Blaszkowski et al v. Mars Inc. et al Doc. 474 Att. 1

LEXSEE 174 FSUPP2D 1315

NILES AUDIO CORPORATION, a Florida Corporation, Plaintiff, v. OEM SYSTEMS COMPANY, INC., et. al., Defendants.

Case No. 01-3259-CIV-GRAHAM/TURNOFF

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

174 F. Supp. 2d 1315; 2001 U.S. Dist. LEXIS 23086

October 30, 2001, Decided
October 30, 2001, Filed

DISPOSITION: [**1] Defendants' Motion to Dismiss GRANTED in PART and DENIED in PART. Count DISMISSED.

COUNSEL: For NILES AUDIO CORPORATION, plaintiff: Stephen E. Nagin, Stacey Schauer Dawes, Michael David Spivack, Nagin Gallop & Figueredo, Ronald Peter Roman, Miami, FL.

For OEM SYSTEMS COMPANY, INC., INTERLECT MARKETING, INC., defendants: Robert Martin Schwartz, Kevin J. O'Grady, Matthew Scott Nelles, Ruden McClosky Smith Schuster & Russell, Fort Lauderdale, FL.

JUDGES: DONALD L. GRAHAM, UNITED STATES DISTRICT JUDGE.

OPINION BY: DONALD L. GRAHAM

OPINION

[*1316] **ORDER**

THIS CAUSE came before the Court upon Defendants OEM'S and Interlect's Motion to Dismiss and Memorandum in Support.

THE COURT has considered the Motion, the pertinent portions of the record and is otherwise fully advised in the premises.

BACKGROUND

Plaintiff Niles Audio Corporation ("Niles") manufactures, or has manufactured by others to its specifications, various audio/video equipment and accessories, including loudspeakers, control systems for home electronics and home theater [*1317] equipment. Since 1994, Niles has promoted and sold a line of loudspeakers known by the designation "OS." There are currently six models in Niles' OS line.

[**2] On July 24, 2001, Niles filed its Complaint against Defendants OEM Systems Company, Inc. ("OEM"), Pittway Corporation d/b/a ADI ("Pittway"), [1] Interlect Marketing, Inc. ("Interlect") and one or more John Does (collectively "Defendants") alleging that Defendants are promoting and offering for sale certain audio speakers which appear to be copied from the design of Niles OS speakers. In particular, Niles alleges that "OEM CS-516" speakers -- promoted and offered by Defendants -- are nearly identical in appearance to the Niles OS Speakers and incorporate all of the distinguishing features of the Niles OS Speakers, including the unique triangular housing, swivel bracket, indented fastening knobs, grille and baffle.

1 On August 21, 2001, Niles voluntarily dismissed Defendant Pittway.

The Complaint contains four counts. In Count I, Niles alleges federal trade dress infringement and unfair competition under *15 U.S.C. § 1125(a)* against all Defendants. In Count II, Niles alleges common law [**3] unfair competition against all Defendants. In Count III, Niles alleges violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") against all Defendants. Finally, in Count IV, Niles alleges breach of the settlement agreement against Defendant Interlect. [2]

2 This is the fifth action brought by Niles for violation of the trade dress associated with its OS line of speakers. Interlect was a defendant in one of those prior actions, style *Niles Audio Corporation v RBH Sound, Inc; Daveco/Omage Corpora-*

Exhibit "A"

Dockets.Justia.com

tion; Interlect Marketing; and one or more John Does; United States District Court, Southern District of Florida Case No. 00-1609-CIV-KING/O'SULLIVAN. In that action, Niles and Interlect resolved their differences by entering into a settlement agreement. Count IV of this agreement appears to be Niles' attempt to enforce that settlement agreement.

On September 7, 2001, Defendants moved to dismiss the Complaint, arguing that Counts I, II and IV -- all predicated on trade dress infringement -- fail [**4] because the allegedly distinctive and unique features of Niles' OS speakers are functional and because Niles cannot establish that its speakers have acquired a secondary meaning. In addition, Defendants argue that as a competitor of Defendants, rather than a consumer, Niles is precluded from bring a FDUTPA claim.

DISCUSSION

Standard on Motion to Dismiss

A complaint should not be dismissed "for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts" that would entitle the plaintiff to relief. *Conley v. Gibson, 355 U.S. 41, 45, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *Bracewell v. Nicholson Air Services, Inc., 680 F.2d 103, 104 (11th Cir. 1982)*. In deciding a motion to dismiss, a court can only examine the four corners of the complaint. See *Crowell v. Morgan Stanley Dean Witter Services, Co., Inc., 87 F. Supp. 2d 1287 (S.D.Fla. 2000)*. Additionally, a court must accept a plaintiff's well pled facts as true and construe the complaint in the light most favorable to plaintiff. *Scheuer v. Rhodes, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*. The threshold [**5] of sufficiency that a complaint must meet is exceedingly low. *Ancata v. Prison Health Servs. Inc., 769 F.2d 700, 703 (11th Cir. 1985)*; *Geidel v. City of Bradenton Beach, 56 F. Supp. 2d 1359, 1362 (M.D. Fla. 1999)*.

I. CLAIMS PREDICATED ON TRADE DRESS INFRINGEMENT

Niles primary claim against Defendants is a trade dress infringement claim [*1318] based on *15 U.S.C. § 1125*, known as Section 43(a) of the Lanham Act. [3] It provides in relevant part:

> Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol or device . . . or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

In order to succeed on a claim of trade dress infringement, plaintiff must demonstrate 1) that the product is distinctive or has developed secondary meaning, 2) that the features in question are nonfunctional, and 3) that the similarity between the parties [**6] products is likely to cause confusion. See *Epic Metals Corp. v. Souliere, 99 F.3d 1034, 1038 (11th Cir. 1996)*.

3 Count II, common law unfair competition, and Count IV, breach of settlement agreement, are based primarily on the same allegations as Niles' federal trade dress infringement claim.

Nonfunctional

In its Complaint, Niles alleges that "all of Niles OS Speakers have a unique, distinctive and recognizable configuration and trade dress, which serve no function other than to distinguish the Niles OS line of audio speakers from Niles' competitors' speakers." (Compl. P 13). Accordingly, Niles has made the requisite allegation that the features of its speakers are nonfunctional. Defendants, however, contend that the promotional brochure displaying Niles' loudspeakers -- attached as Exhibit A to the Complaint -- belies Niles' allegations regarding functionality. In support of this argument, Defendants point to the following statements in the promotional brochure:

> All OS speakers [**7] feature a rigid, acoustically inert enclosure and tapered shape which reduce standing waves that can cancel out sound at certain frequencies, so you can enjoy deep controlled base and crystal-clear acoustics.
>
> Elegant design. Available in white or black, the OS series speakers incorporate an elegantly tapered cabinet that can be tucked neatly into corners or under eaves. All OS models feature a swiveling U-shaped mounting bracket that enables the speaker to be adjusted to the optimum position and quickly locked into place. All speakers utilize MicroPerf, a design with hundreds of perforations that mask the baffle elements, yet create an acoustically transparent grille. "Bottom line" they sound as good as they look.
>
> Tapered to tuck neatly into corners or under eaves, OS loudspeakers come with

> a clever pivoting bracket that provides endless mounting solutions.

(Compl. Exhibit A, pg. 6). Defendants ask the Court to compare these statements with the allegations in the Complaint and make a determination that the contested features of Niles' OS Speakers are "plainly functional."

A functional characteristic is one that is "essential to the use or purpose of the article or [**8] [one that] affects the cost or quality of the article." *Epic Metals Corp. v. Souliere, 99 F.3d at 1039*. "There is no bright line test for functionality." Id. The question of whether features are nonfunctional is one of fact. *Id. at 1038*.

It is uncontested that Niles alleges that the trade dress associated with its OS speakers is non-functional. Although Defendants argue that the promotional brochures negate these allegations, the Court finds that it cannot determine -- at this [*1319] time -- whether Niles' statements in the promotional brochures actually contradict the allegations in the Complaint. The Court is not an expert in audio speakers. Therefore, it would be improper for the Court to assume that the language in the brochures, describing various features of the OS speakers, mandates a finding that those features are functional. Indeed, these are factual issues which can only be resolved after a full record is presented to the Court. Accordingly, Defendants functionality argument fails.

Secondary Meaning

Defendants also argue that Niles fails to state a claim for trade dress infringement because the allegedly distinctive features of Niles' [**9] OS Speakers have not acquired a secondary meaning. Defendants once again rely on the promotional brochure attached to the Complaint to make this argument.

Questions relating to secondary meaning, just like questions relating to functionality, are questions of fact. See *Brooks Shoe Manufacturing Co., Inc. v. Suave Shoe Corp., 716 F.2d 854, 860 (11th Cir. 1983)*. Niles has properly alleged that the features of its OS Speakers have secondary meaning. The Court cannot determine, at this time, whether Niles' Os Speakers do not have secondary meaning. As stated above, the Court needs a full record to make such factual determinations. Accordingly, Defendants' motion to dismiss for failure to state a claim for trade dress infringement must be denied.

II. FDUTPA CLAIM

Defendants also argue that Niles fails to state a claim under FDUTPA because Niles is a competitor of Defendants and not a consumer. Due to the recent amendments to FDUTPA, Defendants' argument fails.

Niles FDUTPA claim is based on *Florida Statute § 501.211*, which authorizes a private cause of action for injunctive relief (*§ 501.211(1)*) and damages (*§ 501.211(2)*). Prior to July 1, 2001, *Section* [**10] *501.211* of FDUTPA provided:

> (1)Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.
>
> (2) In any individual action brought by a *consumer* who has suffered a loss as a result of a violation of this part, such *consumer* may recover actual damages.

Based on the plain language of this version of the statute, Courts have determined that competitors could seek declaratory relief under *§ 501.211(1)*, but that only consumers could seek damages under *§ 501.211(2)*. See *Big Tomato v. Tasty Concepts, Inc., 972 F. Supp. 662, 664 (S.D. Fla. 1997)*; *Klinger v. Weekly World News, Inc., 747 F. Supp. 1477, 1480 (S.D. Fla. 1990)*("Without modifying any language, the plain language of [§ 502.211(1)] includes a broader class of complainants than merely 'consumers'"). Accordingly, the law is clear that Niles, as a competitor, may bring an action for declaratory relief under *§ 501.211(1)*.

[**11] The Florida Legislature recently amended several sections of FDUTPA, including *§ 501.211(2)*, effective July 1, 2001. Section 501.221(2) now reads:

> In any action brought by a *person* who has suffered a loss as a result of a violation of this part, such *person* may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105.

The Court finds that the Florida Legislature's replacement of the word *consumer* [*1320] with the word *person*, demonstrates an intent to allow a broader base of complainants, including competitors such as Niles, to seek damages. Indeed, this is similar to the language in *Section 501.211(1)*, in which "anyone aggrieved" may bring an action for declaratory relief. See *Big Tomato, 972 F. Supp. at 664*. Accordingly, the Court finds that Niles' may bring a claim for both damages and declaratory relief under *Section 501.211*.

III. BREACH OF SETTLEMENT AGREEMENT

In Count IV, Niles alleges breach of the settlement agreement against Defendant Interlect. The settlement agreement referenced in Count IV was reached in *Niles Audio Corporation v. RBH Sound, Inc.; Daveco/Omage Corporation; Interlect* [**12] *Marketing; and One or More John Does*, Case No. 00-1609-CIV-KING/O'SULLIVAN before United States District Judge James Lawrence King. The enforcement of this settlement agreement should be sought in the aforementioned case and not as a newly filed count in this action. Accordingly, Count IV is dismissed in this action.

CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss is GRANTED in PART and DENIED in PART. It is further,

ORDERED AND ADJUDGED that Count IV is DISMISSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of October, 2001.

DONALD L. GRAHAM

UNITED STATES DISTRICT JUDGE

LEXSEE 2002 USDISTLEXIS 28085

BECKY LYNN GRITZKE, Plaintiff, v. M.R.A. HOLDING, LLC, Defendant.

CASE NO. 4:01cv495-RH

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

2002 U.S. Dist. LEXIS 28085

March 14, 2002, Decided
March 16, 2002, Filed

DISPOSITION: [*1] Motion to dismiss denied.

COUNSEL: For BECKY LYNN GRITZKE, plaintiff: DEAN ROBERT LEBOEUF, ESQ, BROOKS & LEBOEUF, TALLAHASSEE, FL. KELLY OVERSTREET JOHNSON, ESQ, KELLY ANN O'KEEFE, ESQ, BROAD & CASSEL, TALLAHASSEE, FL. MATTHEW K FOSTER, ESQ, EDWARD T BAUER, ESQ, BROOKS LEBOEUF & BENNETT PA, TALLAHASSEE, FL.

