.

Incyte argues that it pleaded its unjust enrichment and conspiracy claims “based in part on conduct different than that which forms the trade secret claim.”¹⁶ However, the original complaint contradicts Incyte’s position. For its unjust enrichment claim, Incyte pleaded facts explicitly concerning trade secret misappropriation. It stated: “Defendants have enriched themselves by acquiring and using Incyte’s trade secrets and confidential information about IDO-1 inhibitors.”¹⁷ Incyte similarly invoked trade secrets as the basis of its conspiracy claim when it pleaded “Defendants and Dr. Fridman agreed to work together to misappropriate, and then use for their own benefit, Incyte’s valuable trade secrets

¹⁵ *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 898 (Del. 2002); *Total Care Physicians, P.A. v. O’Hara*, 798 A.2d 1043, 1057 (Del. Super. 2001); *Beard Research, Inc. v. Kates*, 8 A.3d 573, 602 (Del. Ch. 2010) (finding DUTSA did not displace a breach of fiduciary duty claim when “the same facts [were] not required to establish all the elements” of the trade secret and fiduciary duty claim).

¹⁶ Incyte also contends that the Defendants’ displacement argument is barred because the Court previously ruled on Defendants’ Rule 12 claims. *See Incyte Corp. v. Flexus Biosciences, Inc.*, 2016 WL 1735485, at *10 (Del. Super.). However, that opinion concerned the arbitrability of Incyte’s claims and whether Dr. Fridman was a necessary or indispensable party to the case. That decision has no bearing on the question of DUTSA displacement. Defendants also did not waive the DUTSA argument by failing to raise it in its previous motion. Rule 12 provides that defenses or objections available to a party but omitted from a motion may later be raised in a motion for judgment on the pleadings. *See* Super. Ct. Civ. R. 12(h)(2).

¹⁷ Compl. ¶ 60.

and confidential information in breach of Dr. Fridman’s contractual obligations.”¹⁸

The only specific allegation Incyte plausibly points to as having its basis in something other than trade secret misappropriation is its charge that Defendants worked with Dr. Fridman before he left Incyte. However, the paragraph of the original complaint Incyte cites in support of this contention alleged that “Defendants worked with Dr. Fridman to acquire additional confidential information.”¹⁹ The Court is unable to ascertain how Dr. Fridman’s work product is substantively different from divulging trade secrets. This alleged misconduct does not appear to the Court to differ in any way from that underlying the misappropriation of trade secret claim.

Because the “factual predicate of” Incyte’s unjust enrichment and the civil conspiracy claims “mirror the facts alleged to have constituted a misappropriation of trade secrets,”²⁰ DUTSA displaces both claims as alleged in the original complaint. As a practical matter, unjust enrichment may be considered as part of damages if liability is found, but it does not survive as a standalone claim.

¹⁸ *Id.* ¶ 70. The Court notes that it need not decide whether the complaint’s mention of the misuse of “confidential information” in addition to the misuse of trade secrets saves the claims from displacement—Incyte does not argue that Defendants misappropriated any confidential information that was not a trade secret. The Court notes, however, that a recent Superior Court decision that analyzed *Savor* in depth found that the “specific holding of *Savor*” was that DUTSA “precludes common law claims based on misappropriation of business information even in cases in which the claim does not meet the statutory definition of ‘trade secret’ under the Code.” *Atlantic Medical Specialists, LLC v. Gastroenterology Associates, P.A.*, 2017 WL 1842899, at *15 (Del. Super.).

¹⁹ Compl. ¶ 29.

²⁰ *Total Care Physicians, P.A. v. O’Hara*, 798 A.2d 1043, 1057 (Del. Super. 2001)

Therefore, to the extent Incyte's unjust enrichment and civil conspiracy claims are based upon misappropriation of trade secrets, the motion to dismiss those claims is granted on the basis of DUTSA displacement.

Incyte's Cross-Motion to Amend the Complaint

Standard of Review

Incyte's motion to amend its complaint must overcome two obstacles. First, because this Court issued a Case Management Order that stated "[n]o amendment to the pleadings shall be permitted, except upon leave of Court on a showing of good cause,"²¹ Incyte must show good cause for the Court to permit the amendment. "[G]ood cause is likely to be found when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party."²²

Second, the amendment must be permitted under Rule 15. Under Rule 15(a), "[a] party may amend its pleading after a responsive pleading is served by leave of the Court."²³ "[L]eave shall be freely given when justice so requires," but "should be denied when the proposed amendment would be futile."²⁴ "A motion

²¹ *Incyte Corp. v. Flexus Biosciences, Inc.*, Del. Super., C.A. No. N15C-09-055, Johnston, J. (Nov. 17, 2016) (ORDER).

