IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SLINGSHOT TECHNOLOGIES, LLC, Plaintiff, v. ACACIA RESEARCH CORP., and ACACIA RESEARCH GROUP, LLC, Defendants.	)))))))))	C.A. No.: N23C-11-166 EMD CCLD

Submitted: March 28, 2024
Decided: June 20, 2024

Upon Defendant Acacia Research Corp. and Acacia Research Group, LLC's Motion for Summary Judgment
DENIED

Thaddeus J. Weaver, Esquire, Dilworth Paxson LLP, Wilmington, Delaware. *Attorneys for Plaintiff Slingshot Technologies, LLC.*

Michael A. Weidinger, Esquire, Pinckney, Weidinger, Urban & Joyce LLC, Wilmington, Delaware, Paul B. Derby, Esquire, Hajir Ardebili, Esquire, Skiermont Derby LLP, Los Angeles, California. *Attorneys for Defendants Acacia Research Corp. and Acacia Research Group, LLC.*

DAVIS, J.

I. INTRODUCTION

This is a civil action assigned to the Complex Commercial Litigation Division of the Court arising out of the sale of a portfolio of patents. Plaintiff Slingshot Technologies, LLC ("Slingshot" or "Plaintiff") asserts various claims against Defendants Acacia Research Corporation ("ARC") and Acacia Research Group, LLC ("ARG" and, together with ARC, "Acacia" or "Defendants") concerning Acacia's 2018 purchase of the portfolio that Slingshot had also considered acquiring.[1]

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[1] *See, e.g.*, Order Addressing Motion to Dismiss Filed by Acacia Research Corp. and Acacia Research Group, LLC, 2021 WL 1224828, at *1 (hereinafter "Acacia MTD Order") (Del. Ch. Mar. 30, 2021).

Slingshot filed its initial complaint in the Court of Chancery on September 6, 2019.[2] After multiple decisions narrowing the issues and parties, the case was transferred here in September 2023. After the transfer, Slingshot filed a modified Complaint the following month.[3] Slingshot now states four counts against Acacia: misappropriation of trade secrets; unfair competition; tortious interference with prospective business relations and/or economic advantage; and tortious interference with contract.[4]

Presently before the Court is Acacia's Motion for Summary Judgment (the "Motion") on all counts, initially filed in the Court of Chancery on November 18, 2023.[5] Slingshot opposed the Motion.[6]

The Court heard argument from the parties on the Motion on March 28, 2024. After hearing arguments, the Court took the Motion under advisement. For the reasons set forth below, the Court **DENIES** the Motion.

II. RELEVANT FACTS

A. THE PARTIES AND RELEVANT FORMER PARTIES

Slingshot is a Delaware limited liability company with its principal place of business in Maryland.[7] Slingshot acquires and monetizes patents.[8]

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[2] Compl. and Demand for Jury Trial, D.I. No. 1 (hereinafter "Compl.").
[3] Compl.
[4] *See generally id*.
[5] Opening Brief of Defendants Acacia Research Corp. and Acacia Research Group, LLC in Support of Their Motion for Summary Judgment (hereinafter "Acacia MSJ") (D.I. No. 8, Ex. C). Although the Superior Court Complaint reflects rulings in the Court of Chancery removing certain parties and causes of action (see Procedural History, below), the Parties did not similarly modify the instant Motion for Summary Judgment, Opposition, and Reply briefs. Because these documents were filed before Transpacific IP Group, Ltd.'s claims were resolved, they refer to Transpacific as a Defendant and include the now-resolved claim for Tortious Interference with Contract—Transpacific Agreements.
[6] Plaintiff Slingshot Technologies, LLC's Answering Brief in Opposition to Opening Brief of Defendants Acacia Research Corp. and Acacia Research Group, LLC in Support of Their Motion for Summary Judgment (hereinafter "Slingshot Opp'n to MSJ) at 5-6 (D.I. No. 13, Ex. 1).
[7] Compl. ¶ 16.
[8] Acacia MTD Order, 2021 WL 1224828, at *1.

ARC is a Delaware corporation with its principal place of business in California.[9] ARC and Slingshot are competitors.[10] ARG is a Texas limited liability company and a wholly owned subsidiary of ARC.[11] Former defendant Monarch Networking Solutions LLC ("Monarch") is a California limited liability company and a wholly owned subsidiary of ARG.[12]

Former defendant Katherine Wolanyk is a member of ARC's board of directors.[13] In addition, Ms. Wolanyk is Managing Director and head of intellectual property at non-party Burford Capital LLC ("Burford").[14] Buford is a litigation finance company.[15]

Transpacific IP Group, Ltd. ("Transpacific") is a Cayman Islands company with its principal place of business in Singapore.[16] Transpacific is an intellectual property strategy and advising company.[17] The Court of Chancery resolved all claims against Transpacific.[18]

B. Factual Background

The disputes here arise out of ARG's April 2019 purchase of a portfolio of patents from Transpacific. Transpacific "manages, markets, licenses and liquidates" intellectual property portfolios "in order to generate economic return."[19] Transpacific acquired one such portfolio

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[9] Answer and Additional Defenses of Defs. Acacia Research Corp. and Acacia Research Group, LLC to Second Amended Verified Compl. of Plaintiff Slingshot Technologies, LLC (hereinafter "Acacia Answer"), ¶ 17 (D.I. No. 8, Ex. A).
[10] Acacia MTD Order, 2021 WL 1224828, at *1.
[11] *Id.*
[12] 2021 WL 979539, at *1 (Del. Ch. Mar. 15, 2021). Order Dismissing Def. Monarch Networking Solutions LLC (hereinafter "Monarch Dismissal"), *Slingshot Techs., LLC v. Acacia Research Group, et al.*, 2021 WL 979539, at *1 (Del Ch. Mar. 15, 2021).
[13] Order Dismissing Defendant Katherine Wolanyk (hereinafter "Wolanyk Dismissal), *Slingshot Techs., LLC v. Acacia Research Group, et al.*, 2021 WL 979538, at *1 (Del. Ch. Mar. 15, 2021).
[14] *Id*.
[15] *Id*.
[16] Def. Transpacific IP Group Limited's Answer to the Second Am. Verified Compl. for Equitable and Monetary Relief (hereinafter "Transpacific Answer"), *Slingshot Techs., LLC v. Acacia Research Group, et al.*, C.A. No. 2019-0722-NAC, D.I. No. 106, Trans. # 66581011 (Del. Ch. May 7, 2021).
[17] Compl. ¶ 27.
[18] *See* Procedural History, below.
[19] Acacia MSJ at 9.

from Orange, a French telecommunications company, in 2017 (the "Orange Patent Portfolio", "Orange Portfolio", or "Portfolio").[20]

According to Acacia, Transpacific had purchased the Portfolio in anticipation of reselling it to a known buyer.[21] Transpacific did not close that transaction.[22] Afterwards, Transpacific "prepare[d] a treasure trove of materials that demonstrated the potential value of the patents" in order to "enhance the Portfolio's marketability" to other buyers.[23] Transpacific created a data room for potential buyers with "a 'silver platter' package of claim charts, technical analysis, evidence of use, market information, potential infringers, and other documentation . . . ."[24]

Slingshot was one potential buyer.[25] Slingshot and Transpacific began discussing the purchase of the Portfolio in March 2018.[26] At that time Transpacific provided Slingshot with access to its data room.[27]

In September 2018, Slingshot and Transpacific entered into an option agreement (the "Option Agreement" or "Transpacific Purchase Agreement") that gave Slingshot the exclusive right to acquire the Portfolio.[28] The Option Agreement included a 45-day window in which Slingshot could purchase the Portfolio for $3.5 million (the "Exclusive Option" or "Exclusive Option Period").[29] Because the Option Agreement contemplated that Slingshot would introduce potential funders to the Portfolio during this time, the Option Agreement also restricted

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[20] *Id.* at 11; *see also About Orange*, https://www.orange.com/en/group/overview/orange-group (last visited Mar. 22, 2024).
[21] *Id.* at 11-12.
[22] *Id.*
[23] *Id.* at 12.
[24] *Id.*
[25] *Id.* at 13.
[26] *Id.*
[27] *Id.*
[28] Acacia MTD Order, 2021 WL 1224828, at *1. *See also* Acacia MSJ at 13-14 (quoting Second Amended Compl.) ("The Option Agreement permitted 'Slingshot [to] introduce the Orange Patent Portfolio to potential funding sources and use its experience and know-how to generate interest in the patent portfolio from those funders.'").
[29] *Id.*