For M R A HOLDING LLC, defendant: MICHAEL W MARCIL, ESQ, GUNSTER YOAKLEY VALDEZ-FAULI ETC, FT LAUDERDALE, FL. BRYAN SAMUEL MILLER, ESQ, GUNSTER YOAKLEY & STEWART PA, WEST PALM BEACH, FL.

JUDGES: Robert L. Hinkle, United States District Judge.

OPINION BY: Robert L. Hinkle

OPINION
ORDER DENYING MOTION TO DISMISS
Plaintiff, while a Florida college student, was part of the crowd at Mardi Gras and exposed her breasts. Defendant, which makes and sells videotapes, recorded plaintiff's indiscretion and incorporated it into a videotape entitled "Girls Gone Wild," which defendant has sold in the United States and abroad. According to the complaint, defendant used plaintiff's photograph, with her breasts exposed, on the videotape package and in widely disseminated advertisements, as well as on defendant's web site, all without plaintiff's [*2] permission.
Plaintiff's five-count complaint seeks recovery from defendant for violation of the Florida statute prohibiting unauthorized publication of a person's name or likeness for commercial or advertising purposes (counts 1 and 2), for common law invasion of privacy (counts 3 and 4), and for violation of *Florida's Unfair and Deceptive Trade Practices Act* (count 5). Defendant has moved to dismiss for failure to state a claim on which relief may be granted. I deny the motion.
Standards Governing Motion To Dismiss
For purposes of the motion to dismiss, the allegations of the complaint of course must be accepted as true. Thus, for example, although defendant suggests it merely used videotape of the crowd at Mardi Gras as part of a true and accurate depiction of a newsworthy event - much as CBS might cover a presidential speech or Fox might cover the Super Bowl - the complaint alleges, and for purposes of this ruling I accept as true, that defendant made plaintiff the focus of advertisements of its videotape, by prominently displaying plaintiff on the videotape package, in advertisements, and on defendant's web site.
The applicable legal [*3] standard is this. A motion to dismiss for failure to state a claim may be granted only if it appears to a certainty that the plaintiff would be unable to recover under any set of facts that could be proved in support of the complaint. See. e.g., *Hunnings v. Texaco, Inc., 29 F.3d 1480, 1484 (11th Cir. 1994).*
Florida Statutes § 540.08
Plaintiff first seeks recovery under *Florida Statutes § 540.08,* which provides that, without consent,

> No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person . . .

§ 540.08(1), Fla. Stat. (2001). The statute explicitly creates a cause of action for compensatory and punitive

damages and injunctive relief. *§ 540.08(2)*, Fla. Stat. (2001)

Plaintiff has squarely alleged that defendant published her photograph in Florida for commercial and advertising purposes - specifically on the package of defendant's videotape and in advertisements therefor - and [*4] that defendant did so without her permission. This states a claim under *§ 540.08*.

Defendant asserts, however, that the Florida statute is inapplicable, because the videotape was made in Louisiana. The short answer is that, according to the complaint, the videotape also was advertised and sold in Florida. By its terms, *§ 540.08* applies to any publication or other public use of a name or likeness in Florida, not merely creation of the offending material in Florida. [1]

1 That the Florida legislature intended the statute to apply to any publication of a name or likeness in Florida would not necessarily end the inquiry; there are of course *Due Process* and *Commerce Clause* limitations on a state legislature's authority to regulate extra-territorial or interstate events. See, e.g., *Gerling Global Reinsurance Corp. of America v. Nelson, 267 F.3d 1228 (11th Cir. 2001)* (holding that application of specific state statute to certain extra-territorial contracts would violate Due Process Clause); *Flood v. Kuhn, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)* (holding that application of state antitrust laws to business of baseball would violate *Commerce Clause*). But *§ 540.08*, as applied to sales and advertising in Florida, does not run afoul of these principles. To the contrary, even under the choice of law standards governing common law claims, application of Florida law to the case at bar is appropriate, as discussed *infra*.

[*5] **Common Law Invasion of Privacy**

Florida's common law recognizes four branches of the tort of invasion of privacy. In her common law counts, plaintiff invokes two of the four: misappropriation of plaintiff's likeness (by commercial exploitation of her photograph without her consent), and portraying plaintiff in a false light (by falsely suggesting plaintiff willingly participated in and endorsed defendant's videotape). These are recognized causes of action in Florida. See, e.g., *Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (Fla. 1944)*; *Forsberg v. Housing Auth. of Miami Beach, 455 So. 2d 373, 376 (Fla. 1984)*. If plaintiff makes an adequate factual showing in support of these counts, she will be entitled to recover. Under the *Hunnings* standard, the motion to dismiss these counts therefore must be denied.

Defendant asserts, however, that the law of Louisiana, not Florida, governs these counts. That is incorrect.

A federal court, sitting in diversity, applies the choice of law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)* [*6] . Florida has adopted the approach of the Restatement (Second) of Conflict of Laws. See *Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980)*.

The Restatement specifically addresses multistate invasion of privacy cases:

> *§ 153. MULTISTATE INVASION OF PRIVACY*
>
> The rights and liabilities that arise from matter that invades a plaintiff's right of privacy and is contained in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6. This will usually be the state where the Plaintiff was domiciled at the time if the matter complained of was published in that state.

Restatement (Second) of Conflict of Laws § 153 (1971) (emphasis added). The case at bar involves a multistate publication that allegedly invaded the plaintiff's privacy and had the most significant relationship [*7] with the State of Florida, where the plaintiff is domiciled, just as is "usually" the case. Indeed, nothing about the case at bar distinguishes it from the typical case addressed by the highlighted language of *§ 153*.

That this is so is confirmed by the comparatively less significant relationship of this alleged tort with any other jurisdiction. Defendant is a California entity, but even defendant makes no claim California law should apply. The videotape was made in Louisiana; however, it was not the making of the tape but its publication and marketing that allegedly were tortious and have caused damage. The publication and marketing have extended to many jurisdictions, including Florida, but it is only in Florida that the publication and marketing have had their greatest impact. According to the allegations of the complaint, defendant videotaped a Florida citizen and chose to publish and market the product in Florida, and elsewhere, foreseeably causing the plaintiff to suffer damage in Florida. Florida is the state with the most substantial relationship to this alleged tort, just as *§ 153* [*8] makes clear.

This conclusion is consistent with the general principles from which *§ 153* is derived. Thus the *Restatement's § 6*, which is cited in *§ 153*, provides that a court will follow a statutory choice-of-law directive of its own state (here there is none) and otherwise will consider various factors, including the "protection of justified expectations." *Restatement (Second) of Conflict of Laws § 6* (1971). Florida citizens justifiably expect not to have their likenesses marketed in this manner in Florida without their

consent, and that is so without regard to the law of Louisiana on this subject.
Similarly, *§ 145*, the general tort choice of law provision of which § 153 is a specific application, lists as relevant factors "the place where the injury occurred" (in this instance Florida), "the place where the conduct causing injury occurred" (partly elsewhere but also in Florida, one of the states where the videotape was sold), "the domicil ... of the parties" (Florida for the plaintiff and [*9] California for the defendant), and "the place where the relationship, if any, between the parties is centered" (perhaps Louisiana, where defendant videotaped defendant, although that was done surreptitiously and hardly created a "relationship"). *Restatement (Second) of Conflict of Laws § 145* (1971). On balance, these factors favor Florida, just as *§ 153* recognizes. [2]

2 Defendant asserts the governing law is that of Louisiana. Even if that were true, it apparently would make no substantive difference. Louisiana, like Florida, recognizes the common law tort of invasion of privacy, with the same four branches, including the two invoked by plaintiff here. See. e.g., *Jaubert v. Crowley Post-Signal. Inc., 375 So. 2d 1386 (La. 1979)*. It is true, as defendant asserts, that the Louisiana Supreme Court has said "no right of privacy attaches to material in the public view," *id. at 1391*, but this is hardly a statement that a commercial vendor may use an unconsenting person as its poster-person, prominently displayed in advertisements or depicted in a false light, just because the individual was initially photographed in public. See *Sharrif v. American Broadcasting Co., 613 So.2d 768 (La. App. 4th Cir. 1993)*. Defendant cites no authority to the contrary, and I am aware of none.

[*10] **Florida's Unfair and Deceptive Trade Practices Act**

Plaintiff next asserts a claim under Florida's Deceptive and Unfair Trade Practices Act ("DUTPA"), *Florida Statutes §§ 501.201 et seq.* (2001). DUTPA makes unlawful "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Fla. Stat. § 501.204(1)*. Plaintiff's allegation that defendant has used her photograph without her permission, in a manner falsely suggesting that plaintiff has endorsed defendant's product, adequately alleges a violation of DUTPA, under the *Hunnings* standard. [3]

3 To state a claim under DUTPA, a plaintiff must be aggrieved by a violation of the statute. See *Davis v. Powertel, Inc., 776 So. 2d 971, 975 (Fla. 1st DCA 2000)*. "The Act is designed to protect not only the rights of litigants, but also the rights of the consuming public at large." *Id.*; see also *Sarkis v. Pafford Oil Co., Inc., 697 So. 2d 524 (Fla. 1st DCA 1997)*; *Delgado v. J.W. Courtesy Pontiac GMC Truck, Inc., 693 So. 2d 602 (Fla. 2d DCA 1997)*.

[*11] Defendant asserts, however, that plaintiff lacks standing to bring a DUTPA claim, because plaintiff is not a buyer of defendant's product. The statute itself squarely refutes defendant's position.
Prior to July 1, 2001, DUTPA created private rights of action for both declaratory and injunctive relief, on the one hand, and damages, on the other. But the statute made declaratory and injunctive relief available to a broader class of plaintiffs than could recover damages. The statute allowed "anyone aggrieved" by a violation of the statute to bring a private action for declaratory or injunctive relief, see *§ 501.211(1)*, Fla. Stat. (2000), but created a private right of action for damages only in favor of a "consumer." See *§ 501.211(2)*, Fla. Stat. (2000), *amended by* Ch. 2001-39, sec. 6, Laws of Fla., Ch. 2001-214, sec. 27, Laws of Fla. The legislature's limitation of the damages remedy to consumers, while allowing "anyone aggrieved" to bring an action for declaratory or injunctive relief, made clear that although the damages remedy was available only to consumers, declaratory and injunctive relief were available [*12] to anyone aggrieved. See *Klinger v. Weekly World News. Inc., 747 F. Supp. 1477, 1480 (S.D. Fla. 1990)* ("It appears that the legislature's choice of the word 'anyone' in *§ 501.211(1)*, instead of the word 'consumer' which it used in *§ 501.211(2)*, seems deliberate and implies that the scope of the injunctive remedy is greater than the actual damage remedy"); *Big Tomato v. Tasty Concepts. Inc., 972 F. Supp. 662 (S.D. Fla. 1997)* (same)
In 2001 the legislature amended *§ 501.211(2)* to allow a damages action by any "person," not just by a consumer. See *§ 501.211(2)*, Fla. Stat. (2001). This amendment was a deliberate legislative decision to make damages available not just to consumers but to others injured by violations of DUTPA. See *Niles Audio Corporation V. OEM Systems Company, Inc., 174 F. Supp. 2d 1315, 1319-20 (S.D. Fla. 2001)* (concluding that legislature's replacement of the word "consumer" with the word "person" in *§ 501.211(2)* was intended to make damages remedy available [*13] to anyone aggrieved by violation of statute). Plaintiff is a "person" who, according to the complaint, has been damaged by defendant's violation of DUTPA; under *§ 501.211(2)* as amended, plaintiff has sufficiently stated a claim.

First Amendment

Defendant also asserts that allowing plaintiff to recover on her various theories would contravene the *First Amendment*, because, defendant says, it had a *First Amendment* right to record and disseminate footage of a newsworthy public event. Accepting for purposes of argument that defendant did indeed have such a right, this does not help defendant on the instant motion to dismiss, because the complaint alleges that defendant made plain-

tiff's photograph a focus of the videotape package and advertisements, suggesting plaintiff's willing participation in and endorsement of the product. The *First Amendment* provides no right to make an unconsenting individual the poster-person for a commercial product, as plaintiff alleges defendant has done.

Conclusion

For these [*14] reasons,

IT IS ORDERED:

Defendant's motion to dismiss (document 5) is DENIED.

SO ORDERED this 14th day of March, 2002.

/s/ Robert L. Hinkle United States District Judge

LEXSEE 2008 USDISTLEXIS 9464

JAMES D. HINSON ELECTRICAL CONTRACTING CO., INC., Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. BELLSOUTH TELECOMMUNICATIONS, INC., Defendant.

Case No. 3:07-cv-598-J-32MCR

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION

2008 U.S. Dist. LEXIS 9464

February 8, 2008, Decided
February 8, 2008, Filed

COUNSEL: [*1] For James D. Hinson Electrical Contracting Co., Inc., individually and on behalf of all others similarly situated, Plaintiff: David Hagy, LEAD ATTORNEY, Kenneth S. Canfield, LEAD ATTORNEY, Robert E. Shields, Doffermyre, Shields, Canfield, Knowles & Devine, LLC, Atlanta, GA, John Sam Kalil, LEAD ATTORNEY, Law Office of John S. Kalil, P.A., Jacksonville, FL.

