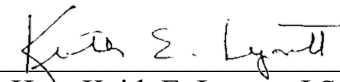


ORDERED that Partial Summary Judgment be and hereby is **ENTERED AGAINST D&B** on Count I of Tropare's Second Amended Counterclaim, declaring that D&B breached its contractual obligations to Tropare as specified in the accompanying Statement of Reasons and shall be liable to Tropare for any resulting injury to Tropare's business from such breach and concomitant damages, as all may be determined at a trial; and it is further

ORDERED that service of this Order shall be deemed effectuated upon all counsel of record upon its upload to eCourts. Pursuant to R. 1:5-1(a), counsel for movant shall serve a copy of this Order on all parties not served electronically within seven days of the date of this Order.

A handwritten signature in black ink, appearing to read "Keith E. Lynott", is written over a horizontal line.

Hon. Keith E. Lynott, J.S.C.

[X] Opposed

Statement of Reasons

In this action alleging breach of contract, misappropriation of trade secrets and related claims, the Defendant/Counterclaimant Tropare, Inc. (“Tropare”) moves for partial summary judgment. It seeks a determination that the Plaintiff/Counterclaim Defendant Dun & Bradstreet, Inc. (“D&B”) breached the contract between Tropare and D&B pertaining to Tropare's Data Selection Tool, also referred to as a Data Segmentation Tool, or “DST”.

For the reasons set forth herein, the Court grants the motion. It finds the motion record, even when examined in D&B's favor, establishes conclusively a breach of contract by D&B. That said, and for the avoidance of any doubt, the Court emphasizes that it renders no determination at this time that such breach caused any injury or damages to Tropare or its business.

I

As this is a motion for partial summary judgment, the court is required to determine if the motion record presents a genuine dispute of material fact warranting a trial. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). A dispute of fact is genuine if a rational Trier of fact could resolve a disputed element of a claim or defense in favor of the non-moving party.

To adjudicate a motion for summary judgment, the Court is required to conduct an assessment of the motion record employing the same analytical method it would use to resolve a motion for directed verdict pursuant to R. 4:37-2(b), save that the motion record consists of Certifications and discovery materials, including deposition testimony, as opposed to trial testimony and admitted Exhibits. The Court must determine if the record presents a sufficient disagreement as to a matter or matters of material fact to submit such disagreement to the trier of fact or, alternatively, if the motion record is so one-sided in favor of the moving party as to require entry of judgment for such party as a matter of law.

On a motion for summary judgment (or partial summary judgment), the Court does not determine the truth of the matters asserted, weigh the evidence or assess its credibility. Indeed, the Court is required to examine the motion record through a lens that favors the non-moving party – here, D&B – and to confer on such party the benefit of all favorable inferences one could reasonably draw from the motion record. The Court must then determine if the motion record, so examined, contains evidence, beyond a scintilla, that could cause a rational fact finder to enter a verdict for the non-moving party.

If the moving party establishes a right prima facie to the relief, the non-moving party must adduce facts in competent evidential form that establish a genuine dispute of material fact warranting a trial. Mere reference to the pleadings, factual disputes of an immaterial nature, conclusory, unsubstantiated or self-serving factual averments as to matters capable of independent corroboration, or factual assertions of an insubstantial, speculative or fanciful nature will not defeat a motion for summary judgment.

The Court is required to be cautious in granting a motion for summary judgment, in order that a deserving litigant is not deprived of a trial and is instead subjected to a trial by affidavit. But if the motion record, properly examined, admits of only a single, unavoidable outcome, the Court is required to grant the motion, lest the parties are required to present for a trial that would not serve any useful purpose.

II

The Court rehearses the facts pertinent to the disposition of this motion for partial summary judgment, examined through a lens that favors D&B, as follows:

D&B, and its affiliate, Lattice Engines, Inc. (“Lattice”), initiated this action seeking a determination that they did not, during or after the conclusion of D&B's business relationship with

Tropare, misappropriate any trade secret, intellectual property or confidential information of Tropare or breach any contractual or other duty or obligation owed to Tropare, in relation to such items. Tropare, in turn, lodged Counterclaims against D&B and Lattice, alleging breach of contract, misappropriation of trade secrets and related claims.

