IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

UBIQUITEL INC. and UBIQUITEL OPERATING COMPANY, Plaintiffs, v. SPRINT CORPORATION, SPRINT SPECTRUM L.P., WIRELESSCO, L.P., SPRINT COMMUNICATIONS COMPANY L.P., SPRINT TELEPHONY PCS, L.P., SPRINT PCS LICENSE, L.L.C., and NEXTEL COMMUNICATIONS, INC., Defendants.	)	Civil Action No. 1489-N

MEMORANDUM OPINION

Submitted: August 26, 2005
Decided: December 14, 2005
Revised: December 19, 2005

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PARSONS, Vice Chancellor.

Plaintiffs UbiquiTel Inc. and UbiquiTel Operating Co. ("UbiquiTel" or "Plaintiffs") have asserted against Sprint Corp. ("Sprint"), Sprint Spectrum L.P., WirelessCo, L.P., Sprint Communications Co. L.P., Sprint Telephony PCS, L.P., Sprint PCS License, L.L.C. (collectively, the "Sprint entities"), and Nextel Communications, Inc. ("Nextel") various claims arising out of the merger of Sprint and Nextel. Among other things, UbiquiTel has asserted claims of tortious interference with contract and civil conspiracy against Nextel. Nextel has moved to dismiss these two claims for failure to state a claim under Court of Chancery Rule 12(b)(6). For the reasons set forth below, Nextel's motion is denied.

I. FACTS[1]

A. The Parties

UbiquiTel is a Delaware corporation with its principal place of business in Conshohocken, Pennsylvania.

Sprint, a Kansas corporation with its principal place of business in Kansas, offers a range of communications products nationwide. Sprint Spectrum L.P., WirelessCo, L.P., Sprint Communications Company L.P. and Sprint Telephony PCS, L.P. are Delaware partnerships with their principal places of business in Kansas; each is a directly or indirectly owned subsidiary of Sprint. Sprint PCS License, L.L.C. is a Delaware limited liability company with its principal place of business in Kansas; it, too, is an indirectly owned subsidiary of Sprint. Together, Sprint and several of the Sprint entities hold and

[1] The facts set forth herein are taken from the Complaint and accepted as true for purposes of Nextel's Motion to Dismiss.

control personal communications services ("PCS") licenses to provide voice and data services using wireless technology in a nationwide network (the "PCS Network").

Nextel, a Delaware corporation with its principal place of business in Virginia, also offers a variety of communications products nationwide.

B. The Management Agreement

When Sprint obtained its PCS licenses from the Federal Communications Commission ("FCC"), it agreed to construct a percentage of its nationwide wireless services network within five years. In furtherance of its agreement, Sprint contracted with various "Affiliates" to finance, construct, operate, manage, maintain and upgrade the PCS Network in certain smaller markets. In October 1998, UbiquiTel became a Sprint Affiliate and entered into a PCS Management Agreement ("Management Agreement") with several of the Sprint entities. As of the filing of its Complaint, UbiquiTel was responsible for the PCS Network in certain parts of nine states—California, Nevada, Washington, Idaho, Wyoming, Utah, Indiana, Kentucky and Tennessee.

The Management Agreement governs the relationship between Sprint and UbiquiTel. It provides, *inter alia*, that UbiquiTel

> will be the only person or entity that is a manager or operator for Sprint PCS with respect to the Service Area and neither Sprint PCS nor any of its Related Parties will own, operate, build or manage another Wireless Mobility Communications Network in the Service Area so long as this agreement remains in full force and effect . . . .[2]

[2] Compl. ¶ 27.

Wireless Mobility Communications Network is defined in the Management Agreement as "a radio communications system operating in the 1900 MHZ spectrum range under the rules designated as Subpart E of Part 24 of the FCC's rules."[3]

The Management Agreement also requires that UbiquiTel regularly provide Sprint with "competitively sensitive and highly confidential information concerning nearly every aspect of UbiquiTel's operations," including, for example, pricing and billing information, build-out and other business plans and details about every UbiquiTel customer.[4] Pursuant to the Management Agreement, Sprint must "'keep confidential, not disclose to others and use only for the purposes authorized in this agreement, all Confidential Information disclosed by the other party to the party in connection with this agreement . . . .'"[5]

C. The Sprint-Nextel Merger

On December 15, 2004, Sprint announced that it intended to merge with Nextel. In a conference call to UbiquiTel and the other Affiliates that same day, Sprint acknowledged that post-merger integration with Nextel would conflict with Sprint's obligations to the Affiliates.[6] Similarly, in their joint proxy solicitation materials seeking shareholder approval of the merger, Sprint and Nextel acknowledged that the former's arrangements with the Affiliates "may limit the ability to fully integrate the operations of

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3 *Id.* Ex. E at 77.

4 *Id.* ¶¶ 35–36.

5 *Id.* ¶ 41 (quoting *id.* Ex. A (Management Agreement § 12.2(a)).

6 *Id.* ¶ 42.