²² *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006) (citation omitted).

²³ Super. Ct. Civ. R. 15(a).

²⁴ *Id.*; *Clark v. State Farm Mutual Automobile Ins. Co.*, 131 A.3d 806, 811 (Del. 2016).

for leave to amend a complaint is futile where the amended complaint would be subject to dismissal under Rule 12(b)(6) for failure to state a claim.”²⁵ “Motions to amend are normally granted by the Court unless there is serious prejudice to the opposing party.”²⁶

Incyte’s Request to Supplement
its Trade Secret Claim

Incyte seeks to amend its complaint to add further factual bases for its misappropriation of trade secret claim. Specifically, it seeks to include alleged facts regarding Defendants’ access to a “confidential Investigator’s Brochure.”

Incyte has good cause for amending the claim to include these allegations—it did not discover the facts regarding the brochure until April 24, 2017. Given that Defendants raised no explicit arguments in opposition to this amendment, the motion to amend the complaint to include the information related to the confidential brochure is granted.

Incyte’s Request to Supplement
its Unjust Enrichment Claim

Incyte also seeks to amend its complaint to supply further factual bases for its unjust enrichment claim. As discussed above, DUTSA displaces the unjust enrichment claim as alleged in the original complaint insofar as any factual

²⁵ *Clark*, 131 A.3d at 811–812.

²⁶ *Harrison v. Hodgson Vocational Technical High School*, 2007 WL 3112479, at *1 (Del. Super.).

allegations have the same factual basis as the trade secret misappropriation claim. However, Incyte may allege unjust enrichment if its proposed amendments put forth new facts, unrelated to trade secret misappropriation.

Incyte wishes to incorporate allegations that Dr. Fridman worked for Flexus during his employment at Incyte, claiming damages for “the value of the salary paid by Incyte to Dr. Fridman from the time Dr. Fridman began performing work for Flexus and the value of the bonus paid by Incyte after Dr. Fridman began performing work for Flexus.”²⁷

Though DUTSA may not the displace the unjust enrichment claim as alleged in the proposed amended complaint, the Court nonetheless finds that adding this claim would be futile. These “moonlighting” allegations directly relate to the terms of a contract Dr. Fridman signed with Incyte that is subject to mandatory arbitration.

In reference to “Conflicting Employment and Financial Interests,” Dr. Fridman’s contract with Incyte states: “During my employment by the Company, I will devote my best efforts to the interests of the Company. I will inform the Company before: . . . Engaging in other employment, occupation, consulting or other business activity . . . that is in direct competition with the Company.”²⁸ Dr. Fridman’s contract also contains an arbitration clause, which states: “I agree that

²⁷ Opening Br. in Support of Pl.’s Cross-Mot. to Am. Compl. Ex. A, at ¶ 96.

²⁸ Compl. Ex. A, at 4.

any dispute arising out of, related to or resulting from the employment relationship between me and the Company . . . shall be resolved by final and binding arbitration, except where the law specifically prohibits the use of arbitration as a final and binding remedy.”²⁹

This Court previously has dismissed claims in this case that are subject to mandatory arbitration under this contract, because those claims arose “out of and relate[d] directly to the Confidentiality Agreement.”³⁰ The same is true of this claim. Delaware law defines unjust enrichment as “the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.”³¹ Determining whether Dr. Fridman’s alleged moonlighting defied “the fundamental principles of justice,” necessarily would require an examination of his contract with Incyte, which is subject to mandatory arbitration. Permitting this amendment would be futile, because the Court would lack subject matter jurisdiction over the claim.

Consistent with this Court’s previously ruling, the motion to amend the complaint for the purposes of adding allegations relating to the unjust enrichment claim is denied.

²⁹ *Id.* at 5.

³⁰ *Incyte Corp. v. Flexus Biosciences, Inc.*, 2016 WL 1735485, at *10 (Del. Super.).

