

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

PIE DEVELOPMENT, LLC

PLAINTIFF

vs.

CIVIL ACTION No.: 3:19-CV-792-HTW-LGI

**PIE INSURANCE HOLDINGS, INC.;
PIE INSURANCE SERVICES, INC.;
DAX CRAIG; and JOHN SWIGART**

DEFENDANTS

ORDER

BEFORE THIS COURT is the defendants’ Motion to Dismiss [**Docket no. 20**] filed under the authority of Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff opposes defendant’s motion. This court has reviewed the submissions of the parties and the pleadings and finds defendants’ motion to dismiss must be granted for the reasons following.

I. FACTUAL ALLEGATIONS

a. Complaint

AmFed National Insurance Company (hereinafter referred to as “AmFed”) and Pie Development, LLC, are wholly-owned subsidiaries of AmFed Holding that provide employers with workers compensation insurance. In March 2016, Billy Roberts (hereinafter referred to as “Roberts”), President of AmFed, directed Greg McLemore, AmFed’s Chief Operating Officer and Executive Vice President, to create Pie Development, LLC (hereinafter referred to as “PieDev”).

Valen Technologies, Inc., d/b/a Valen Analytics (hereinafter referred to as “Valen”) provides consulting services to insurers. Valen advertises its services as “innovative solutions” for insurers “looking . . . to utilize modern approaches to pricing [and] risk selection” Defendant Dax Craig (hereinafter referred to as “Craig”) was during 2016 the president and an equity owner of Valen.

On March 9, 2016, AmFed and Valen executed a non-disclosure agreement (hereinafter referred to as the “March 2016 NDA”) to protect confidential, proprietary and trade secret information that would be disclosed between the two parties in connection with a potential business relationship.

On April 1, 2016, a certificate of formation for PieDev was filed with the Mississippi Secretary of State’s office. Also, on April 1, 2016, PieDev applied for and received a D-U-N-S Number from Dun & Bradstreet. Furthermore, on April 1, 2016, PieDev began the process of obtaining a placeholder “Pie” app from the Apple iTunes Store that would ultimately be used for Pie Development’s planned Pie application. PieDev established its email account on April 18, 2016. On May 16, 2016, Apple’s iTunes Store approved PieDev’s Pie placeholder app via email sent to PieDev.

On May 5, 2016, approximately two months after AmFed and Valen signed the March 2016 NDA, Billy Roberts held a meeting with three other people (hereinafter referred to as the “May 5 Meeting”). Craig, Brett Schoyer (hereinafter referred to as “Schoyer”), both with Valen, and Mike Richardson, AmFed’s Chief Underwriting Officer all attended the May 5 Meeting.

The purpose of the May 5 Meeting was to discuss Valen’s consulting services, including its services to help PieDev develop a new business plan Roberts called “Pie.” As PieDev’s representative, Roberts told the participants at the May 5 Meeting of a business plan to create an application available on the internet and on smartphones to make purchasing workers’ compensation insurance, in Roberts’ words to the May 5 Meeting participants, “as easy as pie.” Roberts conveyed the rest of the business plan to Craig and Schoyer. The application would be named “Pie.”

The concept behind Pie was that an employer seeking to obtain a workers' compensation insurance quote would input into the Pie application minimal information consisting only of a few strategically-chosen data points. Using that minimal information, the Pie application would access various available data sources and provide a workers' compensation insurance quote to the potential Pie customer. The customer could then purchase workers' compensation coverage directly through the Pie application. Pie would not require the participation of an insurance agent. Roberts told the May 5 Meeting participants that he anticipated that it would only take a few minutes from the customer's initiation of the Pie application to the application's generation of a quote for workers' compensation insurance. Pie Development was created to develop and market Pie. Pie Development would do business nationally.

Valen agreed to provide the consulting services that would help Pie Development put the Pie Trade Secret into motion. Under Craig's leadership, Valen did not properly perform its services related to the Pie Trade Secret, suffering from repeated, and unexplained delays. Pie Dev terminated Valen's consulting services in June 2019.

Within months of the May 5 Meeting, Craig supposedly sold his equity in Valen, while continuing to serve as Valen's president. Craig allegedly communicated the Pie Trade Secret to Defendant John Swigart (hereinafter referred to as "Swigart"). Swigart purportedly knew Craig had stolen the Pie Trade Secret. During the time when Valen was purportedly helping Pie execute its business plan, Swigart created Pie Insurance (hereinafter referred to as "PieIns") and Pie Services (hereinafter referred to as "PieSvcs") and began promoting PieIns at trade shows. PieIns began to execute a business plan utilizing methods, techniques, processes and procedures allegedly identical to the Pie Trade Secret.

Months after Swigart and Craig created PieIns, in January of 2018, Craig informed Roberts that he was leaving Valen. Craig told Roberts he was unsure what he planned to do in the future.

