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Delta Electronics (Americas) Ltd.

f/k/a Delta Products Corporation

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: ESSEX COUNTY

Docket No. L-001136/11

**ORDER DENYING DEFENDANT
DELTA’S MOTION FOR SUMMARY
JUDGMENT**

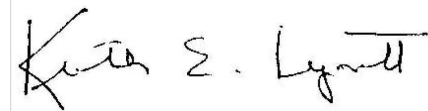
THIS MATTER having been opened to the Court by PILLSBURY WINTHROP SHAW PITTMAN LLP, counsel for Defendant DELTA ELECTRONICS (AMERICAS) LTD. F/K/A DELTA PRODUCTS CORPORATION (“Delta”), by way of a Motion for Summary Judgment; on notice to QUADRA & COLL, LLP and ANSELL GRIMM & AARON, P.C., counsel for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

("SAE"); and the Court having considered all papers submitted and the oral argument of counsel, if any; and for good cause shown;

IT IS on this 19th day of September, 2024:

ORDERED as follows:

1. Delta's Motion for Summary Judgment is hereby **DENIED**.
2. That a copy of this Order is and shall hereby be deemed served on all counsel of record upon being uploaded to the New Jersey e-Courts filing system.



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

OPPOSED
 UNOPPOSED

Statement of Reasons

In this action alleging misappropriation of trade secrets, among other causes, the Defendant Delta Electronics (Americas) LTD f/k/a Delta Products Corporation (“Delta”) moves again for summary judgment as to the remaining claims of the Plaintiffs SAE Power Incorporated and SAE Power Company (collectively, “SAE”). Both parties have also submitted motions in limine as to aspects of proffered expert testimony.

For the reasons set forth herein, the Court denies the motion for summary judgment. It generally denies the motions in limine, though it finds certain aspects of such motions are unopposed and thus granted.

I

As to the motion for summary judgment, the Court must determine if there is a genuine dispute of material fact warranting a trial. R.4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). A dispute effect is genuine if a rational trier of the facts could resolve a disputed element of a claim or defense in favor of the non-moving party.

The Court must employ the same analytical approach it would undertake in examining a motion for directed verdict pursuant to R. 4:37-2(b), save that the record consists of discovery materials and Certifications and not trial testimony and admitted Exhibits. The Court examines that record through a lens that favors the non-movant and confers on the latter the benefit of favorable inferences that one could reasonably draw from the motion record.

The Court’s function is not to determine the truth of the matters asserted, weigh the evidence or assess its credibility. Instead, it examines the motion record to determine if there is

evidence that establishes a sufficient disagreement as to a matter of material fact to warrant holding a trial.

If the movant demonstrates prima facie a right to the relief, the non-moving party must adduce facts in competent evidential form that establish a genuine dispute of material fact. Reference to the pleadings, conclusory assertions without evidential support, speculative, insubstantial or fanciful factual material, or factual disputes that are immaterial, are not grounds for defeating a motion for summary judgment.

The Court must proceed cautiously in granting a motion for summary judgment, in order that a deserving litigant is not deprived of a plenary trial and is instead subjected in effect to a trial by affidavit. But if the motion record, even when examined in the non-movant's favor, admits of a single unavoidable outcome, the Court will grant the motion.

II

As the parties are aware, Delta previously moved for summary judgment. The Court denied the motion, finding a genuine issue of material fact as to the remaining claims of SAE. Delta moves again, asserting (i) new grounds (statute of limitations); and (ii) developments in discovery that, so it contends, warrant a determination in its favor.

However, save for the discussion herein, the Court concludes the essential facts, examined in SAE's favor (solely for purposes of adjudicating this motion), are essentially the same as previously limned in the Court's prior Statement of Reasons. Accordingly, the Court incorporates that Statement of Reasons herein as if set forth in full. It adds the following to such factual recitation:

The former Defendant Avaya Incorporated (“Avaya”) was at all relevant times a Delaware corporation with a headquarters in New Jersey. Avaya also maintained facilities in Colorado. Its technical and contracting leads for the transactions with Delta were located in Colorado.

SAE Power Incorporated is a California corporation with its principal place of business in California. SAE Power Company is a Nova Scotia corporation with its principal place of business in Ontario, Canada.

Delta is a California corporation with its principal place of business in that State. Delta had an affiliate in Thailand that developed Delta’s PSU for Avaya’s Gateway 650 product.

SAE and Delta separately entered into various non-disclosure agreements, a Purchase and Sale Agreement and General Conditions with Avaya between 2002 and 2008. These agreements contain contractual choice of law provisions. However, SAE and Delta were not parties to any agreement between themselves.

In 2001 and 2002, mutual Non-Disclosure Agreements entered between SAE and Avaya contained choice of law provisions selecting New York law as the governing law. These agreements remained in force according to their terms into 2006/2007 and were not modified or rescinded. Such agreements were in force when SAE assisted Avaya in development of specifications for the PSU for the Gateway 650 telephony product, and when Avaya awarded SAE a contract to supply the PSUs and the latter began doing so.

The 2001 agreement identified the parties’ exclusive representatives for reviewing tangible information as individuals located in Colorado (Avaya) and Ontario (SAE). The 2002

non-disclosure agreement identified such representatives as individuals also located in Colorado and Ontario and specified that SAE and Avaya, respectively, maintained offices in these places.

In 2002, Avaya sent a letter from its Colorado offices to SAE awarding SAE the contract for the PSUs. It directed the letter to SAE in California.

The Court accepts that the Purchase and Sale Agreement between SAE and Avaya as to the PSUs in issue, although never executed, was in effect from 2005 (or possibly earlier) forward. This agreement contains a New Jersey choice of law provision applicable to all “transactions” between the parties. However, that agreement also provides explicitly for entry of non-disclosure agreements to govern the terms of conveyance and use of confidential business information and refers to the prior such agreements as if still in force and effect. Although this agreement stated that the buyer maintained offices in New Jersey, it provided for delivery of notices and demands to Avaya in Colorado. A 2008 Non-Disclosure Agreement between SAE and Avaya does contain a New Jersey choice of law provision.

In 2005, Avaya notified Delta of its selection as a second supplier of PSUs. It issued this letter in Colorado and delivered it to Delta in California. Avaya and Delta entered into a Non-Disclosure Agreement in 2005. Such agreement contains a choice of law provision that refers to Delaware law. In 2008, Delta and Avaya subscribed to General Conditions for the sale of PSUs by Delta to Avaya. This agreement contains a New Jersey choice of law provision. There is no evidence in the motion record as to any specific reason or basis for the various choice of law provisions contained in these agreements.

There is no evidence in the record permitting a conclusion that, in relation to Avaya’s commercial dealings with either SAE or Delta in relation to the Gateway 650, the SAE 655A

PSU or the Delta S4 PSU, any meaningful activity occurred in New Jersey. Avaya developed and manufactured its product in Colorado. It sought to purchase PSUs from its possible suppliers, including SAE and Delta, evaluated bids for the PSUs, negotiated agreements, communicated with the two selected suppliers as to such PSUs and received and incorporated the PSUs into its product in and from Colorado.

SAE performed its activities in relation to its PSU, including its development and manufacturing work in California and Ontario. Delta performed all of its essential activities in relation to the development and production of its PSU in California and Thailand.

In November 2006, Avaya's Al Capra (located in Colorado) communicated with Allen Brown, a technical lead for SAE (located in Ontario). The communication referred specifically to a problem with the "Delta 655A power supplies." In that communication, Mr. Capra requested some information from SAE that was related to the operation of the current sharing mechanism in the SAE 655A PSU.

