

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SCHMIDT, LONG & ASSOC., INC. : CIVIL ACTION  
: :  
v. : :  
: :  
AETNA U.S. HEALTHCARE, INC. : NO. 00-CV-3683

**MEMORANDUM**

**Padova, J. July , 2001**

Before the Court are Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment. For the reasons that follow, the Court denies Plaintiff's Motion and grants in part and denies in part Defendant's Motion.

**I. BACKGROUND<sup>1</sup>**

Defendant Aetna U.S. Healthcare Inc. ("Aetna") administers self-funded medical benefit plans on behalf of employers. In performing this service, Defendant pays to the employer's healthcare provider all of the medical claims covered under the employer's benefit plan relating to the provided services. The employer then reimburses Defendant for the amounts paid to the healthcare providers and pays Defendant an additional administrative fee. Plaintiff is a corporation retained by employers to conduct audits of the claims administration of the employer's benefit plan performed by the administrators. The goal

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<sup>1</sup>The following facts are derived from Plaintiff's Complaint.

of Plaintiff's audits are to recover any overpayments made by the employer to the claims administrator.

Beginning in 1995, U.S. Healthcare ("USHC") retained Plaintiff as a forensic expert in litigation initiated by Brokerage Concepts, Inc. against USHC ("BCI Matter"). In the course of this consultation, USHC gave Plaintiff access to information related to USHC's claims administration. Plaintiff, however, did not testify at the trial. The initial trial resulted in a verdict adverse to USHC. USHC successfully appealed the adverse result and obtained a new trial. In November 1998, Defendant notified Plaintiff of the pendency of a new trial in the BCI Matter. By this time, USHC had become Defendant and Plaintiff was in the process of auditing Defendant on behalf of a client. In response to the notification, Plaintiff requested Defendant sign a release waiving any conflict of interest. Defendant refused to execute the waiver and did not use Plaintiff as an expert in the BCI Matter's retrial.

Throughout 1999, Plaintiff was retained by five employers<sup>2</sup> to audit Defendant's administration of their medical benefits plans. When the Employers notified Defendant of their retention of Plaintiff to conduct the impending audits, Defendant sent letters to the Employers refusing to permit Plaintiff to conduct any

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<sup>2</sup>The employers included Kraft General Foods ("Kraft"), OfficeMax Corporation ("OfficeMax"), Sears, Roebuck & Company ("Sears"), Sara Lee Corporation ("Sara Lee"), and Daimler-Chrysler Corporation ("Chrysler") (collectively "Employers").

audits.

## II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Evidence introduced to defeat or support a motion for summary judgment, however, must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n. 9 (3d Cir. 1993)). The Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

### **III. DISCUSSION**

On July 21, 2000, Plaintiff filed suit against Defendant alleging two claims: tortious interference with contract and defamation. In its Answer filed December 18, 2000, Defendant asserted four counterclaims. In its instant Motion, Plaintiff seeks summary judgment on both Defendant's counterclaims and its own claims. Defendant seeks summary judgment only on Plaintiff's claims. The Court will address each party's claims in turn.

#### **A. Cross-Motions for Summary Judgment on Plaintiff's Claims**

Both parties seek summary judgment in their favor on Plaintiff's claims of tortious interference with contractual relations and defamation. The Court has considered each party's

summary judgment motion separately. See Williams v. Philadelphia Housing Authority, 834 F. Supp. 794, 797 (E.D. Pa.), aff'd, 27 F.3d 560 (3d Cir. 1994). For the reasons that follow, the Court determines that a genuine issue of material fact exists with respect to the interference with contract claim only as premised on Plaintiff's contract with Sears. Summary judgment in favor of either party with respect to that part of the claim is therefore precluded. Plaintiff, however, lacks evidence creating a genuine issue of material fact as to essential elements of the interference with contract claim with respect to the other contracts upon which the claim is premised. Defendant, therefore, is entitled to summary judgment on the interference with contract claim as based on contracts with Kraft, OfficeMax, Sara Lee, and Chrysler. Similarly, no issue of material fact exists with respect to two essential elements of Plaintiff's defamation claim and Defendant is entitled to summary judgment on that claim as a matter of law.

1. Tortious Interference with Contract

Plaintiff's Complaint alleges that Defendant tortiously interfered with its contracts with Kraft, Sears, Sara Lee, OfficeMax, and Chrysler by advising them that it would not permit Plaintiff to conduct an audit of their medical plans and asserting the existence of a conflict of interest.