The previous month Swigart as CEO of PieIns filed a U.S. Securities and Exchange Commission (“SEC”) Form D – Notice of Exempt Offering of Securities that reflected that PieIns had raised over \$4 million in capital through the sale of equity securities in PieIns. By December 7, 2017, PieIns, through Swigart, reported that it had raised over \$4 million. Between August 9, 2018 and March 7, 2019, PieIns had raised another \$61 million in capital through the sale of equity securities. Up to this point, every public document PieIns filed had been filed by Swigart.

Months later, the PieIns website listed Craig as PieIns’s “Co-Founder and President.” PieIns’s website explains that it sells workers compensation insurance to customers through an internet application without the need for an insurance agent and using only minimal data points. It further states that a customer can “[g]et an online quote in 3 minutes . . . [and] be covered in as little as a day.” Allegedly parroting Roberts’ words from the May 5 Meeting, the PieIns website states that PieIns is “[m]aking workers comp as easy as pie”

PieIns sells workers’ compensation insurance in most states, including Mississippi. PieIns coordinates with PieSvcs to execute its business plan.

b. Defendants’ Factual Submission

Defendants filed, as an exhibit in support of their motion to dismiss, a copy of the Valen/AmFed NDA along with an affidavit from Craig asserting that it is a true and accurate copy of the Valen/AmFed NDA. That NDA is not signed by Roberts, Craig, Swigart, PieDev, PieIns, or Pie Svs. Jeremy Rudel, the CFO of Valen signed the NDA for Valen. Mike Richardson, a V.P. and the C.U.O. (Chief Underwriting Officer), for AmFed signed the NDA for AmFed.

The NDA provides:

8.7 Neither party may assign this Agreement without the prior written consent of the other party; provided, however, that a party's change of control shall not constitute an assignment if such party's successor retains or assumes all obligations and liabilities of such party hereunder, whether by operation of law or otherwise. Nothing in this paragraph shall relieve any party from its ongoing obligations of confidentiality and non-use of Proprietary Information in accordance with the terms of this Agreement. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors and assigns.

[Docket no. 20-2, P. 2].

II. ANALYSIS

a. Standard of Review

Defendants move this court to dismiss this lawsuit under the authority of Rule 12(b)(6)¹ of the Federal Rules of Civil Procedure. To overcome defendants' motion to dismiss under Rule 12(b)(6), PieDev must have pled "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

In considering a motion under Rule 12(b)(6), this "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004) (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999) (*per curiam*)). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements

¹ (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: [...]

(6) failure to state a claim upon which relief can be granted[...]
Fed. R. Civ. P. 12

of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Should the well-pleaded factual allegations support no “more than the mere possibility of misconduct,” then this court must dismiss PieDev’s complaint. *Id.* at 679.

The United States Court of Appeals for the Fifth Circuit acknowledged that “[d]ismissal under Rule 12(b)(6) is disfavored and ‘rarely granted.’” *Nottingham v. Richardson*, 499 Fed. Appx. 368, 372 (5th Cir. 2012). This court must not dismiss a claim under Rule 12(b)(6) “‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Id.* at 372. (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

b. Misappropriation of a Trade Secret

The Mississippi Uniform Trade Secret Act (hereinafter referred to as “MUTSA”) and its federal counterpart, the Defend Trade Secret Act (hereinafter referred to as “DTSA”) are similarly drafted and interpreted. *See Seshadri Raju, M.D., P.A. v. Medtronic, Inc.*, No. 3:17-CV-357-CWR-LGI, 2021 WL 1232102, at *7 (S.D. Miss. Mar. 31, 2021).

i. Mississippi Uniform Trade Secret Act

PieDev’s claim under MUTSA requires that it plead and prove that a trade secret existed and that it had been misappropriated by the defendant. *See Unified Brands, Inc. v. Teders*, 868 F. Supp. 2d 572, 583-84 (S.D. Miss. 2012).

The MUTSA defines a protectable trade secret as:

information, including a formula, pattern, compilation, program, device, method, technique or process” that:

- (i) 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

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

MISS. CODE ANN. § 75-26-3(d).

The MUTSA defines “misappropriation” to include “[d]isclosure or use of a trade secret” that was “[a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.” *Id.* § 75-26-3(b)(ii)(2)b.

ii. Federal Defend Trade Secret Act

The DTSA permits “[a]n owner of a trade secret that is misappropriated [to] bring a civil action . . . if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.” 18 U.S.C. § 1836(b)(1). The DTSA defines the term “trade secret” to mean:

[A]ll forms and types of financial, business, scientific, technical, economic, or engineering information . . . if:

- (A) the owner thereof has taken reasonable measures to keep such information secret; and
- (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Title 18 U.S.C. § 1839.

