

a/k/a Troll Company ApS v. Russ Berrie & Co., Inc., 290 F.3d 548, 561 (3d Cir. 2002).

A. Valid Copyright

I must determine whether Synogy's documents and software macros are subject to copyright protection. Copyright protects original works of authorship fixed in any tangible medium of expression from which they can be perceived and which are not "any idea, procedure, process, system, method of operation, concept, principle, or discovery" 17 U.S.C. § 102. An original work is one that is both independently created (i.e., not copied) and creative. Feist, 499 U.S. at 345. "[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be." Id.

In response to defendants' summary judgment motion on copyright, Synogy contends that its copyrighted reports and software macros are presumptively valid under 17 U.S.C. § 410(c). Pl.'s Copyright Opp'n Mem. at 26. Section 410(c) provides that:

[i]n any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

17 U.S.C. § 410(c).

The principle that a certificate represents prima facie evidence of copyright validity has been established in a long line of court decisions and is a sound one. . . . [E]ndowing a copyright claimant who has obtained a certificate with a rebuttable presumption of the validity of the copyright does not deprive the defendant in an infringement suit of any rights; it merely orders the burdens of proof. The plaintiff should not ordinarily be forced in the first instance to prove all of the multitude of facts that underlie the validity of the copyright unless the defendant, by effectively challenging them, shifts the burden of doing so to the plaintiff.

Mortgage Mkt. Guide, LLC v. Freedman Report, LLC, No. 06-CV-140-FLW, 2008 WL 2991570, at *15 (D.N.J. July 28, 2008), quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 157, reprinted in 1976 U.S. Code. Cong. & Ad. News 5659, at 5773; see also Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663, 668-69 (3d Cir. 1990) (finding that the presumption is rebuttable and “shifts to the defendant the burden to prove the invalidity of the plaintiff’s copyrights”).

1. Synygy Macros No. 1 and No. 2.

The certificates of copyright registration for Synygy Macros Nos. 1 and 2 are prima facie evidence of the validity of their copyrights. 17 U.S.C. § 410(c). Defendants thus bear the burden to establish a material dispute as to whether Synygy Macros Nos. 1 and 2 are validly copyrighted.

Instead of setting forth evidence to show that the copyrights in Synygy Macros No. 1 and No. 2 are invalid, defendants argue that “Synygy appears to have effectively dropped liability theories based on [the software macros] from the case” because, inter alia “Synygy’s damages expert conceded at deposition that Synygy’s damages claim did not include the ‘Synygy Software Macros’ because Synygy has no evidence that Defendants used the macros.” Defs.’ Copyright Mem. at 11 n.4. This argument is misguided, however, as it goes to the question of whether defendants engaged in unauthorized copying of the software macros and cannot satisfy defendants’ burden of establishing a material dispute with respect to the presumed validity of Synygy’s copyrights in Synygy Macros No. 1 and No. 2. I find that defendants are not entitled to summary judgment based on an invalidity argument with respect to the software macros.

2. **Syngy Reports No. 1**

a. **Applicability of the Presumption of Validity**

The certificate of copyright registration for the Syngy Reports No. 1 notes that “material excluded from this claim” included “NOVO NORDISK logos, trademarks and trade names” and lists as “[n]ew material included in claim: text, Formatting, graphics, organization, selection and arrangement of information.” Defs.’ Ex. 76. However, under “Copyright office notes” at the bottom of the certificate of registration for Syngy Reports No. 1, the certificate of registration states “[r]egarding author information and new material included: Formatting not copyrightable.”⁸ Defs.’ Ex. 76.

⁸ Despite the Copyright Office’s note on the certificate of registration for Syngy Reports No. 1, the regulations of the Copyright Office do not specifically include “formatting” in the following list of items that may not be copyrighted:

- (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;
- (b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;
- (c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;
- (d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.
- (e) Typeface as typeface.

Defendants thus contend that there can be no presumption of validity for Synygy Reports No. 1 because “the Copyright Office expressly found that no copyright extended to any formatting in the reports.” Defs.’ Copyright Mem. at 1, citing Defs.’ Ex. 76. Defendants argue that “no presumption attaches to any color shading, use of color, borders, fonts, border thicknesses, font sizes, font styles, breaking the report into sections with borders, or the way the sections relate in Reports No. 1.”⁹ Defs.’ Copyright Reply at 2-3. Defendants further contend that

because Synygy has disclaimed ownership over everything else in the reports – e.g., Novo’s name, its product names, data, text, and standard industry terminology – and Synygy does not own any parts of the reports or reports designs that contain Novo’s proprietary information . . . , there is nothing in the reports over which any arguable presumption of validity would apply.

Id. at 2.

I find that the Copyright Office’s footnote creates an ambiguity with respect to the scope of any copyright in Synygy Reports No. 1. “The mere fact that a work is copyrighted does not mean that every element of the work may be protected.” Feist, 499 U.S. at 348. Those items which are specifically excluded from the copyright registration under the heading “Limitation of copyright claim” – Novo logos, trademarks and trade names – cannot be subject to the presumption. Further, the Copyright Office’s footnote leaves me with no way to distinguish between formatting, which is “not copyrightable,” and the other material which is included in Synygy’s copyright claim: “text, . . . graphics, organization, selection and arrangement of

⁹ When asked what aspects of a report were “formatting,” Synygy’s 30(b)(6) designee suggested that formatting includes: “[c]olor shading, use of color, the borders, the fonts, the border thicknesses, the font sizes, the font styles, the breaking the report into sections with borders, the way the sections relate.” Pl.’s Ex. 10 (Synygy Rule 30(b)(6) Dep. (Evernham)) at 121:10-122:13.

information.” Pl.’s Ex. 63. “Formatting” is not defined on the certificate of registration, is not defined by the Copyright Act, 17 U.S.C. § 101, and is not defined by the regulations of the Copyright Office. 37 C.F.R. § 202.1. Because of the ambiguity created by the Copyright Office’s footnote, I decline to apply the presumption of validity to Synogy Reports No. 1. Accordingly, I must consider whether plaintiff has otherwise met its burden to prove that some or all of the materials included in Synogy Reports No. 1 are sufficiently original to warrant copyright protection.

b. The Blank Forms Doctrine

Defendants argue that Synogy’s management reports and incentive compensation report scorecards are “not copyrightable as a matter of law” because they are blank forms. Defs.’ Copyright Mem. at 17-21.

The basic principle behind denying copyright protection to “blank forms” lies in the concern that providing such protection would give the copyright owner undue protection over the idea underlying the form, i.e., there are often very few methods to express the content of a form such as a calendar or time sheet and one individual could draw up these variations, copyright them, and thus obtain a virtual monopoly on such clearly useful ideas as a record of the days and of one’s time and activities. Further, the majority of such forms are simple and require like [sic] ingenuity to design, so little incentive (protection) is required to motivate designers, while the use (communication) of the form is very important to society.

Digital Commc’ns Assocs., Inc. v. Softklone Distrib. Corp., 659 F. Supp. 449, 462 (N.D. Ga. 1987).

Although the copyright regulations provide that “applications for registration of [blank forms] cannot be entertained,” 37 C.F.R. § 202.1, “this circuit, like the majority of courts that have considered the issue, has . . . held that blank forms may be copyrighted if they are sufficiently innovative that their arrangement of information is itself informative.” Whelan

Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1243 (3d Cir. 1986); see also Digital Commc'ns Assocs, 659 F. Supp. at 457 (“‘blank forms’ which are designed for recording information and which do not themselves convey information are not copyrightable”). “Whether a form conveys information is a fact-bound determination” Safeguard Bus. Sys., Inc. v. Reynolds and Reynolds Co., No. 88-1426, 1990 U.S. Dist. LEXIS 3617, at *7 (E.D. Pa. March 30, 1990). But cf. Tastefully Simple, Inc. v. Two Sisters Gourmet, L.L.C., 134 F. App’x 1, 4 (6th Cir. 2005) (“Whether a form is a ‘blank form,’ and therefore not entitled to copyright protection, is a question of law for the court to decide.”). Blank forms do not convey information if the

headings [are] so obvious that their selection cannot be said to satisfy even minimal creativity Such a work conveys no information, not just because it contains blanks, but because its selection of headings is totally uninformative. On the other hand, if a scorecard or diary contained a group of headings whose selection (or possibly arrangement) displayed cognizable creativity, the author’s choice of those headings would convey to users the information that this group of categories was something out of the ordinary.

Kregos v. Associated Press, 937 F.2d 700, 708-09 (2d Cir. 1991). Examples of non-copyrightable blank forms include “time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information.” 37 C.F.R. § 202.1(c). I must decide whether the documents included in Synygy Reports No. 1 are like these non-copyrightable blank forms, or whether they convey sufficient information to warrant copyright protection.