The tort of interference with contract provides that one who intentionally and improperly interferes with the performance of a

contract between another and a third person by causing the third person not to perform the contract is subject to liability to the other for the pecuniary loss resulting from the failure of the third person to perform the contract. Maier v. Maretti, 671 A.2d 701, 707 (Pa. Super. Ct. 1996) (citing Restatement (Second) of Torts § 766). To maintain an action for intentional interference with contractual relations, the plaintiff must establish: (1) the existence of a contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of a privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. See Shiner v. Moriarty, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998); Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 184 (3d Cir. 1997) (citing Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979)).

Plaintiff adduces evidence of the existence of a contractual relation between it and each Employer to conduct an audit of Defendant, as well as interference with each contract.<sup>3</sup> See e.g.

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<sup>3</sup>With respect to Chrysler, Plaintiff presents evidence creating a genuine issue of material fact as to the existence of an oral contract to audit Defendant. Pl. Mot. Ex. 13 at 177-79; Pl. Mot. Ex. 27, 28, 29. This evidence is sufficient to survive summary judgment because oral agreements in which the parties agree to essential terms and intend to be bound may be enforceable. See e.g. Shovel Transfer & Storage, Inc. v. PLCB,

Pl. Mot. for Summ. J. ("Pl. Mot.") Ex. 35, 36 (Kraft); Pl. Mot. Ex. 39, 40, 41 (OfficeMax); Pl. Mot. Ex. 46, 47, 48 (Sara Lee); Pl. Mot. Ex. 51, 52, 53 (Sears); Pl. Mot. Ex. 30 (Chrysler); Pl. Opp. to Def. Mot. for Summ. J. ("Pl. Opp.") Ex. H. With respect to each Employer except Sara Lee, the record contains evidence creating a genuine issue of material fact as to impairment of the contractual relation and causation.<sup>4</sup> Pl. Mot. Ex. 29, 33 (Chrysler); Def. Mot. for Summ. J. ("Def. Mot.") Ex. 3 at 64; Pl. Mot. Ex. 36, 37 (Kraft); Pl. Mot. Ex. 41, 43 (OfficeMax); Pl. Mot. Ex. 53, 54 (Sears). Plaintiff, however, fails to submit any evidence indicating that its contract with Sara Lee was impaired by Defendant's alleged interference. To the contrary, the record indicates that Plaintiff is still conducting an audit of Defendant on behalf of Sara Lee. Def. Mot. Ex. 3 at 61, 63. For this reason, Plaintiff may not rely on its contract with Sara Lee as a basis for

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739 A.2d 133, 138 (Pa. 1999); Storms v. O'Malley, Nos. 1510 HSBG.1998, 1509 HSBG.1998, 2001 WL 688477, at \*6 (Pa. Super. Ct. June 20, 2001). Furthermore, to establish a claim for interference with prospective contractual relations, Pennsylvania law only requires a "reasonable probability that contractual relations will be realized." TH Serv., Inc. v. Independence Blue Cross, No.Civ.A.98-CV-4835, 2001 WL 115041, at \*12 (E.D. Pa. Feb. 1, 2001).

<sup>4</sup>Contrary to Defendant's assertion, complete termination of the contractual relation is unnecessary; only proof that the third-party refused to perform the contract is required. See Restatement (Second) of Torts § 766 (1997); see also Thompson Coal, 412 A.2d at 470 (adopting section 766); Frankel v. Northeast Land Co., Inc., 570 A.2d 1065, 1069 (Pa. Super. Ct. 1990).

this claim.

The Court rejects Defendant's argument that no genuine issue of material fact exists with respect to privilege, justification or an intent to harm. Interference is privileged when the actor believes in good faith that his legally protected interest may otherwise be impaired by the performance of the contract. Schulman v. J.P. Morgan Investment Mgmt., Inc., 35 F.3d 799, 810 (3d Cir. 1994) (citing Restatement (Second) of Torts § 733 (1979)). This privilege is closely related to the issue of intent to harm and has not been precisely defined. Schulman, 829 F. Supp. 782, 787 (E.D. Pa.), aff'd 35 F.3d 799 (3d Cir. 1994) (quoting Advent Sys., Ltd. v. Unisys Corp., 925 F.2d 670, 673 (3d Cir. 1991)). Where the defendant acts out of a reasonable good faith belief in the propriety of its action, intent to harm is lacking and a claim for tortious interference with contract cannot be maintained. See, e.g., TH Serv. Group, 2001 WL 115041, at \*13; People's Mortgage Co. v. Fed. Nat'l Mortgage Assoc., 856 F. Supp. 910, 940-42 (E.D. Pa. 1994). When a defendant acts at least in part to protect some legitimate concern that conflicts with an interest of the plaintiff, a line must be drawn and the interests evaluated. Advent Sys., 925 F.2d at 673 (citing Glenn v. Point Park College, 272 A.2d 895, 899 (Pa. 1971)). Generally, the central inquiry in the evaluation is whether the interference is "sanctioned by the rules of the game which society has adopted [defining] socially

acceptable conduct which the law regards as privileged." Id.  
(quotation omitted).