Under the DTSA, “Misappropriation” is defined as:

- (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;
 - (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was--

(I) derived from or through a person who had used improper means to acquire the trade secret;

(II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(iii) before a material change of the position of the person, knew or had reason to know that--

(I) the trade secret was a trade secret; and

(II) knowledge of the trade secret had been acquired by accident or mistake;

Title 18 U.S.C.A. § 1839 (West).

The DTSA defines “improper means” as:

(A) includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means; and

(B) does not include reverse engineering, independent derivation, or any other lawful means of acquisition;

Title 18 U.S.C.A. § 1839 (West).

iii. Trade Secret Pleading

While the DTSA is a relatively new act and courts have not addressed its terms and application in extensive detail, United States District Court Judge Eldon E. Fallon, of the Eastern District of Louisiana held that “existing state law on trade secrets informs the Court's application of the DTSA.” *Complete Logistical Servs., LLC v. Rulh*, 350 F. Supp. 3d 512, 518 (E.D. La. 2018). This court recognizes that Judge Fallon was interpreting the application of Louisiana law to interpret the DTSA but finds his reasoning sound. As this court stated above, the DTSA and MUTSA are interpreted in tandem.

Courts routinely dismiss trade secret claims where the allegations of the complaint fail to separate the alleged trade secret from public knowledge and, therefore, do not establish that the alleged trade secret was “not generally known” or “readily ascertainable by proper means”. *See, e.g., Pension Advisory Grp., Ltd. v. Country Life Ins. Co.*, 771 F. Supp. 2d 680, 701 (S.D. Tex. 2011) (granting a motion to dismiss claim based on alleged misappropriation of “competitive knowledge of insurance regulations and processing” because it failed to “identif[y] the specific trade secret” that was entitled to protection); *Clearline Techs. Ltd. v. Cooper BLine, Inc.*, No. H-11-1420, 2012 WL 43366, at *11 (S.D. Tex. Jan. 9, 2012) (dismissing a misappropriation of trade secrets claim because the plaintiff “failed to identify the specific trade secret information it claims has been misappropriated”) (citing *Pension Advisory Grp.*, 771 F. Supp. 2d at 701); *S-E-A, Ltd. v. Cornetto*, No. JKB-18-1761, 2018 WL 3996270, at *6 (Aug. 21, 2018)(granting a motion to dismiss a DTSA claim based on the alleged misappropriation of a client contact list for failure to plausibly allege those aspects of the list that were not “readily ascertainable through proper means”); *Bladeroom Grp. Ltd. v. Facebook, Inc.*, No. 5:15-CV-01370-EJD, 2015 WL 8028294, at *3 (N.D. Cal. Dec. 7, 2015) (granting a motion to dismiss for failure to plead the alleged trade secret with “sufficient particularity to separate it from matters of general knowledge in the trade”); *Bioquell, Inc. v. Feinstein*, No. 10-2205, 2010 WL 4751709, at *6 (E.D. Pa. Nov. 23, 2010) (dismissing a misappropriation of trade secrets claim on grounds that the complaint failed to “identify the[] trade secrets” and was, instead, “merely a string of conclusory statements devoid of any factual basis”) (citing *Twombly*, 550 U.S. at 570); *Medafor, Inc. v. Starch Med. Inc.*, No. 09-CV-0441 PJS/FLN, 2009 WL 2163580, at *1 (D. Minn. July 16, 2009) (dismissing a misappropriation of trade secrets claim because the plaintiff’s “descriptions of its trade secrets and ‘Confidential Information’ are insufficient to inform [defendant] of the basic fact of what exactly

it is supposed to have stolen or unlawfully obtained”); *see also Sutra, Inc. v. Iceland Express, ehf*, No. 04-11360-DPW, 2008 WL 2705580, at *3-4 (D. Mass. July 10, 2008) (explaining that it is “hornbook law” that a plaintiff must identify the trade secret at issue with adequate specificity).

Plaintiffs, however, are not required to “spell out the details of the trade secret”. *Mackintosh v. Lyft, Inc.*, No. 219CV1849MCEKJNPS, 2019 WL 5682826, at *6 (E.D. Cal. Nov. 1, 2019), report and recommendation adopted, No. 219CV1849MCEKJNPS, 2019 WL 6528953 (E.D. Cal. Dec. 4, 2019).

“Unlike patent law, which aims to protect novelty and non-obviousness, the policy behind trade secret law is to maintain standards of commercial ethics; ‘The necessity of good faith and honest, fair dealing is the very life and spirit of the commercial world.’” *Ultraflo Corp. v. Pelican Tank Parts, Inc.*, 926 F. Supp. 2d 935, 960 (S.D. Tex. 2013) (emphasis supplied) (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 482–83 (1974)). Novelty and uniqueness are not prerequisites for a trade secret. *Id.* “[Trade secret law’s] protection is not based on a policy of rewarding or otherwise encouraging the development of secret process or devices. The protection is merely against the breach of faith and reprehensible means of learning another’s secret.” *Id.* (citing *Water Servs., Inc. v. Tesco Chems., Inc.*, 410 F.2d 163, 172 (5th Cir. 1969)).

