

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

EMTEC, INC. : CIVIL ACTION  
 :  
 v. :  
 :  
 CONDOR TECHNOLOGY SOLUTIONS, INC, :  
 SCM LLC d/b/a THE COMMONWEALTH :  
 GROUP, J. MARSHALL COLEMAN :  
 and KENNARD F. HILL : NO. 97-6652

MEMORANDUM AND ORDER

HUTTON, J.

November 24, 1998

Presently before the Court are Plaintiff's Motion for Leave to File an Amended Complaint (Docket No. 29), Defendants' response (Docket No. 31), and Plaintiff's Reply Brief (Docket No. 31). Also before the Court are the Defendants' Motion for Partial Summary Judgment (Docket No. 22), Plaintiff's response (Docket No. 25), and Defendants' Reply Brief (Docket No. 28). For the reasons that follow, the Plaintiff's Motion for Leave to File an Amended Complaint is **GRANTED IN PART AND DENIED IN PART** and the Defendants' Motion for Partial Summary Judgment is **GRANTED IN PART AND DENIED IN PART**.

**I. BACKGROUND**

Taken in the light most favorable to the nonmoving party, the facts are as follows. In late 1996, Plaintiff Emtec, Inc. and Legg

Mason Wood Walker, Inc. ("Legg Mason"), Emtec's investment banker, began considering the feasibility of a corporate "roll-up" of certain computer companies. A roll-up is a process whereby one corporate structure acquires other companies, generally within a similar field of business, while at the same time stock in the acquiring corporation is offered to the public through an initial public offering ("IPO"). Emtec considered nine companies that were possible participants in the roll-up. Eventually, Emtec shortened this list to three: Computer Hardware Maintenance Corporation ("CHMC"), Corporate Access, Inc. ("Corporate Access"), and PCNet.

Prior to being introduced to Emtec, CHMC and Corporate Access were already interested in being acquired. Corporate Access acted through a corporate broker, Ross Crossland Weston & Co. ("RCW"), in an attempt to find an acquisition partner. RCW sent summary descriptions of Corporate Access a larger descriptive memorandum to numerous potential acquisition companies. Along the same lines, CHMC was also interested in acquisition prior to its discussions with Emtec. CHMC had acquisition discussions with a number of other firms before meeting with Emtec.

In early 1997, Emtec, Corporate Access, and CHMC signed letters of intent. These letters of intent stated that Emtec would acquire Corporate Access and CHMC. Due to market conditions, Emtec was unable to proceed with the roll-up of these three companies in March of 1997. Marshall Coleman, a principal of Defendant

Commonwealth Group, Inc. ("Commonwealth"), discovered Emtec's failed roll-up. Coleman and a representative of Legg Mason, Seth Lehr, met and signed a confidentiality agreement on April 28, 1997. Coleman and Lehr then exchanged financial information about the prospects that each were considering concerning the roll-up.

In late May of 1997, Commonwealth sent letters of intent to Emtec, CHMC, and Corporate Access. These letters of intent set forth the terms pursuant to which Defendant Condor Technology Solutions, Inc. ("Condor") proposed to purchase each of the three companies in their roll-up. On May 13, 1997, Commonwealth and Condor signed a supplemental agreement with Legg Mason and Emtec. Emtec agreed to disclose the identities of CHMC and Corporate Access. The parties also agreed that in no event would Commonwealth enter into any transactions with either CHMC or Corporate Access without Emtec's approval before May 13, 1999.<sup>1</sup>

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<sup>1</sup> The May 13, 1997 letter agreement, attached as Exhibit B to the complaint, states in part:

Commonwealth and Legg Mason have determined to continue to explore a possible business transaction relating to Legg Mason's client EMTEC, Inc. ("EMTEC") and Commonwealth's client The Condor Group ("Condor"). Each of EMTEC and Condor have been having discussions with potential acquisition candidates ("Founding Companies") which are engaged in their respective lines of business. Commonwealth and Legg Mason and representatives of EMTEC and Condor propose to meet to discuss a potential business transaction which would require disclosure of information relating to EMTEC's and Condor's Founding Companies.

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Commonwealth and Legg Mason each hereby agrees that neither it nor Condor or EMTEC, as the case may be, will seek, directly or indirectly, to enter into a business transaction with any of the other's Founding Companies for a period of two years from the date

With the May 13, 1997 agreement signed, Legg Mason and Emtec introduced representatives of Condor and Commonwealth to the presidents of CHMC and Corporate Access. During these introductions, Emtec's CEO, Thomas Dresser, told CHMC and Corporate Access that Emtec planned to roll-up with Condor. On July 3, 1997, Emtec and Condor signed a letter of intent providing for the acquisition of Emtec by Condor.