Several factors must be considered to determine if interference is privileged or justified: (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties. Kelly-Springfield Tire Co. v. D'Ambro, 596 A.2d 867, 871 (Pa. Super. Ct. 1991) (citing Restatement (Second) of Torts § 767 (1977)). Truth is not a defense to liability for interference with contract. Collincini v. Honeywell, Inc., 601 A.2d 292, 296 (Pa. Super. Ct.), appeal denied, 608 A.2d 27 (Pa. 1992).

After reviewing the evidence contained in the record and considering the arguments of both parties, the Court determines that genuine issues of material fact exist with respect to the elements of intent and lack of privilege. Accordingly, neither party is entitled to summary judgment as a matter of law on this basis.

Last, Defendant challenges Plaintiff's ability to adduce evidence of damages. The undisputed record evidence indicates that Plaintiff's fees under the majority of the contracts with the

Employers are contingent based on the amount recovered by the Employer from Defendant following the audit and are reduced by Plaintiff's costs to conduct the audit. Pl. Mot. Ex. 35 at 2, 39 at 2, 51 at 2-3. Defendant argues that Plaintiff lacks evidence indicating that it would have located any overcharges or recovered any sums from Defendant following an audit and thus cannot establish actual damages resulting from the term of the contracts.

"[A] jury may not award damages on the basis of speculation and conjecture." Aircraft Guaranty Corp. v. Strato-Lift, Inc., 991 F. Supp. 735, 739 (E.D. Pa. 1998) (citations omitted). Under Pennsylvania law, "[d]amages are speculative if the uncertainty concerns the fact of damages not the amount." Id. at 739-40. If the uncertainty concerns only the amount of damages, summary judgment is inappropriate. Id. at 740.

With respect to OfficeMax and Chrysler, Plaintiff argues that it can establish the existence of damages from the loss of their contracts based on evidence of an average audit recovery of three to five percent of the historical claims filed under other employer's benefit plans paid by healthcare administrators other than Defendant. See Pl. Opp. Ex. C; Def. Mot. Ex. 50 at 273. Plaintiff, however, fails to submit any evidence supporting the proposition that the recoveries from audits of other administrators is indicative of or relevant to whether any funds would likely be recovered from Defendant. Plaintiff has never completed an audit

of Defendant and submits no information relevant to the results of audits of Defendant conducted by other auditors. See Def. Mot. Ex. 50 at 273-74. The record is similarly devoid of evidence showing that recoveries obtained from other claims administrators would be similar to those obtained from Defendant or would provide a reasonable basis for estimating a recovery from Defendant. In contrast, the record contains evidence that every employer contracts for different types of benefits and each administrator uses a different type of claims payment system. Pl. Opp. Ex. C at 81-83. Every audit is unique and recoveries are not predictable but depend on many variables connected with the particular auditor and the company being audited. Def. Mot. Ex. 50 at 102; Def. Mot. Ex. 3 at 82. Furthermore, Defendant submits evidence that some audits fail to generate any recovery for the client, or generate recoveries in amounts less than Plaintiff's expenses. See Def. Mot. Ex. 64 at 2. Because Plaintiff fails to adduce sufficient evidence creating a genuine issue of material fact as to the existence of damages with respect to the OfficeMax or Chrysler contracts, Plaintiff may not maintain this claim on those contracts.

With respect to the Sears and Kraft contracts, Plaintiff argues that it can establish the fact of actual damages from Prudential Insurance Company's ("Prudential") historical overcharges of Sears.<sup>5</sup> Plaintiff contracted to audit Prudential on

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<sup>5</sup>It is undisputed that Prudential is owned by Defendant.

behalf of Sears for the period of 1993 through 1998. Pl. Mot. Ex. 52. Plaintiff submits evidence of an internal audit of Sears' account conducted by Prudential during 1996 and 1997 that located and refunded approximately \$13.6 million in overcharges for the period between 1990 and 1995. \$7 million of those overcharges accumulated during the period from 1993 to 1995. Pl. Opp. Ex. A; Pl. Opp. Ex. B at 73. This evidence is sufficient to create a genuine issue of material fact as to the fact of damages with respect to Defendant's interference with the Sears contract. Plaintiff, however, lacks evidence indicating that the result of the Sears audit would be applicable to an audit of Kraft. Given the evidence indicating the variable nature of recoveries, Plaintiff cannot rely on the demonstrated Sears overcharges to establish the fact of damages for Kraft.