Defendants say that PieDev failed to satisfy the pleading requirements of both the MTUSA and DTSA because it failed to identify the Trade Secret with the specificity required. According to defendants PieDev failed in the following ways: unspecified “data points” and “data sources”; that its plan to provide a customer experience that takes “only . . . a few minutes” or to “do business nationally” are fundamental business concepts; that quoting and selling insurance over the internet without an insurance agent has been in practice in the insurance industry for over a decade; and that the trade name “Pie” and slogan “easy as pie” are marketing tools, not trade secrets.

PieDev, contrariwise responds that the following portion of its complaint properly identifies its Trade Secret:

24. As Pie Development's representative, Mr. Roberts told the participants at the May 5 Meeting of a business plan to create an application available on the internet and on smartphones to make purchasing workers' compensation insurance as, in Mr. Roberts' words to the May 5 Meeting participants, "as easy as pie."

25. Mr. Roberts told the May 5 Meeting participants that the application would be named "Pie."

26. Mr. Roberts explained to the May 5 Meeting participants that the concept behind Pie is that an employer seeking to obtain a workers' compensation insurance quote would input into the Pie application minimal information consisting only of a few data points.

27. Mr. Roberts further explained that using that minimal information, the Pie application would access various available data sources and provide a workers' compensation insurance quote to the potential Pie customer.

28. The customer could then purchase workers' compensation coverage through the Pie application.

29. Pie would not require the participation of an insurance agent.

30. Mr. Roberts told the May 5 Meeting participants that he anticipated that it would only take a few minutes from the customer's initiation of the Pie application to the application's generation of a quote for workers' compensation insurance.

31. Pie Development was created to develop and market Pie.

32. Pie Development would do business nationally.

33. Pie Development's business plan for Pie is referred to in the remainder of this complaint as the "Pie Trade Secret."

[Docket no. 1, PP. 4-5]. According to PieDev, courts have repeatedly held that a compilation of even publicly known components can be a trade secret. *See ACR Elecs., Inc. v. DME Corp.*, No. 11-62591-CIV, 2012 WL 13005955 at *10 (S.D. Fla. Oct. 31, 2012); *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 971-74 (8th Cir. 2011) (discussing broad range of information entitled to trade secret protection, including compilations of publicly available information); *Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125, 1129-30 (10th Cir. 2003) (under UTSA, method for teaching babies to swim protectable as a trade secret even though components

may be in the public domain and are known in the field); *see also E.I. duPont deNemours & Co., Inc. v. Christopher*, 431 F.2d 1012, 1014-16 (5th Cir. 1970) (plaintiff stated a claim for misappropriation based on defendant's acquisition of trade secret information even though the information was obtained from aerial photographs of plaintiff's plant). "Even if certain components may be known in the industry, compilations of publicly known components can qualify as a trade secret." *ACR Elecs., Inc.*, 2012 WL 13005955 at *10.

In reviewing PieDev's complaint in a light most favorable to PieDev, this court finds that PieDev has failed to adequately plead what its Trade Secret actually is. PieDev is not required to detail the exact protocols and procedures that it contends it owns as a trade secret. It is required, however, to provide more detail as to how its "compilation" of readily known material qualifies as a trade secret. It is clear that "courts in this circuit and all over the country have found that a business plan is a protectable trade secret. *See, e.g. BRG Ins. Sols.*, 2017 WL 7513649 at *8 (holding that future business plan and marketing materials may constitute a trade secret). PieDev's complaint in this matter is too broad and does not provide the defendants with adequate notice of what specifically they have allegedly misappropriated. Accordingly, this court finds that defendants' motion to dismiss must be granted.

iv. Reasonable Measures Pleading

Defendants next argue that even if this court had found that PieDev had adequately pled a trade secret, it failed to allege that it had taken reasonable measures to protect the secrecy of the alleged trade secret. *See* Title 18 U.S.C. § 1839(3)(A); *see also* MISS. CODE ANN. § 75-26-3(d). According to defendants, when Roberts communicated the alleged trade secret to Craig at the May 5 Meeting, he extinguished PieDev's property right in the confidentiality of the information. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (holding that once "an individual

discloses his trade secret to others who are under no obligation to protect the confidentiality of the information . . . his property right is extinguished”).

“Trade secret protection will be awarded to a trade secret holder against ‘the disclosure or unauthorized use by those to whom the secret has been confided under either express or implied restriction of nondisclosure or by one who has gained knowledge by improper means.’” *RealPage, Inc.*, 2017 WL 3313729 at *9 (emphasis supplied) (citing *Phillips v. Frey*, 20 F.3d 623, 629 (5th Cir. 1994) (finding that an explicit promise of confidentiality is not necessary if the recipient of the information knew or should have known that the information was a trade secret and that the owner of the secret expected the recipient to keep the information secret)).