Transpacific from selling the Portfolio to any funding source introduced to Transpacific by Slingshot (the "Prohibited Transaction Provision").[30] This restriction would run for a period of one year from the expiration of the Exclusive Option Period, and would survive the termination of the Option Agreement.[31] The Option Agreement also contained a confidentiality provision that would survive its termination.[32]

The initial Exclusive Option was extended multiple times "by mutual agreement and after Slingshot paid consideration for these extensions, in the interest of reaching a closing on the sale of the Orange Patent Portfolio."[33] The Exclusive Option Period ultimately expired on January 30, 2019.[34]

In September 2018, Slingshot informed its attorneys at Kasowitz Benson Torres LLP ("Kasowitz") about the Portfolio, and Kasowitz conducted due diligence "to assess the value of the Portfolio, devise a litigation and licensing budget, prepare a strategy for monetizing the Portfolio, and analyze the potential damages from the strategy."[35] Kasowitz created pitch materials for a patent infringement assertion entity it had identified, and these pitch materials are among the data Slingshot alleges are trade secrets.[36]

Slingshot consulted with potential funding sources during the Exclusive Option Period.[37] Slingshot consulted with Burford as one of these potential funding sources.[38] Slingshot

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[30] *Id.*
[31] *Id.*
[32] *See id.*, quoting Option Agreement § 10.1 ("The parties agreed to 'keep the terms and existence of [the Option] Agreement and the identities of the parties [t]hereto confidential.'").
[33] Compl. ¶ 32.
[34] Acacia MTD Order, 2021 WL 1224828, at *2.
[35] Slingshot Opp'n to MSJ at 5-6.
[36] *Id.*; Acacia MTD Order, 2021 WL 1224828 at *1.
[37] Acacia MTD Order, 2021 WL 1224828 at *1.
[38] *Id.*

introduced Transpacific to Burford as part of its due diligence process, thereby bringing Burford within the Prohibited Transaction Provision.[39]

In October 2018, Slingshot and Burford entered into two non-disclosure agreements (the "Burford NDAs").[40] Ms. Wolanyk was "involved in the preparation of both Burford NDAs and signed one of them."[41]

The Burford NDAs prohibit the disclosure of confidential information for the term of the agreement and for a seven-year period following.[42] The Burford NDAs state that Burford "shall not for any reason disclose, reveal, report, publish, transfer or make available, directly or indirectly, to any person or entity . . . nor use for any purpose . . . any Confidential Information."[43] "Confidential Information" is defined in the NDAs as including "non-public, confidential, or proprietary information relating to subject matter, such as business plans, business or financial information, research, and technical data."[44]

After entering into the Burford NDAs, Slingshot shared the Kasowitz pitch materials with Burford.[45] Ms. Wolanyk had access to these materials.[46] Slingshot claims that "Burford also requested and received strategic information from Slingshot concerning Slingshot's deal terms for the Orange Patent Portfolio, including the purchase price, the exclusivity agreement, the date(s) on which the Exclusive Option would expire, valuation of the Orange Patent Portfolio, litigation team, litigation and licensing budgets, and enforcement strategy."[47]

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[39] *Id.*
[40] Acacia MSJ at 14-15.
[41] Acacia MTD Order, 2021 WL 1224828, at *1.
[42] Compl. ¶ 48.
[43] *Id.* (internal citations omitted).
[44] *Id.*
[45] Acacia MTD Order, 2021 WL 1224828, at *2; Acacia MSJ at 15; Compl. ¶ 49.
[46] Acacia MTD Order, 2021 WL 1224828, at *2. Slingshot states that it provided Ms. Wolanyk and Burford Vice President Emily Hostage ("Hostage") with "direct access" to its outside counsel. (Compl. ¶¶ 44, 50). Slingshot states that Ms. Hostage "reports to" Ms. Wolanyk. *Id.* ¶ 50.
[47] Compl. ¶ 50.

By mid-December 2018, Slingshot "concluded that it would not reach an agreement with Burford" but continued to pursue other funding sources.[48]

On December 7, 2018, Slingshot and Transpacific entered into an Intellectual Property Services Agreement (the "Transpacific IP Services Agreement").[49] The Transpacific IP Services Agreement governs the exchange of information between Slingshot and Transpacific.[50]

A confidentiality provision in the Agreement stated, in part, that the parties "will at all times during the existence of this Agreement and after its termination . . . keep all information disclosed whether orally or in writing, and whether or not such information is expressly stated to be confidential or marked as such . . . confidential . . . ."[51] In the agreement, Transpacific also "acknowledge[d] and agree[d] that, as between [Transpacific] and [Slingshot], all work product delivered to [Slingshot] pursuant to this Agreement, is the sole property of [Slingshot]."[52] The Transpacific IP Services Agreement was terminated by Transpacific on July 21, 2019.[53]

On January 1, 2019, Transpacific extended the Exclusive Option through January 30, 2019 for what would be the final time.[54]

On January 17, 2019, ARC announced that Ms. Wolanyk had joined its board of directors.[55] Slingshot describes this development as:

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[48] Acacia MTD Order, 2021 WL 1224828, at *2; *See also* Compl. ¶ 34 (The Transpacific IP Services Agreement "contemplated Transpacific performing intellectual property services for Slingshot in anticipation of Slingshot closing on the acquisition of the Orange Patent Portfolio [and] recognized Slingshot's interest in the Orange Patent Portfolio, expressly stating that Slingshot has 'interests in certain patents, patent applications and technologies with respect to the Orange IP Routers Portfolio.'").

[49] Acacia MTD Order, 2021 WL 1224828, at *2; Order Addressing Mot. to Dismiss Filed by Transpacific IP Group, Ltd. (hereinafter "Transpacific MTD Order"), *Slingshot Techs., LLC v. Acacia Research Group, et al.*, 2021 WL 1213539, at *2 (Del. Ch. Mar. 29, 2021).

[50] *Id*.

[51] Transpacific MTD Order, 2021 WL 1213539, at *2.

[52] *Id*. See also Compl. ¶ 38 (Slingshot claims the work product consisted of various reports and analyses of the Orange Patent Portfolio relating to "portfolio work, maintenance, information on infringers and licensees, opinions on the business climate in Asia and other parts of the world.").

[53] Compl. ¶ 39.

[54] Acacia MTD Order, 2021 WL 1224828, at *2.

[55] *Id.*

> [P]art of months' long plans to reconstitute ARC's Board of Directors to strengthen Acacia's IP business, including through strategic acquisition of patents. ARC is the sole member and owner of ARG and ARG is the primary operating subsidiary of ARC. In Wolanyk's role as an ARC Board Member, Wolanyk acts on behalf of both ARC and ARG and makes decisions for and directs the actions of ARG, including ARG's acquisition of patents and management of patent campaigns.[56]

Conversely, Acacia states that Ms. Wolanyk "joined ARC's Board as an outside, independent director of ARC. Ms. Wolanyk has no managerial or executive duties at ARC of its operating subsidiaries."[57]

On February 24, 2019, Transpacific told Slingshot it was talking with other potential buyers, but did not identify Acacia.[58] On February 28, 2019, Acacia entered into an agreement with Transpacific to acquire the Portfolio.[59] The acquisition closed on April 3, 2019.[60] Slingshot claims Transpacific informed Slingshot of this for the first time on April 4, 2019.[61]

Slingshot describes the months leading up to Acacia's acquisition of the Portfolio:

> Burford continued to reach out to Slingshot about the Orange Patent Portfolio, including by asking questions about the Transpacific Agreement and the expiration of Slingshot's Exclusive Option. Burford and Slingshot continued to exchange information under active Burford NDAs and under Burford's and Wolanyk's long-standing relationship of trust with the Slingshot Parties. Still, no one from Burford alerted Slingshot to Wolanyk's new Board of Director role at Acacia, despite the obvious conflicts of interest and concerns about Wolanyk's knowledge of and access to Slingshot's Trade Secrets.[62]

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[56] Compl. ¶ 62.
[57] Acacia MSJ at 10-11; *see also id*. (Acacia further argues that "both ARC and Ms. Wolanyk understood, as a precondition for her joining the Board, that Ms. Wolanyk's priority would be her responsibilities at Burford and that she would have no day-to-day duties at Acacia.").
[58] Acacia MTD Order, 2021 WL 1224828, at *2.
[59] *Id.*
[60] *Id. at* *3.
[61] Compl. ¶ 92 ("The closing occurred directly following Slingshot's communications with Burford in which Slingshot's counsel communicated to Burford that Slingshot was prepared to close on the deal.").
[62] *Id*. ¶ 88.

