

08-2762-bk  
In re Dana Corporation:  
Jasco Tools, Inc.  
v. Dana Corporation

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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August Term, 2008

(Argued: January 15, 2009 Decided: July 31, 2009)

Docket No. 08-2762-bk

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IN RE: DANA CORPORATION,

Debtor,

JASCO TOOLS, INC.,

Appellant,

- v. -

DANA CORPORATION,

Appellee.

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Before: KEARSE, HALL, and LIVINGSTON, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard M. Berman, Judge, affirming decision of bankruptcy court granting summary judgment in favor of debtor-appellee despite the existence of factual disputes and despite the request by creditor-appellant for compliance with a 2005 discovery request, see In re Dana Corp., No. 06-10354, 2007 WL 3376882 (Bankr. S.D.N.Y. Nov. 6, 2007).

Vacated and remanded.

ALEXANDER GEIGER, Rochester, New York  
(Geiger & Rothenberg, Rochester, New York, on the brief), for Appellant.

WILLIAM G. GANDY, McLean, Virginia  
(Wilson, Elser, Moskowitz, Edelman & Dicker, McLean, Virginia, on the brief), for Appellee.



1 agreement pursuant to which Jasco agreed to manufacture, and Dana  
2 agreed to purchase, precision-machined parts for Dana's heavy axle  
3 and brake business (the "Purchase Agreement" or "Agreement").  
4 According to Eugene W. Baldino, who was Jasco's chief executive  
5 officer after May 31, 1999, "[t]he annual volume of business  
6 between Jasco and [Dana], pursuant to the Purchase Agreement, was  
7 approximately \$24 million." (Declaration of Eugene W. Baldino  
8 dated September 19, 2007 ("Baldino Decl." or "Declaration"), ¶ 4.)  
9 According to Adam Haybach, Dana's purchasing manager for the parts  
10 in question during the relevant period, this "was one of the  
11 largest contracts Dana had with any of its suppliers." (Affidavit  
12 of Adam Haybach dated January 4, 2002 ("Haybach Aff."), ¶ 3.)

13           The Agreement provided that the parties would, in the  
14 second quarter of 1999, seek to negotiate an extension of the  
15 Agreement's term beyond 2000. Jasco's claim against Dana's  
16 bankruptcy estate arises out of the manner in which the Purchase  
17 Agreement ended, focusing in particular on events in the summer of  
18 1999 that culminated in Dana's contracting with a Jasco  
19 competitor, Nationwide Precision Products Corporation  
20 ("Nationwide"), to supply the parts previously supplied by Jasco.  
21 The following description of the events is drawn principally from  
22 documents submitted to the bankruptcy court, including Baldino's  
23 Declaration and the exhibits attached to it, consisting chiefly of  
24 records, affidavits, and deposition excerpts obtained in a state-  
25 court action brought by Jasco against Dana, Nationwide, and three  
26 former Jasco employees for, inter alia, breach of contract, unjust

1 enrichment, tortious interference with contract, and  
2 misappropriation of Jasco trade secrets. We describe the record  
3 in the light most favorable to Jasco, the party against which the  
4 bankruptcy court granted summary judgment.

5 A. The Events of 1999

6           Until the summer of 1999, three Jasco employees were  
7 responsible for all aspects of Jasco's performance of its contract  
8 with Dana: Jasco president Gary Rogers, Charles "Chuck" Zicari, a  
9 regional sales manager, and Sean Convertino, an engineering and  
10 quality assurance manager. Rogers was "Dana's primary contact  
11 person at Jasco." (Haybach Aff. ¶ 4.) Rogers retired from Jasco  
12 effective May 31, 1999, at the age of 50. The timing of his  
13 retirement was not of his own choosing. (See Deposition of Gary  
14 Rogers at 47-48.) According to Jasco, "Rogers took numerous  
15 confidential documents when he left Jasco." (Baldino Decl. ¶ 11.)

16           Zicari resigned from Jasco on July 9; Convertino resigned  
17 from Jasco on July 16. During the week after Zicari left Jasco,  
18 while Convertino was still there, Convertino told Zicari he had  
19 computer files containing Jasco information as to the processes,  
20 costs, and budgets for the parts made for Dana. (See Deposition  
21 of Sean Convertino ("Convertino Dep.") at 84-87.) Zicari told  
22 Convertino that "it would be helpful for competitive reasons to  
23 have that information available after [Convertino's] departure."  
24 (Id. at 87-88.) Thus, "[w]hen Mr. Convertino left Jasco, he  
25 retained information from Jasco on his personal computer such as

1 machining cycle times, pricing information, and a list of machines  
2 required for performance under the Agreement," Bankruptcy Court  
3 Decision, 2007 WL 3376882, at \*1.

4           The files taken by Convertino contained information that  
5 had, "over a number of years," been "developed by [Convertino] as  
6 well as other employees at Jasco." (Convertino Dep. at 89; see  
7 id. ("I didn't develop it singularly").) The information was  
8 nonpublic (see id.) and was "proprietary to Jasco" (id. at 290).  
9 Convertino testified, "I felt it was unethical I had left with  
10 Jasco's information." (Id. at 1740.) One reason Convertino took  
11 the files was that he had "some animosity" toward Jasco. (Id. at  
12 44.)

13           Convertino's other reason was that the files "contained  
14 all of the financials and manufacturing process outlines" (id. at  
15 89), including "speed and feed calculations for moving materials"  
16 (id. at 44), making it "very helpful in estimating manufacturing  
17 processes" and "[p]roduc[ing] cost estimates" (id. at 44-45; see  
18 also Baldino Decl. ¶ 20 (the computer disk that Convertino took  
19 with him "contained some 4000 pages of technical details about  
20 Jasco's manufacturing processes with respect to the Dana  
21 parts")). Convertino had in mind that the data "would be a  
22 benefit to Chuck and myself if we started up a business"  
23 (Convertino Dep. at 1740), or "useful to someone else trying to  
24 compete with Jasco" (id. at 44-45). He took all the Jasco data he  
25 thought would be of use (see id. at 1738-40) if they wanted to "go

1 after the Dana business" "[w]ith some other company" (id. at  
2 1739).

3 On August 9, 1999, Convertino became an employee of  
4 Nationwide; on August 16, 1999, Zicari became an employee of  
5 Nationwide. "In his new position at Nationwide, Mr. Zicari played  
6 a role in soliciting the Dana business[,] and Mr. Convertino  
7 helped prepare Nationwide's proposal to Dana." Bankruptcy Court  
8 Decision, 2007 WL 3376882, at \*1. Dana soon agreed to replace  
9 Jasco with Nationwide as its post-2000 supplier, sending  
10 Nationwide a December 20, 1999 letter of intent stating the  
11 expectation that the contract with Nationwide would be finalized  
12 by the end of January 2000. (See Baldino Decl. Exhibit J.) In  
13 February 2000, Convertino received from Nationwide a raise in  
14 salary, the promise of another 9% raise at the beginning of 2001,  
15 a bonus of \$20,000, and the promise of an additional \$22,000 bonus  
16 to be paid in 2001, for "his involvement in securing the Dana  
17 Contract." (Baldino Decl. Exhibit K (February 29, 2000 memorandum  
18 from Ron Ricotta, Nationwide's president and chief executive  
19 officer, to "The Personnel File of Sean Convertino").)

20 The Dana management team responsible for purchasing the  
21 items covered by the Purchase Agreement with Jasco consisted of  
22 purchasing manager Haybach, his boss Paul E. Blanchard, who was  
23 the general purchasing manager for Dana's heavy truck group, and  
24 Robert A. Buss, a purchasing product analyst who reported to  
25 Haybach. (See Deposition of Adam Haybach ("Haybach Dep.") at 74,  
26 110.) With respect to the contention that Dana knew of and

1 encouraged the misappropriation of Jasco's confidential and  
2 proprietary information, Jasco "obtained telephone records showing  
3 dozens of phone calls between and among Rogers, Zicari, Haybach,  
4 and Buss throughout June, July, and August of 1999." (Baldino  
5 Decl. ¶ 13 n.2.)

6 Buss, in his state-court deposition, testified that he had  
7 no reason to have contact with Rogers after Rogers retired (see  
8 Deposition of Robert A. Buss ("Buss Dep.") at 92) and that in  
9 fact he did not have any conversations with Rogers after May 31  
10 (see id. at 88, 91). The telephone company records, however,  
11 indicate that Rogers called Buss several times in the days and  
12 weeks following his May 31 retirement from Jasco, and that calls  
13 on June 7 and August 12 lasted 30 minutes and 25 minutes,  
14 respectively. (See Baldino Decl. ¶ 32.) When confronted with the  
15 records, Buss acknowledged that the telephone number called was  
16 his number at Dana but testified that he had no recollection of  
17 the calls. (See Buss Dep. at 88-89, 91.)

18 The telephone calls principally relied on by Jasco,  
19 including those from Rogers to Buss, as well as several from  
20 Zicari to Buss or Haybach, occurred on the following dates:

21	June 4	Rogers called Buss
22	June 7	Rogers called Buss; they spoke for 30 minutes
23	June 29	Zicari called Haybach
24	July 1	Zicari called Haybach
25	July 6	Zicari called Buss
26	July 6	Zicari called Haybach
27	July 13	Zicari called Haybach
28	July 13	Zicari called Buss
29	July 16	Zicari called Buss
30	August 12	Rogers called Buss; they spoke for 25 minutes
31	August 12	Rogers then immediately called Zicari; they
32		spoke for 13½ minutes

1 August 12 Zicari then immediately called Nationwide  
2 August 20 Zicari called Buss  
3 August 20 Zicari called Buss again

4 (See Baldino Decl. ¶¶ 32-40.) In late August, Zicari called  
5 Jeffrey Nuccitelli, Nationwide's vice president for sales, to  
6 inform him that Nationwide had "an opportunity with Dana."  
7 (Deposition of Jeffrey Nuccitelli ("Nuccitelli Dep.") at 110.) An  
8 October 6, 1999 memorandum by Nuccitelli and Ricotta, stating that  
9 "[w]e now have a very precise list of the active part numbers and  
10 the annual forecasts" (apparently a reference to information that  
11 Nationwide had recently received directly from Dana pursuant to a  
12 Haybach instruction to Buss), described the "Dana Opportunity" as  
13 "an opportunity to generate \$25M in sales with no acquisition  
14 costs." (Baldino Decl. Exhibit J.)

15 On September 30, Haybach had instructed Buss to "pull a  
16 print/quote package for all Jasco parts for Nationwide/Zicari."  
17 (E-mail from Haybach to Buss dated September 30, 1999.) Haybach's  
18 e-mail stated, inter alia, that Zicari had "verbally committed to  
19 a 10% price reduction from Jasco's 1/1/2000 pricing." (Id.)  
20 After several subsequent meetings between employees of Dana and  
21 employees of Nationwide, including Haybach, Buss, Zicari, and  
22 Convertino, Nationwide submitted to Dana a detailed written  
23 proposal, addressed to Blanchard, dated November 26, 1999. (See  
24 Baldino Decl. ¶¶ 14-15; id. Exhibits D, E, F.) Nationwide's  
25 November 26 proposal included a detailed price list for  
26 approximately 130 different parts (see Baldino Decl. ¶ 16; id.  
27 Exhibit F), on which Nationwide "undercut Jasco's price on every



1 part by exactly 10 percent" (Baldino Decl. ¶ 24 (emphasis in  
2 original)).

