

PREPARED AND FILED BY THE COURT

SAE POWER INCORPORATED, a  
California corporation, and SAE POWER  
COMPANY, a Canadian Corporation,

*Plaintiffs,*

v.

AVAYA INCORPORATED and DELTA  
PRODUCTS CORPORATION,

*Defendants.*

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: CIVIL PART  
ESSEX COUNTY

Docket No.: ESX-L-1136-11

Civil Action

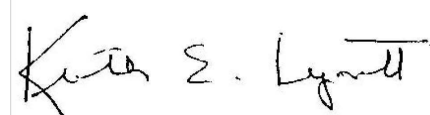
**ORDER**

**THIS MATTER** having been opened to the Court by PILLSBURY WINTHROP SHAW PITTMAN LLP, counsel for Defendant DELTA ELECTRONICS (AMERICAS) LTD. F/K/A DELTA PRODUCTS CORPORATION (“Delta”), by way of a Motion for Summary Judgment; on notice to QUADRA & COLL, LLP and ANSELL GRIMM & AARON, P.C., counsel for Plaintiffs SAE POWER INCORPORATED and SAE POWER COMPANY (“SAE”); and the Court having considered all papers submitted and the oral argument of counsel; and for good cause shown;

**IT IS** on this 15<sup>th</sup> day of June 2021

**ORDERED** as follows:

1. Delta’s Motion for Summary Judgment is hereby **DENIED**.
2. A copy of this Order shall be served on all parties within 5 days of the date of posting hereof.



**HON. KEITH E. LYNOTT, J.S.C.**

Opposed.

## Statement of Reasons

In this complex commercial action alleging misappropriation of trade secrets, civil conspiracy and tortious interference with contract/prospective economic advantage, the Defendant Delta Electronics (Americas) Ltd. f/k/a Delta Products Corp. (“Delta”) moves to dismiss the remaining Counts of the Complaint of the Plaintiffs SAE Power Incorporated and SAE Power Company (collectively, “SAE”). For the reasons set forth herein, the Court denies the motion. It finds the motion record, examined as it must be in the light most favorable to SAE, presents issues of fact warranting a trial as to the remaining claims.

The parties’ submissions were extensive. At oral argument, counsel for Delta produced a comprehensive 60+ page PowerPoint slide deck. The Court permitted the presentation and submission of a hard copy to the Court, but afforded SAE an opportunity for supplemental written response as to any materials presented that were not part of previously submitted Briefs.

### I

As this is a motion for summary judgment, the Court examines the motion record pursuant to R. 4:46-2(c) and the standard of review prescribed by the Supreme Court in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). The Court examines the competent evidential materials in the record in the same manner as it would consider a motion at trial for directed verdict pursuant to R. 4:37-2, save that the procedure on summary judgment involves consideration of written materials (e.g., Certifications, Affidavits, deposition transcripts, documents) as opposed to trial testimony.

The Court is required to examine the motion record in the light most favorable to the non-moving party – here, SAE – and to confer on that party the benefit of all reasonable inferences that may be drawn from the record. It accepts as true the non-moving party’s version of relevant events

insofar as supported by competent, admissible evidence. Although the Court, in assessing the motion, examines the record in light of the burdens of persuasion imposed by law on the parties, the movant bears the burden of establishing the absence of a genuine dispute of material fact.

The Court must determine if a rational trier of the facts could, on the basis of the competent evidential materials comprising the motion record, enter a verdict for the non-moving party by resolving a disputed issue or issues in such party's favor. Put differently, the Court must determine if the record presents a sufficient disagreement to warrant a trial or, in the alternative, is so one-sided in favor of the moving party as to require a judgment for such party as a matter of law. The Court's function is not to determine the truth of the matter or to assess matters of credibility or weight of the evidence. At the same time, if it determines the evidence supporting a claim or defense is insubstantial, it is required to grant the motion.

The purpose of the summary judgment procedure is to provide a prompt, businesslike means of adjudication in appropriate cases, disposing of cases lacking in factual or legal merit and relieving the parties of the burden of participating in a worthless trial. The procedure pierces the pleadings by requiring the non-moving party to produce competent evidence supporting its pleaded assertions. Although the motion must eliminate all reasonable doubt concerning the validity of a claim or defense, the Supreme Court adopted the Brill standard as a means to ensure the trial courts would not hesitate to grant summary judgment when appropriate to do so.

## II

The Court is mindful of the prior procedural history of the action that bears on its consideration of the present motion. As discussed in further detail herein, this action arises out of the design, manufacture and sale by SAE to Avaya Incorporated ("Avaya") of a power supply unit – the "G650 PSU" – to be used in connection with the Avaya's G650 Media Gateway (the "G650

Gateway”). The G650 Gateway is a telecommunications product that commercial establishments use in office locations for telephone services including voice-over-IP (“VoIP”) internet-based communications.<sup>1</sup> The G650 PSU supplies power to the G650 Gateway.

After first engaging SAE to design, manufacture and supply the G650 PSU product in 2002, Avaya awarded a contract in 2005 to Delta to design and manufacture a power supply for the G650 Gateway. Distilled to its essentials, SAE’s claim is that, in implementing this contract, Delta misappropriated trade secrets of SAE supplied to Delta by Avaya.

