

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 06, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

THOMAS TABBERT,	
Plaintiff,	
v.	
HOWMEDICA OSTEONICS CORP., d/b/a STRYKER HOWMEDICA OSTEONICS, a New Jersey corporation,	
Defendant.	
v.	
MICROPORT ORTHOPEDICS INC. and ROCKY MOUNTAIN MEDICAL DISTRIBUTORS, INC.,	
Third Party Defendants.	

No. 2:15-CV-0039-SMJ

**ORDER DENYING  
MICROPORT'S MOTION TO  
DISMISS**

Before the Court, without oral argument, is MicroPort Orthopedics Incorporated's Motion to Dismiss Howmedica Osteonics Corporation's (d/b/a Stryker Howmedica Osteonics) Third-Party Complaint, ECF No. 119. Through this motion, third-party defendant MicroPort seeks to dismiss Howmedica's third-party claims against MicroPort. Howmedica Osteonics Corporation resists the motion.

1 Having reviewed the pleadings and the file in this matter, the Court is fully informed  
2 and denies the motion.

### 3 I. RELEVANT BACKGROUND

4 This action is an employment dispute between Plaintiff Thomas Tabbert and  
5 his former employer, Howmedica Osteonics Corporation, also known as Stryker  
6 Howmedica Osteonics (Howmedica). *See generally* ECF No. 1. Howmedica is a  
7 leading developer, manufacturer, and provider of orthopedic implants, instruments,  
8 and other orthopedic products and services. ECF No. 90 at 16. Tabbert was  
9 employed as a sales representative with Howmedica from about 1995 through June  
10 10, 2014. *Id.*; ECF No. 1 at 4, 8.<sup>1</sup>

11 Tabbert alleges that Howmedica engaged in discriminatory and retaliatory  
12 conduct against him while he was employed there. *Id.* at 1–3. Tabbert resigned  
13 shortly after complaining about this alleged conduct. *Id.* at 3. Tabbert maintains that  
14 he signed two employment agreements at Howmedica’s insistence—one in 1995  
15 (1995 Agreement) and the other in 2003 (2003 Agreement). *Id.* at 4–5. Howmedica  
16 disputes the existence of the purported 2003 Agreement, argues that only the 1995  
17 Agreement exists, and highlights non-compete provisions in the latter agreement.  
18 ECF No. 90 at 3, 26. Tabbert contends that the alleged 2003 Agreement contains

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20 <sup>1</sup> The parties seem to disagree on when Tabbert’s employment at Howmedica began. Howmedica asserts that Tabbert applied for a job in 1995 but did not become an employee until January 1996. ECF No. 90 at 25. Regardless, Tabbert began his employment with Osteonics Corp., which merged with Howmedica in 1998. *Id.*

1 non-compete provisions and promises to compensate him if he left Howmedica.  
2 ECF No. 1 at 9. Both the signed 1995 Agreement and the purported 2003 Agreement  
3 contain provisions indicating that New Jersey law governs the contracts. ECF No  
4 1-4 at 8; ECF No. 90-1 at 45. Through the instant action, Tabbert seeks to enforce  
5 the purported 2003 Agreement. *See generally Id.*

6 For its part, Howmedica filed an answer asserting affirmative defenses,  
7 counterclaims, and third-party claims resisting Tabbert's allegations. *See generally*  
8 ECF No. 90. Howmedica alleges tortious interference with contract against Rocky  
9 Mountain Medical Distributors, Inc. (RMMD) and MicroPort Orthopedics, Inc.  
10 (MicroPort), claiming that both were aware of and "intentionally induced" Tabbert  
11 to breach his contractual obligations. *Id.* at 37–38. RMMD employed Tabbert  
12 shortly after he resigned from Howmedica, and MicroPort distributes RMMD's  
13 products. *Id.* at 15, 32–33. Specifically, Howmedica alleges that Tabbert diverted  
14 business from RMMD and MicroPort in violation of his non-compete obligations.  
15 *Id.* at 15–16.

16 Howmedica further asserts that Tabbert met with an attorney in July 2014  
17 who advised Tabbert that selling MicroPort products would expose him to legal  
18 liability. *Id.* at 33. And Howmedica maintains that RMMD and MicroPort knew of  
19 Tabbert's purported non-compete obligations and his consultation with legal  
20 counsel. *Id.* at 32–35.