3 With respect to negotiations for an extension of the  
4 Purchase Agreement with Jasco, Haybach and Buss met with Jasco on  
5 December 3, 1999. The parties' descriptions of that meeting  
6 diverge. According to Baldino, he

7 presented Jasco's proposal for the renewal period,  
8 which sought modest increases over the life of the  
9 extension term. In response, Adam Haybach simply  
10 told me that Dana was looking for a price reduction,  
11 and that unless Jasco cut its prices across the  
12 board, we had nothing to talk about. The next thing  
13 we heard from Dana was a phone call, on or about  
14 December 20, 1999, telling us that Dana had decided  
15 not to renew the Purchase Agreement with Jasco.

16 (Baldino Decl. ¶ 18 (emphasis added).) According to Haybach, Dana  
17 was anticipating a proposal for modest price increases and Haybach  
18 was "stunned" when, "at the December 3, 1999 meeting, Mr. Baldino  
19 demanded a very substantial across the board price increase that  
20 was far in excess of what Dana could reasonably accept." (Haybach  
21 Aff. ¶¶ 12, 9.)

22 Haybach and Blanchard submitted affidavits in Jasco's  
23 state-court action stating that it was only after that December 3  
24 meeting with Jasco that Dana had contact with Nationwide. (See  
25 Haybach Aff. ¶¶ 13-14 ("upon receiving Mr. Baldino's response, I  
26 sought potential new suppliers to begin work upon expiration of  
27 the Dana/Jasco contract," and "[i]n that regard, Dana contacted  
28 Nationwide" (emphases added)); Affidavit of Paul Blanchard dated  
29 October 3, 2001, ¶ 5 ("Jasco requested an unacceptable price  
30 increase for the contract extension which caused Dana to

1 investigate other sources to provide the necessary work," and Dana  
2 received the favorable Nationwide proposal "[d]uring that search"  
3 (emphases added)).) As indicated above, however, Haybach had  
4 informed Buss by e-mail on September 30 of Nationwide's oral offer  
5 to supply the parts at a 10% discount; and Nationwide's written  
6 proposal confirming that 10% discount, addressed to Blanchard, was  
7 given on November 26. (See also Haybach Dep. at 101 ("Q. You  
8 received the quotation from Nationwide before you received the  
9 pricing direction from Jasco? A. Yes.").)

10 B. Jasco's Action in State Court

11 In 2001, Jasco commenced suit in New York State Supreme  
12 Court against Rogers, Zicari, and Convertino, alleging that they  
13 had engaged in concerted action to divert Dana's business from  
14 Jasco to Nationwide, resulting in Jasco's loss of business with  
15 Dana after the Purchase Agreement's five-year term expired.  
16 Jasco asserted causes of action for, inter alia, breach of  
17 fiduciary duty and misappropriation of Jasco's confidential  
18 business information. Jasco eventually settled its claims against  
19 Convertino; the Supreme Court granted summary judgment dismissing  
20 the claims against Rogers and Zicari, a decision that was reversed  
21 on appeal "[b]ecause only minimal discovery had been conducted  
22 prior to the motions," Jasco Tools, Inc. v. Rogers, 303 A.D.2d  
23 944, 946, 757 N.Y.S.2d 651, 653 (4th Dep't 2003) ("Jasco I").

24 In July 2002, Jasco brought suit against Dana and  
25 Nationwide; after Jasco I reinstated Jasco's action against Rogers

1 and Zicari, the two actions were consolidated (the "Lawsuit").  
2 Jasco asserted causes of action against Dana for, inter alia,  
3 breach of agreement to negotiate in good faith, misappropriation  
4 of trade secrets, and unjust enrichment, and sought \$20 million in  
5 damages. The parties proceeded with discovery; from Dana, Jasco  
6 took three depositions, lasting a total of five days, and received  
7 responses to interrogatories and two document demands.

8 Jasco ultimately settled its claims against Zicari and  
9 Nationwide; and the Supreme Court again granted summary judgment  
10 in favor of Rogers, a decision that was again reversed by the  
11 Appellate Division because Jasco's discovery had not been  
12 completed, see Jasco Tools, Inc. v. Rogers, 45 A.D.3d 1296, 844  
13 N.Y.S.2d 810 (4th Dep't 2007) ("Jasco III"), reversing Jasco  
14 Tools, Inc. v. Rogers, Index No. 4948/01 Amended Decision and  
15 Order, at 9, 10 (N.Y. Sup. Ct. Monroe Co., August 14, 2006)  
16 ("Jasco II"). In the meantime, the Lawsuit remained pending  
17 against Dana; in December 2005, Jasco served on Dana a third  
18 notice to produce documents ("Third Document Demand").

19 In March 2006, Dana and 40 of its subsidiaries  
20 (collectively "Dana" or the "Debtors") filed in the bankruptcy  
21 court a petition for reorganization under Chapter 11 of the  
22 United States Bankruptcy Code, 11 U.S.C. §§ 1101-74. Dana had not  
23 produced any documents in response to Jasco's Third Document  
24 Demand, objecting on various grounds; and the effect of Dana's  
25 Chapter 11 petition was to stay the proceedings against Dana in  
26 Jasco's state-court action, see 11 U.S.C. § 362(a)(1).

1 C. Proceedings in the Bankruptcy Court

2 In September 2006, based on the causes of action asserted  
3 against Dana in the pending state-court action, Jasco filed in the  
4 bankruptcy court a \$20 million proof of claim (the "Claim")  
5 against Dana's estate. On August 31, 2007, Dana filed an  
6 objection, seeking an order "disallowing and expunging the Jasco  
7 Claim." (Objection of Debtors and Debtors in Possession Seeking  
8 To Disallow Claim of Jasco Tools, Inc. ("Dana Objection" or  
9 "Objection"), ¶ 16.) Noting that Rule 56 of the Federal Rules of  
10 Civil Procedure is applicable to contested claims in bankruptcy  
11 proceedings, see Fed. R. Bankr. P. 7056, Dana asserted that there  
12 was no genuine dispute as to any material fact and that Dana was  
13 entitled to summary judgment dismissing the Jasco Claim. (See  
14 Dana Objection ¶¶ 19-20.) It contended that although Jasco's  
15 theory was that Dana had conspired with Rogers, Zicari, and  
16 Convertino to, inter alia, misappropriate Jasco's trade secrets  
17 and unjustly enrich itself, Jasco had failed, even after nearly  
18 four years of discovery, to turn up any evidence of a conspiracy  
19 to which Dana was a party or any evidence that Dana had knowledge  
20 of the alleged theft of Jasco's trade secrets. (See id.  
21 ¶¶ 30-33.)

22 Responding to the Dana Objection on September 20, 2007,  
23 Jasco contended, inter alia, that additional discovery was needed,  
24 pointing out that Dana had never provided any documents in  
25 response to Jasco's Third Document Demand (which was attached to

1 the Baldino Declaration as Exhibit P), which Jasco described as  
2 seeking "only a handful of documents" (Response to Debtors'  
3 Objection to Claim of Jasco Tools, Inc. ("Jasco Response" or  
4 "Response"), ¶ 8). Jasco's Response also stated that it had been

5 made clear to counsel for Dana, both before and since  
6 the bankruptcy filing, [that] Jasco needs some  
7 additional limited discovery in the underlying  
8 action, such as the deposition of one or two  
9 additional Dana employees, before the case is ready  
10 either for a dispositive motion or a plenary trial,  
11 if necessary.

12 . . . .

13 13. The bottom line is that Dana has refused to  
14 provide some basic documents necessary to demonstrate  
15 Dana's culpability in the underlying action and to  
16 rebut Dana's allegations in its summary judgment  
17 motion. Facts essential to justify Jasco's  
18 opposition to any summary judgment motion by Dana  
19 cannot now be presented by Jasco, because Dana  
20 refuses to turn over documents within its possession  
21 and control necessary to rebut Dana's allegations.

22 14. Therefore, to the extent that the instant  
23 Objection is the equivalent of a summary judgment  
24 motion, the Objection must be denied, pursuant to  
25 Rule 56(f) of the Federal Rules of Civil Procedure,  
26 made applicable hereto by Rule 7056 of the Federal  
27 Rules of Bankruptcy Procedure.

28 (Id. ¶¶ 11, 13-14; see also id. ¶ 10 ("Dana has never produced a  
29 single document in response to Jasco's Third [Document Demand],  
30 which has been pending since December 27, 2005.").)

31 As discussed further in Part II.A.1. below, Jasco also  
32 contended that Dana's motion for summary judgment should be denied  
33 on the merits, arguing that there were genuine issues of material  
34 fact to be tried as to each of Jasco's causes of action against  
35 Dana, and pointing out that the existence of such a genuine issue  
36 as to even one of Jasco's causes of action sufficed to defeat

1 Dana's request that the Jasco Claim be dismissed as a matter of  
2 law. (See Jasco Response ¶¶ 15-43.)

3 Accompanying the Jasco Response was Baldino's September  
4 19, 2007 Declaration, parts of which are quoted in Part I.A.  
5 above. Baldino stated that "[o]f all the defendants in the state  
6 court action, Dana has been the least forthcoming during the  
7 discovery process" (Baldino Decl. ¶ 41) and that "Dana employees  
8 submitted a number of affidavits to the state court that  
9 subsequent testimony and documentation has proven to be perjured"  
10 (id. ¶ 42). Examples given by Baldino included the state-court  
11 affidavits of Haybach and Blanchard (quoted in Part I.A. above)  
12 stating that they had begun seeking a new supplier for the parts  
13 covered by the Purchase Agreement only after the breakdown of  
14 negotiations between Dana and Jasco on December 3, 1999, whereas  
15 documents reveal (a) that in fact Haybach had instructed Buss to  
16 send bid materials to Nationwide on September 30, 1999, informing  
17 Buss that Nationwide orally, through Zicari, had already promised  
18 a 10% discount from Jasco prices; and (b) that Nationwide had  
19 given its written proposal to Dana, addressed to Blanchard, on  
20 November 26, 1999. (See id. ¶¶ 45-49; id. Exhibits C, D, F.)

21 In addition, the Baldino Declaration attached copies of  
22 Haybach's personal calendar for October and November, which  
23 revealed several face-to-face meetings between Dana and Nationwide  
24 prior to December 3. (See Baldino Decl. Exhibit D.) At one of  
25 the November meetings, Nationwide, represented by Ricotta,  
26 Nuccitelli, Zicari, and Convertino, made a "PowerPoint" slides

1 presentation to Dana. (See Baldino Decl. Exhibit E.) The  
2 presentation stated, inter alia, that Nationwide "has assessed  
3 this program with employees who have been intimately knowledgeable  
4 with this program"; that Nationwide's goal was to "[s]ave Dana an  
5 average of \$1 million, net per year"; and that Nationwide's  
6 "[e]stimates of current machining cycles (costs) were based on  
7 review of representative prints as well as past experience with  
8 program[.]" (Id. (emphases added).) Baldino characterized these  
9 statements as to Nationwide's knowledge and experience as  
10 "bragg[ing]" (Baldino Decl. ¶ 21) and pointed out that Nationwide  
11 "had almost no prior experience machining these types of cast  
12 iron parts" (id. ¶ 19).