In summary, the record establishes a genuine issue of material fact with respect to all elements of the claim only insofar as it is premised on interference with Plaintiff's contract with Sears. Defendant is entitled to summary judgment on this claim with respect to the Chrysler, Kraft, Sara Lee, and OfficeMax contracts.

## 2. Defamation

In an action for defamation, the plaintiff must prove: (1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by

the recipient that the communication is intended to be applied to plaintiff; (6) special harm to the plaintiff; and (7) abuse of a conditionally privileged occasion. 42 Pa. Cons. Stat. Ann. § 8343(a) (West 2001); Tucker v. Philadelphia Daily News, 757 A.2d 938, 942 (Pa. Super. Ct. 2000). Plaintiff claims that Defendant's letters and communications to the Employers indicating the reasons why it objected to Plaintiff as an auditor constitute libel.<sup>6</sup> See Pl. Mot. Ex. 29, 36, 41, 48, 53. For the following reasons, the Court concludes that Plaintiff fails to establish the defamatory character of the Refusal Letters, or any understanding by the recipient Employers of their defamatory meaning.<sup>7</sup> Accordingly, Defendant is entitled to summary judgment on this claim.

In order for a statement to be considered libelous or slanderous, the trial court must make a threshold determination as to whether the communication complained of can be construed to have the defamatory meaning ascribed to it by the complaining party. Baker v. Lafayette College, 532 A.2d 399, 402 (Pa. 1987). In reaching this conclusion, the court must view the statements in context, and determine whether the statement was maliciously

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<sup>6</sup>Although the wording of each letter varies slightly, the letters contain substantially similar statements. For convenience, therefore, the Court will refer to all such letters sent by Defendant objecting to Plaintiff's retention collectively as 'Refusal Letters.'

<sup>7</sup>Having reached a decision on these grounds, the Court declines to address the parties' additional arguments.

written or published and tended "to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession." Id. (quotation omitted). The test to be applied in evaluating any statement is "the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." Id. (quotation omitted).

Under Pennsylvania law, only statements of fact can support an action for libel, not mere expressions of opinion except where the opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion. Elia v. Erie Ins. Exch., 634 A.2d 657, 660 (Pa. Super. Ct. 1993) (citations omitted); Baker, 532 A.2d at 402. Whether a particular statement or writing constitutes fact or opinion is a question of law for the court to determine at the threshold. Elia, 634 A.2d at 660. Where the communication contains statements of fact, a complete defense to all civil actions for libel exists when it is found that a publication is substantially true and is proper for public information or investigation, and such publication has not been maliciously or negligently made. 42 Pa. Cons. Stat. Ann. § 8342 (West 2001); Tucker, 757 A.2d at 942. The defendant has the burden of proving the truth of the defamatory communication. 42 Pa. Cons. Stat. Ann. § 8343(b)(1) (West 2001); Mikitec v. Baron, 675 A.2d 324, 327 (Pa. Super. Ct. 1996).

The central thrust of the Refusal Letters is Defendant's belief that Plaintiffs operated under a conflict of interest. See Pl. Mot. Ex. 29, 36, 41, 48, 53. Thus, statements in the Refusal Letters of Defendant's belief of the existence of a conflict of interest cannot be construed to have a defamatory meaning because they are opinion. Furthermore, the Refusal Letters do not imply the existence of undisclosed defamatory facts but actually provide the facts that Defendant believes support its evaluation. Defendant adduces sufficient uncontroverted evidence to prove that the statements of fact in the Refusal Letters are substantially true. Plaintiff submits no evidence creating a genuine issue of material fact with respect to truth, malice or negligence. Accordingly, Defendant is entitled to summary judgment on the defamation claim on this ground.

Even if the Refusal Letters could be construed to be defamatory, Plaintiff fails to submit any evidence creating a genuine issue of material fact as to whether the Employers understood the Refusal Letters to be defamatory. All of the Employers save Kraft sent letters to Defendant disputing Defendant's assertions and conclusions and insisting on continuing their contractual relationship with Plaintiff.<sup>8</sup> Def. Mot. Ex. 51, 52, 53, 55, 58; Pl. Mot. Ex. 54. Plaintiff is still acting as an

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<sup>8</sup>There is no record evidence indicating that Kraft understood the Refusal Letters to be defamatory.

auditor for Sara Lee, Chrysler and Sears. Def. Mot. Ex. 3 at 61-62; Pl. Mot. Ex. 27, 28. Furthermore, at least one Employer viewed the truth or falsity of Defendant's statements to be irrelevant. Def. Mot. Ex. 49 at 26-28, 31. Since the record lacks evidence creating a genuine issue of material fact as to this element, Defendant is entitled to summary judgment on this ground as well.