There followed a series of internal communications within SAE. Mr. Brown sent an e-mail that same day to SAE colleagues stating:

This is a proprietary (although unpatented) technique – how should we handle this? I'm sure we told them this when they raised the issue of how the reduced CL worked! His inferences are incorrect and may have been based on Delta's evaluation of our unit (not cricket!). File for patent first? Ask for a license from Delta? Trade for free licenses of other stuff? Certainly do it under NDA and non-use agreement with Delta, possibly while we explore patent?

Sam Lagis of SAE responded on November 20, 2006 that there was need to consult the CEO Colm Campbell. He stated:

This is a Colm issue. Please call and discuss.

My opinion, this is proprietary information and we are not going to help them. They are replacing us with DELTA at Celestica. Celestica is trying to cancel 4000 units for Feb.

The longer it takes DELTA to solve the problem, hopefully it translates to more units we can deliver.

Mr. Brown responded to Mr. Capra on November 20, 2006 as follows:

Sorry for the delay in responding... This is a bit of a tricky situation since it involves SAE IP. I'll have to consult Colm. Is the problem between two Delta units, between each one of each, or both situations? Clearly it works properly between two of ours, and there is no degradation issue.

Mr. Brown later testified that “[w]e were not aware that they had copied our IP until this point, so it was a bit confusing around that time.” He stated that Mr. Campbell decided that “if [SAE] disclosed what was asked for, there should be compensation.” He testified that information about pulses on the shared power supply line “was IP and we could not go further.”

In January 2008, Delta sent one of its PSU units to SAE for testing as a non-working unit. Mike Lovell of SAE sent an e-mail to Mr. Lagis, who forwarded to Mr. Brown (but in February 2009). The e-mail contained photographs of the Delta PSU, taken after removing the cover of the unit. Mr. Lovell called the unit “a knock off.”

Mr. Lagis testified that the layout of the Delta PSU looked like the layout of the SAE product. Mr. Lagis stated, “you didn’t have to be an engineer to see the similarities in this.” SAE’s Complaint in the action alleges that “[i]t is evident from even a superficial inspection of the Delta unit that Delta had copied the primary electrical and mechanical layout of almost the entire SAE power supply, substituting certain obvious alternative materials but utilizing the unusual and expensive materials SAE had used.”

SAE points out that neither Mr. Lovell nor Mr. Lagis was on the development team for the SAE PSU and neither was familiar with the two trade secrets contained (as alleged by SAE) in the product. Mr. Lagis avers in a Certification that similarities in layout did not give him reason to suspect misappropriation of trade secrets.

Mr. Brown did not actually open the Delta unit until a year later in early 2009. It was only then that SAE determined (so it asserts) that the PSU produced by Delta incorporated, as also alleged in the Complaint, “techniques and know how unique to SAE 655A unit beyond what would be in inspected from reverse engineering”, including the proprietary methods for “two current-sharing parallel power supply units that maintained a designated overall total current limit.”

In February 2009, Mr. Brown prepared notes on his examination of the Delta PSU stating his belief that the unit was a copy of the SAE PSU. In March 2009, he further commented to Mr. Campbell on what he stated was a use of SAE’s trade secrets.

Nearly a year earlier, in March 2008, Avaya had communicated with Delta instructing it to commence production of the PSU as a sole supplier. On April 4, 2008, Avaya notified SAE that it would not place any orders with SAE for additional units of SAE’s PSU device. SAE supplied the last units ordered by Avaya in August 2008.

On this motion, Delta claims that, during the discovery that followed the Court’s prior denial of its motion for summary judgment, it obtained testimony that establishes a right to summary judgment. It contends that, in his deposition, Mr. Brown acknowledged that Delta’s PSU employs different circuitry for the lightning protection on the Extra Safety Low Voltage power output line than was employed by SAE. Mr. Brown stated that, although the component parts for this feature of each unit’s – 48 volt output were the same – including the gas discharge tube, OR-ing diode and crowbar – the arrangement of these items and the functionality was entirely different. It asserts its own expert confirms the material differences in functionality (and opines that the circuitry architecture employed by Delta is superior).

Mr. Brown testified that Delta copied the SAE design “pretty much to the best of their ability, except that they put the crowbar on the outside of the [OR-ing], which is a single point of failure.” He testified this configuration was “foolishness” as it resulted in “tak[ing] down both power supplies”, instead of one, upon a lightning strike. According to Mr. Brown, the intended purpose of the design – with the crowbar placed inside the OR-ing – was to ensure only one power supply unit went down while the other continued to operate.

Delta asserts that Mr. Brown also conceded the invalidity of SAE’s claim as to Trade Secret No. 2, the current limiting feature that permits both PSUs to operate concurrently, using a single power sharing line, but without increasing the current level above the specified limit. Delta points out that the claim hinges on a showing that Avaya provided to Delta the information necessary to enable it to include Trade Secret No. 2 into the architecture of its unit, as the Court has already determined that any reverse engineering Delta conducted on its own is not actionable. It contends that Mr. Brown acknowledged in his testimony that SAE never provided the details of Trade Secret No. 2 to Avaya. As a result, so it asserts, the latter could not have provided such information to Delta.

The movant challenges the reliability and admissibility of the opinion of SAE’s liability expert Michael Gershowitz on various grounds. In particular, it contends that, in rendering his opinion as to the claim misappropriation of Trade Secret No. 2, Mr. Gershowitz overlooked that Delta could have replicated, and did identify, the current limiting methodology by measuring the pulses or signals from the SAE PSU unit to meet the current sharing and limiting specifications. Delta posits that such measurements involved testing or analysis of the SAE unit in which it was permitted to engage. It points out that the CB Test Report provided by SAE to Avaya did not

contain any description or schematics pertaining to Trade Secret No. 2 as that report related to safety features and Trade Secret No. 2 was not such a feature.

Mr. Gershowitz opines that it is more likely than not that Delta used information it obtained from Avaya to design and implement the current limiting functionality of the dual PSU configuration – i.e., Trade Secret No. 2. He states that the attempt to duplicate the functionality of the SAE design by measurement of signals from the SAE PSU was “unsuccessful[.]” He states that “without reviewing technical details from Avaya, it would have been more likely than not that Delta would have failed to meet the interoperability requirement of the G650 redundant PSU system.”

Mr. Gershowitz avers that, as the Delta units achieved the interoperability requirement and its unit was able to communicate with the SAE PSU, there is “no question” that Delta employed SAE’s proprietary method to meet this requirement. Among other bases for his opinion, Mr. Gershowitz points out that during a 2006 failure analysis investigation, Delta “expose[d] by its explanation its knowledge of SAE’s proprietary interface.” Mr. Gershowitz explains that the proprietary technology employed by SAE – of which he contends Delta manifested its awareness – was to use pulse modulations on the “current sharing line” to direct a microprocessor to adjust the current from the two power sources if both were operating concurrently.

Mr. Gershowitz describes the use of back-to-back switches to accomplish this pulse generation. He notes that the Delta PSU employs the same arrangement and states “[i]t is highly unlikely Delta would have arrived at the same solution as SAE.” He further opines that “the fact that Delta chose a back-to-back FET switch configuration identical to the configuration used by SAE is unlikely to be coincidental. More likely than not, information about the SAE design was

shared with Delta, and being unsure of how the circuit operated, Delta copied the same back-to-back FET switch configuration used by SAE to ensure that the circuit would work and would be compatible with the SAE PSU.

Mr. Gershowitz points out that although Delta's technical lead Phichej Cheevanantachai described his undertaking to analyze the signal from the SAE PSU that was present on the Avaya backplane to determine the method of communication between the two power sources, "there would be no indication of how that pulse is generated." He observed that Delta modified its circuitry to employ an electronic switch to generate the pulse without explanation of how he deduced the pulse would be generated by the switch. He also points out that Mr. Cheevanantachai testified that he did not actually inspect the SAE PSU to ascertain its configuration. He also points to communication from Margaret Toth of Avaya that indicates its familiarity with use of the switch to generate pulse.