13 Baldino also observed that Buss, at his deposition, denied  
14 having any contact with Rogers after Rogers retired from Jasco,  
15 that that denial was belied by the records of calls by Rogers that  
16 Jasco had obtained from the telephone company, and that, when  
17 confronted with the records and asked about his lengthy  
18 conversations with Rogers, Buss stated that he did not remember  
19 the calls. (See id. ¶¶ 31-32, 51.) Pointing out that at the time  
20 of Dana's bankruptcy filing Dana had failed to provide any  
21 documents in response to Jasco's Third Document Demand, Baldino  
22 stated that, "[g]iven the tendency of Dana employees to lie under  
23 oath, as demonstrated by their affidavits, and given their  
24 forgetfulness, as demonstrated at their depositions, it is  
25 absolutely vital to obtain Dana's paper and electronic records to  
26 demonstrate what actually happened." (Id. ¶ 52.)

1 Dana submitted a reply to Jasco's Response to Dana's  
2 Objection, reiterating many of the arguments made in the Dana  
3 Objection. (See Reply in Support of the Objection of [Dana]  
4 Seeking To Disallow Claim of Jasco Tools, Inc. ("Dana Reply,"  
5 "Reply," or "Debtors' Reply"), ¶¶ 1-28.) It stated, inter alia,  
6 that

7 [t]he Jasco Claim seeks an unproven and unwarranted  
8 sum of \$20 million because Jasco is upset with a  
9 decision by Dana seven years ago to let the parties'  
10 Purchase Agreement expire under its terms and  
11 resource the business with a new supplier. . . .  
12 Jasco's response . . . fails to rebut the arguments  
13 raised in Dana's Objection and seeks to delay a  
14 decision by a contrived request for more time to  
15 conduct further, unnecessary discovery . . . .

16 (Dana Reply ¶ 1 (emphasis in original)). Attaching excerpts from  
17 the depositions of Zicari and Nationwide's president Ricotta, the  
18 Dana Reply argued that

19 Jasco failed to put forth any evidence to support its  
20 purely speculative accusation that Dana knew that  
21 Nationwide, through Messrs. Convertino or Zicari,  
22 misappropriated Jasco's trade secrets. The reason  
23 for this omission is simple: each of the principal  
24 witnesses denied knowledge of anyone ever telling  
25 Dana of the alleged conversion. Mr. Zicari denied  
26 ever advising Dana that "anyone from Nationwide was  
27 using stolen information from Jasco to put together  
28 the bid that Nationwide ultimately presented."  
29 (Zicari Dep., Reply Ex. A at 620-1.) Mr. Convertino  
30 also denied ever telling anyone at Dana that  
31 Nationwide prepared its bid using stolen information  
32 from Jasco. (Convertino Dep., Obj. Ex. I at  
33 1764-1765.) . . . . Mr. Haybach from Dana also  
34 testified that no one ever informed him of the use of  
35 stolen information in Nationwide's bid. (Haybach  
36 Dep., Obj. Ex. G at 526-527.) In short, Jasco offers  
37 no evidence connecting Dana to the alleged conspiracy  
38 because none exists.

39 (Dana Reply ¶ 9 (emphases added); see also id. ¶ 13 ("Nationwide's  
40 president, Ronald Ricotta, testified that Nationwide could offer a



1 10% price cut without the benefit of allegedly stolen information.  
2 (Ricotta Dep., Reply Ex. C at 149-152.)" (emphasis in Reply)).)

3 The Dana Reply also stated, inter alia, that "[i]n its  
4 Response, Jasco never attempts to explain why, after having nearly  
5 four years to conduct discovery in the underlying Lawsuit, it has  
6 not had a sufficient opportunity to present its case" (Dana Reply  
7 ¶ 25), and described Jasco's claim of need for additional  
8 discovery as "contrived" (id. ¶ 27). The Reply attached the as-  
9 of-then-unreversed decision of the state court in Jasco II, which  
10 had granted summary judgment to Rogers with the statement that  
11 Jasco's contention that it needed additional discovery "rings  
12 hollow in view of the Nationwide employees and representatives"  
13 already deposed, Jasco II at 10.

14 An initial status conference on the Dana Objection to the  
15 Jasco Claim was held on October 17, 2007, and the bankruptcy court  
16 scheduled argument on Dana's summary judgment request for October  
17 31, 2007. The court noted that in an October 15, 2007 letter,  
18 Jasco had, inter alia, complained of insufficient notice that the  
19 Dana Objection itself was to be treated as a summary judgment  
20 motion and of Dana's failure to provide a separate statement, as  
21 required by Local Bankruptcy Rule 7056-1(b), setting out the  
22 material facts that Dana contended were not genuinely in dispute.  
23 The court ordered Dana to file such a statement on October 24,  
24 2007; and it ordered Jasco to file--on the same date--a statement  
25 of material facts that it contended were genuinely in dispute.  
26 (See Bankruptcy Court Hearing Transcript, October 17, 2007, at

1 94-97.) Although the court told Jasco's counsel, "if you want  
2 further time to submit the counter designation and augment your  
3 papers on a very brief basis, I'm perfectly happy to do that" (id.  
4 at 94), it ultimately stated to Dana's counsel that "within one  
5 week I expect that there will be a [7056-1] statement served," and  
6 that Jasco's Rule 7056-1 statement should be filed "promptly  
7 thereafter, although [Jasco's counsel] probably doesn't need to  
8 see [Dana's] before he comes up with his own, because those  
9 statements are really parochial in form and type" (id. at 97).

10 Dana and Jasco submitted their Rule 7056-1 statements on  
11 October 24, 2007. Jasco, in addition to narrating the facts that  
12 it contended were genuinely in dispute (see Rule 7056-1(c)  
13 Statement of Jasco Tools, Inc., ¶¶ 3-6), made a blanket denial of  
14 all material facts asserted in Dana's Rule 7056-1 statement (see  
15 id. ¶ 1), complaining that the order that both parties' Rule  
16 7056-1 statements be submitted simultaneously left Jasco "no  
17 choice but to assert that each material fact set forth in Dana's  
18 Statement is in fact controverted" (id. ¶ 1 n.1). The summary  
19 judgment motion was argued as scheduled on October 31.

20 D. The Grant and Affirmance of Summary Judgment Against Jasco

21 In its November 6, 2007 Decision, the bankruptcy court  
22 denied Jasco's request for additional discovery and granted Dana's  
23 motion for summary judgment. In denying discovery, the court  
24 stated principally as follows:

25 Prior to the chapter 11 petition date, the parties  
26 had nearly four years to conduct discovery. Since

1 the petition date, the Lawsuit has been stayed as to  
2 Dana, but Jasco and the remaining defendants,  
3 Nationwide and Messrs. Rogers and Zicari, continued  
4 to conduct depositions. The State Court severed  
5 Jasco's claim against Mr. Rogers from Jasco's claim  
6 against Dana. Ultimately Mr. Roger[s] successfully  
7 moved for summary judgment, and Jasco settled with  
8 Nationwide and Messrs. Zicari and Convertino. On  
9 September 15, 2006, Jasco filed its proof of claim in  
10 this Court.

11 . . . .

12 Jasco claims it needs more discovery before the  
13 case is ready for a dispositive motion. However,  
14 before the Jasco Lawsuit was stayed, Jasco had nearly  
15 four years to conduct discovery. The discovery  
16 efforts included 18 depositions, some lasting for  
17 several days. Among them Jasco deposed three Dana  
18 employees, taking five days to do so. In addition  
19 Dana responded to interrogatories and two notices to  
20 produce providing voluminous documentation.

21 Bankruptcy Court Decision, 2007 WL 3376882, at \*2, \*4. The  
22 bankruptcy court noted that Jasco's contention that it needed  
23 additional discovery had been rejected by the state court in  
24 Jasco II as speculative, and the bankruptcy court adopted that  
25 view:

26 Jasco made a similar argument in response to Mr.  
27 Rogers'[s] motion for summary judgment in the Lawsuit  
28 in July 2006, claiming that it needed to conduct in  
29 excess of a dozen depositions of Nationwide employees  
30 and depositions of Mr. Roger[s]'s wife and  
31 girlfriend. The State Court found that Jasco's cry  
32 for additional discovery "rings hollow" concluding  
33 that Jasco "offers nothing but mere hope and  
34 speculation" that additional discovery would reveal  
35 evidence to prove the alleged conspiracy. See Jasco  
36 Tools, Inc. v. Rogers, Index No. 4948/01 Amended  
37 Decision and Order, at 9, 10 (N.Y. Sup. Ct. August  
38 14, 2006). I find similarly that Jasco's continuing  
39 requests for discovery at this stage are meritless.

40 Bankruptcy Court Decision, 2007 WL 3376882, at \*5 (emphases  
41 added).

1           In finding that there were no genuine issues of material  
2 fact to be tried as to Jasco's claim that Dana had breached the  
3 agreement to negotiate in good faith with respect to a possible  
4 extension of the Purchase Agreement, the bankruptcy court stated,  
5 inter alia, that "a mere agreement to agree is unenforceable," id.  
6 at \*5 (internal quotation marks omitted), and that Dana had  
7 "listed Jasco as one of its worst suppliers in terms of product  
8 non-conformities during its performance of the Agreement and thus  
9 it made perfect sense for Dana to consider its alternatives," id.  
10 at \*6. In finding that there was no evidence to support Jasco's  
11 contention that Dana was a party to a conspiracy to misappropriate  
12 Jasco trade secrets and to unjustly enrich the coconspirators, the  
13 court stated as follows:

14           Jasco's claim is based upon an alleged  
15 conspiracy between Dana and Nationwide and Messrs.  
16 Rogers, Zicari and Convertino to steal and use Jasco  
17 information in order to replace Jasco with Nationwide  
18 as the supplier to Dana. However, despite the  
19 allegations with respect to Nationwide and Jasco's  
20 former employees, there is no evidence connecting  
21 Dana to the alleged conspiracy. The fact that Dana  
22 knew that Messrs. Zicari and Convertino became  
23 Nationwide employees is not probative of a conspiracy  
24 or proof of trade secret misappropriation.  
25 Nationwide's employment of individuals who had worked  
26 with Dana and knew Dana's business is conduct  
27 consistent with permissible business competition.  
28 See Matsushita Elec. Indus. Co. v. Zenith Radio  
29 Corp., 475 U.S. 574, 597 and n.21 . . . (1986)  
30 ("conduct that is as consistent with permissible  
31 competition as with illegal conspiracy does not,  
32 without more, support even an inference of  
33 conspiracy.") [.]

34           Mr. Baldino's affidavit claiming that Nationwide  
35 bragged to Dana about information it had stolen from  
36 Dana is not based upon personal knowledge. The  
37 PowerPoint presentation stating that Nationwide had  
38 employees who were "intimately knowledgeable with

1           [the Dana] program" simply acknowledges the fact that  
2           experienced former Jasco employees would be involved  
3           with a Nationwide-Dana relationship. An employee's  
4           knowledge and experience is not considered a trade  
5           secret.