Defendants argue that PieDev was not a party to the Valen/AmFed NDA and that the NDA contained no provision which would allow PieDev to rely on such. Defendants further say that Roberts disclosed the details of the alleged trade secret as a representative of PieDev, not AmFed. Finally, according to PieDev’s complaint, PieDev is the alleged owner of the trade secret, not AmFed. Thus, says defendants, the AmFed/Valen NDA did not contemplate or cover the alleged alleged trade secret owned by PieDev.

Defendants further argue that PieDev failed to allege a factual basis to support an implied duty of confidentiality. PieDev did not allege that Roberts told the May 5 Meeting participants that the meeting was secret or confidential. PieDev also did not allege that it had signed a NDA with any of the defendants.

PieDev responds that Craig was bound by the AmFed/Valen NDA and that shows that PieDev took reasonable steps to protect the secrecy of its alleged trade secret. “[E]fforts to preserve secrecy are measured by a standard of ‘reasonableness, not perfection.’” *Diomed, Inc.*, 417 F. Supp. 2d at 144. “The efforts required to maintain secrecy are those reasonable under the

circumstances, ...” *Ruby Slipper Cafe*, 2019 WL 1254897 at *6 (citing *CheckPoint Fluidic Sys. Int’l, Ltd. v. Guccione*, 888 F. Supp. 2d 780, 796-97 (E.D. La. 2012)).

According to PieDev the opinion in *Hui Kun Li v. Shuman*, No. 5:14-CV-00030, 2015 WL 3766182 at *14 (W.D. Va. June 16, 2015) is instructive.

“[T]he owner of a trade secret will not lose protection of the law by disclosing the secret to a licensee, an employee, or others, provided that the disclosure is made in express or implied confidence.” *Id.*

Courts have found that facts such as telling the trade secret information to a small number of people, waiting to confirm that a confidentiality agreement or non-disclosure agreement is in place before disclosing the trade secret, and withholding the trade secret from the majority of the plaintiff company employees until it is ready to launch are all evidence that could support a jury’s finding that the plaintiff took reasonable precautions to preserve the secrecy of the alleged trade secret. *Diomed, Inc.*, 417 F. Supp. 2d at 144.

This court is not persuaded that PieDev adequately pled that it took reasonable precautions to prevent the dissemination of its alleged trade secret. In reviewing PieDev’s complaint, this court finds that PieDev intends to rely upon an NDA to which none of the parties are signatories. PieDev took no further steps to protect its alleged trade secret. It would have been a simple matter to require the three (3) participants to the May 5 Meeting to sign an NDA which explicitly covered the alleged trade secret. Furthermore, it would have been even simpler to tell the May 5 Meeting participants that they were sworn to confidentiality or that the meeting was covered by the AmFed/Valen NDA. According to PieDev’s complaint, PieDev did neither. Defendants’ motion to dismiss must be granted.

v. Swigart Misappropriation Pleading

Defendants next contend that PieDev’s complaint does not properly plead a count for misappropriation of trade secrets against Swigart. Pie Dev, aggrieved, responds that it does not have to plead knowledge with particularity and that it had alleged that Craig communicated the trade secret to Swigart (who purportedly knew that Craig had misappropriated it).

PieDev is correct that misappropriation of trade secret claims are not subject to the heightened pleading standards of Federal Rule of Civil Procedure 9. *See Auster Int’l Ltd. v. Austar Pharma, LLC*, 425 F. Supp. 3d, 336, 356 (D.N.J. Nov. 27, 2019) (holding that for claims under the DTSA and the New Jersey Trade Secrets Act, “there is no heightened pleading standard for a misappropriation claim . . .”). Even if the heightened standards of Rule 9 did apply in misappropriation of trade secret claims, the rule expressly states that “intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b). *See Kittrich Corp. v. Chilewich Sultan, LLC*, 2013 WL 12131376 at *6 (C.D. Cal. Feb. 20, 2013) (holding “knowledge, and other conditions of a person’s mind may be alleged generally” and finding that defendant pled enough facts to give rise to the inference that defendant knew the information he received had been misappropriated); *see also ACR Elecs., Inc.*, 2012 WL 13005955 at *11 (finding that a defendant cannot insulate against liability by claiming studiously achieved ignorance) (citing Milgrim on Trade Secrets, § 7.02[2][c]).

The follow are PieDev’s allegations against Swigart in its complaint:

39. After the May 5 Meeting, Dax Craig communicated to John Swigart the Pie Trade Secret. [...]
42. On May 1, 2017, John Swigart created Pie Insurance under Delaware law.
43. In October 2017, John Swigart promoted Pie Insurance at a trade show in Las Vegas. [...]
46. On October 24, 2017, John Swigart created Pie Services under Delaware law.

