

1 **WO**

2

3

4

5

6

7

IN THE UNITED STATES DISTRICT COURT

8

FOR THE DISTRICT OF ARIZONA

9

10 ORDNANCE TECHNOLOGIES)
(NORTH AMERICA) INC.,)

11 Plaintiff,)

12 vs.)

13 RAYTHEON COMPANY,)

14 Defendant.)

No. CV 12-386-TUC-CKJ

ORDER

15 _____)
16 RAYTHEON COMPANY AND)
RAYTHEON MISSILE SYSTEMS,)

17 Counterclaimants,)

18 vs.)

19 ORDNANCE TECHNOLOGIES)
20 (NORTH AMERICAN) INC.,)

21 Counter-defendant.)

22 _____)

23 Pending before the Court is Defendant's Motion for Summary Judgment on Plaintiff's
24 Third Claim for Relief (Doc. 95).¹ Argument was presented to the Court on January 30,
25 2015.

26

27

28

¹Defendant's Motion for Sanctions (Doc. 116) is addressed in a separate order.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. *Factual and Procedural Background*

Ordinance Technologies (North America), Inc. (collectively, with its predecessor in interest Ordinance Technologies (UK) Limited, “OTNA”) alleges it owns the proprietary and intellectual rights to the design of the Laser Multiple Warhead System (“LMWS”). Complaint (Doc. 1), p. 1-2.

The parties state that OTNA worked with Raytheon Missile Systems (collectively, with Raytheon Company, “Raytheon”), beginning in the early 1990s, on Multi Warhead/Multi Mission Warhead programs. OTNA has alleged it invested considerable sums on the research and development of warhead design, modeling and business development with the understanding it would remain the Warhead System Design Authority on the Multi Warhead/Multi Mission Warhead programs and that any intellectual property rights it created would remain the property of OTNA. However, by virtue of multiple agreements between OTNA and Raytheon, Raytheon was, and is, knowledgeable about numerous aspects of OTNA’s business including trade secrets and OTNA alleges that Raytheon was obligated to refrain from using and/or misappropriating OTNA’s trade secrets.

The parties agree OTNA and Raytheon entered into a Technical Assistance Agreement (“TAA”), in which Raytheon agreed to provide OTNA with technical data and defense services related to the integration of the LMWS for use in the Tactical Tomahawk Cruise Missile. The TAA was amended in 2005 (“Amended TAA”). The Amended TAA stated that Raytheon held no rights to the proprietary data at issue in this case and that OTNA the full ownership rights of proprietary data at issue in this case.

The Complaint states that OTNA’s “concerns first began to rise” about Raytheon’s alleged improper use of proprietary data in 2005. Complaint, ¶ 22. OTNA sent correspondence to Raytheon in November 2005, which included the following:

11/16/2005 Email from OTNA principal Stephen Cardy [(“Cardy”) to Raytheon Sr. Design Engineer Matt Buchanan [(“Buchanan”)]:

“OTL intend (sic) to fulfill its current contractual and legal obligations to

1 Raytheon. . . . We will also be seeking formal undertakings regarding use of
2 [OTNA] proprietary data provided to Raytheon. It is OTL's wish to resolve the
current situation. . . .”

3 11/17/2005 Letter from Stephen Cardy to Matt Buchanan:

4 “I would suggest that Raytheon review the TAA content in full as if this is a
5 ‘formal’ US DOD approved document the legal position of OTL is without
6 question. . . . OTL have not withheld design data, manufacturing data or
7 modelling data and very much regarded the program as a team effort and did
not perceive Raytheon as a competitor in terms of the warhead system or
elements of it. It may be that OTL has been commercially naive but now there
is an opportunity to identify where exactly OTL sits regarding the program.”

8 01/09/2006 Email from Stephen Cardy to Matt Buchanan:

9 “I have had meetings with OTL staff and our legal advisors. . . . As you are
10 aware OTL spent some 2 years defending its IPR [intellectual property rights]
11 against claims from SEI Italy. . . . Following discussions with our legal
advisors on the current position, their advice was that we should explore some
form of arbitration with Raytheon rather than enter into another potential
lengthy legal conflict.”

12 Raytheon Statement of Facts (“RSOF”), Exs. 5-7 (Docs. 97-5, 97-6, 97-7).

13 During his deposition, Cardy testified that, in 2005, Raytheon had not breached an
14 agreement, but that there were concerns over trusting Raytheon. Cardy Depo. (Doc. 147-1),
15 35:5-9. Cardy clarified that the concern was that Raytheon “[w]as going to violate the
16 TAA.” Cardy Depo. (Doc. 147-1), 37:6. In a declaration subsequently provided by Cardy,
17 Cardy summarized the circumstances in which he sent the aforementioned correspondence.
18 Cardy stated: “At the time I sent this correspondence, neither myself nor anyone else at OTL
19 believed that Raytheon was in breach of any contract between OTL and Raytheon, including
20 the Amended TAA. Rather, I was seeking an understanding regarding OTL’s future role
21 with Raytheon in the MWS space.” Cardy dec. (Doc. 108-1), pp. 3-4.