The relationship between D&B and Tropare inceptioned in or about September 2012, when the parties entered into a Mobile Solution Agreement, dated as of September 13, 2012 (the “MSA”). At the time, Troapre’s corporate name was Boopsie, Inc. (the Court will refer to it herein as Tropare).

Pursuant to the MSA, Tropare agreed to license to D&B a customer prospecting mobile application created by Tropare and known as the Ultimate Prospector. D&B agreed to market this application to its substantial client base.

Thereafter, the parties agreed that Tropare would develop what became known as the DST, for purposes of servicing a specific D&B client, Sprint/United Management Company and affiliates, now T-Mobile US Inc. (“Sprint”). The DST was an application that managed a large volume of data concerning potential customers that could be integrated, organized and produced by the DST in a specific format that Sprint required and used to support marketing campaigns. The sources of the data input to the tool included Sprint, D&B itself and other third-party sources.

D&B and Tropare entered into an Addendum to Mobile Solution Agreement, dated as of February 28, 2014 (the “DST Addendum”), governing their relationship in relation to the development, licensing and use of the DST. The DST Addendum incorporated many of the terms and conditions of the MSA, including the provisions relevant to the present motion.

D&B licensed the DST from Tropare, and D&B in turn sublicensed the tool to Sprint. D&B also supplied personnel to operate the DST to facilitate the marketing campaigns initiated by Sprint.

Eventually, Tropare concluded it was not benefiting from the arrangement as anticipated and exercised its right to terminate the MSA/DST Addendum, effective September 11, 2018. Thereafter, Tropare licensed the DST directly to Sprint. However, as Sprint was unable to operate the DST itself, D&B continued to supply personnel to do so and to execute the Sprint marketing campaigns. This activity took place with Tropare's knowledge, but pursuant to separate arrangements between D&B and Sprint.

Meanwhile, D&B endeavored to develop a data segmentation tool of its own to market to Sprint to enable it to re-secure this line of Sprint's business. D&B acquired Lattice, which was a software development business. Lattice had a tool called "Atlas" that, D&B contends, provided substantially the same functionality as the DST and, indeed (once again, so D&B asseverates) provided even more robust capabilities than the DST.

One deficiency, however, of Atlas was that the tool did not accept and produce the data in a manner that enabled Sprint to use the output as it intended for its marketing campaigns. Accordingly, D&B and Lattice developed a tool – called the data management tool or "DMT" – that, so D&B asserts, enabled the Atlas tool to accept and produce data in a manner that comported with Sprint's specific needs. However, according to D&B, the data processing functions themselves occurred within Atlas.

In this action, Tropare contends that the DMT is an exact or near exact copy of the DST and is the product of reverse engineering of the DST accomplished by a group of D&B/Lattice personnel. It asserts that D&B/Lattice engineers and other personnel used their knowledge of and

access to the DST to duplicate it in order to re-acquire Sprint's business. It points, among other evidence of claimed malfeasance, to the project name that D&B assigned to its effort to design a comparable product – Project Oopsie – to certain internal communications that explicitly mentioned reverse engineering of the Tropare product and to numerous videos and other evidence that, D&B contends, show that such D&B/Lattice personnel operated the DMT and DST in tandem to facilitate such reverse engineering.

Tropare contends that D&B ultimately succeeded in convincing Sprint to drop its license of the DST in favor of the DMT/Atlas. It asserts that D&B went on to incorporate proprietary features of the DST, re-named the DMT, into a product known as Rev.Up and that D&B has since successfully marketed that product beyond Sprint.

D&B rejects these assertions, and contends – and the Court must accept on this motion practice (only) – that D&B developed the DMT on its own. It asserts that Atlas, a pre-existing data management tool acquired via Lattice, is the tool that D&B employed to achieve the functionality desired by Sprint. It contends that the DMT had limited capability and D&B only developed and used it to input into Atlas the necessary data and to produce the results in a manner that comported with specific formatting needs of Sprint. It asserts that the DMT is not itself a commercially viable product and that its engineering team developed it entirely independently of any access to or knowledge of the DST. Indeed, D&B asserts that the DST, unlike the DMT, would not operate in conjunction with Atlas.

At the same time, however, the Court finds that it is undisputed on the present motion record, even when examined in D&B's favor, that D&B/Lattice personnel did operate and examine the DST after the termination of the MSA/DST Addendum for purposes other than enabling Sprint to conduct marketing campaigns using the DST. Specifically, the record is undisputed that

D&B/Lattice personnel operated the DST in order to compare its functionality with that of the DMT/ Atlas and to ensure that the latter could and would produce results that would meet Sprint's requirements and needs. Examination of the videos produced by D&B establishes beyond peradventure that this is so.

The MSA contained two separate Articles dealing with “Intellectual Property” (Article 9) and “Confidentiality; Security and Privacy” (Article 10). The MSA defined “Intellectual Property Rights” as “all intellectual property rights, and other proprietary rights recognized in any country or jurisdiction in the world, including but not limited to, copyrights, moral rights, trademarks, service marks, trade names, domain names, trade dress, patents, applications, inventions, trade secrets, know-how and rights to data, and any applications and registrations relating to any of the foregoing.” It then defined “Boopsie Intellectual Property as “all intellectual property rights relating to (i) the Boopsie Technology; (ii) all Mobile Apps and software currently existing or owned by Boopsie prior to execution of this Agreement, including the currently existing look and feel of such Mobile Apps and software, (iii) Boopsie Marks, (iv) any graphics and text of the Mobile App that incorporate any Boopsie Marks, (v) software and technology of Boopsie, and (vi) any modifications to any of the foregoing.”

Paragraph 9.3(a) of the MSA provided that “[n]either party shall be permitted to sell, assign, lease, disclose, give, make available or otherwise transfer any Intellectual Property belonging to the other proper party, except as specifically contemplated herein.” Paragraph 9.3(b) stated that “[b]oth parties shall have the right to use the other party’s Intellectual Property solely as necessary to perform its obligations under this Agreement. Neither party shall commit or knowingly permit any act or omission that would impair the other party's rights in their respective Intellectual Property.”

Article 10 separately defined as “Confidential Information” “information in connection with the performance of or otherwise relating to this Agreement (including, without limitation, technical data, trade secrets, plans for products or services, customer or supplier lists, marketing plans, software, source code for software, financial documents or data, inventions, processes, technology or designs) which it maintains is confidential and proprietary and which: (i) if disclosed orally, it identifies in writing as Confidential Information within thirty (30) days of the date of disclosure and (ii) if disclosed in writing, it marks or identifies with the legend ‘Confidential’ or ‘Proprietary’ or a similar legend.” The Agreement provided, inter alia, that a “Receiving Party” will use “Confidential Information of a ‘Disclosing Party’” solely to perform its duties under this Agreement”; would hold such information “in strict confidence and will not make any disclosure of the Confidential Information to any Person” without consent (with certain exemptions for affiliates, employees, agents and consultants who agree to be bound by duties of confidentiality); Would “treat all Confidential Information of a Disclosing Party with the same degree of care” as it treats its own confidential information; and, upon termination, would return or certify to destruction of all Confidential Information.

The parties agree that the provisions of articles 9 and 10 would survive termination expiration or termination of the MSA. The MSA provided for a remedy of injunctive relief for any breach of Article 10.

The DST Addendum provided the Tropare would develop the DST to meet certain “specifications.” These” specifications” included that the DST would be “a cloud-based database, hosted with Amazon, that will store D&B company and contact data, Sprint customer data and campaign history, TNS data and other 3rd party files.” The DST Addendum provided that the DST “must also be capable of consuming and integrating data created by the Integration Manager match

process and the Market Insight tool to support Sprint marketing campaigns”, “will allow Sprint to easily segment campaign selections into multiple promoted/control groups For each campaign and assign unique indicators to each group within the campaign”, “must include reporting capability for these solutions, as well as campaigns”, “will manage suppression at the site, contact and campaign level and store the campaign history for a given location”; “will be responsible for creating the first campaign marketing list and formatting the file with appropriate metadata and other elements for proper integration into Sprint’s CVM/Gryphon process”; and “will be a web-based interface for Sprint users to make selections for campaign creation.”

The DST Addendum provided the various sections of the MSA would apply to Tropare's “development, delivery, maintenance and support of the DST.” The incorporated sections included Article 9 (Intellectual Property) and Article 10 (Confidentiality, Security, Privacy).

III

On this motion, Tropare contends there is no triable issue of fact as to its claim that D&B breached the MSA/DST Addendum. It asserts that it is not seeking a determination at this time and on this record that the breach caused injury or damages or an award of damages.

Tropare asserts the record establishes conclusively both that D&B re-engineered the DST in developing its nearly identical DMT application and used its access to the DST both before and after the termination of the MSA/DST Addendum to do so, thereby breaching the Agreement. Tropare points to numerous communications among D&B personnel and the extensive record of videos produced by D&B by which the latter either admitted to re-engineering the DST to recover Sprint's business or openly engaged in examining the DST for purposes other than running Sprint’s marketing campaigns. It contends that D&B violated the MSA/DST Addendum by affording

access to the DST to an unaffiliated third-party consultant, Cognizant Technology Solutions Corporation, which it engaged to assist D&B in developing its own data management tool.

Tropare posits that the Court need not assess such issues as its claim that the DST is or consists of one or more trade secrets and that D&B misappropriated such trade secrets in order to grant the relief sought on this motion. Nor, according to Tropare, does it ask or seek to have the Court on this motion address issues relating to injury or harm to its business or the measure or quantum of damages. It acknowledges such issues are for a trier of fact to determine at a trial.

D&B contends there is no basis established on this motion for the relief sought. It argues that Tropare never designated any information conveyed to D&B, whether orally or in writing, as “Confidential” or “Proprietary” as the MSA/DST Addendum explicitly required. As a result, according to D&B, there can be no viable claim for breach of contract and certainly no summary judgment granted to Tropare.

D&B asserts that Tropare has not established the claimed re-engineering of the DST. Indeed, it contends that Atlas was a pre-existing product of Lattice when D&B acquired Lattice, and the DMT was merely a tool created to enable it to employ Atlas's data segmentation capabilities in a manner that met Sprint's specific and unique requirements. It argues that the DST and the DMT are perforce different and incomparable applications and that the DST cannot be operated in conjunction with Atlas.

D&B points out that it never had any access to the source code for the DST and thus could not have copied the DST as claimed by Tropare. Instead, it contends its access to the DST was limited to the user interface.

D&B asserts there was no breach of any provision of the MSA/DST Addendum involved in its undertaking to operate the DST alongside the DMT. It contends it was merely engaged in a

customary process of determining whether its separately and independently developed product met Sprint's requirements by comparing the two applications in operation. In all events, it asserts there is no express prohibition of such activity contained in the MSA/DST Addendum.

D&B contends there is no showing by Tropare on this motion that any conduct of D&B/Lattice in examining the DST caused any injury or damage to Tropare. It posits there can be no grant of summary judgment – even partial summary judgment – in the absence of a conclusive showing of such critical elements of a breach of contract claim.

IV

A claim for breach of contract requires the plaintiff – here, Tropare – to establish a binding written or oral contract, performance of such contract by the plaintiff, material failure of performance by the defendant, and resulting harm and damages. Although Tropare must establish all these elements to secure a judgment and award of damages for breach of contract, there is no principle or rule that precludes it from securing a partial summary judgment, if otherwise warranted, as to the issue of a breach.

The polestar of contract interpretation is the parties' intent, as revealed by the express terms of the agreement. The Court is required to accord the contractual language its plain and ordinary meaning. It must not strain to find ambiguity when none exists.

At the same time, the Court is required to assign a sensible meaning to the text that comports with the parties' manifest intent. In addition, the Court must consider the contract as a whole and confer separate and independent meaning on all terms of the agreement.

The agreement at issue in this case – MSA/DST Addendum – has two separate Articles dealing with intellectual property and confidential information. Although there is an obvious overlap between these Articles, they are separate and the Court is, as noted, required to give them

independent effect. In particular, Article 9 imposes certain obligations as to “Intellectual Property” of Tropare even if not specifically designated as “Confidential” or “Proprietary”, as required in Article 10. Although such a designation is required to establish a breach of or entitlement to relief under Article 10, including the remedy of injunctive relief, there is no such requirement to secure rights protected by Article 9.

It is beyond peradventure that Tropare’s DST constitutes “Intellectual Property” for purposes of Article 9. Even though the parties originally developed the specific terms of both Article 9 and Article 10 in relation to the mobile customer prospecting application that was the subject matter of the original MSA, the parties expressly agreed to incorporate both Articles 9 and 10 into the DST Addendum. They thereby established a mutual recognition that the DST, to be developed by Tropare and shared with D&B for purposes of servicing the Sprint account, would qualify as Intellectual Property of Tropare under Article 9 and would, with proper designation, be treated as “Confidential” or “Proprietary” information for purposes of Article 10.

To conclude otherwise is to ignore the principle of contract construction requiring the Court to accord the text of a contract a sensible interpretation consistent with the parties’ intent. When one examines the express “specifications” that Tropare was required by the DST Addendum to meet in developing the DST, it is pellucid – and beyond genuine dispute on this motion record – that the parties recognized the DST as an “invention” and “know-how” within the definition of Intellectual Property Rights of Tropare as contemplated by the MSA/DST Addendum. D&B does not dispute that the DST that Tropare developed and licensed to D&B met the terms of such technical specifications set forth in the DST Addendum.

In order to obtain the protections for such Intellectual Property Rights afforded by Article 9, there is no requirement imposed on Tropare to establish that the DST was or contained a trade

secret or trade secrets. Although Tropare may secure relief on a separate claim of misappropriation of a trade secret(s) should it establish the requisite elements for trade secret protection, including the existence of one or more trade secrets in the DST, it need not do so to demonstrate entitlement to the protections afforded by the parties' contract. Nor, as noted, was or is Tropare required to show that it specifically designated the DST as "Confidential" or "Proprietary" to secure rights under Article 9 (as opposed to Article 10).

The Court finds it is also indisputable on this record that D&B violated an express covenant contained in Article 9 by accessing or examining the DST for a purpose other than "as necessary to perform [D&B's] obligations under this Agreement." The only permitted use of the DST by D&B that the DST Addendum authorized was to enable Sprint to develop and execute marketing campaigns with output generated by the DST, and thereby to advance the mutual business interests of D&B and Tropare in deploying the tool to meet Sprint's requirements. It is fundamentally inconsistent with the explicit terms of such Agreement for D&B personnel to access and use the DST for any other purpose, and in particular to enable D&B to compare the capabilities or functionality of its own tool – the DMT – to the DST in order to enable D&B to supplant Tropare as the supplier of the tool.

This was true while the MSA/DST Addendum was in force and remained so after termination, as the parties expressly agreed the relevant provisions of their Agreement survived a termination. Following the termination of the MSA/DST Addendum, Tropare continued to license the DST directly to Sprint and D&B continued to have access to the DST for the limited purpose of servicing Sprint's needs and requirements, and not to develop, perfect or measure the performance of its own tool.

Yet that is exactly what the undisputed record establishes that D&B did. One cannot examine the present record – and particularly the multiple videos – without concluding that D&B operated the DST on numerous occasions for a purpose other than servicing Sprint and specifically for the unpermitted purpose of facilitating its development of its own tool. This is so even accepting, as the Court does for purposes of this motion practice (only), that D&B independently developed the DMT and did not improperly access the DST to create the DMT in the first instance. D&B's use of the DST for the sole purpose of measuring the DMT's performance to achieve or verify conformity with Sprint's requirements contravened its express contractual commitment not to use Tropare's "Intellectual Property" for a purpose "other than as necessary to perform [D&B's] obligations under the Agreement."

For these reasons, the Court finds that Tropare has established a breach of the MSA/DST Addendum both in letter and spirit. It finds there is no genuine dispute of material fact warranting a trial on this issue (only) as no rational trier of the facts could or would conclude otherwise. Accordingly, the Court grants Tropare's motion for partial summary judgment.

For the avoidance of doubt, the Court emphasizes the limited nature of its disposition of this motion. Although it finds that Tropare has established entitlement to a determination of partial summary judgment on its claim for breach of contract, for the reasons stated, the Court renders no determination at this time and on this record that such breach by D&B as is identified by the Court herein caused any injury to Tropare or its business or warrants the award of compensatory damages in any particular amount. Such issues were not before the Court for decision on this motion. And in all events, there is no basis established on this record for any determination, let alone a determination as a matter of law, as to either of these material elements of Tropare's claim for breach of contract.