Sprint and Nextel in areas managed by the [Affiliates]"[7] and "restrict Sprint's and its affiliates' ability to own, operate, build or manage wireless communications networks or to sell Sprint's wireless services within specified geographic areas."[8]

UbiquiTel filed its Complaint on July 12, 2005. The Complaint alleges that when the merger is completed, Nextel will merge with and into a wholly owned subsidiary of Sprint and Sprint will change its name to Sprint Nextel. The combined entity will continue to be bound by the Management Agreement with UbiquiTel.[9]

II. ANALYSIS

In Counts III and IV of the Complaint, UbiquiTel alleges that Nextel tortiously interfered with the Management Agreement, a contract between UbiquiTel and various Sprint entities, and conspired with Sprint and the Sprint entities to so interfere.[10] Nextel seeks dismissal of both counts under Rule 12(b)(6) for failure to state a claim.

A. Standard for Dismissal under Rule 12(b)(6)

The standard for dismissal pursuant to Rule 12(b)(6) is well settled. A court will grant the motion only if a "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[11] "In considering a motion to

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7 *Id.* ¶ 43.

8 *Id.* ¶ 44.

9 *Id.* ¶ 48. The merger closed after the filing of the Complaint. *See* Form 8-A/A of Sprint Nextel Corp. (Aug. 12, 2005), *available at* http://www.sec.gov/edgar/shtml.

10 Compl. ¶¶ 91–102.

11 *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995) (internal citations omitted).

dismiss under Rule 12(b)(6), the court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint."[12] "[N]either inferences nor conclusions of fact unsupported by allegations of specific facts are accepted as true. That is, a trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiffs' favor unless they are reasonable inferences."[13]

Finally, Delaware is a notice pleading state.[14] Thus, Plaintiffs "need not plead *evidence*. Rather, the [P]laintiff[s] need only allege *facts*, that, if true, state a claim upon which relief can be granted."[15]

B. Choice of Law

Before applying the 12(b)(6) standard, the Court must determine which state's substantive law governs Plaintiffs' claims. Plaintiffs argue Delaware law governs, while Nextel contends Pennsylvania law applies.

Delaware has adopted the most significant relationship test from the Restatement (Second) of Conflicts of Laws (the "Conflicts Restatement").[16] Thus, seven broad policy

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12 *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *11 (Del. Ch. June 29, 2005) (internal citations omitted).

13 *Id.*

14 Ct. Ch. R. 8(a); *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003).

15 *VLIW Tech.*, 840 A.2d at 611 (emphasis added).

16 *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991). "As the forum state, Delaware must apply its own choice of law rule." *Nat'l Acceptance Co. of Cal. v. Mark S. Hurm, M.D., P.A.*, 1989 WL 70953, at *2 (Del. Super. June 16, 1989); *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1116 (Del. 2005) ("[Plaintiff] acknowledges that the courts of Delaware, as the forum state,

considerations inform all choice of law decisions: 1) the needs of the interstate and international systems; 2) the relevant policies of the forum; 3) the relevant policies of other interested states; 4) the protection of justified expectations; 5) the basic policies underlying the particular field of law; 6) certainty, predictability and uniformity of result; and 7) ease in the determination and application of the law to be applied.[17] In a tort action, the Court considers four specific contacts in applying these broad policy considerations to the choice of law determination: 1) the place where the injury occurred; 2) the place where the conduct causing the injury occurred; 3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and 4) the place where the relationship, if any, between the parties is centered.[18] "These contacts are to be evaluated according to their relative importance with respect to the particular issue."[19]

1. Place of injury

UbiquiTel alleges that, as a result of Nextel's conduct, both its competitive position in the marketplace and the goodwill it enjoys from customers as a result of its exclusive arrangement with Sprint will be injured and its opportunity to market a unique

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may apply Delaware's own substantive choice of law rules.") (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)).

17 Restatement (Second) of Conflicts of Laws § 145(1) (1971) (citing Restatement (Second) of Conflicts of Laws § 6 (1971)).

18 *Id.* § 145(2).

19 *Id.*; *see also Travelers Indem.*, 594 A.2d at 48 ("[T]he Restatement test does not authorize a court to simply add up the interests on both sides of the equation and automatically apply the law of the jurisdiction meeting the highest number of contacts listed in Sections 145 and 6. Section 145 has a qualitative aspect.").

product will be destroyed.[20] In other words, the injuries UbiquiTel complains of are usurpation of business opportunities and loss of customers and trade. The place of injury is thus the nine states where UbiquiTel has cellular operations.[21] It is, of course, impossible to apply the law of nine states to the instant dispute.

After acknowledging that "[s]uch customers or trade will frequently be lost in two or more states," the Conflicts Restatement observes that where, as here, the injury complained of is the loss of customers or trade, "[t]he effect of the loss, which is pecuniary in its nature, will normally be felt most severely at the plaintiff's headquarters or principal place of business."[22] "But," the Conflicts Restatement continues, "this place

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20 Compl. ¶ 74.

