Duty Free Americas, Inc.	*	IN THE
Plaintiff	*	CIRCUIT COURT
vs.	*	FOR
Legg Mason Wood Walker, Inc.	*	BALTIMORE CITY
DEFENDANT	*	CASE NO.: 24-C-04-005696

* * * * * * *

MEMORANDUM OPINION

Defendant Legg Mason Wood Walker, Inc. ("Legg Mason") has filed a Motion to Dismiss Counts II, III, and IV of the Amended Complaint filed by Plaintiff Duty Free Americas, Inc. ("Duty Free"). Legg Mason argues in its motion that (1) Count II, which alleges conversion, is preempted by the Maryland Uniform Trade Secrets Act ("MUTSA"); fails to allege an essential element of conversion, i.e. loss of complete control; and also fails because Maryland does not recognize a claim for conversion for intangible rights such as confidential information; (2) Count III is also preempted by MUTSA and additionally must be dismissed because there is no cause of action in Maryland for breach of a confidential relationship, and in any event, Legg Mason did not have a confidential relationship with Duty Free; and (3) Count IV must be dismissed because there was never a contract between Duty Free and Legg Mason. Count I, which is not the subject of the Motion to Dismiss, alleges misappropriation of trade secrets in violation of MUTSA. A hearing was held on the motion on January 6, 2005, and for the reasons stated below, the motion will be granted.

FACTS

Duty Free, a Maryland corporation located in Florida, operates duty free stores in U.S. airports and along the U.S., Canadian, and Mexican borders. Legg Mason, a Maryland corporation with its principal place of business in Baltimore, provides diversified financial

services to the public. In June 2001, Duty Free's parent company, BAA, plc ("BAA"), began exploring the sale of Duty Free to a third party. SunTrust Robinson Humphrey ("SunTrust") was retained as Duty Free's financial adviser. SunTrust prepared a confidential offering memorandum ("Confidential Memorandum") to assist potential purchasers with evaluating Duty Free.

The Confidential Memorandum contained proprietary and confidential financial information about Duty Free. The Confidential Memorandum states that it is "solely for use by prospective purchasers in considering their interest in acquiring [Duty Free]." The second paragraph of the Confidential Memorandum states:

> By accepting this Memorandum, the recipient acknowledges and agrees that: (1) all of the information contained herein is subject to a Confidentiality Agreement previously executed by the recipient; (2) the recipient will not reproduce this Memorandum, in whole or in part; (3) if the recipient does not wish to pursue this matter, the recipient will return this Memorandum to SunTrust Robinson Humphrey as soon as practicable, together with all other material relating to [Duty Free] which the recipient may have received from SunTrust Robinson Humphrey or [Duty Free]; and (4) any proposed actions by the recipient which are inconsistent in any manner with the foregoing agreements will require the prior written consent of SunTrust Robinson Humphrey or [Duty Free].

The Confidential Memorandum was made available to a group of Duty Free's officers and employees ("the Duty Free Management Group") interested in purchasing Duty Free. The Duty Free Management Group provided Legg Mason with the Confidential Memorandum when they retained Legg Mason in order to assist them in their effort to raise capital for the purchase of Duty Free.

On October 11, 2001, Duty Free was sold to DFA Acquisition Corp, now known as DFA Holdings, Inc. Duty Free alleges that after the sale Legg Mason used information

obtained from the Confidential Memorandum to "pitch itself as a financial advisor" to some Bondholders, and that it disclosed to those Bondholders, Duty Free's trade secrets and proprietary and confidential information.

DISCUSSION

"In reviewing the grant of a motion to dismiss pursuant to Maryland Rule 2-322(b), [the Court] must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from [them]." *Bennett Heating & Air Conditioning, Inc. v. Nations Bank*, 103 Md. App. 749, 757 (1995), *rev'd in part on other grounds*, 342 Md. 169 (1996); 2-322(b)(2). Additionally, "[a]ny ambiguity or want of certainty in [the] allegations must be construed against the pleader." *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 345 (2000) (quoting *Read Drug & Chem. Co. v. Colwill Constr. Co*, 250 Md. 406, 416 (1968)). "When moving to dismiss, a defendant is asserting that, even if the allegations of the complaint are true, the plaintiff is not entitled to relief as a matter of law." *Hrehorovich v. Harbor Hosp. Ctr.*, 93 Md. App. 772, 784 (1992). "Thus, in considering a motion to dismiss for failure to state a claim, the circuit court examines only the sufficiency of the pleading." *Id.* "The complaint should not be dismissed unless it appears that no set of facts can be proven in support of the claim set forth therein." *Bennett,* 103 Md. App. at 749.

A. COUNT II- CONVERSION

Legg Mason argues that Duty Free's conversion claim is preempted by MUTSA. It is clear that MUTSA preempts any other tort remedy involving trade secrets.