In July 2016, the Court (Mitterhoff, J.) granted partial summary judgment to Delta. The Court determined as a matter of law that “SAE’s 655A power supply units (the ‘PSUs’) and any information, technology, or trade secrets discernible therefrom were generally available to the public, and within the public domain, as of December 2003 before the acts complained of by SAE in the Complaint.” The Court thus dismissed with prejudice “any and all claims in Counts I, IV, IX, and X of SAE’s Complaint that are in any way related to Avaya having provided SAE PSUs to Delta Products or Delta Products having received, opened, inspected, tested, studied, or copied such SAE PSUs.”

At the same time, however, the Court denied without prejudice Delta’s motion for partial summary judgment “as to SAE’s remaining allegation that Avaya provided a document identified by SAE as the ‘CB Test Report’ or other confidential information to Delta Products.” In so holding, Judge Mitterhoff stated during argument that, if Avaya sent SAE’s designs and specifications to assist Delta in copying the SAE 655A PSU, then such conduct would give rise to actionable misappropriation. She noted that, although Delta was permitted to “reverse engineer” the SAE product, SAE contends that Avaya not only provided the SAE product itself to Delta, but plans,

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<sup>1</sup> The record includes references to the SAE product as the G655A PSU and the G650 PSU. The Court will refer to the same as the G650 PSU.

specifications and other confidential information to assist Delta in copying the product. The Court determined to allow SAE to proceed on its misappropriation of trade secrets, civil conspiracy and tortious interference claims on this basis.

The Court authorized further discovery on the remaining claims. Its Case Management Order permitted discovery “as to SAE’s allegation that Avaya provided Delta Products or any Delta entity (including Delta Electronics, Inc., or Delta Electronics (Thailand) Public Company Limited) with a copy of the ‘CB Test Report’ or other confidential information.” The Court expressly deferred damages-related discovery to a later time. Pursuant to the Order, the parties conducted the discovery authorized by the Court, including exchange of large volumes of documents and depositions of multiple representatives of Avaya and Delta.

Although SAE contends the Court’s prior ruling granting partial summary judgment as described above was erroneous – and has stated it intends to appeal from the same in due course if necessary – such matters are not for this Court to determine. There is no application for reconsideration before the Court and, in any event, such rulings constitute the law of the case.

As a result of the prior motion practice, the remaining claims of SAE sound in misappropriation of trade secrets, civil conspiracy, tortious interference with contract and tortious interference with prospective economic advantage, in each case based solely on alleged transfer by Avaya to Delta of the CB Test Report or other confidential information of SAE. The present motion now seeks dismissal of the remaining claims as a matter of law.

### III

As this is a motion for summary judgment, the Court examines the motion record in the light most favorable to SAE as the non-moving party. The relevant facts, so viewed solely for purposes of adjudicating this motion, are as follows.

As noted, the action relates to the design, manufacture and sale of power supply units for Avaya's G650 Gateway telephony system. The relevant time period extends approximately from 2002, when SAE assisted Avaya in the development of specifications to be submitted to vendors for the power supply units, through 2006/2007 when Delta, pursuant to a contract awarded in February 2005, produced its S4 version of the G650 PSU, a product that SAE contends unlawfully incorporated trade secrets of SAE.

The G650 Gateway is a product that permits users to convert to VoIP without replacing legacy telephony systems, thus reducing cost and minimizing disruptions. The record permits the conclusion that, having developed the G650 Gateway, Avaya was keenly interested in getting this product to market as quickly as possible.

Avaya designed the G650 Gateway to include a redundant power supply. As a result, the product would operate even if one of two power supply units failed.

The dual power supply configuration of the G650 Gateway created a design dilemma for the power supply units, as the configuration could double the load current in a way that would exceed Underwriters Laboratory ("UL") levels for the older plug-in cards the G650 Gateway was designed to use. To avoid the need to redesign its own product, Avaya desired a solution by which the two power supply units would communicate to limit the current level when both such units were functioning.

SAE is a provider of power supply units for electronic and mechanical equipment. It began providing such units to Avaya in 2001.

At Avaya's request, SAE assisted in the preparation of specifications for power supply units for the G650 Gateway. Avaya intended to use the specifications in connection with a Request for Quotation ("RFQ") to power supply vendors to design a power supply unit that would, among

other features, resolve the dual load current issue presented by the G650 Gateway and its redundant power supply configuration. Working in partnership with Avaya, SAE developed specifications that Avaya ultimately used to go to the market for the necessary power supply units.

The record permits the conclusion that, during the relevant time, Avaya and SAE were parties to at least three non-disclosure agreements. The first was dated March 15, 2001. The second was dated August 19, 2002 and the third February 6, 2008. These agreements generally obligated each party to maintain as confidential the counter-party's business information and to employ the same care in respect of such information as it would for its own proprietary information. These agreements provided the confidential information of SAE would remain the property of SAE after expiration of the agreements.

Using the specifications that SAE assisted Avaya in preparing, the latter submitted RFQs to nine suppliers, including SAE, in November 2002. SAE submitted its proposal as revised between September and December 2002. SAE's proposal explicitly stated that it would retain its intellectual property rights in the power supply units to be designed and manufactured for Avaya, rather than sell or license the same.

The record permits the conclusion that the specifications themselves did not delineate the precise manner in which the responding bidder proposed to address and solve the technical issues presented by the project, including the issue of interoperability of the redundant power supply units without creating excessive current. Instead, the specifications left to each bidder the obligation to fashion a solution to these issues.