**B. Plaintiff's Motion for Summary Judgment on Defendant's Counterclaims**

Plaintiff seeks summary judgment on each of Defendant's counterclaims. The Court will address each counterclaim based on the arguments set forth in Plaintiff's original Motion and Defendant's Response only.<sup>9</sup>

**1. Breach of Contract**

Counterclaim One alleges that Plaintiff breached a contract with Defendant by failing to provide consultation services as a litigation expert in the BCI Matter. To prove a claim for breach of contract, a plaintiff must establish: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881, 884 (Pa. Super. Ct. 2000). Plaintiff initially argues that Defendant lacks standing to sue for breach of the agreement. Plaintiff further contends that Defendant

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<sup>9</sup>By Order dated July 23, 2001, the Court struck Plaintiff's reply brief from the record for failure to comply with Court policy and Local Rule of Civil Procedure 7.1(c).

lacks evidence establishing the existence of a contract between Plaintiff and Aetna, a breach thereof, or resultant damages.

The contract that forms the basis of Defendant's counterclaim is an engagement letter sent by Plaintiff in which Plaintiff agrees to provide consulting services and prepare expert testimony on their findings for USHC in connection with the BCI Matter ("Engagement Letter").<sup>10</sup> Def. Mot. Ex. 8. Plaintiff argues that Defendant lacks standing to sue based on a contract entered into with USHC. The Court rejects Plaintiff's argument. The undisputed record evidence indicates that USHC and Defendant are the same company and that USHC changed its name through filings with the Pennsylvania Department of State to Aetna U.S. Healthcare, Inc, and then to Aetna, Inc.<sup>11</sup> Pl. Mot. Ex. 4 at 14-15; Def. Mot. Ex. 7 ¶ 8; Def. Mot. Ex. 7C. There is no basis for concluding that Defendant is not a party in interest to the Engagement Letter.

Next Plaintiff argues that Defendant lacks evidence that Plaintiff breached the Engagement Letter. The Engagement Letter

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<sup>10</sup>Plaintiff does not dispute for the purposes of this Motion that the Engagement Contract represents an enforceable contract.

<sup>11</sup>The Court further notes that under Pennsylvania law, when a corporate entity merges with another entity, the consolidated corporation succeeds to the contractual rights and other rights of action of the constituent entities. See 15 Pa. Cons. Stat. Ann. § 1929(b) (West 2001); Santa Fe Energy Resources, Inc. v. Manners, 635 A.2d 648, 624 (Pa. Super. Ct. 1993). Accordingly, even in the event of a merger, Defendant would have standing to assert a breach of the Engagement Contract as well. See Pl. Mot. Ex. 5.

states:

This engagement letter follows our brief phone conversation of Thursday, February 15 in which we discussed your immediate need for consulting and claims auditing services related to your pending litigation. . . . As well, you require expert witness services which may be used at trial. . . .

We are prepared to dedicate the consulting and audit resources you require for the week of February 19 in order to adequately prepare you for depositions and file reviews as requested. Further, we will supply you with the claims and systems audit and consulting resources you require in order to prepare for trial in addition to the required expertise you need for expert testimony related to our findings.

We look forward to our immediate engagement and to working with you toward a successful conclusion to present and pending litigation.

Def. Mot. Ex. 8 (emphasis added). Defendant claims that Plaintiff breached the Engagement Letter by conditioning its provision of expert services in connection with the BCI Matter retrial on Defendant's agreement to a waiver and release of conflict of interest. In support, Defendant submits a letter from Plaintiff in response to Defendant's request for Plaintiff's continued services in connection with the BCI retrial, stating: "we may be able to assist you again given the attached release and an agreement on the duties and timetable required." Def. Ex. 20; see also Pl. Mot. Ex. 4 at 108, 109-110. Plaintiff points to the italicized portions of the Engagement Letter to support its argument that the Engagement Letter required Plaintiff to provide services only in connection

with the original trial of the BCI Matter, and not with the subsequent retrial.