³¹ *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).

Incyte's Request to Add a Trade Libel Claim

Incyte seeks to amend its complaint to add an entirely new claim—trade libel. Incyte bases this new claim on allegations that Defendants knowingly or recklessly presented false data about Incyte's IDO-1 inhibitor to BMS, inducing BMS to acquire Flexus.

Defendants raise a number of arguments in opposition to the proposed amendment. First, they argue Incyte cannot show good cause for the delay in bringing this claim. Defendants contend that Incyte knew that Flexus was publicly reporting false data about Incyte's IDO inhibitor no later than March of 2015—six months prior to the filing of this lawsuit.

Next, Defendants argue that the amendment would be futile. In an argument mirroring the one they make for a lack of good cause, Defendants assert that the claim is barred by the statute of limitations. Finally, Defendants also argue that Incyte fails to state a claim for trade libel upon which relief can be granted.

The Court finds that Incyte has demonstrated "good cause" for bringing the claim beyond the deadline to amend. Incyte discovered the contents of Flexus's presentation to BMS in December of 2016, a month after this Court's Case Management Order prohibiting amendment without good cause. Even later in the discovery process, Incyte learned the basis of its assertions that Defendants presented that false data with knowledge of its falsity. This is not a case in which

“a party was aware of the facts that would lead it to amend and failed to act”³²

As discussed in more detail in the following statute of limitations analysis, Incyte did not have sufficient information, prior to that December 2016 production, to bring a trade libel claim.

Though no Delaware case law names the statute of limitations applicable to trade libel, libel actions fall within the two-year limitations period prescribed for personal injuries.³³ Under that statute, the two-year limit is calculated “from the date upon which it is claimed that such alleged injuries were sustained.”³⁴ Incyte does not state in its amended complaint when the alleged trade libel occurred, but it does allege the libelous statement induced the February 23, 2015 BMS acquisition of Flexus, meaning the trade libel must have occurred no later than that date. Incyte did not assert its trade libel claim until it filed its August 25, 2017 cross-motion to amend the complaint. The claim is therefore barred unless the statute of limitations was tolled.

Incyte argues the statute of limitations should be tolled under the “discovery rule.”³⁵ For the statute of limitations to be tolled under that rule, Incyte must have suffered an “inherently unknowable” injury and must have been “blamelessly

³² *Paoli v. Stetser*, 2013 WL 2154393, at *2 (D. Del.) (citation omitted).

³³ 10 *Del. C.* § 8119; *DeMoss v. News-Journal Co.*, 408 A.2d 944, 945 (Del. 1979).

³⁴ 10 *Del. C.* § 8119.

³⁵ *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 842 (Del. 2004).

ignorant of the wrongful act and the injury complained of.”³⁶ When a party is blamelessly ignorant, “the statute of limitations begins to run upon the discovery of facts ‘constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery’ of such facts.”³⁷

Incyte admits that Defendants published the allegedly libelous false data to the general public in a February 2015 poster presentation at a tumor immunology symposium. Incyte maintains that it remained blamelessly ignorant of the wrongful act and injury. Incyte alleged it did not know whether Defendants presented BMS with that allegedly libelous data until Defendants’ production of the Flexus presentation to BMS in December 2016.

Defendants counter that internal Incyte emails demonstrate that Incyte had knowledge of the basis of its trade libel claim as early as February 2015. The emails not only establish that Incyte knew the data presented at the symposium was false, but that Incyte had suspicions that Defendants would present the same false data to BMS. On February 23, 2015, one Incyte employee wrote to another, “Did you happen to get a picture of the poster itself? BMS just acquired this asset. So I

³⁶ *Id.*

³⁷ *Id.* (quoting *Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del.1982) (emphasis in original)).

want to get a good idea of what we are looking at when they reach the clinic.”³⁸

However, one Incyte employee’s assumption that Defendants would present BMS with the same data it presented at the symposium is not sufficient to negate Incyte’s blameless ignorance of what actually transpired at the BMS presentation. The “wrongful act” alleged here—knowing presentation of false data to BMS—remained unknown to Incyte until Defendants produced the slide deck from the presentation in December 2016.³⁹

At best, the emails Defendants point to as establishing Incyte’s early knowledge of the basis of its claim only show that Incyte may have been on inquiry notice regarding its trade libel claim. This is because “[i]nquiry notice does not require a plaintiff to have actual knowledge of a wrong, but simply an objective awareness of the facts giving rise to the wrong.”⁴⁰ However, even if the poster presentation and subsequent BMS acquisition of Flexus were “facts

³⁸ Decl. of Katharine L. Mowery in Support of Defendants’ Answering Br. in Opp’n to Incyte’s Mot. for Leave to Am. the Compl. Ex. 20.