The G650 PSU that SAE designed for supply to Avaya for use in the G650 Gateway was thus not an "off-the-shelf" product. As SAE's expert states in his Certification submitted in opposition to the present motion, the product is "a highly specialized and complex electronic power

supply designed and manufactured for use in an extremely specific area of high reliability telecommunications equipment” and contains a “customized form factor, customized connector arrangement, features such as dual AC and DC input power, hot-swapping, ability to operate in tandem with the redundant PSU, and high MTBF (reliability).”

SAE contends that its G650 PSU design contained two distinct trade secrets. The specifications required a high degree of over-voltage protection without introducing high-risk single points of failure. The specification also required that all the AC and DC outputs of the power supply units and the interconnecting backplane operate below Safety or Separated Extra Low Voltage (“SELV”) limits established by an international safety standard and achieve full operability under single fault conditions (i.e., a minimum of two individual faults before the circuit breaker becomes hazardous). The record permits the conclusion that SAE’s design solution to this specification was a trade secret.

The specifications also required, as noted, a design solution to allow two redundant power supplies to operate simultaneously without increasing current above acceptable limits and maintaining total current in the specified level whether one unit or both were operating. The record permits the conclusion that SAE’s solution to this specification was also a trade secret.

Avaya acknowledged the proprietary nature of features of the SAE G650 PSU. In particular, a December 2002 internal communication referred to SAE’s design solution for limiting current as “probably patentable” and observed that SAE “will license other vendors” as “[n]o other vendor has a technical solution now.”

A subsequent email exchange within the Avaya organization in 2004 indicated that Avaya understood that, in connection with developing a second source of power supply units for its G650 Gateway, issues would arise as to how forthcoming SAE would be in sharing technical information



concerning its product, including as to interoperability. An Avaya manager acknowledged that SAE owned intellectual property for the SAE G650 PSU and would not relinquish it.

Avaya awarded to SAE the initial contract to supply power supply units for its G650 Gateway in December 2002. The record permits the conclusion that, although Delta was the low bidder, Avaya was not persuaded that Delta or the other vendors in receipt of the RFQ had furnished workable solutions to the technical challenges, particularly that presented by the need to limit current from the redundant power supply. Delta's Raleigh unit had initially stated that it did not have an existing design at the time that it could "leverage from" for purposes of responding to the RFQ and that it had referred the project to its Thailand engineering affiliate.

Avaya and SAE did not actually execute a contract for the project and product supply until April 7, 2005. But the record, again viewed in the light most favorable to SAE, permits the conclusion that Avaya and SAE conducted themselves in substantial accord with that final contract in the intervening period. This contract obligated Avaya to protect SAE's technical design information with at least the same degree of diligence it employed for its own proprietary or confidential information. SAE's "documents, designs and know-how" remained SAE's property. Together with the nondisclosure agreements, there were a series of overlapping agreements between SAE and Avaya obligating the latter to maintain the confidentiality of SAE's proprietary technical information.

Beginning in March 2003, SAE began shipping its G650 PSU units to Avaya. At the same time, it was, of course, the only supplier of PSUs for the G650 Gateway and, as noted, SAE retained control over its trade secrets. Although the parties are in dispute as to whether Avaya had always intended to secure more than one supplier of power supply units for the G650 Gateway,

the record, examined in SAE's favor, permits the conclusion that Avaya was concerned about over-dependence on SAE and the need for any other vendor to have to secure licensing from SAE.

In September 2003, Avaya sent a RFQ to a group of vendors, including Delta. The record permits the conclusion that SAE was not included in and was not aware of this solicitation. Avaya did not award a contract to another supplier at this time.

In 2004, Avaya again circulated a RFQ to vendors, including Delta. In February 2005, Avaya awarded a contract to Delta, which then began development of its S4 G650 PSU for use in the G650 Gateway.

The record is undisputed that, at or around the same time, Avaya sent to Delta and/or its Thailand affiliate a complete G650 Gateway as well as SAE-manufactured G650 PSUs. The stated purpose for forwarding these items at this time was to enable Delta's design/engineering team to perform testing as part of addressing the need for interoperability of its product under development with the SAE G650 PSU and the G650 Gateway. According to Delta, the purpose in examining the SAE product was to measure the signals emitted by the unit to achieve interoperability with the Delta product. However, evidence in the record also establishes that at least one Avaya employee questioned this action, as Delta had only just begun development of its product, and also noted that testing was ultimately reserved for Avaya once the subject vendor had produced a prototype product.

As noted, Judge Mitterhoff determined that, by this time, the SAE G650 PSU was in the public domain and available for "reverse engineering" (even though Avaya explicitly directed Delta to refrain from infringing on third-party intellectual property rights, including via removing the cover from the SAE power supply units for purposes of examining the internal design). In any event, Delta Thailand's lead engineer and project manager for the Delta version of

the G650 PSU, Pichej Cheevanantachai, has testified that, in the course of developing its own product to meet its contract award from Avaya, Delta/Delta Thailand did not open the SAE G650 PSU or “reverse engineer” it.

Delta contends that, following the award of the contract by Avaya, the communications between Avaya and Delta over the ensuing months were typical of a product development process – and not unlike the communications Avaya had with SAE in 2002-2003. However, the record, once again examined in the light most favorable to SAE, permits the conclusion that Delta had difficulty solving technical challenges associated with the product and the specifications; and that Avaya was frustrated by the delays. Communications in the record include emails in June, July and August 2005 indicating the Delta was behind schedule; that the prototype was not working; and that the unit was not meeting the current limit – the principal technical challenge presented by the project.