22 On May 18, 2012, OTNA filed an action against Raytheon Company alleging claims
23 of (Count 1) Statutory Misappropriation of Trade Secrets, (Count 2) Common Law
24 Misappropriation of Trade Secrets, (Count 3) Breach of Contract, (Count 4) Breach of
25 Implied Contract, (Count 5) Breach of Implied Covenant of Good Faith and Fair Dealing,
26 (Count 6) Unjust Enrichment, (Count 7) Conversion, (Count 8) Interference with Contract
27 or Business Expectancy, (Count 9) Unfair Competition, and (Count 10) a violation of the
28

1 Lanham Act. Complaint (Doc. 1). Raytheon filed an Answer and Counterclaim (Doc. 13)
2 on September 13, 2012.

3 On May 30, 2013, Raytheon filed a Motion for Summary Adjudication of the First,
4 Second and Fourth Through Tenth Claims for Relief and/or For Partial Judgment on the
5 Pleadings (Doc. 35). The Court granted this motion on February 26, 2014. OTNA's Count
6 Three alleging a Breach of Contract is the only remaining claim from OTNA's Complaint.
7 On January 3, 2014, this Court determined that the Count Three Breach of Contract claim
8 as alleged in the Complaint includes only the TAA and the Amended TAA.

9 On June 18, 2014, a Motion for Summary Judgment on Plaintiff's Third Claim for
10 Relief was filed by Raytheon (Doc. 95). OTNA has filed an Opposition (Doc. 108) and
11 Raytheon has filed a Reply (Doc. 145). Argument was presented to the Court on January 30,
12 2015.

13
14 II. *Motion for Summary Judgment Standard and Controverting Statement of Facts*

15 The parties have each made objections to the other party's statements of facts. A
16 motion for summary judgment is to set forth the specific facts (with reference to a specific
17 admissible portion of the record where the fact may be found) on which a party relies
18 separately from the memorandum of law. L.R.Civ. 56.1. Furthermore, the specific facts are
19 to be set forth in serial fashion and not in narrative form. *Id.*

20 Summary judgment may be granted if the movant shows "there is no genuine issue
21 as to any material fact and that the moving party is entitled to judgment as a matter of law."
22 Fed.R.Civ.P. 56(c). The disputed facts must be material. *Celotex Corp. v. Catrett*, 477 U.S.
23 317, 322-23 (1986). Therefore, the nonmoving party must demonstrate a dispute "over facts
24 that might affect the outcome of the suit under the governing law" to preclude entry of
25 summary judgment. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). A dispute
26 over material facts must be genuine. *Id.* A dispute about a material fact is genuine if "the
27 evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

28 A party opposing a properly supported summary judgment motion must set forth

1 specific facts demonstrating a genuine issue for trial. *Id.* Mere allegation and speculation
2 are not sufficient to create a factual dispute for purposes of summary judgment. *Witherow*
3 *v. Paff*, 52 F.3d 264, 266 (9th Cir. 1995) (per curiam); *see also Matsushita Elec. Indus. Co.*
4 *v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (the non-moving party ““must do more
5 than simply show that there is some metaphysical doubt as to the material facts””). “If the
6 evidence is merely colorable or is not significantly probative, summary judgment may be
7 granted.” *Anderson*, 477 U.S. at 249-50. However, the evidence of the nonmoving party is
8 to be believed and all justifiable inferences are to be drawn in his favor. *Id.* at 255.
9 However, the relevant facts are to be determined and inferences drawn in favor of the
10 nonmoving party “to the extent supportable by the record[.]” *Scott v. Harris*, 550 U.S. 372
11 n. 8 (2007).

12 The Court is not to make credibility determinations with respect to the evidence
13 offered and is required to draw all inferences in a light most favorable to the non-moving
14 party. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th
15 Cir. 1987), citing *Matsushita Elec.*, 475 U.S. at 587 (1986). Summary judgment is not
16 appropriate "where contradictory inferences may reasonably be drawn from undisputed
17 evidentiary facts[.]" *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324 (9th
18 Cir. 1980).