On July 17, 1997, however, Dresser told CHMC and Corporate Access that Emtec might not be included in the Condor roll up. Defendants contend that Dresser also stated that Emtec had no objection if CHMC and Corporate Access went ahead with the Condor roll-up. Plaintiff responds, and this Court must accept at the summary judgment stage, that Dresser only stated that Emtec could not legally prevent CHMC and Corporate Access from joining the Condor roll-up without them. On July 24, 1997, Condor withdrew the letter of intent providing for its acquisition of Emtec. As the roll-up transaction approached its target date, the Defendants excluded Emtec and completed the transaction with the other acquirees--including CHMC and Corporate Access--on February 5, 1998. The Defendants argue that they excluded Emtec, among other reasons, because it failed to provide them with audited 1997 financial statements establishing a "clean bill of financial

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hereof, without the prior written consent of the other party.

Pl.'s Compl. at Ex. B.

health.”

Subsequently, Emtec brought suit against the Defendants. Emtec claims that the roll-up was an outright breach of the May 13, 1997 agreement and sues for breach of contract (Count I), tortious interference with business relations (Count II), and misappropriation of a trade secret (Count III). Defendants filed a motion for partial summary judgment and seek dismissal of Counts II and III. After Defendants filed their summary judgment motion, Plaintiff filed a motion to amend the complaint. The Court considers these motions together.

## **II. DISCUSSION**

### **A. Motion to Amend the Complaint**

#### **1. Standard**

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure: “A party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served.” Fed. R. Civ. P. 15(a). Because the Plaintiff seeks to amend the complaint after the Defendants served their responsive pleading, the Plaintiff “may amend [his complaint] only by leave of court.” Id. Rule 15(a) clearly states that, “leave shall be freely given when justice so requires.” Id. “Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility.” In re Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)

(citations omitted); see also Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993).

## **2. Unjust Enrichment**

Plaintiff asks this Court for leave to amend the complaint in order to add an unjust enrichment claim. Defendants argue that Plaintiff cannot assert a right to recover damages under a theory of unjust enrichment because the relationship between the parties is based on an express, written contractual relationship.

"The Supreme Court of Pennsylvania has concluded that the quasi-contractual doctrine of unjust enrichment [is] inapplicable when the relationship between the parties is founded on a written agreement or express contract." Schott v. Westinghouse Elec. Corp., 259 A.2d 443, 448 (Pa. 1969). The Pennsylvania Superior Court followed this holding in Gee v. Eberle, 119, 420 A.2d 1050, 1060 (Pa. Super. Ct. 1980). In Gee, the Court found that "the essence of the doctrine of unjust enrichment is that there is no direct relationship between the parties." Id. If there is a relationship in the form of a promise to the plaintiff, he or she "has a right to recover on the promise . . . . The existence of that right, however, precludes a claim of unjust enrichment." Benefit Trust Life Ins. Co. v. Union Nat'l Bank of Pittsburgh, 776 F.2d 1174, 1177 (3d Cir. 1985).

Here, the damages that Plaintiff alleges in the proposed unjust enrichment claim are the same that Plaintiff alleges in the

breach of contract claim against the Defendants. Because a contractual relationship exists between Plaintiff and Defendants, Plaintiff cannot recover damages against Defendants under a theory of unjust enrichment. The Court finds that a claim for unjust enrichment under these facts fails as a matter of law. Therefore, the Court denies Plaintiff's motion for leave because the addition of an unjust enrichment claim would be "futile." See Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993) (upholding the district court's denial of motion to amend the complaint because the proposed amendment included claims that were "futile").

### **3. Additional and Inaccurate Facts**

Plaintiff also asks for leave to amend the complaint in order to correct a factual inaccuracy and allege additional facts concerning the IPO. Defendants do not oppose the Plaintiff's motion to amend these factual obligations. Therefore, the Court grants Plaintiff leave to correct or allege these facts.

