DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: July 1, 2024 3:48 PM CASE NUMBER: 2023CV32241
SURTEK, INC., a Colorado Corporation Plaintiff, v. MALCOLM J. PITTS, an individual. Defendant	▲COURT USE ONLY▲ Case Number: 2023CV032241 Div. 275 Ctrm:

ORDER RE: FINAL JUDGMENT

THIS MATTER was heard as a trial to the Court through the Webex platform on March 25-27 and May 8-10, 2024. Plaintiff ("Surtek") was represented by Stephen E Csajaghy, Esq. and Randall A. Smith, Esq. (admitted pro hac vice). Defendant ("Dr. Pitts") was represented by Thomas A. Walsh, Esq.

The dispute concerns Surtek, Inc., a closely held corporation, founded in 1978, that provides enhanced oil recovery services ("EOR"), guidance, laboratory services, reservoir engineering and reservoir simulations to its oil company clients and Dr. Pitts's activities while president, after his presidency as a contractor and thereafter.

Dr. Pitts was employed by Surtek from 1980-2022 and was president of the corporation from 2016-2019. As president, Dr. Pitts owned 51% of Surtek's stock. During this same time period, Ken Wyatt ("Mr. Wyatt") was vice president of Surtek. Mr. Wyatt owned 49% of Surtek's stock.

Surtek maintains an Employee Handbook, of which Dr. Pitts was one of the authors. The Employee Handbook was in effect at all relevant times in this case. It also requires all of its employees to sign a non-disclosure agreement ("NDA"), contained in the Employee Handbook, Exhibit 235. The NDA states, in pertinent part:

> "I agree that I shall not during, or at any time after the termination of my employment with the Company, use for others, or myself or disclose or divulge to others including future employees, any trade secrets, confidential information, or any other proprietary data of the Company in violation of this agreement."

See: NDA.

The NDA, and Dr. Pitts's conforming or not conforming with it, is at the heart of this litigation. The narrative presents an unfortunate dispute about Dr. Pitts's conduct during the latter years of his employment with Surtek and thereafter.

Dr. Pitts was affiliated with Surtek for forty-two years. However, pursuant to the July, 2019 Stock Purchase Agreement ("SPA"), Dr. Pitts and Mr. Wyatt sold 100% of the shares of Surtek stock to Elio Dean. In turn, Elio Dean transferred one third of the shares to his brother, James Dean and another third to Walker Baus.

Pursuant to the SPA, Elio Dean was required to pay $3,000,000 to Dr. Pitts. Two million dollars were to be paid at closing; $1,000,000 was to be paid upon the completion of a contract with Kuwait Oil Company ("KOC") and the release of a performance bond connected to the KOC contract.

The SPA also provided that Dr. Pitts and Mr. Wyatt were to receive a commission of 10% of all projects they generated for Surtek after the KOC contract was fully concluded.

The KOC contract was for five years. It was intended that Surtek would provide KOC with consultancy services regarding KOC's oil fields and job training for KOC engineers. (Exhibit 82).

With respect to the final one million dollars (re: performance bond), Surtek paid Dr. Pitts his share thereof on or about July 17, 2020. Defendant's Exhibit G conflicts with other evidence. Dr. Pitts' deposit slip lists $538,670.72. Surtek's check number 25421 is in the amount of $538,870.72.[1]

As of January 31, 2022, Dr. Pitts was no longer an employee of Surtek but assumed the role of contractor with commissions at the rate of $10,000 per month. Surtek terminated this arrangement as of September 22, 2022. A document setting forth this decision (Exhibit 32 [a proposed separation agreement]) was executed by Kathryn Graber on behalf of Elio Dean. Dr. Pitts did not sign the proposed agreement. Exhibit 33 reflects the ongoing dispute between Dr. Pitts and Surtek.[2]

During the latter part of Dr. Pitts's employment with Surtek, he returned his share of the KOC performance bond to Surtek. (Exhibit 92 is a negotiated check from Dr. Pitts to Surtek for $270,589.35).

