

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2019 CA 0730**

**2019 CW 0497**

**CAMSOFT DATA SYSTEMS, INC.**

**VERSUS**

**SOUTHERN ELECTRONICS SUPPLY, INC.  
AND ACTIVE SOLUTIONS, LLC**

**Judgment Rendered: JUL 02 2019**

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**Appealed from the Nineteenth Judicial District Court  
Parish of East Baton Rouge  
State of Louisiana**

**Case No. 582,741**

**The Honorable Janice Clark, Judge Presiding**

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**BEFORE: CRAIN, THERIOT, and HOLDRIDGE, JJ.**

**THERIOT, J.**

In this antitrust litigation, Dell, Inc. and Dell Marketing, L.P. (sometimes referred to collectively as, “Dell”), seek reversal of the trial court’s judgment denying their Peremptory Exception of Prescription and/or Peremption. For the following reasons, we affirm the trial court’s judgment in part and reverse in part. We deny the companion writ application, as well as CamSoft Data System, Inc.’s motion to dismiss, referred to this panel, as moot.

Regarding the appeal filed by MMR Constructors, Inc., MMR Group, Inc., and MMR Offshore Services, Inc. (sometimes referred to collectively as, “MMR”), we dismiss their appeal as abandoned. Pursuant to the Notice of Lodging issued by this court, all appellant briefs were due by June 17, 2019. While Dell timely filed its brief, MMR did not. Accordingly, an Interim Order was issued on June 18, 2019, ordering that MMR “shall file a brief in this matter on or before **12:00 noon on June 19, 2019**. If [MMR] do[es] not file a brief within this deadline, their appeal may be dismissed as abandoned.” (emphasis in original). Despite this Order, MMR failed to file a brief.

Rule 2-12.4(B)(4) of the Uniform Rules, Louisiana Courts of Appeal, provides that “[a]ll assignments of error and issues for review must be briefed. The court may consider as abandoned any assignment of error or issue for review which has not been briefed.” See also **Louisiana Commerce & Trade Ass’n, SIF v. Williams**, 2014-1680, p. 6 (La. App. 1st Cir. 6/5/15), 174 So.3d 696, 699 (“We may consider as abandoned any assignment of error or issue for review which has not been briefed.”). Further, Rule 2-12.9 states that “[i]n cases specially assigned for arguments, the briefs shall be filed as ordered by the court.” Therefore, because MMR failed to file an appellant brief, as instructed by this court’s Notice of Lodging and Interim Order, and did not assign any error to the trial court’s ruling, we dismiss MMR’s appeal as abandoned.

## FACTS AND PROCEDURAL HISTORY<sup>1</sup>

CamSoft Data Systems, Inc. (“CamSoft”) is a technology company owned by Carlo MacDonald (“MacDonald”). In late 2002, CamSoft became a licensed retailer for Tropos Networks, Inc. (“Tropos”), a technology company that manufactures wireless networking hardware allowing for the remote connection of laptops and other computer equipment throughout a large geographical area. In 2003, former New Orleans Mayor C. Ray Nagin (“Mayor Nagin”) announced an initiative to deploy 1,000 video surveillance cameras throughout the City of New Orleans (“Crime Camera Project”). Thereafter, CamSoft formed an alliance with two New Orleans companies, Active Solutions, LLC (“Active”) and Southern Electronics Supply Company, Inc. (“Southern”), to design, develop, and market a wireless surveillance system for the Crime Camera Project. Active is co-owned by Brian Fitzpatrick and Jeff Burkhardt. Ignace A. Perrin, III (“Perrin”) is the owner and president of Southern. CamSoft refers to these companies and individuals as the “Active-Southern Defendants.”

CamSoft used the Tropos technology to develop a “Crime Camera System,” designed to provide real-time surveillance of areas where the cameras were installed. The wireless networking features allowed the system’s cameras to be remotely controlled from a laptop in the field, to adjust the pan, tilt, and zoom features of a camera, and to capture video images while a crime was in progress. In early discussions, CamSoft and the Active-Southern Defendants agreed to keep strictly confidential the Crime Camera System’s technological design features. They further agreed to market their system beyond New Orleans to Baton Rouge, other parts of Louisiana, and to Jacksonville, Florida. In November 2003, following discussions

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<sup>1</sup> The section is taken from this court’s previous opinions of *CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc.*, 2015-1260 (La. App. 1st Cir. 9/23/15), 182 So.3d 1009 and *CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc.*, 2018-1609 (La. App. 1st Cir. 12/3/18), \_\_\_ So.3d \_\_\_, 2018 WL 8141458, writs denied, 2018-02018 (La. 2/11/19), 263 So.3d 1153 & 2018-02088 (La. 2/11/19), 263 So.3d 1151.

and successful initial testing of the Crime Camera System, CamSoft and the Active-Southern Defendants agreed upon the following terms should they obtain the Crime Camera Project: (1) CamSoft would receive all revenues generated from the sale of its Tropos wireless networking equipment, as well as installation and ongoing maintenance services; (2) Active would receive all revenues generated from the sale of its weatherized Sony cameras; (3) Southern would receive all revenues for its centralized accounting function and project coordination with other vendors; and (4) all parties would bear the risk of loss if the City of New Orleans failed to remit payment for any equipment or services performed.

In January 2004, the City of New Orleans Mayor's Office of Technology ("MOT") granted permission to the Active-Southern Defendants and CamSoft to conduct a pilot program for the Crime Camera Project in the New Orleans Iberville housing project. Gregory Meffert ("Meffert"), the Chief Technology Officer ("CTO") of the MOT at the time, appointed Christopher Drake ("Drake") as project manager of the Crime Camera Project. Drake was employed by a private technology company, Imagine Software, LLC ("Imagine"), which was owned in part by Mark St. Pierre ("St. Pierre"), a friend of Meffert, and who had performed work for the City of New Orleans during Meffert's tenure as CTO. As CTO, Meffert was responsible for all technology-related projects in New Orleans. CamSoft refers to these individuals, and Imagine, as the "City Defendants."

Toward the end of the pilot program, St. Pierre and Drake arranged a secret meeting with Meffert and Perrin. At that meeting, the four individuals concocted the following kickback scheme: (1) Meffert would use his influence over the city government to land the Active-Southern Defendants the lucrative Crime Camera Project, and (2) in return, the City Defendants would take over CamSoft's wireless network integrator role on the Crime Camera Project and on all future Crime Camera System sales outside of New Orleans. Meffert also discussed using his influence to

obtain marketing agreements with big technology vendors, including defendants, Dell and Ciber, Inc. (“Ciber”). Perrin agreed to the scheme. At some point, Meffert demonstrated the Crime Camera System to Kim Fury (“Fury”), Dell’s Executive Director of State and Local Government Sales, telling Fury that the pilot program was highly confidential and that CamSoft designed the wireless network using Tropos’ wireless networking equipment. Fury told Meffert that Dell would be interested in selling the Crime Camera System through its national and international sales channels.

Following the success of the pilot program, the City of New Orleans (sometimes, “the City”) issued a Request for Proposals for the Crime Camera Project and ultimately awarded the Crime Camera Project contract to Southern in April 2004. Initially, work on the Crime Camera Project was performed by Southern through its contract with the City, and with participation by Active and CamSoft. Thereafter, on July 8, 2004, a second secret meeting took place between the Active-Southern Defendants, the City Defendants, and Steve Reneker, manager of Dell’s Public Safety and Criminal Justice Division. These parties reached the following agreement: (1) Dell would market and sell the Crime Camera System nationally and internationally; (2) the Active-Southern Defendants would manufacture and sell its weatherized Sony cameras to Dell; and (3) the City Defendants would become a Dell Integrated Service Provider and act as the wireless network designer, integrator, and installer. In exchange, the Active-Southern Defendants turned over CamSoft’s confidential and proprietary technical and business information regarding the Crime Camera System to the City Defendants and Dell.

The City Defendants also entered into a similar kickback scheme with defendant, Ciber. On May 7, 2004, Ciber hired Imagine as a subcontractor to work in New Orleans. On June 23, 2004, Mayor Nagin signed an executive order giving Meffert unilateral authority to make no-bid purchases through Ciber’s General

Services Administration Contract (“GSA Contract”) schedule of rates. See La. R.S. 39:1702(A) & 38:2212.1(E). Thus, Meffert was able to contract with companies, such as Ciber, without going through the process of obtaining competitive bids. Ciber also agreed to give additional subcontractor work to defendant, NetMethods, LLC (“NetMethods”), a company formed by Meffert and St. Pierre to receive proceeds from Crime Camera System sales obtained outside New Orleans. The subcontractor agreement between Ciber and NetMethods was needed to shield from scrutiny kickback payments St. Pierre made to Meffert and Mayor Nagin for awarding work inside New Orleans to Ciber and Dell.

On July 19, 2004, Southern signed the official Crime Camera Project contract (“July 19, 2004 Contract”) with the City of New Orleans. As per the earlier November 2003 agreement it had with the Active-Southern Defendants, CamSoft began performing work on the project – selling, installing, and maintaining Tropos wireless equipment – and deployed the wireless Crime Camera System throughout New Orleans.

Dell and the City Defendants ultimately devised a method of selling cameras for the Crime Camera System through Dell’s no-bid, direct purchase contract with the state of Louisiana (“WSCA Contract”).<sup>2</sup> Dell’s WSCA Contract did not give it authority, however, to sell the other computer and wireless networking equipment needed to deploy a Crime Camera System. Further, to avoid state regulator scrutiny, Dell employees devised a method of misidentifying the equipment being sold by using different descriptive terms. The City Defendants and Dell then marketed

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<sup>2</sup> The WSCA is an alliance of state purchasing directors who seek to obtain better pricing for computer equipment through greater volume purchasing power. It seeks proposals from manufacturers for competitive, discount pricing for direct equipment sales. Public entities within the participating states can then purchase computer equipment directly from the manufacturer at pre-arranged discounted prices. A WSCA contract will specify particular equipment that can be sold pursuant to the contract, but does not specify a particular brand name for the equipment. After participating in the WSCA proposal and approval process, Dell executed a WSCA contract for the sale of certain computer equipment in August 2004, and the state of Louisiana executed a participating addendum with Dell in December 2004. Purchasing the wireless surveillance network equipment directly through Dell’s WSCA Contract avoided the competitive bid process. See La. R.S. 38:2212.1(F).

themselves as the New Orleans Crime Camera System integrators and installers. Eventually, they sold various government officials on the erroneous and illegal notion that there was no need to properly issue Requests for Proposals under the Public Bid Laws, as they could directly procure the systems through Dell's no-bid WSCA Contract.

Following Hurricane Katrina in August 2005, the federal government provided millions of dollars in federal funding to expand the Crime Camera Project. In an effort to obtain the federal money, Ciber, the City Defendants, and Dell developed a method of using their no-bid contracts to circumvent the July 19, 2004 Contract, thus squeezing out Southern, and, by extension, CamSoft. Meffert used his authority as CTO to stop making Crime Camera System purchases under the July 19, 2004 Contract and, further, delayed payment for prior work. MacDonald and CamSoft did not receive payment for work they had performed in New Orleans and, cognizant that City employees were installing Tropos equipment without purchasing it pursuant to the July 19, 2004 Contract, MacDonald advised Meffert on January 10, 2006, via e-mail, that CamSoft would no longer perform work under the July 19, 2004 Contract.