For BellSouth Telecommunications, Inc., Defendant: Albert L. Frevola, Jr., LEAD ATTORNEY, Richard G. Gordon, LEAD ATTORNEY, Vanessa D. Sloat-Rogers, LEAD ATTORNEY, Gordon, Hargrove & James, PA*, Lauderdale, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA.

JUDGES: TIMOTHY J. CORRIGAN, United States District Judge.

OPINION BY: TIMOTHY J. CORRIGAN

OPINION

ORDER
[1]

1 Under the E-Government Act of 2002, this is a written opinion and therefore is available electronically. However, it is intended to decide the motion addressed herein and is not intended for official publication or to serve as precedent.

This case is before the Court on Defendant BellSouth Telecommunications Inc.'s (BellSouth) Motion to Dismiss (Doc. 19) and Plaintiff James D. Hinson Electrical Contracting Co., Inc.'s (Hinson) Response thereto. (Doc. 24.) The Court conducted a hearing [*2] on Defendant's motion on November 29, 2007.

I. Background

This lawsuit arises out of actions taken pursuant to the Florida Underground Facility Damage Prevention and Safety Act. *Fla. Stat. § 556.101 et seq* (2007). Under the statute, excavators give advance notice to utility companies of their activities and the utility marks its underground lines so as to prevent damage or a disruption of service to consumers. *Fla. Stat. § 556.105* (2007). If the underground lines of the utility are nonetheless damaged despite being properly marked, the statute creates a rebuttable presumption of negligence and the excavator is liable to the utility "for the total sum of the losses to all member operators involved as those costs are normally computed." *Fla. Stat. § 556.106* (2007).

Hinson is an electrical contractor that regularly excavates near underground lines owned by BellSouth. (Doc. 1 P 3.) Hinson damaged BellSouth's lines sometime before late June 2003. (Id. at PP 12-14.) In late June 2003, BellSouth sent Hinson a bill of $ 1934.49 for the damage to its underground lines. (Id. at P 13.) Hinson paid that bill in July of the same year. (Id. at P 14.) Hinson now alleges that this amount does not reflect [*3] BellSouth's actual losses and that BellSouth marked up the bill in excess of the total sum of its losses. (Id. at P 34.) Although it has yet to seek certification, Hinson has pled this lawsuit as a class action complaint, defining the class as "[a]ll persons in Florida who as excavators or excavating contractors have been charged and paid 'costs to repair' to BellSouth as a result of damage they caused to BellSouth's underground facilities." (Id. at P 22.)

The complaint alleges that BellSouth is liable based on four theories: (1) that BellSouth's practice of marking up the bills violates the Florida Deceptive and Unfair Trade Practices Act, *§ 501.201 et seq*, Florida Statutes (FDUTPA); (2) unjust enrichment; (3) money had and received; and (4) fraud. In Count V of the complaint,

Hinson specifically requests declaratory and injunctive relief. (Id. at PP 47-50.)

II. Legal Standard

When considering a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the Court must accept all factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Castro v. Secretary of Homeland Sec., 472 F.3d 1334, 1336 (11th Cir. 2006)*; *Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003)*. [*4] "*Federal Rule of Civil Procedure 8(a)(2)* requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Erickson v. Pardus, 127 S.Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)*. "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Erickson, 127 S.Ct. at 2200* (citation omitted). "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. V. Twombly, 127 S.Ct. 1955, 1964-1965, 167 L. Ed. 2d 929 (2007)* (internal citations and quotations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id. at 1965*. The Court does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id. at 1974*.

III. Discussion

The [*5] major disagreement between the parties at this stage, as clarified at the hearing on BellSouth's motion to dismiss, is whether the document sent to Hinson is more similar to a demand letter sent in the context of settling a tort claim or a bill sent for services rendered. BellSouth argues that most of Hinson's claims fail because the document was sent in connection with their attempt to settle a tort dispute. While this may turn out to be so, for the purposes of the motion to dismiss, this Court is required to take the allegations of the complaint as true. The complaint alleges that Hinson received a "bill" from BellSouth, which it paid, and further alleges that the "bill" contained an "undisclosed" and improper markup. *See e.g.* Doc. 1 PP 13-18, 20 and 35. These allegations must be accepted as true for now.

A. Count I states a valid FDUTPA Claim

FDUTPA states that "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *Fla. Stat. § 501.204(1)* (2007). BellSouth argues that Count I of Plaintiff's complaint must be dismissed on two grounds: (1) Plaintiff was not a [*6] consumer or the facts underlying the suit were not a consumer transaction and (2) BellSouth's acts did not occur in the course of trade or commerce. (Doc. 19 at 6-8).

1. FDUTPA does not require Plaintiff to be a consumer

BellSouth argues that Plaintiff's FDUTPA claim must be dismissed because Plaintiff is neither a consumer nor is this a dispute regarding a consumer transaction. (Doc. 19 at 8.) This argument is substantially based on two cases supporting the idea that FDUPTA is primarily a statute to protect consumers. *See Monsanto Co. v. Campuzano, 206 F.Supp 2d 1252, 1268 (S.D. Fla. 2002)* (FDUTPA claim "cannot be maintained unless the alleged unfair or deceptive acts or practices complained of involved a consumer transaction"); *Hughes Supply v. Continental Recovery Svcs., 2007 U.S. Dist. LEXIS 52916, 2007 WL 2120318 (M.D. Fla. 2007)* (dismissing FDUTPA counter-claim because defendant was not a consumer engaging in trade or commerce).

One of the purposes of FDUTPA, which this Court is instructed by the statute to "construe liberally," is "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices [*7] in the conduct of any trade or commerce." *Fla. Stat. § 501.202(2)* (2007). The statute has been substantively amended twice, once in 1993 and again in 2001. In 1993, the Legislature deleted FDUTPA's definitions of "consumer transaction" and "supplier" while broadening its definition of "consumer" to include "any commercial entity." *See* Ch. 93-38, § 2, Laws of Fla. Florida courts have concluded that "the 1993 Amendments to FDUTPA made clear that the statute is not limited to purely consumer transactions," but rather apply "to any act or practice occurring 'in the conduct of any trade or commerce' even as between purely commercial interests." *Beacon Property Management, Inc. v. PNR, Inc., 890 So.2d 274, 278 (Fla. Dist. Ct. App. 2004)*. While *Monsanto* directly contradicts this assertion, Hinson correctly points out that the *Monsanto* court (along with other courts having considered the issue) reached that conclusion in reliance on cases decided before the 1993 amendments. *See Beacon Property Management, Inc., 890 So.2d at 277*. The 1993 Amendments defeat BellSouth's argument that a FDUTPA claim must concern a "consumer transaction." [2]

2 BellSouth's reliance on *§ 501.212(3)* misses the mark. [*8] That provision expressly excluded from FDUTPA "[a] claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction." *Fla. Stat. § 501.212(3)* (2007). However, Hinson is not claiming

damages to property, but rather overcharges pursuant to the Underground Facility Damage Prevention Act procedures. Therefore, *§ 501.212(3)* is inapplicable.
BellSouth's argument that Hinson must be a consumer itself to claim money damages under FDUTPA is contradicted by the 2001 amendments. Prior to 2001, *§ 501.211(2), Florida Statutes*, provided that "[i]n any individual action brought by a *consumer* who has suffered a loss as a result of a violation of this part, such *consumer* may recover actual damages, plus attorney's fees and court costs." (emphasis added). However, FDUTPA's 2001 amendments replaced the word "consumer" with the word "person." *See Fla. Stat. § 501.211(2)* (2007). Courts in this district have held that "[t]his amendment demonstrates a clear legislative intent to allow a broader base of complainants who have been injured by violations of FDUTPA to seek damages, not just injunctive relief." *Furmanite America, Inc. v. T.D. Williamson, Inc., 506 F.Supp 2d 1134 (M.D. Fla. 2007)*; [*9] *True Title, Inc. v. Blanchard, 2006 U.S. Dist. LEXIS 95069, 2007 WL 430659, *3 (M.D. Fla. 2007)*; *Advanced Protection Technologies, Inc. v. Square D Co., 390 F.Supp 2d 1155, 1164 (M.D. Fla. 2005)*. In this circumstance, Hinson, a commercial entity, can bring a FDUTPA claim for damages and injunctive relief.

2. BellSouth's acts occurred in the course of trade or commerce

Additionally, BellSouth argues that the FDUTPA claim must be dismissed because the activities between the parties did not occur in the conduct of trade or commerce. FDUTPA's core prohibition is that it does not allow unfair or deceptive practices in the conduct of "trade or commerce." *Fla. Stat. § 501.204(1)*. "Trade or commerce" is further defined in the statute as "the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated." *Fla. Stat. § 501.203(8)* (2007). It is undisputed that BellSouth is generally involved in the offering of telecommunications services to the general public. Id. Furthermore, the maintenance and repair of its underground cables would seem to [*10] be an integral part of BellSouth's business.
BellSouth says that it has not advertised, solicited or provided something of value to Plaintiff. However, as Hinson pointed out in its response, reading the statute to require a FDUTPA plaintiff to purchase something of value from the defendant would stand contrary to the express holdings of other courts. *See e.g. Gritzke v. M.R.A. Holding, LLC., 2002 U.S. Dist. LEXIS 28085, 2002 WL 32107540 at *3-4 (N.D. Fla. 2002)* (holding plaintiff featured in "Girls Gone Wild" video without her consent stated a valid FDUTPA claim despite never purchasing defendant's product); *Niles Audio Corp v. OEM Systems Co., 174 F.Supp 2d 1315,1319-20 (S.D. Fla. 2001)* (holding that 2001 FDUTPA amendments demonstrated "an intent to allow a broader base of complainants, including competitors . . . to seek damages"). While the Court may revisit the "trade or commerce" issue after some factual and legal development, the Court is not prepared to dismiss Hinson's FDUTPA claim on this basis at this early date.

B. Count IV is pled with the particularity required by Rule 9(b)

BellSouth argues that Count IV of Hinson's complaint should be dismissed because it does not properly plead fraud. *Rule 9(b), Federal Rules of Civil Procedure* [*11] states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." However the application of *Rule 9(b)* "must not abrogate the concept of notice pleading." *Ziemba v. Cascade Intern., Inc., 256 F.3d 1194, 1202 (11th Cir. 2001)*. Here, Count IV is pled with sufficient particularity to give BellSouth notice of the alleged fraud. Hinson provided the date, invoice number and amount charged on the purportedly fraudulent bill. *See* Doc. 1 P at 13. Hinson alleges that this bill, while purporting to be the cost to repair the damage, was marked up in excess of BellSouth's costs contrary to the statute. *See* id. at PP 15-19. This information fully alerts BellSouth to the "precise misconduct with which [it] is charged" and is sufficient under *Rule 9(b). Durham v. Business Mgmt. Assoc., 847 F.2d 1505, 1511-12 (11th Cir. 1988)*. [3] Moreover, Hinson has sufficiently pleaded the elements of a fraud claim under Florida law. Therefore, the Court will deny BellSouth's motion to dismiss as to Count IV.

3 Much of Defendant's argument is based on FCC regulations and the requirements of *§ 556.106(2), Florida Statutes.* These arguments are more [*12] appropriately made later.

C. Counts II, III and V are valid alternative claims for relief

BellSouth argues that Hinson's unjust enrichment, money had and received, and declaratory and injunctive relief claims must be dismissed because Hinson has adequate remedies at law. BellSouth also makes specific arguments to each count. After fully considering those arguments, the Court finds that it would be improper at this stage of the proceedings to dismiss Hinson's equitable claims. While Hinson's unjust enrichment and money had and received claims do seek essentially the same relief as the fraud and FDUTPA claims, the Court sees no reason why Hinson should not be allowed to plead in the alternative. As to Count V, declaratory and injunctive

relief is appropriate under the FDUTPA statute. *Fla. Stat. § 501.211(1)* (2007). [4]

4 Though it would have been better not to plead this as a separate count.

Accordingly, it is hereby

ORDERED:

1. Defendant BellSouth's Motion to Dismiss (Doc. 19) is **DENIED**.
2. The Court has fully considered the separate positions of the parties set forth in the Joint Proposal on Discovery (Doc. 32.) The Court generally agrees with Hinson's proposed approach and directs the parties [*13] to file a joint proposed scheduling Order no later than **February 29, 2008**. [5]

5 In adopting Hinson's approach, the Court is not intimating any position on BellSouth's defenses or whether, if Hinson's individual claim ultimately fails, this action would continue.

DONE AND ORDERED at Jacksonville, Florida, this 8th day of February, 2008.