Mr. Gershowitz's testimony as to what he believes was Avaya's knowledge of Trade Secret No. 2 and likely communication of that knowledge to Delta is thus predicated on an assessment of a variety of factors. It is not limited to the Sueper memorandum concerning an interoperability study that Delta posits never occurred.

III

The movant recites the following (undisputed) procedural history in support of its motion:

SAE filed its initial complaint against Avaya (only) in the United States District Court for the District of New Jersey on January 18, 2010. SAE subsequently amended its complaint to join Delta as a defendant on October 1, 2010. The federal complaint asserted claims against Delta

sounding in tortious interference with contractual relations, tortious interference with prospective economic advantage, misappropriation of trade secrets and civil conspiracy.

On January 24, 2011, the parties stipulated to dismissal of the federal complaint (without prejudice) on jurisdictional grounds. SAE filed the Complaint in this action on January 24, 2011. The parties agree that the running of the applicable statutes of limitation was tolled as to Delta from October 1, 2010 to January 24, 2011.

As noted, the Complaint as to Delta states claims sounding in tortious interference with contractual relations, tortious interference with prospective economic advantage, misappropriation of trade secrets and civil conspiracy. The tortious interference claims are predicated on the alleged use by Delta of SAE's trade secrets to establish a supply relationship with Avaya, displacing SAE as the supplier of PSU units for the Gateway 650 telephony system.

Avaya is no longer a party to the case, as a result of bankruptcy proceedings. On July 19, 2016, the court (Mitterhoff, J., ret.) dismissed claims in SAE's Complaint that are in any way related "to Avaya having provided SAE PSUs to Delta [] or Delta [] having received, opened, inspected, tested, studied or copied SAE PSUs."

IV

On this motion, Delta seeks summary judgment on grounds that it asserts are different from those that informed its prior motion. It contends that the Plaintiffs' claims against Delta fail as a matter of law due to the running of the applicable statutes of limitations governing claims for misappropriation of trade secrets/civil conspiracy and tortious interference.

Delta posits that the California statutes of limitations should apply to the claims SAE asserts against it. Although acknowledging that the statutes of limitations of the forum state

presumptively apply, Delta asserts that New Jersey has no substantial interest in the application of its statutes of limitation and that California has a more significant relationship to the parties and the claims at issue such that its statutes of limitations should apply.

Delta argues that the claims as between SAE and Delta, unlike the claims asserted against Avaya, relate to parties that are incorporated and headquartered in California (or Canada in the case of SAE Power Company) and that these parties have never conducted their relevant business activities in New Jersey. It asserts that even though Avaya was headquartered in New Jersey, it conducted all activities in relation to the development, production and sale of its Gateway G650 telephony system and the subject PSU units of either SAE and/or Delta in Colorado.

Delta posits that New Jersey has no interest in the issues pertaining to this action and that California thus has the most significant relationship to the parties and interest in the facts, circumstances and issues presented by this case and, accordingly, that its statutes of limitations should apply. It asserts that California has a three-year statute of limitations for claims for misappropriation of trade secrets and a two-year statute for actions for tortious interference. It contends that, if California law is not applicable, then the Court should look to the law of Colorado, Ontario or Thailand, where the applicable statutes of limitation are comparable to California. All of these statutes conflict with the New Jersey six-year statute that would otherwise apply to the claims asserted by SAE (although New Jersey has since modified its statute of limitations for misappropriation cases to three years).

Delta argues the fact that both SAE and Delta were separately parties to certain agreements with Avaya that contained New Jersey choice of law provisions is irrelevant to the

circumstances here. It contends that that SAE and Delta have no contractual relationship inter se and the claims asserted by SAE against Delta sound in tort.

Delta contends that a different statute of limitations can and should apply to SAE's claims against Delta than would apply to its claims against Avaya. Thus, according to Delta, it is of no moment that the New Jersey statute of limitations may apply to the SAE/Avaya claims by reason of a contractual choice of law provision or otherwise.

Delta asserts that the California statutes of limitations for the claims sounding in misappropriation and tortious interference ran prior to the commencement of the federal action against Delta in 2010. It posits that SAE was on inquiry notice of the alleged improper use of trade secrets by Delta in November 2006 when Mr. Brown noted in an e-mail that Delta may have copied Trade Secret No. 2. As a result, according to Delta, the Plaintiff should have filed the claim for misappropriation of trade secrets by November 2009, nearly a year before it actually did so.

Delta argues that, if the Court were to find that the Colorado, Ontario or Thailand statutes of limitation were to apply, these statutes expired as well. It asserts that the shorter statutes in Ontario and Thailand expired even if one were to consider the accrual date to be January 2008, when SAE received the Delta PSU and its personnel examined it and called it a "knock off."

Delta posits that the claims for tortious interference accrued by April 2008, when Avaya informed SAE that it would no longer purchase any SAE PSUs. According to Delta, the applicable California statute of limitations – two years – ran in April 2010, several months before the Plaintiff commenced its action against Delta.

Delta argues the same three-year statute of limitations for misappropriation applies to the civil conspiracy claim. It rejects the argument that the cause of action did not accrue so long as Delta allegedly continued to use the SAE trade secrets. It contends the object of the conspiracy was complete when it (allegedly) first obtained and used the trade secrets for its benefit.

Delta asserts the present motion record – as supplemented from the prior record with additional deposition testimony – establishes that the Plaintiff’s claims, all of which are predicated on improper use of the SAE’s trade secrets, fail as a matter of law. It contends that, in his deposition, Mr. Brown acknowledged that the Delta circuitry for output lightning protection works differently than the SAE configuration, which comprises Trade Secret No. 1. It argues that Mr. Brown likewise disclaimed any conveyance by SAE of Trade Secret No. 2 to Avaya. It asserts that, if SAE did not provide the details of Trade Secret No. 2 to Avaya, then the latter could not have improperly provided such trade secret to Delta.

V

As an initial matter, the Court observes in passing that the Plaintiff did not argue that the Defendant waived its right to raise on motion a statute of limitations defense. After 13 years of litigation, including extensive motion practice initiated by Delta, such as the prior summary judgment motion, one might reasonably posit the claim of a limitations bar was waived. But as noted, there is no such claim of waiver raised in opposition to this motion.

In McCarrell v. Hoffman-LaRoche, Inc., 227 N.J. 569 (2017), the New Jersey Supreme Court adopted § 142 of the Restatement (Second) of Conflict of Laws (the “Restatement”) as the governing methodology for deciding choice of law questions relating to the timeliness of a tort action when two or more interested states have conflicting statutes of limitation. The court stated

that “[w]e hold that section 142 of the Second Restatement is now the operative choice-of-law rule for resolving statute-of-limitations conflicts because it will channel judicial discretion and lead to more predictable and uniform results that are consistent with the just expectations of the parties.” Id. at 574.

Section 142 provides as follows:

Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in Section 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:

- (1) the forum will apply its own statute of limitations barring the claim.
- (2) the forum will apply its own statute of limitations permitting a claim unless:
 - (a) maintenance of the claim would serve no substantial interest of the forum; and
 - (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

[Restatement § 142].

Comment g to Restatement § 142 states, in pertinent part:

The view that the forum would entertain a claim that was not barred by its own statute of limitations, even though the forum had no other contact with the case, could lead on occasion to egregious examples of forum shopping... [D]ecision becomes difficult in situations where, although the forum is not the state of most significant relationship to important issues in the case, some forum interest would be served by entertainment of the claim, but this would be at the expense of the interests of another state which has a closer connection to the case and under whose statute of limitations the claim would be barred. One such situation is where the domicile of the plaintiff is in the state of the forum and that of the defendant is in the other state with the most significant relationship to important issues in the case. In such a situation, the forum should entertain the claim only in extreme and unusual circumstances.