³⁹ Delaware has not adopted (or rejected) the “single publication rule,” which starts the statute of limitations clock for a libel claim the first time a statement is published. *See, e.g., Graham v. Today’s Spirit*, 468 A.2d 454, 457 (1983) (“[I]t is the original printing of the defamatory material and not the circulation of it which results in a cause of action.”). Though neither party addressed this, because Defendants published the allegedly libelous statement at issue here at least twice—once during the symposium and once during its confidential BMS presentation—the rule is potentially relevant here. Nonetheless, adopting the rule would likely not change the outcome. A poster presentation at an immunology symposium is not akin to the sort of mass publication other jurisdictions have found necessary to apply the rule. *See id.* (stating that the rule applies to “aggregate communication” such as books, newspapers, movies, and radio and television broadcasts).

⁴⁰ *Van Lake v. Sorin CRM USA, Inc.*, 2013 WL 1087583, at *7 (Del. Super.) (quoting *E.I. DuPont de Nemours & Co. v. Medtronic Vascular, Inc.*, 2013 WL 261415, at *11 (Del. Super.)).

sufficient to put a person of ordinary intelligence and prudence on inquiry,” there is no reason to believe that a “diligent inquiry” by Incyte “would have uncovered facts sufficient to assert” trade libel,⁴¹ because Flexus’s presentation to BMS was confidential. The Court cannot conceive, and Defendants do not suggest, what diligent inquiry Incyte could have pursued that would have revealed the contents of a competitor’s confidential meeting.

Incyte had no actual notice and was not on inquiry notice regarding its trade libel claim more than two years before it brought this claim. The claim is not futile as a result of being barred by the statute of limitations.

The trade libel claim also is not futile because of a failure to state a claim. A claim may not be dismissed under 12(b)(6) “unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief.”⁴² The Court must accept as true all well-pleaded allegations.⁴³

The Defendants’ argument is flawed at the outset, because it faults the amended complaint for not stating a claim for defamation of a public figure. Though it is somewhat unclear what the elements of trade libel are under Delaware law, any reasonable examination of relevant case law reveals it is a tort distinct

⁴¹ *Coleman*, 854 A.2d at 843.

⁴² *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super.1972).

⁴³ *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978).

from defamation.

No Delaware case defines the elements of trade libel. In such situations, Delaware courts look to the Restatement (Second) of Torts for guidance.⁴⁴ The Restatement explains that trade libel is a type of injurious falsehood, a tort that is recognized by Delaware courts.⁴⁵ Neighboring jurisdictions have observed that trade libel, “injurious falsehood,” “commercial disparagement,” “slander of goods,” or “whatever else the fancy of the particular Judge or writer may lead to select” are interchangeable labels for the same cause of action.⁴⁶ As the Pennsylvania Supreme Court explained:

Regardless of the label, the publication of a disparaging statement concerning the business of another is actionable where: (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity.⁴⁷

Defendants argue for dismissal of the trade libel claim because Incyte has not pled a “defamatory” statement that “concern[s] the plaintiff.” The Court finds

⁴⁴ *Ramada Inns, Inc. v. Dow Jones & Co.*, 543 A.2d 313, 328 (Del. Super. 1987) (“Delaware follows the Restatement, Second, Torts in defamation-related lawsuits.”) (citing *Read v. News-Journal Co.*, 474 A.2d 119, 120 (Del. 1984); *Slawik v. News-Journal Co.*, 428 A.2d 15, 15 (Del. 1981)).

⁴⁵ *See id.* (allowing a plaintiff to pursue a cause of action for injurious falsehood); Restatement (Second) of Torts § 626 cmt. a. (1979) (calling trade libel a “particular form of injurious falsehood that involves disparagement of quality”).

⁴⁶ *See Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 246 (Pa. 2002) (quoting *Vaccaro Construction Co. v. A.J. DePace, Inc.*, 349 A.2d 570, 572 (N.J. Super. 1975) (citation omitted)).