[1] This discrepancy does not affect the Court's ruling. It is noted for the record.

[2] The Court notes Dr. Pitts's statement to Dr. Mohammed Al-Murayri: "I will no longer be able to access the Surtek server to support KOC work and papers. To continue supporting you, you will either have to email me all the spreadsheets, word processing, PowerPoint, etc. documents or have SNF or Baker send them. I look forward to continue working with you and value our friendship." September 22, 2022, Exhibit 135.

On June 14, 2022, Dr. Pitts sent an email to various KOC personnel requesting the release of the performance bond. On June 20, 2022, KOC wrote to Dr. Pitts to advise that the performance bond has been confiscated. (Exhibit 106).

Dr. Pitts and Mr. Wyatt expected to be reimbursed should the performance bond be released. They asked for updates about the process from Surtek. They did not receive information satisfactory to them.

As the parties ramped up their preparations in advance of this litigation, actions occurred causing the Court to question the activity of both parties. On February 18, 2023, Surtek wrote to Mohammed Al-Murayri (referred to by Dr. Pitts as "Surtek's principal contact with KOC") to inform him that no exchanges of information between Surtek and KOC should be shared with Dr. Pitts. In the same email, Surtek stated that it understood that KOC "may be releasing Surtek's performance bond in the amount of $574,823. . . . Please ensure that this money is wired directly to Surtek. . . ." (Exhibit 231).

Notwithstanding Surtek's directive, Dr. Al-Murayri forwarded the entirety of Exhibit 231 to Dr. Pitts.[3]

Exhibit 32 states that Dr. Pitts had provided KOC with his "personal banking information to return Performance Bond directly to you." Nevertheless, as set forth, *supra*, Surtek directed Dr. Al-Murayri to arrange for any refunded performance bond money to be sent directly to Surtek.

The testimony indicated that the actual Performance Bond was not released. However, as set forth in Exhibit 96, KOC agreed to "return 574,823 to Surtek."

Exhibit 109 is a "Deed of Settlement" between KOC and Surtek. It states that "Surtek claims entitlement to USD $574,823. . . for settlement of [Surtek's] claim. [KOC] , upon review of [Surtek's] Claim, agrees to refund to [Surtek] for[(*sic*] total amount of USD $574,823." The Deed of Settlement was signed by Elio Dean and James Dean on behalf of Surtek and by KOC's Manager (Innovation and Technology).

The parties disagree about the significance of the Deed of Settlement's and the confiscated bond's specific amounts of $574,823. The Court is unaware of any legal principle of "coincidence". The intent of Surtek and KOC is clear.

The SPA contains the following non-competition clause:

> During Sellers [*sic*] employment with the Corporation and for a period of three (3) years from and after the date on which Sellers cease to be employed by the Corporation, whether voluntary or involuntary (the "Separation Date"), Sellers shall not compete, directly or indirectly in any capacity or form (including, without limitation, by acting as a

[3] Prior to the trial, Surtek attempted to take Dr. Al-Murayri's deposition on two occasions. The undisputed evidence was that Dr. Al-Murayri refused to provide both a preservation deposition and a discovery deposition because he did not trust those processes. The Court draws an adverse inference with respect to Dr. Al-Murayri's trial testimony because of his refusal to provide his testimony in advance of trial.

paid or unpaid director, officer, principal, employee, agent, manager, officer, buyer, joint venture, representative, trustee, cons or otherwise) or engage in any business which directly or indirectly competes with the Corporation.
EOR activities at the Angus Property at Kern River and SPWW are not included in the Non-Compete clause. Sellers acknowledge and agree that (a) a beach of of this non-compete covenant will cause the Corporation irreparable harm, which may not be compensated by money damages alone (b) this non-compete provision is reasonable and protects the legitimate interests of the company (*sic*) and (c) this non-competition covenant shall survive Closing.

See: SPA.