## **B. Motion for Partial Summary Judgment**

### **1. Standard**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The

party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

## **2. Tortious Interference with Business Relationships**

Under Pennsylvania law,<sup>2</sup> a plaintiff must establish four elements to sustain a claim for tortious interference: (1) the existence of a prospective contractual relation between plaintiff and a third party; (2) defendant's purpose or intent to harm the plaintiff by preventing completion of a contractual relationship; (3) improper conduct, which is neither privileged nor justified, on the part of the defendant; and (4) actual legal harm resulting from the defendant's actions. See Nathason v. Medical College of Pa., 926 F.2d 1368, 1392 (3d Cir. 1991). Defendants move for summary judgment based on three of these four factors. Plaintiff argues that there is sufficient evidence on each of these three factors to defeat summary judgment.

### **a. Prospective Contractual Relation**

Defendants first argues that there was no prospective contractual relation between Emtec, Corporate Access, and CHMC. The Pennsylvania Supreme Court has defined "prospective contractual relation" as "something less than a contractual right, something more than a mere hope." Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 n. 7 (Pa. 1980). "This must be something more than a mere hope or the innate optimism of a salesman . . . . 'This is

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<sup>2</sup> Plaintiff's breach of contract claim, Count I, appears to be governed by Virginia law pursuant to the confidentiality agreement between the parties. Counts II and III, however, are tort actions. Neither party disputes the application of Pennsylvania's law to the torts found in Counts II and III.

an objective standard which of course must be supplied by adequate proof.'" Id. at 471 (quoting Glenn v. Point Park College, 272 A.2d 895, 898-99 (Pa. 1971) (footnote and citation omitted)). It exists if there is a reasonable probability that a contract will arise from the parties' current dealings. See Glenn, 272 A.2d at 898-899.

Merely pointing to an existing business relationship or past dealings, however, does not reach this level of probability. See General Sound Tel. Co., Inc., v. AT & T Communications, Inc., 654 F. Supp. 1562, 1565 (E.D. Pa. 1987) (finding that opportunity to bid on a contract is insufficient to establish the existence of a prospective contract under Pennsylvania law); Thompson, 412 A.2d at 471 (finding that existing year-to-year lease on certain property did not amount to a reasonable probability of renewal, despite the existing business relationship). Moreover, in the context of a breach of contract claim, if the breach only incidentally affects the plaintiff's business relations with third parties, then the plaintiff's only cause of action lies in contract. See Glazer v. Chandler, 200 A.2d 416, 418 (Pa. 1964).

Defendants argue that the undisputed facts reveal that Emtec had no objectively reasonable probability that Corporate Access and CHMC would join Emtec's roll-up. Defendants point to the evidence indicating Emtec's own roll-up plans with Corporate Access and CHMC ended by March of 1997. For instance, Defendants note that the

letters of intent between Emtec, Corporate Access, and CHMC expired. Defendants also state that Emtec encouraged Corporate Access and CHMC to roll-up with Condor.

This Court finds that there is enough evidence to suggest that Plaintiff did have a prospective contractual relation. Thomas Dresser, Emtec's CEO, stated in his deposition testimony that, even though the letters of intent expired and the roll up may have been "dead," Emtec, Corporate Access, and CHMC still "wanted to do something with their businesses joined together and be something part of a bigger entity." Dresser Dep. at 35. Viewed objectively, this testimony indicates the existence of "something beyond a mere hope" and "a reasonable probability" that a contract would arise from the parties' dealings.

Moreover, Plaintiff offered the deposition testimony of Dresser which directly contradicts Defendants' statement that Dresser encouraged Corporate Access and CHMC to go ahead with Condor's roll-up without Emtec. See id. at 51. Defendants submitted the affidavits of the Presidents of Corporate Access and CHMC, both of whom state that Dresser encouraged them to roll-up with Condor. Nevertheless, Dresser stated that he never made this statement to anyone from either Corporate Access or CHMC. See id. Rather, Dresser stated that he told them that he could not legally stop them from joining the roll up with Condor. See id. Therefore, because this Court must draw all reasonable inferences

in the light most favorable to the Plaintiff as the nonmovant, it also finds that there remains a genuine issue of fact concerning whether Emtec had a objective reasonable probability that Corporate Access and CHMC would roll up with Emtec.

**b. Purpose or Intent to Harm by Preventing the Relation**

Defendants also argue that "Emtec cannot demonstrate that the Defendants acted with any actionable ill-will, malice or intent as required." However, an intention to interfere with Plaintiff's prospective contractual relations does not require spite or ill will. See Pioneer Leimel Fabrics, Inc. v. Paul Rothman Indus., Ltd., No. CIV.A.87-2581, 1992 WL 73012, at \*7 (E.D. Pa. Mar. 31, 1992), aff'd, 993 F.2d 225 (3d Cir. 1993) (unpublished table decision); Yaindl v. Ingersoll-Rand Co., 422 A.2d 611, 622 (Pa. Super. Ct. 1980). Plaintiff need not show express evidence of intent, but may establish that interference is certain or substantially certain to occur as a result of the action. See Pioneer, 1992 WL 73012, at \*7.