In support of their argument “[t]hat Synygy’s blank forms convey no information,” Defs.’ Copyright Resp. at 7, defendants submit the report of their expert Tony Buglione, who

considered “demonstrative exhibits” presented to him by Counsel for ZS that Buglione found to “fairly and accurately reflect those aspects of the Incentive Compensation Reports . . . that do not include Novo text, numbers and colors.” Defs.’ Ex. 8 (Buglione Report) at 54; see also Defs.’ Copyright Mem. at 19-20 (“In analyzing the scorecards, one should also mentally remove the material that Synygy has admitted it does not own.”). Scrubbed of “terms that are standard industry parlance, . . . the titles of the reports, the name Novo Nordisk, the names of Novo Nordisk’s products, Novo Nordisk’s Apis bull logo, the blue color scheme used in the reports, dates, the numbers of actual product volume targets and attainments,” id. at 53, the exhibits in question indeed appear to be nothing more than a blank grid. Id. at 55.

Defendants also argue that the reports “plainly do not by themselves convey any information: they are replete with zeros for things like payout amounts, the individual variables from which payout amounts are calculated and employee ID numbers, and have entries like “LAST NAME, FIRST NAME” and “TERR_NAME” instead of actual employee or territory names.” Defs.’ Copyright Mem at 1. They contend that “the blank report forms do not convey any information until they are populated with the pertinent factual information” that Synygy removed from the reports before their submission to the Copyright Office. Id. Plaintiff counters that “[e]ven if the Court gives credence to defendants’ argument that the zeroed out values of the copyright deposits affects whether the copyrighted reports convey information, the evidence is still such that a reasonable jury could find that Synygy’s copyrighted reports are not blank forms.” Pl.’s Copyright Opp’n Mem. at 33.

I agree with defendants that Synygy cannot have a copyright in the “numbers and words” or other facts included in Synygy Reports No. 1. Defs.’ Copyright Mem. at 19. First, facts are not subject to copyright protection. Feist, 499 U.S. at 344 (“facts are not copyrightable; . . .

compilations of facts generally are”); see also Whelan, 797 F.2d at 1234 (“It is axiomatic that copyright protects only the expression of ideas and not the ideas themselves.”). Further, the data contained in the reports (e.g., earnings calculations, territories, employee IDs, product names, etc.) belongs to Novo or to a third party data aggregator, not to Synogy. See Pl.’s Ex. 39 (Incentive Compensation Services Agreement) at ¶ 7 (“[Novo] shall be the sole and exclusive owner of [Novo’s] proprietary information.”); see Defs.’ Ex. 4 (Lee Report) at 26-27 (“most pharmaceutical manufacturers . . . purchase their sales data from the same small set of data vendors”).

However, in its copyright registration application for Synogy Reports No. 1, Synogy claimed a copyright in, inter alia, the “organization, selection and arrangement of information.” Defs.’ Ex. 77 at 1. Synogy’s “claims of copyright protection are [appropriately] predicated upon each report *as a whole* – how all of the elements in a report are selected, arranged, and visualized in a way that communicates information to the recipient in what Synogy believes to be the most clear, effective, and aesthetic[ally] pleasing manner.” Pl.’s Copyright Opp’n Mem. at 41 (emphasis added), citing Pl.’s Ex. 10 (Synogy Rule 30(b)(6) Dep. (Evernham)) at 80:7-96:22; 108:24-110:25; 169:6-176:25. As plaintiff contends, “[t]o determine copyrightability, a court need not – and, indeed, should not – dissect every element of the allegedly protected work. Rather, the court need only identify those elements that are copyrightable, and then determine whether those elements, considered as a whole, have been impermissibly copied.” Allen-Myland, Inc. v. IBM Corp., 770 F. Supp. 1004, 1006-07; see also Pl.’s Copyright Opp’n Mem. at 39 (“defendants engage in an improper ‘dissection’ analysis in challenging the expressive and informative nature of Synogy’s copyrighted reports”). As the Court explained in Rottlund Co. v. Pinnacle Corp., when considering the copyrightability of technical drawings containing known

architectural elements where the plaintiff claimed protection in its selection, arrangement and coordination of the elements:

[d]efendants would have the Court find that nothing protectible remains after filtering the individual elements; the drawings merely being sheets of paper shareable amongst architects and builders to copy at will. That would be acceptable if no expression remains in the drawings for copyright “encourages others to build freely upon the ideas and information conveyed by a work.” . . . As urged by Rottlund, however, the Court finds that the selection, arrangement, and combination of the elements expressed in the technical drawings are sufficiently original and detailed to be afforded copyright protection.

No. 01-1980, 2004 WL 1879983, at *14 (D. Minn. Aug. 20, 2004), report and recommendation adopted (Oct. 19, 2004), quoting Feist, 499 U.S. at 350; see also Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001) (“[A] court is not to dissect the works at issue into separate components and compare only the copyrightable elements. To do so would . . . result in almost nothing being copyrightable because original works broken down into their composite parts would usually be little more than basic unprotectible elements like letters, colors and symbols.”) (internal citation omitted); Real View, LLC v. 20-20 Techs., Inc., 683 F. Supp. 2d 147, 157 (D. Mass. 2010) (“The fact that each individual icon or feature on a screen cannot be necessarily copyrighted does not deny the screen itself, as the sum of those icons or features, copyright protection.”).

“Although a work may contain numerous unprotectable elements, the work may still be entitled to copyright protection as a compilation.” Id. at 152. I find that even though Synogy’s copyright registration application characterized Synogy Reports No. 1 as “text,” rather than as a compilation, Defs.’ Ex. 77 at 1, the documents included in Synogy Reports No. 1 are more properly characterized as compilations of incentive compensation data. “A ‘compilation’ is a work formed by the collection and assembling of preexisting materials or of data that are

selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C. § 101. “[E]ven a purely factual compilation is copyrightable when it involves: (1) the assembly of pre-existing material, factors, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an ‘original’ work of authorization.” Thornton v. J Jargon Co., 580 F. Supp. 2d 1261, 1272 (M.D. Fla. 2008) (internal quotations and citation omitted).

It is possible to consider whether Synogy’s reports are worthy of copyright protection as compilations even when they are scrubbed of their original data values and include only the placeholder values included in the reports deposited with the Copyright Office. What I must decide is “whether the arrangement . . . viewed in the aggregate, is original.” Key Publ’ns, Inc. v. Chinatown Today Publ’g Enters., Inc., 945 F.2d 509, 514 (2d Cir. 1991; see also Feist, 499 U.S. at 357 (holding that copyright protection may extend to original selection, coordination or arrangement of facts even though the facts themselves are not protected); Gemel Precision Tool Co. v. Pharma Tool Corp., No. 94-5305, 1995 WL 71243, at *5 (E.D. Pa. Feb. 13, 1995) (finding defendants had not met their burden to show invalidity where they had “not proffered any evidence which indicates that the facts contained in the [computer] databases are devoid of any particularized selection or arrangement such that they could not be considered protected compilations”). “When it comes to the selection or arrangement of information, creativity inheres in making non-obvious choices from among more than a few options.” Matthew Bender & Co. v. West Publ’g Corp., 158 F.3d 674, 682 (2d Cir. 1998). “[C]reativity in selection and arrangement . . . is a function of (i) the total number of options available, (ii) external factors that limit the viability of certain options and render others non-creative, and (iii) prior uses that

render certain selections 'garden variety.'" Id. at 682-83.

1. Management Reports

I find that plaintiff has not met its burden to show that the management reports included in Synygy Reports No. 1 warrant copyright protection. On the evidence before me, I find that no reasonable factfinder could find that the management reports are sufficiently informative or original to constitute something other than non-copyrightable blank forms such as those identified in 37 C.F.R. § 202.1(c).

Defendants analogize Synygy Reports No. 1 to the documents considered in Safeguard Business Systems, Inc. v. Reynolds and Reynolds Co., No. 88-1426, 1990 U.S. Dist. LEXIS 3617, at *7 (E.D. Pa. March 30, 1990), aff'd without op., 919 F.2d 136 (3d Cir. 1990). See Defs.' Copyright Mem. at 14-15. There, following a non-jury trial, the Court considered whether Safeguard's "day sheets" which were "intended to provide healthcare practitioners with a complete system for review and control of billing, collections, and receivables" were blank forms not subject to copyright. Safeguard, 1990 U.S. Dist. LEXIS 3617 at *2. Safeguard had argued that its day sheets taught "how to prepare accounts receivable control and month-to-month proof of accounts" with the use of "color coding and lettering," id. at *8, but the Court found that there was evidence that the forms were "usable only after training or with written instructions," id. at *9, and concluded that the day sheets were "forms that merely ease the recording of information." Id. at *10. Also, the Register of Copyrights had determined that the day sheets "were not copyrightable" and the Court found that the Register's decision was "entitled to deference." Id. at *14. The Court concluded that the "day sheets are designed to record information and do not convey sufficient information to entitle them to copyright protection," instead, they conveyed only "de minimis information." Id. at *13-14.

Confronted with similar facts in Utopia Provider Systems, Inc. v. Pro-Med Clinical Systems, L.L.C., 596 F.3d 1313, 1324 (11th Cir. 2010), on appeal from a decision on summary judgment, the Court of Appeals for the Eleventh Circuit declined to find that a set of forms used by treating physicians was copyrightable. To make its determination, the Court explained that “[w]e look first to whether the headings are anything other than what would be expected . . . , and second to whether the terms actually convey information” Id. at 1322. The Court noted that the forms called for “personal information such as the patient’s name, date of birth, sex, and chief complaint . . . [,] the history of the present illness, a review of systems, medical and social history, physical exam, medical decision making, clinical impressions, and finally, consultation, disposition, and instructions.” Id. at 1323. The Court observed that there was testimony that the content in the forms was consistent with what “a physician doing a systems review of an emergency room patient would consider as a part of his job,” although the physician might not necessarily consider the terms in the same order or document them in the same fashion. Id. (internal quotation omitted). The Court found that the selection and arrangement of terms in the forms was not original and did not convey information. Id. at 1324. Instead, the forms were “better analogized to [a] non-copyrightable baseball scorecard or travel diary with generic headings.” Id. at 1323; see also Bibbero Sys., Inc. v. Colwell Sys., Inc., 893 F.2d 1104 (9th Cir. 1990) (affirming district court’s determination that a medical “superbill” was not copyrightable where it was a blank form that included only “simple instructions to the patient on how to file an insurance claim using the form, such as ‘complete upper portion of this form’”); M.M. Bus. Forms Corp. v. Uarco, Inc., 472 F.2d 1137, 1140 (6th Cir. 1973) (finding no valid copyright in a form for television servicemen where there was “no distinguishable variation in any of [the] simplistic legal arrangements [identified in the form] that can be attributed to the drafter’s own

creativity”).

Ultimately, I find that plaintiff has not distinguished the management reports from the documents considered in Safeguard Business Systems or Utopia Provider Systems. Even if the management reports were “very useful” for determining certain product performance information, see Pl.’s Ex. 66 (Apr. 27, 2006 Novo-ZS Email at ZSA 000259270), plaintiff has not shown that a genuine dispute exists with respect to whether the management reports are sufficiently creative or original to warrant copyright protection. The management reports are comprised of various spreadsheets that include fields for categories including, inter alia, territory, role, name, rank, status, eligibility, goal attainment and earnings. Pl.’s Ex. 64 at 8-23. The tabular headings identified in the management report spreadsheets are not the result of “making non-obvious choices from among more than a few options.” Matthew Bender & Co., 158 F.3d at 682. Rather, they are terms whose use would be expected in order to convey the information transmitted in the reports. Indeed, Syngy’s own expert opined that the incentive compensation terms that appeared on the reports created by Syngy for Novo were “commonly occurring terms within pharmaceutical incentives and used across many pharmaceutical incentive compensation plans. This phenomenon is, in large part, caused by the unique restrictions placed on pharmaceutical sales tracking, which then drives most pharmaceutical manufacturers to purchase their sales data from the same small set of data vendors.” Defs.’ Ex. 4 (Lee Report) at 26-27. Asked whether there were “any words” in a Circle of Excellence Report “that are not standard industry terminology,” former Syngy employee Thomas Lenox responded, “[n]o.” Defs.’ Ex. 32 (Lenox Dep.) at 117:12-17. Asked the same question about a Verification Report – a “report[] that show[s] us . . . just general parameters . . . trying to highlight anything that could potentially be an issue,” Lenox again answered “[n]o.” Id. at 118:1-12. Lenox also responded

“[n]o” when he was asked whether there were any words in an Earnings Summary Report that were “not either the names of Novo Nordisk products or standard industry terminology.” Id. at 122:1-17.

Defendants contend that “Novo would . . . instruct Synegy about which fields should appear in the reports and in what order.” Defs.’ Copyright Mot. at 6; see, e.g., Defs.’ Ex. 19 (Sakhrani Dep.) at 254:2-259:15 (testifying with respect to Novo’s involvement in the inclusion of data in a Circle of Excellence report). Synegy’s Rule 30(b)(6) witness provided conflicting testimony that Synegy employees “would have designed the -- selected which data to be displayed, selected what headings were going to be used, and selected the order in which that information was going to be presented.” Pl.’s Ex. 10 (Synegy Rule 30(b)(6) Dep. (Evernham)) at 202:2-6. However, as defendants argue, Evernham “admitted that the order of the headings was ‘functional’ and based on a ‘logical decision.’” Defs.’ Copyright Mem. at 17, quoting Pl.’s Ex. 10 (Synegy Rule 30(b)(6) Dep. (Evernham)) at 200:8-201:13. Specifically, describing one of the management reports, Evernham testified that:

In this case it’s a tabular report. There’s a lot less complexity on this report than some of the others that we’ve looked at. But even so, the order in which the information is presented is presented in a functional way and in a way that establishes understanding and clarity based on how the recipient will use the report.

So, yes, I do expect that they designed – maybe not the, you know, the sequence that – territory was the first one; that’s just maybe a logical decision.

Pl.’s Ex. 10 (Synegy Rule 30(b)(6) Dep. (Evernham)) at 200:23-201:9. Similarly, Lenox was asked whether he could “say one way or the other whether it was Synegy as opposed to Novo that determined the order of the headings that we see, beginning with “Territory” and ending with “YTD Payout” in an Earnings Summary Report. Id. at 125:24-126:4. He responded, “I

think the layout of this is sort of logical in the way that it flows, so I don't know – I would say it's more Synygy than Novo, but I can't answer the question with 100% yes or no." Id. at 126:7-

13. Asked what he meant by the term "logical," Lenox responded:

So you basically, have your product earnings and you have them sort of in order of importance to Novo. And then you have a total earnings column which sort of gives you a breakout of your product and then you can see what your totals are. And then eligibility is applied and added to – and, you know, eligibility is applied to the total earnings and you sort of get your final payout. So if you're thinking about it, it's like very brand specific and then it gets, you know, like more towards the final payout as you go to the right.

And then sort of, at the far right, you could see how you did in the first POA, how you would have done in the second. I would imagine that POA 2 would be next to that and then year-to-date would be following that.

Id. at 126:17-11. Likewise, a Preliminary Payout Factors Report "sort of has the same logical flow to it. You know, you start with your volume, you have your goal. The volume divided by your goal is attainment." Id. at 131:2-6.

"[S]ummary judgment may properly be granted where a jury could not, as a matter of law, find that the alleged copied material was original to the plaintiff." Mid Am. Title Co. v. Kirk, 867 F. Supp. 673, 681 (N.D. Ill. 1994). I find that plaintiff has not shown that a genuine dispute remains with respect to whether the arrangement of the data transmitted in the management reports is the result of an "exercise of subjective selection and judgment," id. at 683 (N.D. Ill. 1994), that is sufficiently original or informative to warrant a finding that Synygy has a valid copyright in the management reports. Accordingly, I will grant summary judgment in favor of defendants on Synygy's copyright infringement claim insofar as it pertains to the management reports contained in Synygy Reports No. 1.

2. Incentive Compensation Report Scorecards

The other documents included in Synogy Reports No. 1 are various incentive compensation report scorecards. Pl.'s Ex. 64 at 2-7. Plaintiff asserts that the reports "are creative and original works designed to convey inventive compensation-related information to the recipient." Pl.'s Copyright Opp'n Mem. at 28. I find that, unlike with the management reports, Synogy has set forth evidence sufficient to raise a material question of fact with respect to whether the incentive compensation report scorecards convey sufficient information and are sufficiently original to warrant copyright protection.

Defendants argue that "[a]lthough the scorecards are not in the format of tables and contain more headings, they, like the home office tables, do not convey any information until the particular data and information concerning the particular sales rep and his/her particular performance in the particular time period are recorded in the scorecard." Defs.' Copyright Mot. at 18-19. They contend that "without the correctly recorded information [which Synogy omitted from the reports deposited with the Copyright Office], the scorecard conveys no information." *Id.* at 19. Plaintiff counters that "even an IC report with a payout of \$0 conveys valuable information to the recipient regarding why the payout was \$0 and what calculations and business rules led to that determination" Pl.'s Copyright Opp'n Mem. at 33-34. Viewing the summary judgment record in the light most favorable to plaintiff, I find that whether the incentive compensation report scorecards are sufficiently informative to warrant copyright protection is an issue for the jury.

The incentive compensation report scorecards are designed to guide Novo's sales representatives through an understanding of their incentive compensation. Asked about the purpose of incentive compensation report scorecards similar to those included in Synogy's

copyright deposit, see Pl.'s Ex. 79, Novo Nordisk's 30(b)(6) witness, Kathleen Mulrone, testified that "the reports are just actually really sort of like report cards going through the year."

Pl.'s Ex. 37 (Mulrone Dep.) at 148:12-14. She explained,

we would train -- teach the reps, we would communicate to the reps what the -- through their sales management, what the [incentive compensation] plan was and that was constantly reiterated in all communications, meet your goal, beat your goal and the reports were some of the underlying context were saying, okay, where do I stand this month relative to making my goal.

Id. at 58:1-8. Lenox testified about the information conveyed by a payout factor graph on an incentive compensation report scorecard:

So the darker blue line with the I guess little diamond points is the payout curve and the blue dotted -- light blue dotted line or bright blue dotted line is the goal [T]he sort of dark grayish blue line would be the rep's performance and how that relates to the goal and/or the payout curve.

Defs.' Ex. 32 (Lenox Dep.) at 77:25-78:8. As defendants' expert explained when considering a report from a 2004 presentation showing ZS Associates' IC administration capabilities," that included information "comparable" to information contained in Synegy's incentive compensation report scorecards,

[t]he graphs toward the bottom of the report are graphical expressions of the data in the table above. The line graph illustrates the rep's attainment performance over the current period, and the bar graph shows the relative attainments for each product of the nation as well as the sales rep's region and district in order to allow the sales rep to measure how his or her performance falls among each of those three divisions. This type of data can also motivate a sales force by giving them feedback about the company as a whole, which ties their performance to something bigger than just their own territory and own payout.

Defs.' Ex. 8 (Buglione Report) at 64-66.

In F.A. Davis Company v. Wolters Kluwer Health, Inc., 413 F. Supp. 2d 507, 514 (E.D.

Pa. 2005), the Court considered whether copyright protection could attach to blank forms which were “apparently designed to assist a nurse in recording a brief, general report regarding each patient” The Court found that the forms “seem[ed] to evince the requisite originality and *informativeness* to be protected” because, “[b]eyond merely structuring a nurse’s notes, the assessment forms actually guide nurses step-by-step through the information they need to obtain from a patient.” *Id.* (emphasis added). From the evidence before me, I cannot conclude that the selection and arrangement of the information contained in the incentive compensation report scorecards is not similarly informative to the forms considered in F.A. Davis – as the scorecards are designed to guide Novo’s sales representatives through an understanding of their incentive compensation.

I also find that questions of fact remain with respect to whether the design of the incentive compensation report scorecards is sufficiently original to warrant copyright protection. In Digital Communications Associates, Inc. v. Softklone Distributing Corporation, 659 F. Supp. 449, 463 (N.D. Ga. 1987), the Court held that a status screen for a computer program could be copyrighted where “[t]he specific placement, arrangement and design of the parameter/command terms on the status screen is neither arbitrary nor predetermined, but rather, is the result of extensive original human authorship.” The Court held that “the status screen, which is a compilation, is copyrightable to the extent of its arrangement and design of parameter/command terms,” explaining that “[w]hile some of the choices of the two symbols to represent certain parameter/command terms may not be original, . . . other choices of symbols are clearly original.” *Id.* Similarly, copyright protection was found to be appropriate for “the selection, coordination and arrangement of the information contained in . . . (1) screen displays, (2) action grids, (3) data compilations, and (4) data tables” in O.P. Solutions Inc. v. Intellectual Property

Network, Ltd., No. 96-7952, 1999 WL 47191, at *20 (S.D.N.Y. Feb. 2, 1999). The Court made its finding while considering “copyright protection of so-called ‘blank forms’” because the screen displays included a grid that was “to a large extent a form in which the user enters information. Id. at *12. The Court held that “ a form will be entitled to protection so long as it conveys a minimal degree of creativity.” Id. at *13. Likewise, in Bucklew v. Hawkins, Ash, Baptie & Co., LLP, 329 F.3d 923, 928 (7th Cir. 2003), the Court found that the plaintiff had an enforceable claim to copyright in tables in a computer program where the tables were “configured in an optional way, . . . the product of format choices that are not unavoidable, for which indeed there were an immense number of alternative combinations any one of which [the defendant] was free to use instead of [the [plaintiff’s].”

“When there is essentially only one way to express an idea, the idea and its expression are inseparable and copyright is no bar to copying that expression.” Concrete Machinery Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 606 (1st Cir. 1988). But that is not the circumstance before me with the incentive compensation report scorecards. Synogy’s expert Peter Lee opines that

it is clear that there is no industry standardization with respect to incentive compensation report design – the selection of data, the arrangement of data, and the visual representation of the data. Each vendor takes a unique approach that is a clear departure from the others with respect to the placement of client logos, information contained in the report header, ratio of text vs. charts, selection of color palette, placement of summary payout information, decision to show or not show earning calculations, selection of relevant supporting data, size of the report page, and other design features.

Defs.’ Ex. 4 (Lee Report) at 22. Defendants’ expert agreed that “[a]ny number of layouts and formats are effective and clear at conveying the substance and elements of the IC plan design and the accuracy of calculations.” Defs.’ Ex. 8 (Buglione Report) at 58. Indeed, Buglione’s report

opines at length with regard to the different ways in which incentive compensation reports can be formatted. Id. at 58-76. He explains that “[c]ompanies might have different reasons for opting for a text-based IC report over the type of one-page, multi-color, graphical IC reports at issue in this case.” Id. at 74. Novo’s designee also testified that Novo had more than one option with respect to how to format their incentive compensation reports. See Pl.’s Ex. 37 (Mulroney Dep.) at 183:13-15 (“Well, in terms of ultimate reports and what they looked like, we could have moved things in a different place.”). It follows that “[t]he arrangement [of the incentive report scorecards] is in no sense mechanical, but involved creativity on the part of” Synegy. Key Publ’ns, Inc. v. Chinatown Today Publishing Enters., Inc., 945 F.2d 509, 514 (2d Cir. 1991) (finding that the decision regarding “which categories to include” in a business directory and “under what name” . . . “entailed the de minimis thought needed to withstand the originality requirement”). As the Court explained in Bucklew, 329 F.3d at 929-30, “[i]t is not as if everyone who writes programs of this sort uses Swiss font or displays an output range or uses a particular pattern of boldfacing.” It follows that it is not as if everyone who prepares an incentive compensation report scorecard uses the same selection and arrangement of information.

In his report, defendants’ expert asserts that “[t]he choices regarding which types of content to include [in an IC report] are decisions driven by the client and its IC plan, not the IC administration vendor.” Defs.’ Ex. 8 (Buglione Report) at 70; see also Pl.’s Ex. 37 (Mulroney Dep.) at 31:1-4 (“The reports need to reflect the structure of [Novo’s incentive compensation] plan so that there was an implication for how the reports would be laid out based on what the plan was.”). Buglione testified, however, that

I don’t recall any plan dictating what information should be displayed in an IC report. The assumption would be that if the plan, for example, is measuring NRx market share goal attainment at a national level, which is what earlier Novo Nordisk plans did,

then it would make sense that that information, those measurements and metrics, would appear on a plan document. But there was nothing specifically in the plan document that said this is the number that absolutely must appear on the IC goal report.

Pl.'s Ex. 25 (Buglione Dep.) at 84:23-85:8. Plaintiff thus contends that "Novo's IC plan documents do not dictate that a report is required at all, much less the content to be displayed in a report or how the report should be designed." Pl.'s Copyright Opp'n Mem. at 32. Indeed, asked whether there was "anything about the plan documentation that requires [an incentive compensation report scorecard] to be laid out in the fashion" of a report prepared by Synegy for Novo, Novo's designee Mulronev testified that "[t]here's nothing that specifies it except sort of business logic and reading sequencing that would be natural to people." Pl.'s Ex. 37 (Mulronev Dep.) at 168:9-16.

Indeed, any argument that the selection and arrangement of the information in the incentive compensation report scorecards is not sufficiently original to warrant copyright protection is undermined by evidence that ZS could create "enhanced" alternatives to the Synegy-prepared incentive compensation report scorecards, as is reflected by the following testimony from the Rule 30(b)(6) deposition of ZS partner Florent Moise.

- Q. Let's talk about the scorecard report.
- A. There were a number of enhancements that were suggested by ZS and accepted by Novo Nordisk.
- Q. Okay. And there were enhancements to the reports that already existed?
- A. I guess the report that existed is their report that existed. We had to, basically, do our own set of that. . . . Well, ZS had to create, basically, and customize some of our reports, such that we would make sure that they have the – basically, that they meet Novo Nordisk requirements.

Pl.'s Ex. 56 (Moise Dep.) at 124:12-125:12. See Snap-on Bus. Solutions Inc. v. O'Neil &

Assocs., Inc., 708 F. Supp. 2d 669, 685-86 (N.D. Oh. 2010) (finding that the defendant's own evidence "belie[d] its argument that efficiency and function dictate[d] the . . . structure" of the plaintiff's copyrighted proprietary database where, for example, the defendant "believed it could provide a better database . . . precisely because it would alter the arrangement of the data").

Viewing the facts in the light most favorable to Synogy as the non-moving party, I find that it cannot be said as a matter of law that the incentive compensation report scorecards found in Synogy Reports No. 1 are not sufficiently innovative or informative to warrant a copyright. Because I find that a reasonable jury could find that Synogy's incentive compensation report scorecards are not uncopyrightable blank forms, I will deny defendants' motion for summary judgment to the extent that it rests on a copyright invalidity argument with respect to the incentive compensation report scorecards.