Surtek asserts the following claims against Dr. Pitts:

1. Violation of the Colorado Trade Secrets Act (§7-74-101, et. seq. CRS);
2. Breach of Fiduciary Duty;
3. Breach of Contract – Non-Compete Provision;
4. Conversion;
5. Civil Theft; and
6. Tortious Interference with a Prospective Economic Advantage.

Dr. Pitts asserts the following counterclaims (as amended):

1. Breach of Contract;
2. Promissory Estoppel;
3. Equitable Estoppel; and
4. Unjust Enrichment

PLAINTIFF'S (SURTEK) CLAIMS

VIOLATION OF COLORADO TRADE SECRETS ACT

"What constitutes a trade secret is a question of fact for the trial court." *Gold Messenger, Inc. v McGuay*, 937 P.2d 907, 911 (Colo. App. 1997). Section 7-14-102(4) CRS defines a trade secret as: 'the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value.'"

Factors for determining whether a trade secret exists include:
1. the extent to which the information is known outside the business;
2. the extent to which it is known to those inside the business, such as the employees;
3. the precautions taken by the holder of the trade secret to guard the secrecy of the information;
4. the savings effected and the value to the holder in having the information as against competitors;
5. the amount of effort or money expended in obtaining and developing the information; and

6. the amount of time and expense it would take for others to acquire and duplicate the information." *Saturn Systems, Inc.. v. Militare*, 252 P.3d 516 (Colo. App. 2016).

The fact that the University of Texas is a competitor of Surtek is not disputed. The Court concludes that much of the EOR activity commonly known in that industry.[4]

At the same time, the Court finds that Dr. Pitts was (and continues to be) bound by the Surtek Employee Handbook's NDA irrespective of his not agreeing with or signing Exhibit 32.[5]

Dr. Pitts asserts that the spreadsheets attached to Exhibit 234 do not identify "any alleged trade secrets shared solely with Dr. Al Murayri." He further denies that "the spreadsheet attachments to emails sent to Mr. Abdullah on March 2, 3, and 4, 2021, and on June 23, 2021, contained trade secrets."

Ken Wyatt acknowledged that the spreadsheets shared with individuals at the University of Texas contained confidential information.[6]

Elio Dean testified that after assuming a leadership position at Surtek, he learned that, while Dr. Pitts was president of Surtek, Dr. Pitts shared Surtek's confidential information with Mohammed Abdullah, a student at the University of Texas. Dr. Pitts contends that, since Surtek did nothing "to retrieve the information or limit its damaging effect" (Proposed Findings: 7-8), the Court should determine that the information was at least not of significant value.

The Court disagrees and concludes that the sharing of the material had occurred significantly before Elio Dean made this discovery.[7]

The evidence confirms that Surtek expected its employees to adhere to the NDA and that it established reasonable precautions to protect the information's security. Although no specific evidence concerning the amount of time and/or money it would have taken for those at the University of Texas to obtain this information without its disclosure, the Court finds that any such effort would have required substantial exertion and, perhaps, questionable activity.

The Court finds that Surtek took "substantial steps" to protect its data, including its best efforts to enforce the NDA. Trial testimony satisfies the Court that Surtek spent considerable time and effort to maintain its own "brand" of EOR. Testimony also supports Surtek's contention that its competitors did not have direct knowledge of Surtek's approach to EOR prior to the events that gave rise to this action.

---

[4] The Court received no evidence that Surtek is a stand alone provider of EOR services. The Court has no reason to believe that the University of Texas is Surtek's sole competitor.

[5] A non-signatory to a covenant will be bound because a covenator will not be allowed to do through others what he or she could not do directly." *Gold Messenger, Inc. v McGuay*, 937 P.2d 907 (Colo. App. 1997).

[6] During trial, the Court received contradictory testimony as to whether certain spreadsheets had been "scrubbed" – i.e. that confidential information had been removed. The Court is not able to determine whether such "scrubbing" occurred.