1 **II. DISCUSSION**

2 MicroPort argues that Howmedica fails to state a claim against MicroPort  
3 upon which relief can be granted. ECF No. 119 at 1. Specifically, MicroPort asserts  
4 that the third-party complaint “offers nothing by way of specific factual allegations  
5 that would indicate any involvement on MicroPort’s part in Mr. Tabbert’s alleged  
6 breach of contract.” *Id.* Additionally, MicroPort argues that discussions about the  
7 1995 Agreement with legal counsel cannot give rise to the tortious interference with  
8 contracts claim because those discussions are protected by the litigation privilege  
9 doctrine. *Id.* at 12–14.

10 **A. Standard of Review**

11 A claim may be dismissed pursuant to Rule 12(b)(6) either for lack of a  
12 cognizable legal theory or failure to allege sufficient facts to support a cognizable  
13 legal theory. *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015). “Threadbare recitals  
14 of the elements of a cause of action, supported by mere conclusory statements, do  
15 not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to  
16 dismiss under Rule 12(b)(6), a complaint must allege “enough facts to state a claim  
17 to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
18 (2007). “To determine whether the complaint contains a statement showing that the  
19 pleader is plausibly entitled to relief, the court first identifies the elements of the  
20 plaintiff’s claim and then determines whether those elements can be proven on the

1 alleged facts.” *U.S. ex rel. Savage v. Washington Closure Hanford LLC*, No. CV10-  
2 5051-EFS, 2015 WL 5825966, \*9 (E.D. Wash. Oct. 6, 2015) (citing *Iqbal*, 556 U.S.  
3 at 663). “Plausibility does not require a probability of success on the merits; instead  
4 it requires ‘more than a sheer possibility’ of success on the merits.” *Id.* Courts accept  
5 a complaint’s factual allegations as true and construe the pleadings in the light most  
6 favorable to the claimant when conducting this analysis. *Id.* (citations omitted). A  
7 claim is plausible on its face when “the plaintiff pleads factual content that allows  
8 the court to draw the reasonable inference that the defendant is liable for the  
9 misconduct alleged.” *Iqbal*, 556 U.S. at 678. “[W]here the well-pleaded facts do not  
10 permit the court to infer more than the mere possibility of misconduct, the complaint  
11 has alleged—but has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* at  
12 679 (quoting Fed. R. Civ. P. 8(a)(2)). However, the plausibility standard does not  
13 “require that a complaint contain ‘detailed factual allegations.’” *Sheppard v. David*  
14 *Evans and Ass’n*, 694 F.3d 1045, 1048–49 (9th Cir. 2012) (citing *Iqbal* 556 U.S. at  
15 678).

16       Using this standard, the Court must decide whether Howmedica has  
17 sufficiently pleaded its tortious interference with contracts claim. Substantive state  
18 law governs this cause of action. As such, the Court must first determine which  
19 state’s substantive law to apply.

1 **B. The Court need not decide whether New Jersey or Washington Law**  
2 **applies to resolve the present motion.**

3 **i. The elements of a tortious interference with contracts claim under**  
4 **New Jersey and Washington law do not conflict, making a choice-**  
5 **of-law analysis unnecessary.**

6 A federal court sitting in diversity applies the substantive law of the forum  
7 state in which the court is located, including that state's choice-of-law rules. *See*  
8 *Blangeres v. United States Seamless, Inc.*, No. 13-cv-260, 2015 U.S. Dist. LEXIS  
9 165796, at \*9 (E.D. Wash. Dec. 10, 2015) (citing *First Intercontinental Bank v.*  
10 *Ahn*, 798 F.3d 1149, 1153 (9th Cir. 2015)); *Carideo v. Dell, Inc.*, 706 F.Supp.2d  
11 1122, 1126 (W.D. Wash. Fed. 12, 2010) (applying Washington law).