In October 2019 Acacia created Monarch as a patent assertion entity.[63] Acacia assigned four of the patents from the Portfolio to Monarch and Monarch filed an infringement lawsuit to enforce those patents in January 2020 (the "Monarch Action").[64]

C. Procedural History

1. Court of Chancery

Slingshot filed its initial complaint in the Court of Chancery on September 6, 2019, naming Acacia along with Transpacific and Ms. Wolanyk as defendants.[65] All defendants moved to dismiss.[66] Slingshot filed an Amended Complaint in December 2019,[67] followed again by defendants' motions to dismiss.[68] Slingshot filed its Second Amended Complaint on April 9, 2020, naming Monarch as an additional defendant.[69] All defendants again moved to dismiss.[70]

The Court of Chancery dismissed Ms. Wolanyk as a defendant due to lack of subject matter jurisdiction on March 15, 2021.[71] Also on that date, the Court of Chancery dismissed Monarch for lack of personal jurisdiction.[72] The Court of Chancery resolved Slingshot's claims

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[63] Monarch Dismissal, 2021 WL 979539, at *2; Compl. ¶ 63.
[64] *Id*.
[65] Acacia. MSJ at 4; *see also Slingshot Techs., LLC v. Acacia Research Group, et al.*, C.A. No. 2019-0722-NAC, D.I. No. 1, Trans. # 64175205 (Del. Ch. Sept. 6, 2019).
[66] *Slingshot Techs.*, C.A. No. 2019-0722-NAC, D.I. Nos. 20, 27, Trans. ## 64368365, 64370695 (Del. Ch. Oct. 30, 2019).
[67] *Slingshot Techs.*, C.A. No. 2019-0722-NAC, D.I. No. 34, Trans. # 64484380 (Del. Ch. Dec. 3, 2019).
[68] *Slingshot Techs.*, C.A. No. 2019-0722-NAC, D.I. Nos. 36, 37, Trans. ## 64533346, 64534490 (Del. Ch. Dec. 17, 2019).
[69] Acacia MSJ at 4-5; *see also Slingshot Techs.,* C.A. No. 2019-0722-NAC, D.I. No. 56, Trans. # 65569774 (Del. Ch. Apr. 9, 2020).
[70] *Slingshot Techs.*, C.A. No. 2019-0722-NAC, D.I. Nos. 57, 61, Trans. ## 65598501, 65599172 (Del. Ch. Apr. 24, 2020).
[71] Wolanyk Dismissal, 2021 WL 979538 (holding that the parties' mandatory arbitration clause controlled and was not otherwise waived by Ms. Wolanyk).
[72] Monarch Dismissal, 2021 WL 979539 (declining to impute parent company's general jurisdiction onto subsidiary alter ego without sufficient Delaware-directed actions by the subsidiary).

against Transpacific in Transpacific's favor in decisions issued on March 29, 2021,[73] and July 27, 2023.[74]

In the July 27, 2023 decision, the Court of Chancery also addressed what is now the instant Motion for Summary Judgment—i.e., the Motion defined above—initially filed by Acacia in the Court of Chancery on November 18, 2022.[75] The Court of Chancery deferred its decision on the Motion pending supplemental briefing on the "threshold" issue of jurisdiction.[76] The Parties' submitted Joint Briefing Regarding Subject Matter Jurisdiction on September 14, 2023, in which they "agree[d] that transfer to Superior Court would be appropriate."[77]

2. Superior Court

The parties had the case transferred to this Court pursuant to 10 *Del. C.* § 1902 on Sept. 21, 2023.[78] The Court subsequently designated the case as a Complex Commercial Litigation Division case.[79]

Slingshot filed its Complaint on November 20, 2023.[80] The Superior Court Complaint modifies Slingshot's Second Amended Complaint to reflect rulings in the Court of Chancery removing certain defendants and causes of action.[81]

The operative Complaint now alleges the following four counts against Acacia:

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[73] Transpacific MTD Order, 2021 WL 1213539 (Del. Ch. Mar. 29, 2021) (dismissing two breach of contract claims against Transpacific and narrowing the remaining claim for breach of the implied covenant of good faith and fair dealing).
[74] Order Regarding Mots. for Summ. J., *Slingshot Techs., LLC v. Acacia Research Group, et al.*, 2023 WL 4828204 (Del. Ch. July 27, 2023) (granting Transpacific's MSJ on Acacia's only remaining claim for breach of the implied covenant of good faith and fair dealing).
[75] Re-filed on the Superior Court docket as D.I. No. 8, Ex. C.
[76] *See, e.g.*, The Parties' Joint Briefing Regarding Subject Matter Jurisdiction at 1 (hereinafter "Joint SMJ Brief"), *Slingshot Techs., LLC v. Acacia Research Group, et al.*, C.A. No. 2019-0722-NAC, D.I. No. 192, Trans. # 70864920 (Sept. 14, 2023).
[77] *Id*. at 6.
[78] Order Transferring Action to the Superior Court of the State of Delaware, *Slingshot Techs., LLC v. Acacia Research Group, et al.*, C.A. No. 2019-0722-NAC, D.I. No. 194, Trans. # 70918732 (Del. Ch. Sept. 21, 2023).
[79] D.I. No. 3.
[80] D.I. No. 1.
[81] Letter to Judge Davis from Attorney for Plaintiff, Nov. 28, 2023 (D.I. No. 2).

- Count I: Violation of the Maryland Uniform Trade Secrets Act ("MUTSA") (i.e. Misappropriation of Trade Secrets).[82]

- Count II: Unfair Competition.[83]

- Count III: Intentional [Tortious] Interference with Prospective Business Relations and/or Economic Advantage.[84]

- Count IV: Tortious Interference with Contract—Burford NDAs.[85]

III. PARTIES' CONTENTIONS

A. ACACIA

Acacia argues that it is entitled to summary judgment on all counts.[86] Acacia states that Slingshot's claim for misappropriation of trade secrets in violation of the MUTSA (Count I) fails as a matter of law because Slingshot cannot demonstrate "that the information at issue qualifies as a trade secret" or "that Acacia actually misappropriated that information" or has threatened to do so.[87]

Acacia asserts that Slingshot's remaining tort claims are preempted by the MUTSA because the gravamen of those claims is misappropriation of trade secrets.[88]

Alternatively, Acacia contends that even if the claims were not preempted, each would nevertheless "fail on their own merits."[89] Acacia maintains that Slingshot cannot support its claim for unfair competition (Count II) because "there is simply no evidence" that Acacia used

[82] Compl. ¶¶ 117-33 ("Count II" in all Court of Chancery documents). MUTSA is codified at *Md. Code. Ann., Com. Law* §§ 11–1201 *et seq.*
[83] *Id*. ¶¶ 134-38 ("Count III" in all Court of Chancery documents).
[84] *Id*. ¶¶ 139-48 ("Count IV" in all Court of Chancery documents; also referred to as "Tortious Interference with Prospective Business Relations and/or Economic Advantage", and "Tortious Interference with Prospective Economic Relations").
[85] *Id*. ¶¶ 149-159 ("Count IX" in all Court of Chancery documents).
[86] Acacia MSJ at 8.
[87] *Id.* at 30.
[88] *Id.* at 53.
[89] *Id.*

unfair methods to gain a competitive advantage over Slingshot.[90] Acacia argues that Slingshot has failed to produce evidence of the tortious intent and wrongful conduct required to support a claim for tortious interference with prospective business relations and/or economic advantage (Count III).[91] Finally, Acacia avers Slingshot's inability to demonstrate Acacia's tortious intent also defeats Slingshot's claim for tortious interference with contract—Burford NDAs (Count IV).[92]

B. SLINGSHOT

Slingshot responds that each of its claims should survive summary judgment because all involve disputed issues of material fact.[93]

Additionally, Slingshot contends that its claims under Counts II, III, and IV are not preempted by the MUTSA because "they are not solely based on misappropriation of trade secrets."[94] Slingshot contends that these claims also "rely upon allegations that Acacia acted on Slingshot's confidential information as divulged or used by Wolanyk, and not necessarily trade secrets."[95] Therefore, Slingshot argues that the claims are independently actionable.[96]

IV. CHOICE OF LAW AND STANDARD OF REVIEW

A. DELAWARE PROCEDURAL LAW: SUMMARY JUDGMENT STANDARD

"As a general rule, the law of the forum governs procedural matters."[97] Because standards of review are traditionally classified as procedural, Delaware procedural law applies.[98]

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[90] *Id.* at 54.
[91] *Id.* (citing *K & K Mgmt. v. Lee*, 557 A.2d 965, 973-81 (Md. 2003)).
[92] *Id.* at 55 (citing *Macklin v. Robert Logan Assocs.*, 639 A.2d 112, 117 (Md. 1994)).
[93] *See, e.g.*, Slingshot Opp'n to MSJ at 47, 49, 53, 56, 60, 64, 66.
[94] *Id.* at 58.
[95] *Id.* at 59.
[96] *Id.*
[97] *Chaplake Holdings, LTD v. Chrysler Corp.*, 766 A.2d 1, 5 (Del. 2001).
[98] *US Dominion, Inc. v. Fox News Network, LLC*, 2023 WL 1067961 (Del. Super. Jan. 27, 2023).