The interpretation of a contract is a question of law that may properly be decided by the court, unless the court determines that the contract is ambiguous. W.B. v. Matula, 67 F.3d 484, 497 (3d Cir. 1995). Where the contract is ambiguous, the interpretation of the ambiguous term is a question of fact for the jury. Id. The Engagement Letter is ambiguous with respect to the scope of Plaintiff's duties because the Engagement Letter refers both to the pending litigation, which incorporates the entire process, as well as to trial. Accordingly, the meaning of the Engagement Letter is a question of fact to be determined at trial. The Court further determines that Defendant submits sufficient evidence creating a genuine issue of material fact as to whether Plaintiff breached the Engagement Letter and damages. See Def. Mot. Ex. 8, 20; Def. Mem. in Opposition to Pl. Mot. for Summ. J. on Def. Counterclaims ("Def. Opp.") Ex. B. Accordingly, Plaintiff is not entitled to summary judgment on Counterclaim One.

## 2. Conversion

Counterclaim Two asserts that Plaintiff unlawfully converted Defendant's confidential business information gained during the course of Plaintiff's service in the BCI Matter. Plaintiff initially argues that Defendant lacks evidence that it, as opposed to USHC, owned any confidential or proprietary information provided

during the BCI Matter. As stated above, Defendant presents evidence that Aetna and USHC are the same entity. Pl. Mot. Ex. 4 at 14-15; Def. Mot. Ex. 7 ¶ 8; Def. Mot. Ex. 7C. Accordingly, Plaintiff's contention is without merit.

Pennsylvania law recognizes that trade secrets can be the object of conversion. Fluid Power v. Vickers, Inc., Civ.A.No. 92-0302, 1993 WL 23854, at \*3 (E.D. Pa. Jan. 28, 1993). To prove a claim for conversion of trade secrets, the plaintiff must prove that: (1) the plaintiff owns a trade secret; (2) the trade secret was communicated to the defendant within a confidential relationship; and (3) the defendant used the trade secret to the plaintiff's detriment. Id.; see also SI Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1255 (3rd Cir. 1985); Van Prod. Co. v. General Welding & Fabricating Co., 213 A.2d 769, 775 (Pa. 1965). Pennsylvania courts have adopted the definition of a trade secret given in the Restatement of Torts § 757, Comment b (1939):

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

SI Handling, 753 F.2d at 1255; Tyson Metal Prod., Inc. v. McCann, 546 A.2d 119, 121 (Pa. Super. Ct. 1988) (citations omitted). Some factors to be considered in determining whether given information

is a trade secret are: (1) the extent to which the information is known outside of the owner's business; (2) the extent to which it is known by employees and others involved in the owner's business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the owner and to his competitors; (5) the amount of effort or money expended by the owner in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. SI Handling, 753 F.2d at 1256 (citations omitted); Tyson Metal, 546 A.2d at 121.

The Court determines that a genuine issue of material fact exists as to each element of the conversion claim. Defendant produces sufficient evidence to create a genuine issue of material fact that Plaintiff obtained proprietary information within a confidential relationship. Pl. Mot. Ex. 4 at 41-47, 50-56, 62-64, 67-68, 145-46, Ex. 19; Def. Mot. Ex. 1, 10. Given the factual dispute over the content and nature of the information disclosed to Plaintiff during the course of the BCI Matter, whether the information received by Plaintiff constitutes trade secrets under the applicable legal definition is a question of fact for the jury to determine. See West Mountain Poultry Co. v. Gress, 455 A.2d 651, 653-54 (Pa. Super. Ct. 1983); see also Tyson Metal, 546 A.2d at 121. Defendant's submissions further create a genuine issue of material fact as to whether Plaintiff used the information to

Defendant's detriment. See e.g. Def. Opp. Ex. A at 3, C at 51-55; Def. Mot. Ex. 50 at 273-74. Accordingly, Plaintiff is not entitled to summary judgment on Counterclaim Two.

### 3. Breach of Fiduciary Duty

Counterclaim Three states a claim for breach of fiduciary duty for allegedly using the confidential information learned about Defendant's business to solicit Defendant's clients into hiring Plaintiff to audit Defendant.

In Pennsylvania, to state a claim for breach of fiduciary duty a plaintiff must establish that: (1) the defendant acted negligently or intentionally failed to act in good faith and solely for the benefit of the plaintiff in all matters for which he or she was employed; (2) the plaintiff suffered injury; and (3) the agent's failure to act solely for the plaintiff's benefit was a real factor in bringing about plaintiff's injuries. WIH Management v. Heine, No.CIV.A.99-CV-3002, 1999 WL 778319, at \*2 (E.D. Pa. Sept. 30, 1999).