> Except as provided in subsection (b) of this section, this subtitle displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.

Commercial Law § 11-1207(a). Duty Free argues that its conversion claim is not preempted because it is "not based upon misappropriation of a trade secret" pursuant to § 11-1207(b)(1)(ii), but is plead only as a precaution in the event that the Court finds that the Confidential Memorandum and the information in it are not trade secrets. The conversion count alleges that Legg Mason converted "Duty Free's *trade secrets* and proprietary and confidential information." (Emphasis added.) Thus it does include a claim for conversion of trade secrets that would be preempted by MUTSA.

However, even if there were no reference to trade secrets in that count, the conversion claim must be dismissed because there is no allegation that Legg Mason exercised control over the information to the exclusion of Duty Free. A conversion "requires not merely temporary interference with property rights, but the exercise of dominion and control to the complete exclusion of the rightful possessor." *Yost v. Early*, 87 Md. App. 364, 388 (1991). Duty Free has not alleged that Legg Mason exercised control over the information to the complete exclusion of Duty Free. Therefore, Duty Free has failed to state a claim for conversion and Count II will be dismissed. It is therefore unnecessary for the Court to address Legg Mason's argument that a trade secrets and/or confidential information may not form the basis of a conversion claim.

B. COUNT III- BREACH OF CONFIDENTIAL RELATIONSHIP

Legg Mason argues that Count III, breach of confidential relationship, is also preempted by MUTSA. Duty Free correctly points out that it may plead in the alternative because the Court may find that the information is not a trade secret. *See Swedish Civil Aviation Admin. v. Project Management Enterprises, Inc.* 190 F.Supp.2d 785, 785 (D. Md.

2002). However, Legg Mason's other two arguments may not be dismissed so summarily.

Legg Mason argues that the claim for breach of confidential relationship is essentially a claim for breach of fiduciary duty, which is not recognized as a tort in Maryland. *See Kann v. Kann*, 344 Md. 689, 713 (1997) (holding that there is no separate tort for breach of fiduciary duty in Maryland). In response Duty Free cites *Swedish Civil Aviation Admin. v. Project Management Enterprises, Inc.* and *Marshall v. Proctor & Gamble Mfg. Co.*, 210 F. Supp. 619, 619 (D. Md. 1962), to argue that Maryland does recognize a claim for breach of confidential relationship. Legg Mason correctly points out that in *Swedish Civil Aviation Admin.*, the only issue addressed by the Court on the confidentiality claim was whether it was preempted by MUTSA. The district court held only that the claim was not preempted because a plaintiff may plead in the alternative.

> However, as shown above, [plaintiff] may plead in the alternative under the liberal federal pleading standards. Accordingly, [plaintiff's] claim for breach of duty of confidential relationship is not preempted by MUTSA and so the motion to dismiss will be denied as to Count VII.

190 F. Supp. at 802. That court did not address the legal sufficiency of the claim.

Nor does *Marshall v. Proctor & Gamble* support Duty Free's argument. That court merely noted that a claim for breach of a confidential relationship had been submitted to the jury. Because the jury found against the plaintiff, the legal sufficiency of the claim was not before the court.

> The second cause of action was for breach of an alleged confidential relationship. This court was submitted to the jury on interrogatories as to whether or not, during the critical period, plaintiff disclosed to defendants anything defendants did not already know with regard to the processing of certain soapbars; if so, was this disclosed in confidence; if so, was such information used by defendants; and in any event, did the

> plaintiff have the right to maintain an action on his own behalf with respect to such disclosure and use. The jury answered the first interrogatory in the negative, making it unnecessary to consider the other three; and the court directed the Clerk to enter judgment for the defendants on the second cause of action.

Marshall, 210 F. Supp. at 620 (footnote omitted). Furthermore the claim in *Marshall* was based on an alleged misuse of a trade secret which would now be preempted by MUTSA. Finally *Marshall* was decided before it was clear that "Maryland does not recognize a separate tort action for breach of fiduciary duty." *Int'l Bhd. Of Teamsters v. Willis Corroon Corp. of Md.*, 369 Md. 724, 727 n.1 (2002) (citation omitted).

In further support of its argument that breach of confidential relationship is a tort separate from breach of fiduciary duty, Duty Free cites *Faris v. Enberg*, 97 Cal. App. 3d 309, 312-326 (1979). The *Faris* Court stated that breach of a confidential relationship "was not limited to fiduciary relationships, but could exist in any number of situations, such as principal and agent, partners, joint adventurers, and in a buyer/seller relationship where a trade secret is disclosed in the course of confidential negotiations on the price to be paid for the secret." *Id*. at 321 (citing *Thompson v. California Brewing Co.*, 310 P.2d 436, 440 (1957)). Duty Free cites both *Faris* and *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.*, 168 Cal. App. 3d 455, 461-462 (1985), to show that the elements of breach of a confidential relationship are not the same as the elements of breach of fiduciary relationship.