The standard of review on a motion for summary judgment in Delaware is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[99] Summary judgment will be granted if, after viewing the record in a light most favorable to a nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[100] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[101] A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[102]

The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.[103] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate factfinder.[104]

B. MARYLAND SUBSTANTIVE LAW

The Parties agree that the substantive law of Maryland applies to all claims at issue.[105] After a quick analysis, the Court agrees that Maryland law applies.

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[99] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[100] *Id.*
[101] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244 at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").
[102] *Gateway Estates, Inc. v. New Castle County*, 2015 WL 13145613, at *13 (Del. Super. Sept. 29, 2015) (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 243 (1986)).
[103] *See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).
[104] *See Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).
[105] *See* Acacia MSJ at 28-29; Slingshot Opp'n to MSJ at 41-42.

Delaware courts apply the "most significant relationship" test from the Second Restatement of Conflicts to determine choice of law in tort claims.[106] Under Section 145(1), "the law of the state with the most significant relationship to the occurrence and the parties under the principles stated in [section] 6 is the governing law."[107] Section 6 lists seven relevant factors:

(1) the needs of the interstate and international systems,
(2) the relevant policies of the forum,
(3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(4) the protection of justified expectations,
(5) the basic policies underlying the particular field of law,
(6) certainty, predictability and uniformity of result, and
(7) ease in the determination and application of the law to be applied.[108]

In applying these factors, four contacts should be considered:

(1) the place where the injury occurred,
(2) the place where the conduct causing the injury occurred,
(3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(4) the place where the relationship, if any, between the parties is centered.[109]

Ultimately, "the law of the state where the injury occurred should apply 'unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in [section] 6 to the occurrence and the parties.'"[110]

Slingshot argues that the location of the injury is Maryland because, as Slingshot's principal place of business, this is where Slingshot "felt the financial effects of Acacia's tortious conduct".[111] Therefore, Maryland substantive law applies.

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[106] *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 457 (Del. 2010).
[107] *Id*.
[108] *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)).
[109] *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2)).
[110] *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146).
[111] Slingshot Opp'n at 41 (citing *Eureka Res., LLC v. Resources-Appalachia, LLC*, 62 A.3d 1233, 1238 (Del. Super. 2012)) ("[T]he effect of [a] loss, which is pecuniary in its nature, will normally be felt most severely at the plaintiff's headquarters or principal place of business.").

Although Acacia argues that either California law or Maryland law might apply, those laws are "fundamentally the same, and thus the choice of law analysis appears to be moot."[112] Further, Acacia allows that, as Slingshot's principal place of business (and therefore the site of Slingshot's claimed financial injury), Maryland law would apply to the extent there is a conflict.[113]

V. DISCUSSION

A. COUNT I: MISAPPROPRIATION OF TRADE SECRETS.

In order to prevail on a claim for misappropriation of trade secrets in violation of the MUTSA, a plaintiff must show "(1) the materials at issue qualify for protection as a trade secret and (2) [d]efendants misappropriated the materials."[114]

1. The information at issue may qualify as protectable trade secrets.

A "trade secret" is defined under the MUTSA as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) 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; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[115]

In assessing independent economic value, Maryland courts place "particular importance" on "whether the information a business seeks to protect is readily ascertainable from the marketplace."[116] Further, "[c]ourts have long recognized that a trade secret can exist in a

[112] *Id.* (citing *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *8 & *id.* n.116 (Del. Ch. Jan. 29, 2010) (internal citation omitted) ("When a choice of law analysis does not impact the outcome of the court's decision, no choice of law analysis need be made.").
[113] *Id.* at 29 (citing, *e.g.*, *UbiquiTel Inc. v. Sprint Corp*, 2005 WL 3533697, at *5 (Del. Ch. Dec. 19, 2005).
[114] *Brightview Grp., LP v. Teeters*, 2021 WL 1238501, at *4 (D. Md. Mar. 29, 2021).
[115] MUTSA § 11-1201(e).
[116] *Albert S. Smyth Co. v. Motes*, 2018 WL 3635024, at *5 (D. Md. July 31, 2018).

combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret."[117]

Delaware courts, interpreting an identical definition of "trade secrets" under the Delaware Uniform Trade Secrets Act ("DUTSA"),[118] have held that "[t]rade secrets have actual or potential independent economic value if a competitor cannot produce a comparable product without a similar expenditure of time and money."[119] This definition "highlights the notion of competitive advantage and focuses on whether a plaintiff would lose value and market share if a competitor could enter the market without substantial development expense."[120]

Acacia contends that "the pitch materials that [Slingshot] claims are its trade secrets either do not qualify as such under the law or belonged to Transpacific."[121] Acacia states that the pitch materials "were either based on (or identical to) Transpacific's materials or based on publicly available information."[122]

Acacia notes that Transpacific allowed both Slingshot and Acacia to access Transpacific's data rooms, which "contained a treasure trove of diligence materials, including but not limited to claim charts, market information, and potential infringers."[123] Acacia argues that this information provided ARG with a "head start" and that this, along with "the tremendous

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[117] *AirFacts, Inc. v. de Amezaga*, 909 F.3d 84, 96 (4th Cir. 2018) (quoting *Imperial Chem. Indus. v. Nat'l Distillers & Chem. Corp.*, 342 F.2d 737, 742 (2d Cir. 1965) (collecting cases)); *see also Comprehensive Techs. Int'l, Inc. v. Software Artisans, Inc.,* 3 F.3d 730, 736 (4th Cir. 1993) ("[A]lthough a trade secret cannot subsist in information in the public domain, it can subsist in a combination of such information, as long as the combination is itself secret.").
[118] 6 *Del. C.* § 2001(4).
[119] *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *5 (Del. Ch. Apr. 5, 2005), *aff'd*, 913 A.2d 569 (Del. 2006) (internal citation omitted); *accord Heron Bay Prop. Owners Ass'n, Inc. v. CooterSunrise*, LLC, 2013 WL 3871432, at *16 (Del. Ch. June 27, 2013).
[120] *Id.*
[121] Acacia MSJ at 45.
[122] *Id.*
[123] *Id.* at 46 (noting that "Slingshot's principal Keith Machen conceded that Transpacific shared the same sets of materials with both Slingshot and Acacia." (internal citations omitted).

amount of work that ARG's diligence team performed in the time before closing" establishes that "there is no credible basis to conclude that ARG used Slingshot's materials to vet the Portfolio."[124]

Acacia maintains that ARG did not use Slingshot's "purported trade secrets" in the Monarch Action.[125] Acacia specifically notes the differences between the Monarch Action and Slingshot's materials with regard to priority patents;[126] claim charts;[127] potential defendants;[128] damages analysis; and venue selection.[129]

Slingshot disagrees and responds that Acacia's argument "seeks to break Slingshot's trade secrets into component parts" and therefore "ignores Slingshot's claim to the combination of information and analysis provided to [Ms.] Wolanyk, which encompasses Slingshot's playbook for pursuing the Orange Portfolio."[130] Slingshot asserts that the "compilation of information and related analyses of that information" are what constitute protectable trade secrets.[131]