21 *Integral Res. (PVT) Ltd. v. ISTIL Group, Inc.*, 2004 WL 2758672, at *3 (D. Del. Dec. 2, 2004) ("The complaint alleges that [defendant] . . . orchestrated a scheme to usurp from [plaintiff] the economic benefits of the [] Contract and its business relationships with [a third party]. The [] Contract that is the subject of [defendant's] unlawful conduct was negotiated and performed in Ukraine and Pakistan. The places of injury are, therefore, Ukraine and Pakistan."); *M.M. Global Servs. Inc v. Dow Chem. Co.*, 283 F. Supp. 2d 689, 703–04 (D. Conn. 2003) (holding that place of injury is where business would be usurped by alleged interference with contractual relations).

22 Restatement (Second) of Conflicts of Laws § 145(2) cmt. f (1971); *see also id.* § 148(2) cmt. i (stating, in the context of choice of law for fraud and misrepresentation claims, that "[t]he plaintiff's . . . principal place of business, if plaintiff is a corporation, [is a] contact of substantial significance when the loss is pecuniary in nature . . . . This is so because a financial loss will usually be of greatest concern to the state with which the person suffering the loss has the closest relationship.").

may have only a slight relationship to the defendant's activities and to the plaintiff's loss of customers or trade."[23]

Nextel's relevant activities are its competition with UbiquiTel and its negotiations with Sprint. Nextel competes with UbiquiTel in nine states that do not include Delaware or Pennsylvania; the record is silent as to where Nextel's negotiations with Sprint occurred.[24] UbiquiTel does have its "principal executive offices in Conshohocken, Pennsylvania,"[25] but the record before the Court contains no other information regarding UbiquiTel's relationship to Pennsylvania. As such, it appears that Pennsylvania has little, if any, relationship with Nextel's activities, but some relationship with UbiquiTel's loss of customers and trade.

The place of injury factor thus favors application of Pennsylvania law.[26]

2. Place of injury causing conduct

Where, as here, the injury will occur in more than one state, "the place where the defendant's conduct occurred will usually be given particular weight in determining the

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23 Restatement (Second) of Conflicts of Laws § 145(2) cmt. f (1971).

24 It is unlikely the negotiations occurred in Delaware or Pennsylvania. *See infra* at II.B.2.

25 Compl. ¶ 3.

26 *Cf. Brown v. SAP Am., Inc.*, 1999 WL 803888, at *6–8 (Del. Ch. Sept. 13, 1999) (observing that the principal place of business of the injured party is of "substantial importance" for choice of law determination in a misrepresentation case and holding that that state's law applied where the injured party relied on misrepresentations in that state, received the misrepresentations in that state and was to render performance in that state).

state of the applicable law."[27] Two courses of conduct are relevant to this factor because both are required to give rise to a claim for tortious interference with contract. These courses of conduct are those involving interference and those causing injury.[28]

The first course of conduct consists of the negotiations and closing of the merger and the filing of the Certificate of Merger with the Delaware Secretary of State. The Complaint does not indicate where the negotiations occurred.[29] Sprint is headquartered in Kansas, while Nextel is headquartered in Virginia. Presumably, the negotiations took place in one of those two states or even somewhere in between. Either way, UbiquiTel has not pled that the negotiations took place in Delaware.

The filing of the Certificate of Merger with the Delaware Secretary of State did, of course, happen in Delaware. Indeed, Plaintiffs make much of the facts that the merger of

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27 *Int'l Bus. Machs. Corp. v. Comdisco, Inc.*, 1991 WL 269965, at *8 & n.7 (Del. Super. Dec. 4, 1991) (citing Restatement (Second) of Conflicts of Laws § 145(2) cmt. e) (assigning the place of injury little weight because it was impossible to pinpoint).

28 A claim for tortious interference with contract under Pennsylvania law requires 1) a contract, 2) purposeful action by the defendant, 3) absence of privilege or justification and 4) actual legal damage. *Pelgatti v. Cohen*, 536 A.2d 1337, 1343 (Pa. Super. Ct. 1987) (internal citations omitted). Under Delaware law, the claim requires 1) a contract, 2) of which the defendant was aware, 3) an intentional act by the defendant, 4) without justification and 5) injury. *Griffin Corp. Servs., LLC v. Jacobs*, 2005 WL 2000775, at *4 (Del. Ch. Aug. 11, 2005) (citing *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987) (internal citations omitted)).

29 The Complaint also does not indicate where the closing occurred. (The closing did not occur until after the filing of the Complaint.) It is logical to infer it did not take place in Delaware for the same reasons that the negotiations likely did not take place in Delaware.

Sprint and Nextel is a merger of two Delaware corporations, *i.e.*, Sprint's merger subsidiary and Nextel, and that the merger becomes effective only upon the filing of the Certificate of Merger.[30] These technical facts, secondary as they are to the substantive conduct at issue, only weigh slightly in favor of Delaware because the tortious conduct complained of is not the merger itself, but rather includes things such as Nextel's actions in inducing Sprint to enter into the merger.[31] Moreover, the merger is a mere precursor to the conduct that allegedly will injure UbiquiTel.