12 In Washington, a contract's choice-of-law provision is generally enforced.  
13 *McKee v. AT&T Corp.*, 191 P.3d 845, 851 (2008) (citations omitted). However, if  
14 parties dispute a contract's choice-of-law provision, an actual conflict between the  
15 laws or interests of Washington and those from the other state must exist before  
16 courts engage in a conflict-of-laws analysis. *Carideo*, 706 F.Supp.2d at 1126.  
17 Courts disregard a contract's choice-of-law provision and apply Washington law  
18 "if, without the provision, Washington law would apply; if the chosen state's law  
19 violates a fundamental public policy of Washington; and if Washington's interest  
20 in the determination of the issue materially outweighs the chosen state's interest."  
*McKee*, 191 P.3d at 851. All three conditions must be met. *Id.*

1 Here, New Jersey or Washington law could potentially govern this dispute.  
2 Third-party plaintiff Howmedica asserts a tortious interference with contracts claim  
3 against MicroPort. The elements of this cause of action are substantially the same  
4 under both states' laws.<sup>2</sup> Thus, no conflict exists and a choice-of-law analysis is  
5 unnecessary.

6 The Court notes that both the 1995 Agreement and the purported 2003  
7 Agreement designate New Jersey law as governing the agreements. ECF No 1-4 at  
8 8; ECF No. 90-1 at 45. However, because both states' laws on this claim are  
9 substantially in accord, it is unnecessary to decide which state's law applies to  
10 resolve this motion.

11 **ii. The litigation privilege, as applied under New Jersey and**  
12 **Washington law, does not conflict, making a choice-of-law analysis**  
13 **unnecessary.**

14 MicroPort also argues that the litigation privilege precludes Howmedica's  
15 tortious interference with contracts claim. ECF No. 119 at 12–14. The litigation  
16 privilege protects parties, their attorneys, witnesses, and others from suit based on  
17 statements made in judicial proceedings. *See, e.g., Bruce v. Byrne-Stevens &*

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18 <sup>2</sup> The elements of a tortious interference with contracts claim in New Jersey require a plaintiff to demonstrate the  
19 following: "(1) an existing contractual relationship; (2) intentional interference with that relationship; (3) the  
20 malicious nature of the interference; and (4) damages resulting from the interference." *Matrix Essentials, Inc. v.*  
*Cosmetic Gallery, Inc.*, 870 F.Supp. 1237, 1247 (D.N.J. Dec. 12, 1994) (citing *Norwood Easthill Assocs. v. Norwood*  
*Easthill Watch*, 536 A.2d 1317, 1319 (N.J. Super. Ct. App. Div. Feb. 2, 1988), *aff'd* 85 F.3d 612 (3d Cir. 1996). In  
Washington, the elements are substantially the same: "(1) the existence of a valid contractual relationship or business  
expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing  
a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or  
used improper means; and (5) resultant damage." *Leilang v. Pierce Cty. Med. Bureau, Inc.*, 930 P.2d 288, 300 (1997).

1 *Assocs. Eng'rs, Inc.*, 776 P.2d 666, 667–68 (Wash. 1989); *Hawkins v. Harris*, 661  
2 A.2d 284, 288 (N.J. 1995). Courts alternately refer to the litigation privilege as the  
3 witness immunity rule. *See, e.g., Wynn v. Earin*, 181 P.3d 806, 814 (Wash. 2008)  
4 (“Our case law on the [witness immunity rule] is outlined in this opinion, but other  
5 jurisdictions have also recognized the enormous importance of the witness  
6 immunity rule, or litigation privilege as it is also called, to judicial proceedings.”).  
7 These and other cases make clear that the litigation privilege “preserves the integrity  
8 of judicial proceedings by encouraging full and forthright testimony.” *Id.*; *see also*  
9 *Hawkins* 661 A.2d at 288 (asserting that the litigation privilege is necessary to allow  
10 participants in judicial procedures to “speak and write freely without the restraint  
11 of fear of an ensuing defamation action”).

12         Since state law governs the litigation privilege, determining whether New  
13 Jersey or Washington law applies to this issue is a threshold question. *See, e.g.,*  
14 *Hawkins*, 661 A.2d at 289 (discussing the litigation privilege as a state law matter).  
15 However, since New Jersey and Washington law are substantially in accord as to  
16 the litigation privilege, *see supra*, a choice-of-law analysis on this issue is also  
17 unnecessary. And, because it is unnecessary to decide the present motion, the Court  
18 declines to choose either New Jersey or Washington law for purposes of this  
19 motion.