[7] The Court will review this contention with respect to Dr. Pitts's affirmative defense of failure to mitigate damages, *infra*. The Court also will review Dr. Pitts's affirmative defenses after completing its initial findings as to all of Surtek's claims.

Surtek is a relatively small corporation. At a minimum, it reasonably expects its leadership to abide by the NDA. The materials in question had value to Surtek. The Court did not receive credible evidence from Dr. Pitts to contest Surtek's position that the materials sent to the University of Texas are anything other than trade secrets.

Accordingy, the Court finds that Surtek has proven its claim of Violation of the Colorado Trade Secrets Act by a preponderance of the evidence (subject to the Court's review of Dr. Pitts' affirmative defenses, *infra*).

BREACH OF FIDUCIARY DUTY

"In order to recover on a claim for breach of fiduciary duty, a plaintiff must prove:

1. that the defendant was acting as a fiduciary of the plaintiff;
2. that he breached a fiduciary duty to the plaintiff;
3. that the plaintiff incurred damages; and
4. that the defendant's breach of fiduciary duty was a cause of the plaintiff's damages."

Graphic Designs v. Bush, 862 P.2d 1020 (Colo. App. 1993).

"An officer of a corporation has a fiduciary duty to act in good faith and in a manner reasonably believed to be in the best interests of the corporation and all its shareholders. *Lacy v Rotating Production Systems, Inc.*, 961 P.2d 1144, 1145 (Colo. App. 1998).

Surtek contends that Dr. Pitts, while serving as Surtek's president, breached his fiduciary duties by disseminating confidential information to the University of Texas (a Surtek competitor) without Surtek's consent.

Dr. Pitts responds by characterizing his action as, at worst, poor performance. The Court disagrees. A violation of an NDA is not merely "poor performance" *See: Jet Courier Service, Inc. v. Mulei,* 771 P.2d 486, 492 (Colo. 1989): "(An) employee owes a fiduciary duty to (his/her/their) employer and is prohibited from acting in any manner inconsistent with the agency during his employment."

Dr. Pitts contends that, even if he breached his fiduciary duty, Surtek suffered no damages therefrom. The Court will discuss damages, *infra*.

During his employment with Surtek, Dr. Pitts sent a number of emails from his Surtek account to several of his personal email accounts. After his employment with Surtek, he continued to communicate with others, including the University of Texas, a Surtek competitor, about Surtek's work. Testimony from Gregory Weiss, Surtek's retained expert, supports the contention that Surtek experienced some damages resulting from Dr. Pitts's activities.

Dr. Pitts contends that, during the pandemic, he could not gain access to the Surtek office. The Court finds that Elio Dean's testimony (that the Surtek office did not close during the pandemic and that Dr. Pitts had a key to the office at all times) is persuasive.

The Court finds that Dr. Pitts's explanations for this activity are unavailing. In fact, they support Surtek's claim that Dr. Pitts repeatedly violated his fiduciary duty to Surtek.

Subject to its review of Dr. Pitts's affirmative defenses, the Court finds that Surtek has established its second claim for relief by a preponderance of the evidence.

BREACH OF CONTRACT – NON COMPETE PROVISION

Surtek cites well-known Colorado law with respect to its breach of contract claim. Recently, the Colorado Supreme Court reiterated these elements in *University of Denver v. Doe*: "(A) plaintiff suing for breach of contract bears the burden of proving the following elements by a preponderance of the evidence: (1) the existence of a contract, (2) the plaintiff's performance of the contract or justification for nonperformance, (3) the defendant's failure to perform the contract, and (4) plaintiff's damages as a result of the defendant's failure to perform the contract." 2024 CO 27 ¶46.

The Court finds that the non-disclosure agreement is a contract and that Plaintiff has satisfied its burden of proof by a preponderance of the evidence.