The second course of conduct is that which allegedly will injure UbiquiTel. To wit, post-merger competition by the combined Sprint Nextel entity in UbiquiTel's territory and Sprint's sharing of UbiquiTel's confidential information with Nextel.[32] UbiquiTel does not allege that the merger of the two Delaware corporations involved here and the filing of the Certificate of Merger with the Delaware Secretary of State actually will injure UbiquiTel.[33] Instead, the injury-causing conduct will occur in the nine states where UbiquiTel and Nextel compete and wherever Sprint allegedly will share UbiquiTel's confidential information with Nextel, which also is likely to occur in Kansas or Virginia. It is unlikely any of this conduct will occur in Delaware or Pennsylvania.

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30 Pls.' Mem. in Opp. to Nextel Commc'ns' Mot. to Dismiss ("POB") at 8–9.

31 Plaintiffs' counsel conceded as much at argument. Tr. at 39 ("I don't think the place of execution of the contract is the magic. The tort in this case is not about a piece of paper signed.")

32 *See* Compl. ¶¶ 70–71.

33 *See, e.g.*, *id.* ¶ 52 ("Sprint and Nextel plan to breach this exclusivity provision after consummating the merger."); *id.* ¶ 64 ("After the merger" Sprint Nextel will compete in the 1900 MHz band.).

The place of injury causing conduct thus favors application of Delaware law, but only very slightly.

3. Domicile, residence, nationality, place of incorporation and place of business of the parties

Although both UbiquiTel and Nextel are incorporated in Delaware, "a corporation's principal place of business is a more important contact than the place of incorporation."[34] This is particularly true where, as here, the corporation does little or no business in the state of incorporation.[35] Further, where the injury occurs in two or more states, the plaintiff's principal place of business "is the single most important contact for determining the state of the applicable law as to most issues in situations involving . . . financial [or economic] injury . . . ."[36] UbiquiTel's principal place of business is in Pennsylvania; thus this factor favors application of Pennsylvania law.[37]

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[34] Restatement (Second) of Conflicts of Laws § 145(2) cmt. e (1971); *id.* (place of business most important contact when "the interest is a business or financial one, such as in the case of unfair competition [or] interference with contractual relations").

[35] *Id.* The Conflicts Restatement is silent on whether the fact that Plaintiffs also do "little or no business" in the state of their principal place of business affects the analysis. That fact would seem to weaken the case for application of Pennsylvania law.

[36] Restatement (Second) of Conflicts of Laws § 145(2) cmt. e (1971); *see also Pittway Corp. v. Lockheed Aircraft Corp.*, 641 F.2d 524, 528 (7th Cir. 1981) ("The harm that [plaintiff] suffered and for which it seeks to be compensated was purely economic and as such was sustained in Illinois, where [plaintiff's] principal place of business is located . . . .").

[37] The nationality of the parties is irrelevant because both are United States corporations. The domicile of the parties—Pennsylvania and Virginia—adds some weight in favor of application of Pennsylvania law.

4. Relationship between UbiquiTel and Nextel

UbiquiTel and Nextel's relationship is one of competitors in the nine states where UbiquiTel has cellular operations.[38] The companies have no relationship in Delaware or Pennsylvania. In addition, the pre-merger actions complained of do not arise out of any relationship between UbiquiTel and Nextel, while the post-merger actions arise out of their relationship as competitors in nine states. Accordingly, this factor is neutral as between application of Delaware and Pennsylvania law.[39]

5. Policy considerations

An evaluation of the seven broad policy considerations set out in the Conflicts Restatement weighs slightly in favor of applying Delaware law.[40] Both Delaware and

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[38] Compl. ¶¶ 2, 10; POB at 9 (stating that UbiquiTel and Nextel's relationship "is entirely that of competitors in the nine states where UbiquiTel operates").

[39] Plaintiffs argue that the Court should consider the relationship between Nextel and the Sprint entities. POB at 9. The Conflicts Restatement, however, indicates that the relevant relationship is that between the plaintiff (UbiquiTel) and the defendant (Nextel). *See* Restatement (Second) of Conflicts of Laws § 145(2) cmt. e (1971) ("When there is a relationship between the plaintiff and the defendant and when the injury was caused by an act done in the course of the relationship, the place where the relationship is centered is another contact to be considered."). Even assuming for purposes of argument that the relationship between Nextel and the Sprint entities is relevant to this factor, it still may not weigh in favor of applying Delaware law because, on the current record, the location of the relationship between the Sprint entities and Nextel is indeterminate. As discussed in the context of the place of injury causing conduct, it is not the filing of the Certificate of Merger in Delaware that will injure UbiquiTel. *See supra* II.A.2. Rather, it is the pre-merger conduct of Nextel that gives rise to UbiquiTel's alleged tortious interference with contract claim and the post-merger conduct of the combined entity that allegedly will injure UbiquiTel.