Turning to the other extreme, the forum should not entertain a claim when doing so would not advance any local interest and would frustrate the policy of a state with a closer connection with the case and whose statute of limitations would bar the claim. Thus, the claim should not be entertained when the state of the forum has only a slight contact with the case and the parties are both domiciled in the alternative forum under whose statute of limitations the claim would be barred. Similarly, the claim should not be entertained when the forum has no contact with the case and the parties except that the defendant does unrelated business in the state and has designated an agent to receive service of process there.

Speaking generally, a claim that is not barred by the local statute of limitations should not be entertained if no interest of the forum state would be served by entertaining the claim and the claim would be barred by the statute of limitations of the alternative forum. Entertainment of the claim under the circumstances would add to the burden on the local courts and bring no countervailing advantage. This will be so even in situations when entertainment of the claim would not be adverse to the interests of other states.

[Restatement § 142 comment g].

The Restatement § 6 establishes factors relevant to the choice of the applicable rule of law in circumstances not involving a statutory directive of a particular state prescribing application of its own choice law. Such factors are:

- (a) the needs of the Interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested States and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

[Restatement § 6].

In McCarrell, the plaintiff was an Alabama resident who had received a prescription for Accutane in June 1995 to treat an acne condition. The defendants Hoffman-LaRoche and Roche Laboratories, Inc. were both incorporated and had their respective principal places of business in New Jersey. They had designed, manufactured and labeled Accutane in New Jersey and distributed Accutane from New Jersey.

After suffering a severe adverse reaction to his use of Accutane, the plaintiff filed a product liability suit in New Jersey in July 2003. He contended that the defendants failed to adequately warn about the risks and potential side effects of Accutane.

The defendants sought summary judgment, arguing that Alabama’s two-year statute of limitations barred the claim. Unlike New Jersey, the Alabama statute of limitations was not subject to equitable tolling under the “discovery rule.”

The Supreme Court determined that New Jersey’s statute of limitations and discovery rule applied to the plaintiff’s claim. It observed that there was a true conflict between the laws of New Jersey and Alabama, because the choice of law between them would be outcome determinative as the case was barred under Alabama statute and allowed under the New Jersey statute. This required the court to determine the appropriate test for determining conflicts between statutes of limitation in tort cases.

It was in this context that the Supreme Court adopted Restatement § 142 for purposes of determining choice of law in cases involving conflicting statutes of limitation. The court not only confirmed the displacement of the then prevailing “governmental interest” test for purposes of resolving choice of law disputes over statutes of limitations, but concluded that the Restatement § 142, dealing specifically with conflicts in statutes of limitations, and not § 146, dealing generally with conflicts in substantive law in tort cases, should apply and provide the controlling methodology for selecting the governing law.

The court observed that the American Law Institute had purposefully placed § 142 in Restatement to deal with such conflicts. It observed that rationales “for whether the forum state’s substantive law or statute of limitations should govern are different.” McCarrell, 227 N.J. at 591. It concluded that these differing rationales explain the divergent presumptions set forth in § 146, as opposed to § 142. The court reasoned that adopting § 142 was the logical next step to completing the implementation of the Restatement for conflicts in tort cases.

The court determined that, under § 142, if the forum state’s statute of limitations would permit the claim, then the presumption is to apply the forum’s laws when the forum state “has a substantial interest in the maintenance of the claim.” Id. at 593 (citing Restatement § 142(2)). In such circumstances, the inquiry ends save in exceptional circumstances that render the result unreasonable. Only when the forum state has “no substantial interest” in the maintenance of the claim does a court then consider whether the claim would be barred under a statute of limitations of a state that has “a more significant relationship to the parties and the occurrence” pursuant to Restatement §§ 142(2)(a)-(b). To determine whether the other state has a more significant relationship, a court must examine and apply the factors provided in § 6.

The court concluded that there were meaningful differences between the § 142 analysis and the former governmental interest test. It determined that “there are meaningful distinctions between section 142 and the governmental-interest test.” Id. at 596. It declared that “Section 142’s presumption in favor of a forum state with a substantial interest in the litigation can be overcome only by exceptional circumstances that would render that result unreasonable.” Ibid.

The court reasoned that “[u]nder the governmental-interest test, a forum state’s substantial interest in the litigation is a significant factor – but not a conclusive one – to be weighed against the interests of another state connected with the parties or the occurrence.” Ibid. It concluded that “Section 142 is a less malleable standard than the governmental-interest test.” Ibid. This was so because “[f]or all practical purposes, under section 142, once the court finds that the forum state has a substantial interest in the litigation, the inquiry is at an end.” Ibid. The court was persuaded that the presumption in § 142 “will channel judicial discretion to ensure a higher degree of uniformity and predictability in resolving choice-of-law issues.” Id. at 596.

The court observed that, under either the governmental interest test or the § 142 analysis, if the forum state “has *no interest* in the litigation and the claim is barred by another state’s statute of limitations, the forum state should generally not entertain the claim.” Id. at 596 (citing Restatement § 142, cmt. g; emphasis in original). It stated that “[e]gregious examples of forum shopping’ will be discouraged when a forum state that has no interest in the litigation declines to apply its favorable statute of limitations.” Ibid. (quoting Restatement § 142, cmt. g).

Applying § 142 to the facts at hand, the court found that New Jersey “has a substantial interest in deterring its manufacturers from developing, making, and distributing unsafe products, including inadequately labeled prescription drugs.” Id. at 597. The court concluded that New Jersey’s interest “extends to protecting not just citizens of this State but also citizens of other states from unreasonably dangerous products originating from New Jersey.” Ibid. It found that “[o]ur national compact and our interstate system suggests that we should treat the citizens of other states as we treat our own.” Id. at 597-598. The court also observed that had it found that New Jersey had no substantial interest, it was still not “self-evident that Alabama has a more significant relationship than that of New Jersey.” Id. at 598 (emphasis in original). It concluded that there were no “exceptional circumstances” that would warrant overriding the presumption in favor of applying new Jersey’s statute of limitations.

Applying these principles to the circumstances here, the Court finds that New Jersey does not have a substantial interest in the parties and claims asserted in this case, and that California has a more significant relationship to the issues presented by this case than does New Jersey. Accordingly, the Court concludes that, under Restatement § 142, the California statutes of limitation for misappropriation of trade secrets and tortious interference (as well as civil conspiracy) apply in this case.

The Court finds there is a disputed issue of fact as to the accrual date of the claims for misappropriation and tortious interference and, thus, civil conspiracy, such that the Court cannot resolve on a motion for summary judgment the question of whether the limitations periods prescribed by the California statutes of limitation expired when SAE commenced this action against Delta in October 2010.

Although Delta asserts the accrual date is November 2006 and/or January 2008, the Court finds it is not possible to determine dispositively and as a matter of law that either of these dates represents a time when the Plaintiff was on inquiry notice of possible tortious conduct by Delta in relation to the development, production and sale to Avaya of its PSU. Instead, the Court concludes that fact finding is necessary to determine this question.

As an initial matter, there is an actual conflict of laws as between the presumptively applicable six-year statute of limitations of New Jersey – applicable to both the misappropriation and tortious interference claims – and three-year misappropriation and two-year tortious interference statutes of limitation of California. Colorado, Ontario, Thailand, New York, and Delaware, the other possible sources of applicable law, also have shorter limitations periods than New Jersey.

The fact that both SAE and Delta were, separately, parties to contracts with Avaya that contain choice of law provisions providing for the application of New Jersey law is of no moment in assessing the choice of law issues presented as to a claim by SAE against Delta. Although New Jersey courts routinely enforce contractual choice of law provisions – see Restatement § 187 – they do so in relation to the parties to the relevant contract. There is no contract as between SAE and Delta and no contractual choice of law provision that governs their relationship. Nor has SAE established that it was an intended third-party beneficiary of the

agreements between Avaya and Delta such that it would have a right to enforce any provision of those agreements, including the choice of law provision.