47. On December 7, 2017, John Swigart executed as CEO of Pie Insurance a U.S. Securities and Exchange Commission (“SEC”) Form D – Notice of Exempt Offering of Securities that reflected that Pie Insurance had raised \$4,331,962 in capital through the sale of equity securities in Pie Insurance. [...]

50. On August 9, 2018, John Swigart executed as CEO of Pie Insurance an SEC Form D – Notice of Exempt Offering of Securities that reflected that Pie Insurance had raised \$5,048,566 in capital through the sale of equity securities in Pie Insurance.

51. On August 9, 2018, John Swigart executed as CEO of Pie Insurance an SEC Form D – Notice of Exempt Offering of Securities that reflected that Pie Insurance had raised \$11,000,314 in capital through the sale of equity securities in Pie Insurance.

52. On March 7, 2019, John Swigart executed as CEO of Pie Insurance an SEC Form D – Notice of Exempt Offering of Securities that reflected that Pie Insurance had raised \$44,999,990 in capital through the sale of equity securities in Pie Insurance. [...]

71. John Swigart willfully and maliciously misappropriated the Pie Trade Secret.

72. John Swigart both used and disclosed the Pie Trade Secret when he knew that his knowledge of the Pie Trade Secret was derived from or through Dax Craig who owed a duty to Pie Development to maintain the secrecy of the Pie Trade Secret and to not use the Pie Trade Secret.

[Docket no. 1].

The above quoted language, to this court’s eye, fails to adequately plead that Swigart had committed a misappropriation of trade secrets under either the DTSA or the MUTSA. PieDev pled “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements ...”. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). While PieDev is not required to plead with specificity under the heightened standards of Rule 9, it is required to provide this court with some factual basis for its assertion that Swigart knew that Craig had allegedly misappropriated its trade secret. Defendants’ motion to dismiss must be granted.

c. Preemption of State Law Claims by MUTSA

Defendants campaign that PieDev's claims for Unlawful Interference With Business Relations, Unjust Enrichment, and Civil Conspiracy have all been pre-empted by the MUTSA.

The plain language of the statute reads:

- (1) Except as provided in subsection (2), this chapter displaces conflicting tort, restitutionary and other law of this state providing civil remedies for misappropriation of a trade secret.
- (2) This chapter does not affect:
 - (a) Contractual remedies, whether or not based upon misappropriation of a trade secret;
 - (b) Other civil remedies that are not based upon misappropriation of a trade secret; or
 - (c) Criminal remedies, whether or not based upon misappropriation of a trade secret.

MISS. CODE. ANN. § 75-26-15 (West). “[T]he Mississippi Supreme Court has held that claims for relief are not preempted by the MUTSA in cases in which the claims ‘could stand alone and withstand summary judgment even without [the plaintiff] proving that the [information at issue] was a trade secret.’” *ITR Am., LLC*, 2017 WL 5244715 (quoting *Fred's Stores of Miss.*, 725 So.2d at 908).

According to defendants, PieDev alleged the same underlying factual basis for all three state law claims – that defendants purportedly misappropriated or utilized PieDev's trade secret. Thus, says defendants, the MUTSA pre-empts such claims because PieDev's complaint cannot survive summary judgment without proof that defendants misappropriated the trade secret.

PieDev states that MUTSA does not preempt state law claims because this court could still find that PieDev's alleged trade secret does not satisfy the definition of a trade secret. PieDev reasons that it would still be able to proceed on its state law claims because the elements of all

three (2) causes of action do not require proof of a trade secret and, therefore, it could survive summary judgment without proof of a trade secret.

This court finds that the allegation that defendants misappropriated PieDev's trade secret underlies all PieDev's state law causes of action. However, this court also finds that PieDev might still prevail if this court finds that the alleged trade secret is not a trade secret. If the ultimate trier of fact could find that defendants stole information from PieDev, whether or not a trade secret, and used that information for its own benefit, defendants might be held liable under PieDev's state law causes of action.² Accordingly, this court must deny defendants' motion to dismiss on this point.

d. Unlawful Interference with Actual or Prospective Business Relations

A claim of tortious interference with business relations requires that “(1) the offending acts were intentional and willful; (2) the acts were calculated to cause damage to the plaintiffs in their lawful business; (3) the acts were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) actual damages and loss resulted.” *Wachovia Bank N.A. v. Charter Bank*, No. 1:08-CV-267-HSO-JMR, 2010 WL 3812355, at *5 (S.D. Miss. Sept. 22, 2010). To state a claim for unlawful interference, Plaintiff must allege facts sufficient to show the existence of or potential for a contract. *Ronaldo Designer Jewelry, Inc. v. Cox*, No. 1:17-CV-2-DMB-DAS, 2019 WL 1245787,

² The elements of a tortious interference with business relations case are as follows: (1) intentional and willful acts, (2) calculated to cause damage to plaintiffs in their lawful business, (3) done with the unlawful purpose of causing damage and loss, without right or justification, and (4) actual damage and loss resulted. *See AmSouth Bank v. Gupta*, 838 So.2d 205, 214 (Miss. 2002).