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[124] Acacia Reply ISO MSJ at 28.
[125] Acacia MSJ at 43.
[126] "[T]he four patents at issue in the Monarch action were among the nine that Transpacific had advised ARG were Transpacific and Susman Godfrey's 'top picks' . . . .". *Id.* at 46.
[127] "Transpacific's claim charts were among the materials shared with both Slingshot and Acacia." Acacia MSJ at 47 (quoting Mr. Machen that " . . . the two sets of materials 'appear similar . . . The diagrams do indeed look similar' and that portions of the material were 'identical completely,' ultimately concluding, '[t]hey do look similar as we discussed, as we reviewed.'") (internal citations omitted).
[128] "[T]he Transpacific materials . . . identified Cisco as a target defendant. The strategy of suing Cisco on select patents in the Portfolio is not a Slingshot trade secret." *Id.* at 47-48.
[129] "Remarkably, Slingshot contends that ARG's decision to file the Monarch Action in the Eastern District of Texas was taken from Slingshot's playbook. The strategy of filing a patent infringement action in the Eastern District of Texas might be the worst kept secret in the legal industry." *Id.* at 48 (citing Melissa Wee, *TC Heartland v. Kraft and the Resurrection of the Place of Incorporation or "Regular and Established Place of Business" Test for Patent Venue*, 33 BERKELEY TECH. L.J. 981, 990 (2018) ("Commentators have attributed the Eastern District of Texas's popularity to its fast adjudication of patent cases as the 'rocket docket,' its local procedural rules—including a preference for trial over summary judgment, and its patentee-friendly juries."); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 653 (Feb. 2015) ("The speed, large damage awards, outstanding win-rates, likelihood of getting to trial, and plaintiff-friendly local rules suddenly made the Eastern District the venue of choice for patent plaintiffs.")).
[130] Slingshot Opp'n to MSJ at 45.
[131] *Id.* at 47.

Slingshot rejects Acacia's contention that the presence of publicly available information in the materials precludes their protection as trade secrets, stating that "the law recognizes . . . that proprietary analysis and combinations of public information constitute trade secrets."[132] Further, Slingshot argues that its bidding information had "independent economic value" by virtue of its affording Acacia, as its competitor, "an unfair bidding advantage" that enabled Acacia "to jumpstart its evaluation and monetization of the Orange Portfolio and save time and money spent conducting these analyses themselves."[133]

The Court finds that, at a minimum, Slingshot's argument presents a genuine issue of material fact. The factual dispute is whether the "combination of characteristics and components" of its pitch materials, though perhaps otherwise available to Acacia as either public information or information possibly belonging to Transpacific, afforded Acacia a competitive advantage such that these materials qualify as protectable secrets with independent economic value.[134]

Moreover, the Court observes that the Motion does not directly address the second prong of the "trade secret" definition under the MUTSA—whether the information at issue is the "subject of efforts that are reasonable under the circumstances to maintain its secrecy."[135] Slingshot does address this prong, and notes that it "protected the information it provided

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[132] *Id.* at 44-45 (citing *Merck & Co. v. SmithKline Beecham Pharms. Co.*, 1999 WL 669354, at *15 (Del. Ch. Aug. 5, 1999) (quoting *Imperial Chem. Indus.,* 342 F.2d 742 (identical language in *AirFacts,* 909 F.3d 96).

[133] *Id.* at 44 (citing *NuCar Consulting*, 2005 WL 820706, at *5) ("Trade secrets have actual or potential independent economic value if a competitor cannot produce a comparable product without a similar expenditure of time and money. This requirement of 6 *Del. C.* § 2001(4)(a) highlights the notion of competitive advantage and focuses on whether a plaintiff would lose value and market share if a competitor could enter the market without substantial development expense.") (*6 Del. C.* § 2001(4)(a) is the definition of "trade secret" identical to MUTSA § 11-1201(e)).

[134] The Court of Chancery found this to be the case at the motion to dismiss stage. *See* Acacia MTD Order, 2021 WL 1224828, at *4 ("It is reasonably conceivable that the [pitch materials] constitute trade secrets. . . [that] derived their value from not being generally known to or readily ascertainable by others, because if they were, then a competitor of Slingshot could purchase the Orange Portfolio.").

[135] MUTSA § 11-1201(e)(2).

Burford as trade secrets under NDAs with Burford. The information that Slingshot provided to [Ms.] Wolanyk under those NDAs was valuable and competitive sensitive information that Slingshot would never have shared without protection."[136] Slingshot states that its bidding strategy for the Orange Portfolio, including information such as "bidding interest, interest by other funders, purchase price, and timing of exclusivity . . . is clearly the type of competitive sensitive information that is protectable as a trade secret."[137]

In addition, Acacia's Reply Brief omits qualifiers such as "purported" and "claimed" when referring to Slingshot's materials as Slingshot's trade secrets, and instead focuses its argument solely on the "misappropriation" element of Slingshot's claim.[138]

The Court finds that Acacia has failed to carry its burden of showing there are no issues of material fact with respect to whether Slingshot's pitch materials are protectable trade secrets.

2. There is a material factual dispute as to whether the materials were misappropriated.

"Misappropriation" under the MUTSA is defined in pertinent part as the:

> (1) 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; or
>
> (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
>
> > (i) Used improper means to acquire knowledge of the trade secret; or
> > (ii) At the time of disclosure or use, knew or had reason to know that the person's knowledge of the trade secret was:
> >
> > > 1. Derived from or through a person who had utilized improper means to acquire it;
> > > 2. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

[136] Slingshot Opp'n to MSJ at 43.
[137] *Id. See also* Acacia MTD Order, 2021 WL 1224828, at *4 (Holding that Slingshot's "complaint alleges facts supporting the inference that Slingshot took reasonable efforts to maintain the secrecy of the [pitch materials], including by only sharing the [pitch materials] 'with other parties under the protections of non-disclosure agreements.'").
[138] *See, e.g.*, Acacia Reply ISO MSJ.

> 3. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use . . . .[139]

"Improper means" under the MUTSA "includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."[140]

Therefore, in order to secure summary judgment on Slingshot's misappropriation claim, Acacia must demonstrate that there are no material factual disputes about whether Acacia *either* acquired Slingshot's trade secrets via improper means, *or* disclosed or used those trade secrets without Slingshot's consent. Acacia contends that Slingshot has failed to "adduce any evidence" as to either improper acquisition, or disclosure or use.[141]

Acacia argues that Slingshot cannot demonstrate that Acacia acquired Slingshot's trade secrets through Ms. Wolanyk improperly, *i.e.* "in violation of her confidentiality obligations to Slingshot."[142] Acacia claims that Slingshot has failed to show either that Ms. Wolanyk had actual knowledge of its confidential materials, or that such knowledge could be imputed to Acacia by virtue of Ms. Wolanyk's roles at Burford and on ARC's board.[143]

Acacia also argues that Slingshot has failed to establish that Ms. Wolanyk was actually aware of the details of Slingshot's information because Ms. Wolanyk "did not review Slingshot's materials in any detail, but instead relied on her colleagues reporting to her to handle that

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[139] MUTSA § 11-1201(c),
[140] *Id*. § 11-1201(b).
[141] Acacia MSJ at 32 (emphasis supplied); *see also* Acacia Reply ISO MSJ at 9 ("Slingshot's claim is fatally defective as a matter of law because it cannot cite a ***single*** document or excerpt of testimony reflecting that Ms. Wolanyk shared Slingshot's confidential information with Acacia.") (emphasis supplied).
[142] *Id*.
[143] *Id.* at 35, 39.

work."[144] Acacia references that Ms. Wolanyk met with [Slingshot principal York][145] Eggleston "a single time regarding the Portfolio (which was only a high-level discussion) on or about November 7, 2018, in passing, at an intellectual property conference."[146] Further, Acacia notes that Slingshot's principals couldn't identify any direct email communications with Ms. Wolanyk, only examples where she was "merely copied on the correspondence between Burford and Slingshot."[147]

Next, Acacia argues that, even if Ms. Wolanyk was aware of the information, there "is not a shred of evidence" that she shared the information at issue with Acacia.[148] Acacia states that Ms. Wolanyk never responded to the "handful of emails" to which she was a "passive recipient" in which updates were provided to ARC's Board on "ARG's pursuit of the Orange Patent Portfolio, among other numerous other prospective investments . . . ."[149] Further, Acacia claims that Ms. Wolanyk was not asked to provide input, nor did she provide input: "Rather, she played no role in ARG's identification of the opportunity, its negotiations with Transpacific (during which her name did not come up at all), its due diligence regarding the Portfolio, or ARG's decision to close the deal.[150]