19 Further, declarations and other evidence that would not be admissible may be stricken.
20 *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 484 (9th Cir. 1991). As pointed out by
21 Raytheon, when a declaration grossly contradicts the allegations of the Complaint, the
22 evidence, and the declarant’s own sworn testimony, such a declaration may be a sham.
23 *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 954 (9th Cir. 1999) (holding that the plaintiff
24 sought to create “sham issues of fact” for the first time in her affidavit and directly
25 contradicted her prior deposition testimony); *Christopher v. Spectra Elec. Services, Inc.*, No.
26 CV-12-00345-PHX-DGC, 2012 WL 5471779, **1-2 (D.Ariz., Nov. 09, 2012) (“a party
27 cannot create an issue of fact to avoid summary judgment by submitting an affidavit that
28 flatly contradicts prior sworn testimony”).

1 The Court will not specifically address each dispute, but will only consider admissible
2 evidence that is supported by specific facts that may show a genuine issue of material fact
3 in resolving the issues. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct.
4 2505, 2510 (1986). As to the Cardy deposition and declaration, the Court finds the
5 statements regarding the statute of limitations issue are not directly contradictory. In the
6 deposition, Cardy stated that Raytheon had not breached an agreement, but that there were
7 concerns over trusting Raytheon. This statement is consistent with Cardy’s statement in the
8 declaration that OTNA did not believe Raytheon was in breach of any contract at the time
9 of the correspondence. However, to any extent Cardy’s declaration contradicts his deposition
10 testimony, the Court will not consider those portions of his declaration in ruling on the
11 pending motion.

12 13 III. *Statute of Limitations*

14 The parties agree that a six year statute of limitations applies to the breach of contract
15 claim. A.R.S. § 12-548. Raytheon argues that OTNA’s conduct in November 2005 alleging
16 the improper use of proprietary data establishes that OTNA believed it had a claim as of late
17 2005 and early 2006. OTNA asserts the references to proprietary issues were in the context
18 of an ongoing discussion between the parties about performance under the contract.

19 OTNA points out the correspondence does not accuse Raytheon of a breach of
20 contract and, in fact, reaffirms the contract. OTNA argues that a breach of contract cause of
21 action does not accrue until a plaintiff discovers or should have discovered by reasonable
22 diligence circumstances establishing breach. *Gust, Rosenfeld & Henderson v. Prudential Ins.*
23 *Co. of America*, 182 Ariz. 586, 588 (1995). At a minimum, OTNA argues that triable issues
24 of fact exist which preclude summary judgment on the statute of limitations issue. *Gust*, 182
25 Ariz. at 591 (“When discovery occurs and a cause of action accrues are usually and
26 necessarily questions of fact for the jury.”).

27 OTNA asserts that the correspondence was addressing concerns as to the results of
28 a field “sled test” at Pendine in November 2005 (“Pendine test”) and cost increases and

1 expenses (and their allocation). Further, OTNA asserts the parties continued performing
2 under the contract. Additionally, the correspondence and the subsequent conduct of the
3 parties shows an ongoing contractual relationship that was expected to continue. Impliedly,
4 this is as opposed to a relationship that was terminated because of a belief of a breach of
5 contract. OTNA asserts the evidence shows that, after the correspondence, Raytheon
6 reassured OTNA of an ongoing relationship, the parties continued to work together. In other
7 words, OTNA asserts it “had no knowledge of any breach of contract, because in fact that
8 contract was not breached, and was instead reaffirmed by word and deed at the time.”

9 Raytheon asserts that the results of Pendine test are not material because OTNA
10 admits this test was conducted under a separate contract. However, consideration of the
11 context of the correspondence is appropriate. Although Raytheon asserts the Cardy
12 declaration should be disregarded because it contradicts his deposition testimony, other
13 evidence supports OTNA’s argument. The deposition testimony of Buchanan indicates
14 discussions occurred between Raytheon and OTNA as to ongoing responsibilities. The
15 allegations in the Complaint show that OTNA had concerns about Raytheon’s use of OTNA
16 proprietary data and had asked Raytheon in November 2005 if Raytheon had passed on
17 OTNA propriety data. *See e.g.* Complaint, Doc. 1, ¶¶ 22 and 23.

18 Raytheon asserts the Complaint and the correspondence establishes OTNA knew of
19 Raytheon’s alleged use of proprietary data. For example, the Complaint refers to Raytheon
20 briefings that used OTNA proprietary data. However, the Complaint does not clarify what
21 type of briefings are being referred to – such reference in a briefing presented only to
22 Raytheon and OTNA personnel working jointly on a project may have different ramifications
23 than including such a reference in legal documents or presentations to third parties.
24 Raytheon also asserts the Court previously determined that OTNA knew of the alleged
25 misappropriation. *See* February 26, 2014, Order, Doc. 85, pp. 7-9. However, the Court’s
26 statements in that Order were referring to knowledge of OTNA as expressed in a 2009
27 infringement letter, not knowledge as allegedly expressed in the 2005 correspondence.