To prove its unjust enrichment claim, PieDev must allege and show that the defendants hold money which in equity and good conscience belongs to the plaintiff. *See Owens Corning v. R.J. Reynolds Tobacco Co.* 868 So.2d 331, 342 (Miss. 2004).

“Conspiracy requires a finding of[:] (1) two or more persons or corporations; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result.” *Braddock L. Firm, PLLC v. Becnel*, 139 So. 3d 722, 726 (Miss. Ct. App. 2013) (Quoting *Gallegos v. Mid-South Mortgage & Inv., Inc.*, 956 So.2d 1055, 1060 (Miss.Ct.App.2007))

at *4 (N.D. Miss. Mar. 18, 2019) (“While the pleading standards are not onerous, federal ‘courts have dismissed claims for tortious interference where the claimant fails to identify any customers or potential customers that it lost because of its adversary's alleged wrongful conduct.’”).

Defendants cite United States District Courts sitting in the State of Texas and interpreting Texas state law for their position. According to defendants a general allegation that “defendants actions caused ‘some’ of [plaintiff’s] existing and potential customers to refuse to purchase [plaintiff’s] products, or to threaten to cease purchasing [plaintiff’s] products” is insufficient. *Zhejiang Med. Co. v. Kaneka Corp.*, No. CV H-11-1052, 2012 WL 12893418, at *5 (S.D. Tex. Aug. 13, 2012). A bald reference to unnamed entities cannot save a claim from dismissal. *See Mill Creek Press, Inc. v. The Thomas Kinkade Co.*, No. CIVA.3:04-CV-1213-G, 2004 WL 2607987, at *11 (N.D. Tex. Nov. 16, 2004) (dismissing claim for failure “to identify any prospective contracts and the alleged interference with those contracts”); *see also Zhejiang Med. Co.*, 2012 WL 12893418, at *5.

The correct Mississippi jurisprudence which governs this State of Mississippi action is as follows:

While interfering with potential customers would be an act that could make a malicious interference with business relations claim available to a party, it is not the only act for which the claim could be brought. *See Cenac v. Murry*, 609 So.2d 1257, 1270 (Miss.1992) (quoting Prosser & Keeton, *The Law of Torts*, § 130, 1005–1014 (5th ed. 1984)) (“[T]he ‘expectancies’ thus protected [by a malicious interference with business relations claim] have been those of future contractual relations, such as the prospect of obtaining employment or employees or the opportunity of obtaining customers.”).

HansaWorld USA, Inc. v. Carpenter, No. 2:15-CV-73-KS-JCG, 2015 WL 5794437, at *7 (S.D. Miss. Oct. 1, 2015), *aff’d*, 662 F. App’x 259 (5th Cir. 2016). “While the pleading standards are not onerous, federal ‘courts have dismissed claims for tortious interference where the claimant fails to identify any customers or potential customers that it lost because of its adversary’s alleged

wrongful conduct.” *Ronaldo Designer Jewelry, Inc. v. Cox*, No. 1:17-CV-2-DMB-DAS, 2019 WL 1245787, at *4 (N.D. Miss. Mar. 18, 2019) (Collecting cases).

PieDev’s complaint fails utterly to identify any customer which it allegedly lost due to defendants’ actions. PieDev merely generally alleged that “[t]he defendants’ actions have unlawfully diverted prospective customers away from Pie Development’s business and have caused Pie Development to suffer actual damage and loss.” [Docket no. 1, ¶ 89]. This court is not persuaded that PieDev’s allegations sufficiently identify any potential customers. Indeed, PieDev’s complaint in this regard is a threadbare recital of the elements of a cause of action, supported by mere conclusory statements which do not suffice to survive a motion to dismiss. *See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

To survive a motion to dismiss, a complaint must also allege how it has suffered damages and what those damages actually are. *See HansaWorld USA, Inc. v. Carpenter*, No. 2:15-CV-73-KS-JCG, 2015 WL 5794437, at *8 (S.D. Miss. Oct. 1, 2015), *aff’d*, 662 F. App’x 259 (5th Cir. 2016) (dismissing interference claim holding that a plaintiff cannot merely state it “has suffered damages”). PieDev does not respond to defendants’ argument that it must plead damages more specifically than it has.

As quoted above, PieDev’s complaint does not specify any actual damage or loss. This court similarly finds that PieDev failed to plead more than the elements of the cause of action for Unlawful Interference with Actual or Prospective Business Relations and, therefore, defendants’ motion to dismiss must be granted.

e. Unjust Enrichment

Defendants next campaign that unjust enrichment is not an independent cause of action under Mississippi jurisprudence. For support, defendants cite *Coleman v. Conseco, Inc.*, 238 F.