⁴⁷ *Id.* (citing Restatement (Second) of Torts § 623(A)).

that Incyte need not do so. Under the elements of trade libel, the statement need only be false, not necessarily defamatory, and the statement must concern “the business of another,” not the plaintiff itself. Incyte has pleaded both of these elements.

Defendants also argue that Incyte failed to plead a sufficient mental state to make its claim. Accepting as true the well-pleaded allegation that Flexus employees knew that the data presented to BMS was false,⁴⁸ Incyte also has satisfied this element for purposes of a *prima facie* claim. Although Defendants’ focus on defamation led it to fail to argue otherwise, Incyte also has successfully pleaded the trade libel elements of pecuniary loss: it claims in its amended complaint that Defendants had reason to know their disparagement of Incyte’s product would “decrease the value of Incyte’s product and . . . advance [BMS]’s entrance into the IDO-1 marketplace . . . to Incyte’s disadvantage.”⁴⁹ The Court holds that Incyte has stated a claim for trade libel.

The only remaining hurdle for this claim is the Court’s determination of whether allowing it at this stage of litigation would result in prejudice to Defendants under Rule 15.⁵⁰ Incyte assured the Court during oral arguments that pursuing this claim would result in minimal additional discovery, only one

⁴⁸ Opening Br. in Support of Pl.’s Cross-Mot. to Am. Compl. Ex. A, at ¶ 106.

⁴⁹ *Id.* at ¶ 109.

⁵⁰ *Harrison v. Hodgson Vocational Technical High School*, 2007 WL 3112479, at *1 (Del. Super.) (“Motions to amend are normally granted by the Court unless there is serious prejudice to the opposing party.”).

deposition, and that it would require no additional documents from the Defendants to pursue the claim. These assurances, combined with the fact that this claim is sufficiently intertwined with the case's other allegations, lead the Court to conclude that Defendants suffer no prejudice from this amendment.

The Court grants the cross-motion to amend the complaint to include a trade libel claim.

Incyte's Request to Supplement its Civil Conspiracy Claim

The facts Incyte seeks to add to its civil conspiracy claim relate to two other claims: unjust enrichment and trade libel. For the same reasons discussed in the above unjust enrichment analysis, the Court denies the amendment so far as it relates to the "moonlighting" allegations. The Court grants the request insofar as it is based on the facts underlying the trade libel claim. As with the trade libel claim, the Court anticipates that this amendment will not require extensive additional discovery and that discovery will be narrowly tailored to the precise allegations in the amendment.

CONCLUSION

Defendants' Motion for Partial Judgment on the Pleadings is hereby **GRANTED**. To the extent the claims are based upon the misappropriation of trade secrets, the unjust enrichment and civil conspiracy claims are displaced by DUTSA. The amended complaint saves the civil conspiracy claim only as it

relates to trade libel. Unjust enrichment remains as a method by which damages may be measured, if liability is found.

Incyte's Cross-Motion to Amend the Complaint is hereby **GRANTED IN PART AND DENIED IN PART**, as follows.

Incyte's Cross-Motion to Amend the Complaint to include facts relating to the "investigator's brochure" to supplement the trade secret misappropriation claim is hereby **GRANTED**. Defendants did not specifically oppose this amendment.

Incyte's Cross-Motion to Amend the Complaint to include facts relating to "moonlighting" allegations to supplement the unjust enrichment claim is hereby **DENIED**. The "moonlighting" allegations are inextricably intertwined with a contract subject to mandatory arbitration, making this amendment futile.

Incyte's Cross-Motion to Amend the Complaint to add a claim for trade libel is hereby **GRANTED**. Incyte showed good cause for the amendment, brought it within the statute of limitations, and properly stated the claim. Allowing this claim does not result in prejudice to Defendants.

Incyte's Cross-Motion to Amend the Complaint to include facts to supplement the civil conspiracy claim is hereby **GRANTED IN PART** and **DENIED IN PART**. The request to amend to include facts related to a conspiracy to commit trade libel is hereby **GRANTED**. The request to amend to include facts related to a conspiracy to commit unjust enrichment is hereby **DENIED**.

IT IS SO ORDERED.



The Honorable Mary M. Johnston