[40] The following factors are irrelevant here: 1) the needs of the interstate and international systems and 7) ease in the determination and application of the law to

Pennsylvania have an interest in deterring tortious interference with contract and punishing those who do so interfere. Pennsylvania also has an interest in protecting its residents from, and compensating them for, tortious interference with contract, but Delaware has a similar interest in protecting its corporate citizens from such interference.

It is the sixth consideration—certainty, predictability, and uniformity of result—that weighs in favor of applying Delaware law. This action is one of two currently before this Court with virtually identical causes of action and virtually identical facts giving rise to those causes of action.[41] It would be somewhat inefficient if this Court applied Pennsylvania law in this case, but Delaware, or even another state's law, in the *Horizon* case. However, UbiquiTel cannot reasonably argue that it has some justified expectation in the application of Delaware law to the tort claims it asserted against Nextel when UbiquiTel's principal place of business is in Pennsylvania and its operations are dispersed among nine other states.

The broad policy considerations that inform choice of law decisions thus weigh slightly in favor of applying Delaware law.

6. Choice of law conclusion

At this stage in the proceedings, it appears as if Pennsylvania has the most significant relationship to UbiquiTel's tort claims. UbiquiTel's principal place of

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be applied. Although this Court is more familiar with Delaware law, it can ascertain the law of Pennsylvania with relative ease.

[41] *See* Complaint, *Horizon Pers. Commc'ns, Inc., et al. v. Sprint Corp., et al.*, C.A. No. 1518-N (asserting, *inter alia*, claims for tortious interference with contract and civil conspiracy against Nextel).

business is in Pennsylvania and it will, in a financial and economic sense, be injured in Pennsylvania by the loss of customers and trade. Thus, for purposes of the instant motion, the Court will apply the substantive law of Pennsylvania.[42]

C. Intentional Interference with Contract Claim[43]

To set forth a legally sufficient cause of action for intentional interference with contractual relations, UbiquiTel must plead four elements:

> (1) the existence of a contractual . . . relation between the complainant and a third party;
>
> (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation . . .;
>
> (3) the absence of privilege or justification on the part of the defendant; and
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> (4) the occasioning of actual legal damage as a result of the defendant's conduct.[44]

Failure to plead any one of the elements adequately will result in dismissal of UbiquiTel's claim.

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[42] Based on the undeveloped state of the record with respect to many of the factors relevant to the choice of law analysis, this conclusion is preliminary only. As such, it is possible that a more fully developed factual record combined with the policy considerations that favor application of Delaware law will cause this Court to conclude after trial that it should apply the substantive law of Delaware to the tort claims in Counts III and IV of the Complaint.

[43] In Pennsylvania, the tort complained of here is referred to as "*intentional* interference with contract," while in Delaware it is referred to as "*tortious* interference with contract." The parties have used those terms interchangeably and so, too, will the Court.

[44] *Pelgatti*, 536 A.2d at 1343 (internal citations omitted).

The Court finds that UbiquiTel has adequately pled the existence of a contract between it and Sprint,[45] the absence of a privilege or justification on the part of Nextel[46] and actual legal damage that will result from Nextel's conduct.[47] Thus, the dispositive question for purposes of the pending motion is whether UbiquiTel has alleged that Nextel acted with the requisite intent.

Nextel argues that the requisite intent is an act taken "with the *specific intent* to harm UbiquiTel's contractual relations with Sprint."[48] Nextel overstates the required intent. To plead this element, UbiquiTel need only allege that Nextel knew "an injury [was] certain or substantially certain to occur as a result of his action."[49] This level of intent comports with that evinced in the Restatement (Second) of Torts (the "Torts Restatement"), whose formulation of this cause of action the Pennsylvania Supreme Court has adopted.[50]

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45 Compl. ¶ 17 & Ex. A.

46 *Id.* ¶ 95.

47 *Id.* ¶¶ 51–71, 83, 96.

48 Def.'s Opening Br. in Support of its Motion to Dismiss ("DOB") at 8–9 (citing *Glenn v. Point Park Coll.*, 272 A.2d 895, 899 (Pa. 1971)).

49 *Leonard A. Feinberg, Inc. v. Cent. Asia Capital Corp.*, 974 F. Supp. 822, 846 (E.D. Pa. 1997) (internal citations omitted); *Total Care Sys., Inc. v. Coons*, 860 F. Supp. 236, 241 (E.D. Pa. 1994) ("[I]intent in this [tortious interference with contract] case may be shown where the actor knows an injury is certain or substantially certain to occur as a result of his action.") (internal citation omitted).

50 *Alder, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175, 1183 (Pa. 1978); *accord Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 470 (Pa. 1979).

In Comment j to Section 766 (Intentional Interference with Performance of Contract by Third Person), the Torts Restatement states that the cause of action "is broader . . . in its application than to cases in which the defendant has acted with [the] purpose or desire" of interference with a contract.[51] The cause of action also includes

> intentional interference, as that term is defined in § 8A, in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action.[52]

Section 8A defines "intent" for purposes of the Torts Restatement. It provides that "[i]f the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."[53]

UbiquiTel has pled, at least, that Nextel knew that its actions would cause Sprint to breach its contract with UbiquiTel. In its Complaint, UbiquiTel quotes from Sprint

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51 Restatement (Second) of Torts § 766 cmt. j (1979).