Slingshot characterizes Ms. Wolanyk's involvement differently. Slingshot maintains that "Acacia's contention that [Ms.] Wolanyk was a mere passive recipient is implausible, presumptively untrue, and in any event should be determined by the trier of fact."[151] Slingshot

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[144] *Id.* at 33. *See also id.* at 34, quoting Wolanyk Dep. at 98:3–14 ("I think that's another misconception that there was a bunch of competitive information that I was aware of. As the leader [of] the group, I was not in any of the details.").
[145] *Id*. at 9.
[146] *Id.* at 33.
[147] *Id.* at 33-34.
[148] Acacia MSJ at 35.
[149] *Id.*
[150] *Id.*
[151] Slingshot Opp'n to MSJ at 56.

states that Ms. Wolanyk not only received "robust packets from Kasowitz containing all of its diligence materials, analyses, and conclusions, but she also had direct access to Kasowitz and Slingshot through phone calls, in-person meetings, and email."[152] Therefore, Slingshot argues, "Acacia's assertion that [Ms.] Wolanyk was so 'high-level' she did not review these materials, despite having directly received them and provided affirmative feedback regarding the information contained therein is [] unpersuasive and directly at odds with the evidence."[153]

Slingshot disputes Acacia's characterization of Ms. Wolanyk's role as passive, and instead argues that Ms. Wolanyk:

> [P]articipated in two Board meetings in which the Board discussed Acacia's pipeline opportunities and investments, on February 1, 2019, just prior to Acacia engaging with Transpacific to discuss the Orange Portfolio, and on March 12, 2019, during Acacia's due diligence into the Orange Portfolio. In between those meetings, Wolanyk reviewed pipeline updates concerning the Orange Portfolio prior to Acacia entering into the option agreement, she participated in the Board's vetting of the transaction, and she participated in numerous phone calls with Booth[154] about portfolio opportunities, the substance of which she does not recall, including a call with Booth the day before ARG entered into the option agreement with Transpacific for the Orange Portfolio.[155]

Finally, Acacia addresses Slingshot's "acquisition by osmosis"[156] argument that Ms. Wolanyk's knowledge of Slingshot's information can be imputed to Acacia because of her dual positions on ARC's board and at Burford.[157] Acacia states that Slingshot's "novel theory of liability for misappropriation" would have ARG "deemed to have improperly acquired knowledge of Slingshot's trade secrets that Ms. Wolanyk supposedly learned in her employment

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[152] *Id.* at 48.
[153] *Id.*
[154] Marc Booth is Chief Intellectual Property Officer of ARC's Board. He "is located at ARC's corporate headquarters in *See* Compl. ¶ 68 (California; however, he signed an employment agreement with ARG, and he is responsible for managing and monetizing ARG's patent portfolio for ARC. Booth is also listed as the Chief Executive Officer for Monarch on the Statement of Information filed with the Secretary of State of California.").
[155] Slingshot Opp'n to MSJ at 51-52.
[156] Acacia Reply ISO MSJ at 10.
[157] *See* Compl. ¶ 130 ("[G]iven Wolanyk's role at Acacia and her involvement in communications about the Orange Patent Portfolio, any information and knowledge she had about the Orange Patent Portfolio is imputed to Acacia.").

at Burford simply by virtue of her service as an outside director of ARC—all regardless of whether she ever breathed a word about the subject."[158]

Slingshot focuses on misappropriation and not use. Slingshot provides that "whether or not Wolanyk used Slingshot's information to Acacia's advantage, a fact which is disputed, Acacia improperly acquired Slingshot's trade secrets when Wolanyk joined and served on Acacia's Board of Directors without taking steps to protect Slingshot's trade secrets from Acacia."[159]

The parties disagree on the standard for when the knowledge of a corporate officer may be imputed to the corporation. Acacia relies on Delaware law for the proposition that "the fact that two or more corporations have officers or agents in common will not of itself impute the knowledge gained by such officers while acting for one corporation to another corporation in which they also hold office."[160] However, as Slingshot notes, Maryland courts have recognized that a "common officer's knowledge of the affairs of one corporation will be imputed to the other when such knowledge is present in his mind and memory at the time he engages in a transaction on behalf of such other corporation . . . ."[161]

Slingshot argues that it is Ms. Wolanyk's "failure to take any steps to protect Slingshot's trade secret information about the Orange Portfolio while Acacia was pursuing the same portfolio" that "constitutes an improper acquisition" of those trade secrets.[162] Slingshot contends

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[158] Acacia Reply ISO MSJ at 10 (emphasis removed).
[159] Slingshot Opp'n to MSJ at 50. *See also* Compl. ¶ 74 ("As a Board Member of ARC, with responsibility for management of ARG's acquisition activities, Wolanyk's knowledge of Slingshot's confidential information was in the possession of and imputed to both ARC and ARG.").
[160] *NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *27 (Del. Ch. Nov. 17, 2014) (quoting *B.A.S.S. Gp., LLC v. Coastal Supply Co*., 2009 WL 1743730, at *7 n.72 (Del. Ch. June 19, 2009)).
[161] *Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atl., Inc*., 815 A.2d 886, 904 (Md. Ct. Spec. App. 2003).
[162] Slingshot Opp'n to MSJ at 52 (citing *In re Wayport, Inc. Litig.*, 76 A.3d 296, 324 (Del. Ch. 2013) (internal citation omitted) ("It is the general rule that knowledge of an officer or director of a corporation will be imputed to the corporation.").

under these circumstances—in which Ms. "Wolanyk was an executive of both Burford and Acacia, Wolanyk's knowledge of Slingshot's trade secrets in her role at Burford is imputed to Acacia, where her knowledge was clearly present in her 'mind and memory' at the time Acacia engaged in the Orange Portfolio transaction."[163]

Acacia argues that Slingshot's "narrow exception" argument is a misstatement of the legal standard because it "conflates two different entities—ARC and ARG. Ms. Wolanyk served as an outside director of ***ARC***, while ***ARG*** is the entity that identified, vetted, and acquired the Orange Portfolio."[164] Acacia claims that "ARC was not in involved in ARG's acquisition. The Board did not vote to approve ARG's purchase of the Portfolio, nor was a Board vote required to proceed with closing."[165] Acacia states that there is therefore "no nexus" between Ms. Wolanyk's role at ARC and ARG's pursuit of the Orange Patent Portfolio that would impute her knowledge to ARC as being in her "mind and memory" at the relevant time.[166]

Slingshot disagrees and maintains that the records shows "overwhelming evidence of [Ms.] Wolanyk's close and direct involvement in Acacia's business, including the communications surrounding the Orange Portfolio."[167] Slingshot argues that because "Acacia and [Ms.] Wolanyk had every opportunity to take the appropriate steps to wall [off] [Ms.] Wolanyk from being on both sides of the transaction and failed to do so. To" the extent [Ms.]

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[163] *Id.* (quoting *NAMA Holdings*, 2014 WL 6436647, at *28 (internal citation omitted) (quoting identical language from *Mercy Med. Ctr.*, 815 A.2d at 904).
[164] Acacia Reply ISO MSJ at 10, 13-14 (emphasis supplied).
[165] *Id.* at 10.
[166] *Id.* at 13-14; *see also id*. (emphasis added) ("Ms. Wolanyk must have ***engaged in a transaction on Acacia's behalf*** with knowledge of Slingshot's trade secrets in her mind and memory. Without the active participation of the director in the transaction at issue, there would not be an opportunity for that director to act ***with the knowledge*** that is to be imputed to the corporation . . . .").
[167] Slingshot Opp'n to MSJ at 50.

Wolanyk participated in the Orange Portfolio transaction in any way, her participation must be presumed to constitute use of Slingshot's trade secret information."[168]

The Court finds that Slingshot has effectively presented facts to establish a material dispute as to imputation. Acacia insists that imputed knowledge alone is insufficient to satisfy the "touchstone of a misappropriation of trade secrets claim" that the subject information was acquired by improper means.[169] However, it is the violation of Ms. Wolanyk's "duty to maintain secrecy" on behalf of Slingshot by virtue of her role at Burford that constitutes the improper means suggested by Slingshot.

Because Acacia has failed to carry its burden as to whether there are material factual disputes as to whether Acacia improperly acquired Slingshot's trade secrets, either through Ms. Wolanyk's actual knowledge or as imputed to Acacia, the Court need not consider the alternative means of establishing misappropriation—whether Acacia disclosed or used the information.

