IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

LELAND HARDY, Individually and on Behalf of THE BUSINESS INSTITUTE FOR CONTINIUNG EDUCATION IN PROFESSIONAL SPORTS, INC., (a/k/a B.I.C.E.P.S.), Plaintiffs,	:	April Term 2007
	:	No. 2178
	:	(Commerce Program)
v.	:	Control Number 091099
THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA, THE ARESTY INSTITUTE OF EXECUTIVE EDUCATION OF THE WHARTON SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA; and KENNETH L. SHROPSHIRE, J.D., Defendants.	:	

O R D E R

AND NOW, this 21st day of February 2008, upon consideration of defendants' Preliminary Objections and the response in opposition, the respective Memoranda, all matters of record, after oral argument and in accord with the contemporaneous Opinion, it is **ORDERED** that defendants' Preliminary Objections are **Sustained, in part,** as they pertain to the following claims: misrepresentation/fraud (Count II), theft of ideas (Count III), conversion (Count IV), misappropriation of trade secrets (Count VI), punitive damages (Count IX), and Uniform Trade Secrets Act (Count X).

Plaintiffs are granted leave to amend Count VIII (intentional interference with prospective contractual relations) within twenty (20) days to identify by name at least one prospective business relation with which defendants allegedly interfered.

Defendants' remaining Preliminary Objections are **Overruled**.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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<u>O P I N I O N</u>

Albert W. Sheppard, Jr. ……………………………………...…. February 21, 2008

Presently before the court are defendants' Preliminary Objections seeking dismissal of the Complaint, except Count I (breach of contract) against the Trustees of the University of Pennsylvania. For the reasons discussed, the Preliminary Objections are sustained, in part, as they pertain to plaintiffs' misrepresentation/fraud (Count II), theft of ideas (Count III), conversion (Count IV), misappropriation of trade secrets (Count VI), punitive damages (Count IX), and Uniform Trade Secrets Act claims (Count X). Plaintiffs are granted leave to amend Count VIII (intentional interference with prospective contractual relations) within twenty (20) days to identify by name at least one prospective business relation with which Defendants allegedly interfered.

Defendants' remaining Preliminary Objections are overruled.

BACKGROUND

This case concerns the creation, and proprietary use of an educational business program designed to provide professional athletes with the training and knowledge necessary to handle various business affairs that may present themselves upon acquiring substantial wealth and assets. Plaintiffs', Leland Hardy (hereinafter "Hardy") and the Business Institute for Continuing Education in Professional Sports, Inc. (hereinafter "B.I.C.E.P.S.") (collectively "plaintiffs")[1] allege, among other things, that defendants' Trustees of the University of Pennsylvania, The Aresty Institute of Executive Education of The Wharton School of the University of Pennsylvania, The Wharton School of the University of Pennsylvania, and Kenneth Shropshire (hereinafter "Shropshire") (collectively "defendants") misappropriated - - for their own gain - - an educational program, solely created and designed by Hardy.

In 1998-1999, Hardy developed the B.I.C.E.P.S. Program ("Program"), which he described as a "novel and cutting-edge concept in order to provide direct, customized business education for professional athletes in a business school setting."[2] Hardy, himself an alumnus of The Wharton School, presented the Program to the defendants' in the hope that defendants would aid launching it.

Negotiations between plaintiffs and defendants continued during the years 1999, 2000, and 2001. Hardy named the Program "The Wharton Institute for Professional Athletes," and developed a three-day course curriculum with the assistance of Shropshire.[3] Hardy also provided defendants with $55,000 to cover various costs to

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[1] Leland Hardy is the sole shareholder of B.I.C.E.P.S. and serves as its president and CEO. Hardy acted in his individual capacity and as an agent of B.I.C.E.P.S. during the time period pertinent to this dispute.

[2] Complaint ¶ 6.

[3] At this point, Mr. Kenneth Shropshire, Esq. was appointed Academic Director of The Wharton Institute for Professional Athletes.

initiate the Program. On April 5, 2002, plaintiffs and defendants reached agreements, and the Program was presented at The Wharton School on July 17-19, 2002.[4]

After the successful launch of the program in 2002, Hardy initiated an aggressive promotional effort, which resulted in a content license and weblinking agreement with defendants, and a preliminary agreement with AIC Corporation to sponsor the program's activities.[5] In order to assist the sponsoring of the program by the AIC Corporation, defendants furnished emails that touted the success of the program and the relationship between B.I.C.E.P.S. and The Wharton School.[6]

On April 15, 2003, plaintiffs and defendants entered into a second agreement which provided that the Program would be offered, in the same form as previously, at The Wharton School on June 3-6, 2003.[7] However, plaintiffs' allege that without warning, by letter dated April 18, 2003, the defendants repudiated the April 15, 2003 agreement.[8]

While plaintiffs sought to determine why the repudiation had occurred and to repair the severed business relationship, the defendants entered into an agreement with the National Football League (NFL) and the National Football Players Association (NFLPA) to provide an educational business program at The Wharton School to the league's athletes. Defendants' Program took place on April 6-8, 2005 and was chaired by defendant Shropshire. Plaintiff alleges that this Program contained a "virtually identical

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[4] Exhibit "E" of the Complaint.