28 In the Complaint, OTNA refers to concerns of OTNA as to Raytheon’s use of

1 proprietary data. Complaint, Doc. 1, ¶ 22. This shows that OTNA had suspicions as to
2 Raytheon's use of proprietary data. The Court of Appeals of Arizona has stated that the
3 "discovery rule is not intended to allow plaintiffs to ignore their suspicions and postpone
4 their investigations. Indeed, plaintiffs have a 'duty to investigate with due diligence to
5 discover the necessary facts.'" *Forrer v. Johansen*, 1 CA-CV 10-0712, 2011 WL 3209844
6 *3 (Ariz.App. July 28, 2011) (citations omitted). Further, the language of the
7 correspondence is even more conclusive. For example, the correspondence refers to the use
8 of OTNA propriety data provided to Raytheon. RSOF, Ex. 5, November 16, 2005 Email
9 from Cardy to Buchanan (Doc. 97-5). The correspondence also refers to discussions with
10 legal counsel as to whether OTNA should pursue legal action or arbitration. RSOF, Ex. 7,
11 January 9, 2006 Email from Cardy to Buchanan (Doc. 97-7).

12 While when a cause of action accrues is usually a question of fact for a jury, *Gust*, 182
13 Ariz. at 591, the issue should be decided as a matter of law when the evidence is insufficient
14 to dispute the accrual of the statute of limitations. *See generally Rhoads v. Harvey*
15 *Publications, Inc.*, 145 Ariz. 142, 700 P.2d 840 (App. 1984). Although other issues were
16 raised in the correspondence, the 2005 and 2006 emails make clear that OTNA had
17 concluded that Raytheon had improperly used the proprietary data. Although Cardy's
18 deposition testimony and declaration indicate that neither he nor anyone at OTNA believed
19 Raytheon was in breach of any contract, the language of the correspondence indicates that
20 he (and others at OTNA) believed Raytheon had improperly used proprietary data. In other
21 words, *OTNA knew of Raytheon's conduct or the facts giving rise to the claim* when Cardy
22 sent the correspondence. *See e.g. Matusik v. Dorn*, 157 Ariz. 249, 251, 758 P.2d 346, 349
23 (App. 1988) ("the cause of action does not accrue until the plaintiff knows, or in the exercise
24 of reasonable diligence should know, of the injury"); *Logerquist v. Danforth*, 188 Ariz. 16,
25 932 P.2d 281 (App. 1996); *see also Little v. State*, 225 Ariz. 466, 240 P.3d 861, 864 (App.
26 2010).

27 Furthermore, contrary to OTNA's assertion, that the relationship continued between
28 Raytheon and OTNA does not support OTNA's implication that the correspondence only

1 confirmed and clarified that ongoing relationship. Rather, as stated by another district court:

2 [Plaintiff] was certainly entitled to make this decision – that is, to decline to sue (or
3 to even ask questions about its suspicions) in order to maintain its business
4 relationship with [Defendant], and to wait instead . . . But this decision has
5 consequences for statute of limitations purposes.

6 *AT Engine Controls Ltd. V. Goodrich Pump & Engine Control Systems, Inc.*, No. 3:10-cv-
7 01539 (JAM), 2014 WL 7270160 (D.Conn. 2014) (without discussion, appears to agree
8 claim for breach of contract for use of proprietary data is permitted).²

9 As a matter of law, the three emails establish that OTNA knew by no later than
10 January 9, 2006, when Cardy informed Buchanan that OTNA preferred to arbitrate
11 intellectual property disputes rather than engaging in a lengthy legal dispute, that it had
12 discovered (or should have discovered with reasonable diligence) a claim against Raytheon
13 regarding Raytheon’s use of the proprietary data. The statute of limitations had expired when
14 the Complaint was filed on May 18, 2012. Summary judgment in favor of Raytheon as to
15 Count III, the breach of contract claim, is appropriate.

16 Accordingly, IT IS ORDERED:

17 1. The Motion to File Exhibits and Unredacted Briefs Under Seal (Doc. 143 is
18 GRANTED. The Clerk of Court shall file the deposition transcript excerpts of Thomas
19 Bootes, Matthew Buchanan, and Stephen Cardy, together with the unredacted version of
20 Raytheon’s Reply and Response to OTNA’s Statement of Facts (Docs. 146 and 147)
21 UNDER SEAL.

22 2. The Motion for Summary Judgment on Plaintiff’s Third Claim for Relief (Doc.
23 95) is GRANTED.

24
25
26 ²OTNA could have alternatively chose to terminate the agreement with Raytheon. *See*
27 *e.g., PharMetrics, Inc. v. Source Healthcare Analytics, Inc.*, 21 Mass.L.Rptr. 526 (Mass
28 Super. 2006) (right to terminate agreement if confidential information is disclosed
inappropriately).