D. Copying

Because I find that material questions of fact remain with respect to whether Synogy holds a valid copyright in the Software Macros No. 1 and No. 2 and/or the incentive compensation report scorecards, I must consider whether there is a triable issue with respect to the second element of Synogy's claim for copyright infringement: "copying of constituent elements of the work that are original." Feist, 499 U.S. at 361. Plaintiff contends that "defendants have not raised any issues concerning infringement" and "there is unrebutted evidence of direct copying." Pl.'s Copyright Opp'n Mem. at 27 n.11. Synogy argues that "in a case such as this one where defendants have admitted to using copyrighted material, 'that alone would make the defendant[s]' liable for copyright infringement, absent the owner's authorization." Id., quoting Stenograph, L.L.C. v. Sims, No. 99-5354, 2000 U.S. Dist. LEXIS 9619, at *7 (E.D. Pa. July 12, 2000).

In the absence of direct evidence of copying, copying may be proved inferentially “by showing that the defendant had access to the copyrighted work and that the original and allegedly infringing works share substantial similarities.” Kay Berry, Inc. v. Taylor Gifts, Inc., 421 F.3d 199, 207-08 (3d Cir.2005) (citations omitted); see also Peel & Co. v. The Rug Market, 238 F.3d 391, 398 (5th Cir.2001) (“[N]ot all copying is legally actionable. To support a claim for copyright infringement, the copy must bear a substantial similarity to the protected aspects of the original.”).

The issue of access is not in dispute. As I have previously noted, ZS has stipulated that “in late 2005 and early 2006, ZS received from Defendant Novo Nordisk, Inc. (“Novo”) electronic materials from Synegy’s incentive compensation management services for Novo, including the macros contained in those materials,” and that “ZS received such materials via CD and e-mail.” Pl.’s Ex. 57. Accordingly, I must determine whether there is sufficient evidence of substantial similarity to permit plaintiff’s claims with respect to Synegy Macros. No. 1 and 2 and the incentive compensation report scorecards to go to the jury. “The standard used to detect substantial similarity is ‘whether an ordinary lay observer would detect a substantial similarity between the works.’” Am. Bd. of Internal Med. v. Von Muller, No. 10-2680, 2012 WL 2740852, at *4 (E.D. Pa. July 9, 2012), aff’d (Sept. 12, 2013), quoting Nat’l Conference of Bar Exam’rs v. Multistate Legal Studies, Inc., 413 F. Supp. 2d 485, 487 (E.D. Pa. 2005) (further citations omitted).

1. Synegy Macros No. 1 and No. 2

Defendants contend that “without any damages for copyright infringement relating to the macros and without a finding that they were ever used, there is no need for a trial, and summary judgment should therefore be entered on the copyright claim insofar as Macros I and Macros II

are concerned.” Defs.’ Copyright Reply. at 13-14. Defendants make this argument based on the deposition testimony of Synygy’s damages expert, who explained, “I haven’t attempted to calculate any revenue derived from use of the macros or the code to generate fees. It’s my understanding [defendants] didn’t use it.” Defs.’ Ex. 13 (Hampton Dep.) at 265:19-20. Whether Synygy suffered damages as a result of defendants’ alleged infringement of Synygy’s copyright in Synygy Macros No. 1 and No. 2 is not, however, dispositive of whether defendants can be found liable for infringement of Synygy Macros No. 1 and 2.¹⁰ And I find that Scott Hampton’s testimony is not dispositive of whether or not defendants copied the macros.¹¹

In his report, Synygy’s expert Peter Lee compared the macro code contained in a Synygy incentive compensation report (SYN 0094710) and a ZS report (ZSA000000466) and found that

¹⁰ Under the Copyright Act the owner of a registered copyright that has been infringed may elect at any time before final judgment is rendered to recover either actual damages and any additional profits of the infringer or statutory damages. See 17 U.S.C. § 504. In its second amended complaint, plaintiff asks me to “[i]ssue an order requiring ZS and Novo to account for all gains, profits and advantages derived from their acts of misappropriation . . .” and seeks an award for, inter alia, “loss of profits, damages for infringement” and “statutory damages in the amount of \$150,000 per infringement based upon ZS’s and Novo’s acts of willful infringement, pursuant to the Copyright Act of 1976, 17 U.S.C. § 101 and 504(c), et seq. . . .” Second Am. Compl. at p. 22, ¶¶ k, m, n. Because Synygy has asserted a claim for statutory damages, its failure to set forth evidence of actual damages with respect to Synygy Macros No. 1 and No. 2 is not fatal on summary judgment to Synygy’s copyright claim with respect to the macros.

¹¹ Indeed, Synygy’s expert qualified his statement by explaining that “[m]y understanding is [the macros’] use was limited to copying it, holding it, and they didn’t use it to provide services.” Id. at 265:14-16. He explained that his damages

calculation is consistent with the fact pattern that there was use of the macros and the code in the sense that it was copied, that it was led, but I don’t know that it was actually used to provide services. . . . I consider use holding something or copying it. And I think there was that type of use. But my understanding is it wasn’t used to provide services. It didn’t generate directly the accused revenue.

Id. at 264:11-265:5.

the comparison “shows an exact duplication of the SYNYGY VBA code exists in the ZS report” and that “[c]omparing line-by-line VBA code in SYN0094710 and ZSA000000000466 shows that the VBA code in those report templates are 100% identical.” Defs.’ Ex. 4 (Lee Report) at 6; see also id. at 50-65. The code Lee reviewed in his report appears to be substantially similar (if not identical) to the code set forth in the unredacted copy of Synygy Macros No. 1 in plaintiff’s Exhibit 87. Also, defendants’ expert Cliff Ragsdale testified that a number of reports delivered by ZS to Novo contain macros which are identical to the macros copyrighted by Synygy. See Pl.’s Ex. 27 at 56:19-23 (“Q. And would you agree that the VBA macrocode in the Synygy workbook that is SYN-94710 appears almost identically in the workbook that is ZSA466? A. Yes.”). Asked why ZS would copy Synygy’s macro code, he speculated that a ZS employee:

had a file and someone probably was told to copy it not knowing what was in it to begin with in which case it probably wasn’t a specific decision on their part to copy that piece of code; just like they probably didn’t specifically decide to copy all the range names either. It just happens as part of the copying process.

Id. at 176:14-177:2.

On these facts, I find that genuine issues of material fact require denial of defendants’ motion for summary judgment on plaintiff’s copyright infringement claim with respect to Synygy Macros No. 1 and No. 2.

2. Incentive Compensation Report Scorecards

Likewise, I find that genuine issues of material fact remain with respect to whether defendants copied the incentive compensation report scorecards. In their memorandum in support of their motion for summary judgment, defendants nowhere contend that they did not copy the incentive compensation report scorecards. See Defs.’ Copyright Mem. In its response to defendants’ motion, Plaintiff contends that “[d]efendants have admitted to using Synygy’s

copyrighted reports, and at least tens of thousands of reports that ZS delivered to Novo contain digital 'fingerprints' proving that they were copied from Synogy's electronic files." Pl.'s Copyright Resp. at 37, citing Defs.' Ex. 4 (Lee Report) at 2-11.

Suggesting that Synogy's incentive compensation report scorecards were copied, in an email one ZS employee instructed another ZS employee working on mockups of reports for Novo to "[p]lease check the File>Properties>Summary Tab to ensure that we have no references to Synogy/any other company than ZS." Defs.' Ex. 4 (Lee Report) at 67 (copy of ZSA000242853). Synogy's expert explained in his report that Synogy's reports were "used as the foundation for the report design that was deployed by ZS to NOVO. . . . ZS proposed minor changes to the report notes and footnotes, some data visualization changes of the same dataset as the SYNYGY incentive reports, and no incentive data presentation strategy modifications." Defs.' Ex. 4 (Lee Report) at 8. Lee noted that "Document ZSA000241572 describes in detail the adjustments that were proposed by ZS for the SYNYGY designed [incentive compensation report scorecard] prior to deployment by ZS." Id. He concludes that the

list of the 6 proposed changes represent (at best) an adjustment to an existing report and is not a transformation or redesign. No design changes were made to the selection of the data items (especially the summary top sections of the report) and no design changes were made to the arrangement of data items. The bottom of the report included a modification of the graphical representation of a selected set of data but was not a modification of the data selection or calculation process.

Id. at 9. Lee's conclusions are in line with the testimony of ZS's 30(b)(6) designee Moise that:

Novo Nordisk wishes [sic] was to have as little disruption as possible for its sales force, and therefore -- . . . they wanted us to either match or enhance the actual, the reports that they were currently distributing. As an example, of course -- like company logo, et cetera, it has to be retained. . . . I think they wanted to have some continuity between the reports that they were using at that time and what ZS would be producing.

Pl.'s Ex. 56 (Moise Dep.) at 128:7-129:7. Similarly, Kathleen Mulroney, Novo Nordisk's 30(b)(6) witness, testified that when ZS took over from Synogy the job of preparing Novo's reports,

in terms of ultimate reports and what they looked like, we could have moved things in a different place. We didn't move a lot of things to lessen a disruption in the field and not that it's a big disruption to move something a few inches down but just to minimize the disruption in the questions that we would get.

Pl.'s Ex. 37 (Mulroney Dep.) at 183:13-19.

Even if ZS made some "enhancements" to the incentive compensation report scorecards, "[v]ariants that result from tinkering with a copied form are derivative works from that form, and it is a copyright infringement to make or sell a derivative work without a license from the owner of the copyright on the work from which the derivative work is derived." Bucklew, 329 F.3d at 930; Pickett v. Prince, 207 F.3d 402, 405-407 (7th Cir.2000); see also National Conference of Bar Examiners v. Multistate Legal Studies, Inc., 458 F.Supp.2d 252, 258 (E.D. Pa. 2006) ("less than wholesale reproduction can also provide a sufficient basis to conclude that there was copying"). On the record before me I find that there is sufficient evidence of copying to require that Synogy's copyright claim with respect to the incentive compensation report scorecards be submitted to a jury.

IV. State Law Claims

In defendants' fourth motion for summary judgment, they seek summary judgment on plaintiff's state law claims for unfair competition (Counts IV and V), breach of contract (Count VI), tortious and intentional interference (Counts VII, IX and XI), conversion (Count X) and unjust enrichment/quantum meruit (Count XII).

A. Copyright Preemption

Defendants first seek summary judgment with respect to Synogy's claims for unjust enrichment quantum/meruit, conversion, tortious and intentional interference, unfair competition and breach of contract,¹² arguing that these claims are preempted pursuant to the Copyright Act's express preemption provision found at 17 U.S.C. § 301. Specifically, the Copyright Act preempts:

all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103.

17 U.S.C. § 301. “[T]he preemption provision does not apply if the subject matter does not come within the subject matter of copyright” Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc., 307 F.3d 197, 216-17 (3d Cir. 2002) (citation and internal quotation omitted).

Synogy contends that “defendants misappropriated and disclosed . . . Synogy confidential information, which are [sic] outside of the subject matter of copyright law.” Pl.’s State Law Response at 29. Specifically, Synogy asserts that its “state law causes of action based on defendants’ wrongdoing with respect to the IC simulator, Excel Named Ranges, and background excel datasheets are not preempted since they are not the subject of copyright law.” Id. But Synogy’s state law claims set forth in its second amended complaint appear to encompass

¹² Although plaintiff devotes a portion of its response to defendant’s motion to an argument that its trade secret misappropriation causes of action are not preempted by the Copyright Act, see Pl.’s State Law Response at 25-29, defendants do not contend that Synogy’s trade secret misappropriation causes of action are preempted by the Copyright Act. See Defs.’ State Law Reply at 1 (“Defendants did not move to preempt Synogy’s trade-secret claims [under the Copyright Act] because, in the Third Circuit, it is difficult to apply § 301 to trade-secret misappropriation.”).

materials which fall within the subject matter of copyright law. See, e.g., Second Am. Compl. ¶ 132 (claiming Novo breached its contract by “reproducing, distributing and using copies of the Synogy Software Macros, the Synogy Reports, and other Confidential Information”); id. ¶ 127 (asserting a claim for unfair competition under New Jersey law for defendants’ use of “Synogy’s trade secrets, confidential business and technical information, and other goods and services”). As is further set forth above, Synogy’s software macros and incentive compensation report scorecards clearly fall within the subject matter of copyright. Thus to the extent that plaintiff’s state law claims rest on these materials, the claims may be subject to preemption where they are “equivalent in substance to a federal copyright claim.” Gemel Precision Tool Co., Inc. v. Pharma Tool Corp., No. 54-5305, 1995 WL 71243, at *5 (E.D. Pa. Feb. 13, 1995).

Courts employ a “functional test” to determine whether a state law cause of action is preempted by the Copyright Act: “if a state cause of action requires an extra element beyond mere copying, preparation of derivative works, performance, distribution or display, then the state cause of action is qualitatively different from, and not subsumed within, a copyright infringement claim and federal law will not preempt the state action.” Dun & Bradstreet, 307 F.3d at 217, citing Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1164 (1st Cir. 1994). “To determine whether a claim is qualitatively different, the Court looks at what the plaintiff seeks to protect, the theories in which the matter is thought to be protected and the rights sought to be enforced.” Tegg Corp. v. Beckstrom Elec. Co., 650 F. Supp. 2d 413, 422 (W.D. Pa. 2008) (quotations and citations omitted). Defendants argue that Synogy’s claims for unjust enrichment quantum/meruit, conversion, tortious and intentional interference, unfair competition and breach of contract are preempted because they “assert rights that are equivalent to rights protected under the Copyright Act: The state law claims, like the federal copyright claim, are

rooted in the alleged unauthorized copying and distribution of the incentive compensation reports that Synogy deposited in the Copyright Office.” Defs.’ Copyright Mem. at 1-2. I will consider each claim in turn.

1. Unjust Enrichment/Quantum Meruit (Count XII)

Plaintiff’s claim for unjust enrichment/quantum meruit does not state an extra element not included in a claim under the Copyright Act. Plaintiff alleges that “ZS has been unjustly enriched” in that it “has enjoyed the benefit of the skills, expertise, knowledge and intellectual property of Synogy, which enabled ZS to unlawfully gain an entry into the sales compensation management market without investing in the training of employees and/or research and development of intellectual property.” Second Am. Compl. ¶¶ 165-66. “The foundation of [Synogy’s] claim is that [defendants] ha[ve] exploited [its] intellectual property without compensating [Synogy] for the benefits derived from such use.” Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 210 F. Supp. 2d 552, 567 (D.N.J. 2002). Synogy’s claim “necessarily involves [defendants’] acts in reproducing, distributing and displaying [Synogy’s software macros and incentive compensation report scorecards], all of which are encompassed in rights protected under copyright law.” Id.; see also Visual Commc’ns, Inc. v. Assurex Health, Inc., No. 14-3854, 2014 WL 4662474, at *9 (E.D. Pa. Sept. 18, 2014) (“Plaintiff’s quantum meruit claim . . . does not contain an ‘extra element’ beyond a traditional copyright infringement claim, because the quantum meruit claim seemingly seeks compensation for Defendant having profited from the use of Plaintiff’s drawing and thus seeks to protect the same rights as those protected by the Copyright Act.”); CollegeSource, Inc. v. AcademyOne, Inc., No. 10-3542, 2012 WL 5269213, at *13 (E.D. Pa. Oct. 25, 2012) (finding plaintiff’s unjust enrichment claim was preempted under the Copyright Act and that “[t]he extra element of misrepresentation, or taking in an

underhanded way, does not avoid preemption”). I will grant summary judgment in favor of defendants on plaintiff’s unjust enrichment claim to the extent that it relates to Synogy’s software macros and incentive compensation report scorecards.

2. Conversion (Count X)

In its second amended complaint, Synogy claims that “ZS intentionally, willfully and wantonly converted Synogy’s intellectual property by unlawfully obtaining and utilizing Synogy’s proprietary trade secrets and confidential information about the services provided to Synogy’s clients.”¹³ Second Am. Compl. ¶ 158. “Conversion is a tort by which the defendant deprives the plaintiff of his right to a chattel or interferes with the plaintiff’s use or possession of a chattel without the plaintiff’s consent and without lawful justification.” Pittsburgh Constr. Co. v. Griffith, 834 A.2d 572, 581 (Pa. Super. Ct. 2003).

To the extent that Synogy’s conversion claim relates to its software macros and incentive

¹³ Plaintiff’s second amended complaint does not specify whether its claim for conversion falls under the law of Pennsylvania or New Jersey. In its response to defendants’ motion, plaintiff defends its conversion claim only under Pennsylvania law. See Pl.’s State Law Opp’n Mem. at 43-45 (setting forth the elements of a claim for conversion under Pennsylvania law). Accordingly, I will consider plaintiff’s claim under the law of Pennsylvania.

To the extent that plaintiff’s second amended complaint could be construed as bringing a claim for conversion under New Jersey law, I agree with defendant that the claim would fail insofar as it relates to plaintiff’s intellectual property. See Defs.’ State Law Mem. at 30; see also StrikeForce Techs., Inc. v. WhiteSky, Inc., No. 13-1895, 2013 WL 3508835, at *8 (D.N.J. July 11, 2013), quoting Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 210 F. Supp. 2d 552, 568 (D.N.J. 2002) (“a cause of action for conversion relates to interference with tangible property and does not protect rights to intangible property” and “[s]oftware code, trade secrets, and other intellectual property have generally been recognized as intangible property, that is, property without physical embodiment”). In contrast, it has been held that “Pennsylvania law recognizes that trade secrets can be the object of conversion.” Schmidt, Long & Assoc., Inc. v. Aetna U.S. Healthcare, Inc., No. 00-CV-3683, 2001 WL 856946, at *8 (E.D. Pa. July 26, 2001), citing Fluid Power Inc. v. Vickers, Inc., No. 92-0302, 1993 WL 23854, at *3 (E.D. Pa. Jan. 28, 1993); cf. Partners Coffee Co., LLC v. Oceana Servs. & Prods. Co., No. 09-236, 2009 WL 4572911, at *7 (W.D. Pa. Dec. 4, 2009) (“permitting a conversion claim based on Defendants’ alleged diversion of confidential data from Plaintiff’s computer system . . . to proceed” following a motion to dismiss).

compensation report scorecards, I find that it is preempted under the Copyright Act. “Although copyright law does not protect possession, per se, implicit in the ownership rights conferred by § 106 is the power to control the use of the copyrighted materials.” Gemel Precision Tool, 1995 WL 71243, at *6 (finding “the conversion claim is identical to [the plaintiff’s] exclusive right to copy, to create derivative works from, and to distribute the copyrighted materials, as provided for by § 106”). When “plaintiff’s conversion claim” arises “from copying and misuse of its work, it” is “functionally equivalent to a copyright claim.” Tegg Corp., 650 F. Supp. 2d at 432. This is not a case where the conversion claim seeks the return of “tangible, physical property, the rights to which are distinctly different from those rights involved in” plaintiff’s copyright claim. Video Pipeline, 210 F. Supp. 2d at 568-69 (finding conversion claim was not preempted to the extent that it sought the return of allegedly converted items). Here, through its conversion claim plaintiff seeks to recover for the unauthorized use of Syngy materials including its copyrighted software macros and incentive compensation report scorecards. Section 301 preempts such a claim. I will grant summary judgment in favor of defendants on plaintiff’s conversion claim to the extent that it relates to Syngy’s software macros and incentive compensation report scorecards.