1 **C. Tortious Interference with Contracts Claim**

2 Since a choice-of-law analysis is unwarranted in this case, the Court next  
3 considers Howmedica’s complaint’s plausibility. Under New Jersey and  
4 Washington law, to succeed on a tortious interference with contracts claim,  
5 plaintiffs must demonstrate: (1) the existence of a contractual relationship; (2)  
6 intentional interference with the relationship; (3) that defendants interfered for an  
7 improper purpose or used improper means—what New Jersey refers to as the  
8 malicious nature of the interference; and (4) resultant damage. *Matrix Essentials,*  
9 *Inc.*, 870 F. Supp. at 1247; *Leilang*, 930 P.2d at 300. Washington also requires that  
10 defendants knew about the relationship. *Leilang* 930 P.2d at 300.<sup>3</sup>

11 MicroPort argues that Howmedica fails to allege facts establishing: “(1)  
12 MicroPort’s intentional interference causing breach of the 1995 Agreement; (2) an  
13 improper purpose, use of improper means, or malice on MicroPort’s part in  
14 connection with the alleged interference; or (3) resulting damages caused by  
15 MicroPort’s alleged acts.” ECF No. 119 at 7. Accordingly, the Court addresses  
16 these elements but not the remaining elements for this cause of action because they  
17 are uncontested.

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<sup>3</sup> Defendant’s knowledge is not at issue here, therefore, there is no conflict between New Jersey and Washington law.

1           **i. Howmedica has sufficiently pleaded that MicroPort intentionally**  
2           **interfered with the contractual relationship between Tabbert and**  
3           **Howmedica.**

4           As discussed above, Howmedica must plead sufficient facts to make a  
5           plausible claim. MicroPort contends that Howmedica has failed to plead facts with  
6           sufficient detail to plausibly show that MicroPort interfered with the 1995  
7           Agreement. ECF No. 119 at 7–10; ECF No. 133 at 2–5. MicroPort analogizes this  
8           case to *Bethea v. Roizman*, No. CIV. 11-254 JBS/JS, 2012 WL 250092, at \*32  
9           (D.N.J. June 27, 2012). In *Bethea*, the court found that an allegation that just one  
10          meeting took place between the contractually-obliged party and the alleged  
11          interferer before the agreement’s breach was too speculative to support an inference  
12          of interference. ECF No. 133 at 2–3 n. 2; *see also* ECF No. 119 at 9 (asserting that  
13          Howmedica’s contention that MicroPort interfered with the 1995 Agreement is  
14          based on one meeting). MicroPort maintains that the pleading here suffers from the  
15          same flaw.

16          Here, paragraphs 66 through 74 and 90 through 96 of Howmedica’s  
17          third-party complaint are particularly relevant. ECF No. 90 at 32–35, 37–39. In  
18          these paragraphs Howmedica alleges that Tabbert met with RMMD and MicroPort  
19          representatives and that they knew of his alleged contractual obligations to  
20          Howmedica. Specifically, Howmedica asserts that Tabbert forwarded to RMMD  
                and MicroPort documents purporting to outline his legal obligations to Howmedica,

1 including legal advice he received. *See, e.g.*, ECF No. 90 at 33. Nevertheless both  
2 MicroPort and RMMD put Tabbert to work in territory where he allegedly could  
3 not work. *Id.* Howmedica also claims that MicroPort’s legal team helped Tabbert  
4 respond to a cease and desist letter he received in September 2014. *Id.* at 34.

5         MicroPort contends these factual allegations are insufficient to state a claim  
6 against it. The Court disagrees. Although Howmedica does not completely detail  
7 how MicroPort intentionally interfered with the 1995 Agreement, it is under no  
8 obligation to do so. The circumstances alleged here collectively make interference  
9 plausible: Tabbert’s meeting with RMMD and MicroPort representatives; his  
10 relating his lawyer’s opinion about his legal exposure to RMMD and MicroPort;  
11 and MicroPort’s alleged purveyance of legal assistance to Tabbert. As alleged,  
12 MicroPort, though not directly employing Tabbert, knew of his supposed  
13 contractual obligations and allegedly provided legal assistance. This is enough to  
14 allege the first element.