B. COUNTS II, III, AND IV ARE NOT PREEMPTED UNDER THE MUTSA.

Acacia argues the "MUTSA preempts any other tort claims that are based on the misappropriation of trade secrets, with a few exceptions not applicable here."[170] Acacia therefore contends that Counts II, III, and IV should be dismissed as preempted by the MUTSA because "the gravamen of each of the . . . tort claims is misappropriation of trade secrets and Slingshot seeks civil remedies . . . ."[171]

Slingshot counters and asserts that its claims are not preempted "because they are not solely based on misappropriation of trade secrets."[172] As such, Slingshot states that its "claims

[168] *Id.* at 56-57.
[169] Acacia MSJ at 38.
[170] *Id.* at 49-50 (citing, in part, MUTSA § 11-1207; *LeJeune v. Coin Acceptors, Inc.*, 849 A.2d 451, 461 (Md. 2004) ("[MUTSA] currently provides the exclusive civil remedy for misappropriation of a trade secret").
[171] *Id.* at 53.
[172] Slingshot Opp'n to MSJ at 58-59.

for unfair competition and tortious interference are actionable claims regardless of Acacia's misappropriation of trade secrets."[173] Slingshot differentiates between "confidential information" and "trade secrets" and argues that its claims for unfair competition and tortious interference "rely upon allegations that Acacia acted on Slingshot's confidential information as divulged or used by Wolanyk, and not necessarily trade secrets."[174]

Slingshot relies on *Hardwire, LLC v. Ebaugh*, a 2020 case in the District Court of Maryland applying the MUTSA.[175] The *Hardwire* court held that the "MUTSA's displacement provision states that it does not preempt "[o]ther civil remedies that are not based upon misappropriation of a trade secret… ."[176] The *Hardwire* court also found that a "broad interpretation of MUTSA's displacement provision could result in the preemption of claims not based upon the misappropriation of trade secrets in contravention of the statute's plain meaning if a court ultimately concluded that confidential information at issue did not constitute a trade secret."[177]

Acacia responds that this "narrow view of preemption Slingshot proposes" should be rejected because it "encourages exactly what [it] was the Uniform Trade Secrets Act ["UTSA"] sought to avoid: vague pleading that information is confidential and/or trade secret and the addition of every conceivable common law count to the same set of operative facts that constitute the misappropriation of trade secrets."[178] Acacia insists that the "majority interpretation" of the UTSA that "preempts all common law tort claims based on

[173] *Id.* at 59.
[174] *Id.*
[175] 2020 WL 5077469 (D. Md. 2020).
[176] *Id.* at *5.
[177] *Id.*
[178] Acacia Reply ISO MSJ at 31.

misappropriation of information, whether or not it meets the statutory definition of a trade secret."[179]

It is unclear on what authority Acacia claims its interpretation of the UTSA is that of the "majority" or why that view should override the application of the MUTSA by Maryland courts.[180] Regardless, Slingshot's reliance on the application of the MUTSA is persuasive, and, more importantly, presents a material factual dispute that survives summary judgment—the factual basis of its claims. Therefore, Acacia's claim for summary judgment on the basis of preemption is denied.

C. COUNT II: UNFAIR COMPETITION.

Acacia argues that, even if Slingshot's claims are not preempted, the Court should still grant summary judgment. Acacia maintains that "each of those claims fails for the same reasons as discussed above with respect to Slingshot's claim for trade secrets—namely, that there is no evidence to support Slingshot's allegations that Ms. Wolanyk shared Slingshot's purported trade secrets with Acacia or that Acacia used them in acquiring the Orange Patent Portfolio."[181]

In Maryland, unfair competition is defined as "damaging or jeopardizing another's business by fraud, deceit, trickery or unfair methods . . . . What constitutes unfair competition in

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[179] *Id.* (citing *Hauck Mfg. Co. v. Astec Indus., Inc.,* 375 F. Supp. 2d 649, 655 (E.D. Tenn. 2004); *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1265 (7th Cir. 1992) ("[UTSA] has abolished all common law theories of misuse of [secret] information.") (internal citation omitted)).

[180] See *Hardwire,* 2020 WL 5077469, at *4 (internal citations omitted):

> The Maryland Court of Appeals has not addressed the scope of MUTSA preemption, and divergent interpretations of the UTSA's displacement provision have emerged in jurisdictions around the country. Some courts have given the provision broad effect, finding that 'the UTSA preempts all common law tort claims based on misappropriation of information, whether or not it meets the statutory definition of a trade secret.' Others, including courts in the District of Maryland, have found that the UTSA (and specifically, MUTSA) preempts only claims based on misappropriation of trade secrets, not other confidential information.

[181] Acacia MSJ at 53.

a given case is governed by its own particular facts and circumstances."[182] Those particular facts mean that "[e]ach case is a law unto itself, subject, only, to the general principle that all dealings must be done on the basis of common honesty and fairness, without taint of fraud or deception."[183] "The rationale of the law is that no one . . . is justified in damaging or jeopardizing another's business by fraud, deceit, trickery or unfair methods of any sort."[184]

Acacia argues that there is "simply no evidence to support" Slingshot's theory that "Acacia's unfair methods were using Slingshot's confidential and proprietary information to gain a competitive advantage over Slingshot in seeking to acquire the Portfolio."[185]

Slingshot alleges that Ms. "Wolanyk's sourcing of the Orange Portfolio is unfair competition because her identification of the Portfolio was undeniably bound up in her two-months' long evaluation of Slingshot's confidential information about the same Portfolio."[186] Slingshot claims that material issues of fact exist as to whether Ms. Wolanyk informed Acacia about the Orange Portfolio and suggested contacting Transpacific; whether Acacia unfairly competed by virtue of Ms. Wolanyk's participation as an ARC board member "in the decision to enter an option agreement and close on the Orange Portfolio transaction, including by vetting the Portfolio"; and whether Acacia's receipt of information from Ms. Wolanyk, "gained from Slingshot . . . accelerated its ability to close quicker than it would have without this information."[187]

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[182] *Cavalier Mobile Homes, Inc. v. Liberty Homes, Inc.*, 454 A.2d 367, 374 (Md. Ct. Spec. App. 1983) (citing *Baltimore Bedding Corp. v. Moses*, 34 A.2d 338, 342 (Md. 1943), alteration in original).
[183] *Elecs. Store, Inc. v. Cellco P'ship*, 732 A.2d 980, 991 (Md. 1999) (internal citation omitted).
[184] *Id.*
[185] Acacia MSJ at 54.
[186] Slingshot Opp'n to MSJ at 61.
[187] *Id.* at 60-62.

Slingshot relies on evidence that "leads to a reasonable inference" of these unfair methods. This evidence includes the overlapping time frames of Slingshot's exclusivity with Transpacific expiring and Ms. Wolanyk joining the board of ARC; Ms. Wolanyk's arrival at ARC and Erik Ahroon's outreach to a contact of Ms. Wolanyk's at Transpacific; and the potential for Ms. Wolanyk to have discussed the Portfolio with Mr. Booth and other members of the ARC board.[188]

Acacia rejects Slingshot's evidence as failing to "demonstrate that Acacia used Slingshot's information to gain a competitive advantage."[189] However, whether Slingshot has proven its claim is not an appropriate question on a motion for summary judgment.[190]

Acacia has not shown the absence of issues of material fact Slingshot's claim for unfair competition. Slingshot has argued facts that a reasonable jury could conclude constitute the "particular facts and circumstances" supporting a finding of unfair competition. Therefore, Acacia Motion as to Count II is denied.

D. COUNT III: TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS[191]

With respect to tortious interference under Counts III and IV, Maryland courts recognize that:

> Tortious interference with business relationships arises only out of the relationships between three parties, the parties to a contract or other economic relationship . . . and the interferer . . . . [T]he two general types of tort actions for interference with business relationships are inducing the breach of an existing contract and, more

[188] *Id; see also id.* at 40 ("Erik Ahroon…spearheaded ARG's business development efforts….").

[189] Acacia Reply ISO MSJ at 33.

[190] *See Merrill v. Crothall-Am,* 606 A.2d 99 ("The role of a trial court when faced with a motion for summary judgment is to identify disputed factual issues whose resolution is necessary to decide the case, but not to decide such issues.").