52 *Id.*

53 Restatement (Second) of Torts § 8A (1979). Nextel's citation to *Glenn* in support of its argument that UbiquiTel must plead that it acted purposefully to harm UbiquiTel is unavailing. *Glenn* set out this more particularized intent for cases of alleged intentional interference with *prospective* contractual relations. 272 A.2d 895, 899; *see also Thompson Coal*, 412 A.2d at 466 (acknowledging "a trend to separate those instances in which there has been an alleged interference with an existing contract right from instances in which the interference is charged with affecting prospective contractual relations."). Further, the Court has found no case in which a Pennsylvania court has applied *Glenn*'s particularized intent standard in the context of a claim for intentional interference with contractual relations.

and Nextel's joint proxy statement. There, Nextel acknowledged that "[a]ll of these [Affiliate] arrangements restrict Sprint's and its affiliates' ability to own, operate, build or manage wireless communications networks or to sell Sprint's wireless services within specified geographic areas."[54] Nextel also acknowledged that the arrangements with the Affiliates subject Sprint to "other restrictions"[55] besides the exclusivity provisions like, for example, the provisions concerning the protection of the Affiliates' confidential information. UbiquiTel alleges that Nextel "was aware of UbiquiTel's exclusive rights under Section 2.3 of the Management Agreement and aware that if Sprint merged with Nextel, then Sprint, or its successor in interest, would breach that contractual obligation to UbiquiTel."[56] Finally, UbiquiTel alleges that "Nextel intentionally caused Sprint to execute the merger agreement – a significant factor giving rise to the imminent breach of the Management Agreement."[57] UbiquiTel thus has adequately alleged the four elements of a claim for intentional interference with contract under Pennsylvania law.[58]

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54 Compl. ¶ 44.

55 *Id.* ¶ 43.

56 *Id.* ¶ 93.

57 *Id.* ¶ 94.

58 The Court finds that UbiquiTel also has adequately alleged a claim for tortious interference with contract under Delaware law. *See* Compl. ¶¶ 17 & Ex. A (contract), 44 (Nextel's awareness of the contract), 93, 94 (an intentional act by Nextel that is a significant factor in bringing about the breach of the contract), 95 (the act was without justification), 51–71, 83, 96 (injury).

D. Temporal Considerations

Nextel argues, in the alternative, that it cannot be liable for tortious interference with contract as a matter of law because "'[i]t is hornbook law that a party or successor party to a contract cannot tortiously interfere with its own contracts.'"[59] In Nextel's view, the tort of intentional interference with contract is not complete until the party subject to the inducement—here, Sprint—breaches the contract and injures the other party, UbiquiTel.[60] Thus, according to Nextel, by the time the combined entity completes the tort, Nextel will be a party to the contract. The combined entity may be liable for breach, but not for tortious interference with contract.

Nextel's argument ignores the doctrine of anticipatory breach. "Pennsylvania law has long recognized that an anticipatory repudiation by an obligor to a contract gives the obligee the immediate right to sue for breach of contract . . . ."[61] "[T]o constitute

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59 DOB at 10–11 (quoting *First & First, Inc. v. Dunkin' Donuts, Inc.*, 1990 WL 36139 (E.D. Pa. Mar. 27, 1990)); Def.'s Reply Brief Br. in Support of its Mot. to Dismiss ("DRB") at 8–10.

60 DOB at 11 & n.6; DRB at 8.

61 *2401 Pa. Ave. Corp. v. Fed'n of Jewish Agencies of Greater Phila.*, 489 A.2d 733, 742 (Pa. 1985) (Larsen, J., dissenting) (citing *McClelland v. New Amsterdam Cas. Co.*, 185 A. 198 (Pa. 1938); *Weinglass v. Gibson*, 155 A. 439 (Pa. 1931); *Cameron v. Eynon*, 3 A.2d 423 (Pa. 1939)); *see also* Restatement (Second) of Contracts § 250 (1981) ("A repudiation is (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach . . . ."). Delaware law recognizes the same principle: "[T]he law generally has acknowledged for more than one hundred years that an unequivocal statement by a promisor that he will not perform his promise gives the injured party an immediate claim to damages for total breach, in addition to discharging his remaining duties of performance." *Carteret Bancorp, Inc. v. Home Group, Inc.*, 1988 WL 3010, at *5 (Del. Ch.

anticipatory breach under Pennsylvania law there must be an *absolute and unequivocal* refusal to perform or a distinct and positive inability to do so."[62] Whether in this case there has been an absolute and unequivocal refusal or there was a distinct and positive inability to perform constitutes a mixed question of fact and law inappropriate for resolution now.[63] To survive a motion to dismiss, UbiquiTel must allege facts that, if proven true, could allow the trier of fact to find anticipatory breach. This it has done. In the Complaint, UbiquiTel alleges that Sprint thrice indicated that merging with Nextel "would conflict with Sprint's obligations to the Affiliates."[64] The fact that Sprint went ahead with the merger without resolving these issues with the Affiliates through

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Jan. 13, 1988); *see also Wells v. Lee Builders, Inc.*, 99 A.2d 620, 622 (Del. 1953) (acknowledging doctrine of anticipatory breach).