Defendant's submissions create a genuine issue of material fact as to each element of this claim. For the reasons previously stated with respect to Counterclaims One and Two, the Court rejects Plaintiff's argument that Defendant cannot assert any fiduciary duty owed to USHC. The record contains evidence from which a reasonable juror could conclude that Plaintiff failed to act in good faith and for Defendant's benefit resulting in injury

sufficient to justify injunctive relief and causation. See e.g. Def. Opp. Ex. A at 3, C at 51-55, D at 21; Def. Mot. Ex. 1 at A00107-A00109, 50 at 273-74; Pl. Mot. Ex. 4 at 41-47, 50-56, 62-64, 67-68, 145-46, 165, Ex. 19. For these reasons, Plaintiff is not entitled to summary judgment on this counterclaim.

4. Lanham Act

Counterclaim Four asserts that Plaintiff made false representations of fact about its and Defendant's services when soliciting Defendant's clients in violation of section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a)(1)(B). The statute provides:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -

. . .  
(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1) (1994).

At the threshold, Plaintiff contends that any false statements that it might have made are not actionable as 'commercial advertising or promotion' under the Lanham Act. Some courts have

adopted the definition of section 1125(a)(1)(B)'s language regarding 'commercial advertising or promotion' articulated in Gordon & Breach Science Publishers S.A. v. Am. Institute of Physics, 859 F. Supp. 1521, 1536 (S.D. N.Y. 1994): (1) commercial speech; (2) by a defendant in commercial competition with the plaintiff; (3) designed to influence customers to buy the defendant's products; and (4) that is sufficiently disseminated to the relevant purchasing public to constitute advertising or promotion within the industry. Proctor & Gamble v. Haugen, 222 F.3d 1262, 1273-74 (10th Cir. 2000); Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 734-35 (9th Cir. 1999); Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1384 (5th Cir. 1996); Kansas Bankers Sur. Corp. v. Bahr Consultants, Inc., 69 F. Supp. 2d 1004, 1012-13 (E.D. Tenn. 1999); Peerless v. Mestek, No.Civ.A. 98-CV-6532, 2000 WL 637082, at \*10 (E.D. Pa. May 11, 2000); Synogy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570, 576 (E.D. Pa.), aff'd, 229 F.3d 1139 (3d Cir. 2000); J & M Turner, Inc. v. Applied Bolting Tech. Prod., Inc., Nos. Civ.A.96-5819, Civ.A.95-2179, 1997 WL 83766, at \*16 (E.D. Pa. Feb. 24, 1997). The competitor requirement is designed to prevent the Lanham Act from being transformed from a statute prohibiting unfair competition into a general tort cause of action for misrepresentation. See Halicki v. United Artists Communications, Inc., 812 F.2d 1213, 1214-15 (9th Cir. 1987). The Third Circuit, however, does not require that the

parties be in direct competition. See Conte Bros. Auto. Inc. v. Quaker State-Slick 50, 165 F.3d 221, 230-34 (3d Cir. 1998). Rather, the plaintiff need only have a "reasonable interest to be protected against false advertising." Id. at 230-31. Thus, under Conte, an entity doing business at a different economic level from the entity allegedly engaging in misconduct is not precluded from suit under the Lanham Act. Id. at 231.

To determine the existence of a reasonable interest, the Conte court considered five factors: (1) the nature of the alleged injury; (2) the directness of the asserted injury; (3) the proximity of the party to the alleged injurious conduct; (4) the speculativeness of the damage claim; and (5) the risk of duplicative damages or complexity in apportioning damages. Id. at 233 (citing Associated General Contractors, Inc. v. Cal. State Council of Carpenters, 459 U.S. 5109, 538-44 (1983)); see also Proctor & Gamble v. Amway, 242 F.3d 539, 562 (5th Cir. 2001) (adopting Conte test). In the context of a Lanham Act claim, the first factor requires consideration of whether the plaintiff can prove competitive harm, or harm to goodwill or reputation. Id. at 234. Consideration of these factors under the circumstances of this case indicates that Defendant has a competitive interest that was directly impugned by Plaintiff's comments. Plaintiff's assertions that it has previously audited Defendant and recovered significant overcharges could reasonably directly injure Defendant's goodwill

and reputation with its customers. There is little risk of duplicative damages and a damage claim is not overly speculative.