/s/ Timothy J. Corrigan

TIMOTHY J. CORRIGAN
United States District Judge

LEXSEE 506 FSUPP2D 1134

FURMANITE AMERICA, INC., Plaintiff, vs. T.D. WILLIAMSON, INC., TDW SERVICES, INC., GREG FOUSHI, JOSE DELGADO, SAUL FERRER, JAMES JACKSON, ROBERT JOLIN, MICHAEL MAINELLI, REBECCA MINERVINO, JAMES OVERSTREET, ROBERT SCHMIDT, NICOLE TURNER, JOHN FOUSHI and BRYAN McDONALD, Defendants.

Case No.: 6:06-cv-641-Orl-19JGG

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

506 F. Supp. 2d 1134; 2007 U.S. Dist. LEXIS 28386

April 12, 2007, Decided

SUBSEQUENT HISTORY: Motion denied by *Furmanite Am. v. T.D. Williamson, 2007 U.S. Dist. LEXIS 31429 (M.D. Fla., Apr. 28, 2007)*

PRIOR HISTORY: *Furmanite Am., Inc. v. T.D. Williamson, Inc., 506 F. Supp. 2d 1126, 2007 U.S. Dist. LEXIS 75387 (M.D. Fla., Apr. 5, 2007)*

COUNSEL: [**1] For Furmanite America, Inc., Plaintiff: Daniel W. Matlow, LEAD ATTORNEY, Thomas K. Gallagher, LEAD ATTORNEY, Ruden, McClosky, Smith, Schuster & Russell, PA, Ft Lauderdale, FL.

For T.D. Williamson, Inc., TDW Services, Inc., Brian McDonald, Defendants: Richard D. Tuschman, LEAD ATTORNEY, Epstein Becker & Green, P.C., Miami, FL.

For Greg Foushi, Jose Delgado, Saul Ferrer, James Jackson, Robert Jolin, Michael Mainelli, Rebecca Minervino, James Overstreet, Robert Schmidt, Nicole Turner, John Foushi, Defendants: Neil F. McGuinness, LEAD ATTORNEY, Neil F. McGuinness, P.A., Miami, FL.

For Michael Mainelli, Greg Foushi, Rebecca Minervino, James Overstreet, Robert Schmidt, Nicole Turner, John Foushi, Jose Delgado, Saul Ferrer, James Jackson, Robert Jolin, Counter Claimants: Neil F. McGuinness, LEAD ATTORNEY, Neil F. McGuinness, P.A., Miami, FL.

For Furmanite America, Inc., Counter Defendant: Daniel W. Matlow, LEAD ATTORNEY, Thomas K. Gallagher, LEAD ATTORNEY, Ruden, McClosky, Smith, Schuster & Russell, PA, Ft Lauderdale, FL.

JUDGES: PATRICIA C. FAWSETT, CHIEF JUDGE.

OPINION BY: PATRICIA C. FAWSETT

OPINION
[*1136]

AMENDED ORDER
This case comes before the Court on the following:

1. [**2] Motion for Summary Judgment (with Incorporated Memorandum of Law), filed by Defendants T.D. Williamson, Inc., TDW Services, Inc., and Bryan McDonald on December 29, 2006; (Doc. No. 101);
2. Former Employees' Motion for Summary Judgment (with Incorporated Memorandum of Law), filed by Defendants Greg Foushi, Jose [*1137] Delgado, Saul Ferrer, James Jackson, Robert Jolin, Michael Mainelli, Rebecca Minervino, James Overstreet, Robert Schmidt, Nicole Turner, and John Foushi on December 29, 2006; (Doc. No. 102);
3. Plaintiff's Response to Defendants, T.D. Williamson, Inc., TDW Services, Inc., and Bryan McDonald's, Motion for Summary Judgment, filed by Plaintiff Furmanite America, Inc., ("Furmanite") on January 29, 2007; (Doc. No. 119); and
4. Plaintiff's Response to Former Employees' Motion for Summary Judgment, filed by Furmanite on January 30, 2007. (Doc. No. 120).

Background
Furmanite and T.D. Williamson, Inc. are both firms which operate in the industrial pipeline repair industry.

Prior to December of 2005, Furmanite employed Defendants Greg Foushi, Jose Delgado, Saul Ferrer, James Jackson, Robert Jolin, Michael Mainelli, Rebecca Minervino, James Overstreet, Robert [**3] Schmidt, Nicole Turner, John Foushi as employees in its Orlando, Florida service center. (*E.g.*, Doc. No. 61, P 24). On March 31, 2006, Greg Foushi, Jose Delgado, Saul Ferrer, James Jackson, Robert Jolin, Michael Mainelli, Rebecca Minervino, James Overstreet, Robert Schmidt, and Nicole Turner all resigned from their employment with Furmanite, allegedly without providing any advance notice of their resignations and leaving Furmanite's Orlando office without staffing. [1] (*Id.* at P 31). On or about April 3, 2006, these individuals interviewed and completed paperwork to become employees of T.D. Williamson. (*E.g., id.* at P 35; Doc. No. 101, p. 8, P 12). The employees brought various items with them to T.D. Williamson. An employee for T.D. Williamson arranged to have a U-Haul truck pick up the employees' materials. (*E.g.*, Doc. No. 120-31, pp. 7-8). It is undisputed that one of the items Greg Foushi and Michael Mainelli brought with them to T.D. Williamson from Furmanite is the ACT Database, a contact management software program. (*E.g.*, Doc. No. 101, p. 9, P 15).

1 John Foushi had previously resigned on March 17, 2006. (*E.g.*, Doc. No. 61, P 28).

[**4] The crux of the instant case is an alleged conspiracy on the part of the corporate [2] and individual Defendants [3] to cripple Furmanite's Orlando office by having the former employees simultaneously resign on March 31, 2006 while also removing Furmanite's property and engaging in trade slander by disparaging Furmanite to its customers. (*See generally* Doc. No. 61). Furmanite alleges that Defendants' actions amount to tortious interference with business relationships, (Count I), Trade Slander, (Count II), a violation of *Section 688.001 et seq.*, Florida Statutes, (Count III), breach of confidentiality agreements, (Count IV), conversion, (Count V), a violation of the Florida Unfair and Deceptive Trade Practices Act, (Count VI), economic boycott, (Count VII), civil conspiracy, (Count VIII), and a breach of the duty of loyalty on the part of John and Greg Foushi. (Count IX). [4] TDW and the individual Defendants deny the above allegations, and Defendants Greg Foushi and Michael Mainelli counterclaim for breach of contract and unpaid commissions. (*See generally* [*1138] Doc. Nos. 65, 66). TDW and the individual Defendants each move for summary judgment on all Counts [**5] of the Amended Complaint, arguing that no genuine issue of material fact exists and that Defendants are entitled to judgment as a matter of law. In the alternative, Defendants ask for partial summary judgment on those claims for which no genuine issue of material fact is present. Furmanite argues in response that genuine issues of material fact exist for all Counts of the Amended Complaint.

2 For the purposes of the instant motion, the Court will refer to the corporate Defendants, T.D. Williamson, Inc., and TDW Services, Inc. simply as "TDW."

3 The last named individual Defendant in the instant case, Bryan McDonald, is an employee of T.D. Williamson, Inc., and is alleged to have assisted the former employees in their actions. (*E.g.*, Doc. No. 61, P 15, 71).

4 (*See* Doc. No. 61).

Standard of Review

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue [**6] as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

In determining whether the moving party has satisfied its burden, a court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson, 477 U.S. at 255*. A court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (11th Cir. 1993)* (citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a [**7] court must not grant summary judgment. *Id.* (citation omitted). Once a movant who does not bear the burden of proof on the pertinent claim or defense satisfies its initial burden under *Rule 56(c)* of demonstrating the absence of a genuine issue of material fact, the burden shifts to the party bearing the burden of proof on the pertinent claim or defense to come forward with specific facts showing that there is a genuine issue for trial. *Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115-17 (11th Cir. 1993)*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. The non-movant must demonstrate that there is a material issue of fact that precludes summary judgment. *Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir.1991)*. "A mere 'scintilla' of evidence supporting the [nonmoving] party's position will not suffice; there must be enough of a showing that the jury could reasonably

find for that party." *Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir.1990)* (citing *Anderson, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202*). "[T]he nonmoving party may avail itself of all facts and justifiable inferences [**8] in the record taken as a whole." *Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998 (11th Cir. 1992)* (citing *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962))*. All justifiable inferences are to be drawn in favor of the non-movant, and the evidence presented by the non-movant is to be believed by the court. *Tipton, 965 F.2d at 999* (quoting *Anderson, 477 U.S. at 255* (citing *Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970))*. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue of material fact remaining for trial. *Matsushita, 475 U.S. at 587* (citing *First Nat'l Bank of Ariz. v. Cities* [*1139] *Serv. Co., 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968))* (internal quotation marks omitted).

Analysis

A. License

Defendants seek summary judgment on Furmanite's claims for lost business opportunities in Counts I through VIII, arguing that Furmanite cannot legally recover such damages because it was not licensed to perform "line stop" and "wet tap" services, and thus that it could not legally undertake [**9] these jobs under *Section 489.128, Florida Statutes*. This argument is not well taken.

First, an issue of fact exists as to whether Furmanite possessed a valid license. It is undisputed that prior to the resignation of John Foushi, Furmanite had no licensing problems because John Foushi was a licensed, qualified individual under Florida law. (*E.g.*, Doc. No. 101, p. 10; Doc. No. 119, pp. 7-8). Furmanite claims, and John Foushi admits, that he granted Furmanite permission to use his license after he retired from the company. (Doc. No. 119-6, p. 7). However, John Foushi claims, and Furmanite denies, that he granted such permission with a condition that Furmanite's right to use his license would expire if his son, Greg Foushi, ever left the company. (*E.g.*, Doc. No. 119-6, pp. 7-8; Doc. No. 119-5, p. 2). Thus, an issue of fact exists as to the scope of the agreement between John Foushi and Furmanite regarding Furmanite's right to use the Foushi license after the resignation of Greg Foushi.

Furthermore, TDW offers no evidence that Furmanite's claims for lost business opportunities encompass only claims for work for which a license was required. *Section 489.128* only bars unlicensed [**10] contractors from enforcing contracts for work requiring a license. *§ 489.128, Fla. Stat.* (2006). A license is not required for all potential work a contractor could conceivable undertake. *See, e.g., id.* at *§ 489.128(1)(b)* ("if no state or local license is required for the scope of work to be performed under the contract, the individual performing that work shall not be considered unlicensed."). In fact, an employee of TDW testified that its qualifying individual does not live in the State of Florida and only oversees one or two projects per year. (Doc. No. 119-10, p. 3). Construing all reasonable inferences in favor of the non-moving party, Furmanite could have suffered lost business opportunities for which a license was not required even if it had no permission to use the Foushi license. For these reasons, the Court will deny Defendants' motion for summary judgment as to the licensing issue. [5]

5 Furthermore, the Court questions whether *Section 489.128* bars an unlicensed contractor from being a Plaintiff in the instant case. The statute in question only bars unlicensed contractors from attempting to enforce a contract in law or in equity. The Court's independent research has produced no Florida case extending the statute beyond its plain language to bar damages for tort claims. Defendants cite to the case of *Marco Island Cable, Inc. v. Comcast Cablevision of the South, Inc., No. 2:04-cv-26-FTM-29DNF, 2006 U.S. Dist. LEXIS 44864, 2006 WL 263605 (M.D. Fla. Feb. 2, 2006)*, for the proposition that Furmanite lacks standing in the instant case. However, *Marco Island* is distinguishable because in that case Plaintiff was an unlicensed cable operator who was barred by federal law from providing any cable services without a franchise. *Id. 2006 U.S. Dist. LEXIS 44864, [WL] at *4*. In addition, that case involved whether the plaintiff could establish antitrust standing. *Id.* No antitrust claims are pled in the instant case.

[**11] **B. Trade Slander**

Count II of the Amended Complaint avers that all Defendants are liable for trade slander for making false statements to other persons regarding the condition of Furmanite's business and its ability to perform contracts. (Doc. No. 61, p. 9). Defendants [*1140] deny such allegations and argue that there is no evidence of trade slander in the instant case.

To recover for slander or libel under Florida law, a plaintiff must demonstrate 1) that the defendant published a false statement; 2) about the plaintiff; 3) to a third party; and 4) the party suffered damages as a result of the publication of the statement. *E.g., Thompson v. Orange Lake Country Club, Inc., 224 F.Supp.2d 1368, 1376 (M.D. Fla. 2002)*; *Valencia v. Citibank Int'l, 728 So. 2d 330, 330 (Fla. 3d DCA 1999)*.