[191] This decision titles Count III consistently with Acacia's Motion, although the Parties address the tort by multiple names: "Intentional Interference with Prospective Business Relations and/or Economic Advantage" (Compl.; Acacia MSJ); "Tortious Interference with Business Relations or Economic Advantage" (Slingshot Opp'n to MSJ); and "Tortious Interference with Prospective Economic Relations" (Acacia Reply ISO MSJ). Maryland courts also address the tort multiple ways. *See, e.g.*, *Total Recon Auto Center, LLC v. Allstate Insurance Co.*, 2023 WL 8545228, n.3 ("The phrase 'tortious interference with economic relations' is a synonym for 'tortious interference with prospective advantage.'").

> broadly, maliciously or wrongfully interfering with economic relationships in the absence of a breach of contract.[192]

A plaintiff claiming tortious interference with a prospective relationship must show: "(1) intentional and wilful [sic] acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting."[193]

Therefore, "[t]o establish tortious interference with prospective contractual relations, it is necessary to prove both a tortious intent and improper or wrongful conduct."[194] Tortious intent may be proven "by showing that the defendant intentionally induced the breach or termination of the contract in order to harm the plaintiff or to benefit the defendant at the expense of the plaintiff."[195] Improper or wrongful conduct is "incapable of precise definition" and is instead "a factual question to be determined on the basis of all the facts and circumstances."[196]

Acacia insists that Slingshot "cannot adduce evidence to demonstrate wrongful conduct on Acacia's part, but also because there is no evidence that Acacia intended to induce the termination of the prospective business relationship between Transpacific and Slingshot."[197]

Acacia does not further address wrongful conduct.[198] However, as discussed throughout this decision, Slingshot has presented genuine issues of material fact with respect to whether the facts and circumstances underlying its other claims may constitute wrongful conduct on Acacia's

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[192] *K&K Mgmt.,* 557 A.2d at 973 (internal citations omitted).
[193] *Natural Design, Inc. v. Rouse Co.*, 485 A.2d 663, 675 (Md. 1984) (internal citation omitted).
[194] *Macklin*, 639 A.2d at 119 (internal citations omitted).
[195] *Id.*
[196] *Id.*
[197] Acacia MSJ at 54-55.
[198] See id. at 53 (Acacia does not argue that different conduct or facts are at issue in the various claims. Indeed, Acacia states that, absent preemption (discussed above), Claims II, III, and IV fail for the "same reasons [as] Slingshot's claim for trade secrets—namely, that there is no evidence to support Slingshot's allegations that Ms. Wolanyk shared Slingshot's purported trade secrets with Acacia or that Acacia used them in acquiring the Orange Patent Portfolio.").

part. Because all claims are based on the same facts and circumstances, Acacia cannot carry its burden as to wrongful conduct on Count III.

With regard to tortious intent, Acacia claims that Slingshot cannot prove this element because "Slingshot's exclusive option period had already expired before ARG and Transpacific's initial contacts regarding the Portfolio. Moreover, Transpacific was motivated to proceed with ARG because, unlike Slingshot, it had the requisite funds available to close and Transpacific was facing pressure from its investors."[199]

Slingshot challenges Acacia's reliance on Ms. Wolanyk's "shifting recollection" to confirm a lack of tortious intent does not resolve the issue for purposes of summary judgment.[200] Further, Slingshot argues that Acacia "places undue emphasis on the expiration of the exclusivity period" because "Slingshot continued to be an active bidder for the Orange Portfolio and Slingshot still could have purchased the Orange Portfolio but for Acacia bidding against Slingshot with access to Slingshot's confidential information through Wolanyk."[201]

The Court finds that Acacia has failed to satisfy the legal standard for summary judgment on Count III. Acacia insists that Slingshot's argument about the "conspicuous" timing of Ms. Wolanyk's arrival at Acacia and Acacia's purchase of the Orange Portfolio is unsupported by any evidence "that Acacia (or even Ms. Wolanyk) was aware of . . . communications between Slingshot and Burford, that the timing of Acacia's funding and close on the deal had any connection whatsoever to these communications, or that the timing of the closing was

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[199] Acacia MSJ at 55.
[200] Slingshot Opp'n to MSJ at 64.
[201] *Id.* at 63-64 (further noting that "Slingshot's counsel and Eggleston were communicating with Wolanyk's direct report at Burford about Slingshot's bidding strategy, not realizing that Wolanyk was serving on Acacia's Board of Directors and competing against Slingshot for the same opportunity. Shortly thereafter, Acacia did an about-face and suddenly funded the Orange Portfolio transaction to close on the deal. The timing is conspicuous, to say the least . . . .").

inconsistent with ARG and Transpacific's agreement."[202] However, the "absence of evidence is not evidence—particularly for a party bearing the burden of proof."[203]

As stated above, Slingshot has presented genuine issues of material fact as to the wrongful conduct required for Count III. Slingshot has also presented facts that could lead to the reasonable conclusion that Acacia had the requisite tortious intent. Acacia's statement that Slingshot has failed to *prove* otherwise does not resolve the issue for summary judgment purposes. Therefore, Acacia is not entitled to summary judgment on Count III.

E. COUNT IV: TORTIOUS INTERFERENCE WITH CONTRACT—BURFORD NDAS

In Maryland, a claim for tortious interference with contract involves: "(1) the existence of a contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional interference with that contract; (4) hindrance to the performance of the contract; and (5) resulting damages to the plaintiff."[204]

Acacia contends that "Slingshot cannot demonstrate that there was an underlying breach of the Burford NDAs because there is no evidence to support its allegation that Ms. Wolanyk disclosed Slingshot's confidential information to Acacia." [205] Without the underlying breach, Acacia claims that Slingshot's claim against Acacia fails as a matter of law.[206]

The Court notes that this tort does not requires an underlying breach. Maryland's element of "hindrance to the performance of the contract" is distinct. "Under Maryland law, a person who intentionally and wrongfully hinders contract performance, as by causing a party to

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[202] Acacia Reply ISO MSJ at 33-34.
[203] *Wilmington Tr. Co. v. Renner's Paving, LLC*, 2013 WL 1442366, at *4 (Del. Super. Mar. 27, 2013).
[204] *Total Recon Auto Ctr., LLC v. Allstate Ins. Co.*, 2023 WL 8545228, at *2 (D. Md. Dec. 11, 2023).
[205] Acacia MSJ at 55-56.
[206] *Id.*

cancel the contract, and thereby damages a party to the contract, is liable to the injured party *even if there is no breach of the contract*."[207]

Acacia also alleges that Slingshot cannot produce evidence of Acacia's intentional interference: "[T]here is no evidence that Acacia was even aware of the NDAs or Slingshot's transmittal of information to Burford, and thus Acacia could not have been aware of any purported conflict of interest on Ms. Wolanyk's part arising from the Burford-Slingshot relationship."[208]

Slingshot relies upon the Burford NDAs. Under the Burford NDAs, Burford was prohibited from "disclosing or making available, directly or indirectly, the confidential information provided by Slingshot."[209] Slingshot argues that a material issue of fact exists as to whether Ms. Wolanyk made that information available, even indirectly, in violation of the NDAs.[210] Slingshot claims that "because Acacia knew of the potential conflicts of interest, but took no steps to address those conflicts", the interference was tortious and resulted "in [Ms.] Wolanyk bidding against Slingshot, her own client, for the same portfolio that Slingshot disclosed to Burford under the NDAs."[211]

The Court finds that Slingshot has presented evidence by which a reasonable jury could find that Acacia had tortious intent with respect to an alleged breach of the NDAs that resulted in damage to Slingshot. Therefore, the Motion is denied as to Count IV.

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[207] *Total Recon Auto Ctr.*, 2023 WL 8545228, at *3 (internal citation omitted) (emphasis supplied); *see also Baron Fin. Corp. v. Natanzon*, 509 F. Supp. 2d 501, 524 (D. Md. 2007) ("[P]roof of breach of contract is not an essential element of the tort of intentional interference with contractual relations."); *Mona Elec. Grp., Inc. v. Truland Serv. Corp.*, 56 Fed. App'x 108, 110 (4th Cir. 2003); *Trimed, Inc. v. Sherwood Med. Co.,* 977 F.2d 885, 889 (4th Cir. 1992) ("[P]roof of breach of contract is not an essential element of the tort.").
[208] Acacia Reply ISO MSJ at 35.
[209] Slingshot Opp'n to MSJ at 65.
[210] *Id.*
[211] *Id.*

VI. CONCLUSION

For the reasons stated above, the Court **DENIES** the Motion for Summary Judgment.

IT IS SO ORDERED.

June 20, 2024
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress