

(Id. ¶ 3.) Neal Menaged is a shareholder of L&N, along with Lewis Hendler and Harold Semanoff.² (Id. ¶ 4.) Mr. Menaged is President and Mr. Handler is Executive Vice President. (Defts.' Ex. H ¶¶ 3-4.) Kathryn Menaged is the estranged wife of Neil Menaged; they are involved in divorce proceedings, which began in March 1996. (Id. ¶¶ 13, 17.) Kathryn Menaged was employed by Danel from 1989 or 1990 until 1997. (Pl.'s Mem. Ex. B, Kathryn Menaged Dep. ("KM Dep.") at 21, 28.) She was Vice President of Danel and was responsible for management and for sales and marketing of the division until a reorganization of Danel in February 1997 reduced her responsibilities. (Id. at 28; Pl.'s Mem. Ex. C, Hendler Dep. ("Hendler Dep.") at 35-38, Ex. D, Neil Menaged Dep. ("NM Dep.") at 98-99.) Thereafter, her administrative and marketing responsibilities were reassigned to other employees; she remained a Vice President of the Danel division only with respect to sales until she left the company on July 1, 1997. (Hendler Dep. at 36-42; NM Dep. at 83-88, 92, 96-99.)

James Dunn was employed by L&N in its Danel division from 1994 until May, 1997, as director of sales administration, director of customer service and director of production and purchasing. (Pl.'s Mem. Ex. K, Dunn Dep. ("Dunn Dep.") at 12-13, 38, 48, 159; Defts.' Mem. Ex. L, Dunn Aff. ("Dunn Aff.") ¶ 1.)

²Katheryn Menaged also claims to be a shareholder of L&N and has filed a separate lawsuit asserting this claim, which Defendants dispute, in state court.

Marlene Friedberg was employed by L&N from 1990 or 1991 until May, 1997; she was a designer, design director, and creative director for Danel. (Pl.'s Mem. Ex. L, Friedberg Dep. ("Friedberg Dep.") at 10-14; Ex. M, Friedberg Aff. ("Friedberg Aff.") ¶ 1.) Amici is a corporation in the business of selling hair accessories and other fashion accessories. It was formed by the individual Defendants on May 14, 1997. (Dunn Dep. at 48.) Katheryn Menaged is President, Marlene Friedberg is Vice-President, and James Dunn is Secretary-Treasurer. (Id. at 75.) Each of the three has a one-third interest in Amici. (KM Dep. at 134-35.)

B. Defendants' Alleged Tortious Conduct

1. Solicitation of Mimi Hoffman

After the individual Defendants had conceived the idea of forming a separate company, but while they were still working for L&N, they met with Mimi Hoffman, one of L&N's suppliers, and solicited from her a \$600,000 line of credit to start their business. They agreed to pay interest and urged her to take a 5% share of the profits. (Hoffman Dep. at 15-20; KM Dep. at 149-59.)

2. El & Co. Scarf License

In the spring of 1996, Katheryn Menaged began negotiating a licensing agreement with El & Co. for a scarf product they owned that L&N wished to market. (KM Dep. at 217-19; NM Dep. at 141-51.) L&N wanted the exclusive license to market the product for all trade classifications, including mass market chain stores such as Wal-Mart and K-Mart. (NM Dep. at 143-45; KM Dep. at 218-19; Pl.'s Mem. Ex. E, Diana Husson Dep. ("Husson Dep.") at 30-31.) In the spring of 1997, El & Co. wrote that the proposed agreement was too broad. On April 30, 1997, Katheryn Menaged wrote to El & Co. that she was unsure as to her continuing position at L&N and they should therefore contact Diana Husson and continue the negotiations with her. (KM Dep. at 219.) She did not, however, notify Ms. Husson or L&N's attorney with whom she had been working on the licensing agreement or any other L&N personnel that she was ceasing work on the negotiations and transferring them to Ms. Husson. (KM Dep. at 219-21.) Ms. Husson did not learn that the job of negotiating the license agreement had been passed to her until almost a month later. (Husson Dep. at 30.) Husson then requested the file and draft agreements from Katheryn Menaged, but did not receive them for several more weeks. (Id. at 30-31.) Katheryn Menaged admitted that she did not tell anyone at L&N that she had stopped negotiations with El & Co. because L&N "was advising me on a daily basis that my authority was changing. I didn't think it was my responsibility to tell them what I was and wasn't doing. That's what they were doing to me." (KM Dep. at 220.) When Ms.

Husson and Neil Menaged finally reached El & Co.'s principal, Sol Inspector, to negotiate, they learned that he had decided to give the exclusive license to the mass market outlets to Amici, reserving for L&N only the smaller drugstore market, in which it had little interest. (Husson Dep. at 31-40; NM Dep. at 141-51.) Plaintiff alleges that Katheryn Menaged's failure to inform L&N that she had stopped negotiating and her delay in turning over the file were part of a deliberate effort to get for Amici the licensing agreement she was supposed to be negotiating for L&N. (Pl.'s Mem. at 8.)

3. Solicitation of Wal-Mart

Katheryn Menaged had an appointment with Wal-Mart, L&N's largest customer, on behalf of Amici at the beginning of July, 1997, within a day or two of her departure from L&N. (NM Dep. at 33, 159; Husson Dep. at 66.) Lewis Hendler, Executive Vice President of L&N, testified that it would ordinarily take a new vendor months to get an appointment with Wal-Mart. (Hendler Aff. ¶ 7.) Plaintiff concludes that Katheryn Menaged must have made the appointment while she was still employed by L&N.

4. Damage to L&N's Relations with Customers

Prior to mid-1996, Danel had some problems meeting customers' orders: it sometimes had to ship substitute products and had difficulty meeting customers' shipment deadlines. It attributes many of these problems to Katheryn Menaged's "chaotic" management of Danel. (Pl.'s Mem Ex. F, Paul Liguori Dep. ("Liguori Dep.") at 25-30, 56-58; NM Dep. at 86-88.) Plaintiff

alleges that in the few months before her departure from L&N, Katheryn Menaged, with the help of Dunn and Friedberg, deliberately tried to sabotage and damage L&N's relationship with at least three key customers, Wal-Mart, Target, and the Gap. It states that Katheryn Menaged harbored great animosity toward her estranged husband over the breakup of their marriage and toward L&N over her reduced responsibilities in the company. (Husson Dep. at 61; Hendler Dep. at 57-58; Curtis Dep. at 33-34; Friedberg Dep. at 25-26.)

In or about May 1996, there was a major complaint by Wal-Mart, whose representative was extremely upset when, without Wal-Mart's authorization, L&N substituted inferior products for products Wal-Mart had ordered. The substitution was not by Danel, but by the other division of L&N. However, as a result of Wal-Mart's extreme reaction, L&N developed a company-wide policy of allowing absolutely no substitution without customer authorization. The policy was discussed with all management personnel in May, 1996. (Hendler Dep. at 59-60.) Lewis Hendler testified that the policy was formalized in writing in early 1997.³ (Hendler Dep. at 60.)

Another aspect of L&N policy concerned lead time, the time between order and delivery. In February, 1997, Michael Katz, who had been hired as a consultant by L&N to improve

³In referring to the no-substitution policy, Plaintiff cites a memorandum on Danel policy and procedures dated February 25, 1997; however the memorandum does not mention substitutions. (Pl.'s Mem. in Opposition at 10, Ex. J.)

Danel's management, wrote a memorandum setting forth the policies concerning lead time: a 90-day period was to be allowed on all orders. If customers requested an earlier delivery date, Danel personnel were not to commit the company without checking on the feasibility of the new deadline. (Pl.'s Mem. Ex. J; Hendler Dep. at 89-91; Pl's Mem. Ex. H, Joan Curtis Dep. ("Curtis Dept.") at 60-62.)

a. Wal-Mart

L&N employee Jennifer DeLaurentis testified that Katheryn Menaged directed her to make substitutions in the Wal-Mart Order for Fall 1997 in March, 1997, the same day the order was placed. (Pl.'s Mem. Ex. R, Jennifer DeLaurentis Dep. ("DeLaurentis Dep.") at 17-19, 20-22.) The substituted items were quite different from the merchandise ordered, using spring colors and textures instead of fall ones and different style barrettes. (DeLaurentis Dep. at 20-21; Husson Dep. at 48.) Katheryn Menaged told DeLaurentis that she wanted to dispose of excess inventory through the Wal-Mart order, and that the buyer did not check the product in the stores and therefore would not know about the substitutions. (DeLaurentis Dep. at 21; Pl.'s Mem. Ex. S, DeLaurentis Aff. ("DeLaurentis Aff.") ¶ 3.) However, Wal-Mart did learn of the substitutions and was very displeased; it demanded and received credits of over \$286,000 for the merchandise. (NM Dep. at 43-45, 69-71, 140; Husson Dep. at 48, 85-86, 99-100.) Plaintiff contends that this episode resulted in

a loss of over a \$1 million in business from Wal-Mart and that Wal-Mart continues to "punish" L&N because of the incident. (Husson Dep. at 100-107; NM Dep. at 69-71.)

b. Target

In early April, 1997, Katheryn Menaged presented a new program to the Target chain store. (Husson Dep. at 47, 71-77.) She committed L&N to deadlines considerably shorter than the required 90 days without first determining the sources or prices for the items. (NM Dep at 66; Husson Dep. at 47, 69-70, 84-85.) In addition, she failed to provide L&N personnel with the information they needed to process the orders. (Liguori Dep. at 40-41.) When L&N could not meet the deadlines, Katheryn Menaged directed that L&N ship substitute products. (Liguori Dep. at 38-39; NM Dep. at 67.) This caused L&N to lose good will and business with Target. (NM Dep. at 67; Liguori Dep. at 39-40.)

c. The Gap

In March of 1996, Katheryn Menaged and James Dunn flew to San Francisco to meet with representatives of the Gap, a large clothing store chain. In July, 1996, the Gap placed orders with L&N for a group of new hair accessory products. (Curtis Dep. at 13, 30.) Katheryn Menaged accepted a large order without first determining the sources or prices of the products and whether they could be manufactured in time. (Id. at 25-27, 47-50; NM Dep. at 38-39.) In addition, L&N employees did not have the

information they needed to fill the order; James Dunn gave other L&N employees some information, but Katheryn Menaged gave them none. (Curtis Dep. at 25-26.) As a result, some parts of the Gap order were shipped late, other parts were defectively manufactured, other parts were incomplete because sufficient materials were not available, and still other parts could not be filled because the product could not be made for the price Katheryn Menaged had quoted to the Gap. (Curtis Dep. at 25-27, 46-50, 55-56; NM Dep. at 38-39, 78.) As a result L&N was required to give the Gap over \$50,000 in credits and suffered over \$300,000 in losses on that order. (Defts.' Mem. Ex. R; Curtis Dep. at 17-18, 23, 19, 47-48, 55-56; NM Dep. at 39, 78.) The Gap decided not to place previously planned orders for the next season, and L&N's faulty performance contributed to a decision by the Gap to stop selling hair accessories altogether. (Curtis Dep. at 23-24; 28-30; NM Dep. at 39.)

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510

(1986). A factual dispute is "material" if it might affect the outcome of the case. Id.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, "the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). That is, summary judgment is appropriate if the nonmoving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. at 322, 106 S. Ct. at 2552. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S. Ct. at 2513 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

III. DISCUSSION

Defendants offer three overall arguments applying to the Complaint in general and a number of more specific subsidiary arguments in favor of their Motion for Summary Judgment. In their first argument, Defendants point out that customer credits for unacceptable substitutions or defective merchandise were commonplace in both the Danel division and the other division of the company, the L&N division, as were late deliveries. They note that L&N never tried to charge its employees for these credits, even though some of them were undoubtedly attributable to mistakes by L&N personnel. Therefore, they conclude, "there is no basis to hold Katheryn Menaged, let alone the other defendants, liable for any of the losses purportedly occurring with regard to the Target, The Gap, and Wal-Mart accounts."

(Defts.' Mem. at 6.) In taking this position, Defendants gloss over a key difference: Plaintiff alleges the losses are due not to mistake, but to Defendants' intentional actions to harm Plaintiff or their reckless disregard for Plaintiff's welfare; presumably Plaintiff would not seek to hold Defendants liable if it thought the losses were due to nothing more than honest mistake. There is a genuine issue of material fact as to whether Katheryn Menaged's substitution of products in the Wal-Mart order in March 1997 without customer approval the very day the order was placed was simple carelessness or whether she acted with malice or reckless disregard. This must be considered in light of the extreme negative reaction of Wal-Mart to substitution of

products 10 months earlier, a reaction of which everyone was aware.

Second, Defendants argue that it makes no sense for Katheryn Menaged to try to sabotage Plaintiff's business; any bad reputation she succeeded in creating at L&N would follow her to her new business, and she clearly has an interest in seeing L&N succeed because she has initiated a suit for recognition as one of its shareholders. Plaintiff responds that companies would be more likely to attribute any failings to L&N than to personnel that left the company. It is not obvious to the Court that companies dissatisfied with L&N would attribute the same shortcomings to Amici. In addition, if Katheryn Menaged is as angry at her estranged husband and at L&N as some of the testimony suggests, she could conceivably wish to "get at" her husband or L&N both by harming the business and by taking a share of its profits. Again, there is a genuine issue of material fact as to motive.

Third, Defendants contend that Plaintiff has no competent evidence that Defendants have caused any injury to Plaintiff. They point out that the evidence that they are responsible for decreased business from Target, the Gap, and Wal-Mart is all hearsay -- reports by Plaintiff's officers of conversations they had with customers as to the customers' reasons for reduced business or no additional business with L&N. In support of this argument, Defendants cite Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc., 63 F.3d 1267 (3d Cir. 1995), in

which the United States Court of Appeals for the Third Circuit ("Third Circuit") held that the district court had erred in allowing at trial hearsay statements of customers as proof of actual damages in the form of lost sales. Id. at 1274-75. However, in this case, unlike in Stelwagon, the evidence is used not at trial, but to oppose a Motion for Summary Judgment, and the Stelwagon court noted that, "the rule in this circuit is that hearsay statements can be considered on a motion for summary judgment if they are capable of being admissible at trial." Id. at 1275 n. 17. That is, the hearsay evidence can be considered for purposes of this Motion, but the customers themselves would have to be produced at trial. Id.; see also J.F. Freeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1535 (3d Cir. 1995); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993). In addition, the hearsay statements might even be admissible at trial, depending on the purpose for which they were used. Under Federal Rule of Evidence 803(3), commonly referred to as the "state of mind" exception, hearsay statements of a customer as to his reasons for not dealing with a supplier may be admissible for the limited purpose of proving customer motive. Stelwagon, 63 F.3d at 1274. It is only if the statements are used to prove the fact that the customer stopped buying the product from this supplier, bought the product from someone else instead, or stopped buying the product altogether, that they become inadmissible. See id. For purposes of this Motion, therefore, Plaintiff has produced

sufficient evidence that the decline in sales with several of its key customers was due to the inefficient way in which orders were handled.

In addition to these three major arguments, Defendants take issue with Plaintiff's interpretation of the facts on a number of smaller points. The Court will not review each one; a few examples will suffice to show that, while Defendants offer a different interpretation of the evidence, they have not demonstrated an absence of genuine issues of material fact. As Plaintiff noted, the key flaw in Defendants' Motion for Summary Judgment is that it disregards the fundamental requirement of Rule 56 that the court must view the evidence presented on the motion in the light most favorable to the opposing party.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S. Ct. at 2513 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

With respect to the allegation that Katheryn Menaged accepted an order from Target with a delivery deadline shorter than policy allowed, one that she knew or should have known Plaintiff could not meet, and then substituted goods without authorization, Defendants argue that Katheryn was "concerned" about the delivery date. They further state that Mr. Kaplan, who was by then Ms. Menaged's supervisor, "could have interceded, but he failed to do so."⁴ (Defts.' Mem. at 6.) Both of these

⁴The evidence offered for Katheryn Menaged's concern is the following statement in a memorandum from Michael Katz to Lester

arguments go to show alternative interpretations, not an absence of evidence.

In response to Plaintiff's allegation that Katheryn Menaged stopped negotiating the El & Co. exclusive license for L&N without telling anyone at L&N and then allegedly withheld the file from Diana Husson in order to secure the most desirable markets for Amici, Defendants point out that Plaintiff did not pursue the licensing agreement for what was left. They also note that the Amici's formal licensing agreement with El & Co. was not signed until months after Defendants left L&N. Neither of these points is determinative of whether Katheryn Menaged breached her fiduciary responsibility to L&N by ceasing to negotiate for L&N without informing them, failing to turn over the files immediately, and securing for Amici a promise from El & Co. for the exclusive license to mass market stores, a license that she was supposed to have negotiated for L&N.

Plaintiff has sufficient evidence of injury caused by one or more of the Defendants to create a genuine issue of

Kaplan regarding the Target order: "[A]ttached is a revised spread sheet including case dimensions (with cubes) covering the above order, as you requested. . . . Separately, I saw a memo to you from Katheryn indicating concern over delivery of above, implying some confusion on the part of Johnna and/or Al Parton; and that I should be coordinating their efforts on this order. We should be concerned (Defts.' Mem. Ex. R. (emphasis in original.)) As the memo continues, it is clear that Katz is extremely concerned and critical of orders such as this one that are taken without prior planning to determine if they can be met. Rather than "intervene" as Defendants suggest, his approach is to "fight our way through the current fires (fall planogram orders), let the reorganization in Danel take hold and build a better tomorrow for Danel." (Id.)

material fact. The next question is whether it has produced sufficient evidence for each separate Count in the Complaint. The Court will review in turn each of the Counts that Defendants challenge.

A. Count I - Conspiracy

To sustain a claim for civil conspiracy, L&N must show that "two or more persons combine[d] or enter[ed] an agreement to commit an unlawful act or to do an otherwise lawful act by unlawful means. . . . Proof of malice is an essential part of a cause of action for conspiracy." In re Asbestos School Litigation, 46 F.3d 1284, 1292 (3d Cir. 1994). There is clear evidence that the individual Defendants agreed to form a business and took steps to do so while still in the employ of L&N. What is not clear is whether there is evidence that what they combined to do was unlawful.

Defendants were all at-will employees and were not subject to any covenants not to compete with Plaintiff once they left the company, so their formation of a competing company, and even the steps they took to form the company while still employed by L&N, was not illegal. See United Aircraft Corp. v. Boreen, 284 F. Supp. 428, 444 (E.D. Pa. 1968) (quoting Spring Steels, Inc. v. Molloy, 162 A.2d 370, 372, 374 (Pa. 1960)); Oestreich v. Environmental Inks & Coatings Corp, Civ. A. No. 98-8907, 1990 WL 210599, at *6 (E.D. Pa. Dec. 17, 1990). The first illegal action

Plaintiff alleges that Defendants took together is that, while still employed by Plaintiff, they met with Mimi Hoffman, one of Plaintiff's suppliers, to ask her to provide financial backing for the competing company they were forming and to offer her a share of the profits of their new company.

Plaintiffs have presented no evidence that Mimi Hoffman's financial backing of Amici harmed L&N's relationship with her as a supplier. Defendants note that the cases on which Plaintiff relies are critical of employees who solicit business for their new companies while still in the employ of their former companies, but say nothing about soliciting a supplier to provide financial backing. See Oestreich, 1990 WL 210599, at *6, Boreen, 284 F. Supp. at 444-445, Spring Steels, 162 A.2d at 375. This is not to say that employees might not harm their employers by soliciting trade or support for a new business from their employers' suppliers; they clearly could do so if the suppliers would no longer meet the employers' needs because of their involvement with the new business. However, we have no evidence here that any harm came to Plaintiff, or was likely to, as a consequence of Defendants' successful solicitation of Mimi Hoffman's financial support.

Plaintiff mentions a number of other actions that Katheryn Menaged took while still employed by L&N that allegedly harmed the business; however, there is no evidence that she conspired with James Dunn or Marlene Friedberg or both to bring them about. (Pl.'s Mem. at 27 and record citations.) Those two

may have known of her activities, indeed, there is some evidence that James Dunn did, but so did a number of other L&N employees on whose testimony Plaintiff relies.

Plaintiff's Count I for conspiracy fails because it has provided no evidence that the individual Defendants entered an agreement "to commit an unlawful act or to do an otherwise lawful act by unlawful means." In re Asbestos School Litigation, 46 F.3d at 1292. Summary judgment will therefore be granted in favor of Defendants on this Count.

B. Count II - Breach of Fiduciary Duty

Plaintiff claims that Katheryn Menaged breached her fiduciary duty to L&N in scheduling an appointment with Wal-Mart on behalf of Amici while she was still employed by L&N. Accepting for purposes of this Motion that she did so, the Court sees nothing improper in that. While her actively soliciting L&N's customers while still an employee would have been improper, the actual solicitation did not occur until after her resignation, when she kept the appointment. The scheduling of the appointment was a step in preparation for the later competition. As this Court stated in Oestreich, "under the law of Pennsylvania employees at will do not breach a fiduciary duty to the employer by making preparations to compete upon termination of employment provided the employee does not use the confidential information of his employer, solicit the customers of his employer, or otherwise engage in conduct directly damaging

his employer during the period of employment." Oestreich, 1990 WL 210599, at *6.

The other alleged violations of fiduciary duty of which Plaintiff accuses Katheryn Menaged come under the heading of "conduct directly damaging [her] employer during the period of employment." They include the alleged intentional and malicious substitution of inferior or inappropriate products without customer approval and the setting of delivery dates that were both contrary to company policy and impossible for L&N to meet. As discussed above, there is sufficient evidence to create a genuine issue of material fact on these questions, but only as to Katheryn Menaged. The portions of the record Plaintiff cites in its Memorandum in Opposition to Defendants' Motion for Summary Judgment implicate only Katheryn Menaged. At most, James Dunn and Marlene Friedberg knew of her actions, as did other employees of L&N; there is insufficient evidence they breached their fiduciary duty to L&N. Therefore, with respect to Count II of the Complaint, Defendants' Motion for Summary Judgment will be granted as to James Dunn and Marlene Friedberg and denied as to Katheryn Menaged.

C. Count IV - Unfair Trade Practices

Defendants contend that Plaintiff has not made out a claim for unfair trade practices because it has not established that they used any legally protectable trade secrets. Plaintiff

does not contest this argument and, consequently, Defendants' Motion for Summary Judgment will be granted as to Count IV.

D. Count VI - Malice (Punitive Damages - Katheryn Menaged)

Defendants argue that, because Plaintiff has stated no valid tort claims, it cannot sustain a claim for punitive damages. In addition, they argue that Plaintiff has presented no evidence that any of Katheryn Menaged's actions were outrageous, intentionally reckless, or malicious so as to warrant punitive damages. As to the first argument, the Court has found that at least some of Plaintiff's tort claims can go forward. As to the second one, it will let the claim go forward. Defendants may renew their Motion on this point at the close of evidence if they deem it appropriate.

E. Count VII - Intentional Interference with Existing and Prospective Contractual Relations

1. Interference with Existing Contractual Relations

A claim for intentional interference with existing contractual relations contains four elements: (1) the existence of one or more contracts; (2) the purpose or intent by the defendants to harm the plaintiff by preventing completion of the contract; (3) improper conduct by the defendants; and (4) harm resulting from the defendants' actions. Silver v. Mendel, 894 F.2d 598, 604-05 (3d Cir. 1990). See also Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. Ct. 1997).

Plaintiff contends that Defendants interfered with its contract with Wal-Mart for the fall of 1997 by preventing

Plaintiff from properly performing the contract. Defendant Menaged allegedly substituted inappropriate and unacceptable merchandise, causing losses to Plaintiff in the form of credits it had to extend to Wal-Mart.

Two sections of the Restatement (Second) of Torts deal with intentional interference with contractual relations.

Section 766 provides:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement (Second) of Torts (1979), § 766. By contrast, section 766A has a different focus. It provides:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Id. § 766A. Pennsylvania has adopted section 766 but not section 766A, and the Third Circuit has stated that it is not persuaded that the Pennsylvania Supreme Court would adopt section 766A.

Gemini Physical Therapy and Rehabilitation, Inc., v. State Farm

Mut. Auto. Ins. Co., 40 F.3d 63, 66 (3d Cir. 1994). Thus

Pennsylvania recognizes intentional interference where a defendant prevents a third party from performing a contract with a plaintiff and thereby incurs liability to the plaintiff, but it does not recognize intentional interference where a defendant

interferes with the plaintiff's own performance of his contract with a third person.

Plaintiff claims Defendants interfered with L&N's contract with Wal-Mart by causing Plaintiff to breach the contract. This tort is not recognized in Pennsylvania and the Court will therefore grant Defendants' Motion for Summary Judgment with respect to intentional interference with existing contractual relations.

2. Interference with Prospective Contractual Relations

The elements of intentional interference with prospective contractual relations are essentially the same as those for intentional interference with existing contractual relations except that the contract has not yet been formed. The Court will assume that the Third Circuit would be equally reluctant to predict that the Pennsylvania Supreme Court would adopt section 766A of the Restatement (Second) of Torts with respect to prospective contractual relations as it is with respect to existing contractual relations.

Plaintiff claims Katheryn Menaged interfered with its prospective exclusive license agreement with El & Co. when she stopped negotiating for the license on behalf of L&N without informing L&N, and delayed in turning over the file to L&N once they learned that she had not concluded the agreement. By the time L&N had the file and was able to contact El & Co., that company had already promised the best parts of the market to

Amici. In this case, Plaintiff is not precluded from seeking redress by the fact that Pennsylvania has not adopted section 766A. Accepting Plaintiff's evidence as true, and drawing all reasonable inferences from it, Katheryn Menaged directed her efforts to both L&N and El & Co. in getting for Amici the better part of the licensing agreement she was supposed to negotiate for L&N. Her interference consisted not only in obstructing L&N's efforts, but also in approaching Amici and securing the promise of a license from El & Co. while she allegedly kept L&N at bay. Therefore, her conduct with respect to the El & Co. licensing agreement falls under section 766 as well as section 766A of the Restatement (Second) of Torts. Plaintiff may proceed with this claim and Defendants' Motion for Summary Judgment will be denied as to it.

G. Count IX - Indemnity

Defendants argue that there is no legal basis for indemnification, that at most, Defendants' alleged acts caused L&N to breach contracts with its customers. The Third Circuit has quoted a Pennsylvania Supreme Court case from the 1950's in explaining indemnity in the case of secondary liability of an employer for the tortious conduct of its employee: "[T]he person primarily liable is the employee or agent who committed the tort, and the employer or principal may recover indemnity from him for the damages which he [the employer] has been obliged to pay." Williams v. Rene, 72 F.3d 1096, 1099 (3d Cir. 1995) (quoting

Builders Supply Co. v. McCabe, 77 A.2d 368, 370 (Pa. 1951). The Pennsylvania Supreme Court goes on to state:

The right of indemnity rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable.

Builders Supply Co., 77 A.2d at 370 (emphasis added).

In this case, Plaintiff claims that Defendants caused L&N to breach its contract with Wal-Mart, resulting in economic losses to L&N in the form of credits it was obliged to provide to Wal-Mart. Plaintiff describes this by stating that "the secondarily liable employer [L&N] has been required to pay a third-person [Wal-Mart] for the acts of its primarily liable employee [Katheryn Menaged]." (Pl.'s Mem. at 3.) The flaw in this argument is that none of the Defendants is primarily or otherwise liable to Wal-Mart. Wal-Mart's remedy would be a breach of contract action against L&N, not an action against its employees who were acting within the scope of their employment. Therefore, L&N has no cause of action for indemnity and Defendants' Motion for Summary Judgment will be granted as to this Count.

J. Counts X, XI and XII - Permanent Injunction, Accounting and Constructive Trust, and the Appointment of a Receiver

Defendants note that a request for an injunction is not a separate cause of action, but may be granted only when a

substantive claim has been established. In addition, an injunction, a constructive trust, and the appointment of a receiver are all forms of equitable relief and are appropriate only when a remedy at law is insufficient. Defendants contend that Plaintiff cannot establish its claims for breach of fiduciary duty and tortious conduct so that none of the equitable remedies is warranted. Moreover, they claim that L&N cannot establish that its remedy at law is inadequate, thus requiring equitable relief. There is no need to decide these question at the present juncture. Once it is clear which, if any, of its claims Plaintiff establishes, the Court can decide whether legal relief is sufficient or whether equitable relief is warranted.

IV. CONCLUSION

For the reasons that appear above, Defendants' Motion for Summary Judgment will be granted in part and denied in part.

An appropriate Order follows.

JOHN R. PADOVA, J.