In *Tele-Count Engineers, Inc.,* the court noted that in order to state a claim for breach of confidential relationship, the relationship between the parties must be an implied or actual contract:

> The tort of breach of confidence is based upon the concept of an implied obligation or contract between the parties. It is an obligation in law where in fact the parties made no promise. It

> is not based upon apparent intentions of the involved parties; it is an obligation created by law for reasons of justice.

168 Cal. App. 3d at 464 (citations and internal quotation marks omitted). In other words, there must be "an understanding *between the parties* and the defendant's *voluntary assumption* of a *relation of personal confidence*." *Id.* (citations and internal quotation marks omitted) (emphasis added).[1] As the court stated in *Faris,* "[t]here must exist evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred." 97 Cal. App. 3d at 323.

> Among the factors from which such an inference can be drawn are: proof of the existence of an implied-in-fact contract; proof that the material submitted was protected by reason of sufficient novelty and elaboration; or proof of a particular relationship such as partners, joint adventurers, principal and agent or buyer and seller under certain circumstances.

Id.

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[1]In *Tele-Count Engineers, Inc.,* 168 Cal. App. 3d at 463, the court cited § 757 of the Restatement of Torts in support of its holding. That section provides:

> One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if
> (a) he discovered the secret by improper means, or
> (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or
> (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or
> (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.

Although California does not limit the tort of breach of confidential relationship to trade secrets, the requirements set out in this section applies to the tort even if no trade secret is involved.

As discussed below, Duty Free did not repose any confidence in Legg Mason because it had no relationship with Legg Mason. Further Duty Free has not alleged that Legg Mason discovered the information by improper means, that Legg Mason has reason to believe that the Duty Free Management Group obtained the information illegally, or was otherwise breaching a duty in sharing it with Legg Mason, or that the disclosure to Legg Mason was a mistake.

This is consistent with what the Maryland Court of Appeals has stated is required for a confidential relationship to exist. *See Buxton v. Buxton*, 363 Md. 634, 654-655 (2001) (A confidential relationship "exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind."); *Lynn v. Magness,* 191 Md. 674, 684 (1948) (Confidential relationship "exists whenever confidence is reposed by one person and accepted by the other.").

As discussed below, Duty Free has not alleged any facts that show a contract existed between it and Legg Mason, nor has it alleged facts to show an "implied obligation" between Duty Free and Legg Mason. Duty Free argues that a confidential relationship arose when Legg Mason obtained the Confidential Memorandum which states that the information contained therein was confidential. However, the flaw in Duty Free's argument lies in the fact that Legg Mason obtained the Confidential Memorandum from the Duty Free Management Group, not from Duty Free. The Duty Free Management Group sought to retain Legg Mason in order to assist them in their effort to raise capital for the purchase of Duty Free. Thus, if there existed a confidential relationship at all it was between Legg Mason and the Duty Free Management Group. There was *no relationship* between Duty Free and Legg Mason at all, and certainly none from which a confidential relationship could be said to have been established. Legg Mason never purported to act or advise with Duty Free's interest in mind and Duty free never "reposed" its confidence in Legg Mason. Thus, whether the tort of breach of a confidential relationship exists in Maryland, there are no facts alleged that could support a breach by Legg Mason of any confidence it owed to Duty Free. Therefore, Count III for breach of a confidential relationship will be dismissed.

C. <u>COUNT IV- BREACH OF CONTRACT</u>

Finally Legg Mason argues that Count IV, breach of contract, must be dismissed because there are no allegations from which a factfinder could find that Legg Mason had a contract with Duty Free. A complaint for breach of contract must allege "facts showing a contractual obligation owed by the defendant to the plaintiff and a breach of that obligation by the defendant." *Continental Masonry Co., v. Verdel Constr. Co., Inc.,* 279 Md. 476, 480 (1977).

Duty Free argues that a contract was formed when Legg Mason accepted the Confidential Memorandum. The language of the Memorandum does not support this argument. It provides that: "*By accepting this Memorandum*, the recipient . . . agrees that: (1) all of the information contained herein *is subject to a Confidentiality Agreement previously executed by the recipient* ." (Emphasis added.) There is no allegation that Legg Mason had previously executed any Confidentiality Agreement. The "recipient" referred to in the Memorandum was the Duty Free Management Group, which received the Memorandum directly from Duty Free. There are no facts to show that Legg Mason ever entered into any agreement with Duty Free. Thus, there was no contract that Legg Mason could breach and therefore, Count IV for breach of contract will be dismissed.

CONCLUSION

For the foregoing reasons, the Court will enter an order granting Legg Mason's Motion to Dismiss Counts II, III, and IV without leave to amend.

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Date JUDGE EVELYN OMEGA CANNON

Copy of Duty Free.Motion to Dismiss.Final Opinion.wpd

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