On June 20, 2006, Meffert placed a first order of cameras. Dell sold to the City the wireless networking equipment, computer hardware, and cameras through its no-bid WSCA Contract, and Veracent, LLC, another company owned by St. Pierre, supplied the networking equipment and cameras to Dell for resale to the City. Installation of the surveillance system was billed to the City by Ciber, through Ciber's GSA Contract. On July 15, 2006, Meffert resigned from public office. Prior to leaving office, Meffert, St. Pierre, and Mark Kurt ("Kurt") agreed that Kurt would take over as New Orleans CTO. As a co-owner of Imagine, Kurt allegedly knew of the conspiracy to circumvent the July 19, 2004 Contract. After Mayor Nagin



appointed Kurt as acting CTO, Kurt continued the no-bid purchasing method through Dell's WSCA Contract until his resignation in February 2007.

Sales of Crime Camera Systems continued when, in 2007, Dell and NetMethods sold and installed a Crime Camera System in Baton Rouge. They secured the no-bid contract by bribing Donald Evans, then acting CTO for the City of Baton Rouge, and used Dell's no-bid WSCA Contract for equipment sales and installation charges. In March 2007, Dell was instructed by the director of the Louisiana Office of State Purchasing (as it was called at that time), Division of Administration ("OSP"), to discontinue the sale of surveillance equipment through its WSCA Contract because the sale and installation of that type of equipment was beyond the scope of the contract. Nevertheless, on June 7, 2007, the Baton Rouge City Council allocated \$3.5 million to purchase and install a replica Crime Camera System as sold by Dell and NetMethods. Thereafter, in June 2007, the OSP issued a solicitation for bids for a brand name contract<sup>3</sup> for NetMethods brand name surveillance equipment; NetMethods bid on and received the brand name contract, allowing it to sell wireless networking and video surveillance equipment labeled as NetMethods brand products to state agencies. The City of Baton Rouge then purchased millions of dollars of equipment and installation services from NetMethods through its brand name contract from 2007 to 2009.

NetMethods and Dell continued selling Crime Camera Systems both locally and nationally. In the summer of 2009, NetMethods and MMR Constructors, Inc. executed an "Assignments of Proceeds of Contract," which assigned the revenue from some of NetMethods' contracts, including contracts with the City of Baton

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<sup>3</sup> Regarding name brand contracts, the OSP would issue a solicitation for bids for a particular brand of products, and the contract would be awarded to the lowest bidder meeting the specifications. Any entity bidding to receive a brand name contract must either manufacture those products or have a relabeling agreement with the manufacturer, allowing the entity to relabel the product as the brand name. When selling products through a brand name contract, the brand name contract holder can supply to a state agency only products of that particular brand and must warranty the equipment. Thus, only those entities that manufactured NetMethods brand surveillance equipment or those with relabeling agreements with NetMethods could bid on the solicitation for bids for NetMethods surveillance equipment.

Rouge, to MMR Constructors. Around the same time, MMR purchased some of NetMethods' assets, and formed a new division of MMR Constructors - MMR Communications. Also, many of NetMethods' employees transferred their employment to MMR Communications. In October 2009, MMR Constructors d/b/a MMR Communications obtained its own brand name contract for wireless networking and video surveillance equipment and began selling wireless networking and video surveillance systems to numerous state and local governments and private parties through its brand name contract. MMR has continued to receive ongoing no-bid Crime Camera System maintenance payments from the City of Baton Rouge.

Extensive civil and criminal litigation ultimately resulted from the sale of Crime Camera Systems as outlined above, along with the underlying deals and agreements between and among various parties and entities related to those sales. Active and Southern initiated legal proceedings in Civil District Court in Orleans Parish on April 29, 2007, by filing suit against Dell, and other defendants, for breach of contract, unfair trade practices, unjust enrichment, and tortious interference with a contract, all in connection with the July 19, 2004 Contract. See Active Solutions, L.L.C. v. Dell, Inc., 2010-1590 (La. App. 4th Cir. 7/21/11), 73 So.3d 934. Meffert and St. Pierre were charged in a sixty-three count federal grand jury indictment with offenses including conspiracy, wire fraud, bribery concerning programs receiving federal funds, money laundering, false statements, and filing false tax returns. Meffert ultimately pled guilty to one count of conspiracy to commit public bribery and one count of filing a false tax return.

After unsuccessfully attempting to intervene in Active and Southern's lawsuit against Dell, CamSoft filed a "Petition for Declaratory Judgment and Damages" ("Original Petition") against them on September 18, 2009. CamSoft claimed it primarily designed and developed the disputed "wireless video surveillance system." It sought judgment declaring its rightful ownership of the surveillance system and

any “intellectual property” arising out of work performed in conjunction with Active and Southern. Further, CamSoft sought its “share in any fruits or products derived from the wireless video surveillance system.” CamSoft later filed an amended petition, pleading additional claims and naming seventeen more defendants, and alleging that a group of defendants: (1) conspired to misappropriate CamSoft’s confidential and proprietary technical designs, business information, and trade secrets while working as New Orleans city vendors; (2) used their access to New Orleans technology products to design and construct a competing wireless video surveillance system; and (3) thereafter sold their competing system to state and local governments through the illegal use of no-bid contracts, which was often made possible through graft and bribery of public officials.

On December 14, 2009, the case was removed to federal court on the basis of federal question jurisdiction under 28 U.S.C.A. §§ 1331, 1338(a), and 1441(a) (2006). CamSoft vigorously opposed removal and moved to remand, but the federal district court found that the allegations of “ownership” over the potential or existing patent rights necessarily invoked federal patent law and gave rise to jurisdiction. **CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc.**, No. 09-1047 (M.D. La. Mar. 4, 2010), 2010 WL 763508 (unpublished). After CamSoft’s unsuccessful challenge to removal, the matter remained in federal court for five years until the federal district court remanded the case back to state court based on a finding by the federal Fifth Circuit Court of Appeals that the district court lacked jurisdiction. **CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc.**, 756 F.3d 327 (5th Cir. 2014), cert denied, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1162, 190 L.Ed.2d 914 (2015).

On February 10, 2015, following remand to the Nineteenth Judicial District Court, CamSoft filed a “Master Petition for Declaratory Judgment, Supplemental Relief, Damages, and Attorney’s Fees” (“Master Petition”), reasserting its

allegations regarding the conversion and misappropriation of its confidential technical and business information and trade secrets which resulted in the world's first municipal-scale wireless video surveillance system and subsequent conspiracies by various defendants to market their replica wireless video surveillance system to the cities of New Orleans and Baton Rouge through the illegal use of no-bid government sales contracts and the extensive use of bribes, gratuities, and kickbacks paid to public officials, all for the purpose of circumventing Louisiana public bid laws. Through original and amending petitions, CamSoft asserted various causes of action, including breach of the duty of good faith, loyalty, and fair dealing, conspiracy to commit the intentional torts of fraud, tortious interference with contract, and conversion, conspiracy to violate Louisiana's Antitrust Act, La. R.S. 51:122, *et seq.*, conspiracy to violate Louisiana's Unfair Trade Secrets Act, La. R.S. 51:1431, *et seq.* ("LUTSA"), conspiracy to violate Louisiana's Unfair Trade Practices and Consumer Protection Law, La. R.S. 51:1409, *et seq.* ("LUTPA"), and violations of the Louisiana Racketeering Act, La. R.S. 15:1351, *et seq.* ("LRA").

Among the defendants named in the various petitions were: Southern and its president/owner, Ignace A. Perrin, III; Active and its owners, Brian Fitzpatrick and Jeff Burkhardt; Imagine; NetMethods; St. Pierre; Kurt; Drake; Dell; Billy Ridge, an employee of Dell; Dell employee Steve Reneker; NetMethods; Ciber; and MMR. CamSoft eventually dismissed its claims against Perrin, Active, Fitzpatrick, Burkhardt, St. Pierre, Kurt, Drake, Ridge, and Reneker.

Specifically regarding CamSoft's LUTSA, LUTPA, antitrust and intentional tort conspiracy claims, Dell filed a peremptory exception of prescription and/or peremption on March 2, 2018, with an initial hearing held on May 14-15, 2018. Therein, Dell argued that "[t]he record is replete with evidence that CamSoft had actual and constructive knowledge of its claims against Dell years before filing suit. This is shown both on the face of CamSoft's petition and the facts of the case."

(emphasis in original). Thereafter, the trial court took the matter under advisement. On August 24, 2018, Dell filed a supplemental peremptory exception of prescription and/or peremption, with a second hearing held on September 13, 2018. Again, after taking the matter under advisement, on April 2, 2019, the trial court signed a judgment as to Dell and MMR, overruling their exceptions, and stating as follows: “Dell’s Peremptory Exception of Prescription and/or Peremption, MMR’s Peremptory Exception of Prescription and/or Peremption, and Dell’s Amended and Supplemental Peremptory Exception of Prescription and/or Peremption are **DENIED.**”<sup>4</sup> From this judgment, Dell appeals pursuant to La. R.S. 51:134.<sup>5</sup>

## LAW AND ANALYSIS<sup>6</sup>

### A. CIVIL CONSPIRACY

Initially, we note that, relative to the claims addressed herein, CamSoft alleges a conspiracy by Dell to violate LUTSA, LUTPA, Louisiana antitrust statutes, and various intentional torts. The Louisiana Supreme Court has held that conspiracy by itself is not an actionable claim under Louisiana law. Instead, it is “the tort which the conspirators agreed to perpetrate and which they actually commit in whole or in part” that constitutes the actionable elements of a claim. **Crutcher-Tufts Resources, Inc. v. Tufts**, 2007-1556, p. 3 (La. App. 4th Cir. 9/17/08), 992 So.2d 1091, 1094, writ denied, 2008-2677 (La. 1/16/09), 998 So.2d 105, citing **Ross v. Conoco, Inc.**, 2002-0299 (La. 10/15/02), 828 So.2d 546. Thus, the applicable prescriptive periods for CamSoft’s various conspiracy claims will be the same as their underlying torts. See **Ames v. Ohle**, 2011-1540, p. 12 (La. App. 4th Cir. 5/23/12), 97 So.3d 386, 393, writ denied, 2012-1832 (La. 11/9/12), 100 So.3d 837.

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<sup>4</sup> On March 28, 2018, MMR likewise filed its own peremptory exception of prescription and/or peremption, effectively copying Dell’s exception. Though MMR filed a separate Motion for Appeal in response to the trial court’s denial, we are not considering these issues due to the abandonment of MMR’s appeal, as discussed above.

<sup>5</sup> As set forth in La. R.S. 51:134, all exception judgments in cases involving antitrust claims shall be appealable within ten days and shall be heard and determined within forty days after the appeal is lodged.

<sup>6</sup> For purposes of our discussion of prescription, we will assume CamSoft has stated causes of action. See **Hardy v. Easy T.V. and Appliances of Louisiana, Inc.**, 2001-0025, p. 6 (La. App. 4th Cir. 12/12/01), 804 So.2d 777, 781.

**B. LIBERATIVE PRESCRIPTION**

Liberative prescription is a mode of barring actions as a result of inaction for a period of time. La. Civ. Code art. 3447. The fundamental purpose of prescription statutes is to afford a defendant economic and psychological security if no claim is timely made and to protect him from stale claims and the loss of non-preservation of relevant proof. **Giroir v. South Louisiana Medical Center, Div. of Hospitals**, 475 So.2d 1040, 1045 (La. 1985). However, prescription statutes are strictly construed against prescription and in favor of maintaining the claim. See Naquin v. Bollinger Shipyards, Inc., 2011-1217, p. 4 (La. App. 1st Cir. 9/7/12), 102 So.3d 875, 878, writs denied, 2012-2676 (La. 2/8/13), 108 So.3d 87 & 2012-2754 (La. 2/8/13), 108 So.3d 93.

The objection of prescription may be raised by a peremptory exception. La. Code Civ. P. art. 927(A)(1). Generally, the burden of proving that a cause of action has prescribed rests with the party pleading prescription; however, when the plaintiff's petition shows on its face that the prescriptive period has run, and the plaintiff is contending there is a suspension or interruption of prescription, the burden is on the plaintiff to prove suspension or interruption. **St. Romain v. Luker**, 2000-1366, p. 5 (La. App. 1st Cir. 11/9/01), 804 So.2d 85, 88, writ denied, 2002-0336 (La. 4/19/02), 813 So.2d 1083. At the hearing on the objection of prescription, evidence may be introduced to support or controvert the exception of prescription when the grounds thereof do not appear from the petition. See La. Code Civ. P. art. 931; **Kelley v. General Ins. Co. of America**, 2014-0180, p. 5 (La. App. 1st Cir. 12/23/14), 168 So.3d 528, 533, writs denied, 2015-0157, 2015-0165 (La. 4/10/15), 163 So.3d 814, 816. When evidence is received at the trial of the exception, the appellate court reviews the trial court's factual findings under the manifest error-clearly wrong standard of review. **Warren v. Board of Sup'rs of Louisiana State**

**University and Agr. and Mechanical College**, 2014-0310, p. 5 (La. App. 1st Cir. 11/20/14), 168 So.3d 436, 439, writ denied, 2015-0068 (La. 4/2/15), 163 So.3d 795. On review, an appellate court should not reweigh the evidence or substitute its own factual findings. **Pinsonneault v. Merchants & Farmers Bank & Trust Co.**, 2001-2217, p. 11 (La. 4/3/02), 816 So.2d 270, 279. Thus, if the trial court's findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Rando v. Anco Insulations, Inc.**, 2008-1163, 2008-1169, p. 20 (La. 5/22/09), 16 So.3d 1065, 1082; see also **Richard v. Richard**, 2011-0229, p. 4 (La. 10/25/11), 74 So.3d 1156, 1158 (per curiam). "The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between respective courts." **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 883 (La. 1993) citing **Canter v. Koehring Co.**, 283 So.2d 716 (La. 1973).

Prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort. A prescriptive period will begin to run even if the injured party does not have actual knowledge of facts that would entitle him to bring suit as long as there is constructive knowledge of same. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start running of prescription. **Campo v. Correa**, 2001-2707, p. 11-12 (La. 6/21/02), 828 So.2d 502, 510-11; see also

**Babineaux v. State ex rel. Dept. of Transp. and Development**, 2004-2649, p. 3 (La. App. 1st Cir. 12/22/05), 927 So.2d 1121, 1123-24.

A plaintiff will be deemed to know what he could have learned through reasonable diligence. **Babineaux**, 2004-2649 at p. 5, 927 So.2d at 1124. Further, “while it is true that prescription does not begin to run until discovery of facts which give rise to a cause of action, it is equally clear that ignorance of one’s legal rights based upon known facts does not suspend or delay the running of prescription.” **Hawthorne v. Louisiana Dept. of Public Works**, 540 So.2d 1261, 1263 (La. App. 3d Cir.), writ denied, 544 So.2d 406 (La. 1989). Nevertheless, a plaintiff’s mere apprehension that something may be wrong is insufficient to commence the running of prescription unless the plaintiff knew or should have known through the exercise of reasonable diligence that he is a victim of a tort. See Campo, 2001-2707 at pp. 14-15, 828 So.2d at 512. The “ultimate issue” in determining whether a plaintiff had constructive knowledge is “the *reasonableness* of [his] action or inaction, in light of his education, intelligence . . . , and the nature of the defendant’s conduct.” **Bailey v. Khoury**, 2004-0620, p. 10 (La. 1/20/05), 891 So.2d 1268, 1276. (emphasis in original).

### **C. CAMSOFT’S LUTSA & LUTPA CONSPIRACY CLAIMS**

Regarding CamSoft’s claims under LUTSA and LUTPA, the acts are similar in that they both regulate and balance the rights of parties engaged in competitive commerce with the goal of striking a balance between free commerce and protecting business owners by prohibiting unfair or deceptive acts or practices in the conduct of trade. Both acts provide injunctive relief and damages for violations thereunder. The conduct prohibited by both acts is aimed at achieving this common goal; LUTSA is more specific and narrow and prohibits the theft, bribery, misrepresentation, breach, or misappropriation of a company’s “trade secrets”: LUTPA contains more general prohibitory language, encompassing “unfair methods



of competition” and “unfair or deceptive acts or practices.” For example, allegations of acts constituting requirements of a prohibited breach of confidence may not meet the requirements of a trade secret by definition, yet fall within the scope of prohibited conduct under LUTPA. Because there is overlap in the scope of coverage of the acts, claims of violations under both acts are frequently pled and tried together, as reflected by the jurisprudence that oftentimes analyzes evidence against the backdrop of both acts. **Bihm v. Deca Systems, Inc.**, 2016-0356, p. 18 (La. App. 1st Cir. 8/8/17), 226 So.3d 466, 481-82, citing **B & G Crane Serv., L.L.C. v. Duvic**, 2005-1798, pp. 4-5 (La. App. 1st Cir. 5/5/06), 935 So.2d 164, 167, writ denied, 2006-1820 (La. 10/27/06), 939 So.2d 1280.

**D. LOUISIANA UNIFORM TRADE SECRETS ACT (LUTSA)**

In its Master Petition, CamSoft alleges a conspiracy by Dell to steal its trade secrets, a violation of LUTSA.<sup>7</sup> Although LUTSA does not directly state its purpose, the comments following each section of the act are replete with references to unfair commercial advantage resulting from disclosure of trade secrets to competitors. The purpose of LUTSA is to prevent one person or business from profiting from a trade secret developed by another, because it would thus be acquiring a free competitive advantage. **Stork-Werkspoor Diesel V.V. v. Koek**, 534 So.2d 983, 985 (La. App. 5th Cir. 1988); see also **Bihm**, 2016-0356 at p. 19, 226 So.3d at 482. A trade secret is defined in La. R.S. 51:1431(4) as “information, including a formula, pattern, compilation, program, device, method, technique, or process,” that:

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<sup>7</sup> Generally, in its Master Petition, CamSoft asserts its trade secrets as “the compatibility of networking and camera equipment, the use of various equipment settings and features, the proper distances for transmitting the signals, the proper method of powering the devices, the proper arrangement of network nodes, the proper data backhaul routing methods for live video signals, the method of controlling public and private access to the wireless network, the design of custom software to access the Crime Camera System, marketing plans for governmental agency presentations, pricing information, and strategic business development plans.” CamSoft alleges this “confidential information satisfies the legal definition of a trade secret because it concerns internal wireless networking designs and formulas, in-field verified wireless networking equipment tolerances and specifications, and associated wireless networking equipment compilations related to wireless video surveillance systems.” Whether or not the above satisfies the legal definition of a trade secret in La. R.S. 51:1431(4), or any possible misappropriation thereof by Dell, is not before us at this time in this appeal. See **CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc. and Active Solutions, LLC** 2019-0734 (La. App. 1st Cir. 7/2/19) (unpublished), and **CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc. and Active Solutions, LLC** 2019-0744 (La. App. 1st Cir. 7/2/19) (unpublished), which are also being issued this date.

- (a) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and
- (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

LUTSA, pursuant to La. R.S. 51:1433, also provides for the recovery of damages for the actual loss caused by misappropriation of a trade secret, and for the unjust enrichment caused by misappropriation. Moreover, the court has the authority to award reasonable attorney fees to the prevailing party upon a finding of bad faith or willful and malicious misappropriation. See La. R.S. 51:1434. Misappropriation is defined in La. R.S. 51:1431(2):

- (a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (b) disclosure or use of a trade secret of another without express or implied consent by a person who:
  - (i) used improper means to acquire knowledge of the trade secret; or
  - (ii) at the time of the disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
    - (aa) derived from or through a person who had utilized improper means to acquire it;
    - (bb) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
    - (cc) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
  - (iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

The threshold inquiry is whether the information at issue is indeed a legally protected trade secret; the second element is whether an express or implied contractual or confidential relationship existed between the parties which obligated the party

receiving the secret information not to disclose it; and finally, whether the party receiving the secret information wrongfully disclosed the information to the injury of the plaintiff. **B & G Crane Serv., L.L.C.**, 2005-1798 at p. 4, 935 So.2d at 167; **Southern Marsh Collection, LLC v. State Traditions, LLC**, 2017-0459 (La. App. 1st Cir. 11/1/17), 2017 WL 4985217 (unpublished), writ denied, 2017-2013 (La. 2/2/18), 233 So.3d 617.

Louisiana Revised Statute 51:1436 provides that “[a]n action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purpose of this Section, a continuing misappropriation constitutes a single claim.” While little jurisprudence has interpreted this statute, the Legislative Comments state it “rejects a continuing wrong approach to the statute of limitations but delays the commencement of the limitation period until an aggrieved person discovers or reasonably should have discovered the existence of misappropriation. If objectively reasonable notice of misappropriation exists, three years is sufficient time to vindicate one’s legal rights.” Therefore, as CamSoft filed its Original Petition on September 18, 2009, our review is limited to whether CamSoft had any actual or constructive knowledge of misappropriation of its trade secrets by Dell before **September 18, 2006**.

As discussed above, in January 2004, Active, Southern, and CamSoft participated in the Crime Camera Project pilot program and, according to an affidavit from MacDonald, there “existed a nondisclosure agreement between [them] relative to the trade secrets associated with the Crime Camera System.” Further, CamSoft alleges that during the pilot program, it worked “intimately” with Imagine during the “initial creation, design and installation of the world’s first municipal scale prototype wireless video surveillance system[.]” CamSoft avers that “[a]s the project manager for the City of New Orleans, Drake was made privy to proprietary details

concerning the design and deployment of this prototype system. As Drake's supervisor, St. Pierre was also made privy to this proprietary information." Additionally, MacDonald testified that he disclosed "some" of CamSoft's trade secrets to Drake and Southern during the pilot project. Specifically, MacDonald described his role in designing the Crime Camera System as "how is the best way to get those cameras connected to the wireless network, and then what type of equipment would you put inside the camera to allow it to connect, and there's many different ways that you can connect a camera." In fact, St. Pierre testified he did not have any experience designing a wireless video surveillance system prior to the Crime Camera Project, that he thought it was "cool," that "everything we did at Imagine we were trying to figure out if there was some way we can leverage that and do it some other places and grow our business[,] and that the "wireless is what made ... most of the money for us."

On July 22, 2004, MacDonald was aware that Drake and Imagine were pursuing wireless video surveillance and networking contracts outside of New Orleans, as Perrin provided MacDonald marketing materials<sup>8</sup> for the wireless video surveillance systems that were to be used in the City of New Orleans in which Imagine (not CamSoft) was identified as one of the "solution architects" of the wireless video surveillance system. When MacDonald inquired about the missing logo, Drake responded, "[y]our logo was the one that I presented at the conference. Somehow, the version that got to the guy that has to upload them to the websites was missing it. I'm not sure at all how that had happened. At any rate, I will do [my] best to get a corrected version uploaded." MacDonald accepted Drake's apology as he

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<sup>8</sup> The first sentence of the marketing brochure states, "[i]n a revolutionary first for the industry, Southern Electronics, Active Solutions, Imagine Software, AIMSI and ONSSI has teamed up to concisely integrate all individual systems into just one easy-to-operate solution." The brochure further states that "[w]hether you are a municipality, law enforcement agency, or a school district, our total system approach will provide you with centralized monitoring, remote video access, and emergency live video that is instantly deliverable to anywhere in your network." Additionally, "[o]ur wireless expertise in Mesh networks, point to point and point to multi-point applications is unrivalled. We have many systems, including the **country's first metro-wide deployment**, already to our credit." (emphasis in original).

had seen similar mistakes “happen before.” Based on Drake’s explanation, MacDonald specifically testified he did not have any reason to distrust Drake.

Following Hurricane Katrina’s devastating impact on New Orleans on August 31, 2005, the floodwaters ruined the City’s existing telecommunications infrastructure. On September 2, 2005, MacDonald informed Drake that he contacted Tropos, seeking a donation of wireless nodes to restore communications through a municipal Wi-Fi network. MacDonald testified, “my expertise was around the Tropos nodes I suggested that, you know, let’s get some Tropos nodes down there particularly around the mayor’s office so that the first responders could have internet and communicate with their companies.” However, by October 2005, Drake informed MacDonald, “[t]he City has determined to put these direct-donation units up itself. We are using internal resources due to the urgent need to get them up quickly. We have the ability to dedicate significant resources that do not have other priorities and get the network up very quickly. In this case[,] it was in the City’s best interest to go internal.”

One month later, in a November 29, 2005 email, and after learning that Drake and other Imagine employees had taken over CamSoft’s role managing part of the City of New Orleans’ wireless network and installing Tropos equipment, MacDonald wrote to Meffert: “[T]he problem I have is Chris [D]rake, the person who I first introduced [two-and-a-half] years ago to [T]ropos, decided he was going to do it himself using city workers. The only problem is that [C]hris [D]rake is a contractor very high up in the city, and from what I heard, hired a wireless guy, put him on his payroll, and then used him to help deploy. Fishy? [Y]es. ... ” “This is great for the city, but I have soured on [N]ew [O]rleans from a government [standpoint]. Someone is making money on this deal and [it’s] not me. They are using [Tropos] products which I helped get donated, but I got no credit for this. [It’s] typical of [N]ew [O]rleans officials. Very disappointing.” Further, in December

2005, MacDonald wrote to Perrin that, "I have heard that Chris [Drake] hired some wireless guys under his own company name, rumor on the street is he is using them to manage the wifi network in [N]ew [O]rleans." Perrin responded by telling MacDonald that "Imagine or the Mayor's Office of Technology is doing the wifi system in the city." MacDonald replied, "If Chris [Drake] was using his [I]magine (or Net[M]ethods, whatever they stick himself and others under this month) staff to build the network, there could be some issues from a legality [standpoint]. We and others will be watching it very closely."

In a January 10, 2006 email, MacDonald wrote to Drake and Meffert, withdrawing CamSoft from the Crime Camera Project:

The camera system has nothing to do with the free wifi network built[,] nor was it ever a part of it. The city took the knowledge and guidance from a vendor over the past [three] years and deployed its own network without compensating that vendor for their knowledge or time. I understand that is the risk we take. I am very excited that [Tropos] and [Intel] donated the equipment[.] ... We all understood the city could not pay for any services or equipment at this time.

\* \* \*

I am curious if the mayor knows that the network you deployed was the exact thing Verge Wireless presented to him [three] years ago in his office on my laptop and spent three years teaching [e]conomic development departments, countless city officials, and travel and tourism departments of your city, so that when the time is right you would get complete [sic] buy in. Is he aware that Verge Wireless is not involved in the free network? [D]o we have the money to help the city with the network for free? [N]o, but if there are dollars being spent on this network, we would have appreciated an opportunity to assist.

\* \* \*

I am however disappointed in you, Greg Meffert, and the city in the lack of support for local vendors and the efforts of Verge Wireless. From the get go, we have not been included in any presentations you or your 'private' company has presented, yet other vendors have been included, AKA power points, etc. I am glad to have helped the city because [it's] good for Louisiana. I am excited that [Tropos] was able to step in and continue our effort in helping your department make free Wi-Fi a reality. It is something I have been pushing for years and [it's] good to see again, a Louisiana city to be the first.

\* \* \*

It is however with great disappoint[ment], that I would like to let the City of New Orleans and Southern Electronics know that we will no longer be involved in the camera project for the [C]ity of New Orleans and that all [Tropos] purchases should be directed to another vendor or through [Tropos] directly.

\* \* \*

I hope Greg Meffert, yourself and the mayor see value in the future [in] supporting technology companies in the city like Verge Wireless, who spent a lot to show how [Tropos] and mesh networking can work in New Orleans. Although we didn't get any recognition for the Wi-Fi idea in New Orleans from the city, we will continue to move forward with new technology and services as they become available[.]

MacDonald further explained this email at the exception hearing:

Q: And so did you leave the City of New Orleans because you believed that the City employees were violating your trade secrets because they were putting up a camera system?

A: No, they were building – you know, they – it was – it was a wireless network for public access. It was nothing about cameras involved. If I thought there were cameras involved and other things, I would have been asking those questions.

\* \* \*

Q: Now, did you believe that just because they didn't hire you to deploy these nodes that you had a right to file a lawsuit against the city?

A: No. No, I mean, we just mentioned that. We expected them not to pay anything. These were donated nodes. We were looking to get them in any which way possible. My beef was that there was no recognition to any of the vendors including myself.

Later, in a March 22, 2006 email to Meffert, MacDonald again noted that he “was upset about all the work we did on the [Tropos] and Intel [d]eals as well as [the] camera project only to be pushed aside. I understand the political issues as well as the state of the city at the time and [don't] have a problem with that, but the way it was handled was wrong in the eyes of the vendors who helped make it happen.”

Further, in June 2006, Drake and NetMethods sold wireless video surveillance cameras and Tropos networking equipment to the City of Baton Rouge through Dell's WSCA Contract with the State of Louisiana. MacDonald and CamSoft were informed about the sale on June 27, 2006 when an acquaintance of MacDonald, Don

Powers, told him that the City of Baton Rouge purchased a wireless video surveillance system with fifty-three cameras for \$800,000.00 without going through the Request for Proposal (“RFP”) process. Specifically, MacDonald learned that “the FBI is investigating the Baton Rouge Homeland Security Director for kickbacks in relation to [an] \$800,000 wireless camera contract that was issued without an RFP this week. The folks said the FBI is also looking at Greg Meffert, deputy Mayor of New Orleans, and his role in this contract.”

Based on this history, Dell argues that, “[i]f, as CamSoft contends, CamSoft invented the methodology for deploying cameras on a Tropos network and taught Drake to design networks, CamSoft certainly had reasons to suspect that its trade secrets were being used by Drake and others.” Further, regarding the June 2006 sale to the City of Baton Rouge, Dell contends that “[n]ews that Drake and Meffert were involved in the sale should have certainly raised CamSoft’s suspicions that its trade secrets were being misappropriated. Indeed, CamSoft did not believe that Drake or Meffert had any prior experience designing wireless camera systems.” Lastly, Dell avers that “[i]f CamSoft really believed it had developed multi-million dollar trade secrets during the Crime Camera Project, in June, 2006, the minute it learned that Drake and Meffert were selling wireless video surveillance systems through Dell, CamSoft should have investigated to determine whether its trade secrets were being used. Any reasonable person would have. At the very least, this information should have excited CamSoft’s attention and prompted further inquiry.” However, CamSoft correctly points out that the June 27, 2006 email from Don Powers “did not identify Dell or NetMethods as the seller or designer of the Baton Rouge camera system. The email did not contain information identifying the manufacturing brands or types of equipment utilized in the system. ... And even if the email would have identified Dell as the seller of the camera system, CamSoft possessed no knowledge that Dell



was involved in a conspiracy to sell a camera system anyway, so without context, identifying Dell as the seller would have meant nothing to MacDonald at the time.”

MacDonald testified at the exception hearing that later, in December 2006, after he left the Crime Camera Project, “[Perrin] had called me...and was telling about some of the problems he was having in the City of New Orleans. I had left the project by that time. I had no idea what they were doing, and so he was describing some of the problems that he was having, and he mentioned Chris Drake. Now, I had no love loss for Chris Drake at that time because of the stuff that happened after Katrina. So, I was letting him know that if he needed any help with that just – just let me know.” MacDonald continued, noting that Perrin’s “complaint ... [was a] breach of contract with the City of New Orleans, and that there was something about the camera design and I mean, they were designing multiple cameras after I left so I just assume it was something after I left, and he – and I even asked him on that phone call, I said, you know, is there any – are they using any of our technology. He said he had no idea of what they were using at that time.” Perrin further testified that he and MacDonald “spent a lot of time commiserating about all the things that they were doing going back to the post-Katrina deployment of Tropos antennas around the city and everything else along the way, because we both felt slighted, more slighted individually at different points.” In fact, Perrin “actively asked for [MacDonald’s] help in connection with a potential lawsuit that [Southern was going to file and] to gather up some of the old information that dated back to the days of the pilot project.” At this point, regardless of what MacDonald and Perrin actually knew at the time of their December 2006 conversation, by MacDonald asking Perrin if Drake or the other City Defendants were using their technology, this exchange was enough to excite MacDonald’s attention and cause him to inquire further regarding possible misappropriation of CamSoft’s trade secrets.

Therefore, based on the facts presented, we find that prescription did not begin to run on CamSoft's LUTSA claims until December 2006. The omission of CamSoft's logo from presentation materials was "explained" by Drake, and MacDonald accepted his apology without any cause to distrust Drake. The November 2005 emails wherein MacDonald states something is "fishy," and that he would watch from a "legality standpoint," all relate to the New Orleans public Wi-Fi system, not necessarily to the Crime Camera Project. Dell conflates the two, attempting to show MacDonald wanted to watch the Crime Camera Project "from a legality standpoint[,]" but MacDonald testified that he was referencing the lack of recognition for the public Wi-Fi system. The only information MacDonald or CamSoft received prior to September 18, 2006 possibly addressing the misappropriation of trade secrets, was the June 27, 2006 email from Don Powers which, though mentioning a "wireless camera contract," did not identify the Active-Southern defendants, the City defendants (other than Meffert), Dell, or otherwise give additional information to excite MacDonald's attention regarding possible misappropriation of CamSoft's trade secrets.

Accordingly, as CamSoft's petition was filed on September 18, 2009, in consideration of the guiding principles of prescription which favor maintaining claims, strict construction of prescription statutes, and the manifest error standard of review we are constrained to follow, we find CamSoft's LUTSA conspiracy claims were timely filed in accordance with La. R.S. 51:1436, and the trial court did not err in denying Dell's peremptory exception of prescription and/or peremption in this regard.

**E. LOUISIANA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (LUTPA)**

Under the Louisiana Unfair Trade Practices Act, La. R.S. 51:1405(A), the legislature declared it unlawful to engage in "unfair methods of competition and

unfair or deceptive acts or practices in the conduct of any trade or commerce[,]” and La. R.S. 51:1409(A) grants a private right of action to “[a]ny person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal” as a result of a violation of LUTPA to recover actual damages and, if such damages are awarded, reasonable attorney fees and costs. That provision also provides for the awarding of treble the actual damages sustained if the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general. Further, “[u]pon a finding by the court that an action ... was groundless and brought in bad faith or for the purposes of harassment, the court may award to the defendant reasonable attorney fees and costs.” See Bihm, 2016-0356 at p. 20, 226 So.3d at 483.

LUTPA does not enumerate those instances of conduct that constitute unfair trade practices, other than La. R.S. 51:1405(A) providing that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” See Van Hoose v. Gravois, 2011-0976, p. 10 (La. App. 1st Cir. 7/7/11), 70 So.3d 1017, 1023. Because of the broad sweep of this language, Louisiana courts determine what is a LUTPA violation on a case-by-case basis. **Quality Environmental Processes, Inc. v. I.P. Petroleum Co., Inc.**, 2013-1582, p. 21 (La. 5/7/14), 144 So.3d 1011, 1025. This court has consistently held that in establishing a LUTPA claim, a plaintiff must show that the alleged conduct offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious. **Cheremie Services, Inc. v. Shell Deepwater Production, Inc.**, 2009-1633, p. 10 (La. 4/23/10), 35 So.3d 1053, 1059; see also Bihm, 2016-0356 at pp. 20-21, 226 So.3d at 483.

Louisiana Revised Statute 51:1409(E) provides that a cause of action under LUTPA “shall be subject to a liberative prescription of one year running from the time of the transaction or act which gave rise to this right of action.” Although not

specified by the statutory language, Louisiana jurisprudence has consistently held that the prescriptive period for a private action pursuant to LUTPA is preemptive. **Bihm**, 2016-0356 at p. 28, 226 So.3d at 488, citing **Zeigler v. Hous. Auth. of New Orleans**, 2012-1168, pp. 11-12 (La. App. 4th Cir. 4/24/13), 118 So.3d 442, 451-52; see also **Spencer-Wallington, Inc. v. Service Merchandise, Inc.**, 562 So.2d 1060, 1063 (La. App. 1st Cir.), writ denied, 567 So.2d 109 (La. 1990); **Morris v. Sears Roebuck and Co.**, 99-2772, p. 4 (La. App. 4th Cir. 5/31/00), 765 So.2d 419, 422. Preemption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the preemptive period. Consequently, a preemptive period cannot be renounced, interrupted or suspended. La. Civ. Code arts. 3458 & 3461.

In its Master Petition, CamSoft alleges that in August 2004, “Drake told Reneker that they needed to develop a method of selling the Crime Camera System through no-bid state contracts, ... [and that] [t]hey openly discussed the illegality of camera sales through their no-bid, direct purchase contract with the State of Louisiana[.] Moreover, Dell’s WSCA Contract did not give the company authority to sell the other computer networking and wireless networking equipment needed to deploy a Crime Camera System. Nonetheless, to avoid state regulator scrutiny, the Dell employees colluded on a method of misidentifying the equipment sold.” Further, CamSoft alleges that, beginning in January 2005, “the City Defendants and Dell Defendants began independently marketing themselves to newly elected Baton Rouge city officials as the New Orleans Crime Camera System integrators and installers. ... Eventually, the City Defendants and Dell Defendants sold the government officials on the erroneous, and illegal, notion that there was no need to properly issue requests for proposals under Louisiana’s Public Bid Laws, where they could directly procure the cameras through Dell’s illegal, no-bid WSCA Contract.” CamSoft asserts that on June 20, 2006, “Meffert ordered New Orleans’ first twenty-

five cameras through Dell's WSCA Contract," and that "[d]uring the summer of 2006 ... [Dell] also began to install a Crime Camera System within the City of Baton Rouge, as well as for DOTD transportation projects ... utiliz[ing] Dell's ... illegal, no-bid WSCA Contract for both equipment sales and installation charges." Further, CamSoft alleges that Dell "continued making illegal, no-bid contract purchases under Dell's WSCA Contract through ... February 12, 2007. Dell and NetMethods also continued making illegal, no-bid WSCA Contract sales to the City of Gretna[.]" However, "[b]y June 7, 2007, the Baton Rouge city council allocated \$3.5 million from a \$19 million surplus to purchase and install the replica Crime Camera System sold by Dell and NetMethods. The Baton Rouge Purchasing Department issued a single purchase order, P.O. #71491, for the Crime Camera System sold by NetMethods and Dell."

Based on the above allegations, CamSoft asserts that Dell conspired to violate LUTPA, claiming that "beginning as early as May or June 2005 through approximately January 2010, NetMethods, Dell and/or Dell Marketing knowingly (1) erroneously marketed themselves and took credit as the corporations responsible for the Crime Camera System installation in New Orleans; (2) continued its use [of] illegal no-bid contracts to sell the Crime Camera System to state and local governmental agencies, including over \$4 million in sales to the City of Baton Rouge alone; and (3) continued its illegal use of CamSoft's confidential technical and business information and trade secrets to install the competing Crime Camera System."

Dell contends that, because the time period in which to bring a LUTPA claim is preemptive, the doctrines of *contra non valentem* and/or continuing tort do not apply and cannot be used to suspend a preemptive period. Dell further argues "[i]t is clear from the face of the Master Petition that CamSoft's LUTPA claim arises out of conduct that occurred in 2006 and 2007, **more than two years before CamSoft**

filed this lawsuit.” (emphasis in original). Recently, this court held, in **Safe Air Technology, LLC v. Christie**, 2017-0320, p. 22 (La. App. 1st Cir. 9/15/17), 2017 WL 4082243 (unpublished), writ denied, 2017-1979 (La. 3/9/18), 238 So.3d 454, that “[t]he continuing tort doctrine is a suspension principle based on *contra non valentem*; therefore, it cannot be used to suspend a preemptive period.” Other circuits have similar holdings, such as the Fourth Circuit in **Canal Marine Supply, Inc. v. Outboard Marine Corp. of Waukegan, III**, 522 So.2d 1201, 1203 (La. App. 4th Cir. 1988), which noted that, in analyzing LUTPA, “if the statute which creates a right also provides the time period in which that right must be exercised, the period is viewed as preemptive.” The **Canal Marine Supply** court stated that La. R.S. 51:1409(A) created a cause of action which did not exist in Louisiana before 1972, and La. R.S. 51:1409(E), enacted at the same time, fixed the time period in which this newly created right must be exercised. The court also analyzed the intent of the legislature in drafting the statute and noted that LUTPA “is intended to protect the *public’s* interest in fair trade and competition.” (emphasis in original). In addition, “[b]ecause the statute is penal in nature, it is subject to reasonably strict construction.” The court concluded:

The special nature of the private right of action under the [L]UTPA and the serious consequences of a successful action both militate in favor of an absolute, uninterrupted time period. The [L]UTPA’s provision for triple damages is in derogation of the ordinary rules on damages. ... By including a provision setting forth the time in which the private right of action must be asserted, the legislature showed an intent to remove this unique right from the ordinary rules of prescription. The plain language of R.S. 51:1409(E) shows an intent to make that period absolute (that is preemptive). Section E provides that the action must be brought within one year “... running from the time of the transaction or act which gave rise to this right of action.” There is no qualifying language attached to this very definite statement of when the clock starts running on a private right of action under the [L]UTPA. If the legislature had wanted this time period to be interruptible it could either have said so specifically or have let the ordinary rules of prescription apply by not making special provision for it in the act. It did neither.

**Canal Marine Supply**, 522 So.2d at 1203-04.

Furthermore, this court, in **Spencer-Wallington, Inc.**, 562 So.2d at 1063, directly citing **Canal Marine Supply**, stated “as to the cause of action under La. R.S. 51:1409, the one year period of limitation for commencement of the action is peremptive, thus not subject to interruption or suspension even under the doctrine of *contra non valentem*.” See also Glod v. Baker, 2004-1483, p. 6 (La. App. 3d Cir. 3/23/05), 899 So.2d 642, 647, writ denied, 2005-1574 (La. 1/13/06), 920 So.2d 238 (noting “[a] strong line of Louisiana jurisprudence” which rejects the notion that the peremptive period may be interrupted or suspended under the continuing tort or *contra non valentem* doctrines for claims under LUTPA); **Zeigler**, 2012-1168 at p. 12, 118 So.3d at 452 (“The continuing tort doctrine is a suspension principle based on *contra non valentem*; therefore, it cannot be used to suspend a peremptive period.”).<sup>9</sup>

Herein, CamSoft’s Master Petition clearly states that “on June 20, 2006, Meffert ordered New Orleans’ first twenty-five cameras through Dell’s WSCA Contract.” Further, CamSoft alleges that “[d]uring the summer of 2006, the City Defendants and [Dell] also began to install a Crime Camera System within the City of Baton Rouge, as well as for DOTD transportation projects. The City Defendants and [Dell] utilized Dell’s same illegal, no-bid WSCA Contract for both equipment sales and installation charges.” Further, CamSoft’s Petition claims that, in New

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<sup>9</sup> We note this court’s decision in **Bihm**, 2016-0356 at pp. 29-30, 226 So.3d at 489, which, in considering La. R.S. 51:1409(E) noted three previous First Circuit opinions holding that the peremptive period in La. R.S. 51:1409(E) could be suspended by the continuing tort doctrine. Specifically, this court stated that “peremption did not run on [defendants’] claim against them for violations of LUTPA until the wrongful acts ceased to occur.”

However, the **Bihm** decision primarily relied on the earlier First Circuit decision in **Fox v. Dupree**, 633 So.2d 612, 614 (La. App. 1st Cir. 1993), writ denied, 635 So.2d 233 (La. 1994), wherein this court agreed, citing **Canal Marine Supply** and **Spencer-Wallington, Inc.**, *supra*, that the time limitation in La. R.S. 51:1409(E) is “peremptive, rather than prescriptive[,]” and that “[a]s construed, the term is not subject to interruption or suspension, even if the aggrieved party was unaware of acts giving rise to the right of action.” The **Fox** court continued, however, noting that, “[p]laintiff’s alleged failure to comply with the bond filing and disclosure requirements of the Loan Brokers’ statute was a continuing violation of the statute. Every day he was not in compliance with the law, plaintiff violated the statute. The law provides that a violation of the statute is an unfair trade practice. La. R.S. 51:1915(A). ... In this case, violation of the Loan Brokers’ statute gives rise to an unfair trade practice claim. The peremptive term could not even begin to run until a loan broker complied with the law because every day he is in violation gives rise to a new right of action for an unfair trade practice.”

Accordingly, as the instant lawsuit does not address a continuing duty from Dell or MMR to affirmatively follow certain statutory reporting and disclosure requirements, we find **Fox**, and subsequently **Bihm**, distinguishable, and choose not to follow them herein.

Orleans, “Kurt continued making the illegal, no-bid purchases until his resignation in February 2007.”

Accordingly, it is clear from the face of CamSoft’s Original Petition and Master Petition that the “transaction or act which gave rise to [its] right of action” under LUTPA occurred as early as June 20, 2006, when Meffert first purchased camera equipment through Dell’s WSCA Contract, in circumvention of the July 19, 2004 Contract. Therefore, as CamSoft did not file its petition or assert its LUTPA conspiracy claims until September 18, 2009, we find such claims are untimely and preempted and that the trial court was manifestly erroneous in denying Dell’s peremptory exception of prescription and/or preemption in this regard.