62 *Edwards v. Wyatt*, 2005 WL 1349531, at *1 (3d Cir. June 8, 2005) (internal citation omitted) (emphasis in original).

63 *2401 Pa. Ave. Corp. v. Fed'n of Jewish Agencies of Greater Phila.*, 466 A.2d 132, 136 (Pa. Super. 1983) ("The first question raised is whether the preceding set of facts is sufficient, as a matter of law, to support the finding of an anticipatory breach . . . ."), *aff'd*, 489 A.2d 733 (Pa. 1985); *2401 Pa. Ave. Corp.*, 489 A.2d at 736 (majority opinion) (concluding that "[t]he *facts* of this case indicate no statement or action which constituted an absolute or unequivocal refusal to perform or a distinct and positive statement of an inability to do so.") (emphasis added).

64 Compl. ¶¶ 42–44.

negotiation, as it allegedly told the Affiliates it would attempt to do,[65] may support a finding of an anticipatory breach.[66]

Nextel argues that the portions of it and Sprint's public disclosures cited by UbiquiTel do not show an immediate intention of the combined entity to breach the Management Agreements and thus UbiquiTel has not pled breach, whether actual or anticipatory.[67] Underlying Nextel's argument is the possibility that the combined entity will abide by the provisions the Management Agreement to the detriment of the financial and economic success of the combined entity. Nextel may be right with respect to the exclusivity provisions of the Management Agreement, but, at least with respect to the confidential information provisions, UbiquiTel has pled facts that if proven true could give rise to a finding of anticipatory breach. To wit, UbiquiTel alleges that 1) Sprint possesses UbiquiTel's confidential information,[68] 2) "[d]isclosure of this information to UbiquiTel's competitors would irreparably harm UbiquiTel,"[69] 3) Nextel is a competitor

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65 *Id.* ¶ 42.

66 *Cf. 2401 Pa. Ave. Corp.*, 489 A.2d at 737 (majority opinion) (noting that party's continued negotiations support the conclusion that it's words and conduct did not constitute an unequivocal refusal to perform).

67 *See* Tr. at 60–61 (counsel for Nextel arguing that "those quoted sections of the proxy complaint simply won't bear that weight, because . . . they say that the intention is to follow the agreements and pointing out, as a matter of risk disclosure, that a dispute over those agreements might arise and . . . might impose burdens on Sprint-Nextel.").

68 Compl. ¶ 35–37.

69 *Id.* ¶ 39.

of UbiquiTel,[70] 4) Nextel will continue to sell Nextel products after the merger,[71] and 5) Nextel will have access to the confidential information by virtue of the merger with and into Sprint.[72] The merger of Sprint and Nextel while Sprint possesses UbiquiTel's confidential information and is obligated not to use such information to compete with UbiquiTel conceivably could evidence, at least at the pleading stage, a distinct and positive inability to perform under the contract.

Whether an anticipatory breach of contract completes the tort of intentional interference with contract appears to be a matter of first impression in Pennsylvania.[73] At

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70 *Id.* ¶ 10.

71 *Id.* ¶ 54.

72 *Id.* ¶ 69.

73 *Cf. First & First*, 1990 WL 36139, at *93 (declining to grant preliminary injunction on tortious interference with business relations claim because defendants said they would honor all of third party's contractual commitments and because it is hornbook law that a party cannot tortiously interfere with a contract to which it is a party, but not addressing the question of whether an anticipatory breach, which was not present in that case, could give rise to a claim of tortious interference with contract). It also appears to be a matter of first impression in Delaware. In *Universal Studios, Inc. v. Viacom, Inc.*, then Vice Chancellor (now Chief Justice) Steele confronted a very similar factual scenario: MCA and Paramount were parties to a contract that prohibited them from owning or operating a competing cable television station. Viacom, an operator of competing television stations, merged with Paramount and MCA sued. The Court concluded that "MCA ha[d] not carried its burden of proof on the required element of an intent to interfere in the performance of the parties' obligations under this joint venture agreement," but observed, in dicta, that there "can be no tortious interference by Viacom because the act complained of is the merger. But the merger, in and of itself, is not violative of Paramount's obligations under the Guarantee or the Agreement." 705 A.2d 579, 593 (Del. Ch. 1997). Chief Justice Steele thus did not address the question of whether there had been an anticipatory

least one court, however, has ruled on this issue. In *Hawkinson v. Bennett*, the Supreme Court of Kansas held that anticipatory breach is sufficient to satisfy the breach element of a claim for tortious interference with contract.[74]

At this stage in the proceeding, where the Court has made only a tentative decision as to which state's substantive law applies and where the parties have not fully briefed the issue, the Court is inclined to agree with the reasoning of the Kansas court that anticipatory breach is sufficient to satisfy the breach element for tortious interference with contract. If the Court were to hold otherwise, it might allow a party to a merger to tortiously interfere with a contract but then avoid tort liability for such interference by consummating the merger. Such a result arguably would be inequitable because it would permit a party to commit a wrong in tort without being exposed to liability for a tort-based remedy.[75] Although the injured party still would have an action sounding in contract, *i.e.*, for breach of contract, situations may exist where the injured party would prefer to bring an action sounding in tort. For example, the damages flowing from a contract cause of action may be more limited than from a tort cause of action.