Delta did not produce a product until the latter part of 2006. The record permits the conclusion that there was disappointment within the Avaya technical organization with the delays. Even after Delta’s version of the power supply unit was in the manufacturing phase, and had been incorporated into the G650 Gateway and sold to customers, there were problems requiring a “failure analysis” in October 2006.

The record also permits the conclusion that Avaya was determined to assist Delta in its product design and development work and the parties had numerous technical exchanges – including weekly exchanges – over the period between February 2005 and October 2006. Once again, Delta contends these exchanges were typical of the development process of a complex product. But the trier of fact could conclude from the nature of the exchanges that Delta was not only delayed in producing a viable product, but that it was stymied by technical hurdles.

Exchanges between Delta and Avaya – or internal communications among Avaya technical staff – include questions raised very early in the process about whether SAE owned the I2C source code in the SAE unit and whether it could be shared with Delta. There does not appear to be a written response. The source code was, the trier of fact could determine, proprietary to SAE.

The record also reflects a request for mechanical drawings of SAE's unit and information concerning part numbers used in the SAE product. It includes communications as to how SAE had solved various technical challenges and instructions by Avaya to use certain features of SAE's technical solutions.

Earlier in 2004, an Avaya engineer, John Boucher, had copied and stored in his office computer system a portion of an SAE schematic. It is undisputed that he did so in March 2004. He asserts he undertook this step to enable him to blow up and study a particular portion of the SAE power supply configuration to address a current leakage issue that had been raised in Brazil. Although he avers that he copied and imported a portion of the schematic for this limited purpose; that he did so for his own use only; and that he never shared the schematic with anyone, the record permits the conclusion that the first reference to an issue involving current leakage in Brazil did not occur until April 2004, after Boucher had copied the schematic. In this same time period, Avaya was, as noted, contemplating solicitation of Delta and other vendors for re-sourcing the G650 PSU.

None of these communications represents a “smoking gun”, establishing clear evidence of either the harvesting of SAE proprietary information by Avaya and/or a transfer of SAE's confidential information to Delta – and SAE makes no such claim as to any such communications on this motion. However, the trier of fact could draw from the frequency, intensity and character of the communications the conclusion that Delta was behind schedule – and does not appear to

have produced a prototype nearly as quickly as SAE; that its development process was hampered by technical challenges; and that Avaya was not only concerned about the delay, but determined to assist Delta in overcoming the challenges it was encountering.

In October 2006, a “failure analysis” report prompted concern within Avaya as to its risk as the Delta product had by this point been incorporated into G650 Gateway units shipped to customers. At this same time, an Avaya executive asked SAE for another copy of SAE’s CB Test Report.

The CB Test Report is a report submitted to an international standard-setting organization as to compliance with international safety standards applicable to a complex electronic product. It is undisputed that a report of this nature contains schematics and other confidential information concerning a product such as a power supply unit. The producer of the product submits the report with the understanding that the organization will preserve and maintain the confidentiality of such information.

SAE had previously provided its CB Test Report for the G650 PSU to Avaya three years earlier in 2003. As Avaya itself was also required to submit its own report of this nature, sharing of such information among entities such as Avaya and SAE is necessary. Delta contends the October 2006 request by Avaya for another copy of the SAE CB Test Report was utterly routine and necessary to enable Avaya to incorporate any updates concerning a component of its product into the comparable Avaya report. It also points out that, by October 2006, the Delta product was already in the manufacturing stage and the difficulties then encountered were manufacturing – and not design – issues.

There is no direct evidence that Avaya provided this report to Delta in October 2006 or at any other time (and Avaya denies ever doing so). However, the timing of the request – combined

with the fact that, following its receipt, Delta was finally able to overcome its prior difficulties with producing an interoperable product – permits the conclusion that the actual purpose for securing a copy of the report at this time was not to update Avaya’s body of information, but to assist Delta in producing a viable alternative G650 PSU.

SAE has tendered a Certification of a proposed expert – Michael N. Gershowitz – who examined documents pertaining to the Delta and SAE power supply units incorporated into the Avaya G650 Gateway. In his Certification, he expresses the following opinions:

- The SAE G650 PSU is not an “off-the-shelf” product, but instead is a highly-specialized and complex power supply device with customized features.
- The technical information contained in the specifications supplied by Avaya did not direct or establish the specific manner by which the responding parties were to solve the technical issues identified, including in particular the requirement for redundant power supply units that would be interoperable without creating excessive current. A responding party – such as Delta – could not have produced a G650 PSU bearing significant similarity to SAE’s product based on the specifications alone.
- The SAE solution to this technical challenge was “unique and creative, and more likely than not patentable.” In its own development, Delta attempted and repeatedly failed to achieve a technical solution to permit the redundant power supply unit to communicate so as to limit the current.
- Without having reviewed proprietary technical details as to SAE’s product, it is more likely than not that Delta would not have met the interoperability requirement. Gershowitz states that, as Delta met the interoperability requirements and its G650 power supply units were able to communicate with SAE’s PSUs to meet current-limiting requirements, there is no question that Delta used SAE’s proprietary method to meet Avaya’s current-limiting specifications.
- As a result of an examination of the schematics and bills of materials, Gershowitz concludes that there was a great similarity in the design of the two power supply units, including several identical specialty components. The expert opines that this is not a coincidence. Indeed, the likelihood that devices will employ a single identical component, let alone multiple components, without an actual sharing of design details was very remote. Gershowitz opines that, based on the use of similar and identical specialty components, and accepting Delta’s averment that it did not “reverse engineer” the

SAE G650 PSU, the Delta unit is based in part on SAE's proprietary design and Delta could not have produced it without access to information concerning the same provided by Avaya. Although there are physical constraints and the devices require similar configurations of parts, similarity in the details of the products makes it extremely unlikely that the Delta product was designed without access to SAE's confidential information.

