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

ARMSTRONG WORLD INDUSTRIES, INC., Plaintiff,	:	
v.	:	**Civil No. 97-3914**
SOMMER ALLIBERT, S.A., MARC ASSA, and TARKETT AG, Defendants.	:	

MEMORANDUM

Cahn, C.J. November ___, 1997

INTRODUCTION

Plaintiff Armstrong World Industries, Inc. ("Plaintiff" or "Armstrong") seeks equitable relief and money damages from Defendants Sommer Allibert, S.A. ("Sommer"), Marc Assa ("Assa"), and Tarkett AG ("Tarkett"). Armstrong's primary thrust is that this court enjoin Armstrong's competitors, Sommer and Tarkett, from completing a planned business combination until after September 24, 1999.[1] Armstrong bases its claims on numerous theories of liability, including breach of contract, breach of

[1]Alternatively, Plaintiff requests that the court enjoin the combined Sommer-Tarkett entity from: 1) using any Armstrong Russian or Eastern European distributor for two years; 2) interfering with Armstrong's relationships with those distributors; 3) raiding Armstrong personnel in Russia or Eastern Europe; 4) introducing the hot melt calendaring process, see Finding of Fact 5, into the United States until trial, and thereafter for at least three years; and 5) engaging in business in the United States for eighteen months. Although Plaintiff's Amended Complaint requested additional equitable relief, Plaintiff did not pursue these requests, and the court considers them abandoned. With respect to legal relief, Plaintiff requests entry of judgment in its favor.

the duty of good faith, fraud, negligent misrepresentation, conversion, promissory estoppel, civil conspiracy, and unfair competition.[2] Denying liability, Sommer, Assa, and Tarkett filed answers to Armstrong's First Amended Complaint in Equity. The court granted the parties almost three months to conduct discovery, held five days of hearings, and accepted post-hearing and supplemental post-hearing briefs, as well as supplemental proposed findings of fact and conclusions of law.[3] The court now makes the following:

FINDINGS OF FACT

A. The Parties

1. Plaintiff is a Pennsylvania corporation with its principal place of business in Lancaster, Pennsylvania.

2. Plaintiff manufactures floor coverings and other products. In its flooring business, Plaintiff primarily manufactures resilient flooring.

3. The defendants are Sommer, Assa, and Tarkett.

4. Defendant Sommer is a French corporation with its principal place of business in Nanterre, France.

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[2]Armstrong lodges each of these claims against Sommer, Assa, and Tarkett. Armstrong names Tarkett only as an aider and abettor, however, in its breach of contract, breach of the duty of good faith, fraud, negligent misrepresentation, promissory estoppel, and conversion claims.

[3]In addition to the hearing exhibits and hearing testimony, the record in this case includes exhibits and deposition testimony that the parties submitted with their briefs.

5. Flooring and automotive interiors are Sommer's two main businesses. In its flooring business, Sommer primarily manufactures resilient flooring and linoleum flooring. Sommer manufactures some of its resilient products through the use of a hot melt calendaring process, which converts recycled and off-grade materials into a single-layered vinyl flooring product without using chlorine.

6. Sommer owns a majority of the stock of Domco, Inc. ("Domco"), a Canadian corporation with its principal place of business in Montreal, Canada.

7. Defendant Marc Assa is a resident of Luxembourg and has been the CEO of Sommer since 1990. Assa started his career in the flooring business in 1968, and Sommer has employed Assa since 1976.

8. Defendant Tarkett is a German corporation with its principal place of business in Frankenthal, Germany.

9. Tarkett manufactures floor coverings, primarily resilient flooring and hardwood flooring.

10. Lars Wisén ("Wisén") is Tarkett's CEO. At all times pertinent to this controversy, Wisén held this position and had authority to negotiate with Sommer.

11. Sommer and Tarkett compete with Armstrong in the worldwide flooring business.

B. Global Competition

12. The following percentages represent estimates of Armstrong's, Sommer's, and Tarkett's current share of the United States flooring market:

a. Armstrong's United States market share is estimated to be between forty and fifty percent. Armstrong's share of the residential market is within this range, as is Armstrong's share of the commercial market.

b. Estimates place Domco's United States market share between five and ten percent. Domco's share of the commercial market is at the top of or is slightly above this range, and Domco's share of the residential market is at the bottom of or slightly below this range.

c. Estimates place Tarkett's United States market share in the United States between ten and fifteen percent. Estimates suggest that Tarkett's share is divided evenly between the residential and commercial markets.

13. In the Western European market, Sommer and Tarkett are regarded as two of the leading manufacturers of resilient flooring. Armstrong's market share in Europe is less than either Sommer's market share or Tarkett's market share.

14. Armstrong, Sommer, and Tarkett sell floor coverings in Eastern Europe and Russia. Neither Armstrong, Sommer, or Tarkett is currently producing floor coverings in those areas.

15. Armstrong and Sommer have joint ventures in Asia, and Tarkett has offices in Asia.

C. The Future of the Flooring Industry

16. The Western European flooring market is mature, with relatively low growth, and is ripe for consolidation.

17. Eastern Europe is expected to have a strong flooring market in the next decade. Demand is expected to grow annually at a rate of over ten percent.

18. The Russian flooring market may grow, depending upon political and economic developments.

19. Asian flooring markets likely will offer attractive opportunities for growth.

20. The above four findings of fact are based on reports by investment bankers, as well as testimony in this proceeding.

D. Overview of the Armstrong-Sommer Negotiations

21. George Lorch ("Lorch"), Chairman and CEO of Armstrong, and Assa, CEO and Chairman of the Management Board of Sommer, have been acquainted as business associates for approximately ten years.

22. Representatives of Armstrong and Sommer discussed possible cooperative business combinations from approximately 1990-1997. Negotiations intensified from 1995-1997, but Armstrong and Sommer never completed a business transaction.

23. Lorch and Assa frequently met when either individual had to travel to the other's country for business reasons unrelated to the Armstrong-Sommer negotiations.

24. Although Lorch and Assa had a friendly relationship, they bargained at arm's length.

25. The executives who consistently negotiated with Sommer on behalf of Armstrong were Lorch; Robert J. Shannon, Jr. ("Shannon"), President of Armstrong's Worldwide Floor Products Operations; and Frank A. Riddick III ("Riddick"), Armstrong's Chief Financial Officer ("CFO").[4]

26. The executives who consistently negotiated with Armstrong on behalf of Sommer were Assa; Christian Coumans ("Coumans"), Sommer's former Executive Vice President in charge of North American development activities;[5] and Michel Cognet ("Cognet"), Sommer's Controller and Managing Director of Finances and Human Resources. Although Jean Milliotte ("Milliotte"), the President of Sommer, participated in some negotiations, he did not attend any Armstrong-Sommer meetings after June 1996.

27. Coumans, Sommer's authorized representative in the United States, had the authority to contact Armstrong on Assa's behalf.

28. Armstrong and Sommer both acknowledged that, at all times pertinent to this controversy, they were obligated to keep their negotiations confidential.

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[4]Shannon became President of Worldwide Floor Products Operations in February 1997. During a substantial portion of the negotiations with Sommer, Shannon was Armstrong's President of Floor Products - International.

[5]Coumans was officially employed by Sommer until September 30, 1997.

E. Overview of the Sommer-Tarkett Negotiations

29. The investment banking firm SBC Warburg independently initiated the discussions that led to the Sommer-Tarkett transaction, which is now scheduled to close on December 3, 1997, and will terminate unless closed by December 31, 1997.

30. The Sommer-Tarkett negotiations began in November 1996, and continued through May 1997.

31. On May 28, 1997, Sommer and Tarkett publicly announced their plans to combine the two companies' flooring businesses.

32. The executives who consistently negotiated with Tarkett on behalf of Sommer were Assa; Cognet; and, to a lesser extent, Milliotte.

F. Negotiations Between Armstrong and Sommer: December 1995-June 1996

33. In June or July 1995, Lorch and Assa met and discussed the possibility of Armstrong utilizing some of Sommer's excess production capacity in Europe. They explored business prospects in Eastern Europe, Russia, Central Europe, and Asia. Assa suggested that Armstrong and Sommer penetrate the Eastern European market by using Sommer's capacity to manufacture product that would be marketed under the Armstrong brand.

34. At a meeting in New York in December 1995, Armstrong proposed that it submit a cash bid for Domco and form a European joint venture with Sommer. Assa stated that he was not

interested in selling Domco, but wanted to pursue a joint venture in Europe.

35. In 1996, Armstrong and Sommer initially explored the possibility of a joint manufacturing transaction. In March 1996, Milliotte proposed that Armstrong and Sommer form a joint venture company and share excess capacity at its facility located in Wiltz. Shannon then expressed interest in a joint manufacturing transaction involving Sommer's Clervaux facility, which Lorch toured in 1995. Assa rejected that proposition. In June, Shannon and Milliotte met and discussed the Wiltz joint venture that had been proposed in April, and Shannon raised the possibility of entering a broader transaction. The parties agreed to continue to negotiate.

G. The July 9-10, 1996 Meeting in Lancaster

36. On July 9-10, 1996, Assa, Coumans, and Cognet attended a meeting with Armstrong in Lancaster, Pennsylvania, the location of Armstrong's executive offices.

37. On July 9, the parties dined at Lorch's home and briefly discussed business. Lorch announced that on the following day Shannon would be presenting a new idea that had grown out of the parties' prior discussions about a possible joint venture, and Shannon summarily described his idea to combine Armstrong's and Sommer's flooring businesses to create a company that would have a formidable global presence.

38. On July 10, the parties met at Armstrong's executive offices. Shannon gave an approximately one hour presentation explaining how value could be achieved through synergies that would result from the combination of Armstrong's and Sommer's flooring businesses. Shannon's presentation focused on strategies for the residential flooring market. Shannon discussed synergies that would result in North America, Western Europe, Eastern Europe, and Asia.

39. The North American synergies identified by Shannon included:

a. Realizing some economies of scale in the North American market, such as having one sales and marketing force instead of two;

b. At the same time, using multiple brands, multiple distribution systems, and multiple channels so that the new global business could retain almost all the revenue of Armstrong's and Domco's current business;

c. Utilizing Sommer's technology and excess manufacturing capacity, as well as capitalizing on the strength of Armstrong's brand and distribution system, by introducing Sommer's hot melt calendaring technology and Sommer's use of glass backs for flooring products into the American home improvement center channel (the "big box" retail channel);[6] and

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[6]A big box retailer sells products that appeal to the consumer seeking the "do it yourself" approach. Home Depot is a well-known example of a big box retailer. Big box retailers are (continued...)

d. Using Domco's excess capacity and expanding Armstrong's product range by manufacturing a luxury tile product in the Domco facility that would be sold through Armstrong's distribution system under the Armstrong brand.

40. The Western European synergies identified by Shannon included:

a. Combining capacities;

b. Realizing economies of scale;

c. Better utilizing Sommer's technology;

d. Selling, general and administrative ("SG&A") synergies; and

e. Leveraging management.

41. The Eastern European synergies identified by Shannon included:

a. Using Sommer's European manufacturing capability to produce flooring for the Eastern European market; and

b. Introducing Armstrong's brand and American-style distribution network[7] in Eastern Europe.

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[6](...continued)
not unique to the North American market.

[7]Shannon explained that an "American style distribution system" means a "two-step distribution to market where you attempt[] to get as exclusive a relationship with a distributor in a given market as possible. . . instead of like the Western European model where a distributor would tend to carry multiple brands which compete with each other."

42. The Asian synergies identified by Shannon included gaining capacity by investing in joint ventures as part of a larger consolidation strategy.

43. Shannon's presentation focused on the North American synergies that would result from a combination.

44. Shannon's presentation did not include discussion of: Armstrong's technology; Armstrong's new product and research and development plans; the chemical processes involved in manufacturing Armstrong products; Armstrong's pricing formula or pricing models; Armstrong's profitability data on a per-product basis; the actual cost of Armstrong's material, labor and transportation; Armstrong's suppliers; Armstrong's lease arrangements; all of Armstrong's plants and their technological foundations; Armstrong's inventory levels; Armstrong's customer lists; or Armstrong's employee information.

45. Following Shannon's presentation, Lorch offered to purchase Sommer's flooring business for stock or cash.

46. Assa replied that he did not want to exit the flooring business.

47. Cognet then persuaded Assa to stay and partake in further discussions in an effort to find a way to achieve the synergies that a combination of Armstrong and Sommer would yield. Although Cognet suggested some joint venture concepts, the discussions were not productive because Riddick was not present. The meeting ended, and the parties agreed to negotiate further regarding possible structures for a combination.

H. Further Negotiations Lead to a Written Confidentiality Agreement

48. On September 9, 1996, Shannon and Riddick met with Cognet and Milliotte to discuss how to allocate shares in a combined company.

a. Armstrong disclosed that the anticipated net present value of the potential synergies of a combination would exceed $200 million dollars. Coumans requested a detailed analysis of the synergies that would create $200 million dollars, but Shannon did not respond to the request because it exceeded what he believed was necessary to reveal during negotiations.

b. The parties discussed different ways of structuring a combination. A stock purchase was one of the options.

c. At the end of the meeting, the parties agreed to exchange detailed financial information in order to help determine the relative values of Armstrong's and Sommer's flooring businesses.

d. Armstrong believed that Sommer would be more comfortable providing financial information if a written confidentiality agreement existed. Thus, Shannon offered to send Sommer a written confidentiality agreement, even though the parties understood that they were operating under an agreement of confidentiality.

49. Shannon subsequently sent a signed Confidentiality Agreement to Coumans, who signed the agreement on September 24, 1996. The Confidentiality Agreement provides, in relevant part:

> In connection with a potential business transaction . . . Armstrong and [Sommer] wish to exchange certain information which is either confidential, proprietary or otherwise not generally available to the public to assist the Parties in making an evaluation of the potential business transaction (the "Evaluation").
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> . . . .
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> 1. Nondisclosure of Information. The Information each Party furnishes to the other Party will be kept confidential, will not be used by the other Party in any way detrimental to the Party supplying it, will not be used other than in connection with the Evaluation, and the Parties will use their best efforts to safeguard the information each receives from unauthorized disclosure.
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> . . . .
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> 4. Public Information. This agreement will be inoperative as to such portions of the Information supplied by a Party which (i) are already in the other Party's possession or of which it is aware, (ii) are or become generally available to the public through no fault or action by the other Party . . . or (iii) are or become available to the other Party on a nonconfidential basis from a source, other than the Party supplying it . . . which, after due inquiry, is not legally prohibited from disclosing such Information.
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> . . . .
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> 6. Miscellaneous. . . . This agreement will be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania, without giving effect to the principles of conflict of laws thereof.

I. The Armstrong Financial Data

50. Pursuant to the Confidentiality Agreement, Armstrong provided Sommer with four pages of financial information.

a. Armstrong's data included Summary Financial Data for 1994, 1995, the first six months of 1996, and projected figures for 1996.

b. The figures were broken down into the following geographic regions: North America, Europe, and the Pacific Rim. In addition, the figures were totaled.

c. The data included summary income statement data, summary balance sheet data, and cash flow data. More specifically, the data included, for example, EBIT and EBITDA figures[8], sales figures, capital expenditures data, and tax rate data.

J. Sommer and Tarkett Negotiations Commence

51. On September 10, 1996, Assa met with representatives of SBC Warburg, who had no contractual arrangement with Sommer at this time. SBC Warburg initiated the meeting to explain to Sommer that, given the trends in the flooring industry, Sommer should make an acquisition or merge with another company. SBC Warburg recommended that Sommer focus its attention on Tarkett.

52. SBC Warburg's September 1996 report to Sommer on opportunities in the European flooring business identified the benefits of a combination of Sommer and Tarkett. SBC Warburg identified benefits, including, but not limited to: creating the

[8]"EBIT" is earnings before interest and taxes. "EBITDA" is earnings before interest, taxes, depreciation, and amortization. Both are standard earnings measures.

largest flooring group in Europe and in all main and faster growing product markets; complementary product ranges, with Tarkett contributing its leading presence in the hardwood market; increased United States market sales; potential to leverage Tarkett's Eastern European market presence; a new powerful sales group; a stronger position with distributors due to increased size and wider product range; and economies of scale on research and development and product innovation and design.

53. SBC Warburg then approached Tarkett to ascertain if Tarkett had an interest in exploring combination options with Sommer. Tarkett expressed interest.

54. On November 5, 1996, Assa and Wisén met to discuss the possibility of a business transaction.

55. On November 13, 1996, Assa and Cognet met with Wisén and Christer Hiller ("Hiller"), Tarkett's CFO, to discuss a transaction in which Sommer would sell its flooring business to Tarkett for cash, and then acquire the majority of Tarkett shares.

K. A Pause in the Armstrong-Sommer Negotiations

56. On November 19, 1996, representatives of Armstrong and Sommer met to continue their negotiations. At this meeting:

a. Armstrong reviewed the substance of the July 10 meeting;

b. Riddick informed Sommer that Armstrong was not interested in pursuing Sommer's joint venture ideas;

c. Sommer told Armstrong that a stock transaction would not give Sommer a sufficient ownership interest in Armstrong, because Sommer's analysis of the financial data revealed that Armstrong's business was more profitable as a percent of revenues than Sommer's business; and

d. Despite this failure to reach common ground, Assa agreed to resume contact with Lorch after the end of the year, which he stated was a busy time for Sommer.

L. Sommer Focuses on Tarkett: December 1996 - mid-February 1997

57. Representatives of Sommer and Tarkett met to negotiate twice in December 1996, twice in January 1997, and twice in early to mid-February 1997. They debated how much Sommer should pay for Tarkett shares and how much Tarkett should pay for Sommer's flooring business.

58. Armstrong and Sommer had no face-to-face meetings during this time frame. Lorch had a few telephone conversations with Coumans in December 1996 - January 1997. In these conversations, Lorch inquired whether Sommer was still interested in pursuing a transaction with Armstrong, because if Sommer was no longer interested, then Armstrong would pursue alternative strategies. Coumans advised Lorch not to pursue other plans. Lorch responded that he would give Sommer some additional time, and Coumans agreed to contact Lorch again shortly.

M. Armstrong Hires Lazard Frères

59. Fearful that it was not taking the proper cultural approach in its pursuit of Sommer, Armstrong retained the investment banking firm Lazard Frères ("Lazard") in February 1997. Armstrong selected Lazard because of the firm's knowledge of the French market and its "knowledge of some of the principals at Sommer."

60. Francois De Combret ("De Combret"), a partner in Lazard's Paris office, contacted Assa on Armstrong's behalf on two occasions. De Combret knew both Assa and the De Coninck family, Sommer's major shareholders, and was a member of the board of Renault, a large customer of Sommer's automotive interior business.

61. De Combret placed his first telephone call to Assa sometime in late February, 1997. De Combret told Assa that he was calling on behalf of Lazard to explain why Sommer would benefit from a transaction with Armstrong. De Combret stated that Armstrong wished to purchase Sommer's flooring business, and that this purchase would please Sommer's automotive customers. Assa replied that he did not plan to sell Sommer's flooring business.

62. De Combret called Assa a second time approximately one week later. Although De Combret offered no new reasons why Sommer should consider Armstrong, Assa unexpectedly reversed his prior position and agreed to meet with Armstrong in the United States within a few weeks.

N. Difficulties in Negotiating a Value for the Sommer-Tarkett Transaction

63. During the final week of February 1997, Assa made two offers for Tarkett. Wisén rejected both offers.

a. The first offer, which Sommer made on February 24, 1997, included a price at which Sommer proposed to acquire sixty percent of outstanding Tarkett shares, a price at which Sommer would sell its flooring business, and proposals for financing the transaction. The price for Sommer's flooring business was 675 million Deutschmark ("MDM"). On February 25, 1997, Wisén rejected this offer. Wisén complained that "we are buying at too high a price." Wisén also raised other objections. According to Wisén, in order to acquire a majority interest in a public company, a purchaser must pay a premium of approximately thirty percent.

b. The second offer, which Assa made on February 27, 1997, included a term that Tarkett purchase Sommer's flooring business for 725 MDM. The offer contained a corresponding increase in the price proposed for the Tarkett shares, as well as new financing terms. On February 28, 1997, Wisén rejected this offer. He questioned the parties' ability to reach an agreement and noted that Tarkett had other alternatives. Wisén outlined two counterproposals, both of which included a term that Tarkett purchase Sommer's flooring business for 663 MDM.

64. There is no direct evidence that the second telephone conversation between Assa and De Combret, in which Assa stated he

would meet with Armstrong, occurred after Wisén rejected Assa's two offers for Tarkett during the final week of February.

65. On March 6, 1997, Sommer, Tarkett, and SBC Warburg met in Germany.

a. In preparation for this meeting, and at Wisén's direction, SBC Warburg created an outline of the contemplated transaction. This outline, dated March 5, 1997, contained an acquisition price of 675 MDM for Sommer's flooring business.

b. According to Wisén, the Sommer and Tarkett executives had developed a possible structure for the transaction prior to the March 6 meeting, which was held for the primary purpose of discussing the structure of the deal with Sommer's and Tarkett's lawyers.

c. After this meeting, Wisén needed to obtain the agreement of Goldman Sachs Capital Partners ("Goldman") and Doughty Hanson ("Doughty"), who together as institutional investment bankers own sixty-five percent of the outstanding Tarkett shares.

66. Between early March 1997 and the end of April 1997, Sommer and Tarkett had no face-to-face meetings. During this time, Goldman and Doughty were performing their own analyses to structure a deal that would yield more value for themselves. Wisén and Goldman were also engaged in private negotiations.

67. At this point in time, a combination between Sommer and Tarkett appeared questionable.

O. The March 18, 1997 Meeting: Sommer Requests a Cash Bid

68. In early March 1997, Coumans called Lorch and requested that he attend an important meeting with Assa on March 18, 1997, when Assa would be in the United States on a business trip. When asked, Coumans stated that he did not know what Assa intended to discuss at the meeting.

69. The March 18, 1997 meeting was a dinner during which the Armstrong and Sommer representatives discussed business for approximately fifteen minutes.

70. At the March 18, 1997 meeting, Assa:

a. Announced that he had decided to sell Sommer's flooring business;

b. Requested that Armstrong prepare an all-cash bid for Sommer's flooring business;

c. Committed himself to bringing the bid to Sommer's Supervisory Board[9] in May if the price was fair; and

d. Gave Armstrong one page of Sommer financial data to assist Armstrong in preparing the bid.

71. Lorch responded that Armstrong was interested in making a cash bid. Riddick then interrupted Lorch to state, among other things, that:

a. The bid would be subject to due diligence;

b. Armstrong "would want to deal with [Sommer] exclusively for some period of time;"

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[9]The Supervisory Board has the "ultimate decision-making authority" at Sommer.

c. Armstrong would follow up with an offer letter; and

d. The parties should have another face-to-face meeting when Armstrong presented the offer.

72. Assa's request for a cash bid surprised Armstrong because Assa had previously mentioned that selling the flooring business was not his personal preference.

P. The April 17, 1997 Meeting: Armstrong Presents its Bid

73. On April 17, 1997, Lorch, Shannon, and Edward Case ("Case"), Treasurer of Armstrong, met with Assa and Cognet in New York. At this meeting, Armstrong presented to Sommer its cash bid of 4.5 billion French francs.[10]

74. Lorch began the April 17, 1997 meeting with a presentation that closely tracked the language of Armstrong's offer letter, a copy of which Lorch gave to Assa. Lorch reviewed the letter "in fairly verbatim format."

75. Armstrong's offer letter was carefully prepared and/or reviewed by Riddick; Case; Shannon; Armstrong's in-house and outside counsel; Bain & Company, Inc. ("Bain");[11] and investment bankers from J.P. Morgan & Co. ("J.P. Morgan") and Lazard. Lorch also read and signed the letter, which was on his personal stationery.

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[10]This amount is roughly equivalent to $768 million dollars.

[11]Bain is a marketing consulting firm that is based in Boston.

76. Under the heading “Next Steps,” the offer letter reads, “[a]s part of this offer, <u>we would ask</u> that Sommer grant Armstrong the exclusive right to conduct due diligence and negotiate a transaction.” (Emphasis added). When Lorch reached this part of the letter in his presentation, he either quoted these words or paraphrased them carefully, without changing their meaning.

77. On April 17, 1997, Assa did assent, on behalf of Sommer, to the terms and conditions that Armstrong requested, including that, if Sommer’s Supervisory Board approved the bid, Armstrong and Sommer would deal exclusively during the subsequent period of due diligence.

78. Once Cognet and Assa completed some calculations, Assa stated that the bid was fair. Assa did not object to any aspect of the Armstrong presentation.

79. Assa stated that he would present Armstrong’s bid to Sommer’s Supervisory Board, and would contact Lorch following the May 13 Supervisory Board Meeting.

<u>Q. Sommer and Tarkett Resume Face-to-Face Negotiations</u>

80. At the end of April 1997, Goldman and Doughty agreed to the Sommer-Tarkett deal structure that SBC Warburg had proposed. Goldman and Doughty, however, wanted a higher price for their shares.

81. As a result of Goldman's and Doughty's assent to the structure of the transaction, Sommer and Tarkett resumed negotiations.

82. Representatives of SBC Warburg, Sommer, and Tarkett, including Goldman and Doughty, met in London on May 1, 1997. At this meeting, Tarkett agreed to increase the value of Sommer's flooring business from 675 MDM to 705 MDM, which was the final price at which the parties agreed Sommer would sell its flooring business to Tarkett. The parties also agreed to increase the price Sommer would pay for Tarkett shares and alter some aspects of the financing. Although the parties made progress at this meeting, they failed to agree on a value for the transaction.

83. The Armstrong cash bid was not mentioned during the May 1, 1997 meeting.

84. Sometime between May 1 and May 6, 1997, Sommer and Tarkett reached an agreement in principle with respect to the value of the transaction.

R. The May 13, 1997 Supervisory Board Meeting

85. At the May 13, 1997 Supervisory Board meeting, Assa discussed the flooring market and advised the Board that it needed to consider the future of Sommer's flooring business. Assa then presented both Armstrong's April 17, 1997 offer letter and the Tarkett proposal. The Board thus faced the choice of either selling its floor coverings business or increasing its presence in the global market.

86. Although the Armstrong offer letter was never translated into French, and Bernard De Coninck ("De Coninck"), the President of the Sommer Supervisory Board, speaks little or no English, Assa orally described the Armstrong offer. This description did not include any mention of exclusivity.

87. Assa, on behalf of Sommer's Management Board, recommended that Sommer increase its presence in the flooring industry and pursue the Tarkett transaction.

88. The Supervisory Board then authorized Assa to pursue the Tarkett transaction.

S. Assa's May 15, 1997 and May 26, 1997 Telephone Calls with Lorch

89. On May 15, 1997, Assa called Lorch to explain that Sommer had been working to protect itself from a potential takeover and had not had time to consider Armstrong's bid. Lorch agreed to allow Sommer additional time. Assa stated that the Board would meet again the following Thursday to make a decision, and he would give Lorch an answer over the Memorial Day weekend.

90. At no point during this May 15, 1997 conversation did Assa tell Lorch that the Supervisory Board had decided to pursue the Tarkett transaction.

91. On May 26, 1997, Assa called to inform Lorch that Sommer had decided against selling its flooring business. This response surprised Lorch. Assa made no mention of the pending Tarkett transaction.

T. Armstrong Learns of the Sommer-Tarkett Transaction

92. On May 28, 1997, Sommer and Tarkett publicly announced plans to combine their flooring businesses. The major features of the proposed transaction include:

a. The sale of Sommer's flooring business to Tarkett for 705 MDM;

b. The acquisition by Sommer of sixty percent of the outstanding Tarkett shares via a public tender offer for all shares at DM 32.75 per share; and

c. The commitment of Goldman and Doughty to sell Sommer enough shares to ensure that Sommer will own at least 60% of the Sommer-Tarkett entity.

This arrangement allows Tarkett shareholders, including Goldman and Doughty, to realize a premium on the price of their shares.

93. The public announcement of this transaction was the first notice Armstrong had of Sommer's negotiations with Tarkett.

94. On May 29, 1997, Assa called Lorch to explain that he was unable to tell Lorch about Tarkett earlier because the Sommer-Tarkett transaction had been neither final nor public.

95. Armstrong acted ethically and legally. Sommer used deceptive tactics to establish a global company. Assa misled Lorch.

U. Tarkett Learns that Sommer had Negotiated with Armstrong

96. Tarkett did not learn that Sommer had been negotiating with Armstrong until Armstrong filed this action on June 9, 1997.

V. Future Business Plans

97. If the Sommer-Tarkett transaction is completed, the combined entity may, among other things, increase dual branding in the United States. The combined entity is not, however, planning to introduce hot melt calendar product into the big box retail market in the United States. In fact, Sommer and Tarkett representatives testified that this strategy would not be profitable.

W. Other Litigation Between Armstrong and Sommer

98. On June 9, 1997, the same day that Armstrong initiated this proceeding, it made a hostile takeover bid for Domco. Subsequent events related to this unsolicited offer caused Armstrong to request various types of injunctive relief in the Canadian courts. On November 14, 1997, Madame Justice Greer of the Ontario Court, General Division, dismissed Armstrong's requests. The dismissal has no effect on this court's consideration of Armstrong's claims.

99. The parties have informed this court that Sommer has sued Armstrong in France and Canada. The record in the case at bar, however, contains no pleadings, opinions, or other documents from such proceedings.

X. Armstrong's Claims

100. The concepts that Shannon discussed on July 10, 1996, including economies of scale, multiple branding and distribution,

leveraging capacity, distribution, management, and technology, and increasing product range, are generally known in the commercial marketplace and did not originate with Armstrong.

a. A 1996 SBC Warburg study shows that the Western European flooring market is saturated, the Eastern European and Asian markets are expected to grow, the flooring industry is ripe for consolidation, consolidation could yield significant economies of scale in manufacturing, and "[d]istribution network is key - size and breadth of product range are significant advantages in securing access to distribution, especially with potentially growing importance of DIY [Do It Yourself]." At the time SBC Warburg prepared this report, the firm had no contractual arrangement with either Armstrong or Sommer. In addition to being conducted independently, the study was based solely on public information.

b. Armstrong's 1995 Annual Report, which was publicly available before the July 9-10, 1996 meetings in Lancaster, discloses some of the ideas that Shannon discussed in his presentation. For example, the 1995 Annual Report reads, "[t]o reduce distribution channel conflicts and promote maximum growth in all market segments, Floor Products introduced segmented tile and sheet flooring products for independent specialty retailers, regional chains and the largest warehouse home centers." In addition, the Report makes numerous references to Armstrong's focus on developing "a more global business." The Report even summarizes activity in specific countries. For example, "[i]n

1995, Armstrong established new residential distributors in Russia, Poland and the Czech Republic."

c. Sommer and Tarkett both utilize multiple brands. Assa testified that in countries in which Sommer has a large market share, it markets multiple brands. In addition, Domco markets under the Domco, Azrock, and Nafco brands. In Germany, Tarkett markets under four different brands and has a brand specifically directed to the big box retailers of Germany.

d. In 1995, prior to Shannon's presentation, Assa had already suggested penetrating the Eastern European market by using Sommer's capacity and Armstrong's brand.

101. Armstrong is the marketing expert in the flooring industry and, on July 10, 1996, proposed what may have been a formidable plan to market the products of a combined Armstrong-Sommer entity. Nevertheless, Shannon's general strategies for creating value were not secrets.

102. The Confidentiality Agreement executed by Armstrong and Sommer in September 1996 does not impose an exclusivity requirement, or an affirmative obligation to negotiate in good faith.

103. The financial data Armstrong provided to Sommer pursuant to the Confidentiality Agreement is largely public information. Armstrong has publicly filed its financial data for 1994, 1995, and 1996. Armstrong does not publicly disclose, however, data regarding its segments, such as the floor product segment, by region of the world. In addition, the figures that

Armstrong gave to Sommer are different from the information that Armstrong publicly reveals to the extent that certain products, such as installation products, were not included in the data provided to Sommer. Finally, Armstrong does not publicly disclose the line item "average capital employed." Armstrong does, however, disclose figures relevant to the line item "working capital" in its annual reports, although it does not disclose working capital for the company's different segments.

104. Armstrong did not provide Sommer with any projected financial figures for 1997 or other future years.

105. Only Assa, Cognet, and Coumans reviewed the Armstrong financial data.

106. Armstrong expects that Sommer will misuse the Armstrong financial data to pursue markets where Armstrong is profitable.

107. Even if a competitor could use this data to predict Armstrong's future activity, projections could not be made for particular countries within North America, Europe, or the Pacific Rim on the basis of the disclosed data.

108. Armstrong's annual reports disclose Armstrong's profitability. The annual reports, in some cases, are even more specific than the geographic financial breakdowns provided to Sommer. For example, describing its floor products segment, Armstrong's 1996 Annual Report reads, "[s]trong <u>Eastern</u> European business leads European growth." (Emphasis added).

109. Armstrong acknowledged that the financial data would be slightly different today because, since December 30, 1996,

Armstrong has made acquisitions and currently intends to complete a joint venture. With each strategic move Armstrong makes, the data become less accurate.

110. Sommer will not have a future competitive advantage by having heard Shannon's presentation and having reviewed the Armstrong financial data.

a. Shannon's presentation did not reveal the reasons for Armstrong's significant profitability in flooring. The presentation focused on synergies achievable in the future, following a combination with Sommer.

b. To the extent that Shannon discussed strategies that Armstrong had used in the past or was currently using, Shannon's presentation, as found previously, consisted of commercial generalities. Moreover, Armstrong publicized its successful strategies in its annual reports.

c. Cognet, although surprised at Armstrong's profitability in Europe, never learned why Armstrong was so profitable.

111. The March 18, 1997 meeting was the first time that Assa told Armstrong he would present a potential Armstrong-Sommer transaction to the Sommer Supervisory Board.

112. Armstrong reasonably believed that Sommer would sell its flooring business to Armstrong, if Armstrong made a fair bid that was acceptable to Sommer's Supervisory Board.

113. Armstrong did not know, and had no reason to know, that Sommer was negotiating with Tarkett.

114. Armstrong expended significant time and resources in preparing the cash bid that Assa requested at the March 18, 1997 meeting.

115. At the April 17, 1997 meeting, Lorch requested exclusivity, and did not confirm the existence of a prior exclusivity agreement. The language of the offer letter is prospective. Notes taken at the meeting confirm that Lorch requested exclusivity. Case's notes read that Armstrong "ask[s] for exclusive rights to negotiate." Cognet's notes include the phrase "exclusive on negotiating." No notes reflect any statement by Lorch that Armstrong and Sommer had already agreed to exclusivity. While Armstrong was preparing its bid, Armstrong attorneys gave Lorch a written exclusivity agreement, in the form of a letter addressed to Coumans and dated April 14, 1997, that Armstrong never gave to Sommer. Lorch and Riddick made a joint decision not to send this letter to Sommer, and acknowledged that one of the reasons for this decision was that they did not want to risk the time that would be necessary to negotiate the written exclusivity agreement.