Plaintiff also argues that Defendant cannot prove sufficient dissemination. "The level of circulation required to constitute advertising and promotion will vary from industry to industry and from case to case." J & M Turner, 1997 WL 83766, at \*16 (quoting American Needle & Novelty, Inc. v. Drew Pearson Marketing, Inc., 820 F. Supp. 1072, 1077-78 (N.D. Ill. 1993)); see also Seven-Up, 86 F.3d at 1385. Generally, isolated private statements are not sufficiently disseminated to constitute advertising. See Synygy, 51 F. Supp. 2d at 577; J & M Turner, 1997 WL 83766, at \*16. However, where the potential purchasers in the market are relatively limited in number, even a single promotional presentation to an individual purchaser may be enough to trigger the protections of the Act. See Seven-Up, 86 F.3d at 1386. The parties agree that the "relevant purchasing public" in this case is the pool of self-funded medical plan customers. Defendant submits sufficient evidence to create a genuine issue of material fact as to dissemination. See e.g. Def. Opp. Ex. C at 188, D at 16-21, E at 21.

The elements of a claim for false advertising under § 1125(a)(1)(B) are as follows: 1) that the defendant has made false or misleading statements as to his own or another's product; 2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; 3) that the deception

is material in that it is likely to influence purchasing decisions; 4) that the advertised goods traveled in interstate commerce; and 5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc. Warner-Lambert v. Breathasure, Inc., 204 F.3d 87, 91-92 (3d Cir. 2000); Syngy, 51 F. Supp. 2d at 576. Defendant submits evidence creating a genuine issue of material fact as to each element.

Only statements of fact capable of being proven false are actionable under the Lanham Act because when personal opinions on nonverifiable matters are given, the recipient is likely to assume only that the communicator believes the statement, not that the statement is true. Licata & Co., Inc. v. Goldberg, 812 F. Supp. 403, 408 (S.D. N.Y. 1993); see also Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir. 1999). Defendant submits evidence that Plaintiff solicited Defendant's customers for audits through factual representations that it had audited Defendant in the past and recovered overcharges, and that such representations are false. See Pl. Mot. Ex. 50 at 273-74; Def. Opp. Ex. C at 164-65, D at 16-21, E at 21, F at 5, G. The record also contains evidence of the materiality of the deception and that Plaintiff's services occurred in interstate commerce. Def. Mot. Ex. 31, 32, 33, 34; Pl. Mot. Ex. 13 at 177-79; Def. Opp. Ex. G at 1. Since Defendant adduces evidence that the statements were false and Defendant seeks only injunctive relief, proof of actual deception

is unnecessary. Warner-Lambert, 204 F.3d at 92 (citations omitted).

To show entitlement to monetary damages under section 43(a), a plaintiff must show actual damages rather than a mere tendency to be damaged. Synygy, 51 F. Supp. 2d at 575 (citing Rhone-Poulenc Rorer Pharmaceuticals, Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511 (8th Cir. 1996), and 15 U.S.C. § 1117(a)). Otherwise, a showing of a reasonable belief of injury will usually be sufficient to establish a reasonable likelihood of injury under § 43(a). Warner-Lambert, 204 F.3d at 95-96. Given the nature of the alleged misstatements, a jury could reasonably determine the likelihood of goodwill injury from the record.

Having determined that the circumstances of this case permit Defendant to sue under the Lanham Act for Plaintiff's alleged misrepresentations and that the evidence creates a genuine issue of material fact as to each element, the Court denies Plaintiff's Motion with respect to Counterclaim Four.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court denies Plaintiff's Motion in its entirety. Defendant's Motion is granted with respect to Plaintiff's defamation claim and tortious interference with contract claim as based on the OfficeMax, Chrysler, Sara Lee, and Kraft contracts. Accordingly, Plaintiff's claim for tortious interference with contract with respect to the Sears contract and Defendant's counterclaims for breach of contract, breach of

fiduciary duty, conversion, and false statements under the Lanham Act may proceed to trial. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SCHMIDT, LONG & ASSOC., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
AETNA U.S. HEALTHCARE, INC.	:	NO. 00-CV-3683

O R D E R

**AND NOW**, this                    day of July, 2001, upon consideration of Defendant's Motion for Summary Judgment (Doc. No. 43), and Plaintiff's Motion for Partial Summary Judgment on Defendant's Counterclaims and as to Liability on Plaintiff's Claims (Doc. No. 42), and all attendant and responsive briefing, **IT IS HEREBY ORDERED** that Defendant's Motion is **GRANTED** in part and **DENIED** in part and Plaintiff's Motion is **DENIED**.

Defendant is **GRANTED** summary judgment on Count I for tortious interference with contract with respect to the OfficeMax Corporation, Daimler-Chrysler Corporation, Kraft General Foods, and Sara Lee Corporation contracts, and on Count II in its entirety. Remaining for trial are Defendant's Counterclaims One, Two, Three and Four, and Plaintiff's claim for tortious interference with contract with respect to the Sears, Roebuck & Company contract.

BY THE COURT:

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John R. Padova, J.