15         **ii. Howmedica has sufficiently pleaded that MicroPort improperly**  
16         **interfered with the contractual relationship between Tabbert and**  
17         **Howmedica.**

18         To demonstrate improper interference under either New Jersey or  
19 Washington law, Howmedica must show more than the simple fact that MicroPort  
20 interfered with the 1995 Agreement. *Wapato Heritage, LLC v. Evans*, No. 07-CV-  
314-EFS, 2008 WL 2403653, \*2 (E.D. Wash. June 11, 2008) (finding the improper

1 purpose element met by inferring impropriety from facts relating to the alleged  
2 breach of contract); *Singer v. Beach Trading Co., Inc.*, 876 A.2d 885, 895 (N.J.  
3 Super. Ct. App. Div. July 19, 2005) (citations omitted) (“[M]alice is defined to  
4 mean that the interference was inflicted intentionally and without justification or  
5 excuse. Malice is determined on an individualized basis, and the standard used by  
6 the court must be flexible, viewing the defendants’ actions in the context of the case  
7 presented.”); *Pleas v. City of Seattle*, 774 P.2d 1158, 1163 (Wash. 1989) (citations  
8 and quotations omitted) (“[P]laintiff must show not only that the defendant  
9 intentionally interfered with his business relationship, but also that the defendant  
10 had a duty of non-interference; *i.e.*, that he interfered for an improper purpose . . .  
11 or . . . used improper means . . .”).

12 Here, Howmedica’s third-party complaint sufficiently pleads malice or  
13 improper purpose or means. As in *Wapato Heritage*, the pleaded facts in the  
14 third-party complaint here suggest that MicroPort’s alleged interference was  
15 intended to have Tabbert actively take away business from Howmedica even though  
16 it knew of Tabbert’s existing contractual obligations. In short, the third-party  
17 complaint alleges that MicroPort knew that the actions it allegedly supported  
18 improperly encouraged Tabbert’s breach of contractual obligations and undertook  
19 them anyway. Under either New Jersey or Washington law, this alleged improper  
20 interference suffices to plead the malice or improper purpose or means element.

1           **iii. Howmedica has met its burden in pleading damages.**

2           MicroPort points to case law holding that vague damages claims are  
3 insufficient and asserts that Howmedica’s damages claims are similarly vague. ECF  
4 No. 133 at 7–8. While the total amount of money damages alleged in this case is  
5 not plead with certainty, the damages are not so vague and unsupported as to require  
6 dismissal. Paragraph 78 of the third-party complaint alleges that Howmedica lost  
7 not only substantial business but also “the value of its goodwill, customer  
8 relationships, trade secrets and confidential and proprietary information” as a result  
9 of Tabbert’s, MicroPort’s, and RMMD’s actions. ECF No. 90 at 35–36.  
10 Collectively, Howmedica points to sufficient damages to support its claim.

11           **iv. The litigation privilege is inapplicable here.**

12           The Court is unpersuaded by MicroPort’s assertion of the litigation privilege.  
13 As discussed above, the purpose of the litigation privilege is to encourage  
14 participants in judicial proceedings to speak freely without leaving themselves  
15 vulnerable to subsequent legal liability. *See, e.g., Bruce*, 776 P.2d at 667–68;  
16 *Hawkins* 661 A.2d at 288. Although MicroPort correctly notes that the scope of the  
17 judicial proceedings in which the privilege applies is broad and includes pending or  
18 contemplated actions, ECF No. 119 at 13–14, to apply it in this case would be  
19 incongruous with the privilege’s purpose. Here, Howmedica alleges that MicroPort  
20 actively assisted Tabbert in undermining his contractual obligations. These

1 allegations are based, in part, on conversations Tabbert had with his attorney. To  
2 apply the litigation privilege here would effectively immunize third-parties  
3 assisting someone in circumventing their purported contractual obligations by  
4 simply talking to an attorney and receiving legal advice. This does not comport with  
5 the purpose of the litigation privilege. Therefore, the litigation privilege does not  
6 prevent Howmedica from asserting its claim against MicroPort.

### 7 **III. CONCLUSION**


8 As discussed above, Howmedica's third-party complaint sufficiently alleges  
9 facts that nudge its tortious interference with contracts claim from the possible to  
10 the plausible. Therefore, MicroPort's motion is denied.

11 Accordingly, **IT IS HEREBY ORDERED:**

12 **1.** MicroPort's Motion to Dismiss, **ECF No. 119**, is **DENIED**.

13 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
14 provide copies to all counsel.

15 **DATED** this 6th day of January 2017.

16   
17 SALVADOR MENDOZA, JR.  
18 United States District Judge  
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