6           Bankruptcy Court Decision, 2007 WL 3376882, at \*7 (quoting  
7           Baldino Decl. Exhibit E) (emphases ours). The bankruptcy court  
8           also agreed with the Jasco II court's assessment of the evidence,  
9           stating,

10                   [s]imilarly, as the State Court found in granting  
11                   summary judgment in favor of Mr. Rogers [in  
12                   Jasco II], the evidence of telephone calls between  
13                   former Jasco employees and Dana employees "does not  
14                   (even given every available inference that might  
15                   justifiably be drawn in favor of the plaintiff)  
16                   salvage plaintiff's position."

17           Bankruptcy Court Decision, 2007 WL 3376882, at \*7 (quoting  
18           Jasco II at 5).

19                   On November 9, 2007, three days after the bankruptcy court  
20           issued its Decision, Jasco II was reversed. The Appellate  
21           Division stated that

22                   because plaintiff established that discovery has yet  
23                   to be completed, Supreme Court erred in granting the  
24                   subsequent motion of Rogers in part, granting Rogers  
25                   summary judgment dismissing the complaint against him  
26                   . . . ; see generally CPLR 3212[f]). Indeed,  
27                   plaintiff established that it requires further  
28                   document discovery and must depose or complete the  
29                   depositions of additional witnesses.

30           Jasco III, 45 A.D.3d at 1296-97, 844 N.Y.S.2d at 811 (emphasis  
31           added).

32                   On November 16, 2007, the bankruptcy court entered its  
33           Order Disallowing Claim of Jasco Tools, Inc. [and denying other  
34           requested relief not relevant here] ("November 16 Order" or  
35           "Order"), stating that Jasco's Claim "is disallowed and expunged

1 in its entirety," id. at 3. The Order stated that the court had  
2 reviewed, inter alia, "the Objection, the Jasco Response, the  
3 Debtors' Reply, the [Jasco] October 15th Letter, the Debtors'  
4 Statement of Undisputed Facts, [and] Jasco's Statement of  
5 Undisputed [sic] Facts," and that the court had

6 determined that the legal and factual bases set  
7 forth in the Objection, the Debtors' Reply, [and] the  
8 Debtors' Statement of Undisputed Facts and the  
9 Debtors' Response to Abstention Motion and at the  
10 Hearing establish just cause for the relief granted  
11 herein.

12 Id. at 2 (emphases added).

13 Jasco appealed to the district court, arguing the merits  
14 of the bankruptcy court's Decision and pointing out that Jasco II,  
15 on which the Decision in part relied, had been reversed. In an  
16 Order dated May 9, 2008 ("District Court Order"), the district  
17 court affirmed the bankruptcy court's Decision. With respect to  
18 Jasco's request for discovery, the district court ruled that

19 Jasco has not shown that the Bankruptcy Court abused  
20 its discretion in concluding that additional  
21 discovery "at this stage [is] meritless," as "Jasco  
22 had [had] nearly four years to conduct discovery,"  
23 during which Jasco took "18 depositions" and received  
24 "voluminous documentation" from Dana.

25 Id. at 5-6 (quoting Bankruptcy Court Decision, 2007 WL 3376882,  
26 at \*4-\*5). The district court did not mention that only three of  
27 the 18 depositions were taken of employees of Dana. As to the  
28 merits, the district court found no error, quoting the Decision's  
29 rationale. See, e.g., District Court Order at 6-7.

30 This appeal followed.

1 II. DISCUSSION

2 On appeal, Jasco argues principally that summary judgment  
3 was inappropriate because Jasco should have been allowed to  
4 complete discovery of Dana and because there were genuine issues  
5 of fact to be tried. Jasco also protests the bankruptcy court's  
6 procedures leading to the grant of summary judgment, contending  
7 (a) that treating the Dana Objection as a motion for summary  
8 judgment allowed Dana to get away with a "bait and switch  
9 procedure" (Jasco brief on appeal at 7, 25); (b) that giving the  
10 parties only two weeks from the date of the initial status  
11 conference "to argue the non-existent summary judgment motion"  
12 denied Jasco due process (*id.* at 7, 26, 27); (c) that allowing  
13 Dana to move for summary judgment without a supporting  
14 "[a]ffidavit" or "other sworn statement," and without "evidence in  
15 admissible form," ignored the requirements for summary judgment  
16 (*id.* at 29); and (d) that requiring that the Rule 7056-1  
17 statements be served simultaneously made it impossible for Jasco  
18 actually to respond to Dana's assertions as to what facts were not  
19 genuinely in dispute (*see id.* at 26-27).

20 On an appeal from the district court's affirmance of a  
21 bankruptcy court's order, we review the decision of the bankruptcy  
22 court independently, assessing its conclusions of law *de novo* and  
23 its factual findings for clear error. *See, e.g., In re Wireless*  
24 *Data, Inc.*, 547 F.3d 484, 492 (2d Cir. 2008); *In re First Central*  
25 *Financial Corp.*, 377 F.3d 209, 212 (2d Cir. 2004). The bankruptcy

1 court's discretionary rulings with regard to such matters as  
2 scheduling and continuances are reviewed for abuse of discretion.  
3 See, e.g., In re Lehal Realty Associates, 101 F.3d 272, 276 (2d  
4 Cir. 1996). An abuse of discretion may consist of an error of  
5 law or a clearly erroneous finding of fact, see, e.g., Cooter &  
6 Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990), or a decision  
7 that, "though not necessarily the product of a legal error or a  
8 clearly erroneous factual finding[, ]cannot be located within the  
9 range of permissible decisions," Zervos v. Verizon New York, Inc.,  
10 252 F.3d 163, 169 (2d Cir. 2001).

11 For the reasons that follow, we find merit in Jasco's  
12 principal contentions, i.e., that Jasco should have been allowed  
13 additional discovery and that on the present record, viewed in  
14 the light most favorable to Jasco, summary judgment dismissing at  
15 least one of Jasco's causes of action was inappropriate. We pause  
16 first, however, to address Jasco's other procedural complaints, in  
17 which we find limited merit.

18 A. Jasco's Challenges to the Summary Judgment Procedures

19 1. The Claimed Summary Judgment Surprise

20 Jasco argues that Dana's use of its Objection to seek  
21 judgment as a matter of law without filing a separate summary  
22 judgment motion constituted a "bait and switch procedure" that  
23 disadvantaged Jasco because Jasco did not understand that it was  
24 responding to a summary judgment motion, rather than merely being



1 given notice that Dana would move for summary judgment in the  
2 future. (Jasco brief on appeal at 7, 25-26.) We are unpersuaded.

3 Although Dana's Objection was not labeled a motion for  
4 summary judgment and was not accompanied by a separate statement  
5 of undisputed facts as required by S.D.N.Y. Bankr. R. 7056-1(b),  
6 the Objection explicitly requested summary judgment. It set out  
7 the criteria for granting a motion for summary judgment (see Dana  
8 Objection ¶ 19), citing Celotex Corp. v. Catrett, 477 U.S. 317  
9 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)  
10 ("Liberty Lobby"), and stated that "[f]or the reasons set forth  
11 below, the Debtors are entitled to summary judgment in their  
12 favor" (Dana Objection ¶ 20 (emphasis added)). There followed a  
13 section entitled "III. Material Undisputed Facts of the Jasco  
14 Claim," followed by Dana's assertions as to the facts surrounding  
15 the Purchase Agreement (see id. ¶¶ 21-22), the December 1999  
16 negotiations for an extension of that Agreement (see id.  
17 ¶¶ 23-24), the actions of Rogers, Zicari, and Convertino (see id.  
18 ¶¶ 25-26), the bid by Nationwide (see id. ¶¶ 27-29), and the  
19 discovery conducted in Jasco's state-court action (see id.  
20 ¶¶ 30-33). These paragraphs were followed by a section entitled  
21 "IV. Dana's Summary Judgment Arguments," with paragraphs  
22 repeatedly asserting, inter alia, that Dana had never been told  
23 that Nationwide was using or had used Jasco trade secrets, and  
24 that Jasco lacked evidence to prove its causes of action (see id.  
25 ¶¶ 34-58). Dana's Objection repeatedly stated that Dana was

1 seeking "summary judgment" (e.g., ¶¶ 19, 20, 59, 60) or "judgment  
2 as a matter of law" (e.g., ¶¶ 6, 63).

3           The fact that the Dana Objection itself requested summary  
4 judgment was not lost on Jasco. To be sure, Jasco's Response  
5 began with protests (a) against Dana's effort to have Jasco's  
6 \$20 million Claim summarily dismissed without, as required by an  
7 earlier procedural order of the bankruptcy court ("Procedural  
8 Order"), submitting an "'affidavit, declaration or verification in  
9 support of the relief requested'" (Jasco Response ¶¶ 2-3 (quoting  
10 Procedural Order)), and (b) against Dana's efforts to cut off  
11 Jasco's right to discovery despite Dana's failure to produce any  
12 documents pursuant to Jasco's outstanding Third Document Demand,  
13 which had been pending in the state-court action since 2005 (see,  
14 e.g., Jasco Response ¶¶ 5-13). But the next 30 paragraphs of the  
15 Jasco Response addressed the merits of Dana's request for summary  
16 judgment.

17           First, Jasco stated that Dana's request for relief should  
18 be denied pursuant to Fed. R. Civ. P. 56(f) (dealing with the need  
19 for discovery) "to the extent that the instant Objection is the  
20 equivalent of a summary judgment motion." (Id. ¶ 14.) There  
21 followed a section entitled "**Dana's Motion for Summary Judgment**  
22 **must be Denied on the Merits,**" with a discussion of the legal  
23 standard for granting summary judgment (see id. ¶ 15)--quoting a  
24 case citing Celotex and Liberty Lobby--and an introductory  
25 paragraph stating that

26           [t]here are four different causes of action alleged  
27           against Dana in the underlying state court action.

1           As will be shown below, Dana is not entitled to  
2           summary judgment with respect to any of these four  
3           causes of action. Of course, as long as any one  
4           cause of action survives Dana's summary judgment  
5           motion, the Debtors' Objection must be dismissed

6           (Jasco Response ¶ 16 (emphases added)). The ensuing paragraphs  
7           discussed the substantive law governing, and the evidence to  
8           support, Jasco's breach of contract cause of action (see id.  
9           ¶¶ 17-29), its trade secret misappropriation cause of action (see  
10          id. ¶¶ 31-34), its unjust enrichment cause of action (see id.  
11          ¶¶ 36-38), and its cause of action for prima facie tort (see id.  
12          ¶¶ 40-42). As to these claims, Jasco concluded that:

13                   [a]t a minimum, there are genuine issues of material  
14                   fact concerning Dana's alleged breach of contract  
15                   which require denial of Dana's motion for summary  
16                   judgment upon this cause of action

17          (id. ¶ 30);

18                   [a]t a minimum, the facts set forth in the Baldino  
19                   Declaration and in the Exhibits annexed thereto raise  
20                   genuine issues of material fact concerning Dana's  
21                   [trade secret misappropriation], which require denial  
22                   of Dana's motion for summary judgment upon this cause  
23                   of action

24          (id. ¶ 35);

25                   [a]t a minimum, there is a genuine issue of material  
26                   fact concerning Dana's unjust enrichment, which  
27                   requires denial of Dana's motion for summary judgment  
28                   upon this cause of action

29          (id. ¶ 39); and

30                   [a]t a minimum, the facts raise genuine issues of  
31                   material fact concerning Dana's actions which  
32                   require denial of Dana's motion for summary judgment  
33                   upon [Jasco's prima facie tort] cause of action

34          (id. ¶ 43). We conclude that Jasco's contention that it was  
35          disadvantaged in responding to Dana's Objection because it

1 believed that that Objection was not a summary judgment motion but  
2 only a precursor to such a motion is meritless.