In its memorandum in opposition, Furmanite argues it has evidence of two statements made by Greg Foushi to potential clients that Furmanite had gone "bankrupt." It

offers no evidence or argument as to alleged slanderous statements made by any Defendant other than Greg Foushi, or the existence of an agreement or plan between the Defendants regarding these alleged statements. [**12] After examining the record, the Court agrees with Defendants that there is no genuine issue of material fact concerning this claim as to Defendants other than Greg Foushi and that Defendants T.D. Williamson, Inc., TDW Services, Inc., Bryan McDonald, Jose Delgado, Saul Ferrer, James Jackson, Robert Jolin, Michael Mainelli, Rebecca Minervino, James Overstreet, Robert Schmidt, Nicole Turner, and John Foushi are entitled to judgment as a matter of law on Furmanite's trade slander claim. Summary judgment must also be granted in favor of Greg Foushi, as there is no evidence in the record that Greg Foushi ever made a knowingly false statement about Furmanite. Furmanite argues that Greg Foushi told Daniel Salinas of Poole & Kent Construction Company that Furmanite had gone bankrupt. (Doc. No. 120, p. 11). However, there is no support for this contention in the record. Daniel Salinas testified that Greg Foushi told him that Flowserve Corporation "no longer existed." (Doc. No. 120-30, p. 4). Furmanite has presented no evidence that Greg Foushi ever said anything about Furmanite's solvency or its ability to service it customers, and Greg Foushi confirmed this in his deposition. (Doc. No. 120-2, p. [**13] 18). In fact, the only evidence of any statement made by Greg Foushi about Furmanite was the factual statement made in mid-April of 2006 that the former employees had resigned. (*Id.*) Thus, since Furmanite has presented no evidence of any false statement about Furmanite published by Greg Foushi or any other Defendant, the Court will grant summary judgment as to all Defendants on Count II of the Complaint.

C. Misappropriation of Trade Secrets

Count III of the Amended Complaint alleges that Defendants, with the exception of John Foushi and Bryan McDonald, misappropriated trade secrets in violation of *Section 688.001, et. seq., Florida Statutes*. For the reasons that follow, the Court finds that genuine issues of material fact exist and that summary judgment is not warranted on this Count.

Defendants do not dispute that the former employees took the following items with them to TDW after their resignation on March 31, 2006: 1) customer lists within the ACT database, a contact management software program used by Greg Foushi and Michael Mainelli; 2) a log of quotes for "hot-tapping" and "line-stopping" services; and 3) computer files and contracts. ([**14] *E.g.*, Doc. No. 102, pp. 8-11). [6]

6 Furmanite also contends that the former employees took documents and files from Furmanite's office, which Defendants dispute. (*Id.* at pp. 11-12).

In order to prevail on a claim for misappropriation of trade secrets under Florida [*1141] law, a plaintiff must demonstrate that the defendants misappropriated secret information from the plaintiff of which the plaintiff made reasonable efforts to maintain the secrecy, resulting in damages. *See § 688.004, Florida Statutes*; *Lee v. Cercoa, Inc., 433 So. 2d 1, 2 (Fla. 4th DCA 1983).* Information that is generally known or readily available to third parties generally cannot qualify for trade secret protection under Florida law. *American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1410 (11th Cir. 1995).*

Defendants argue that Furmanite cannot demonstrate ownership of the ACT database, cannot demonstrate that any of the other alleged documents constitute a trade [**15] secret, and likewise cannot show that it took sufficient steps to protect any of the taken information. While Defendants may be able to demonstrate such points at trial, the Court finds that Defendants have not demonstrated that no genuine issue of material fact exists with regard to these highly fact-specific allegations. Courts are extremely hesitant to grant summary judgment regarding the fact-intensive questions of the existence of a trade secret or whether a plaintiff took reasonable steps to protect its trade secrets. "The term 'trade secret' is one of the most elusive and difficult concepts in the law to define. The question of whether an item taken from an employer constitutes a 'trade secret,' is of the type normally resolved by a fact finder after full presentation of evidence from each side." *Lear Siegler, Inc. v. Ark-Ell Springs, Inc., 569 F.2d 286, 289 (5th Cir. 1978)*; *see also Learning Curve Toys, Inc., v. PlayWood Toys, Inc., 342 F.3d 714, 723 (7th Cir. 2003).* Courts have previously found an ACT database and information such as that contained in quote logs can contain confidential, trade secret information. *E.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dunn, 191 F.Supp.2d 1346, 1352 (M.D. Fla. 2002)*; [**16] *Thomas v. Alloy Fasteners, Inc., 664 So. 2d 59, 59 (Fla. 5th DCA 1995)*; *Conseco Finance Serv. Corp. v. North American Mortgage Co., 381 F.3d 811, 819-20 (8th Cir. 2004).*

Summary judgment is likewise inappropriate in the instant case, as issues of fact exist regarding Furmanite's claims. First, a "full presentation of evidence" from each side" is required regarding whether the ACT database and quote log constitute a trade secret. Defendants argue that the information in the quote log is not a trade secret because none of the information was provided by Furmanite. Defendants further claim that the information in the ACT database is not a trade secret because Greg Foushi and Michael Mainelli entered the information themselves, and the names and contact information are available from other sources. Such arguments are insufficient to demonstrate the absence of a genuine issue of material fact. Furthermore, Furmanite has presented evi-

dence that information in the quote log and ACT database was provided to the employees by Flowserve, Furmanite's predecessor and the company whose records Furmanite purchased. (Doc. No. 120-2, pp. 29-30). Thus, summary judgment [**17] is not appropriate on this issue.

Defendants next argue that neither Furmanite nor its predecessors made sufficient effort to claim ownership of the ACT database. (Doc. No. 102, p. 9). However, Defendants point to no specific instances of Greg Foushi or Michael Mainelli ever claiming ownership of such database to Furmanite or of Furmanite or its predecessor disclaiming ownership of the ACT database. This, without more, is insufficient to demonstrate that the database was not the property of the employer, Furmanite.

Defendants further argue that Furmanite did not take sufficient steps to protect [*1142] the confidentiality of the information contained in the ACT database, the quote log, or in Furmanite's computer or paper files. However, Furmanite had each Defendant execute a confidentiality agreement which prohibited the dissemination of, *inter alia*, customer files, computer records, and financial data. (*See, e.g.*, Doc. No. 120-9). Defendants point to no instance where Furmanite allowed its employees to disclose any of the above information to third parties. In fact, Greg Foushi and Michael Mainelli testified that they did not share the information in the ACT database and did not [**18] know if the two databases they respectively used were identical. (Doc. No. 120-2, pp. 26-28; Doc. No. 120-13, p. 13). Furthermore, Defendants' contentions are belied by the fact that as soon as the quote log was discovered at TDW, it was immediately returned the following day. (Doc. No. 120-27, pp. 3-4). Based on the limited evidence presented, the Court cannot conclude as a matter of law that the measures taken by Furmanite did not give the employees reason to know that Furmanite intended or expected the secrecy of such information be maintained.

Next, Defendants appear to argue that partial summary judgment is warranted because TDW never used the information contained in the quote log or allegedly missing files. [7] Furmanite argues that sufficient evidence exists on this issue to survive summary judgment, and also that use of the trade secret is not required. If Furmanite cannot show at trial that TDW used any of the information in the quote log or missing files or that Furmanite suffered any damages in the actual loss of such materials, Furmanite cannot recover for the misappropriation of such material even if it demonstrates that the materials constituted a trade secret. [8]

7 Defendants concede that Greg Foushi and Michael Mainelli continue to use the ACT database in the course of their employment with TDW.

[**19]

8 *See, e.g., Alphamed Pharms. Corp. v. Arriva Pharms, Inc., 432 F.Supp.2d 1319 (S.D. Fla. 2006)* (Defendants did not violate statute by taking documents containing competitor's trade secrets from its trash, absent showing that competitor suffered any actual damages as result or that competitor obtained injunctive relief, because no damages were shown and nominal damages were not available under statute).

However, Defendants have not met their burden of demonstrating that no use of the information took place in the instant case. TDW possessed the quote log for nineteen (19) days before returning it to Furmanite, [9] and Furmanite alleges that some information from their files is still missing. Considering the facts of the instant case and construing all reasonable inferences in favor of the non-movant, the Court cannot conclude as a matter of law that no use of the information occurred.

9 (*E.g.*, Doc. No. 120-27, p. 4).

[**20] Lastly, Defendants argue that there is no evidence that any computer files were taken by the former employees. However, Furmanite's corporate representative stated that files were missing the day the employees left. (*E.g.*, Doc. No. 119-12, pp. 4, 5). Thus, an issue of fact also exists as to misappropriation of Furmanite's files. For these reasons, the motions for summary judgment on Count III of the Complaint are denied.

D. Breach of Confidentiality Agreements

Count IV of the Amended Complaint avers that Defendants, with the exception of Bryan McDonald, are all liable for breaching the confidentiality agreements between the former employees and Furmanite. (Doc. No. 61, p. 11). Defendants contend that summary judgment must be granted as to all Defendants. [*1143] The Court finds that summary judgment must be granted in favor of TDW but denied as to the individual Defendants named in the Complaint except for Bryan McDonald. As TDW points out, corporate defendants T.D. Williamson, Inc, and TDW Services, Inc. were never parties to a confidential agreement with Furmanite. Furmanite concedes this point and further concedes that Count IV was not meant to be directed toward the corporate [**21] Defendants. (Doc. No. 119, p. 19). Thus, the Court will grant summary judgment on Count IV in favor of TDW. However, summary judgment is not warranted with respect to the remaining individual Defendants named in Count IV. The former employees argue, as they did with respect to Count III, that they are entitled to judgment as a matter of law because Furmanite cannot establish that any information obtained from the former employees was a trade secret, that any information was misappropriated, that it has suffered any damages, or that any information was used or shared by the former employees or TDW. (Doc. No. 102, p. 19). For the reasons ex-

plained above, numerous issues of fact exist as to these defenses which make summary judgment inappropriate. Furthermore, unlike a trade secrets claim, Furmanite need not prove that the former employees or TDW used the removed information in order to prevail on a claim for breach of the confidentiality agreement, as the agreement does not limit damages to this situation. (*See* Doc. No. 120-9). Thus, Defendants' contention that no information was shared with TDW is not determinative of this issue. For these reasons, the Court will deny the former [**22] employees' motion for summary judgment on Count IV.

E. Conversion

In Count V of the Amended Complaint, Furmanite alleges conversion claims against all Defendants for the misappropriation of its electronic and paper files, equipment, and "the value of Furmanite's Orlando service center." (Doc. No. 61, pp. 11-12). Defendants claim that summary judgment must be granted as to all Defendants as there is no evidence of conversion. Defendants also argue that Florida law does not recognize a conversion claim for the value of Plaintiff's service center. (Doc. No. 102, pp. 19-21).

Under Florida law, conversion is an intentional tort consisting of an unauthorized act which deprives another of his property, permanently or for an indefinite time. *E.g., Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd., 450 So.2d 1157, 1160-61 (Fla. 3rd DCA 1984)* (footnote omitted) (citing *Star Fruit Co. v. Eagle Lake Growers, Inc., 160 Fla. 130, 33 So.2d 858 (Fla. 1948)* (en banc)). The essence of the tort is not the acquisition of the property; rather, it is the wrongful deprivation of the property. *Star Fruit Co., 33 So.2d at 860*.

In the case at bar, summary [**23] judgment must be granted on Furmanite's conversion claim for the value of its Orlando office as to all named Defendants, but denied with respect to its claims for conversion of files and equipment. Thus, the Court will grant partial summary judgment on Count V of the Complaint.

There is no genuine issue of material fact with regard to Furmanite's conversion claim for the value of its Orlando office. As Defendants point out, there is no evidence that TDW or the former employees ever acted to deprive Furmanite of its Orlando service center. Having satisfied its initial burden under *Rule 56(c)* of demonstrating the absence of a genuine issue of material fact, the burden shifts to Furmanite to come forward with specific facts showing that there is a genuine issue for trial. *Fitzpatrick, 2 F.3d at 1115-17*. Furmanite has not done so, arguing only [*1144] that circumstantial evidence exists to survive summary judgment on all conversion claims. Furthermore, summary judgment is appropriate on this issue because Florida law does not recognize a claim for conversion of the value of a business under the instant circumstances. Courts have generally been hesitant to extend common law actions [**24] for conversion further than to claims for the misappropriation of a tangible chattel or the misappropriation of intangible rights which are identified or merged in a document or other tangible chattel. *See, e.g., In re Estate of Corbin, 391 So. 2d 731, 733 n. 1 (Fla. 3d DCA 1980)*; *Ippolito v. Lennon, 150 A.D.2d 300, 303, 542 N.Y.S.2d 3 (N.Y. App. 1989)*. Furmanite cites solely to the *Corbin* case for support that its claim can survive summary judgment. However, in *Corbin*, Florida's Third District Court of Appeal held that an action for conversion may be brought for the intangible interests in a business venture where the personal representative of an estate unlawfully sold the estate's business to a third party and kept the consideration for the transfer. Thus, the Court reasoned, an action for conversion should be allowed because the defendant deprived the property owner of its rights over the business and did so in a fashion where restitution "may well be an inadequate remedy." *Id. at 733, n. 1. Corbin* bears no resemblance to the allegations of the instant case, where Defendants are not alleged to have deprived Furmanite of the ownership or possession [**25] of its Orlando office. Thus, the Court grants summary judgment on this issue in favor of Defendants.