CONVERSION

"Conversion is defined as any distinct, unauthorized act of dominion or ownership exercised by one person over personal property belonging to another. Although the act of conversion takes place at the time the converter takes dominion over the property, predicates to a successful claim for conversion are the owner's demand for the return of the property and the controlling party's refusal to return it." *Glenn Arms Associates v Century Mort. & In.t Corporation*, 680 P.2d 1315 (Colo. App. 1984, internal citations omitted).

Surtek has offered no evidence that there was a demand for the return of the materials at issue. Realistically, the transmission of data by a defendant to a third person necessarily results in the transmitter's loss of control of the data – the recipient would be able to send it to others who, in turn, could share it with yet additional individuals.

The Court finds that Surtek has not proven its conversion claim by a preponderance of the evidence and dismisses the same.

CIVIL THEFT

The Court finds that Dr. Pitts's citation, *Winninger v. Kirchner* is on point and demonstrates that Surtek's civil theft claim is without merit. As the Colorado supreme court held in *Winninger*, "[w]hen the legislature intends to create a separate criminal theft offense, distinct from theft under section 18-4-401, it has done so expressly by using language such as 'commits theft of a trade secret' in section 18-4-408(1). And theft of trade secrets (does not) support[] a civil theft claim under section 18-4-405." 2021 CO 47 ¶¶34, 35.

The Court finds that Surtek is not entitled to seek relief for civil theft and dismisses its claim against Dr. Pitts therefor.

TORTIOUS INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE

This tort requires "a showing of improper and intentional interference by the defendant that prevented the formation of a contract between the plaintiff and a third-party." *Omedelena v. Denver Options, Inc.*, 60 P.3d 717, 721 (Colo. App. 2002).

Surtek asserts that Dr. Pitts's consulting with Dr. Al-Murayri without charge (at least during Dr. Pitts's affiliation with Surtek) fulfills the requirements of this tort. Surtek cites *Harris Group, Inc. v. Robinson*, for the proposition that, "[i]n order to prove this form of tort, it is not necessary to show that an underlying contract exists, but, rather, the plaintiff must show that intentional and improper interference prevented a contract from being formed . . . [and] that such interference was 'improper'" 209 P. 3d 1188, 1196 (Colo. App. 2009); *see also*: *Amoco Oil Co. v. Ervin*, 908 P.2d 493 (Colo. 1995).

Amoco Oil Co. also holds that "[a] defendant will be liable for tortious interference with a plaintiff's prospective contractual relations if a defendant intentionally and improperly interferes with such relationships." *Id.* at 507.

The United States District Court (D. Colo.) has held that tortious interference with a prospective business relations requires a showing of "*intentional and improper interference* with another's prospective contractual relation. . . . For liability to attach, defendant's intentional and improper interference must either *induce or cause* the third party not to enter into or continue business relations with the plaintiff. . . .[T]he conduct of the defendant must cause the third party to refuse to enter business relations with the plaintiff." *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, 311 F. Supp. 2d 1048, 1119-1120 (D. Colo. 2004) (emphasis in opinion, internal citations omitted).

Surtek asks the Court to find that Dr. Pitts's "cause(d) KOC[] and its contractors [] not to enter into or continue the prospective relations. (Proposed findings: 21) The Court concludes that such a finding would be a bridge too far. There simply is insufficient evidence to establish that KOC would have entered into a new contract(s) with Surtek but for Dr. Pitts's actions. The Court dismisses Surtek's claim for tortious interference with a prospective economic advantage.

DR. PITTS'S CLAIMS

BREACH OF CONTRACT

Dr. Pitts's first claim is for breach of contract with respect to the KOC performance bond. As noted, *supra*, there is no legal principle of "coincidence". The amount of money returned to Surtek is the exact amount of the performance bond.

Although the Court did not receive evidence as to the details of any negotiations with respect to Surtek's receiving $574,823, Surtek did receive that amount from KOC. It also is noteworthy that Surtek instructed Dr. Al-Murayri not to inform Dr. Pitts of this arrangement. As discussed, *supra*, the fact that the Performance Bond was confiscated with the identical sum ultimately being remitted to Surtek does not mean that Dr. Pitts is not entitled to receive his share of the remittance.