116. At the April 17, 1997 meeting, Armstrong did not secure an agreement that exclusivity would commence immediately. The language of the offer letter does not suggest that exclusivity would begin on April 17, 1997. In addition, it is unlikely that Assa would have agreed to exclusivity, given his negotiations with Tarkett, Armstrong's interest in Sommer, and the lack of a reciprocal obligation.

117. Armstrong considered its cash bid for Sommer's flooring business confidential. The offer letter reads, "[t]he existence and content of this proposal are strictly confidential."

118. Sommer, in its papers and oral arguments, suggests that the cash bid is no longer confidential because Armstrong revealed its existence and amount in this lawsuit.

119. Sommer assured Armstrong that all information provided by Armstrong to Sommer for the purpose of negotiations would be kept confidential and only used in connection with evaluating the Armstrong-Sommer transaction.

120. Armstrong reasonably relied on this representation and gave Sommer a cash bid.

121. Although Armstrong made a cash bid of 4.5 billion French francs, if assumed debt and minority interest are subtracted from this figure, the result is 3.155 billion French francs. This lower figure represents the actual value that Armstrong placed on Sommer's flooring business.

122. In his notes of the April 17, 1997 meeting, Cognet converted the 3.155 billion French franc figure into 939 MDM.

123. Cognet admitted he made this conversion because he had been trying to value the Sommer flooring business in negotiations with Tarkett.

124. In the margin of his April 17, 1997 notes, Cognet wrote 30%. Cognet cannot remember why he wrote this figure.

125. The 939 MDM figure is approximately thirty percent greater than 725 MDM. Back on February 27, 1997, Assa had

proposed that Tarkett purchase Sommer's flooring business for 725 MDM.

126. On May 13, 1997, the Sommer Supervisory Board was presented with two options, and it chose Tarkett. The May 13, 1997 meeting minutes, which Sommer representatives testified reflect everything discussed, do not state that the Supervisory Board decided Sommer would resume negotiations with Armstrong if the Tarkett deal could not be completed. Although the minutes do not state that the Board formally rejected the Armstrong proposal, it is likely that had the Supervisory Board agreed that Armstrong would be the alternative, that decision would be memorialized in the minutes. Although the minutes reveal that the Supervisory Board agreed with the Management Board's conclusions, the minutes do not reflect that these conclusions included approving the Armstrong offer as an alternative to the Tarkett proposal.

127. Armstrong understood that if the Supervisory Board approved Armstrong's bid, the parties would complete a transaction, subject to the completion of due diligence.

128. Assa's statement to Lorch on May 15, 1997 that the Supervisory Board needed additional time to consider Armstrong's bid was untrue. Assa's statement that the Board would meet the following Thursday to further consider the offer was also untrue.

129. Although Assa testified that he could not have told Lorch of the negotiations because Sommer owed Tarkett a duty of

confidentiality, Assa could have told Lorch on May 15, 1997 that the Supervisory Board had rejected the Armstrong proposal.

130. Although Assa planned to complete the transaction with Tarkett, he intended to keep the Armstrong option available in case unexpected problems arose with Tarkett.

131. Although Assa told Armstrong on May 15, 1997 that Sommer was trying to protect itself from a potential takeover, Sommer had time to negotiate the Tarkett transaction to a conclusion.

132. Armstrong had no reason to believe that Sommer would reject Armstrong's bid in favor of pursuing a transaction with another party that involved the sale of Sommer's flooring business.

133. There is no evidence that Tarkett was a knowing recipient of any Armstrong confidential information.

DISCUSSION

Although Armstrong alleges state law claims, the court applies federal standards to assess Armstrong's request for a preliminary injunction. Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 799 (3d Cir. 1989). In making this assessment, the court examines four factors: (1) whether the plaintiff is likely to succeed on the merits; (2) the probability that the plaintiff will suffer irreparable harm absent an injunction; (3) the effect of the issuance of an injunction on the defendants; and (4) the public interest. AT&T v. Winback and

Conserve Program, Inc., 42 F.3d 1421, 1426 (3d Cir. 1994), cert. denied, 514 U.S. 1103 (1995). The movant bears the burden of proving that all four factors favor preliminary relief. New Jersey Hosp. Ass'n v. Waldman, 73 F.3d 509, 512 (3d Cir. 1995); AT&T, 42 F.3d at 1426. A contractual agreement that money damages will be insufficient to remedy a breach never trumps the court's own analysis. See Baker's Aid v. Hussmann Foodservice Co., 830 F.2d 13, 16 (2d Cir. 1987). See also Dice v. Clinicorp, Inc., 887 F. Supp. 803, 810 (W.D. Pa. 1995) (contractual provision providing that breach constituted irreparable harm is not a substitute for the requisite showing).

The "extraordinary remedy" of a preliminary injunction is proper only in limited circumstances. Instant Air Freight Co., 882 F.2d at 800. Courts in this District and Circuit apply the equitable maxim that "to doubt is to deny." Madison Square Garden Corp. v. Braddock, 90 F.2d 924, 927 (3d Cir. 1937); Graham v. Triangle Publications, Inc., 233 F. Supp. 825, 829 (E.D. Pa. 1964), aff'd, 344 F.2d 775 (3d Cir. 1965); Spirol Int'l Corp. v. Vogelsang Corp., 652 F. Supp. 160, 161 (D.N.J. 1986).

Armstrong's requests for preliminary injunctive relief must be denied because Armstrong has failed to prove that the second and third factors favor such relief. None of Plaintiff's claims supports a finding of irreparable harm, and the entry of an injunction would cause serious harm to the Defendants. The court also finds that Plaintiff has not established a public interest in support of a grant of injunctive relief.

A. Irreparable Harm

An injunction "may not be used simply to eliminate a possibility of a remote future injury." Acierno v. New Castle County, 40 F.3d 645, 655 (3d Cir. 1994). (internal quotation marks and citations omitted). Rather, the plaintiff bears the burden of making "a 'clear showing of immediate irreparable injury.'" Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 91-92 (3d Cir. 1992) (quoting ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987) (citations omitted). Irreparable means "that which cannot be repaired, retrieved, put down again, atoned for. . . ." Acierno, 40 F.3d at 653 (internal quotation marks and citations omitted). If money damages provide an adequate remedy at law, then injunctive relief is inappropriate. See id.; see also Instant Air Freight Co., 882 F.2d at 801. Harm is not irreparable solely because it is difficult to precisely measure. Acierno, 40 F.3d at 655. Considering the findings of fact, Armstrong is unable to establish irreparable harm arising from any of its claims.

1. Breach of Confidentiality Agreement

Before addressing the irreparable harm issue, the court notes that the Confidentiality Agreement contained a choice of law provision requiring the application of Pennsylvania law. Neither Armstrong nor Sommer disputes the validity of the Agreement. In addition, no party to this litigation claims that another jurisdiction's law should apply to any of the contract or

tort claims alleged by Armstrong. Thus, Pennsylvania law applies to Plaintiff's claims.