- Gershowitz states that the record of communications between Avaya and Delta discloses that Avaya provided guidance to Delta on a selection of components based on the knowledge of the SAE design. He identifies specifically the selection of gas discharge tubes, OR-ing Diodes, Diode Bridge, DC boost converter transformer and AC fuses.
- The expert states that, although it is possible to "reverse engineer" the SAE G650 PSU with sufficient expertise, resources and time, such an undertaking would have involved more than merely opening and examining the SAE product, an action that Delta denies any event.

Delta asserts that it did not design its version of the G650 PSU based on the SAE G650 PSU design, but instead by employing its own design for the G700 power supply system that it had also developed for Avaya. However, Gershowitz opines that the Delta G700 product was a far simpler design; that it employed design techniques that are fundamentally different from those in the G650 PSU; and that the G700 design did not include the power-sharing feature so central to the G650 PSU product.

#### IV

On this motion, Delta asserts that the remaining claims available to SAE – misappropriation of trade secrets, civil conspiracy and tortious interference with contract/perspective advantage – fail as a matter of law for multiple reasons. The principal reason asserted is that SAE's efforts to establish a factual basis on which to carry its burden of proving

its claim that Avaya somehow transferred to Delta or its Thailand affiliate any protected confidential information of SAE has turned up empty.<sup>2</sup>

Delta contends that, after dismissing much of SAE's claim, Judge Mitterhoff permitted SAE to proceed to discovery in order to explore whether any facts exist to warrant a trial on the remaining claims – namely, whether Avaya conveyed to Delta the CB Test Report or other confidential information of SAE that Delta, in turn, used to inform development of its S4 G650 PSU. As a result, SAE had a full opportunity to demand documents and take multiple depositions of Avaya and Delta personnel.

Delta asserts the results of this discovery are decidedly underwhelming and the claims of misappropriation and tortious interference are, accordingly, gossamer thin. It asseverates that SAE failed to turn up any evidence of misappropriation of trade secrets or facts otherwise establishing that Delta's version of the G650 PSU is not its own, independently-produced design. It argues that none of the witnesses examined by SAE acknowledged any transfer of SAE's confidential information and the thousands of documents produced failed to yield a scintilla of documentary evidence giving rise to a triable claim of misappropriation of confidential information.

Delta contends that, even though the Court must examine the evidence in a light favorable to SAE, the latter can defeat summary judgment only on the basis of reasonable inferences from the record. It contends that, on this record, there is no basis for any such inferences of tortious conduct by Delta.

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<sup>2</sup> There is a suggestion in Delta's Statement of Undisputed Material Facts supporting the motion – though not argued in its briefing – that Delta Products Corp. is not even a proper party, as it was only a sales and marketing component of the Delta organization. Delta suggests the Delta affiliate in Thailand actually designed and produced the Delta S4 G650 PSU. However, the record does reflect Delta Products Corp. received and responded to the Avaya RFQ and subsequent requests and was awarded and accepted the contract offered by Avaya. There thus appears to be ample evidence in this record of a triable claim against Delta Products.



Instead, according to Delta, SAE relies impermissibly on its proffered expert, whose Certification is conclusory and sets forth inadmissible net opinions. Delta asserts that SAE further relies not on the firsthand testimony of its own percipient witnesses, but on their after-the-fact musings of what Avaya and Delta must have done in order for Delta to produce its version of the subject product.

Finally, Delta asserts that SAE distorts the record that does exist, asking the Court to draw strained and unsupported inferences from the record of communications between Avaya and Delta during product development. Delta argues the process was utterly typical – in terms of the time it took and the content of the communications – for the development of a complex electronic product. The development process was not dissimilar in material respects from the process in which SAE and Avaya had previously engaged and did not, in all events, involve any transfer of proprietary information of SAE.

Delta argues that California and not New Jersey law applies to the claims asserted by SAE, as California bears the most significant relationship to the parties and the claims in this case. It contends that California and New Jersey law differ in various respects and, in particular, that under California law the statutory claim for misappropriation of trade secrets preempts a common-law claim for civil conspiracy. It argues that, irrespective of choice of law, it is entitled to summary judgment as to all remaining claims under both New Jersey and California law.

SAE rejoins that the record presented, particularly when examined in the light most favorable to it, provides ample factual basis for a trial as to the remaining claims.<sup>3</sup> SAE argues that a claim for misappropriation of trade secrets almost always rests on a body of circumstantial

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<sup>3</sup> As previously noted, SAE suggests there was error in Judge Mitterhoff's prior ruling in the case and that it intends to appeal in due course if necessary. This, of course, is not a matter for this Court to address at this time, as SAE does not challenge any of these rulings here.

evidence as the tortfeasor is unlikely to have created “smoking gun” evidence of a transfer of confidential, proprietary information.

SAE argues in essence that the facts of record permit the trier of fact to conclude that its G650 PSU product contains at least two trade secrets and other confidential information, all of which SAE retained as part of its contract with Avaya; and that Avaya was determined to secure a second source of PSU for its important G650 Gateway product in order to avoid over-dependence on a single supplier vested with rights to such trade secrets. It asserts the record permits the conclusion that, when Delta was unable to produce a viable product on its own, Avaya enabled it to do so by transferring SAE’s confidential information, likely including a copy of the CB Test Report.