3. Tortious and Intentional Interference (Counts VII, IX and XI) and Unfair Competition under New Jersey Common Law (Count V)¹⁴

¹⁴ Defendants’ motion for summary judgment addresses plaintiff’s Count V claim for unfair competition under New Jersey common law along with plaintiff’s claim under the New Jersey Fair Trade Act. See Defs.’ State Law Mem. at 20-22. The claim is, however, appropriately addressed with plaintiff’s claims for tortious and intentional interference. “New Jersey courts have noted that, in essence, unfair competition is a business tort, generally consisting of the misappropriation of a business’s property by another business.” Sussex Commons Outlets, L.L.C. v. Chelsea Prop. Grp., Inc., No. A-3714-07T1, 2010 WL 3772543, at *9 (N.J. Super. Ct. App. Div. Sept. 23, 2010) (citing cases). “‘There is no distinct cause of action for unfair competition. It is a general rubric which subsumes various other causes of action’ for unlawful interference with a current or prospective economic interest.” Tipton v. U-Go, Inc., No. A-1543-12T3, 2014 WL 4231363, at *8 (N.J. Super. Ct. App. Div. Aug. 28, 2014),

Syngy claims that “ZS possessed and harbored an intent to harm Syngy by interfering with Syngy’s contractual and prospectively contractual relationship with Novo.” Second Am. Compl. ¶ 141. Syngy also claims that “ZS jointly and severally, possessed and harbored an intent to harm Syngy by interfering with Syngy’s contractual and prospectively contractual relationship with Schering-Plough.” Id. at ¶ 153. Further, Syngy claims that “ZS intentionally interfered with Syngy’s business relations with its clients.” Id. at ¶ 161. Defendants argue that “Syngy’s three interference counts are no different” from its claim for copyright infringement. Defs.’ State Law Mem. at 20. They assert that “the only extra element alleged is ZS’ purported ‘knowledge’ of a Syngy-Novo ‘contractual relationship’ and an ‘intent to harm Syngy by interfering’ with that relationship.” Id. (citation omitted). I agree with defendants that “[t]his does not suffice as an extra element establishing a qualitative difference” Id.

“[N]umerous courts have found that tortious interference is generally preempted by the Copyright Act.” MCS Servs., Inc. v. Johnsen, No. 01-4430, 2002 WL 32348500, at *7 (E.D. Pa. Aug. 13, 2002); see also Tegg Corp., 650 F. Supp. 2d at 429 (citing cases). “[T]he act of marketing with intent to interfere with existing contractual relationships does not constitute an extra element necessary to protect the tortious interference claim from preemption.” Tegg Corp., 650 F. Supp. 2d at 430-31. The “additional elements of awareness and intentional interference . . . do[] not establish qualitatively different conduct on the part of the infringing party, nor a fundamental nonequivalence between the state and federal rights implicated. In both cases, it is the act of unauthorized publication which causes the violation.” Harper & Row v. Nation

quoting C.R. Bard, Inc. v. Wordtronics Comme’ns, 235 N.J. Super. Ct. 168, 172 (Law Div.19 89). “New Jersey common law unfair competition includes, but covers a broader spectrum of behavior than, service mark infringement.” Holiday Inns, Inc. v. Trump, 617 F. Supp. 1443, 1465 (D.N.J. 1985) (citations omitted).

Enters., 723 F.2d 195 (2d Cir. 1983). “Plaintiff’s ultimate claim[s are] based on its right to prevent unlawful interference with its right to distribute and reproduce its copyrighted [software macros and incentive compensation report scorecards] to current and future parties, and create for those parties derivative works based on its copyrighted [materials].” Tegg Corp., 650 F. Supp. 2d at 431. These claims are not qualitatively different from plaintiff’s claim for copyright infringement and therefore are preempted. The same follows for plaintiff’s claim for unfair competition under New Jersey common law to the extent that it “historically has been considered a subspecies of the class of torts known as tortious interference with business or contractual relations.” Sussex Commons Outlets, L.L.C. v. Chelsea Prop. Grp., Inc., No. A-3714-07T1, 2010 WL 3772543, at *9 (N.J. Super. Ct. App. Div. Sept. 23, 2010) (citing cases). I will grant summary judgment in favor of defendants on plaintiff’s tortious and intentional interference claims and its claim for unfair competition under New Jersey Common law to the extent that the claims relate to Synogy’s software macros and incentive compensation report scorecards.

4. New Jersey Fair Trade Act (Count IV)¹⁵

N.J.S.A. 56:4-1 provides that “[n]o merchant, firm or corporation shall appropriate for

¹⁵ Defendants also contend that summary judgment is warranted in their favor on Synogy’s claims for unfair competition, including its claim under the New Jersey Fair Trade Act, because Synogy has not set forth evidence that “Novo was ever confused or misled about the source of its IC reports.” Defs.’ State Law Reply at 14. The Fair Trade Act is the state statutory equivalent of section 43(a)(1) of the Lanham Act. See FM 103.1, Inc. v. Universal Broad. of New York, Inc., 929 F. Supp. 187, 198 (D.N.J. 1996). As with a claim under the Lanham Act, plaintiff’s claim under the Fair Trade Act is “broad enough to cover the use of trademarks which are likely to cause confusion, mistake, or deception of any kind, not merely of purchasers nor simply as to source of origin.” Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 711 (3d Cir. 2004) (citation and internal quotation omitted). “[S]ummary judgment is appropriate if the Court is satisfied that the products or marks are so dissimilar that no question of fact is presented.” Fresh Prepared Foods, Inc. v. Farm Ridge Foods LLC, No. 10-6310, 2013 WL 4804816, at *11 (D.N.J. Sept. 9, 2013) (citation omitted). On the record before me, I find that material questions of fact remain with respect to whether Synogy has shown that defendants’ use of . . . created a likelihood of confusion. I therefore decline to grant summary judgment in defendants’ favor on this basis with respect to Synogy’s claim for unfair competition under New Jersey common law.

his or their own use a name, brand, trade-mark, reputation or goodwill of any maker in whose product such merchant, firm or corporation deals.” N.J.S.A. 56:4-1. Synygy claims that defendants “unlawfully appropriated for their own use [Synygy’s] trade secrets and confidential business and technical information” and that they harmed Synygy when they unlawfully used the trade secrets and confidential information in their businesses and when Novo disclosed the trade secrets and confidential information to ZS and others.” Second Am. Compl. at ¶ 119-120.

Synygy’s second amended complaint alleges that defendants’ “conduct in ‘passing off’ Synygy trade secrets, confidential business and technical information goods and services as their own has caused confusion between the goods and services of Synygy and ZS.” *Id.* at ¶ 128. Synygy alleges that “ZS’s and Novo’s joint and several use in commerce of the Synygy trade secrets and confidential business and technical information . . . without Synygy’s consent has and is likely to cause confusion, or to cause mistake, or to deceive as to the origin, sponsorship, or approval of their goods, services or commercial activities by another person.” *Id.* at ¶ 125.

Unfair competition claims have been held to be preempted by the Copyright Act when they are premised on a “reverse passing off” theory. Fun-Damental Too Ltd. v. Universal Music Group, Inc., No. 97-1595, 1997 WL 381608, at *4 (E.D. Pa. July 8, 1997); see also Schiffer Publ’g, Ltd. v. Chronicle Books, LLC, 350 F. Supp. 2d 613, 619-20 (E.D. Pa. 2004) (finding preemption barred an unfair competition claim under a reverse passing off theory). “Reverse passing off” occurs when “[t]he producer misrepresents someone else’s goods or services as his own.” Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 27 n.1 (2003). Reverse passing off is “grounded in the alleged unauthorized copying and use of another’s copyrighted expression.” Fun-Damental Too, 1997 WL 381608, at *4-5. Where an unfair competition claim “rest[s] squarely on the unauthorized act of copying and distributing,” an allegation that

defendants' actions were "likely to cause mistake, confuse or deceive the general public" has been found insufficient "to pass the extra element test." Daley v. Firetree, Ltd., No. 04-2213, 2006 WL 148879, at *4 (M.D. Pa. Jan. 19, 2006).