Defendants again point to the statements by Dresser to Corporate Access and CHMC encouraging them to proceed with the Condor roll up without Emtec. As noted, this Court must view the facts in the light most favorable to the Plaintiff. Dresser denied making these statements in his deposition. Therefore, the Court finds that summary judgment is not proper on this ground as well.

**c. Actual Damage**

Finally, Defendants argue that Plaintiff did not suffer sufficient injury to warrant a tortious interference with prospective contractual relations claim. Under tortious interference with prospective contractual relations, a plaintiff may recover damages for the pecuniary loss of the benefits of the contract or the prospective relation, consequential losses legally caused by the interference, and emotional distress or actual harm to reputation reasonably expected to result from the interference. See Pioneer, 1992 WL 73012, at \*9.

This Court finds that Plaintiff offered sufficient evidence to preclude summary judgment. Plaintiff suffered lost profits as a result of Defendants' interference with their potential roll-up with Corporate Access and CHMC. This is pecuniary loss of benefits of the prospective relation. Therefore, the Court denies summary judgment on Plaintiff's interference with contractual relations claim.

**3. Misappropriation of Trade Secrets**

In order to prove a claim of misappropriation of trade secrets, a plaintiff must prove: (1) the existence of a trade secret; (2) the trade secret was communicated in confidence to defendant; (3) defendant used the trade secret in breach of that confidence; and (4) defendant used the trade secret to the detriment of the plaintiff. See Prudential Ins. Co. of Am. v.

Stella, No. CIV.A.97-4163, 1998 WL 57514, at \*4 (E.D. Pa. Feb. 12, 1998). Defendants argue that the Court should grant summary judgment on Plaintiff's claim for misappropriation of trade secrets because the information alleged to be a trade secret by Plaintiff does not fall within the definition of a trade secret under Pennsylvania law. Plaintiff argues that the identities of CHMC and Corporate Access as potential acquisition candidates are similar to customer lists and falls within the definition of a trade secret under Pennsylvania law.

Pennsylvania courts have adopted the definition of trade secret found in a comment to the Restatement of Torts. See Smith v. BIC Corp., 869 F.2d 194, 199 (3d Cir. 1989); see also Restatement of Torts § 757 cmt. b (1939). This comment provides:

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. [A trade secret] . . . differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of a business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business.

Id. In addition, the Third Circuit cited several factors which should be considered in concluding whether certain information is a trade secret:

(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 Sys., Inc. v. Heisley, 753 F.2d 1244, 1256 (3d Cir. 1985) (citing Restatement of Torts § 757 cmt. b (1939)).

A trade secret can be a plan or process, tool or mechanism, compound or element which is known only to its owner and those employees to whom it is necessary to inform of it. See Van Prods. Co. v. General Welding & Fabricating Co., 213 A.2d 769, 775 (Pa. 1965). "Novelty is only required of a trade secret to the extent necessary to show that the alleged secret is not a matter of public knowledge." Id. Consequently, information that is in the public domain cannot be protected as trade secrets. See id.

Protection has been extended to certain business and marketing information. See, e.g., SI Handling, 753 F.2d at 1260 (extending trade secret protection to cost and pricing information); Union Carbide Corp. v. UGI Corp., 731 F.2d 1186, 1191 (5th Cir. 1984) (extending trade secret protection to marketing information and

strategies); Alexander & Alexander, Inc. v. Drayton, 378 F. Supp. 824, 833 (E.D. Pa.) (extending trade secret protection to the terms of specific customer accounts), aff'd, 505 F.2d 729 (3d Cir. 1974) (unpublished table decision); Air Prods. & Chems., Inc. v. Johnson, 442 A.2d 1114, 1121 (Pa. Super. Ct. 1982) (extending trade secret protection to business plans and financial projections). "Customer lists and confidential business information cannot be trade secrets if they are easily or readily obtained, without great difficulty, through some independent source other than the trade secret holder." See Smith, 869 F.2d at 200; see also General Bus. Servs., Inc. v. Rouse, 495 F. Supp. 526, 530 (E.D. Pa. 1980). "Accordingly, courts have denied protection to customer lists which are easily generated from trade journals, ordinary telephone listings, or an employee's general knowledge of who, in an established industry, is a potential customer for a given product." Smith, 869 F.2d at 200; see also S.I. Handling, 753 F.2d at 1258.