Material issues of fact exist, however, with respect to Furmanite's claims for conversion of its files and equipment. On the day he resigned, Greg Foushi admitted copying some of his files to a disk and deleting others from his work computer, in part because he was "upset." (Doc. No. 119-13, pp. 5-8). Furmanite initiated an inventory of its Orlando office in April after the resignation of the former employees and discovered that electronic and paper files regarding business contacts, job descriptions, and financial information were missing. (Doc. No. 119-12, pp. 3-4, 7-8, 14-15). Furthermore, TDW arranged to have a truck pick up materials of the former employees and transport the materials to TDW. Gary Goins, TDW's manager, stated that tools were among the things moved, but he never checked to see if any of Furmanite's equipment was among those items removed. (Doc. No. 119-10, pp. 6-7). The former employees all deny moving any Furmanite equipment. (*E.g.*, Doc. No. 102-2) (declarations of former employees denying the taking of Furmanite property). Construing all reasonable inferences [**26] in favor of Furmanite, a genuine issue of material fact exists as to whether Furmanite's property was among the materials taken by the former employees.

F. Tortious Interference

Count I of the Amended Complaint alleges that all Defendants tortiously interfered with Furmanite's business relationships with its customers, causing Furmanite damages. (Doc. No. 61, p. 8). Defendants move for summary judgment, arguing that because Furmanite's

claims for trade slander and misappropriation of trade secrets must fail, Furmanite cannot establish any interference with a business relationship under Florida law. Pursuant to Florida law, Plaintiff must establish five elements to state a claim for tortious interference with an advantageous business relationship: (1) the existence of a business relationship under which the claimant has rights; (2) the defendant's knowledge of the relationship; [*1145] (3) an intentional and unjustified interference with the relationship; (4) by defendant; and (5) damage to the claimant cause by the interference. *E.g., Rudnick v. Sears, Roebuck, and Co., 358 F.Supp.2d 1201, 1205 (S.D. Fla. 2005)*.

In the instant case, the Court finds Defendants have [**27] not met their burden of establishing that no genuine issue of material fact exists with respect to Furmanite's tortious interference claim. Genuine issues of material fact exist as to whether the former employees, acting in concert with TDW and Bryan McDonald, misappropriated Furmanite's trade secrets, files, equipment, and financial information, and issues of fact exist as to whether such actions constitute tortious interference under Florida law. Defendants admit that the former employees removed property from Furmanite's Orlando office with the assistance of TDW, although the exact contents of what was removed is in dispute. (*E.g.*, Doc. No. 119-13, pp. 5-8; Doc. No. 119-12, pp. 3-4, 7-8, 14-15; Doc. No. 102-2). TDW's manager confirms that items were removed but testified he had know way of knowing to whom the items belonged, and he did not check to see if Furmanite material was hauled away from Furmanite's office. (Doc. No. 119-10, pp. 6-7). Florida courts have stated that the alleged conversion and unauthorized use of a customer list under certain circumstances could constitute tortious interference with business relationships. *E.g., Viscito v. Fred S. Carbon, Inc., 717 So. 2d 586 (Fla. 4th DCA 1998).* [**28] For these reasons, Defendants' claim for summary judgment on Count I of the Complaint is denied.

G. Florida Deceptive and Unfair Trade Practices Act

Count VI of the Amended Complaint avers that TDW, Bryan McDonald, and John Foushi are liable to Furmanite for violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). (Doc. No. 61, pp. 12-13). Defendants argue that summary judgment on Count VI must be granted for several reasons. First, Defendants argue that actions for damages under FDUTPA apply only to consumer transactions. Next, they argue that summary judgment is warranted because Plaintiff's allegations are based on the misappropriation of trade secrets and confidential information and TDW's hiring of the former employees, none of which constitute an unfair or deceptive trade practice. (Doc. No. 101, pp. 14-22).

FDUTPA broadly declares unlawful any unfair or deceptive acts or practices committed in the conduct of any trade or commerce. *§ 501.204(1), Fla. Stat. Section 501.211* provides that any person who has suffered a loss as a result of such practices may commence a private action for actual damages and possibly attorneys' [**29] fees and court costs. *§ 501.211(2), Fla. Stat.* The Florida Supreme Court has emphasized that the remedies of the FDUTPA "are in addition" to other remedies available under state or local law. *Pinellas County Department of Consumer Affairs v. Castle, 392 So.2d 1292, 1293 (Fla. 1980).* A practice is unfair under FDUTPA if it offends established public policy, is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Suris v. Gilmore Liquidating, Inc., 651 So.2d 1282, 1283 (Fla. 3d DCA 1995).* The Florida Supreme Court has recently held that the statute "applies to private causes of action arising from single unfair or deceptive acts in the conduct of any trade or commerce, even if it involves only a single party, a single transaction, or a single contract." *PNR, Inc. v. Beacon Prop. Mgt. Inc., 842 So. 2d 773, 777 (Fla. 2003).*

Prior to July 1, 2001, FDUTPA provided that "[i]n any individual action brought by [*1146] a *consumer* who has suffered a loss as a result of a violation of this part, such *consumer* may recover actual damages, plus attorney's fees and court costs." *§ 501.211(2), Fla. Stat.* [**30] (emphasis added). However, FDUTPA was amended in 2001, and the amendment replaced the word "consumer" with the word "person." The current version of FDUTPA provides that "[i]n any action brought by a *person* who has suffered a loss as a result of a violation of this part, such *person* may recover actual damages, plus attorney's fees and court costs." *§ 501.211(2), Fla. Stat.* (emphasis added). This amendment demonstrates a clear legislative intent to allow a broader base of complainants who have been injured by violations of FDUTPA to seek damages, not just injunctive relief. *See, e.g., Advanced Protection Tech., Inc. v. Square D Co., 390 F.Supp.2d 1155, 1164 (M.D. Fla. 2005)*; *Gritzke v. M.R.A. Holding, LLC, No. 4:01CV495-RH, 2002 U.S. Dist. LEXIS 28085, 2002 WL 32107540, at *4 (N.D. Fla. Mar. 15, 2002).* "With the deletion of *consumer transaction* from FDUTPA, it would seem that such business entity *consumers* could sue for damages from outlawed acts and practices in ordinary business transactions without regard to whether the claimant was acting in the capacity of consuming goods or services. At least, nothing in *section 501.211(2)* purports [**31] to state otherwise." *Beacon Prop. Mgt., Inc. v. PNR, Inc., 890 So. 2d 274, 278 (Fla. 4th DCA 2004)* (emphasis in original). After the amendments to the FDUTPA, courts have opined on several occasions that actions under the statute could be sustained absent the failure to allege that FDUTPA violation arose from a "consumer transaction."

*See, e.g., Gritzke, 2002 U.S. Dist. LEXIS 28085, 2002 WL 32107540 at *4* (*§ 501.211(2)*, as amended, merely requires a "person" who "has been damaged by [a] defendant's violation" of the statute); *Niles Audio Corp. v. OEM Systems Co., Inc., 174 F.Supp.2d 1315, 1319-20 (S.D. Fla. 2001)* (concluding that legislature's replacement of the word "consumer" with the word "person" in *§ 501.211(2)* was intended to make damages remedy available to anyone aggrieved by violation of statute); *see also Beacon Property, 890 So. 2d at 278* (rejecting the per se argument that a judgment was erroneous "simply because the facts at trial do not involve a consumer transaction"). This Court has recently held that the 2001 amendments to FDUTPA allow a plaintiff to seek damages despite a failure to allege that the unfair and deceptive conduct [**32] arose from a "consumer transaction." *See True Title, Inc. v. Blanchard, Case No. 6:06-cv-1871-Orl-19DAB, 2006 U.S. Dist. LEXIS 95069, at *10 (M.D. Fla. Feb. 5, 2006)*. Thus, the Court cannot agree with Defendants' contention that summary judgment is warranted in the instant case because no consumer transaction is involved.

Furthermore, summary judgment on Furmanite's FDUTPA claim is inappropriate because of the numerous issues of fact which remain regarding TDW's alleged misappropriation of Furmanite's trade secrets and confidential information. Accepting all reasonable inferences from the facts of the case, TDW's alleged plan to hire all of Furmanite's employees away *en masse* [10] and use them to misappropriate [*1147] Furmanite's trade secrets would constitute unlawful and unfair or deceptive acts or practices under the broad reading Florida courts traditionally apply to FDUTPA. [11] In fact, Stanley Pitts, a manager for TDW, admitted in his deposition that the conduct of the TDW employees in the instant case in his opinion was not up to the "ethical standards of TDW." (Doc. No. 119-3, p. 6). In addition, Defendant Bryan McDonald stated that although he denied any wrongdoing [**33] on the part of TDW, if the facts were as Furmanite believed them to be, TDW's actions would amount to "inappropriate" and "unethical" conduct in the marketplace. (Doc. No. 119-17, p. 4). For these reasons, the Court finds that issues of fact exist which preclude granting summary judgment on Furmanite's FDUTPA claims.

10 There is evidence in the record to create a genuine issue of material fact with regard to TDW's alleged hiring plan. John Foushi discussed with the former employees employment opportunities with TDW both before and after his resignation. (*E.g.*, Doc. No. 101-7). Furthermore, Furmanite has produced emails between Greg Foushi and Stanley Pitts of TDW which, construing all inferences in favor of Furmanite, appear to discuss the timing and repercussions of a mass resignation of the former employees. (*See* Doc. No. 119-4, p. 5) (e-mail by Greg Foushi to Stanley Pitts discussing how it would be "real aggressive to be in by April 3rd" and e-mail statement by Greg Foushi to Stanley Pitts that if there is a delay in having a lease "before the cat is out of the bag....we could all be exposed").

[**34]

11 *See, e.g., MJS Music Publications, LLC v. Hal Leonard Corp., No. 8:06-cv-488-T-30EAJ, 2006 U.S. Dist. LEXIS 26673, 2006 WL 1208015, at *2 (M.D. Fla. May 4, 2006)* ("Therefore, when considering whether a defendant's actions support a finding of 'unfair methods of competition, unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce,' courts have regarded the concept as 'extremely broad.' [...]" (internal citations omitted).

H. Conspiracy/Economic Boycott

Count VII of the Amended Complaint alleges that all Defendants are liable to Furmanite under the theory of economic boycott. Specifically, Furmanite alleges that the coordination of the simultaneous resignations of the former employees amounted to an economic boycott. (Doc. No. 61, pp. 13-14).

Economic boycott is a cause of action sounding in civil conspiracy under Florida law. Some courts have also referred to this as the "force of numbers exception" to the general rule that the basis for a civil conspiracy must be an independent wrong or tort which would constitute a cause of action if the wrong were done by [**35] one person. *See Kee v. Nat'l Reserve Life Ins. Co., 918 F.2d 1538, 1541-42 (11th Cir. 1990)*. Under this exception, the "conduct complained of would not be actionable if done by one person, but by reason of force of numbers or other exceptional circumstances, the defendants possess some peculiar power of coercion, which gives rise to an independent tort of conspiracy, sometimes referred to as an 'economic boycott.'" *American Diversified, 439 So.2d at 906*. A showing of mere malice is not enough. *Id.* The result of the defendants' concerted action "must be different from anything that could have been accomplished separately." *Kee, 918 F.2d at 1542*.

In the *Kee* case, the Plaintiff sought to recover under a civil conspiracy theory that several companies acted in concert to destroy the plaintiff's business by informing the state commissioner of his alleged wrongdoings and thus causing him to be investigated, by cancelling the plaintiff's general agent's contracts, and by withholding from him commissions he had allegedly earned. In refusing to find that the "narrow" force of numbers exception would allow the plaintiff to recover under [**36] his theory of the case, the Eleventh Circuit reasoned that "[e]ach company could independently inform the insurance commissioner of its suspicions, cancel the at-will agency contracts, and withhold commissions pending

resolution of the claims in court. These independent acts taken together did not amount to something larger than the sum." *Id. at 1542*.

In the instant case, there is no dispute that the former employees were at-will employees who could all legally resign [*1148] at any time. Furmanite's employee handbook stated that either Furmanite or the employee could end the employment "at any time, with or without cause, notice, or reason." (Doc. No. 101-9, p. 3). Applying the analysis used by the Eleventh Circuit in *Kee* to the instant case, Defendants rightfully argue that there is no evidence in the record that the alleged agreement by the Defendants for the former employees to resign caused any harm in addition to that which would have been caused if the employees had all individually decided to resign without agreement. *See also American Diversified, 439 So. 2d at 906* ("the allegations do not show that appellees, by force of numbers or other exceptional [**37] circumstances ... attempted to destroy appellant's business by acting together").