Armstrong argues that this court should grant preliminary injunctive relief because Sommer breached, and will continue to breach, the Confidentiality Agreement. In order to establish irreparable harm based on this claim, Armstrong must prove a substantial threat exists that Sommer will use Armstrong confidential information to Armstrong's detriment. The information that Armstrong claims is confidential falls into three categories: information discussed by Shannon at the July 1996 meeting,[12] financial data disclosed by Armstrong pursuant to the Confidentiality Agreement, and Armstrong's cash bid for Sommer's flooring business.

Armstrong cannot show irreparable harm based on a substantial threat of the misuse or disclosure of any of this information. First, as the court has found on the limited record, the information that Shannon presented in July 1996 was generally known and not secret. The court defers deciding whether Shannon's idea to introduce hot melt calendar product into the big box retailers in the United States was confidential because the evidence showed that Sommer and Tarkett thought that this was a terrible idea. Thus, until the Sommer-Tarkett entity decides to pursue this course of action, that issue is not ripe

[12]Although this information was disclosed in July 1996, the parties acknowledged that all of their negotiations would be confidential. In any event, Shannon repeated this information, in large part, during the November 19, 1996 meeting.

for adjudication. Second, Riddick acknowledged that the financial data disclosed by Armstrong pursuant to the Confidentiality Agreement is public with limited exceptions. See Finding of Fact 103. The court found, however, that this limited, nonpublic information is not capable of being misused by a competitor in the future. Third, Armstrong has failed to explain how Sommer's potential use or disclosure of the cash bid will cause Armstrong irreparable harm. Thus, the court concludes that Armstrong has not made an adequate showing of irreparable injury on this contract claim. To the extent that Sommer misused Armstrong confidential information in the past, Armstrong may recover damages in a trial on the merits.

2. Conversion

Armstrong's conversion claim is based on precedent that demands, as the requisite for recovery, the existence of "a trade secret." Sims v. Mack Truck Corp., 488 F. Supp. 592, 598 (E.D. Pa. 1980) (internal quotation marks and citations omitted). The information conveyed by Armstrong to Sommer, however, did not include any trade secrets. Thus, Armstrong cannot show irreparable harm on its conversion theory; no danger exists that any trade secrets could be used to Armstrong's detriment.

Pennsylvania follows the Restatement of Torts, which defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and gives him an opportunity to obtain an advantage over competitors who do not know or use it." Restatement of Torts § 757 cmt. b (1939). See

also Felmlee v. Lockett, 351 A.2d 273, 277 (Pa. 1976); GE Capital Mortgage Services, Inc. v. Pinnacle Mortgage Inv. Corp., 897 F. Supp. 854, 871 (E.D. Pa. 1995); Tan-Line Studios, Inc. v. Bradley, No. 84-5925, 1986 WL 3764, at *6 (E.D. Pa. March 25, 1986). Although trade secrets can include compilations of commercial information, such as marketing plans, see Den-Tal-Ez, Inc. v. Siemens Capital Corp., 566 A.2d 1214, 1228 (Pa. Super. 1989); Air Products and Chemicals, Inc. v. Johnson, 442 A.2d 1114, 1121-1122 (Pa. Super. 1982), information cannot qualify as a trade secret if it is not substantially secret. See Den-Tal-Ez, Inc., 566 A.2d at 1228.

As discussed above, this court found that most of Shannon's ideas constituted general commercial knowledge. Thus, this information does not meet the legal standard of substantial secrecy. The court found that knowledge of the financial data and the cash bid, even when coupled with Shannon's ideas, would not advantage an Armstrong competitor. Thus, the financial data and the bid do not meet the Restatement definition of a trade secret. Accordingly, Armstrong cannot establish irreparable harm on a conversion theory.

3. Breach of Exclusivity Agreement

In light of the court's findings that: 1) Armstrong and Sommer did not agree to exclusivity on March 18, 1997, and 2) Assa agreed to deal with Armstrong exclusively during a period of due diligence that never arose, the court need not examine

whether Armstrong's breach of exclusivity agreement theory could support a finding of irreparable harm.

4. Fraud/Negligent Misrepresentation

Armstrong claims that Sommer committed fraud by failing to disclose material facts it knew Armstrong lacked and by making affirmative misrepresentations.

Armstrong argues that Sommer's promises of exclusivity gave rise to a duty to disclose the existence of the Sommer-Tarkett negotiations. Even if no exclusivity agreement existed, Armstrong argues, Sommer knew that Armstrong thought an exclusivity agreement existed and should have disclosed that it would not agree to exclusivity. Armstrong also claims that Sommer had a duty to disclose other facts basic to the transaction.

Courts have found irreparable harm in cases in which the plaintiff proved that the defendant both breached a duty to disclose certain facts and was likely to misuse the plaintiff's trade secrets or confidential information. See e.g., Den-Tal-Ez, 566 A.2d 1214. In Den-Tal-Ez, the defendant ("Siemens") and plaintiff ("Star") were negotiating Siemens's acquisition of Star. Star had agreed to negotiate, so long as Siemens was no longer negotiating with one of Star's competitors, Midwest. Although Siemens represented that it was no longer interested in Midwest, Siemens nevertheless conducted simultaneous negotiations with Star and Midwest. The court found that Siemens breached its duty to disclose the Midwest negotiations, and that Star had

revealed to Siemens many of its trade secrets and much confidential information in reliance on Siemens's misrepresentations. The court held that disclosure of the trade secrets and confidential information would be inevitable if Siemens were allowed to complete its planned acquisition of Midwest. The court explained that Midwest was Star's largest competitor, Star had given Siemens free reign over its records and facilities, some of the Siemens personnel negotiated with Star and Midwest, and Siemens personnel who had obtained Star's confidential information would participate in the management of the new entity.

The facts of this case are distinguishable. No exclusivity agreement existed between Armstrong and Sommer that imposed a duty on Sommer to reveal its negotiations with Tarkett,[13] and Sommer never represented that it was negotiating exclusively with Armstrong. Thus, Armstrong did not give Sommer confidential information in reliance upon any nondisclosure. In addition, Armstrong's information was either not confidential or not useful to a competitor. Thus, the irreparable harm in Den-Tal-Ez is not present in this case.

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[13]In response to Armstrong's argument that the mention of exclusivity on March 18, 1997 and April 17, 1997 obligated Sommer to disclose certain facts, the court notes that Sommer had no reason to know that Armstrong thought an exclusivity agreement existed. The documentary evidence in this case suggests that Armstrong asked for Sommer's agreement to negotiate exclusively only while due diligence proceeded.

Even if Armstrong proved that Sommer committed fraud by failing to disclose material facts, any resulting injury would relate to past, not future, harm. Armstrong's claims of affirmative misrepresentations suffer from the same flaw.

5. Unfair Competition

Like the claims above, Armstrong's unfair competition claim depends upon a showing that a competitor is likely to misuse confidential information in order to compete unfairly. As Armstrong failed to make this showing, no irreparable future harm could result.

6. Promissory Estoppel, Breach of the Duty of Good Faith, and Civil Conspiracy

Assuming arguendo that Armstrong proved the elements of these claims, the appropriate remedy for these past harms is money damages.