Under the following principles, the Court grants summary judgment for the Defendants on the Plaintiff's claim of misappropriation of trade secret because it finds that the Plaintiff's confidential information simply does not fall within even a broad reading of the definition of a trade secret. The identities of two companies as possible acquisition targets is not the type of information meant to be protected as a trade secret. Plaintiff argues the identity of these two corporations is similar

to a customer list. However, this is not information that will be routinely used in Plaintiff's business as a computer company, nor does it give the Plaintiff an everyday advantage over Plaintiff's competitors. See Restatement of Torts § 757 cmt. b (1939) (noting that proposed security investments are not trade secrets to a company because it is a single event and not used every day as an advantage over competitors). Therefore, this Court finds that the identities of two companies for possible acquisition is not a trade secret.

Moreover, this Court is persuaded by the similar reasoning employed by the Second Circuit in Lehman v. Dow Jones & Co., 783 F.2d 285, 297-98 (2d Cir. 1986). In Lehman, the plaintiff provided the defendant with information regarding the availability of a certain company for merger. See id. This information included the attractiveness of such a merger for the defendant. See id. The Second Circuit, using the same Restatement definition of a trade secret, held that this merger information was not used in the operation of plaintiff's business. See id. Rather, the court found that this information was a single event and did not constitute a trade secret under the Restatement definition. See id. This Court agrees with the Lehman court's analysis and finds that the information provided by Emtec to Condor and Commonwealth was not a trade secret.

Even if this Court were to find that this information fit the Restatement's definition of a trade secret, this information cannot be protected as a trade secret because it was in the public domain. See Smith, 869 F.2d at 200 ("Customer lists and confidential business information cannot be trade secrets if they are easily or readily obtained, without great difficulty, through some independent source other than the trade secret holder."). In this case, Defendants submitted the affidavits of Richard T. Marino, the President and CEO of Corporate Access, and Michael G. Paglaicetti, the President of CHMC. These affidavits outline the numerous and substantial efforts that Corporate Access and CHMC undertook in order to merge with other computer companies. These efforts included, inter alia, the hiring of an investment banker to locate acquisition partners, the distribution of memorandum describing Corporate Access to hundreds of possible acquisition companies, and CHMC's acquisition discussions with companies prior to meeting with Emtec. Clearly, the identity of Corporate Access and CHMC as possible acquisitions was very well known in the computer industry. Therefore, summary judgment for the Defendants on Plaintiff's misappropriation of trade secrets claim is proper on this ground as well.

Finally, this Court agrees with the Plaintiff that whether information is a trade secret is ordinarily a question of fact to be decided by a jury. See Protocomm Corp. v. Fluent, Inc., No.

CIV.A.93-0518, 1995 WL 3671, at \*4 (E.D. Pa. Jan. 4, 1995). Nevertheless, the Court finds that summary judgment is appropriate in this case because, like all questions of fact, whether a plaintiff has a protective trade secret may be determined by a court where no reasonable person could determine the issue in any way but one based upon the evidence. See Frank W. Winne & Son, Inc. v. Palmer, No. CIV.A.91-2239, 1991 WL 155819, at \*3 n.3 (E.D. Pa. Aug. 7, 1991); Continental Data Sys., Inc. v. Exxon Corp., 638 F. Supp. 432, 442 (E.D. Pa. 1986).

An appropriate Order follows.

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 GROUP, J. MARSHALL COLEMAN :  
 and KENNARD F. HILL : NO. 97-6652

O R D E R

AND NOW, this 24th day of November, 1998, upon consideration of the Plaintiff's Motion for Leave to File an Amended Complaint and Defendants' Motion for Partial Summary Judgment, IT IS HEREBY ORDERED that the Plaintiff's Motion for Leave to File an Amended Complaint is **GRANTED IN PART AND DENIED IN PART** and Defendants' Motion for Partial Summary Judgment is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that:

(1) Plaintiff may file an amended complaint within twenty (20) days of the date of this Order to the extent that Plaintiff seeks to plead additional facts relating to consummation of the IPO roll-up transaction and correct a factual inaccuracy relating to a letter of intent between Emtec and CHMC; and

(2) Count III of Plaintiff's complaint is **DISMISSED**.

BY THE COURT:

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HERBERT J. HUTTON, J.