Having demonstrated the absence of a genuine issue of material fact on this issue, the burden shifts to Furmanite to come forward with specific facts showing that there is a genuine issue for trial. *Fitzpatrick, 2 F.3d at 1115-17*. Furmanite has not done so. Furmanite attempts to distinguish *Kee* by arguing that if the former employees had resigned independently, Furmanite would have suffered less in damages. However, Furmanite offers no evidence to support this proposition. [12] For these reasons, the Court grants summary judgment on Count VII of the Complaint.

12 Matthew Sisson offered that, in Furmanite's opinion, if fewer employees had resigned on March 31, 2006 and more had stayed employed with the company, Furmanite would have been "better off," (Doc. No. 119-12, p. 19), but this speculation is unsupported in the record and furthermore is not the proper inquiry under *Kee.*

I. Civil Conspiracy

[**38] Count VIII of the Amended Complaint alleges that all Defendants are liable to Furmanite under the theory of civil conspiracy. Unlike Furmanite's claim for economic boycott, Furmanite alleges that the overt acts in furtherance of such conspiracy were Defendants' actions in tortiously interfering with Furmanite's business relations, and conversion of Furmanite's paper and electronic files and equipment. (Doc. No. 61, pp. 14-15). Thus, because Furmanite has alleged an unlawful act or act in furtherance of such conspiracy, and several issues of fact exist as to whether tortious interference and conversion actually took place, it would be inappropriate to grant summary judgment on Count VIII of the Complaint. *See American Diversified, 439 So. 2d at 906-07* (despite dismissing economic boycott claim, allegations of tortious interference in the complaint that former employee diverted to new employer inquiries and leads were sufficient to state a cause of action for civil conspiracy). In the instant case, Defendants' lone argument is that summary judgment must be granted on the conspiracy claim if the Court grants summary judgment on the conversion and tortious interference [**39] claims. As the Court has not granted summary judgment on these claims, Defendants have not met their burden of demonstrating that no genuine issue of material fact exists with regard to the civil conspiracy claim.

J. Breach of the Duty of Loyalty

Count IX of the Amended Complaint avers that John Foushi and Greg Foushi are liable to Furmanite for breaching their respective duties of loyalty to Furmanite. Furmanite alleges that John Foushi breached his duty of loyalty by holding a meeting with the former employees while he was still employed with Furmanite in which he solicited them to accept employment with TDW, and that Greg Foushi breached his duty of loyalty by orchestrating the simultaneous resignations of the [*1149] former employees without notice. (Doc. No. 61, p. 15).

The general rule with regard to an employee's duty of loyalty to his employer is that an employee does not violate his duty of loyalty when he merely organizes a competing business during his employment to carry on a rival business after the expiration of his employment. *Fish v. Adams, 401 So. 2d 843, 845 (Fla. 5th DCA 1981)*. Mere preparation to open a competing business, such as assisting in [**40] the opening of a bank account, the obtaining of office space and other services with respect to the future employer are likewise insufficient to demonstrate a breach of such duty. *E.g., Harllee v. Professional Serv. Indus., Inc., 619 So. 2d 298, 300 (Fla. 3d DCA 1992)*. Additionally, an employee may take with him a customer list that he himself has developed. *Id.* However, an employee may not engage in disloyal acts in anticipation of his future competition, such as using confidential information acquired during the course of his employment or soliciting customers and other employees prior to the end of his employment. *Id.; Insurance Field Services, Inc. v. White & White Inspection & Audit Service, Inc., 384 So.2d 303 (Fla. 5th DCA 1980)*. An employee does not have to be managerial in order to have this duty of loyalty. *Fish, 401 So. 2d at 845*. In the instant case, summary judgment on this issue must be denied with respect to both Defendants. Issues of fact which exist as to whether Greg Foushi misappropriated trade secrets and company property and engaged in tortious interference preclude the entry of summary judgment as to that [**41] Defendant. Furthermore, Furmanite has presented evidence of at least one e-mail by Greg Foushi sent from Furmanite's computers to a contractor encouraging it to do business with TDW. (*See*

Doc. No. 119-4, p. 2) (e-mail to Suffolk Construction providing TDW's new contact information in Orlando and stating "everybody at TDW knows about your project and its importance. You and your customer are in even better hands..."). For these reasons, summary judgment is denied with respect to Defendant Greg Foushi. In addition, issues of fact exist with respect to John Foushi's actions which also preclude the entry of summary judgment. Furmanite contends that John Foushi told it when he resigned that he was going to retire. However, John Foushi had a meeting with Furmanite's Orlando employees in March of 2006 prior to his resignation in which attendees state that John Foushi told them he was not going to retire, that TDW was opening a service center in Orlando in which he was going to work, and that TDW was offering opportunities for them which "looked good." (*E.g.*, Doc. No. 101-7, p. 3). Accepting all reasonable inferences from these facts, an issue of fact exists as to whether John Foushi [**42] solicited Furmanite's employees on behalf of TDW while he was still employed by Furmanite. For these reasons, summary judgment as to John Foushi on this claim must be denied.

Conclusion

Based on the foregoing, the Motion for Summary Judgment (with Incorporated Memorandum of Law), filed by Defendants T.D. Williamson, Inc., TDW Services, Inc., and Bryan McDonald on December 29, 2006, (Doc. No. 101), and the Former Employees' Motion for Summary Judgment (with Incorporated Memorandum of Law), filed by Defendants Greg Foushi, Jose Delgado, Saul Ferrer, James Jackson, Robert Jolin, Michael Mainelli, Rebecca Minervino, James Overstreet, Robert Schmidt, Nicole Turner, and John Foushi on December 29, 2006, (Doc. No. 102), are **GRANTED in part and DENIED in part,** as follows:

[*1150] 1. Summary judgment is **DENIED** as to Count I of the Amended Complaint (Tortious Interference);
2. Summary judgment is **GRANTED** as to Count II of the Amended Complaint (Trade Slander);
3. Summary judgment is **DENIED** as to Count III of the Amended Complaint (Misappropriation of Trade Secrets);
4. Summary judgment is **GRANTED** in favor of Defendants T.D. Williamson, [**43] Inc., and TDW Services, Inc. as to Count IV of the Amended Complaint (Breach of Confidentiality Agreements). In all other respects, summary judgment is **DENIED** with respect to Count IV;
5. Summary judgment is **GRANTED** as to all Defendants as to Furmanite's Conversion claim for the value of its Orlando office. In all other respects, summary judgment is **DENIED** as to Count V of the Amended Complaint (Conversion);
6. Summary judgment is **DENIED** as to Count VI of the Amended Complaint (FDUTPA);
7. Summary judgment is **GRANTED** as to Count VII of the Amended Complaint (Economic Boycott);
8. Summary judgment is **DENIED** as to Count VIII of the Amended Complaint (Civil Conspiracy);
9. Summary judgment is **DENIED** as to Count IX of the Amended Complaint (Breach of Duty of Loyalty).

DONE and ORDERED in Chambers in Orlando, Florida this 12th day of April, 2007.
PATRICIA C. FAWSETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

LEXSEE 2006 USDISTLEXIS 95069

TRUE TITLE, INC., Plaintiff, v. ERICA BLANCHARD and NATIONS DIRECT TITLE AGENCY, L.L.C. Defendants.

Case No. 6:06-cv-1871-Orl-19DAB

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

2006 U.S. Dist. LEXIS 95069

February 5, 2006, Decided
February 5, 2006, Filed

COUNSEL: [*1] For True Title, Inc., Plaintiff: Allen K. Von Spiegelfeld, LEAD ATTORNEY, Fowler, White, Boggs & Banker, PA, Tampa, FL.; Ronald J. White, LEAD ATTORNEY, Murphy, Rogers, Sloss & Gambel, P.L.C., Hammond, LA.

For Erica Blanchard, Nations Direct Title Agency, L.L.C., Defendants: Gregory Dean Snell, LEAD ATTORNEY, Snell Legal, Ormond Beach, FL.

For Erica Blanchard, Nations Direct Title Agency, L.L.C., Counter Claimants: Gregory Dean Snell, LEAD ATTORNEY, Snell Legal, Ormond Beach, FL.

For True Title, Inc., Counter Defendant: Allen K. Von Spiegelfeld, LEAD ATTORNEY, Fowler, White, Boggs & Banker, PA, Tampa, FL.; Ronald J. White, LEAD ATTORNEY, Murphy, Rogers, Sloss & Gambel, P.L.C., Hammond, LA.

JUDGES: PATRICIA C. FAWSETT, CHIEF JUDGE.

OPINION BY: PATRICIA C. FAWSETT

OPINION

ORDER

This matter comes before the Court on the Motion to Dismiss [Counts I, II, IV of the Complaint], Motion to Dismiss or in the Alternative, Motion to Strike [Count III of the Complaint], and Motion to Strike [Count VIII of the Complaint], filed by Defendants Erica Blanchard and Nations Direct Title Agency, L.L.C. (collectively "Nations Direct") on January 4, 2007. (Doc. No. 11).

Background

[*2] The following allegations are taken from Plaintiffs Complaint. (Doc. No. 1). Plaintiff True Title, Inc. ("True Title") is a title company involved in the business of title insurance and real estate transactions. (*Id.* at P 6). True Title's employee Handbook clearly states that it maintains exclusive ownership of alltechnology, proprietary software, files, and work product used by employees working on behalf of True Title and that all information contained in its employees' work product is to be kept confidential. (*See id.* at P 7).

True Title alleges that on or about September 29, 2006, Defendant Blanchard, who at that time was the general manager of True Title's Ormond Beach, Florida office, resigned her position effective immediately, along with all the other employees of the Ormond Beach office. (*See id.* at P 14). On October 2, 2006, True Title purportedly discovered that Ms. Blanchard or others through her direction had impermissibly taken company files, property, and computer data and erased important information from computer work stations. (*See id.* at PP 16-17). True Title further alleges that Ms. Blanchard plotted to abscond with such property in order to "jump [*3] start" her new business, co-Defendant Nations Direct Title Agency, whose existence Ms. Blanchard concealed from True Title. (*See id.* at P 20). The Complaint avers that Ms. Blanchard also disparaged True Title to its clients while she was still an employee of True Title in order to divert business to Nations Direct. (*See id.* at P 22). Finally, True Title states, upon information and belief, that Nations Direct is still using property and information belonging to True Title. (*See id.* at P 23). Plaintiff avers that such conduct amounts to a violation of the Florida Uniform Trade Secrets Act (Count I of the Complaint), a violation of the Florida Deceptive and Unfair Trade Practices Act (Count II), various common-law torts such as conversion, wrongful diversion, misappropriation, negligence, and "intentional tortious conduct," (Count III), a breach of fiduciary duty and an implied duty of good faith and fair dealing, (Count IV), defamation, (Count V) and conversion (Count VI). (*See generally*

Doc. No. 1). True Title seeks monetary damages, an injunction proscribing the use of its property, punitive damages, attorneys' fees, and an accounting of all real estate transactions [*4] closed by Nations Direct as a result of such alleged conduct. (*See id.* at pp. 15-19). Nations Direct moves to dismiss Counts I, II, and IV of the Complaint, to strike Plaintiff's request for punitive damages in Count VIII, and to dismiss or strike Count III. (*See generally* Doc. No. 11). True Title has not responded to Defendants' motion.

Standard of Review

For the purposes of a motion to dismiss, the Court must view the allegations of the complaint in the light most favorable to the plaintiff, consider the allegations of the complaint as true, and accept all reasonable inferences that can be drawn from such allegations. *Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994)*; *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*. Further, the Court must limit its consideration to the complaint and written instruments attached to it as exhibits. *Fed R. Civ. P. 10(c)*; *GSW, Inc. v. Long County, Ga., 999 F.2d 1508, 1510 (11th Cir. 1993)*. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle the plaintiff to [*5] relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. Although a copy of Defendants' motion was sent to Plaintiff's counsel on January 4, 2007, Plaintiff has not filed a brief in opposition to such motion pursuant to Local Rule 3.01(b). Failure to oppose a motion to dismiss raises an inference that there is no objection to such motion. *See, e.g., Freshwater v. Shiver, Case No. 6:05-cv-756, 2005 U.S. Dist. LEXIS 43869, 2005 WL 2077306, at *2 (M.D. Fla. Aug. 29, 2005)*.