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breach of the agreement and, if there was, whether that would have been sufficient to satisfy the injury requirement for a claim of tortious interference with contract.

74 962 P.2d 445, 471–72 (Kan. 1998).

75 *See Agostino v. Hicks*, 2004 WL 443987, at *9 (Del. Ch. Mar. 11, 2004) ("[E]quity will not suffer a wrong without a remedy . . . ."); *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *2 n.12 (same).

E. Civil Conspiracy Claim

"[T]o state a cause of action for civil conspiracy, a plaintiff must show that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, *i.e.*, an intent to injure, is essential in proof of conspiracy."[76] The Court already has found that UbiquiTel has alleged that two persons (Sprint and Nextel) agreed to do an unlawful act (intentionally interfere with UbiquiTel and Sprint's contract). Thus, the dispositive question is whether UbiquiTel has pled that Nextel acted with an intent to cause injury.

Court of Chancery Rule 9(b) provides that "[m]alice, intent, knowledge and other conditions of mind of a person may be averred generally." UbiquiTel has pled that Nextel had knowledge of the Management Agreement before consummating the merger[77] and was "aware that if Sprint merged with Nextel, then Sprint, or its successor in interest, would breach that contractual obligation to UbiquiTel."[78] UbiquiTel also has pled that Nextel announced plans to compete with UbiquiTel in the 1900 MHz band "immediately."[79] Assuming these facts are true, as the Court must do on a motion to dismiss under Rule 12(b)(6), they are sufficient to suggest an inference that Nextel

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[76] *Skipworth by Williams v. Lead Indus. Assoc.*, 690 A.2d 169, 174 (Pa. 1997) (internal citation omitted).

[77] Compl. ¶¶ 44, 92–93.

[78] *Id.* ¶ 93.

[79] *Id.* ¶ 66.

intended to cause injury. Whether Nextel's intent rises to the level of actual malice is a question of fact for trial.[80]

Nextel denies having had any intent to compete unfairly against UbiquiTel, arguing that it has a different competitive focus than UbiquiTel.[81] Nextel relies on a document attached to the Complaint to support its allegation that it has a different competitive focus from UbiquiTel.[82] The Complaint, however, specifically alleged that Nextel has announced an intent to compete with UbiquiTel.[83] On a motion to dismiss, the Court "cannot choose between two differing reasonable interpretations of ambiguous provisions."[84] "Dismissal . . . is proper only if the defendant's interpretation is the *only* reasonable construction as a matter of law."[85] Nextel's argument that it and Sprint cannot

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80 The Court finds that UbiquiTel has adequately alleged a cause of action for civil conspiracy under Delaware law. To state a claim for civil conspiracy under Delaware law, a plaintiff must allege "(i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) damages resulting from the action of the conspiracy parties." *Albert*, 2005 WL 2130607, at *10. *See* Compl. ¶¶ 2 (confederation), 44, 93–94 (unlawful act), 51–71, 83, 96 (injury/damages).

81 DRB at 11; *see also* DOB at 13 ("UbiquiTel's pleaded facts cannot support an inference that Nextel is improperly using confidential information to compete with UbiquiTel.").

82 Compl. Ex. D. at 79.

83 *Id.* ¶ 66.

84 *VLIW Tech.*, 840 A.2d at 615 (internal citation omitted); *see also Orman v. Cullen*, 794 A.2d 5, 16 n.9 (Del. Ch. 2002) ("'On a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents.'") (quoting *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996)).

85 *VLIW Tech.*, 840 A.2d at 615 (internal citation omitted).

have conspired to harm UbiquiTel because they do not compete is not the only reasonable inference that the Court can draw from the Complaint and its attached documents.[86] It is also reasonable to infer, for example, that Sprint and Nextel, when they were negotiating the merger, intended to begin competing with UbiquiTel. Because the Complaint supports a reasonable inference sufficient to state a claim for civil conspiracy to tortiously interference with contract, the Court cannot dismiss UbiquiTel's claim.

III. CONCLUSION

For all of the reasons stated herein, Nextel's motion to dismiss UbiquiTel's tortious interference with contract and civil conspiracy claims is DENIED.

IT IS SO ORDERED.

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[86] Furthermore, at the pleading stage the Court does not consider itself bound to accept the truth of all matters set forth in documents attached to the Complaint, such as Exhibit D.