SAE and Delta agreed to be bound by New Jersey law as to the subject matter covered by the respective agreements as to which there is a contractual choice of law provision. They certainly did not agree to be so bound as to any claims or defenses they possess against each other. Indeed, given that there are multiple agreements with Avaya and each of these two parties that contain provisions selecting New York or Delaware law, it is difficult to conceive of any particular rationale for the selection of New Jersey law in the other agreements.

The Court agrees with SAE that the Court must resolve the choice of law question pertaining to the applicable limitations periods as of the time SAE originally filed its Complaint against Delta. At such time, Avaya was a party. The choice of law analysis should not consider that, after the filing of the Complaint, Avaya ceased to be a party.

At the same time, however, just as statutes of limitation differ as among causes of action, they can differ as between differently situated parties. There is no impediment – and none is cited – to a determination that the law of a different state regarding statutes of limitations may apply to the claims asserted by SAE against Delta than would apply to the claims asserted formerly asserted by SAE against Avaya. That said, the connection between New Jersey and the circumstances here rests on such a slender reed that, but for the contractual choice of law, it is not apparent that New Jersey’s limitation law would apply even to the SAE/Avaya claim, even considering Avaya’s presence in this State at the relevant time.

When one examines the relevant contacts in light of Restatement § 6 factors, it is readily apparent that New Jersey does not have a substantial interest in the application of its six-year

statute of limitations as to the claims asserted by SAE against Delta. Both SAE Incorporated and Delta are California corporations with their principal places of business there. Neither had any direct or meaningful indirect connection with New Jersey, save that they transacted business with Avaya, a New Jersey-headquartered entity.

SAE conducted all of its development and manufacturing work relative to the SAE PSU in California and Ontario. It interacted with Avaya personnel located in Colorado, including while assisting Avaya in developing the specifications for the PSU bidding process. It supplied its bid response to Avaya to the latter in Colorado and, to the extent it disclosed its claimed trade secrets to Avaya, it did so in communications directed from California or Ontario to Colorado.

Delta likewise conducted its development work on its PSU in California and Thailand. It communicated with Avaya from its California and/or Thailand locations and directed its communications concerning its development of an alternative source of supply for the PSU to Avaya and Colorado. The record discloses that Avaya and Delta hatched and implemented any conspiracy to misappropriate SAE's trade secrets in order to ensure an alternative source of supply between Avaya in Colorado and Delta in California and Thailand.

In these circumstances, New Jersey has no substantial interest in the maintenance of this claim by SAE against Delta under its longer statute of limitations. As noted, these parties did not agree to select New Jersey law for any claim *inter se*. New Jersey has no interest in deterring conduct that involves misappropriation of trade secrets and/or tortious interference merely because the entity accused of such conduct maintained a headquarters here, when all of the conduct relevant to such alleged activity occurred elsewhere. Nor does New Jersey have an interest in maintaining a claim here that is considered stale in the jurisdictions where the relevant conduct occurred. It has no interest in protecting the rights of a non-New Jersey plaintiff when,

unlike the circumstances in McCarrell, the resident defendant did not undertake the tortious conduct in or from New Jersey.

The lack of a substantial interest in New Jersey in the maintenance of SAE's claim here defeats the Restatement § 142 presumption in favor of the law of the forum. Under the methodology prescribed by § 142, the Court must consider whether any other state has a more significant relationship to the parties and the occurrences than New Jersey.

When one examines the facts and circumstances in light of the § 6 factors, it is apparent that the State with the more significant relationship is California. That is the State of domicile of both parties. California has both an interest in protecting its corporate domiciliaries from misappropriation of their intellectual property and deterring its corporate residents from undertaking to access, use or employ the trade secrets of another by unlawful means. But it also has an interest in protecting its corporate residents from claims asserting such conduct that are stale. Its Legislature has struck that balance by adopting the three-year and two-year statutes of limitations governing claims for misappropriation of trade secrets/tortious interference. As both parties maintain a strong connection to California that is directly related to the occurrences at issue here, California has a strong interest in application of its law and a more significant relationship to the parties and the occurrences than New Jersey.¹

¹ It is noteworthy in this regard that in 2012 New Jersey adopted a three-year statute of limitations as to claims for misappropriation. Although that statute would not apply retroactively to this case – were New Jersey statute of limitations law to apply – the adoption of the statute by the New Jersey Legislature suggests that the State has now determined to balance the rights and interests of parties to a misappropriation dispute in much the same way California has. Such action by the Legislature certainly does not create or demonstrate any substantial interest in the application of New Jersey's six-year statute of limitations.

Likewise, the factor of preserving interstate comity would also support the selection of California law. As the parties to the dispute are located in California and conducted much of the relevant activity in and from that state, not only does the presumption in favor of the forum not apply – New Jersey has no substantial interest in application of its limitations periods – but it is appropriate for a New Jersey court to defer to the application of California law, and the balance of competing interests that State has achieved via its three-year and two-year statutes of limitation.

Although McCarrell establishes the methodology the Court is required to employ to arrive at the selection of governing law, the facts of McCarrell are not analogous to those here. In McCarrell, the New Jersey-based defendants not only maintained corporate offices in this State, but they designed, manufacture and distributed Accutane in and from New Jersey. In this context, the court concluded that New Jersey had a substantial interest in the application of its more favorable (to the plaintiff) statute of limitations law to the claim of the non-New Jersey resident.

The court reasoned that New Jersey had an interest in the application of its longer statute of limitations and discovery rule in order to regulate the conduct within its borders of entities that (allegedly) designed, manufactured and distributed a harmful product here. In such circumstances, the court concluded that it was necessary and appropriate to treat the non-New Jersey plaintiff in the same manner as it would treat a resident plaintiff by affording such plaintiff the benefit of a longer statute of limitations than afforded under Alabama law.

There are no comparable facts on this record. Indeed, apart from the fact that Avaya maintained its headquarters here – and entered separate contractual arrangements with both SAE and Delta, some of which contained choice of law provisions selecting New Jersey law – there are no facts in this record connecting New Jersey to the relevant activities of any of the parties,

including Avaya. The record establishes beyond peradventure that all such relevant activities pertinent to the claims and defenses at issue in this case, including the actions and/or omissions of Avaya in relation to the Gateway G350, the design, development, manufacture and sale of the PSUs, and the issues pertaining to the creation and protection of the intellectual property contained in such devices, took place outside of New Jersey. There are no facts suggesting that either SAE or Delta entered or conducted relevant activities in New Jersey or even directed their conduct in some way to New Jersey. SAE has not contended or adduced facts suggesting otherwise or establishing a need for factfinding as to connections to New Jersey.

SAE argues that the Court should consider the outcome if SAE were a New Jersey resident entity, just as the McCarrell court determined that, because it would apply the New Jersey limitations period to protect a New Jersey resident, it should do so for a non-resident plaintiff in the interest of interstate comity. But the court reached that conclusion because the New Jersey entities sued by that plaintiff in that case designed, manufactured and distributed the harmful product in and from New Jersey. The absence of any such conduct by Avaya or Delta here divests New Jersey of any interest in the maintenance of an action by a non-New Jersey plaintiff.

The circumstances could be materially different if SAE were a New Jersey-based plaintiff. In such event, it likely would have conducted some or all of its activities in developing protected intellectual property here and would have suffered harm from the misappropriation of such property here. One could readily find that New Jersey would have a substantial interest in the application of its longer limitations period in these circumstances. But that is simply not what is entailed here

In contrast, two cases cited by Delta reflect the application of Restatement §§ 6 and 142 principles in circumstances more closely resembling those here. In Rigollet v. Kassoff, 570 F. Supp. 3d 256, 249-251 (D.N.J. 2021), the District Court declined to apply the New Jersey statute of limitations to a malpractice claim against an attorney who was licensed and practiced in New Jersey because the case involved a litigation in Florida involving Florida residents. Likewise, in MTK Food Servs., Inc. v. Sirius America Ins. Co., 455 N.J. Super. 307, 312-315 (App. Div. 2018), the court declined to apply the New Jersey statute of limitations in a legal malpractice case involving a New Jersey-licensed attorney working in an office in New Jersey where the underlying litigation involved a plaintiff who resided in Pennsylvania and events that occurred there. In both cases, the courts determined that New Jersey did not have a substantial interest in the cases or the occurrences.

In each of these cases, the defendant, like Avaya in this case, maintained a connection to New Jersey. But the court nevertheless looked to the limitations law of another state because all the relevant actions or omissions of such party in relation to the claims and defenses at issue occurred outside of New Jersey. In those circumstances, as here, the court determined that New Jersey did not have a substantial interest in application law and either Florida or Pennsylvania had a more significant relationship to the parties and the claim than New Jersey.

For these reasons, the Court finds that, pursuant to Restatement § 142(2)(b), California has a more significant relationship to the parties and the occurrences at issue than does New Jersey. Accordingly, the Court will apply California's three-year (misappropriation/civil conspiracy) and two-year (tortious interference) statutes of limitation to SAE's causes of action against Delta. As Delta only argues for the law of Colorado, Ontario or Thailand in the alternative and SAE has argued for presumptive application of New Jersey law, there is no need

to address the relative interest of these jurisdictions in this case. In all events, the Court finds for essentially the same reasons that California has the most significant relationship.

There is no dispute on this record that, before the Court could determine that either of these statutes of limitations has expired, it must ascertain when SAE knew or reasonably should have known that Delta had allegedly misappropriated its trade secrets, as to the misappropriation claim, and that it suffered injury from the fault of another in relation to the tortious interference claim. As noted, Delta contends that SAE was on inquiry notice of the misappropriation claim in November 2006, when Avaya inquired about certain functionality of the current sharing/current limiting architecture in the SAE PSU due to issues that had arisen with Delta's PSU. It posits that, in all events, such inquiry notice arose by January 2008, when it received a Delta PSU and one of its executives found it to be a "knock off." Delta contends that Plaintiff suffered from any claimed tortious interference no later than April 2008, when Avaya informed that it would no longer purchase PSUs from SAE.

As both the misappropriation and tortious interference claims hinge on the claimed theft of trade secrets, the question of accrual of either cause of action depends in whole or in part on the time when SAE knew or reasonably should have known of the misappropriation. The Court is required to examine the facts relevant to this discovery date through a lens that favors SAE.

The Court finds that there are disputed questions of fact that must be resolved before it could conclude that SAE was on inquiry notice of Delta's alleged misappropriation beginning in November 2006. Although Mr. Brown's communication and response to Mr. Capra's e-mail seeking information about Trade Secret No. 2 states that Delta's possible copying activity was "not cricket", the subject of the communication was the perceived need for protection of the information that SAE concluded Mr. Capra was asking to obtain, not assessment of activities that

had already taken place. The SAE personnel concluded the information responsive to Mr. Capra's inquiry was SAP IP and warranted a license or patent application or some other action by SAE.

Given the subject matter and Mr. Brown's apparent understanding of the situation, it is not possible to conclude dispositively from that November 2006 interaction that SAE was on notice of possible wrongdoing by Delta. Such a conclusion would require the Court to resolve a disputed fact in favor of the movant on a summary judgment record that the Court is required to examine favorably to the non-movant and without a factual hearing in which a full record concerning what the inquiry was and what it meant to SAE personnel could be developed and the facts determined accordingly.

The 2008 delivery of the Delta PSU to SAE and its attendant circumstances present a closer question, particularly given Mr. Lovell's characterization of the unit as a "knock off." Even so, the record permits the conclusion that neither Mr. Lovell nor Mr. Lagis, who examined the unit at the time, were part of the technical team that developed the trade secrets contained in the SAE PSU. The discovery of similarities in the general layout of the two units was not, of itself, and without more, necessarily an indication that Delta had misappropriated the actual trade secrets developed by SAE. Indeed, in seeking to preclude or at least discredit Mr. Gershowitz's expert testimony, Delta makes essentially this same point.

The question presented in relation to the statutes of limitation is whether the receipt and surficial examination of the Delta PSU should have caused SAE to take further investigative action to determine if Delta had misappropriated SAE's trade secrets to its own use. This may be so, but once again the Court is required to examine the record through a lens that favors SAE. It concludes it cannot determine conclusively that the circumstances necessarily would have

prompted SAE to investigate further at the time. It finds a more complete record and fact finding is necessary to determine the significance, in terms of triggering the running of the applicable limitations periods, of the receipt by SAE of the Delta PSU.

The Court will afford the parties an opportunity for briefing concerning the nature of the fact finding that is required under California law for purposes of determining the accrual date of the limitations. Under New Jersey law, such a hearing is conducted by a court without a jury. The question for the parties is whether California law contemplates a similar proceeding or whether the issue is presented to a trial jury.

VI

The Court finds, largely for reasons previously stated in its disposition of the prior motion, that there are genuine disputes of material fact warranting a trial as to whether Delta misappropriated either or both of Trade Secrets No. 1 and/or No. 2. There is sufficient evidence in the record to support a conclusion by the fact finder that Delta received information from Avaya that enabled it to employ either or both of these trade secrets in its PSU unit, and that it did not duplicate these features through its own independent efforts as claimed.

As to Trade Secret No. 1, the motion record, even as supplemented by the additional discovery through the deposition of Mr. Brown, establishes a dispute of fact as to whether Delta endeavored to copy Trade Secret No. 1, but did so imperfectly, as Mr. Brown claims, or fashioned a different solution to the requirement for lightning protection on the PSU's output line, employing different circuitry with different functionality.

In this regard, although Delta places heavy reliance on Mr. Brown's testimony as the basis of its renewed motion, the Court observes that Mr. Brown testified that the Delta PSU

employed Trade Secret No. 1 and its components and layout, albeit by placing the crowbar outside the OR-ing – a placement he considered to have been foolish and ineffective. Whether or not this is so – or, alternatively, as Delta asserts, its use and placement of the crowbar was not only materially different but a superior design – is not a question this Court can or should resolve on summary judgment. It is instead a matter for the trier of fact. To conclude otherwise would unfairly deprive SAE of its right to a trial on this issue.

Likewise, Trade Secret No.2. Although Delta has elicited testimony from Mr. Brown to the effect that SAE never conveyed the details of Trade Secret No. 2 to Avaya – such that it could have provided this information to Delta in its efforts (as claimed by SAE) to develop a second source of supply of the PSU – the Plaintiff’s expert concludes otherwise. Mr. Gershowitz points to the record of extensive interactions between the technical teams of Avaya and Delta in the relevant time period. He opines that the features of the Delta PSU are so similar in layout and use of specific components that it is, in his opinion and experience, highly unlikely that Delta developed the current sharing/current limiting features of the PSU without employing information obtained from SAE via Avaya. He opines these similarities relate not only to the general layout and configuration of Delta’s PSU, but specifically the method and technology for current sharing/current limiting on the Avaya backplane necessary to facilitate the use of two PSUs, operating in tandem, but without overloading such backplane with current. He states that it is unlikely that Delta could have duplicated SAE’s method of generating a pulse modulation in the current sharing line by its own undertaking of measurements of the pulse from the SAE unit.

The Court is mindful that Delta challenges the admissibility of Mr. Gershowitz’s proposed expert testimony on multiple grounds, including that, in rendering an opinion that accepted as true testimony of Delta’s technical lead that Delta did not open the SAE PSU for re-

engineering purposes, Mr. Gershowitz essentially overlooked the possibility claimed by that same individual that it obtained what it needed from measurement of the pulse from the SAE unit. But Mr. Gershowitz's report addresses this point quite specifically as he concluded such measurement would not have permitted Delta to determine how the SAE PSU generated the pulse, and that Delta employed the identical means for doing so.

More generally, the Court finds that Mr. Gershowitz's opinion is not inadmissible and must be considered both on this motion and by the finder of fact. His proposed testimony establishes a sufficient disagreement concerning misappropriation of Trade Secret No. 2 to warrant a trial. Although Delta has raised issues concerning Mr. Gershowitz's opinion that could cause a fact finder to discount it – and now has the testimony of Mr. Brown as well as to SAE's caution in conveying information to Avaya – the Court finds these are matters for the trier of fact, not the Court on summary judgment.

On a motion for summary judgment, the Court is required to examine the motion record in the non-movant's favor and to determine if evidence establishing a sufficient disagreement as to a matter of material fact exists that could cause the fact finder to render a verdict for the non-movant, and not whether the weight or credibility of such evidence is sufficient to carry the Plaintiff's burden. It so concludes on this record. A rational finder of the facts could conclude on the basis of the motion record that Avaya improperly communicated information it received from SAE concerning Trade Secret No. 2 to Delta and Delta used that information (and not entirely its own efforts) to duplicate the current sharing/current limiting approach created by SAE.

VII

Delta seeks an Order barring Michael Gershowitz from testifying, in whole or in part, as to his opinions concerning misappropriation by Delta. It seeks this relief on multiple grounds.

It contends that Mr. Gershowitz has not offered any opinion as to misappropriation of Trade Secret No. 1. Instead, according to Delta, Mr. Gershowitz makes clear that he misunderstood Trade Secret No.1 altogether, as his opinion relates to lightning protection on the power input line of the PSU and not the output line.

Delta asserts the Court should bar Mr. Gershowitz from testifying inasmuch as his opinion is limited to comparison of general features, components and layout of the PSU. He contends that, because Mr. Gershowitz does not address the specific details of Trade Secret No. 2 – the architecture for permitting two PSUs to operate in tandem without overloading the Avaya backplane with current – the opinions of Mr. Gershowitz are inadmissible.

The movant asserts that Mr. Gershowitz improperly opines on matters of credibility of witness testimony. Specifically, it points out that Mr. Gershowitz accepts certain testimony of Delta's technical lead, Mr. Cheevanantachai – to the effect that Delta did not open the SAE PSU for purposes of re-engineering – but then discounts the testimony of the same individual to the effect that he derived what he needed to know about SAE's current sharing/current limiting method by measuring the pulses from the SAE PSU.

Delta contends that Mr. Gershowitz used an untenable scientific methodology to the extent he identified two specific components of the SAE PSU and opined that it was unlikely that the use of the same components by Delta could have been a coincidence. Delta posits that, not only is the analysis limited to two components, but also that Mr. Gershowitz improperly

expanded the universe of possible comparator components by focusing on components with higher voltage rating than the Avaya specifications and overlooking that certain components in the range he selected were identical, albeit differently packaged.

The movant asserts that Mr. Gershowitz has also failed to render a competent opinion that putative Trade Secret No. 2 is in fact a trade secret. It contends that Mr. Gershowitz conceded in his deposition that he did not conduct any research as to the details of Trade Secret No. 2 to support his conclusion that the method employed by SAE constitutes a trade secret.

The record is undisputed that Mr. Gershowitz will not testify specifically that, in his opinion, Delta misappropriated Trade Secret No. 1. He has so acknowledged – albeit not because he misunderstood trade Secret No. 1 as Delta claims. The record reflects he is well aware that the lightning protection on the input line to the PSU is not Trade Secret No. 1. Instead, it is apparent that he offers an opinion on this matter as part of a body of circumstantial evidence that Delta was engaged in misappropriation.

Save for this acknowledged limitation, the Court finds there is no basis for barring Mr. Gershowitz's testimony. Contrary to Delta's claims, there are no grounds established for concluding that Mr. Gershowitz only opines as to similarities in the two units generally without specific reference to the claimed trade secrets. He offers opinions about Trade Secret No. 2 pointing to the identical layout to the units and opining that, even if Mr. Cheevanantachai were able to glean certain information from measuring signals, he would not have been able to identify the source of the pulses from the SAE PSU, a key aspect of the innovation. That Mr. Gershowitz offers opinions specifically referring to Trade Secret No. 2 separates this case from other cases on which Delta relies involving mere general similarity of the products at issue. Certainly, in

these circumstances, Mr. Gershowitz is permitted to testify concerning other corroborative evidence (so he asserts) of misappropriation.

Mr. Gershowitz is also permitted to accept Mr. Cheevanantachai's assertion that he did not open or examine the SAE PSU for purposes of re-engineering, while not at the same time accepting the averment that Delta derived its knowledge of the current sharing/current limiting technology employed by SAE by measurement of pulses from the SAE PSU. Mr. Gershowitz employs his experience and examination of the architecture of the two PSU units to opine that Delta could not have reasonably derived all of the information necessary for duplicating SAE's Trade Secret No. 2 by such means and that, without having received technical details from Avaya, Delta could not have met the interoperability requirement. This is permissible expert testimony, not an attack per se merely on the credibility of an opposing witness.

The Court concludes that Mr. Gershowitz has established an adequate foundation for his proposed testimony concerning the specific components that he opines Delta could not have selected at random. His report and testimony establish the method used to arrive at such a conclusion, including his reasoning for examining available components at higher voltage levels than specified by Avaya. The Court finds the assertion that he improperly looked to available components with higher voltage tolerances and/or considered duplicate components as separate items – thereby arbitrarily increasing the universe of available options – is a matter for cross-examination and jury assessment of the credibility and weight of his proposed testimony.

Mr. Gershowitz has also adequately explained his basis for considering Trade Secret No. 2 to be a trade secret. He opines, based on his experience and analysis of the SAE PSU, that it was not an off-the-shelf product; that it could not have been derived from the Avaya specifications; and that the solution arrived at by SAE to meet the requirement for two PSUs

operating in tandem without increasing the current was predicated on a novel technical innovation. He did not rely for such opinion merely on the statement of Mr. Capra that the innovation was likely to be patentable.

Although acknowledging in his deposition that he did not specifically research the use of a single current sharing line, he found that the method employed by SAE to generate and modulate pulse on this line that, in turn, played a role in activating a current limiting mechanism was a novel solution. The performance or not of such research by Mr. Gershowitz is a matter that goes to the weight or credibility of the testimony, and not its admissibility.

VIII

Delta seeks an order barring the testimony of the Plaintiffs' damages expert, Gary Rosen. It contends that Rosen's opinion must be excluded because his opinions do not "fit" the circumstances of this case for multiple reasons, and thus would not be helpful to the trier of the facts. It contends that Rosen has failed to apportion damages as between Delta and former Defendant Avaya, and as to the causes of action no longer involved in the case, or as to the different causes of action asserted against Delta. Instead, Rosen posits an aggregate quantum of damages, which Delta asserts would not be helpful to the trier of fact.

Delta also contends that Rosen failed to apportion lost sales volume of SAE to the alleged trade secrets. Instead, Rosen presents an opinion as to damages based on the lost value of the PSU as a whole.

Delta contends that the Court should bar Rosen's opinion as to damages from scrapped inventory. It asserts that this opinion – and the amount of damages calculated on the basis of scrapped inventory – is related only to the former claim against Avaya.

The Court concludes that Rosen's proposed testimony adequately fits the facts of the case and the remaining claims. Distilled to its essentials, the claim of the Plaintiff is that Delta secured a place as a supplier of PSUs to Avaya, supplanting SAE entirely in that role, by unlawfully copying SAE's trade secrets. Given the nature of the claim, a measure of damages predicated on the lost value of SAE's product as a whole – which product it specifically designed, produced and supplied to Avaya to meet Avaya specifications – is factually and legally tenable and may be presented to the trier of fact.