Analysis

A. Florida Uniform Trade Secrets Act

Count I of the Complaint alleges a violation of the Florida Uniform Trade Secrets Act ("FUTSA"). *See Fla. Stat. Ann. §§ 688.001 et seq.* To show misappropriation of a trade secret under the FUTSA, a claimant must prove that: 1) the plaintiff possessed secret information and took reasonable steps to protect its secrecy; and 2) the secret it possessed was misappropriated. *See Fla. Stat. § 688.002*; *Border Collie Rescue, Inc. v. Ryan, 418 F.Supp.2d 1330, 1338 (M.D. Fla. 2006)*. In a trade secret action, the plaintiff bears the burden of demonstrating the specific information it seeks [*6] to protect is a trade secret. *American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1410 (11th Cir.1998)*. Nations Direct argues that the cursory allegations of the Complaint fail to state how the allegedly misappropriated items constitute secret or confidential information or establish how True Title took reasonable means to protect the items as secret, and thus that this claim should be dismissed.

Nations Direct's argument is not well taken. True Title alleges that it possessed valuable trade secret information that was misappropriated by Nations Direct. (*See* Doc. No. 1, PP 7-8, 23, 26). Plaintiff further alleges that it sought to protect such information with disclosures to its employees in its employee Handbook. (*See id.* at P 7). Taking such allegations as true and accepting all reasonable inferences therefrom, True Title has stated a claim under the FUTSA. At the motion to dismiss.stage, the Plaintiff is not required under Florida law to state exactly how its information constitutes a trade secret. [1] Thus, the motion to dismiss Count I of the Complaint is denied.

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This is because whether a particular type of information constitutes a trade secret is a question of fact better addressed in a motion for summary judgment. *See Capital Asset Research Corp. v. Finnegan, 160 F.3d 683, 686 (11th Cir.1998)*; *Del Monte Fresh Produce Co. v. Dole Food Co., Inc., 136 F.Supp.2d 1271, 1292 (S.D. Fla. 2001)*.

[*7] **B. Florida Deceptive and Unfair Trade Practices Act**

Count II of the Complaint avers that Defendants have violated the Florida Deceptive and Unfair Trade Practices Act. ("FDUTPA"). *See Fla. Stat. §§ 501.202 et seq.* Nations Direct argues that Count II of the Complaint fails to state a claim under FDUPTA, asserting that True Title is not entitled to damages, but only injunctive relief, under the statute, and that its claim is barred because it did not arise from a consumer transaction. (*See* Doc. No. 11, pp. 6-7).

The FDUTPA broadly declares unlawful any unfair or deceptive acts or practices committed in the conduct of any trade or commerce. *Fla. Stat. Ann. § 501.204(1). Section 501.211* provides that any person who has suffered a loss as a result of such practices may commence a private action for actual damages and possibly attorneys' fees and court costs. *Fla. Stat. Ann. § 501.211(2)*. The Florida Supreme Court has emphasized that the remedies of the FDUTPA "are in addition" to other remedies available under state or local law. *Pinellas County Department of Consumer Affairs v. Castle, 392 So.2d 1292, 1293 (Fla.1980)*. [*8] A practice is unfair under the FDUTPA if it offends established public policy, is immoral, unethical, oppressive, unscrupulous, or substan-

tially injurious to consumers. *Suris v. Gilmore Liquidating, Inc., 651 So.2d 1282, 1283 (Fla. 3d DCA 1995).*
A complaint under the FDUTPA must plead only 1) that the conduct complained of was unfair or deceptive, and 2) that the plaintiff was damaged by such unfair or deceptive conduct. *See, e.g., Haun v. Don Mealy Imports, Inc., 285 F.Supp.2d 1297 (M.D. Fla. 2003).* The Florida Supreme Court has recently held that the statute "applies to private causes of action arising from single unfair or deceptive acts in the conduct of any trade or commerce, even if it involves only a single party, a single transaction, or a single contract." *PNR, Inc. v. Beacon Prop. Mgt. Inc., 842 So. 2d 773, 777 (Fla. 2003).*
Prior to July 1, 2001, FDUTPA provided that "[i]n any individual action brought by a *consumer* who has suffered a loss as a result of a violation of this part, such *consumer* may recover actual damages, plus attorney's fees and court costs." *Fla. Stat. § 501.211(2)* [*9] (emphasis added). However, FDUTPA was amended in 2001, and the amendment replaced the word "consumer" with the word "person." The current version of FDUTPA provides that "[i]n any action brought by a *person* who has suffered a loss as a result of a violation of this part, such *person* may recover actual damages, plus attorney's fees and court costs." *Fla. Stat. § 501.211(2)* (emphasis added). This amendment demonstrates a clear legislative intent to allow a broader base of complainants who have been injured by violations of FDUTPA to seek damages, not just injunctive relief. *See, e.g., Advanced Protection Tech., Inc. v. Square D Co., 390 F.Supp.2d 1155, 1164 (M.D. Fla. 2005)*; *Gritzke v. M.R.A. Holding, LLC, No. 4:01CV495-RH, 2002 U.S. Dist. LEXIS 28085, 2002 WL 32107540, at *4 (N.D. Fla. Mar. 15, 2002).* "With the deletion of *consumer transaction* from FDUTPA, it would seem that such business entity *consumers* could sue for damages from outlawed acts and practices in ordinary business transactions without regard to whether the claimant was acting in the capacity of consuming goods or services. At least, nothing in *section 501.211(2)* purports [*10] to state otherwise." *Beacon Prop. Mgt., Inc. v. PNR, Inc., 890 So. 2d 274, 278 (Fla. 4th DCA 2004)* (emphasis in original).
After the amendments to the FDUTPA, courts have opined on several occasions that complaints alleging a cause of action under the statute could be sustained absent the failure to allege that the FDUTPA violation arose from a "consumer transaction." *See, e.g., Gritzke, 2002 U.S. Dist. LEXIS 28085, 2002 WL 32107540 at *4* (*§ 501.211(2),* as amended, merely requires a "person" who "has been damaged by [a] defendant's violation" of the statute); *Niles Audio Corp. v. OEM Systems Co., Inc., 174 F.Supp.2d 1315, 1319-20 (S.D. Fla. 2001)* (concluding that legislature's replacement of the word "consumer" with the word "person" in *§ 501.211(2)* was intended to make damages remedy available to anyone aggrieved by violation of statute); *see also Beacon Property, 890 So. 2d at 278* (rejecting the per se argument that a judgment was erroneous "simply because the facts at trial do not involve a consumer transaction").
Thus, the Court cannot agree with Nations Direct's contention that True Title is barred from seeking damages under the FDUTPA [*11] and has failed to state a cause of action because no consumer transaction is involved. The plain language of *Section 501.211(2)* does not bar such relief, and Plaintiff has cited no post-2001 cases which hold that the amendments to the FDUTPA bar such claim. To the contrary, the cases which have addressed the issue strongly suggest otherwise. *See, e.g., Gritzke, 2002 U.S. Dist. LEXIS 28085, 2002 WL 32107540 at *4*; *Niles Audio 174 F.Supp.2d at 1319-20*; *see also Beacon Property, 890 So. 2d at 278*; *see also Advanced Protection 390 F.Supp.2d at 1164.* [2] For these reasons, the motion to dismiss Count II of the Complaint is denied.

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*But see TR Information Publishers v. Randall Publishing Co., Inc., Case No. 8:05-cv-517-30MSS, 2006 U.S. Dist. LEXIS 73028, 2006 WL 2868933, at *3 (M.D. Fla. Oct. 6, 2006)* (FDUTPA only provides remedies for consumer transactions). However, *TR Information* relies solely on a 1994 case which predated the aforementioned 2001 amendments to the FDUTPA.

[*12] **C. Common Law Torts**
The Court finds that Count III of the Complaint, which alleges violations of various common law torts, must be dismissed. In Count III, True Title alleges three separate torts: 1) negligence; 2) conversion, wrongful diversion and/or misappropriation of property; and 3) "intentional tortious conduct." (Doc. No. 1, pp. 11-12). True Title lumps all three claims into one count of the Complaint and fails to plead any of the elements of any of the alleged torts. Thus, for the reasons that follow, the Court will dismiss Count III of the Complaint with, leave to amend.
In Florida, negligence consists of a duty of care owed by the defendant to the plaintiff, a breach of that duty, proof that the breach was the cause of an injury to the plaintiff, and proximately caused damages. *See Eppler v. Tarmac America, Inc., 752 So. 2d 592, 594 (Fla. 2000).* In the instant case, True Title fails to allege any of the four elements of a negligence claim, with the exception of damages. Thus, the Complaint fails to state a cause of action for negligence.
Furthermore, as Nations Direct points out, True Title's claim for "conversion, wrongful diversion and/or misap-

propriation [*13] of property" is duplicative of Count VI of the Complaint, which also states a cause of action for conversion. (*See* Doc. No. 1, p. 14). Thus, the Court dismisses such claim as it appears in Count III, as redundant and unnecessarily duplicative of another count of the Complaint. [3]

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Nations Direct does not seek to dismiss Count VI of the Complaint.

Lastly, as Defendants demonstrate, there is no cause of action under Florida law for "intentional tortious conduct." While Florida law recognizes a cause of action for various intentional torts, True Title does not specify which intentional torts it wishes to prosecute in the Complaint. Thus, to the extent True Title intended to plead additional intentional torts other than those already alleged in the Complaint under the heading "intentional tortious conduct," such claim or claims are dismissed for failure to state a claim upon which relief can be granted.

D. Breach of Fiduciary Duty; Duty of Good Faith and Fair Dealing

Count IV of the [*14] Complaint alleges that Erica Blanchard owed True Title a fiduciary duty and a duty of good faith and fair dealing and that Ms. Blanchard breached these duties, causing True Title to suffer damages. (Doc. No. 1, pp. 12-13). After reviewing the allegations of the Complaint, the Court finds that Plaintiff has stated a cause of action for a breach of fiduciary duty, but its good faith and fair dealing claim must be dismissed.

The elements for a breach of fiduciary duty claim are: 1) the existence of a fiduciary duty; 2) breach of the fiduciary duty; and 3) damages that are a direct and proximate cause of the breach. *See, e.g., Border Collie Rescue, Inc. v. Ryan, 418 F.Supp.2d 1330, 1342 (M.D. Fla. 2006)*. In the instant case, True Title has alleged all three. Plaintiff alleges that due to her high-ranking position and authority, Ms. Blanchard owed True Title fiduciary duties which she breached by her actions on the day of her resignation and by her alleged continuing use of misappropriated materials, causing True Title monetary damages. (*See* Doc. No. 1, PP 39, 40). Such allegations are all that is required to survive a motion to dismiss. However, True Title's claim [*15] for breach of a duty of good faith and fair dealing must be dismissed. Florida law does not recognize breach of a duty of good faith and fair dealing as an independent cause of action, but rather recognizes such claim as a breach of a specific contractual obligation. *Centurion Air Cargo, Inc. v. United Parcel Serv. Co., 420 F.3d 1146, 1151 (11th Cir. 2005)*. Thus, in order to assert a claim for breach of a duty of good faith and fair dealing, a plaintiff must allege that a specific contractual provision has been breached, causing it damages. *See, e.g., id.; Ament v. One Las Olas, Ltd., 898 So. 2d 147*; 149 (Fla. 4th DCA 2005). In the case at bar, True Title has failed to allege the existence of a specific contractual provision, or even a specific contract, from which would arise a duty of good faith and fair dealing. Thus, this claim must be dismissed.

E. Punitive Damages

Nations Direct argues that True Title's punitive damages claim in Count VIII of the Complaint must be stricken from the record due to a failure to comply with *Section 768.72(1), Florida Statutes.* However, the United States Court of Appeals for the Eleventh [*16] Circuit has clearly held that "the pleading requirements of *Florida Statutes § 768.72* are inapplicable in federal diversity cases." *Cohen v. Office Depot, Inc., 184 F.3d 1292, 1299 (11th Cir. 1999)* (vacated in part on other grounds, *204 F.3d 1069 (11th Cir. 2000)*). Thus, the request to strike the claim for punitive damages in Count VIII is denied.

Conclusion

Based on the foregoing, the Motion to Dismiss [Counts 1, II, IV of the Complaint], Motion to Dismiss or in the Alternative, Motion to Strike [Count III of the Complaint], and Motion to Strike [Count VIII of the Complaint], filed by Defendants Erica Blanchard and Nations Direct Title Agency, L.L.C. on January 4, 2007, (Doc. No. 11), is **GRANTED in part and DENIED in part,** as follows:

1. The motion to dismiss Counts I and II of the Complaint is **DENIED.**
2. The motion to dismiss Count III of the Complaint is **GRANTED.**
3. The motion to dismiss Count IV of the Complaint is **GRANTED in part and DENIED in part.** Plaintiff's claim for breach of a duty of good faith and fair dealing is dismissed. In all other respects, the motion [*17] to dismiss Count IV of the Complaint is **DENIED.**
4. The motion to strike Count VIII of the Complaint is **DENIED.**

Plaintiff shall have leave to file an Amended Complaint which comports with this Order within ten (10) days from the date below.

DONE and **ORDERED** in Chambers in Orlando, Florida this 5th day of February, 2006.

PATRICIA C. FAWSETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT