

**Radiancy, Inc. v Tria Beauty, Inc.**

2011 NY Slip Op 33884(U)

August 22, 2011

Supreme Court, New York County

Docket Number: 650025/11

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos

PART 53

Index Number : 650025/2011  
**RADIANCY, INC.,**  
 vs.  
**TRIA BEAUTY, INC.,**  
 SEQUENCE NUMBER : 003  
 DISMISS ACTION

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

*is decided in accordance with accompanying memorandum decision and order.*

Dated: 8/22/2011

  
**CHARLES E. RAMOS** *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----x

RADIANCY, INC.,

Index No. 650025/11

Plaintiff,

-against-

TRIA BEAUTY, INC.,

Defendant.

-----x

**Charles Edward Ramos, J.S.C.:**

Motion sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence number 003, defendant TRIA Beauty, Inc. (Tria) moves to dismiss the complaint pursuant to CPLR 3211 (a) (7).

In motion sequence number 004, Tria moves, pursuant to CPLR 3214 (b) and Rule 11 (d) of the Commercial Division Rules, to apply the automatic stay for discovery pending the adjudication of its motion to dismiss, and for an order prohibiting Radiancy, Inc. (Radiancy) from pursuing discovery prior to the adjudication of Tria's CPLR 3211 motion, pursuant to CPLR 3103 (a).

Radiancy cross-moves to compel Tria to immediately comply with all outstanding discovery demands, pursuant to CPLR 3124 and 3126.

Background

This is an action to prevent a competitor from exploiting confidential and proprietary information in the consumer beauty

product market.

### **Plaintiff's Allegations**

Radiancy specializes in designing and selling light-and heat-based hair removal and skin treatment products for professional and consumer use. Tria designs and sells similar products for hair and skin treatment. The instant dispute concerns the marketing of one of Radiancy's best-selling products, a handheld hair removal device, marketed under the brand name of "no! no! Hair."

As set forth in the complaint, Radiancy has allegedly been engaging in "commercial stalking," in order to gain access to plaintiff's confidential proprietary information (Complaint, ¶ 2). Tria purportedly has had difficulty creating a successful marketing strategy for its products, and as a result, has resorted to attempting to obtain Radiancy's data from vendors employed by Radiancy with the intention of misappropriation. For instance, after Radiancy employed certain vendors to market its product, Tria employed these same vendors shortly thereafter. For reasons best known to the plaintiff, the vendors who are alleged to have breached their contracts with Radiancy, are not parties to this litigation.

According to the complaint, Radiancy has been selling products primarily in Chile since 1996. Desiring to introduce its products to the American market, Radiancy and non-party

Behrman Communications (Behrman) agreed that the latter would provide public relations services in connection with the "no! no!" product line. To this end, the parties executed an agreement in 2007 (Behrman Agreement).

The Behrman Agreement contained a non-disclosure provision that acknowledged that Behrman would have access to confidential and proprietary information concerning Radiancy's business and financial activities, including research information, plans, products, services, licenses, methods, formulas, technology, pricing, costs, and other technical and non-technical information. Pursuant to the agreement, Behrman agreed to keep the information in confidence and to use or disclose it only as part of its performance thereunder.

The Behrman Agreement also contained a non-compete clause whereby, for one year after the agreement terminated, Behrman would not have any connection with any business that competed with Radiancy. Either party could terminate the agreement upon one month's written notice.

In accordance with the agreement, Radiancy allegedly shared its confidential and proprietary information related to plans for product launches, market expansions and strategies, media efficiency ratios, sales and revenue data, and other proprietary information with Behrman. In September 2007, no! no! Hair was launched in the United States. On October 4, 2010, Behrman

terminated its relationship Radiancy without giving the one month requisite notice.

On October 26, 2010, Behrman issued a press release announcing Tria's "TRIA Hair" product. TRIA Hair purportedly performs the same functions as no! no! Hair. The complaint alleges that Tria hired Behrman to gain access to Radiancy's confidential and proprietary information, that Tria did gain such access, and that Tria knew of and intentionally induced Behrman to breach the non-compete and non-disclosure provisions of the Behrman Agreement.

Throughout this time period, Radiancy was working on a new model of no! no! Hair. According to the complaint, in December 2008, Radiancy began discussing the development of an infomercial and direct response marketing campaign for the new model with an infomercial production company, Script to Screen (STS), and STS's affiliate, M2, a direct response media services company. STS and M2 entered into separate identical confidentiality and non-use agreements with Radiancy (the STS Agreements).

In the STS Agreements, the vendors acknowledged that Radiancy possessed confidential information in the field of light and heat therapies, clinical trials, field tests, marketing plans, vendor and customer relationships, finances, business operations, and other trade secrets. The STS Agreements obligated the vendors to keep Radiancy's information in strict

confidence and not to use it, except in performance of services on Radiancy's behalf, for five years after the date of the agreements.

From December 2008 through June 2009, Radiancy worked with STS and M2 to develop the infomercial and related media campaign for the new no! no! Hair. To this end, Radiancy shared information with vendors about no! no! Hair and additional products which STS and M2 might work on the future, including no! no! Skin. STS and M2 purportedly used confidential information about call center scripts, performance metrics, and financial models to analyze Radiancy's costs of operation and the results of the infomercial on each channel and website on which it aired. The vendors used the analyses to create detailed models for a new campaign intended to save costs and increase revenue by avoiding repeats of infomercials on channels or internet sites which did not produce successful sales results.

In June 2009, Radiancy ceased working with STS and M2 due to creative differences on a new campaign for the no! no! line. Months later, Tria retained STS and M2 in connection with campaigns for its hair removal and acne treatment products.

The complaint alleges that the TRIA Hair infomercial uses the same creative approach as Radiancy's no! no! Hair infomercial, and that the Tria infomercial appeared at times and on channels which, as the vendors knew, had produced successful

results for Radiancy's products. According to Radiancy, Tria hired STS and M2 in order to obtain its confidential and proprietary information, and that Tria knew of Radiancy's agreements with these vendors, and induced them to breach the confidentiality clauses contained therein.

In February 2010, Radiancy hired Mercury Media (Mercury) to perform media buying services, including negotiating, arranging, and buying placements for no! no! Hair advertisements on broadcast, cable, and satellite TV. The parties executed an agreement (Mercury Agreement) containing a non-disclosure provision that requires Mercury to refrain from disclosing any information relating to Radiancy's business obtained as a result its performance of the agreement. Later, Radiancy learned that Tria had engaged Mercury, and that Mercury purchased placements for TRIA infomercials on many of the same channels that provided successful results for Radiancy's no! no! infomercials. When Radiancy confronted Mercury, it represented that it had discontinued working with Tria.

In May 2008, Radiancy engaged SKO Brenner (SKO) to perform collections services with respect to delinquent consumer accounts, pursuant to contract (SKO Agreement). The SKO Agreement contained a non-disclosure clause, obligating the vendor not to disclose Radiancy's confidential and proprietary information, including customer lists. Radiancy recently learned



that Tria also hired SKO. Upon information and belief, the Tria allegedly hired SKO with the intention of misappropriating Radiancy's customer lists and accounts.

### **Discussion**

The first cause of action sounds in unfair competition. The complaint alleges that Radiancy had a confidential relationship with each vendor by virtue of the non-disclosure agreements, business dealings, and representations that the vendors made to Radiancy. Further, Radiancy allegedly took adequate and reasonable precautions to prevent the theft or misappropriation of its confidential and proprietary information, and Tria would not have obtained access to the information without engaging the vendors, which it did for the purpose of acquiring this information, and, presumably, inducing them to breach.

The second cause of action sounds in tortious interference with contract. The third cause of action sounds in misappropriation of confidential information. Radiancy seeks damages and permanent injunctive relief.

Tria moves to dismiss the complaint for failure to state a cause of action on the grounds that it lacks specific factual allegations that Tria actually hired the vendors to steal Radiancy's confidential and proprietary information. Further, Tria contends that the complaint lacks any allegation as to how

and when Tria induced the vendors to breach the confidentiality and non-compete provisions, and alleges no facts to show that it was even aware of the contract between Radiancy and Behrman.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's inquiry is limited to ascertaining whether the pleading states any cause of action, and not whether there is evidentiary support for the allegations (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Whether Radiancy will ultimately be able to establish the truth of its averments is not regarded (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The Court will consider affidavits submitted by the Radiancy to remedy any defects in the complaint (*Leon*, 84 NY2d at 88).

To establish a claim of misappropriation of trade secrets, Radiancy must demonstrate that it possessed a trade secret, and that the defendant used the secret in the breach of a duty of loyalty, an agreement, or a confidential relationship, or as a result of discovery by other improper means (*North Atl. Instruments, Inc. v Haber*, 188 F3d 38, 43-44 [2d Cir 1999]; *Schanfield v Sojitz Corp. of Am.*, 663 F Supp 2d 305, 349 [SD NY

2009]; *Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd.*, 5 Misc 3d 285, 297 [Sup Ct, NY County 2004]). Improper means includes inducing employees or others to reveal information in breach of a duty not to do so (*Liberty Power Corp., LLC v Katz*, 2011 WL 256216, \*5, 2011 US Dist LEXIS 7470, \*13 [ED NY 2011]).

"[T]he essence of an unfair competition claim is that one may not act in bad faith to misappropriate the skill, expenditures, and labor of another" (*Bongo Apparel, Inc. v Iconix Brand Group, Inc.*, 18 Misc 3d 1108[A], \*13 [Sup Ct, NY County 2008], citing *Electrolux Corp. v Val-Worth, Inc.*, 6 NY2d 556, 567 [1959]; see also *Krinos Foods v Vintage Food Corp.*, 30 AD3d 332, 333-334 [1<sup>st</sup> Dept 2006]).

Because Radiancy's unfair competition cause of action is predicated entirely on the alleged trade secret misappropriation, the causes of action will be treated as one (see *Abernathy-Thomas Eng'g Co. v Pall Corp.*, 103 F Supp 2d 582, 599-600 [ED NY 2000]; *CBS Corp. v Dumsday*, 268 AD2d 350, 353 [1<sup>st</sup> Dept 2000]).

Tria contends that a trade secret cannot consist of data as to when and on what channel a program aired because it is public information. However, Radiancy is not claiming that the misappropriated trade secret is the time or channel of its infomercials. Rather, Radiancy argues that the data showing the effectiveness of airing an infomercial at certain times on certain channels is itself a trade secret. Radiancy claims the

same for research and data showing the effectiveness of certain slogans or advertising techniques.

Courts have held that "pricing data and market strategies" are not recognized as trade secrets, nor is "mere knowledge of the intricacies of a business" (*Marietta Corp. v Fairhurst*, 301 AD2d 734, 738-739 [3d Dept 2003]).

Nonetheless, strategic business information has, in some cases, been held to constitute a trade secret (*Spinal Dimensions, Inc. v Chepenuk*, 16 Misc 3d 1121[A],\* 9 [Sup Ct, Albany County 2007], citing *Estee Lauder Cos., Inc. v Batra*, 430 F Supp 2d 158, 175 [SD NY 2006] [confidential products currently under development and product innovations scheduled for the coming years]; e.g. *Portware, LLC v Barot*, 11 Misc 3d 1059[A],\*1 [Sup Ct, NY County 2006] [pricing information, future development plans, and other information covered by confidentiality agreements between plaintiff and its present and potential customers]; *Plasmanet, Inc. v Apax Partners, Inc.*, 6 Misc 3d 1011[A],\*3 [Sup Ct, NY County 2004] [information concerning finances, pricing, profit and revenue, consumer usage, marketing strategies, names of suppliers and customers]; *Misys Intl. Banking Sys., Inc. v TwoFour Sys., LLC*, 6 Misc 3d 1004[A],\*12 [Sup Ct, NY County 2004] [market information, pricing or consulting rates]; *DoubleClick Inc. v Henderson*, 1997 WL 731413, \*5, 1997 NY Misc LEXIS 577, \*14 [Sup Ct, NY County 1997]

[confidential information about pricing and customers]).

In addition, unfair competition may be based on misappropriation of information not rising to the level of trade secrets, such as client lists, internal company documents, and business strategies (*Berman v Sugo LLC*, 580 F Supp 2d 191, 208 [SD NY 2008]), where the party worked long and hard to develop it or discover it (*Sit-Up Ltd. v IAC/InterActiveCorp.*, 2008 WL 463884, \*20, 2008 US Dist LEXIS 12017, \*61-62 [SD NY 2008]; *Norbrook Labs. Ltd. v G.C. Hanford Mfg. Co.*, 297 F Supp 2d 463, 491 n 22 [ND NY 2003], *affd* 126 Fed Appx 507 [2d Cir 2005]).

Radiancy alleges that it expended significant amounts of time and money developing its research and other information. Radiancy also took efforts to keep its data secret, including by entering into confidentiality and/or non-disclosure agreements with the vendors. For the purposes of this motion, Radiancy sufficiently alleges that the information allegedly shared with the vendors is confidential and proprietary and/or constitutes trade secrets. The allegation that Tria is using the same vendors, channels, time slots, and slogans as Radiancy is sufficient at this point to support the allegation that, through the vendors, Tria became privy to Radiancy's research on the effectiveness of Radiancy's techniques. However, the fact that Tria solicited these vendors because they had experience with Radiancy's marketing, is not enough. The plaintiff must prove

that Tria knew that Radiancy's confidential and proprietary trade secrets were being used and induced the vendors to breach their covenants with Radiancy. This obviously requires discovery.

Finally, Radiancy sufficiently pleads a cause of action for tortious interference with contract, whereby a plaintiff must allege that it entered into a valid contract with a third party, that the defendant knew of that contract, that defendant intentionally induced the third party to breach the contract, and that the plaintiff was thereby damaged (*Meghan Beard, Inc. v Fadina*, 82 AD3d 591, 592 [1<sup>st</sup> Dept 2011]).

Radiancy alleges that it has suffered damages resulting from the compromised competitive advantage in promoting its own products based upon market strategies that it worked long and hard to develop and maintain. For these reasons, the complaint states a cognizable cause of action for tortious interference with contract.

Tria's motion to stay discovery pending the determination of the motion to dismiss and for permission to submit supplemental affidavits, is denied as moot. For the same reason, the cross-motion to compel is denied.

It is hereby

ORDERED that defendant's motion to dismiss the complaint (003) and defendant's motion to stay disclosure (004) are denied; and it is further

ORDERED that plaintiff's cross-motion to compel disclosure is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry. The parties are thereafter directed to contact the Part Clerk for the purpose of scheduling a preliminary conference.

Dated: August 22, 2011

ENTER:



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J.S.C.

**CHARLES E. RAMOS**