Supp. 2d 804, 813 (S.D. Miss. Dec. 30, 2002) which has since been abrogated by *Davis v. ING Fin. Advisers, LLC*, No. 3:06-CV-34BS, 2006 WL 8454341, at *4 (S.D. Miss. Apr. 26, 2006) (holding that “contrary to the holding in *Coleman*, Mississippi does in fact recognize an independent cause of action of unjust enrichment, based not on tort principles but on the equitable theory of quasi-contract.”) (Both cases were decided by United States District Court Judge William H. Barbour). This court finds defendants’ first argument, that Mississippi does not recognize a cause of action for unjust enrichment, is invalid and will deny defendant’s motion to dismiss.

Defendants also state that they have already adequately argued that PieDev had failed to allege that they had engaged in any unjust conduct. PieDev asserts again that they have properly pled viable claims. As this court has discussed above, PieDev’s complaint *sub judice* has failed in various ways to satisfy the *Twombly/Iqbal* standard and, therefore, this court must agree with defendants that PieDev’s complaint fails to allege a cause of action for unjust enrichment. Accordingly, this court must grant defendants’ motion to dismiss.

f. Civil Conspiracy

Defendants finally argue that PieDev has alleged that only Craig and Swigart participated in the alleged civil conspiracy and both are officers of PieIns. Two or more persons or entities must participate for a conspiracy to exist. *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1953). “[T]he acts of a corporate agent are the acts of the corporation.” *Elliott v. Tilton*, 89 F.3d 260, 265 (5th Cir. 1996). “As a matter of law, a corporation or other company cannot conspire with itself, no matter how many of its agents participate in the complained of action.” *Id.* When all defendants accused of conspiracy are agents, officers, or directors of the same company, courts have found plaintiffs’ complaints failed to state a claim for civil conspiracy. *See*

Travelers Cas. & Sur. Co. of Am. v. Holloway, No. 1:03CV762GURO, 2004 WL 7337456, at *4 (S.D. Miss. July 8, 2004); *Nelson Radio & Supply Co.*, 200 F.2d at 914.

PieDev, aggrieved, says that the allegations of the complaint predate the formation of PieIns and, therefore, the intracorporate conspiracy doctrine cannot shield them. PieDev cites *Tu Nguyen v. Duy Tu Hoang*, 318 F. Supp. 3d 983, 1023 (S.D. Tex. 2018) for support. *Tu Nguyen* is distinguishable, however, because in that case United States District Court Judge Gray H. Miller grappled with whether the intracorporate conspiracy doctrine would protect members of an unincorporated association.

This court finds that the formation of PieIns, based upon a reading of PieDev's complaint, was a natural outflowing of the alleged continuing conspiracy. PieIns figures prominently in PieDev's complaint. Swigart formed PieIns in May, 2017 and began raising investment capital at the same time. Swigart also promoted PieIns at an insurance trade show in Las Vegas, Nevada in October, 2017. Lastly, PieDev complains that PieIns utilized the alleged trade secret to raise investment capital at least as late as March, 2019. Accordingly, based upon the record before it, this court finds the intracorporate conspiracy doctrine protects both Craig and Swigart. Defendants' motion to dismiss must, therefore, be granted.

III. CONCLUSION

This court has thoroughly reviewed PieDev's complaint, the submissions of the parties, and the record before it. As set forth *supra*, this court found that PieDev's complaint failed in various ways: that it failed to set forth in sufficient detail what it claims the trade secret is; that it failed to set forth in sufficient detail what reasonable measures it had taken to protect the alleged trade secret; that it failed to identify what customers (actual or prospective), defendants interfered with; that it failed to identify how it had been damaged; that it failed to identify its actual losses;

that it failed to set forth a factual basis to support a cause of action for unjust enrichment; and finally, that the intracorporate conspiracy doctrine shields defendants from a civil conspiracy count.

This court also found that the MTUSA, based upon the facts and allegations contained herein, do not pre-empt PieDev's state law causes of action (although this court ultimately granted the motion to dismiss those same state law causes of action on other grounds). Finally, this court found that unjust enrichment is a recognized cause of action in Mississippi jurisprudence.

While this court finds that it must dismiss PieDev's complaint, it will do so without prejudice and allow PieDev time to amend its complaint to cure the deficiencies this court has enumerated above.

IT IS, THEREFORE, ORDERED that defendants' Motion to Dismiss [Docket no. 20] is hereby GRANTED and this lawsuit is hereby DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that PieDev shall file its Amended Complaint, if any, within thirty (30) days of the entry of this order.

IT IS FINALLY ORDERED that the parties shall contact the United States Magistrate Judge assigned to this lawsuit to schedule a Rule 16 conference within fourteen (14) days of the filing of its Amended Complaint.

SO ORDERED this the 21st day of July, 2021.

s/ HENRY T. WINGATE
UNITED STATES DISTRICT COURT JUDGE