Defendants argue that "Synygy's unfair-competition counts allege no more than a reverse passing-off theory, namely that ZS and Novo copied allegedly protected elements of Synygy's report designs and passed them off as their own." Defs.' State Law. Mem. at 21. Indeed, in paragraph 127 of Synygy's second amended complaint, Synygy asserts that defendants "engaged in unfair competition by utilizing Synygy's trade secrets, confidential business and technical information, and other goods and services and *passing those trade secrets, goods and services off as their own.*" Second Am. Compl. ¶ 127 (emphasis added). In its response to defendants' motion for summary judgment Synygy has not provided any reason for me to find that its claims for unfair competition are anything other than claims for reverse passing off. "Any confusion [arising from defendants' conduct] is a result of the alleged unlawful copying and distributing, and does not make the unfair competition claim[s] qualitatively different from the copyright claim." Daley, 2006 WL 148879, at *5. To the extent that Synygy's unfair competition claims arise out of the alleged wrongful use of Synygy's software macros and incentive compensation report scorecards, they are equivalent to Synygy's copyright claim and are therefore preempted. To the extent that defendants' claims for unfair competition arise out of actions other than the claimed infringement of Synygy's copyrighted works, they are not preempted. See Pl.'s State Law Opp'n Mem. at 40 ("Synygy's unfair competition claims . . . [are also based on] the misappropriation and disclosure of Synygy's trade secrets . . . and other confidential information not subject to copyright.").

5. Breach of Contract (Count VI)¹⁶

Under Section 8 of the Synygy-Novo contract, Novo agreed not to “divulge, disclose, convey or permit the disclosure of any of the Proprietary Information of [Synygy], either verbally or in writing, to any person, corporation, or third party” Defs.’ Ex. 14 at SYN0000700. Synygy asserts that “under the terms of the Novo Contract, Novo was required to maintain all [working copies of the Synygy Software, Synygy Reports, and the Confidential Information contained therein] as confidential and not disclose [them] to anyone without Synygy’s permission.” Second Am. Compl. ¶ 78. Synygy claims that Novo breached its contract with Synygy “by reproducing, distributing and using copies of the Synygy Software Macros, the Synygy Reports and other Confidential Information without the right or Synygy’s permission.” Second Am. Compl. at ¶ 132. Synygy contends that its breach of contract claim against Novo is not preempted under the Copyright Act because it has “extra elements” which make it qualitatively different from its copyright claim. Pl.’s State Law Opp’n Mem. at 30-32. Defendants argue that Synygy’s breach of contract claim is preempted because “there is no qualitative difference between the conduct proscribed in § 8 and the conduct proscribed by the Copyright Act” Defs.’ State Law Reply at 8.

¹⁶ In their motion for summary judgment on plaintiff’s state law claims, defendants also contend that summary judgment is warranted in their favor on plaintiff’s breach of contract claim because Synygy has no evidence of a contract breach. Defs.’ State Law Mem. at 25. Defendants contend that Synygy’s breach theory fails “because of an express exclusion built into section 8, which makes clear that the nondisclosure restrictions of that section do *not* apply to ‘Proprietary Information’ that is or becomes public knowledge.” *Id.* at 26. They argue that the record is “unambiguous” that the relevant “Proprietary Information” “was all in fact publicly disclosed by Synygy during client pitches, at trade shows, and in a book published by the company’s CEO.” *Id.* Synygy counters that “there is absolutely no evidence that Synygy ever publicly disclosed the customized deliverables that it designed and produced for Novo.” Pl.’s State Law Opp’n Mem. at 37. I decline to grant summary judgment in defendants’ favor on the basis of their public disclosure argument as I find that material questions of fact remain with respect to whether Novo’s disclosures to ZS were in breach of Novo’s obligations to Synygy under the terms of their agreement.

While it is not a settled question, “the general rule is that matters involving breach of contract claims are not preempted because a breach of contract claim requires an extra element that renders the claim qualitatively different from a claim for copyright infringement: a promise by the defendant.” MCS Servs., Inc., 2002 WL 32348500, at *5 (citations and internal quotations omitted); see also Am. Bd. of Internal Medicine v. Von Muller, No. 10-2680, 2012 WL 2740852, at *7 (E.D. Pa. July 9, 2012) (“Although not a bright-line rule, the vast majority of courts in this circuit and elsewhere that have addressed the issue of contracts and preemption under Section 301 of the Copyright Act have found that the rights protected by breach of contract claims are not the same as copyright rights.”) (citations, internal quotations and alterations omitted); Mainardi v. Prudential Ins. Co. of Am., No. 08-3605, 2009 WL 229757, at *7 (E.D. Pa. Jan. 30, 2009) (“district courts within the circuit have agreed that an extra element exists in a breach of contract claim”). In CollegeSource Inc. v. AcademyOne, Inc., 2012 WL 5269213, at *9, the Court explained that the extra elements that distinguish a breach of contract claim from a claim under the Copyright Act include: “the existence of a contract or agreement,” including proof of “offer, acceptance, and consideration to establish that a contract exists.” Further, “[b]ecause contract is *in personam* and copyright is *in rem*, a judgment on the basis of contract law will impact a third party’s rights differently.” Id. But see Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 457 (6th Cir 2001) (“If the promise amounts only to a promise to refrain from reproducing, performing, distributing or displaying the work, then the contract claim is preempted.”).

Syngy’s breach of contract claim arises out of Novo’s alleged broken promise to abide by the terms and conditions of the pledge of honesty which she signed prior to taking the examination. While unquestionably similar, the claims are not identical.

Plaintiff claims that “Novo’s breach of the contract is not limited to its promise to refrain from using, copying, distributing and creating derivate works from Synogy’s copyrighted materials, but rather includes a breach of the confidentiality obligations under Section 8 of the Synogy-Novo Contract.” Pl.’s State Law Opp’n Mem. at 31. As plaintiff contends, “[s]uch a promise of confidentiality and nondisclosure is qualitatively different from a promise not to infringe Synogy’s copyrighted works.” Id. at 31-32. “While unquestionably similar, the claims are not identical.” Am. Bd. of Internal Med., 2012 WL 2740852, at *7. I will not grant summary judgment in defendants’ favor on Synogy’s breach of contract claim on the basis of copyright preemption.

B. PUTSA Preemption - Trade Secret Misappropriation

In its response to defendants’ motion for summary judgment with respect to Synogy’s state law claims, Synogy argues that its state law claims are not preempted under the Copyright Act because they “are based on defendants’ misappropriation and disclosure of Synogy’s trade secrets in addition to acts of copyright infringement.” Pl.’s State Law Opp’n Mem. at 1; see also id. at 25-29 (“defendants’ preemption theory ignores the fact that their wrongdoing is not limited to the mere infringement of Synogy’s copyrighted reports and software macros”). However, as defendants contend in their reply brief, “there is an express preemption clause governing trade secret claims as well, found in the PUTSA, 12 Pa. Cons. Stat. Ann. §§ 5301-5308.” Defs.’ State Law Reply at 4. Section 5308 provides that “this chapter displaces conflicting tort, restitutionary and other law of this Commonwealth providing civil remedies for misappropriation of a trade secret.” 12 Pa. Cons. Stat. Ann. § 5308(a). The PUTSA thus preempts state law tort claims “based on the same conduct that is said to constitute a misappropriation of trade secrets.” Youtie v. Macy’s Retail Holding, Inc., 653 F. Supp. 2d 612, 620 (E.D. Pa. 2009). Defendants thus

contend that, to the extent that plaintiff's claims for unfair competition, tortious and intentional interference, conversion and unjust enrichment are not barred by copyright preemption, summary judgment is warranted in their favor for plaintiff's claims under Pennsylvania law on the basis of PUTSA preemption. Defs.' State Law Reply at 3-6.

However, given that disputed issues of material fact remain with respect to whether defendants misappropriated any Synogy trade secrets, as is further set forth above, I decline to grant summary judgment in favor of defendants on the basis of PUTSA preemption. See PNC Mortg. v. Superior Mortg. Corp., No. 09-5084, 2012 WL 628000, at *15 (E.D. Pa. Feb. 27, 2012); see also Bro-Tech Corp. v. Thermax, Inc., 651 F. Supp. 2d 378, 412 (E.D. Pa. 2009) (denying summary judgment on PUTSA claim and noting that "due to the displacing effect of [the PUTSA], if and when any Defendants are found at trial to have misappropriated [the plaintiff's] trade secret information, [the plaintiff's] other tort or restitutionary claims against them will be preempted to the extent such claims are predicated on misappropriation of trade secrets as opposed to confidential or proprietary information of other sorts"). "[I]f a jury determines that the information at issue in this case constitutes a trade secret under PUTSA, then many of Plaintiff's common law remedies will be preempted" insofar as they arise out of defendants' conduct with respect to any trade secrets belonging to Synogy. PNC Mortg., 2012 WL 628000, at *15, citing 12 Pa. Cons. Stat. § 5308.

An appropriate Order follows.