3       2. The Claimed Denial of Due Process

4           Nor is there merit in Jasco's contention that the  
5 bankruptcy court's scheduling of oral argument on Dana's summary  
6 judgment motion, to take place just two weeks after the initial  
7 status conference, denied Jasco due process. Rule 56 of the  
8 Federal Rules of Civil Procedure, which "applies in adversary  
9 proceedings" in the bankruptcy court, Fed. R. Bankr. P. 7056,  
10 allows a motion for summary judgment to be served "10 days before  
11 the day set for the hearing." Fed. R. Civ. P. 56(c). Given (a)  
12 that the Dana Objection explicitly requesting summary judgment was  
13 served on Jasco on August 31, 2007, (b) that Jasco responded in  
14 detail on September 20, (c) that the bankruptcy court made it  
15 clear beyond peradventure at the October 17 status conference that  
16 the court was treating Dana's Objection as a summary judgment  
17 motion, (d) that the October 31 date for the hearing on the motion  
18 was announced at that October 17 conference, and (e) that the  
19 hearing was held on October 31, Jasco's due process argument  
20 borders on the frivolous.

21       3. The Absence of Affidavits

22           Jasco also complains that the bankruptcy court allowed  
23 Dana to move for summary judgment without the support of an  
24 affidavit, declaration, or other sworn verification. The

1 requirement for such a sworn statement--which Dana asked the  
2 bankruptcy court to waive, in light of the fact that Dana  
3 supported most of its factual allegations with citations to  
4 depositions, i.e., to sworn testimony (see Dana Objection ¶ 65)--  
5 was included in the bankruptcy court's Procedural Order. Rule 56,  
6 however, imposes no such requirement. It provides that a party  
7 against which relief is sought may move for summary judgment "at  
8 any time, with or without supporting affidavits." Fed. R. Civ. P.  
9 56(b) (emphasis added). Thus, in Celotex, the Supreme Court found  
10 that as to a summary judgment motion based on the absence of  
11 evidence to prove an element of an opponent's cause of action,  
12 there is "no express or implied requirement in Rule 56 that the  
13 moving party support its motion with affidavits or other similar  
14 materials," 477 U.S. at 323; "where the nonmoving party will bear  
15 the burden of proof at trial on a dispositive issue, a summary  
16 judgment motion may properly be made in reliance solely on the  
17 pleadings, depositions, answers to interrogatories, and admissions  
18 on file," id. at 324 (internal quotation marks omitted).

19 In support of its contention that Jasco possessed no proof  
20 that Dana had participated in the alleged conspiracy to use  
21 Jasco's misappropriated trade secrets, Dana relied principally on  
22 deposition excerpts that it attached to its Objection. Reliance  
23 on such sworn statements--though they do not warrant the granting  
24 of the motion if there is a question as to the weight to be given  
25 them or as to the witnesses' credibility (see Part II.C.2. below)-  
26 -was not foreclosed by Rule 56; and the bankruptcy court had

1 discretion, as to which we see no abuse here, to relax the sworn-  
2 statement requirement set out in its Procedural Order.

3 4. The Requirement for Simultaneous Rule 7056-1 Statements

4 We find greater merit in Jasco's contention that it was  
5 inappropriate for the bankruptcy court to order that Jasco and  
6 Dana serve their Rule 7056-1 statements simultaneously. The  
7 purpose of the summary judgment mechanism is to allow the prompt  
8 resolution of actions in which there is no genuinely disputed  
9 issue as to any material fact. In aid of this purpose, the  
10 pertinent local rule provides that a party moving for summary  
11 judgment must annex to its motion "a separate, short, and concise  
12 statement, in numbered paragraphs, of the material facts as to  
13 which the moving party contends there is no genuine issue to be  
14 tried." S.D.N.Y. Bankr. R. 7056-1(b). One purpose of requiring  
15 the movant to submit such a statement is to provide its opponent  
16 with notice as to the moving party's factual contentions. Another  
17 is to provide a precise framework for responses that will reveal  
18 to the court which material facts are, and which are not, actually  
19 in dispute. In aid of the latter purpose, the local rule requires  
20 a party opposing summary judgment to include a statement with  
21 "correspondingly numbered paragraph[s] responding to each numbered  
22 paragraph in the statement of the moving party," *id.* Rule  
23 7056-1(c); and it provides that each assertion by the moving party  
24 in its Rule 7056-1(b) statement that is not "specifically  
25 controverted by a correspondingly numbered paragraph in the

1 statement required to be served by the opposing party" as provided  
2 by Rule 7056-1(c) "shall be deemed admitted," id. Rule 7056-1(d).

3 In the present case, the bankruptcy court ordered the  
4 simultaneous service of Rule 7056-1 statements, stating that  
5 Jasco did not need to see Dana's Rule 7056-1 statement before  
6 serving its own because Dana's Objection and Jasco's Response had  
7 expounded at length on the parties' respective positions as to why  
8 summary judgment was or was not appropriate. But while Jasco may  
9 not have needed further notice as to Dana's positions, the order  
10 for simultaneous service of the Rule 7056-1 statements made it  
11 impossible for Jasco to "respond[]" point-by-point as required by  
12 Rule 7056-1(c), and Jasco therefore sought to protect itself  
13 against any inadvertent "deemed admi[ssion]" pursuant to Rule  
14 7056-1(d) by stating a wholesale denial of all of Dana's  
15 assertions. The result of the court's order was an exercise that,  
16 contrary to the purpose of Rule 7056-1, was of no apparent benefit  
17 to the parties and disserved the interest of the court in  
18 achieving specific identification of any factual issues that were  
19 not really in dispute.

20 We would be inclined to view the error of requiring the  
21 simultaneous service of the Rule 7056-1 statements as harmless if  
22 there were no indication that the bankruptcy court deemed any Dana  
23 assertion admitted for lack of the requisite Jasco Rule 7056-1(c)  
24 response. However, while the Bankruptcy Court Decision did not  
25 state that it deemed any of Dana's assertions admitted by Jasco,  
26 the court's November 16 Order ruled that Dana's right to summary

1 judgment was "establish[ed]" by "the legal and factual bases set  
2 forth in the [Dana] Objection, the [Dana] Reply, [and] the [Dana]  
3 Statement of Undisputed Facts." Bankruptcy Court November 16  
4 Order at 2 (emphasis added). Since it is not clear how the  
5 bankruptcy court could validly have considered the facts to have  
6 been "established" by Dana's assertions, given that Jasco denied  
7 them, it is not clear that Jasco was not prejudiced by the  
8 bankruptcy court's order that the Rule 7056-1 statements be served  
9 simultaneously.

10 In any event, we view the bankruptcy court's conclusion--  
11 i.e., that Dana's submissions established facts that demonstrated  
12 its entitlement to dismissal of all of Jasco's causes of action as  
13 a matter of law--as an aspect of the court's flawed application of  
14 well established summary judgment principles, which we discuss in  
15 Part II.C. below.

#### 16 B. Jasco's Request for Additional Discovery

17 Rule 56 provides that if a party opposing a summary  
18 judgment motion shows by affidavit that, for specified reasons, it  
19 cannot present facts essential to justify its opposition, the  
20 court may, inter alia, deny the summary judgment motion or order a  
21 continuance to allow the opposing party to obtain affidavits, take  
22 depositions, or conduct other discovery that is material to its  
23 opposition to the motion. See Fed. R. Civ. P. 56(f); see, e.g.,  
24 Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir.  
25 1994). A court plainly has discretion to reject a request for



1 discovery if the evidence sought would be cumulative or if the  
2 request is based only on "speculation as to what potentially could  
3 be discovered," id. at 1138; and a bare assertion that the  
4 evidence supporting plaintiff's allegations is in the hands of the  
5 moving party is insufficient to justify the denial of summary  
6 judgment, see id. But a party against which summary judgment is  
7 sought must be afforded "a reasonable opportunity to elicit  
8 information within the control of his adversaries." Quinn v.  
9 Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir.  
10 1980) ("Quinn") (summary judgment should not be granted against  
11 nondilatory party who has been "denied reasonable access to  
12 potentially favorable information").

13 In the present case, Jasco sought compliance with its  
14 outstanding document demand in order to be able to respond more  
15 fully to Dana's contention that Dana had no knowledge of the  
16 misappropriation of Jasco's trade secrets. The bankruptcy court  
17 rejected that request, stating that, despite the fact that Jasco  
18 had had nearly four years to conduct discovery in the state-court  
19 action, see Bankruptcy Court Decision, 2007 WL 3376882, at \*4,  
20 "there is no evidence connecting Dana to the alleged conspiracy,"  
21 id. at \*7. The court stated that Jasco had taken 18 depositions,  
22 including three of Dana employees; that Dana had responded to  
23 interrogatories and two notices to produce, providing voluminous  
24 documentation; and that Jasco had made a request for additional  
25 discovery in the state-court action in opposition to a summary  
26 judgment motion by Rogers, a request that the state court found

1 "'r[ang] hollow,'" viewing it as being based on "'nothing but mere  
2 hope and speculation' that additional discovery would reveal  
3 evidence to prove the alleged conspiracy," id. at \*5 (quoting  
4 Jasco II at 10). The bankruptcy court stated that its own  
5 conclusion was "similar[]." Bankruptcy Court Decision, 2007 WL  
6 3376882, at \*5. Dana, in addition to endorsing the bankruptcy  
7 court's rationale, contends that we should reject Jasco's  
8 challenge to the denial of discovery on the grounds that Jasco  
9 failed to submit a Rule 56(f) affidavit in support of its  
10 discovery request (see Dana brief on appeal at 16-17) and "failed  
11 to identify the individuals it wished to depose or explain how  
12 these depositions would impact the material legal issues in this  
13 case" (id. at 16). We conclude that none of these rationales  
14 permitted the grant of summary judgment in the face of Jasco's  
15 request for discovery.

16 First, the bankruptcy court's intimation that Jasco had  
17 conducted extensive discovery in the state-court action failed to  
18 focus sufficiently on the discovery that had been obtained from  
19 Dana. Discovery from parties other than Dana could have elicited  
20 evidence that Dana was a knowing participant in a tortious  
21 misappropriation or use of Jasco trade secrets; but when the state  
22 of a defendant's knowledge is a material issue, discovery from  
23 others may well not be an adequate substitute for depositions of  
24 the defendant who professes ignorance. As to Dana itself, as the  
25 bankruptcy court noted, Jasco had taken only three depositions,  
26 consuming a total of only five days. With respect to a suit

1 seeking \$20 million in damages for, inter alia, an alleged trade  
2 secret misappropriation conspiracy--hardly a fanciful allegation,  
3 given Convertino's sworn statements, see Parts I.A. above and  
4 II.C.1. below--in which, given the documents in the record, Dana  
5 could be found to have taken part in various ways and at various  
6 times, see, e.g., Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 580,  
7 450 N.Y.S.2d 776, 780 (1982) (on a concerted action theory, a  
8 joint tort-feasor may be held liable for furthering a common plan  
9 or design to commit a tort if it knowingly "lend[s] aid or  
10 encouragement to the wrongdoer, or ratif[ies] and adopt[s] [the  
11 tortfeasor's] acts done for [its] benefit" (internal quotation  
12 marks omitted)), five days of depositions cannot reasonably be  
13 viewed as extensive.

14           Second, the various discovery methods are more  
15 complementary than fungible. For example, documents or  
16 interrogatory answers may help to identify persons with knowledge  
17 of the pertinent events, so that those persons may be deposed;  
18 depositions, at which there can be cross-examination, may serve to  
19 clarify statements in documents that are ambiguous; and deposition  
20 testimony may be shown to have been false after documentary  
21 evidence is obtained. No one type of discovery is necessarily an  
22 adequate substitute for another. Here, where Jasco's trade secret  
23 misappropriation cause of action against Dana is based on an  
24 alleged conspiracy, a type of agreement that is by its nature  
25 secretive, responses to interrogatories and document demands do  
26 not necessarily obviate the need for depositions of persons

1 believed to have knowledge relevant to the alleged secret  
2 agreement.

3           The bankruptcy court gave no explanation as to why Jasco's  
4 prior discovery of Dana sufficed. The Decision contained no  
5 substantive comparison of what had been produced with what is now  
6 requested and no finding that Jasco's Third Document Demand sought  
7 information that was cumulative or that it was otherwise unduly  
8 burdensome. Nor was there a finding that Jasco's discovery  
9 request was dilatory--a finding that would have been untenable,  
10 given that the document demand Jasco seeks to pursue was served in  
11 December 2005 and that its pursuit was stalled by Dana's March  
12 2006 bankruptcy petition. And to the extent that the bankruptcy  
13 court's adoption of the Jasco II court's view--i.e., that Jasco's  
14 discovery requests were based on "'nothing but mere hope and  
15 speculation'"--may be deemed a ruling that Jasco's request called  
16 for documents that were not reasonably calculated to lead to  
17 admissible evidence, see Fed. R. Civ. P. 26(b)(1), the bankruptcy  
18 court's reliance on Jasco II is doubly flawed. First, Jasco II  
19 was reversed (after issuance of the bankruptcy court's Decision,  
20 but prior to the issuance of the November 16 Order dismissing  
21 Jasco's Claim). Second, the Jasco II court was dealing with  
22 Jasco's proposed depositions of Nationwide employees, Zicari's  
23 wife and father-in-law, and Rogers's wife and girlfriend, see  
24 Jasco II at 10, not with the Third Document Demand or any other  
25 request for discovery from Dana.

1           Finally, we reject the additional arguments advanced by  
2 Dana. First, its contention that we should affirm the denial of  
3 discovery on the ground that Jasco failed to submit a Rule 56(f)  
4 affidavit exalts form over substance. Jasco's Response to Dana's  
5 Objection was accompanied by the Baldino Declaration. As that  
6 Declaration was submitted "under penalties of perjury" (Baldino  
7 Decl. ¶ 54), it was plainly the equivalent of an affidavit.  
8 Second, although not labeled a "Rule 56(f)" affidavit, the  
9 Declaration gave specific reasons for Jasco's need for discovery.  
10 It stated that Dana had refused to comply with Jasco's outstanding  
11 document demand--which was attached to the Declaration as  
12 Exhibit P--and that Jasco needed to obtain the requested documents  
13 from Dana in light of the instances in which Dana employees had  
14 "lie[d] under oath, as demonstrated by their affidavits, and given  
15 their forgetfulness, as demonstrated at their depositions." (Id.  
16 ¶ 52.) Finally, although Dana argues that Jasco "failed to  
17 identify the individuals it wished to depose or explain how these  
18 depositions would impact the material legal issues in this case"  
19 (Dana brief on appeal at 16), Jasco's counsel had informed Dana's  
20 counsel in a July 30, 2007 e-mail--which also was attached to the  
21 Baldino Declaration--that Jasco wanted to depose "one or two" of  
22 the Dana employees who were "most centrally involved in the  
23 project" "that is the subject of this lawsuit," and that Jasco  
24 needed responses to ¶¶ 11-13 of the Third Document Demand in order  
25 to identify those persons (Baldino Decl. Exhibit O). In sum, the

1 Baldino Declaration sufficed as an affidavit providing the  
2 information contemplated by Rule 56(f).

3 Given, inter alia, the scant extent of the depositions  
4 conducted of Dana employees, the dearth of analysis by the  
5 bankruptcy court of the 2005 Third Document Demand, the bankruptcy  
6 court's reliance on Jasco II which concerned discovery only of  
7 parties other than Dana, the sworn statements by Convertino  
8 indicating that a trade secret misappropriation conspiracy  
9 existed, the evidence of false and questionable sworn statements  
10 by Dana employees as to the origin of Dana's dealings with  
11 Nationwide, and the fact that any attempt by Jasco to compel  
12 compliance with its December 2005 discovery request was foreclosed  
13 by Dana's March 2006 bankruptcy filing, we conclude that the  
14 bankruptcy court's denial of Jasco's discovery request was not  
15 within the range of permissible decisions.

16 C. The Misapplication of Summary Judgment Principles

17 Finally, we conclude that even without discovery of  
18 additional evidence, the record as it stands was sufficient to  
19 preclude the entry of summary judgment dismissing and expunging  
20 the Jasco Claim. "[S]ummary judgment is a useful device for  
21 unmasking frivolous claims and putting a swift end to meritless  
22 litigation"--when "properly employed." Quinn, 613 F.2d at 445. A  
23 motion for summary judgment may properly be granted--and the grant  
24 of summary judgment may properly be affirmed--only where there is  
25 no genuine issue of material fact to be tried, and the facts as to

1 which there is no such issue warrant judgment for the moving party  
2 as a matter of law. See Fed. R. Civ. P. 56(c); see, e.g., Madonna  
3 v. American Airlines, Inc., 82 F.3d 59, 61 (2d Cir. 1996). The  
4 function of the district court in considering the motion for  
5 summary judgment is not to resolve disputed questions of fact but  
6 only to determine whether, as to any material issue, a genuine  
7 factual dispute exists. See, e.g., Liberty Lobby, 477 U.S. at  
8 249-50. "[W]hen the party against whom summary judgment is sought  
9 comes forth with affidavits or other material obtained through  
10 discovery that generates uncertainty as to the true state of any  
11 material fact, the procedural weapon of summary judgment is  
12 inappropriate." Quinn, 613 F.2d at 445. Summary judgment is  
13 inappropriate when the admissible materials produced in opposition  
14 to the summary judgment motion "make it arguable" that the claim  
15 has merit. Id. Thus, Rule 56 authorizes summary judgment only  
16 "where the moving party is entitled to judgment as a matter of  
17 law" on the basis that "no genuine issue remains for trial"  
18 because "it is quite clear what the truth is." Poller v.  
19 Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962)  
20 (internal quotation marks omitted).

21 The principles governing a court's assessment of whether  
22 a genuine issue of material fact exists are the same whether that  
23 question arises in the context of a motion for summary judgment or  
24 of a motion for judgment as a matter of law during or after trial,  
25 see, e.g., Liberty Lobby, 477 U.S. at 250-51; Eastman Machine Co.  
26 v. United States, 841 F.2d 469, 473-74 (2d Cir. 1988), and these

1 principles are well established. In considering whether there is  
2 sufficient evidence to create a genuine issue of fact, the  
3 district court may not properly consider the record in piecemeal  
4 fashion, giving credence to innocent explanations for individual  
5 strands of evidence; rather, it must "review all of the evidence  
6 in the record," Reeves v. Sanderson Plumbing Products, Inc., 530  
7 U.S. 133, 150 (2000) (discussing propriety of judgment as a matter  
8 of law after trial). "In doing so, however, the court must draw  
9 all reasonable inferences in favor of the nonmoving party, and it  
10 may not make credibility determinations or weigh the  
11 evidence. . . . 'Credibility determinations, the weighing of the  
12 evidence, and the drawing of legitimate inferences from the facts  
13 are jury functions, not those of a judge.'" Id. at 150-51  
14 (quoting Liberty Lobby, 477 U.S. at 255 (discussing propriety of  
15 summary judgment)) (emphases ours); see, e.g., Agosto v. INS, 436  
16 U.S. 748, 756 (1978) ("a district court generally cannot grant  
17 summary judgment based on its assessment of the credibility of the  
18 evidence presented"); Continental Ore Co. v. Union Carbide &  
19 Carbon Corp., 370 U.S. 690, 696 (1962) (in reviewing a directed  
20 verdict, court of appeals must "view the evidence in the light  
21 most favorable to [the party against which the verdict was  
22 directed] and give [that party] the benefit of all inferences  
23 which the evidence fairly supports, even though contrary  
24 inferences might reasonably be drawn"). "Where an issue as to a  
25 material fact cannot be resolved without observation of the  
26 demeanor of witnesses in order to evaluate their credibility,



1 summary judgment is not appropriate." Fed. R. Civ. P. 56(e)  
2 Advisory Committee Note (1963).

3 In reviewing the record as a whole, "the court should give  
4 credence to the evidence favoring the nonmovant as well as that  
5 'evidence supporting the moving party that is uncontradicted and  
6 unimpeached, at least to the extent that that evidence comes from  
7 disinterested witnesses.'" Reeves, 530 U.S. at 151 (quoting 9A  
8 C. Wright & A. Miller, Federal Practice and Procedure § 2529 (2d  
9 ed. 1995), at 300). But a jury is free to believe part and  
10 disbelieve part of any witness's testimony, see, e.g., Fiacco v.  
11 City of Rensselaer, 783 F.2d 319, 325 (2d Cir. 1986), cert.  
12 denied, 480 U.S. 922 (1987); United States v. Gleason, 616 F.2d 2,  
13 15 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980), and the  
14 court considering a summary judgment motion "must disregard all  
15 evidence favorable to the moving party that the jury is not  
16 required to believe," Reeves, 530 U.S. at 151 (emphasis added).

17 Our review of the record persuades us that these  
18 principles were not properly applied in the present case.  
19 Although the parties debate their application with respect to each  
20 of Jasco's four causes of action against Dana, we need discuss no  
21 more than one, since if any one of Jasco's causes of action could  
22 not properly be summarily dismissed, Dana's Objection to the  
23 Jasco Claim should have been rejected. We will thus limit our  
24 discussion to the alleged conspiracy, or concerted action, to  
25 misappropriate Jasco's trade secrets, the cause of action that  
26 presents one of the clearest factual disputes.