***F. ANTITRUST***

Louisiana Revised Statute 51:122(A) provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal.” Louisiana’s Antitrust Act is virtually identical to Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and federal analysis of the Sherman Act is persuasive, though not controlling. **HPC Biologicals, Inc. v. UnitedHealthcare of Louisiana, Inc.**, 2016-0585, p. 8 (La. App. 1st Cir. 5/26/16), 194 So.3d 784, 793, citing **Louisiana Power and Light Company v. United Gas Pipe Line Company**, 493 So.2d 1149 (La. 1986). The federal and state antitrust laws were intended to be sweeping in breadth, encompassing every conspiracy, contract, or combination that restrains trade. **HPC Biologicals**, 2016-0585 at p. 8, 194 So.3d at 793.

There is no statute of limitation in La. R.S. 51:121 *et seq.*, the Louisiana Antitrust Act, more particularly La. R.S. 51:137, which provides for recovery of treble damages. However, in **State ex rel. Ieyoub v. Bordens, Inc.**, 95-2655, p. 3 (La. App. 4th Cir. 11/27/96), 684 So.2d 1024, 1026, writ denied, 97-0339 (La. 3/14/97), 690 So.2d 42, citing **Loew’s, Incorporated v. Don George, Inc.**, 110



So.2d 553 (La. 1959), it was held that an antitrust action sounds in tort, and the one year prescriptive period of La. Civ. Code art. 3492<sup>10</sup> applies in a private action. See also **Big River Industries, Inc. v. Headwaters Resources, Inc.**, 971 F.Supp.2d 609, 624 (M.D. La. 2013) (interpreting the Louisiana Anti-Monopoly Law). The damage need not be certain or fully incurred but cannot be speculative. **Harvey v. Dixie Graphics, Inc.**, 593 So.2d 351, 354 (La. 1992).

Prescription begins to run at the time the cause of action accrues unless an exception applies. **Corsey v. State, Through Dept. of Corrections**, 375 So.2d 1319, 1321 (La. 1979). One such exception, *contra non valentem*, suspends the running of the prescriptive period when the cause of action is not known or reasonably knowable by the plaintiff. *Contra non valentem* is an exceptional remedy recognized by our jurisprudence which is in direct contradiction to the articles in the Civil Code and therefore should be strictly construed. **Id.** at 1321-22; see also **Ellender v. Goldking Production Co.**, 99-0069, pp. 8-9 (La. App. 1st Cir. 6/23/00), 775 So.2d 11, 16-17, writ denied, 2000-2587 (La. 2/16/01), 786 So.2d 96. Another such exception to the general rule is the continuing tort doctrine which acts to delay the beginning of a prescriptive period in complex business torts until the continuing tort ceases. **State ex rel. Ieyoub**, 95-2655 at p. 3, 684 So.2d at 1027. For the continuing tort doctrine to apply, there must be continuous wrongful action, not just continuing ill effects. **Id.**; **Crump v. Sabine River Auth.**, 98-2326, p. 9 (La. 6/29/99), 737 So.2d 720, 728.

Regarding the U.S. Supreme Court's interpretation of the prescriptive period of the Sherman Antitrust Act, the Court has held that, generally, an antitrust cause of action accrues when a defendant commits an act which injures a plaintiff's business. However, in the context of a continuing conspiracy to violate antitrust

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<sup>10</sup> Louisiana Civil Code article 3492 provides, in pertinent part, that "[d]elictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained."

laws, each time a plaintiff is injured by the act of a defendant, a cause of action accrues to recover damages caused by that act and the statute of limitations runs from the commission of the last act. **State ex rel. Ieyoub**, 95-2655 at p. 4, 684 So.2d at 1027, citing **Al George, Inc. v. Envirotech Corp.**, 939 F.2d 1271 (5th Cir. 1991) (per curiam), quoting **Zenith Radio Corp. v. Hazeltine Research, Inc.**, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); see also **Imperial Point Colonnades Condominium, Inc. v. Mangurian**, 549 F.2d 1029, 1036-37 (5th Cir.), cert denied, 434 U.S. 859, 98 S.Ct. 185, 54 L.Ed.2d 132 (1977). Federal cases interpreting the statute of limitations involved in antitrust actions hold that in a conspiracy action the period begins with an overt act pursuant to the conspiracy. **State ex rel. Ieyoub**, 95-2655 at pp. 4-5, 684 So.2d at 1027 citing **State of Texas v. Allan Construction Co.**, 851 F.2d 1526 (5th Cir. 1988).

Though prescription may not begin until the last act of the conspiracy, a plaintiff nevertheless has a duty to exercise due diligence and prescription will begin when a plaintiff has “knowledge of certain facts which are ‘calculated to excite inquiry’ [and] give rise to the duty to inquire.” In **In re Catfish Antitrust Litigation**, 826 F.Supp 1019, 1031 (N.D. Miss. 1993), the federal district court noted the plaintiffs alleged a “pattern of conduct by the defendants which included face-to-face meetings and telephone calls – all conducted under the cloak of secrecy in furtherance of the conspiracy to fix the price of catfish.” The district court found that such conduct “of clandestine meetings and telephone conversations, if proven, is sufficient to establish the requisite ‘affirmative acts’ of fraudulent concealment.”<sup>11</sup> However, citing **Allan Construction Co.**, 851 F.2d at 1533, the district court noted that “[i]n order to avail the doctrine of fraudulent concealment and its equitable

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<sup>11</sup> “The doctrine of fraudulent concealment contains two elements which a plaintiff must prove. First, the defendant concealed the conduct complained of; and, second, despite the exercise of due diligence, plaintiff failed to discover the facts that form the basis of his claim. It is generally recognized that the statute of limitations is tolled only if the defendant has engaged in affirmative acts of concealment.” **Jensen v. Snellings**, 841 F.2d 600, 607 (5th Cir. 1988).

tolling of the statute of limitations, the plaintiffs must show that they failed, despite the exercise of due diligence on their part, to discover the facts that form the basis of their price fixing claim. “[T]he statute of limitations is tolled only until such time as the plaintiff, exercising reasonable diligence, could have discovered the facts forming the basis for the claim.” The plaintiffs need not have actual knowledge of the facts before the duty of due diligence arises; rather, knowledge of certain facts which are “calculated to excite inquiry” give rise to the duty to inquire. The statute of limitations begins to run once plaintiffs are on inquiry that a potential claim exists. **In re Catfish Antitrust Litigation**, 826 F.Supp. at 1013; see also **In re Beef Industry Antitrust Litigation, MDL Docket No. 248**, 600 F.2d 1148, 1170 (5th Cir. 1979); **Clement A. Evans & Co., Inc. v. McAlpine**, 434 F.2d 100, 102 (5th Cir. 1970), cert denied, 402 U.S. 988, 91 S.Ct. 1660, 29 L.Ed.2d 153 (1971). As Louisiana looks to federal jurisprudence as persuasive influence on the interpretation of our state antitrust statutes, we find these cases helpful.

On March 4, 2007, in an email, Perrin sent MacDonald a link to a New Orleans Times-Picayune article which chronicled Southern’s original award of the July 19, 2004 Contract with the City of New Orleans, the subsequent fallout, and the later dealings with the City of New Orleans, Imagine, and NetMethods. The article discussed Meffert and St. Pierre’s connections to the Crime Camera Project and to Imagine and NetMethods both in New Orleans and Baton Rouge. The article even explained Dell’s sales of the Crime Camera Systems through its WSCA Contract. In response, MacDonald wrote to Perrin: “I commend you on coming out on this. To be honest, it has been bothering me for a while. I don’t like living in a state that allows this sort of behavior. ... [i]t may hurt our business a bit in government work, but who needs work from a government that is corrupt. Maybe I am just hoping for a pipe dream.” MacDonald later testified that “you can get my feeling from that email that I was pretty pissed off about those kind of things happening. ... it was a

concern of mine, absolutely.” On March 14, 2007, Perrin emailed MacDonald, informing him “[w]e had the state remove the cameras from the state contract.” Perrin then stated, “[r]ead this” and attached another Times-Picayune article, which MacDonald admitted reading, that detailed how the City of New Orleans “turned to a standing contract the state has with computer giant Dell Inc. to purchase the second group of cameras via a subcontractor with City Hall connections.” The article also discussed a directive from the director of the OSP to stop selling cameras until further notice: “Lea said her directive was unrelated to a recent controversy over the city’s recent use of the Dell contract for 53 crime cameras, a controversy that stems from links between the city’s last two chief technology officers and the owner of the company that supplies the cameras to Dell.” The article also stated that “[t]he 53 cameras bought through Dell under the state contract were provided by a supplier with connections to City Hall. The vendor, which is also installing the units, is Veracent, LLC, which is owned by Mark St. Pierre.” MacDonald replied to Perrin’s email with, “Good job! Keep up the fight!” Later, on March 20, 2007, Perrin sent MacDonald an email with a link to an online article, to which MacDonald replied, “Iggie, I find it hard to believe that we [cannot] sue [C]hris [Drake] and them for technology theft. They are still selling equipment and services under the [N]et[M]ethods name.”<sup>12</sup> Additionally, on June 4, 2007, MacDonald emailed Gordon Russel (“Russel”) (an investigative journalist with the Times-Picayune who also wrote the article forwarded to MacDonald on March 14, 2007) and Perrin a link to an article about former City of Baton Rouge Mayor Kip Holden who wanted to “provide local law enforcement agencies with high-tech eyes and ears in the sky to help monitor areas associated with criminal activity. Holden is pushing a \$3.5

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<sup>12</sup> CamSoft admits in its opposition brief that “[t]he *Wi-Fi Planet* article reported that NetMethods built a wireless video surveillance system for the City of Savannah, Georgia. MacDonald wrote to Perrin: ‘Iggie, I find it hard to believe that we [cannot] sue [C]hris [Drake] and them for technology theft. They are still selling equipment and services under the [N]et[M]ethods name.’ MacDonald explained that he wrote the email because he did not know how NetMethods built its wireless camera system. MacDonald sent the email to Perrin as a way of inquiring into whether Perrin knew or possessed any information concerning NetMethods’ designs or equipment compilations.”

million budget supplement to install James Bond-type cameras equipped with shot spotter technology that will immediately report gunshots to the police.”

Dell argues that “**more than two-and-a-half years before filing its lawsuit**, MacDonald was corresponding with an investigative journalist who had been writing about Dell’s sales of crime cameras with Drake, NetMethods and Veracent under Dell’s WSCA [C]ontract. This sale of crime camera systems to [the City of Baton Rouge] formed one of the bases of CamSoft’s antitrust and other claims against Dell. Communicating directly with an investigative journalist covering the subject matter of the lawsuit, within months of already claiming that CamSoft could ‘sue Chris [Drake] and them for technology theft’ presents a most clear-cut example of knowledge sufficient to bar CamSoft’s claims due to prescription.” (emphasis in original). We agree.

Moreover, CamSoft was aware that Active and Southern filed a lawsuit against Drake, Imagine, NetMethods, and other defendants for, among other claims, “technology theft.” When asked whether he was “curious about the nature of the lawsuit” given his work on the Crime Camera Project, MacDonald answered he was “focused on other things.” However, the Second Amending Petition filed in that action in October 2007, disclosed all the facts CamSoft needed to bring its claims. For example, the amending petition discussed the July 8, 2004 meeting between Dell, Active, Southern, Drake and St. Pierre. It alleged that “[a]s result of the meetings with Dell, the Dell Defendants and the City’s MOT employees Drake and St. Pierre obtained all of Plaintiffs’ price schedules and the proprietary [s]ystem design with full access to all of its components and technology.” The amending petition alleged that Active and Southern provided Dell and Drake with “specifications for, the products and infrastructure of their [s]ystem” including “the manner in which the camera sites could be used as wireless access points and be utilized in any number of ways[.]” It further alleged that Dell and the other

defendants “copied and utilized” the wireless video surveillance system “in the City and elsewhere throughout the United States and the world, without Plaintiffs’ permission or knowledge” and that the system was worth “millions of dollars.” In fact, regarding MacDonald’s potential claims, Perrin specifically advised MacDonald that he “needed to get help. That was from a very early-on period. I said, you need to figure that out, because I don’t know what you’d have any claims for. You know, I don’t know what our claims are, necessarily. And I just felt that since he quit the project that our claims were not necessarily aligned, because they might – his bigger claims would have been bigger than what mine were[.]”

Both under Louisiana state law and the federal jurisprudence interpreting antitrust allegations, “the prescriptive period commences when there is enough notice to call for an inquiry about a claim, not when an inquiry reveals the facts or evidence to sufficiently prove the claim.” **Babineaux**, 2004-2649 at p. 5, 927 So.2d at 1125, citing **Terrel v. Perkins**, 96-2629 p. 4 (La. App. 1st Cir. 11/7/97), 704 So.2d 35, 38; see also **In re Catfish Antitrust Litigation**, 826 F.Supp. at 1031. Herein, MacDonald’s correspondence with Perrin and Russel in March to June 2007 establish CamSoft had more than enough notice to call for an inquiry for a possible “conspiracy ... in restraint of trade or commerce” in the months and years before September 18, 2008 – one year before it filed suit on September 18, 2009. MacDonald at least contemplated the idea of litigation when he asked why he could not sue Drake for “technology theft.” CamSoft attempts to downplay this statement, averring that MacDonald wrote the email “because he did not know how NetMethods built its wireless camera system. MacDonald sent the email to Perrin as a way of inquiring into whether Perrin knew or possessed any information concerning NetMethods’ designs or equipment compilations.” While CamSoft attempts to show MacDonald’s possible lack of actual knowledge, such a statement further demonstrates MacDonald’s constructive knowledge – “put[ting] the injured

party on guard and call[ing] for inquiry.” Moreover, while MacDonald may have chosen to ignore the litigation against Dell by Active and Southern, the fact that litigation was even filed, especially in light of the news articles and MacDonald’s past history with these parties, should have caused him to inquire further about the possible existence of a claim. Perrin even wrote to MacDonald on May 6, 2008, stating: “How are things? We are in the middle of the discoveries with the Dell lawsuit. They are trying to find the links that show BR purchased their camera system from Imagine (or Veracent, Net[M]ethods, or whatever they called themselves). Do you have any contacts that would know the details?” “While it is true that prescription does not begin to run until discovery of facts which give rise to a cause of action, it is equally clear that ignorance of one’s legal rights based upon known facts does not suspend or delay the running of prescription.” **Hawthorne**, 540 So.2d at 1263.

Accordingly, we find that MacDonald and CamSoft had constructive knowledge to excite attention sufficient to prompt further inquiry between March and October 2007 and must be charged with all facts to which a reasonable investigation would have led. Therefore, we find the antitrust conspiracy claims asserted by CamSoft in its Original Petition and Master Petition are untimely and, accordingly, find the trial court was manifestly erroneous in denying Dell’s peremptory exception of prescription in this regard.

#### **G. TORTIOUS INTERFERENCE WITH CONTRACT**

Tortious interference with contract is a tort, based on duties arising from La. Civ. Code art. 2315. Actions in tort are delictual actions, subject to a one-year liberative prescription. The prescription commences to run from the day injury or damage is sustained. Louisiana courts maintain that prescription on the tort claim begins to run on the date the injured party discovers or should have discovered the facts upon which its cause of action is based. **SMP Sales Management, Inc. v. Fleet**

**Credit Corp.**, 960 F.2d 557, 559 (5th Cir. 1992), citing 9 to 5 Fashions, Inc. v. Spurney, 538 So.2d 228 (La. 1989); see also Simmons v. Templeton, 98-0043, p. 6 (La. App. 4th Cir. 11/10/98), 723 So.2d 1009, 1012, writs denied, 98-0350 (La. 2/5/99), 738 So.2d 4 & 98-0360 (La. 2/5/99), 738 So.2d 5 (“[t]he applicable prescriptive period for ... claims [of] ... tortious interference with contract are subject to a liberative prescription period of one year.”).

CamSoft’s First Supplemental and Amending Petition for Declaratory Judgment and Damages states, in pertinent part:

CamSoft alleges that [Dell], Ciber and Kurt conspired to disrupt the July 19, 2004 Contract between CamSoft, Active Solutions and Southern Electronics and the City of New Orleans. Said Defendants conspired to form a conglomerate of companies that would eventually misappropriate CamSoft’s intellectual property rights to technological information relative to the wireless video surveillance system and directly compete for the sale of same to municipalities and other consumers of said system, which has caused and continues to cause irreparable financial harm to CamSoft.

In its Master Petition, CamSoft also sets forth the following allegation:

Moreover, the City Defendants, Dell Defendants, and Ciber all directly conspired and participated in the tortious interference with the July 19, 2004 Contract. CamSoft jointly collaborated in the entire bidding process and possessed a direct financial interest in the good faith deployment of the July 19, 2004 Contract. The conspirators knowingly participated and concurred in Meffert’s unilateral action as the Chief Technology Officer to interfere with the July 19, 2004 Contract. They conspired to interfere with the contract so as to reap the financial windfall associated with the federal government’s rebuilding money following Hurricane Katrina. Accordingly, they all conspired to stop ordering the Crime Camera System through the July 19, 2004 Contract and to stop making timely payments for work already performed. This tortious interference was designed to inflict financial harm on CamSoft, and did inflict such financial harm. Eventually, on January 10, 2006, CamSoft voluntarily quit the July 19, 2004 Contract deployment.

We find the same facts and information that provided CamSoft with constructive knowledge of its antitrust conspiracy claims, as discussed above, also provided CamSoft with constructive knowledge of its conspiracy to commit tortious interference with contract claim. Specifically, the March 14, 2007 Times-Picayune article, which MacDonald admitted reading, discussing how the City of New Orleans



“turned to a standing contract the state has with computer giant Dell Inc. to purchase the second group of cameras via a subcontractor with City Hall connections,” and MacDonald’s statements to Perrin about filing a lawsuit against Drake for “technology theft” and that “[t]hey are still selling equipment and services under the [N]et[M]ethods name,” in addition to the other examples as discussed above, provided CamSoft with constructive knowledge of this claim. Accordingly, we find the claim of conspiracy to commit tortious interference with contract advanced by CamSoft is untimely and, therefore, find the trial court manifestly erred in denying Dell’s peremptory exception of prescription in this regard.

#### **H. CONVERSION**

A conversion is an act in derogation of the plaintiff’s possessory rights and any wrongful exercise of assumption of authority over another’s goods, depriving him of the possession, permanently or for an indefinite time. **Quealy v. Paine, Webber, Jackson & Curtis, Inc.**, 475 So.2d 756, 760 (La. 1985). A conversion is committed when any of the following occurs: (1) possession is acquired in an unauthorized manner; (2) the chattel is removed from one place to another with the intent to exercise control over it; (3) possession of the chattel is transferred without authority; (4) possession is withheld from the owner or possessor; (5) the chattel is altered or destroyed; (6) the chattel is used improperly; or (7) ownership is asserted over the chattel. **Dual Drilling Co. v. Mills Equipment Investments, Inc.**, 98-0343, p. 4 (La. 12/1/98), 721 So.2d 853, 857. A conversion action sounds in tort and is subject to a one-year liberative prescriptive period. See La. Civ. Code art. 3492; **Gallant Investments, Ltd. v. Illinois Cent. R. Co.**, 2008-1404, p. 7 (La. App. 1st Cir. 2/13/09), 7 So.3d 12, 17-18; see also **Bihm**, 2016-0356 at p. 15, 226 So.3d at 480.

CamSoft generally alleges a conspiracy to commit conversion by Dell, though it does not provide any specific allegation in support thereof. Nevertheless, based on

the doctrine of constructive knowledge, we find the same facts and information that provided CamSoft with constructive knowledge of its antitrust and tortious interference with contract conspiracy claims, as discussed above, also provided CamSoft with constructive knowledge of a conspiracy to commit conversion by Dell. Specifically, MacDonald's question to Perrin in December 2006, where he asks if the City Defendants "are they using any of our technology," and his statement on March 20, 2007, where he tells Perrin, "I find it hard to believe that we [cannot] sue [C]hris [Drake] and them for technology theft[.]" support CamSoft's constructive knowledge. Further, in the Active and Southern lawsuit, which MacDonald was aware of, an allegation is specifically made that Dell "copied and utilized" the wireless video surveillance system "in the City and elsewhere throughout the United States and the world, without [Active and Southern's] permission or knowledge." While Active and Southern were the plaintiffs therein, this allegation, which CamSoft should have been aware of, provides sufficient constructive knowledge of its conspiracy to commit conversion claim. Accordingly, we find the claim of conspiracy to commit conversion advanced in CamSoft's Original Petition and Master Petition is untimely and, accordingly, find the trial court manifestly erred in denying Dell's peremptory exception of prescription in this regard.

#### **I. FRAUD**

Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. La. Civ. Code art. 1953. In pleading fraud, the circumstances constituting the fraud shall be alleged with particularity. La. Code Civ. P. art. 856. The Louisiana Civil Code provides two possible prescriptive periods for fraud: a liberative prescription of one year for delictual actions found in La. Civ. Code art. 3492, and a liberative prescription of ten years for personal actions not otherwise provided for in La. Civ. Code art. 3499. This court, in **Beckstrom v.**

**Parnell**, 97-1200 (La. App. 1st Cir. 5/15/98), 714 So.2d 188, on reh'g, 97-1200, p. 8 (La. App. 1st Cir. 11/6/98), 730 So.2d 942, 947, when discussing the two, stated:

A suit for breach of fiduciary duty is generally a personal action with a ten year prescriptive period. However, courts must consider the underlying claim to determine if the action is indeed one for breach of fiduciary duty which is governed by the ten year prescriptive period or merely a suit against a fiduciary for negligence which is governed by the one year prescriptive period. (internal citations omitted).

“The necessary implication of this language in **Beckstrom** is that a fiduciary’s simple negligence should be treated as an offense subject to a one year prescriptive period, while deliberate actions, such as fraud, misrepresentation or conversion would be subject to the ten year prescriptive period. Such an approach has in its favor the fact that it would permit greater accountability for deliberate acts. The distinction between damages *ex delicto* and *ex contractu* is that the latter ensue from the breach of a special obligation, and the former from the violation of a general duty.” **dela Vergne v. dela Vergne**, 99-0364, p. 9 (La. App. 4th Cir. 11/17/99), 745 So.2d 1271, 1275-76; see also **Young v. Adolph**, 2002-0067, p. 10 (La. App. 5th Cir. 5/15/02), 821 So.2d 101, 106 citing **dela Vergne**, 745 So.2d at 1271. “The breach of a fiduciary duty is the breach of a special obligation, although the same act may constitute the breach of a general obligation as well. The essence of the fiduciary duty lies in the special relationship between the parties. ... It is the duty of loyalty which distinguishes the fiduciary relationship.” **dela Vergne**, 99-0364 at p. 9, 745 So.2d at 1276; citing **Beckstrom**, 97-1200 at p. 10, 714 So.2d at 194-95; see also **Blank v. Equisol, L.L.C.**, 2014-1462 (La. App. 1st Cir. 6/18/15), 2015 WL 3824835 (unpublished). Therefore, the nature of the cause of action must be determined before it can be decided which prescriptive term is applicable. The character of an action disclosed in the pleadings determines the prescriptive period to that action. **Ames**, 2011-1540 at p. 6, 97 So.3d at 391.

In CamSoft's Original Petition, it alleged that "[t]he relationship between joint venturers, like that existing between partners, is fiduciary in character. A fiduciary obligation is imposed on all participants of loyalty and the utmost good faith, fairness and [honesty] in dealings." Further, CamSoft asserts it, "Active Solutions and Southern Electronics formed a joint venture for the sale of the wireless video surveillance system designed, developed and created during the pilot project in the Iberville Projects." CamSoft ultimately alleges that "[t]here existed a fiduciary relationship between CamSoft, Active Solutions and Southern Electronics." Additionally, CamSoft advances the following allegations in its Master Petition:

Towards the end of the Pilot Project, St. Pierre and Drake arranged for a secret dinner meeting between Meffert and Perrin of Southern Electronics. While eating dinner at the *Bandidos Restaurant* in New Orleans, LA, Meffert, St. Pierre, Drake, and Perrin agreed upon the following kickback scheme: Meffert would use his influence over city government to land the Active-Southern Defendants the lucrative Crime Camera Project, and, in exchange, the City Defendants would take over CamSoft's wireless network integrator role on both the New Orleans project, as well as all future Crime Camera System sales outside of New Orleans (the "Bandidos Agreement"). Meffert also discussed using his influence to land them lucrative marketing agreements with billion dollar technology vendors, including Dell, Inc. and Ciber, Inc. Perrin agreed to the surreptitious deal and notified Fitzpatrick of the arrangement.

\* \* \*

Without knowledge of the surreptitious Bandidos Agreement, on or about January 28, 2004, CamSoft provided to Perrin of Southern Electronics its expressly marked 'confidential' technical and pricing information for inclusion in the parties' jointly submitted Crime Camera Contract proposal[.]

\* \* \*

Thereafter, Meffert personally demonstrated CamSoft's Pilot Project to Kimberly Fury ('Fury'), Dell, Inc.'s Executive Director of State and Local Government Sales. Meffert told Fury that the Pilot Project was highly confidential and that CamSoft designed the wireless network using Tropos' wireless networking equipment. Fury told Meffert that Dell would absolutely be interested in selling the crime camera system through its national and international sales channels[.]

\* \* \*

On July 8, 2004 [Steve] Reneker, [Dell's Public Safety and Criminal Justice Division Manager] flew into New Orleans for [a] secret meeting. The meeting participants reached an agreement: Dell would

market and sell the Crime Camera System nationally and internationally; the Active-Southern Defendants would manufacture and sell to Dell its weatherized Sony camera; and the City Defendants would become a Dell Integrated Service Provider and act as the wireless network designer, integrator, and installer ('Dell Agreement'). In exchange, the Active-Southern Defendants knowingly turned over CamSoft's confidential and proprietary technical and business information to the City Defendants and Dell regarding the Crime Camera System. ...

\* \* \*

The Active-Southern Defendants and City Defendants committed a direct fraud upon CamSoft. The Active-Southern Defendants and City Defendants knowingly and fraudulently suppressed and omitted the truth surrounding their activities and motives after making the Bandidos Agreement and Dell Agreement. These agreements were made with the specific intent of fraudulently and maliciously harming CamSoft's business. The Active-Southern Defendants and City Defendants knowingly suppressed the truth in order to obtain a fraudulent and unjust economic advantage over CamSoft, which included CamSoft's purposeful exclusion of Crime Camera System sales potentially worth hundreds of millions, if not billions, of dollars.

\* \* \*

Although Dell employees never directly communicated with CamSoft, the Dell employees nonetheless participated in the conspiracy to commit a fraud upon CamSoft by stealing and converting CamSoft's business information for its own financial gain: (1) Dell employees knew that CamSoft designed the Crime Camera System using the Tropos equipment; (2) Dell employees knew that the Active-Southern Defendants and City Defendants were intentionally excluding CamSoft from the July 8, 2004 Meeting and Dell Agreement; (3) Dell employees helped facilitate the City Defendants' taking over CamSoft's role as the wireless network integrator by making them Dell DISP agents; (4) Dell employees knowingly entered into kickback contract agreements, whereby Dell and Dell Marketing obtained lucrative computer sales with the City of New Orleans in exchange for illegally selling CamSoft's Crime Camera System through no-bid contracts; (5) Dell knew its subcontractors were using CamSoft's confidential information; and (6) Dell financially profited from the conspiracy.

On the face of its Original Petition and Master Petition, CamSoft alleges a conspiracy between Dell, MMR, the City Defendants, Active, and Southern. While Dell and CamSoft did not communicate directly, Dell was nonetheless part of a conspiracy which involved parties who had a fiduciary relationship with CamSoft pursuant to the July 19, 2004 Contract. CamSoft's Original Petition states "the meetings, conferences, contractual negotiations and actual signing of contracts

between Active Solutions, Southern Electronics and Dell all took place during the time that Active Solutions and Southern Electronics were conducting their joint venture business relationship with CamSoft. While CamSoft was busy designing, installing and testing the wireless video surveillance system in the City of New Orleans, its joint venture partners were secretly conspiring to remove CamSoft from the joint venture.”

Louisiana Civil Code article 2324 provides that “[h]e who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.” We find the nature of CamSoft’s fraud cause of action is that of a breach of a fiduciary relationship. Therefore, we conclude that, pursuant to the general fiduciary duties of loyalty and good faith owed by Active and Southern to CamSoft, and the intentional acts of fraud committed on CamSoft by Dell, the ten-year prescriptive period as set forth in La. Civ. Code art. 3499 also applies to Dell. Accordingly, as CamSoft’s Original Petition was filed on September 18, 2009, this claim was timely, and the trial court did not err in denying Dell’s peremptory exception of prescription in this regard.

### **CONCLUSION**

As stated above, this appeal is dismissed as abandoned as to MMR Group, Inc., MMR Constructors, Inc., and MMR Offshore Services, Inc. Further, and for the foregoing reasons, the April 2, 2019 judgment denying Dell’s Peremptory Exception of Prescription and/or Peremption, is affirmed regarding CamSoft’s LUTSA and fraud conspiracy claims. The judgment is reversed, and the exception is granted, regarding CamSoft’s LUTPA, antitrust, tortious interference with contract, and conversion conspiracy claims as they are prescribed and/or preempted and, accordingly, these claims are dismissed. We deny the companion writ application, as well as CamSoft’s motion to dismiss, referred to this panel, as moot. Costs of this appeal are to be assessed equally to appellants, Dell, Inc., Dell

Marketing, L.P., appellants MMR Constructors, MMR Group, Inc., and MMR Offshore Services, Inc., and appellee, CamSoft Data Systems, Inc. This matter is remanded for further proceedings consistent with the views expressed herein.

**APPEAL DISMISSED AS ABANDONED AS TO MMR GROUP, INC., MMR CONSTRUCTORS, INC., AND MMR OFFSHORE SERVICES, INC.; AFFIRMED IN PART AND REVERSED IN PART AS TO DELL, INC. AND DELL MARKETING, L.P.; WRIT AND MOTION TO DISMISS DENIED AS MOOT.**

CAMSOFT DATA SYSTEMS, INC.

STATE OF LOUISIANA

VERSUS

COURT OF APPEAL

FIRST CIRCUIT

SOUTHERN ELECTRONICS  
SUPPLY, INC. AND ACTIVE  
SOLUTIONS, LLC

NOS. 2019 CA 0730  
2019 CW 0497

WTC  
CRAIN, J., dissents in part.

I write separately to address the LUTSA conspiracy claim. The three-year prescriptive period applicable to CamSoft's trade secrets claim commenced when it had knowledge of facts sufficient to incite further inquiry into a possible violation. *See* La. R.S. 51:1436; *Hogg v. Chevron USA, Inc.*, 09-2632 (La. 7/6/10), 45 So. 3d 991, 997. In his testimony, Carlo MacDonald, the owner of CamSoft, revealed what information would be sufficient to prompt such an inquiry by him. When asked if he was concerned in late 2005 that certain work by the City of New Orleans on its wireless network violated CamSoft's trade secret agreements, MacDonald replied, "If I thought there were cameras involved and other things, I would have been asking those questions." Using this standard, MacDonald, by his own admission, had sufficient information to prompt further inquiry of a trade secret violation as of June 27, 2006.

On that date, Don Powers informed MacDonald that the City of Baton Rouge purchased a wireless video surveillance system with fifty-three cameras for \$800,000.00 without going through the RFP process. MacDonald also learned that the FBI was investigating kickbacks "in relation to [an] \$800,000 wireless camera contract that was issued without an RFP this week," and that Greg Meffert was a subject of the investigation. That communication revealed an agreement for crime cameras in Baton Rouge and the involvement in some respect of Greg Meffert, a known participant in the original New Orleans Crime Camera Project. In my



opinion, it is clearly wrong and without factual support to conclude that those facts should not have incited further inquiry in light of MacDonald's acknowledgement that they would. Therefore, the trial court manifestly erred in finding that claim had not prescribed. I dissent from the majority's decision to affirm the trial court's erroneous denial of the exception of prescription as to the LUTSA conspiracy and fraud claims, but agree in all other respects.

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**HOLDRIDGE, J., concurring in the result in part, agreeing in part.**

As stated by the majority in its opinion, the standard of review in cases where evidence is presented at a hearing on an exception raising the objection of prescription is the manifest error-clearly wrong standard of review. **Warren v. Board of Sup'rs of Louisiana State University and Agr. and Mechanical College**, 2014-0310, p. 5 (La. App. 1st Cir. 11/20/14), 168 So.3d 436, 439, writ denied, 2015-0068 (La. 4/2/15), 163 So.3d 795. Thus, if the trial court's findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Rando v. Anco Insulations, Inc.**, 2008-1163, 2008-1169, p. 20 (La. 5/22/09), 16 So.3d 1065, 1082.

Applying this standard of review to the trial court's judgment, I find the trial court was not clearly wrong or manifestly erroneous in its factual ruling as to CamSoft's LUTSA and fraud conspiracy claims, and therefore agree with the majority's holding as to these claims. I further agree with the majority regarding CamSoft's LUTPA claim, since it appears that this claim has a preemptive period, and not a prescriptive period, as applied by the trial court.

While I disagree with the granting of the preemptory exception on the basis of prescription as to CamSoft's antitrust, tortious interference with contract, and conversion conspiracy claims, I concur in the result of dismissing those claims for the reason set out in my concurrence in cases 2019 CA 0737 and 2019 CA 0740.