SAE contends that its proffered expert testimony is not only competent, but that it demonstrates at minimum a genuine dispute of material fact as to the claims of misappropriation and tortious interference. It argues the expert examined the record and compared the product designs. He concluded that the product specifications did not contain the design details, but instead established performance criteria that the product must meet, including the all-important interoperability criterion. He determined that the contractor was required to design solutions of its own to meet the specifications, including the means of assuring the product would operate in the redundant power supply environment. He opines that the product designs of the SAE and Delta products are similar in ways – including usage of identical components – that reflect the probable transfer of SAE confidential information to Delta. He states that Delta could not have derived its version of the G650 PSU from its prior design of a power supply product for Avaya– the G700 power supply unit – as the latter is too dissimilar from, and far less complex than, the subject product.

SAE asserts that there is no actual conflict in the relevant laws of California and New Jersey applicable to its claims. It asserts that New Jersey has the most significant relationship to the parties and events at issue. It argues that, under either state's law, a trial is required as the record presents material disputes of fact as to the issues of misappropriation and tortious interference.

## V

As to the conflict of laws issue presented by this motion, the Court is not persuaded by the briefing (generally of the very highest quality on both sides, but fairly sparse as this particular issue) that there is an actual conflict of laws, save for the preemption of the civil conspiracy claim were California law to be applied. Except as noted, the specific formulations of the material elements of the remaining claims may differ as between the two States, but the substance is virtually identical.

The parties' discussion of the underlying facts pertaining to a choice of law determination is largely conclusory, with each side declaring the bare facts point to application of one State's law or the other. The Court finds the present record does not present adequate basis on which to render a definitive determination.

As Delta bears the burden of establishing that law of a State other than the forum State applies, the Court finds it has not sustained that burden at this time. Accordingly, the Court will apply New Jersey law in adjudicating this motion. However, given the substantial conformity of legal principles as to the claims at issue (with the exception noted), the Court concludes that denial of summary judgment is warranted under either body of law.

As there is an apparent conflict in respect of the civil conspiracy claim, and the choice of law may have an impact on jury instructions at a trial, the Court's determination on this matter is for purposes of this motion only and without prejudice to further motion practice. Delta is free to

renew its choice of law application on the basis of a more complete record of relevant facts and more thorough briefing, should it wish to do so.

## VI

The disposition of this motion does not require the Court to examine or resolve legal disputes among the parties or even disputes as to the application of relevant legal principles to the facts. There is thus no need for an extensive discussion of such legal principles or for interpretation of case law.

Both sides ultimately agree – at least on this motion – that, under New Jersey or California law, SAE is required to prove by competent evidence that the G650 PSU incorporates one or more trade secrets; that SAE provided information to Avaya comprising its trade secrets in confidence; that Avaya provided Delta with access to materials containing SAE’s trade secrets; and that Delta knowingly used such information in designing and producing its version of this product. Compare Rycoline Prods., Inc. v. Walsh, 334 N.J. Super. 62, 71 (App. Div. 2000), with Cal. Civ. Code § 3426.1(b)(1). Delta asserts the Plaintiff has not satisfied – and can never satisfy – this burden of proof, despite having had a full and fair opportunity for discovery. SAE contends it has adduced facts on this record to cause a rational trier of fact to render findings in its favor.

As an initial matter, the Court reiterates that its function on this motion is not to weigh the evidence, determine the ultimate truth of the matter or assess the weight or credibility of the evidence. Its function instead is merely to determine if there is evidence that could cause the trier of fact to enter a finding for the non-moving party.

In this regard, the Court accepts as part of the record upon which this motion is to be decided the proffered expert Certification of Mr. Gershowitz. The Court finds the Certification on its face is not a “net” opinion and there is no basis on this record to reject it as such. That

Certification recites that the expert examined facts of record, including the product specifications, the design details of the two power supply units of Delta and SAE, respectively, relevant communications and deposition testimony. See N.J.R.E. 703. He applied his expertise and experience to render an opinion that the Delta product is so similar in various ways to the SAE product as not to have been designed and produced without access to and use of SAE's proprietary information, Delta having represented under oath that it did not "reverse engineer" the SAE product.

Although the Certification is relatively brief, the Court would not necessarily have expected a substantially more detailed document on this motion for summary judgment. As noted, the Court's function is to determine the existence of competent evidence, not weigh its credibility.

If, as may have been the case, there was no expert report submitted as part of discovery, the Court would take up that issue separately, upon submission of an appropriate application to bar the same, or for service of a sufficiently detailed expert report. Moreover, if Delta wishes to depose the proffered expert, either with or without a process for the issuing of a report, the Court will also consider such an application. If Delta seeks to bar the expert as lacking in appropriate qualifications, lacking an accepted and reliable methodology or as otherwise inadmissible, that is also a matter to be addressed separately, including (if appropriate) following a Rule 104 hearing. But, as noted, on the present record there is no basis established to disregard the proffered expert testimony.

A claim for misappropriation of trade secrets can – and in most cases likely would – turn on circumstantial evidence. It is highly improbable, particularly in an environment involving sophisticated corporate entities, that there would be direct evidence of the transfer of proprietary materials or information.

Here, the Court finds, based on an examination of the record in the light most favorable to SAE, a genuine dispute of material fact for trial on the issue of whether Avaya transmitted, and Delta knowingly received and used, proprietary information of SAE in connection with its design and development of its power supply unit for use in the G650 Gateway. A rational trier of fact could find that SAE developed identifiable trade secrets in design/production of its G650 PSU in response to Avaya's contract award and that Avaya transmitted confidential information of SAE to Delta, enabling the latter to incorporate SAE's trade secrets into its design. Put differently, the Court cannot conclude on this record that there is a single, unavoidable resolution of the disputed issues or that the record of competent evidence is so one-sided as to warrant entry of judgment as a matter of law for the Defendant.

The record permits the conclusion that, after assisting Avaya in developing specifications for the G650 PSU for the G650 Gateway telecommunications product, the Plaintiff proceeded to design and manufacture a product that met the specifications. Such product included at least two trade secrets, providing technical solutions for the product specifications relating to over-voltage protection and interoperability of the redundant power supply units connected to the G650 Gateway.

The Court does not perceive that, on this motion, Delta challenges the assertion that the SAE G650 PSU incorporates one or more trade secrets. Instead, its motion asserts in essence that, even if and to the extent that is so, Delta did not receive from Avaya and did not use or employ in designing its own power supply product for Avaya any such proprietary information of SAE.

In any event, the motion record contains competent evidence establishing (on a motion for summary judgment) that, in connection with its design of the G650 PSU, SAE developed information that was not known outside of SAE's business, including by the other bidders that

received solicitations from Avaya for power supply units for its G650 Gateway; that SAE undertook actions reasonably calculated to protect its confidential information in respect of the G650 PSU from disclosure, including as discussed herein, non-disclosure agreements with Avaya itself; that the trade secrets incorporated into the G650 PSU had commercial value to SAE and its competitors; and that SAE had devoted substantial resources to develop such trade secrets. Indeed, Avaya acknowledged that the SAE design solution to the specification for redundant power supply without increasing the current above specified levels, regardless of the operating configuration (including both power supplies operating simultaneously), was likely patentable.

The record reflects that, in submitting its response to the initial RFQ, SAE made clear that it intended to retain, and not convey to Avaya, all of its intellectual property developed in connection with the project. The contract ultimately entered by Avaya and SAE in 2005 – and, as the record reflects, observed and adhered to prior to that time – so provides. Avaya and SAE are parties to multiple contracts, including the April 2005 contract, that contain provisions obligating Avaya to maintain the confidentiality of SAE’s proprietary information concerning the subject design and product. When Avaya provided SAE’s G650 PSU to Delta – purportedly for compatibility testing – it instructed Delta that it could not open or inspect the units. It thereby recognized the proprietary nature of components of the same (even though, as Judge Mitterhoff later ruled, the SAE power supply unit itself was in the public domain and open to reverse engineering).

The trier of facts could infer that Avaya was concerned about over-dependence on one supplier, particularly a supplier that possessed intellectual property rights in respect of the product; and, as a result, that it intended to develop a second source of power supply units for the G650

Gateway. There is a basis for finding that Avaya recognized the use by an alternative supplier of the key elements of the SAE design would require a license that was unlikely to be forthcoming.

The record reflects that Avaya began to seek an alternative supplier as early as September 2003, after only a few months of production of SAE's equipment. Avaya initiated contact with Delta without informing SAE.

Following the September 2003 inquiry, Avaya went to the market in 2004, seeking an alternative supplier. It ultimately awarded the contract to Delta in February 2005 to develop and produce a power supply unit for the G650 Gateway.

At that time, even before development began in earnest, Avaya provided SAE's G650 PSU unit to Delta for the stated purpose of testing the compatibility of its then undeveloped product with the SAE G650 PSU. At least one manager within Avaya considered this to be an unusual step, given the nascent stage of development and the fact that Avaya would undertake in due course to ensure ultimate compliance with the specification as to interoperability.

The record permits the conclusion that Delta encountered delays in the design/development process and Avaya personnel were frustrated with the delays. One can rationally conclude that the development process took considerably longer in respect of the Delta product than the SAE power supply unit. Although Delta contends otherwise – and argues the record of development of the Delta product is not unlike the record in respect of the SAE product in all material respects – this is a matter for the trier of fact to gauge. The trier of fact may, of course, ultimately agree with Delta, but it could also determine on this record that Delta encountered difficulties in meeting the Avaya specifications, delaying its product rollout for manufacturing until the second half of 2006.

The trier of fact may accept that, even after Delta began supplying its product to Avaya for use in the G650 Gateway and sold to customers, there were problems, necessitating a failure



analysis. Here again, the trier of fact may determine, as Delta contends, that at this time there were manufacturing and not design matters at issue, but the jury could also infer that there was a continuation of the difficulties Delta had experienced in producing a product that achieved solutions to the technical challenges presented by the project, including the required interoperability.

The record reflects that, over a period of many months from February 2005 to the latter part of 2006, Avaya's and Delta's technical teams were in continuous communication and shared information concerning the various issues that were arising in connection with the design of a product that would meet the Avaya specifications. Such exchanges, as well as internal Avaya communications, include inquiries about whether Avaya owned and could share source code for an element of the SAE product; whether Delta could obtain certain SAE mechanical drawings; and directions by Avaya to use certain specified components or other features of the SAE design.

None of these communications themselves represents direct evidence of the transfer from Avaya to Delta of SAE's proprietary information. However, the communications do permit the conclusion that Avaya was not only intensely interested in securing a second source of power supply units from Delta, but ready, willing, and able to actually assist Delta in effecting solutions to the significant technical challenges that one could find that Delta encountered along the way. When this body of communications is examined together with other evidence in this record, one could reasonably find this assistance extended to transfer of proprietary information.

The record contains evidence that an Avaya engineer, Mr. Boucher, copied a portion of a SAE schematic into his own computer files. In late 2006, Avaya also requested from SAE another copy of the CB Test Report, which SAE provided. Here again, there is no direct evidence that Avaya provided these materials to SAE. But examined in the light favorable to SAE – and in the

context of other evidence – a trier of fact could find that Avaya’s purpose in securing these materials was to transmit them to Delta to assist it in overcoming the difficulties it encountered in completing a successful design.

Delta argues that SAE has grossly distorted the import of these (and other) events and communications, creating what it labeled at oral argument as a series of “false narratives.” It contends the Court can and should only draw reasonable inferences from the record to deny a motion for summary judgment and the inferences SAE urges the Court to derive from the body of communications and other evidence are decidedly unreasonable. Specifically, Delta contends that Mr. Boucher copied a portion of the SAE schematic solely for purposes of addressing an issue that had arisen with the product in Brazil – as, it claims, the documentary record reflects – and that Avaya sought an updated version of the CB Test Report in October 2006 simply in order to enable Delta to incorporate the same into its own CB Test Report for the G650 Gateway. It points out that all of the individuals from both Avaya and Delta from whom SAE obtained testimony during discovery disclaimed any knowledge of transmitting or receiving the schematic, the CB Test Report, or any similar items containing proprietary information of SAE.

The trier of fact may, of course, accept these explanations from Avaya and denials by Delta as to all of these matters. However, the Court must, on this motion, construe the evidence in favor of SAE. When one examines all of the evidence in the motion record, it finds a genuine dispute of fact as to the claim of misappropriation of SAE trade secrets.

Such evidence includes the proffered expert testimony of Mr. Gershowitz, which the Court has described above in detail. The testimony, if accepted by the factfinder, permits findings (among others) that neither SAE or Delta could have designed a product that met the performance criteria of the Avaya specification based on examining the specifications alone; that the SAE G650 PSU

contains identifiable trade secrets; that comparison of the Delta S4 G650 PSU to the SAE product discloses that the Delta product contains numerous identical components, a coincidence that is not expected in circumstances involving design teams operating independently to design and produce separate products; that, having disclaimed any “reverse engineering” activity, Delta could not have designed and produced its version of the G650 PSU without having access to SAE’s proprietary information; and that the Delta PSU could not have been developed merely on the basis of adapting the design of the Delta G700 product also designed for Avaya.

The Court thus finds that, insofar as Delta claims a right to summary judgment on the remaining SAE claims as to misappropriation of trade secrets and the related claim of civil conspiracy, the competent evidence in the motion record establishes a genuine issue of material fact warranting a trial. The circumstantial evidence supporting the claim of misappropriation – and of concerted action by Avaya and Delta to use proprietary information of SAE for mutual benefit – is not insubstantial or speculative, as contended. To the contrary, when considered (as it must be) in the light most favorable to SAE, the record instead gives rise to a substantial disagreement as to these matters that only the trier of fact is permitted to resolve.

## VII

Delta additionally challenges SAE’s claims for tortious interference with contract and/or prospective economic advantage. In addition to the matters already discussed, Delta contends these claims fail for want of knowledge on the part of Delta as to the specific features of the Avaya-SAE contract or of the opportunities for prospective economic advantage to establish a viable claim for tortious interference. In particular, Delta contends it had no role whatsoever in Avaya’s decision to terminate its contract with SAE and no knowledge at the relevant time of Avaya’s intention to do so.

The Court finds that the present record permits the rational trier of fact to conclude that Avaya sought to shift to Delta as a principal or exclusive supplier of power supply units for its G650 Gateway out of a concern for over-dependence on SAE as a source of such critical component. Avaya initially solicited a proposal/quote from Delta for a power supply product in 2003 without informing SAE.

The record also permits a rational factfinder to determine that Delta was aware of the existing relationship between SAE and Avaya's desire to supplant SAE as the principal supplier. This knowledge, one could find, follows from the intense effort of Avaya to assist Delta in completing a successful design of an alternative to the SAE G650 PSU.

Although healthy competition for a valuable supply arrangement is, needless to say, not actionable, the basis for a claim arises if the factfinder determines Delta received and misappropriated SAE trade secrets in the course of developing its relationship with Avaya. Such a finding would demonstrate that Delta interfered with an existing supplier relationship of which Delta was aware and without justification in derogation of the code of ethical commercial conduct that the tort of tortious interference seeks to foster.

The record further permits the conclusion that Delta was also aware of both the utility and value of SAE's proprietary solutions to the technical issues involved in developing an appropriate power supply for the Avaya G650 Gateway. The finder of fact could conclude that Delta had reason to know that SAE had retained ownership of the same as part of its arrangement with the Avaya in order to leverage such intellectual property for other products and markets. If the jury accepts that Delta misappropriated such property, it can also find the Delta knowingly acted in a manner as to deprive SAE of such benefits of that property.

SAE would, of course, be required to establish damages and a proximate causal connection between such claimed damages and the alleged tortious conduct. In connection with tortious interference with prospective advantage, such proofs would necessarily have to include a showing of a reasonable probability of converting the intellectual property developed for Avaya into a power supply product or products that could be sold to others. As the Court has already bifurcated this case into separate proceedings going to liability and damages, these are matters for another day, if SAE succeeds in establishing the alleged culpable wrongdoing by Delta.