1 Confidential proprietary data relating to pricing, costs,  
2 systems, and methods are protected by trade secret law. See  
3 generally Lehman v. Dow Jones & Co., 783 F.2d 285, 298 (2d Cir.  
4 1986). Under New York law, which governs Jasco's cause of action  
5 for the misappropriation of its trade secrets, a plaintiff may, on  
6 a theory of concerted action, recover damages from a defendant  
7 that was one of a group of entities if at least one of those  
8 entities committed a tort in pursuance of a common plan or design,  
9 see, e.g., Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289,  
10 295, 582 N.Y.S.2d 373, 375 (1992), and the defendant knew the  
11 wrongful nature of the primary actor's conduct and intended to  
12 assist in or profit from the commission of the tort, see, e.g.,  
13 id.; National Westminster Bank USA v. Weksel, 124 A.D.2d 144, 147,  
14 511 N.Y.S.2d 626, 628-29 (1st Dep't), appeal denied, 70 N.Y.2d  
15 604, 519 N.Y.S.2d 1027 (1987). Such liability may also be imposed  
16 on one who encourages the commission of a tort or who, knowing of  
17 a tort committed for its benefit, ratifies it:

18 Concerted action liability rests upon the  
19 principle that "[a]ll those who, in pursuance of a  
20 common plan or design to commit a tortious act,  
21 actively take part in it, or further it by  
22 cooperation or request, or who lend aid or  
23 encouragement to the wrongdoer, or ratify and adopt  
24 his acts done for their benefit, are equally liable  
25 with him" (Prosser, Torts [4th ed], § 46, at p 292;  
26 see, also, Restatement, Torts 2d, § 876). An  
27 injured plaintiff may pursue any one joint tort-  
28 feisor on a concerted action theory . . . .

29 Bichler v. Eli Lilly & Co., 55 N.Y.2d at 580-81, 450 N.Y.S.2d at  
30 780 (emphases added).

1 Dana argues that Jasco has "manufactured an elaborate  
2 conspiracy theory" (Dana brief on appeal at 1 (emphasis added)),  
3 endorsing the bankruptcy court's conclusion that "there is no  
4 evidence connecting Dana to the alleged conspiracy," Bankruptcy  
5 Court Decision, 2007 WL 3376882, at \*7. We have two difficulties  
6 with this conclusion. First, Dana itself stated to the bankruptcy  
7 court that "[t]he reason" for the lack of direct evidence of  
8 Dana's knowledge of the misappropriation was "simple: each of the  
9 principal witnesses denied knowledge of anyone ever telling Dana  
10 of the alleged conversion." (Dana Reply ¶ 9 (citing testimony by  
11 Convertino, Zicari, and Haybach) (emphasis ours).) But  
12 Convertino, Zicari, and Haybach, accused of participating in, or  
13 knowingly encouraging or ratifying, the misappropriation of  
14 Jasco's trade secrets, were hardly disinterested witnesses. Of  
15 course, the fact that their denials were self-serving does not  
16 mean that such testimony would not be admissible at trial; the  
17 self-serving nature of a witness's statements goes to the  
18 statements' weight, not to their admissibility. See, e.g., St.  
19 Pierre v. Dyer, 208 F.3d 394, 405 (2d Cir. 2000); United States v.  
20 Lawal, 736 F.2d 5, 8 (2d Cir. 1984). But the weighing of such  
21 statements is a matter for the finder of fact at trial, "not the  
22 prerogative of the court on a motion for summary judgment." St.  
23 Pierre v. Dyer, 208 F.3d at 405.

24 Second, the denials by Convertino, Zicari, and Haybach of  
25 knowledge on the part of Dana could not justify the entry of  
26 summary judgment because it is well established that "[b]oth the

1 existence of a conspiracy and a given defendant's participation in  
2 it with the requisite knowledge and . . . intent may be  
3 established through circumstantial evidence,'" United States v.  
4 Huezo, 546 F.3d 174, 180 (2d Cir. 2008) (quoting United States v.  
5 Stewart, 485 F.3d 666, 671 (2d Cir. 2007)). Circumstantial  
6 evidence may permit a factfinder to infer that a witness had  
7 knowledge of a particular fact despite his testimonial denial of  
8 knowledge. See, e.g., Smith v. California, 361 U.S. 147, 154  
9 (1959).

10           The bankruptcy court, in support of its conclusion that  
11 there was "no evidence connecting Dana to the alleged conspiracy,"  
12 stated that "[t]he fact that Dana knew that Messrs. Zicari and  
13 Convertino became Nationwide employees is not probative of a  
14 conspiracy or proof of trade secret misappropriation," Bankruptcy  
15 Court Decision, 2007 WL 3376882, at \*7. But in focusing on the  
16 sole facts that Nationwide hired Zicari and Convertino and that  
17 Dana knew of those hirings, the court surely viewed the record in  
18 piecemeal fashion and ignored other evidence favorable to Jasco,  
19 for there was both (1) direct evidence that trade secrets were in  
20 fact misappropriated and that a conspiracy to misappropriate them  
21 existed, and (2) circumstantial evidence from which it could be  
22 inferred that Dana knew of the trade secret misappropriation  
23 conspiracy and encouraged or ratified the misappropriation.

24           1. Direct Evidence of the Existence of Conspiracy

1           As to the existence of a conspiracy, two opinions of the  
2 state courts cited evidence from Convertino himself, a member of  
3 the conspiracy. In Jasco II, submitted by Dana with its Reply to  
4 Jasco's Response to Dana's Objection, the state court quoted a  
5 Convertino affidavit describing the commencement of his tortious  
6 collaboration with Zicari and Rogers:

7           ¶ 14. In approximately April of 1999, while all  
8 three of us were still employees of Jasco, Chuck  
9 Zicari approached me, told me that he was thinking of  
10 starting his own business in Kentucky, in competition  
11 with Jasco, and asked me whether I was interested in  
12 joining him. . . . He also told me that Gary Rogers  
13 was helping him.

14           ¶ 15. . . . Chuck told me . . . that while Gary was  
15 still at Jasco, he went into Chuck's personnel file  
16 and removed from it Chuck's signed Non-Compete  
17 Agreement and that he believed it was destroyed, thus  
18 enabling Chuck to carry forward with this plan.

19 Jasco II at 2-3 (second emphasis in Jasco II; other emphases  
20 ours). And the Appellate Division in Jasco I stated that  
21 "[a]ccording to Convertino, Rogers aided the efforts of  
22 Convertino and Zicari by providing them with documents while he  
23 was still employed by plaintiff." 303 A.D.2d at 945, 757  
24 N.Y.S.2d at 653 (quoted in Jasco II at 1).

25           Further, as described in Part I.A. above, Zicari knew that  
26 Convertino had computer records containing Jasco data as to,  
27 inter alia, the materials, manufacturing processes, pricing, and  
28 costs for all of the parts Jasco was selling to Dana. In the last  
29 week of Convertino's employment with Jasco, Zicari, who had just  
30 left Jasco, told Convertino that "it would be helpful for  
31 competitive reasons to have that information available after

1 [Convertino's] departure." (Convertino Dep. at 87-88.)  
2 Accordingly, Convertino, who had "some animosity" toward Jasco  
3 (id. at 44), took with him all the Jasco data that he thought  
4 would be useful to himself and Zicari (see id. at 1738-40; see  
5 also id. at 44-45) "to go after the Dana business" "[w]ith some  
6 other company" (id. at 1739). Convertino testified that the  
7 information he took had been developed in part by "other employees  
8 at Jasco" "over a number of years" (id. at 89); that it was  
9 nonpublic information (see id.) that was "proprietary to Jasco"  
10 (id. at 290); and that he knew "it was unethical" to take it (id.  
11 at 1740).

12 Moreover, Convertino indicated--with some apparent  
13 reluctance--that Nationwide must have known he used confidential  
14 and proprietary information belonging to Jasco in order to prepare  
15 Nationwide's bid to Dana:

16 Q. Now, did Messrs. Ricotta and Nuccitelli  
17 understand that you were giving them proprietary  
18 information belonging to Jasco?

19 . . . .

20 A. They were very concerned whether or not I  
21 had signed a no-compete clause or confidentiality  
22 agreement.

23 Q. Again, the question is, were they aware that  
24 you were providing to them proprietary information  
25 that you had taken from Jasco?

26 . . . .

27 A. They knew that I was using my experience as  
28 a basis of coming up with estimates for them.

29 Q. Did they know that you had actual documents  
30 that you had taken from Jasco?

1           A. I would have to say yes, because I provided  
2           them with the cost breakdown and quantities that I  
3           faxed to Chuck Zicari. I couldn't have had those  
4           without taking documents from Jasco.

5           (Convertino Dep. at 290-91 (emphases added).)

6           Thus, the record contains evidence from a confessed  
7           coconspirator that would permit a jury to find that Jasco trade  
8           secrets were misappropriated, that there existed a trade secret  
9           misappropriation conspiracy of which at least Rogers, Zicari, and  
10          Convertino were members, and that the conspiracy was joined by  
11          Nationwide.

12          2. Circumstantial Evidence that Dana Had a Culpable Role

13          The record also contains circumstantial evidence from  
14          which a jury could permissibly infer that Dana had knowledge of  
15          the theft, and/or the planned theft, of Jasco trade secrets as  
16          early as the summer of 1999 and that, either at that time or  
17          thereafter, Dana agreed to--and eventually did--knowingly take  
18          advantage of that misappropriation in order to lower its  
19          purchasing costs by many millions of dollars (see Haybach Dep. at  
20          447-49 (the combined effect of Dana's rejection of the Jasco  
21          proposed price increases (more than \$8 million) and its  
22          acceptance of the Nationwide price reductions (\$7.4 million) was  
23          to save Dana nearly \$15.5 million)).

24          As to the events in the summer of 1999, preceding  
25          Nationwide's offers, the evidence described in Parts I.A., I.C.,  
26          and II.C.1. above, taken in the light most favorable to Jasco,  
27          includes the following. Rogers was forced to retire as Jasco's

1 president on May 31; before leaving, he began helping Zicari to  
2 prepare to compete with Jasco, by removing Zicari's non-compete or  
3 confidentiality agreement from Jasco's locked personnel files and  
4 destroying it, and by providing Zicari and Convertino with other  
5 documents. Rogers had been "Dana's primary contact person at  
6 Jasco" (Haybach Aff. ¶ 4); but after his retirement, Buss had no  
7 legitimate business reason to speak with him. Yet, in June,  
8 within the first week after Rogers involuntarily retired, he  
9 repeatedly called Buss; one of their telephone conversations  
10 lasted 30 minutes. Buss categorically denied ever speaking to  
11 Rogers after Rogers's retirement; and when confronted with  
12 telephone company records showing such calls, Buss testified that  
13 he had no recollection of those calls. Additional telephone  
14 company records show an August 12 sequence in which Rogers again  
15 called Buss and they conversed for 25 minutes; Rogers immediately  
16 thereafter called Zicari, with whom he conversed for 13½ minutes;  
17 and Zicari then immediately called Nationwide. Zicari went to  
18 work for Nationwide on August 16. In late August, Zicari called  
19 Buss twice and thereafter called Nuccitelli to tell him that  
20 Nationwide had "an opportunity with Dana" (Nuccitelli Dep. at  
21 110). As with respect to the telephone calls from Rogers in June,  
22 Buss professed to have no recollection of his 25-minute telephone  
23 conversation with Rogers in August.

24 The bankruptcy court found that the telephone records  
25 provided no support for Jasco's claims, but that assessment  
26 plainly did not view this evidence in the light most favorable to



1 Jasco. A jury could easily believe, in light of the telephone  
2 records, that Buss's denial of any contact with Rogers after  
3 Rogers's retirement was untruthful. And, as "the factfinder is  
4 entitled to consider a party's dishonesty about a material fact as  
5 affirmative evidence of guilt," Reeves 530 U.S. at 147 (internal  
6 quotation marks omitted), the jury could also infer (a) that  
7 Buss's denial and his assertion that he does not remember the  
8 calls from Rogers are designed to conceal the subject matter of  
9 those conversations, and (b) that the conversations concerned  
10 precisely what actually occurred: that Zicari's and Convertino's  
11 planned or eventuated theft of Jasco trade secrets would benefit  
12 Dana by allowing it to receive a 10% discount from the prices  
13 charged by Jasco if Dana would replace Jasco with another company  
14 employing Zicari and Convertino.

15 We note that both Buss and Haybach admitted that they had  
16 received calls from Zicari; they stated that the subject was  
17 Zicari's plan to start his own company and his hope to solicit  
18 business from Dana. Buss testified that he did not recall  
19 precisely when he received such a call; Haybach stated that he  
20 received such calls "[a]fter Mr. Zicari left Jasco, and before he  
21 began with Nationwide"; and Haybach denied that these  
22 conversations related to "the renewal of the Jasco contract."  
23 (Haybach Aff. ¶ 20; see Buss Dep. at 92.) Any such denials by  
24 Haybach or Buss as to the contents of their many July and August  
25 conversations with Zicari (see, e.g., Part I.A. above) are, of  
26 course, subject to credibility assessments by a factfinder, which

1 would not be required to believe the denials. But in any event,  
2 we have seen nothing in the record before us that even attempts to  
3 provide an innocent explanation for Zicari's calls to Buss on  
4 August 20, i.e., after he had abandoned his plan to start his own  
5 business and had gone to work for Nationwide, and shortly before  
6 he called Nuccitelli to say that Nationwide had an opportunity  
7 with Dana.

8 As to Nationwide's proposals in the fall of 1999, the  
9 bankruptcy court ruled that Nationwide's PowerPoint presentation  
10 to Dana--which stated, inter alia, that Nationwide had employees  
11 who were "'intimately knowledgeable with [the Dana] program,'"  
12 Bankruptcy Court Decision, 2007 WL 3376882, at \*7 (quoting Baldino  
13 Decl. Exhibit E)--did not convey to Dana any sense that Nationwide  
14 had access to Jasco trade secrets but instead "simply  
15 acknowledge[d] the fact that experienced former Jasco employees  
16 would be involved with a Nationwide-Dana relationship," Bankruptcy  
17 Court Decision, 2007 WL 3376882, at \*7. We have difficulties with  
18 this ruling as well. First, it is a finding of fact. On a motion  
19 for summary judgment, the court is to identify factual issues, not  
20 to resolve them. Second, this finding did not evaluate the  
21 statements by Nationwide either in light of the record as a whole  
22 or in the light most favorable to Jasco. As a whole and in that  
23 light, the record contains evidence that Nationwide had almost no  
24 prior experience in machining the types of parts Dana was buying  
25 from Jasco; that Convertino took confidential and proprietary data  
26 belonging to Jasco with him to Nationwide in order to facilitate

1 competition against Jasco; that Convertino knew it was unethical  
2 for him to take that information; that barely six months after  
3 Convertino's arrival at Nationwide, as soon as the Dana contract  
4 was secured, Nationwide gave and promised Convertino substantial  
5 salary raises, plus bonuses totaling \$44,000, i.e., in excess of  
6 60% of his Nationwide starting salary, as a reward for "his  
7 involvement in securing the Dana Contract" (Baldino Decl. Exhibit  
8 K); and that Convertino testified he "would have to say" that  
9 Nationwide knew he had proprietary Jasco documents that he was  
10 using to help prepare the Nationwide proposal to Dana (Convertino  
11 Dep. at 291). Persons engaged in wrongful activity frequently use  
12 coded language to convey meanings that are not intended to be  
13 understood by outsiders. In light of the record as a whole, the  
14 import of the assurances to Dana that Nationwide had employees who  
15 were "intimately knowledgeable" about the parts in question, with  
16 "past experience with [the] program" (Baldino Decl. Exhibit E), is  
17 a matter for assessment by the finder of fact. The factfinder of  
18 course will not be required to view the evidence in the light most  
19 favorable to Jasco; but since the factfinder is permitted to do  
20 so, the bankruptcy court was not allowed to grant summary judgment  
21 based on its own view that the Nationwide PowerPoint statements  
22 were simply innocuous.

23 Dana, in arguing to the bankruptcy court that there was no  
24 evidence that Dana knew the Nationwide bid contained, or was  
25 prepared using, Jasco trade secrets, repeatedly cited testimony by  
26 Haybach (see Dana Objection ¶¶ 32, 44; Reply ¶ 9), that Haybach

1 did not "have any inkling that Nationwide personnel had stolen  
2 confidential or proprietary information from Jasco" (Haybach Dep.  
3 at 526-27). Yet Haybach also asserted that at no time prior to  
4 awarding Nationwide the contract to succeed Jasco did Dana inform  
5 Nationwide of the prices that Jasco was charging. (See Haybach  
6 Dep. at 457, 493-94 ("I d[id] not, and I am reasonably assured  
7 that none of our people would do that" because it would have been  
8 "bad-bad," "not right," "not ethical," "not fair".)) If the jury  
9 credits this assertion that Nationwide did not learn Jasco's  
10 prices from Dana, the jury may well infer that, far from having no  
11 inkling that Zicari and Convertino had stolen Jasco trade secrets,  
12 Haybach, Blanchard, and Buss must have known to a certainty that  
13 Nationwide was using such stolen trade secrets, given that  
14 Nationwide quoted to Dana a price that was exactly 10% less than  
15 Jasco's price for each and every one of the 130 parts. Such an  
16 inference as to Dana's knowledge could lead to a finding that, in  
17 entering into the agreement with Nationwide, Dana ratified and  
18 adopted the theft of Jasco's confidential and proprietary  
19 information.

20 Further, in assessing the credibility of the Haybach  
21 testimony relied on by Dana for the proposition that Dana had no  
22 knowledge that Nationwide was using or had used confidential  
23 information belonging to Jasco (Dana did not cite to denials by  
24 any other Dana employee as to such knowledge), the jury would  
25 also be entitled to take into account Buss's implausible denial of  
26 any recollection of his lengthy conversations with Rogers and the

1 fact that Haybach and Blanchard made false statements in their  
2 state-court affidavits (quoted in Part I.A. above) as to the  
3 origin of Dana's contact with Nationwide. The representations by  
4 Haybach and Blanchard that Dana did not have contact with  
5 Nationwide until after December 3 were squarely contradicted by,  
6 inter alia, (a) Haybach's September 30 e-mail stating that Zicari  
7 had already "verbally committed to a 10% price reduction from  
8 Jasco's 1/1/2000 pricing" and instructing Buss to send Nationwide  
9 bidding materials (Baldino Decl. Exhibit C); (b) Haybach's  
10 personal calendar entries showing four meetings with Nationwide in  
11 October and November (see id. Exhibit D); and (c) the November 26  
12 written confirmation from Nationwide addressed to Blanchard (see  
13 id. Exhibit F).

14 Finally, we note that the bankruptcy court found that  
15 "Nationwide's employment of individuals who had worked with Dana  
16 and knew Dana's business [wa]s conduct consistent with permissible  
17 business competition," citing the statement in Matsushita Electric  
18 Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), that  
19 "conduct that is as consistent with permissible competition as  
20 with illegal conspiracy does not, without more, support even an  
21 inference of conspiracy," id. at 597 n.21. Bankruptcy Court  
22 Decision, 2007 WL 3376882, at \*7. We have considerable difficulty  
23 with the bankruptcy court's finding and its reliance on  
24 Matsushita. First, Matsushita, unlike Jasco's state-court action,  
25 involved antitrust claims, and the Matsushita Court noted that

1 "antitrust law limits the range of permissible inferences from  
2 ambiguous evidence in a [Sherman Act] § 1 case," 475 U.S. at 588.

3         Second, the context of the Matsushita Court's reference to  
4 conduct that is "as consistent with permissible competition as  
5 with illegal conspiracy" was the allegation that Japanese  
6 manufacturers who were in competition with each other, had entered  
7 into a predatory pricing scheme in which they would sell their  
8 products below cost in the United States in order to drive  
9 competing American manufacturers out of business. Given that such  
10 a scheme would entail sure and immediate losses--with only a  
11 speculative hope of future profits that might not be achievable  
12 without resort to price-fixing or some other surely actionable  
13 anticompetitive conduct--the Supreme Court found that the scheme  
14 alleged was inherently implausible. The Court stated that "if the  
15 factual context renders [the plaintiffs'] claim implausible--if  
16 the claim is one that simply makes no economic sense--[the  
17 plaintiffs] must come forward with more persuasive evidence to  
18 support their claim than would otherwise be necessary."  
19 Matsushita, 475 U.S. at 587 (emphasis added); see id. at 597-98  
20 (remanding for consideration of whether there was sufficiently  
21 unambiguous evidence to permit a jury to find that the defendants  
22 conspired as alleged "despite the absence of any apparent motive,"  
23 in order to engage in conduct that was "economically senseless").

24         The Matsushita discussion has little resonance here.  
25 Jasco's claim of trade secret misappropriation does not allege  
26 economically senseless parallel actions by persons competing with

1 each other. Rather it charges collaborative action by, inter  
2 alia, (a) a buyer that saved more than \$15 million on its  
3 purchases (see Haybach Dep. at 447-49), (b) a seller that  
4 "generate[d] a \$2M bottom line" from "\$25M in sales with no  
5 acquisition costs" (Baldino Decl. Exhibit J (Nationwide internal  
6 memorandum of Ricotta and Nuccitelli dated October 6, 1999,  
7 at 2)), and (c) a disgruntled former Jasco employee who, by reason  
8 of his theft of Jasco trade secrets, received many thousands of  
9 dollars in salary increases and bonuses (see Convertino Dep.  
10 at 44; Baldino Decl. Exhibit K).

11 Finally, Matsushita stated that an inference of conspiracy  
12 is not supported by mere proof of conduct that is as consistent  
13 with permissible competition as with illegal conspiracy, "without  
14 more." 475 U.S. at 597 n.21. The record described above,  
15 including the direct evidence as to the existence of a trade  
16 secret misappropriation conspiracy and the use of Jasco trade  
17 secrets demonstrably profiting at least Convertino, Nationwide,  
18 and Dana, and the circumstantial evidence from which Dana's  
19 knowledge, encouragement, ratification, and adoption of the theft  
20 and use of Jasco trade secrets could be inferred, surely provided  
21 the Matsushita "more."

22

#### CONCLUSION

23 We have considered all of Dana's arguments on this appeal  
24 and have found in them no basis for affirming the grant of summary

1 judgment dismissing and expunging Jasco's Claim. The judgment of  
2 the district court and the November 16, 2007 Order of the  
3 bankruptcy court are vacated, and the matter is remanded for  
4 further proceedings not inconsistent with this opinion.