Given the factual underpinning for all of SAE's claims, it was not necessary for Rosen to quantify damages per claim or per trade secret. Nor was it necessary for Rosen to apportion damages as between Avaya and Delta. As SAE accurately points out, the trier of the facts will, based on the evidence adduced at the trial, assign a proportionate share of liability to Avaya. The Court will then mold any judgment based on that finding.

The Court further finds that it is appropriate to offer proofs as to the lost inventory value in relation to the claims against Delta. SAE contends that Delta's misconduct prompted or enabled Avaya to terminate SAE as a supplier and thereby caused SAE to lose the value of inventory. It is a matter for the trier of fact to determine if the Plaintiff has proved the causation element as to this component of its claimed damages. There is no basis established for eliminating this element of SAE's claim as a matter of law.

IX

SAE moves to bar certain testimony of Delta's liability expert, Stephen Fairfax. It contends that Mr. Fairfax improperly trenches on the Court's function to determine the applicable principles of law concerning the claim of SAE as to its trade secrets, as Mr. Fairfax proposes to

testify that SAE's PSU design does not contain any trade secrets. SAE posits that, in rendering such opinion, Mr. Fairfax has employed his own definition of a trade secret and the Court should not permit him to offer opinions as to the existence vel non of trade secrets based on such definition.

SAE contends that Mr. Fairfax improperly comments on the qualifications of Mr. Gershowitz to serve as an expert for SAE on liability issues. It posits that this is a matter reserved for the Court.

SAE asserts that Mr. Fairfax's opinion as to the length of time necessary for Delta to develop on its own the trade secrets allegedly embodied in the SAE PSU is an inadmissible net opinion. His opinion relates to assessment by the Defendant's damages expert of "head start" damages.

The movant contends that Mr. Fairfax has not provided any factual basis for his opinions that Delta could have developed Trade Secret No. 1 in approximately a week and Trade Secret No. 2 in approximately a month. It asserts that this opinion is at odds with facts and the record that (so SAE asserts) establishes that Delta experienced significant difficulties over a period of years to design the features of its PSU necessary to meet Avaya's requirements.

The movant further asserts that the opinion of Mr. Fairfax to the effect that the Delta PSU was more reliable than the SAE version of the unit is likewise an inadmissible net opinion. It contends this opinion lacks any factual basis or foundation.

Delta asserts that Mr. Fairfax proposes to offer inadmissible testimony that the SAE PSU did not comply with Avaya's specifications. It asserts this opinion lacks the requisite foundation as there is no evidence that Avaya asserted a violation.

Finally, SAE contends that Delta has agreed that Mr. Fairfax will not testify as to certain matters. It seeks confirmation that Mr. Fairfax will omit opinions as to the general market for PSUs of the character at issue and/or that Avaya selected Delta as the supplier because Delta's product was more competitive than SAE. It further seeks through the motion practice to verify that Mr. Fairfax will not testify that Mr. Gershowitz "intentionally concealed" information about one of the components discussed in the latter's report or that Avaya's Al Capra was either unprofessional or an industrial spy.

As an initial matter, the Court agrees that neither party's liability expert should testify that one or another feature is or is not a trade secret. It would be confusing to the Jury to have experts testify in such a manner as to the ultimate issue without offering what they mean by the term and the only proper and controlling definition is that which the Court will provide. However, the experts are free to render opinions, within the scope of their competencies, about the various components of the legal definition and whether the SAE PSU does or does not meet these components.

The Court finds that Mr. Fairfax is permitted to testify as to the "head start" for the trade secrets at issue. His report contains ample detail concerning the basis for such opinions. In his report, Mr. Fairfax applies his experience in the field to estimate the time it would take to develop both the lightning protection circuit and the current limiting circuit. He characterizes the former as a relatively simple circuit that could be established in a week's time. He posits a month for the current limiting circuit.

He identifies the specific steps necessary – assuming, as he does, that all other functions were already in place when the issue as to this circuit arose during the Delta process, and posits, based on experience, the time to complete each step. This is a defensible methodology. That the

Plaintiffs may adduce evidence concerning the length of time it took for Delta to produce its PSU or technical problems it encountered along the way are facts that a trier of fact may conclude diminish the weight and/or credibility of Mr. Fairfax's assessment, but that is a matter for the fact finder, not the Court.

Mr. Fairfax has also explained the factual basis for his opinion that the Delta PSU was more reliable than the SAE product. He explained that the different configuration Delta employed for the lightning protection on the unit's output line was not a mistake – as a SAE asserts – but a more suitable configuration that made that made for a more reliable product (see, e.g., the analogy to the bull in a China shop).

The Court understands from the motion record that Mr. Fairfax will not offer opinions (unless asked by SAE) as to general market conditions, the competitiveness of the products, Gershowitz's qualification as an expert or any intentional concealment of facts by Mr. Gershowitz or Mr. Capra's role as a spy. That said, Mr. Fairfax is, of course, free to testify as to flaws or errors in Mr. Gershowitz's opinions or methods.

The Court also concludes there is no relevance to any opinion that the SAE PSU did not meet the specifications established by Avaya. Failure to comply with specifications was not the reason Avaya terminated the supply arrangement with SAE.

X

SAE moves in limine to bar certain opinions of the Defendants damages expert, James Pampinella. Specifically, SAE contends that the Court should bar Mr. Pampinella from offering opinions as to damages based on licensing fees for the trade secrets at issue, as this is not an

appropriate measure of damages. The Plaintiffs assert that, by offering opinions on a license fee, Mr. Pampinella is usurping the Court's role in determining the proper measure of damages.

SAE contends that the Court should preclude Mr. Pampinella from testifying as to the time required for Delta to have developed Trade Secret Number 1 and/or 2 – the “head start” damages – as it claims there is no factual foundation or basis for such testimony for the same reasons as apply to Mr. Fairfax's opinion on this subject. SAE contends that Mr. Pampinella's opinion that SAE offered pricing to Avaya of \$299 per unit, as opposed to pricing in the high \$300s, is an unsupportable net opinion lacking in factual foundation, as SAE never sold PSUs to Avaya at this price. SAE seeks to bar, as equally unfounded, Mr. Pampinella's testimony that Avaya viewed Delta's PSU as a better solution, and that multiple competitors could have produced PSUs that met Avaya's specifications.

SAE further asserts that the Court should not permit Mr. Pampinella to testify as to any recovery by SAE through Avaya's bankruptcy proceeding. It asserts the bankruptcy court expressly stated that its estimated valuation of SAE's claim against Avaya was not binding on any party in this case.

The Court concludes there is no basis on which to bar Mr. Pampinella's testimony as to a license fee. Such a result could only occur on a motion for partial summary judgment as to the measure of damages, not on a motion in limine concerning expert testimony as to the quantum of damages based on such measure. This is simply not a proper subject for a motion in limine.

As discussed supra, there is a sufficient basis for an opinion by Mr. Fairfax as to the period(s) for “head start.” Mr. Pampinella is permitted to rely on Mr. Fairfax's opinion and proceed on such basis to render an opinion on the quantum of “head start” damages.

The Court finds that Mr. Pampinella is permitted to testify as to \$299 pricing by SAE. The record permits a finding that SAE sought to retain Avaya's business and its role as supplier by such pricing. The question of whether this is an approximate appropriate basis for measuring SAE's actual lost revenue is a matter for the fact finder.

The Court understands that Mr. Pampinella will not testify to the effect that the Delta PSU was the better solution or that there were multiple competitors that could have supplied a compliant product. It further understands that the expert will not offer opinion based upon the bankruptcy court's valuation of the SAE claim against Avaya. Any set-off (if any) for amounts received from Avaya would be a matter for the Court in molding a verdict.