In this instance, the Court draws an inference (a conclusion that follows, as a matter of reason and common sense, from the admitted evidence) that Surtek and KOC arranged for the precise amount of the (confiscated) performance bond to be returned to Surtek pursuant to the Deed of Settlement (Exhibit 109). Dr. Pitts is entitled to his share of the $1 million. Exhibit 22, §3.1.2.

Dr. Pitts has proven his breach of contract claim by a preponderance of the evidence (subject to the Court's review of Surtek's affirmative defenses, *infra*.)

PROMISSORY ESTOPPEL

Although the Court has found that the Deed of Settlement is a contract, the parties disagree as to whether Dr. Pitts is entitled to receive his share of the $574,823 returned to Surtek pursuant to the Deed of Settlement.

To the extent that an appellate court disagrees with this Court's findings with respect to Dr. Pitts's breach of contract claim, the Court notes the following:

The elements of promissory estoppel are:

1. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise;
2. Action or forbearance induced by that promise; and
3. The existence of circumstances such that injustice can be avoided only by enforcement of the promise." *Chidester v. Eastern Gas and Fuel Associates*, 859 P.2d 222 (Colo. App. 1982).
4. The Court stands by its findings and order with respect to Dr. Pitts's breach of contract claim. The evidence also supports his promissory estoppel claim.

EQUITABLE ESTOPPEL

Unlike Dr. Pitts's promissory estoppel claim, he cannot prevail with respect to equitable estoppel.

The elements of equitable estoppel are:

> The party to be estopped must have known the relevant facts and must have intended [its] conduct or representations to be the basis of action by the party seeking the estoppel, or at least that [it] must have acted in a way that the party seeking estoppel had a right to believe that the action was so intended. In addition, **the party asserting the estoppel must have been ignorant of the true facts and must have changed (his) position to (his) detriment in reliance on the conduct or representation of of the party to be estopped.** *Fanning v. Denver Renewal Authority*, 709 P.2d 22 (Colo. App. 1985, emphasis added)

Based in no small part on the conduct of Dr. Al-Murayri, the Court finds that Dr. Pitts cannot establish his equitable estoppel claim by a preponderance of the evidence and orders that said claim be and hereby is dismissed.

UNJUST ENRICHMENT

The Court has found that section 3.1.2 of the SPA is a valid contract. "In general, a party cannot recover for unjust enrichment by asserting a quasi-contract when an express contract covers the same subject matter because the express contract precludes any implied-in-law contract." *Interbank Investments, LLC v Eagle River Water and Sanitation District*, 77 P.3d 814, 816 (Colo. App. 2003); *see also: Printz Services Corp. v. Main Electric, Ltd.*, 949 P.2d 77 (Colo. App. 1997, *affirmed in part, reversed in part, Main Electric, Ltd. v. Print Services Corp*., 980 P.2d 532 (Colo. 1999)).

As stated, *supra*, Dr. Pitts's breach of contract claim has been proven by a preponderance of the evidence. Accordingly, his unjust enrichment claim is dismissed.

DEFENDANT'S (DR. PITTS'S) AFFIRMATIVE DEFENSES

The following of Dr. Pitts' affirmative defenses require review.

1. The one matter which gives rise to the defense of failure to comply with conditions precedent is Dr. Pitts's violation of the NDA.
2. "Waiver arises when a party to a contract is entitled to assert a particular right, knows the right to exist, and intentionally abandons that right." *Glover v. Innis*, 252 P.3d 1204, 1208 (Colo. App. 2011). The Court received no evidence to support the contention that Surtek waived any rights.
3. "Ratification occurs when a party 'with knowledge of all material facts' adopts and confirms an act performed or entered into on his behalf by another, without authorization." *Fiscus v. Liberty Mortgage Corporation*, 372 P.3d 644 (Colo. App. 2014). No evidence of ratification was presented herein.
4. The conduct of KOC and Surtek gave rise to Dr. Pitts's claim concerning the remanding of $574,823 to Surtek. The Court did not receive meaningful evidence that Dr. Pitts failed to mitigate his damages.

PLAINTIFF'S (SURTEK) AFFIRMATIVE DEFENSES

1. Surtek's claim of a setoff, in whole or in part, is considered in the judgment entered herein.

2. "Failure to mitigate damages refers to the injured party's failure to take such steps as are reasonable under the circumstances to minimize the resulting damages. . . [but that party] is not required to take unreasonable measures in an effort to mitigate damages." *Burt v. Beautiful Savior Lutheran Church of Broomfield*, 809 P.2d 1064, 1068 (Colo. App. 1990). The Court does not find any evidence to support this affirmative defense.

3. Surtek claims that Dr. Pitts's claims are barred by his prior breach(es) of contract. Surtek has not laid out a sufficient basis to establish this defense by a preponderance of the evidence, specifically, which prior breach(es) which occurred at what time.

4. With respect to Surtek's defense of payment, the Court takes all evidence into consideration in entering its judgment.

5. "(Dr. Pitts's) damages, if any, are the result of his own conduct. Surtek has established the inappropriate conduct by a preponderance of the evidence. The Court takes that evidence into consideration in the entry of the judgment.

DAMAGES

"The goal of the law of compensatory damages is reimbursement for actual loss suffered." *Montgomery Ward & Co. v. Andrews*, 736 P.2d 40 (Colo. App. 1987).

"The general measure of damages for breach of contract cases is that sum which places the non-defaulting party in the position the party would have enjoyed had the breach not occurred." *Smith v. Hoyer*, 697 P.2d 761, 765 (Colo. App. 1984).

SURTEK'S DAMAGES

The Court received testimony that the KOC five year contract was the largest in Surtek's history and that said contract did not provide any guarantee that KOC would seek further services from Surtek after 2020. The Court cannot and will not engage in any surmise, speculation or conjecture with respect to the possibility of additional work by Surtek for KOC.

The Court does find that Dr. Pitts's repeatedly provided confidential information to Dr. Al-Murayri and Mr. Abdullah by email. The Court also finds that Dr. Pitts's transmission of Surtek information from his business email to his personal email addresses was not justified and was an important factor in the Court's finding in favor of Surtek and against Dr. Pitts for Surtek's claim of Violation of the Colorado Trade Secrets Act.

"Compensatory damages may be measured by . . . plaintiff's lost sales or profits; or research and development damages." *Sonoco Products Co. v. Johnson*, 23 P.3d 1287, 1289 (Colo. App. 2001, internal citation omitted).

Although "[d]amages in trade secret appropriation cases after often difficult to ascertain with certainty . . [d]amages based on mere speculation and conjecture are not allowed." *Johns Manville Corporation v. Knauf Insulation, LLC*, 2017 WL 4222621 at *12 (D. Colo. 2017). Thus, the plaintiff must submit substantial evidence, which together with reasonable inferences to be drawn therefrom provides a reasonable basis for computation of the damage." *Id*.

Evidence that the KOC contract accounted for approximately 80% of Surtek's income during its timeframe was not disputed. Thus, the Court must consider the testimony of the parties' expert witnesses.

Gregory Weiss was admitted as Surtek's expert witness in forensic accounting and business damages valuation. He offered two calculations as to Surtek's diminution in value resulting from Dr. Pitts's actions (December 31, 2020 – September 30, 2023): $3,690,000.00 per the capitalized earnings method and, alternatively, $3,357, 535.00 lost profits. (This latter calculation was completed after Mr. Weiss received the report from Dr. Pitts's expert.)