B. Effect of Injunction on Defendants

Enjoining the Sommer-Tarkett transaction would cause substantial harm to the Defendants. The harm to Tarkett, against whom the Plaintiff has no direct evidence, particularly troubles this court. Following the announcement of the Sommer-Tarkett transaction in May, the market price of Tarkett shares increased by approximately thirty percent. News of an injunction would likely alarm investors and devalue Tarkett's shares. An injunction would injure shareholders who want to profit from the proposed transaction by selling their shares. See Kennecott

Corp. v. Smith, 637 F.2d 181, 189 (3d Cir. 1980) (holding, in the context of a tender offer, that delay between the time of the announcement of the offer and commencement of the offer harms offeree shareholders who cannot evaluate whether to sell on the escalating market). An injunction would have the further financial effect of preventing Tarkett from realizing approximately five million dollars each month in synergies. As important as the financial harm is the disruption that an injunction would cause Tarkett's suppliers, employees, and customers who have been preparing for the combination.

Sommer raises similar arguments to prove that the issuance of an injunction would cause it to suffer harm. Sommer's argument is less compelling to the extent that the announcement of the merger caused an immediate decrease, rather than increase, in the value of Sommer shares.

Granting Armstrong's other requests for injunctive relief,[14] see supra n.1, would be less burdensome to Sommer and Tarkett than enjoining the entire transaction. Nevertheless, the Defendants would suffer harm. First, granting Armstrong's requests would cause Defendants to forgo profits otherwise achievable in the United States, Eastern Europe, and Russia. In addition, granting relief might adversely affect the value of the

[14]The court does not consider Armstrong's request that the court enjoin Sommer from raiding Armstrong personnel in Eastern Europe and Russia. Armstrong's counsel agreed that the allegations of paragraph thirty-five of the First Amended Complaint in Equity, which sets forth this claim, would not be raised in the preliminary injunction hearing.

Sommer-Tarkett securities, prevent the realization of anticipated synergies in certain geographic regions of the world, and create uncertainty among Sommer and Tarkett employees associated with the entity's business in North America and Eastern Europe.

C. Public Interest

Plaintiff and Defendants have identified what they deem to be important policy considerations raised by this case. Armstrong contends that an injunction would further the public's interest in corporate morality, the enforcement of contracts, and efficient and honest negotiations among companies evaluating business transactions. Defendants tout the public's interest in increased competition in the North American flooring market. In addition, Defendants argue that if the court were to enjoin the Sommer-Tarkett transaction, companies might complete fewer beneficial business combinations as a result of their reluctance to engage in preliminary merger negotiations. Finally, Defendants suggest that enjoining the Sommer-Tarkett transaction would harm investors around the globe.

The court may not focus its analysis on abstract principles. In a case in which an employer sued a former employee and his new employer to enforce nondisclosure and noncompetition covenants, the Third Circuit Court of Appeals explained:

> [a]lthough it is axiomatic that our laws protect private property and set standards for business competition and that obedience to such laws is in the public interest, these broad principles have no relevance as a separate factor in determining whether an interlocutory order is appropriate. If the interest in the enforcement of contractual obligations were the

> equivalent of the public interest factor in deciding whether or not to grant a preliminary injunction, it would be no more than a makeweight for the court's consideration of the moving party's probability of eventual success on the merits.

Continental Group, Inc. v. Amoco Chems. Corp., 614 F.2d 351, 357-58 (3d Cir. 1980). In contrast, where an injunction would have the effect of interdicting the training of police, for example, the public interest would favor denial of the injunction because interfering with police training could result in an understaffed police force. See id. at 358 (citing Oburn v. Shapp, 521 F.2d 142, 152 (3d Cir. 1975)). This court finds that the considerations raised by Armstrong, Sommer, and Tarkett are abstract principles, and thus the public interest factor is not relevant to this case. The court also notes that it considered the injury to investors in Sommer and Tarkett in its analysis of harm to the Defendants.

D. Brief Conclusion

The court wishes to emphasize that its denial of preliminary injunctive relief does not prevent Armstrong from pursuing a trial on the merits. The court's findings of fact and conclusions of law, made on a limited record, "are not binding at trial on the merits." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Despite the denial of injunctive relief, Armstrong enjoys a formidable litigation position. During the hearing, Sommer repeatedly conceded that Armstrong may have

claims for damages, although Sommer believes the amount will be minimal. The equitable doctrine of judicial estoppel exists to ensure that litigants do not gain an advantage in one proceeding by taking one position, and then obtaining an advantage in a concurrent or subsequent proceeding by adopting an inconsistent position. The court also reminds Sommer of its continuing obligations under the Confidentiality Agreement, which remains in effect until September 24, 1999.

CONCLUSIONS OF LAW

1. The court has subject matter jurisdiction over this controversy pursuant to 28 U.S.C. § 1332(a)(2). The matter involves a citizen of Pennsylvania and citizens or subjects of foreign states, France and Germany. The amount in controversy exceeds $75,000.

2. Sommer Allibert contractually consented to personal jurisdiction.

3. The court declines to rule on the question of personal jurisdiction over Tarkett. The court notes, however, that Tarkett properly raised this jurisdictional defense in its answer and appeared specially in this proceeding. If Armstrong pursues a jury trial, the court will resolve the jurisdictional issue at that time.

4. Proper venue lies in this court pursuant to 28 U.S.C. § 1391.

5. Each of Plaintiff’s claims for injunctive relief will be rejected because Plaintiff has failed to show irreparable harm, and because an injunction would unduly harm Defendants.

6. An appropriate order will be entered.

BY THE COURT:

_____

Edward N. Cahn, C.J.

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

ARMSTRONG WORLD INDUSTRIES, INC., Plaintiff,	:	
v.	:	**Civil No. 97-3914**
SOMMER ALLIBERT, S.A., MARC ASSA, and TARKETT AG, Defendants.	:	

O R D E R

AND NOW, this ___ day of November, 1997, in accordance with the Memorandum filed this date, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Preliminary Injunction is DENIED without prejudice.

2. All discovery shall be completed on or before September 12, 1998. In the event of any discovery disputes, counsel are encouraged to arrange a telephone conference with the court.

3. Jury selection shall take place on Monday, September 14, 1998, at 10:00 A.M. in Courtroom 17A, United States Courthouse, Philadelphia, Pennsylvania.

4. Trial of the within case shall commence on Tuesday, September 15, 1998, in Courtroom 4B, United States Courthouse and Federal Building, 504 West Hamilton Street,

Allentown, Pennsylvania, at 9:30 A.M., or as soon thereafter as the schedule of the court permits.

5. On or before Monday, August 31, 1998, counsel for the parties shall file with the Clerk and serve on the opposition:

a. A list of all exhibits to be used at the trial. All exhibits shall be premarked and counsel shall exchange with each other copies of all documentary and photographic exhibits and shall provide an opportunity for opposing counsel to view any models or video tapes;

b. A list of each witness to be called at the trial setting forth the point or points to be established by the testimony of each witness;

c. Memoranda of Law on all legal and evidentiary issues expected to arise at trial; and

d. Requests for instruction to the jury.

BY THE COURT:

_____

Edward N. Cahn, Chief Judge