Mr. Weiss prepared several charts, one of which was labelled "Chart 2: Revenues from Kuwait Oil." It notes that, after Dr. Pitts began to "share[] proprietary information, that revenue decreased from approximately $3,600,000 to $500,000 in 2021; $1,000,000 in 2022; and approximately $250,000 in 2023. Mr. Weiss also opined that Surtek's business value declined from $6,170,000 (as of December 31, 2020) to $2,480,000 (as of September 30, 2023), with lost profits of $3,020,617. (The specific date of said lost profits is not listed on that portion of Mr. Weiss's report but can reasonably be construed as September 30, 2023.)

Dr. Pitts's retained expert witness was Kenneth Naes, a CPA. At the outset, Mr. Naes acknowledged that this was the first non-domestic relations case in which he testified as an expert. He does perform business evaluations in non-litigation matters.

The most impressive part of Mr. Naes's testimony was that the sales price of Surtek in 2019 was $3,000,000. He questioned Mr. Weiss's calculations that the company's value jumped to $6,180,000 in approximately 18 months and then declined to $2,400,000 in 2023.

The Court is required to utilize CRE 702 with respect to expert testimony. The relevant factors are: (1) are the principles as to which the witness is testifying reasonably reliable; and (2) is the witness qualified to opine on the matters for which the witness is called. Additionally, the Court's inquiry with respect to reliability is "broad in nature (and considers) the totality of the circumstances of each specific case." *People v. Shreck*, 22 P.3d 68 (Colo., 2001).

The Court questions Mr. Weiss's connection between Dr. Pitts's sharing of information (which is a violation of the Colorado Trade Secrets Act) and the stated massive swings in Surtek's valuation.

At the same time, Mr. Naes never interviewed the key people in this case and did not perform a "start from scratch" analysis of Surtek's change in value (2020-2023). He admitted having limited knowledge of the underlying activities. Respectfully, Mr. Naes was somewhat evasive during his cross-examination.

The Court finds that the loss assessed by Mr. Weiss seems exaggerated. The Court finds that Surtek's prevailing in its Violation of Trade Secrets claim is best measured by the change in corporate value from 2020 to 2022 ($1,000,000). Based on this evidence, the Court finds that the gross damages experienced by Surtek total $2,600,000.

DR. PITTS'S DAMAGES

Dr. Pitts should have received his share of the $574,823 "rebate" from KOC. This was established as totaling $259,173.73. Dr. Pitts also has established that he was not paid commissions on projects while serving as a Surtek employee ($71,089.17) and a final payment of $10,000 (per Exhibit 32) for a total of $340,762.90.

SETOFF

Surtek's damages of $2,600,000 is reduced by the damages established by Dr. Pitts ($340,762.90).

JUDGMENT

The Court enters judgment in favor of Plaintiff, Surtek, Inc. and against Defendant, Malcom J. Pitts for $2,600,000 less Dr. Pitts's damages of $340,762.90 – a net total of $2,259,237.10.

The evidence presented at trial does not establish a specific date on which Surtek's damages began to accrue. Accordingly, the Court applies §13-21-101(1) CRS: "it is lawful for the plaintiff in the complaint to claim interest on the damages alleged from the date the suit is filed." CCEFS indicates that this action was filed on August 1, 2023.

Therefore, pursuant to §5-12-102(1)(b) CRS, interest (at 8% per annum, compounded annually) shall accrue for Surtek's judgment against Dr. Pitts, commencing August 1, 2023.

PREVAILING PARTY

Although the Colorado Court of Appeals has held that, "where both parties have prevailed in part on the question of liability, the trial court is free to determine which is prevailing for the purposes of applying a fee-shifting agreement" (*Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499, 504 (Colo. App. 2003), that court also has recognized that the trial court has discretion to determine that neither party is prevailing. *Western Stone & Metal Corp. v. DIG HPI, LLC*, 2020 COA 58, ¶12.

The Court finds that both parties engaged in deleterious activity herein. Accordingly, and in its discretion, the Court finds that neither party has prevailed.

SO ORDERED this 1st day of July, 2024.

JOHN P. LEOPOLD
Appointed Judge