[5] For a copy of the content license and weblinking agreement, see Exhibit "H" of the Complaint.

[6] Exhibits "I" and "J" of the Complaint.

[7] This agreement is contained in Exhibit "K" of the Complaint.

[8] Exhibit "M" of the Complaint.

curricula" to his (Hardy's) program.[9] Hardy became aware of defendants' "rival" program after receiving telephone calls in late April and in May from various professional football players who had attended defendants' April 6th Program.

On April 18, 2007, plaintiffs commenced this action by Writ of Summons. On June 28, 2007, plaintiffs filed their Complaint which includes breach of contract, misrepresentation/fraud, theft of ideas, conversion, unjust enrichment, misappropriation of trade secrets, unfair competition, intentional interference with prospective business relationships, punitive damages, and Uniform Trade Secrets Act claims. Defendants responded by filing these preliminary objections arguing the court's lack of personal jurisdiction against certain defendants and the legal insufficiency of the claims.

D I S C U S S I O N

In reviewing preliminary objections, "[a]ll material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review."[10] "[T]he focus of the inquiry is the pleadings as a court must sustain preliminary objections only where it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief."[11]

I. Plaintiffs' Misrepresentation/Fraud claim (Count II) is Dismissed Pursuant to the "Gist of the Action" Doctrine.

Under the gist of the action doctrine, a tort claim is barred where, as here, the duties allegedly breached were created and grounded in the contract itself.[12] As pled,

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[9] Complaint ¶ 28.
[10] *Employers Insurance of Wausau, A Mutual Company v. Commonwealth of Pennsylvania, Department of Transportation*, 865 A.2d 825, 829 (Pa. 2005).

[11] *DeStefano & Assocs. v. Cohen*, 2002 Phila. Ct. Com. Pl. LEXIS 54, *8 (2002).

[12] *Etoll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 14 (Pa. Super. 2002).

plaintiffs' fraud claim centers upon defendants alleged breach of the confidentiality provision of the Agreement between the parties, a duty which arises pursuant to the written agreement between them. The fact that defendants may have willfully or intentionally breached that contractual duty does not give rise to a tort claim, but instead provides a basis for a breach of contract claim only. Accordingly, Count II is dismissed.

II. Plaintiffs Have Failed to Establish a Property Right in the Idea.

Count III (theft of ideas) is dismissed because plaintiffs have failed to establish a property right in the idea and therefore, no theft has occurred. Pennsylvania courts afford protection to an idea if it is both novel and concrete.[13] "An idea is novel and merits protection when it is truly innovative, inventive, and new."[14] This court submits that an idea providing a business education (a concept involving many students worldwide on a daily basis) to professional athletes fails to qualify as novel. Plaintiffs' have condensed the scope of the business education offered and targeted a different audience. This is merely a "clever version or variation of already existing ideas," and therefore does not warrant protection.[15]

III. Defendants Retained a Property Interest in the Program.

Count IV (conversion) is dismissed because defendants, by agreement, retained a property interest in the program that they helped create. The Complaint states that the creation of the Program's curriculum was a collaborative effort of both plaintiffs and defendants. Under the April 5, 2002 agreement, defendants retained "all rights, title, and interest in and to all materials developed by Wharton."[16] It is alleged that defendants

[13] *Thomas v. R. J. Reynolds Tobacco Co.*, 38 A.2d 61, 63 (Pa. 1944).

[14] *Blackmon v. Iverson*, 324 F. Supp. 2d 602, 607 (E.D. Pa. 2003).

[15] *Id.* at 608.

[16] Complaint, Exhibit "E".

have since created their own rival program and thus converted plaintiffs' property. However, the Court finds that defendants have neither deprived plaintiffs of their use of the property at issue (the Program) nor have they interfered with such use.[17] Defendants have lawfully exercised their right in using any and all property rights retained by agreement, along with utilizing information in the public domain, in order to create a rival program.

IV. Plaintiffs Have Failed to Establish that The B.I.C.E.P.S. Program is a "trade secret".

Count VI (misappropriation of trade secrets) is dismissed because plaintiffs' B.I.C.E.P.S. Program does not constitute a "trade secret." Plaintiffs allege that the program's "concept, design, and plan" constitutes a "trade secret." The Court rejects this argument because the program, and therefore its "concept, design, and plan," was intentionally placed into the public domain for profit. The educational course was marketed to various athletes, agents, professional sports teams, and leagues. Plaintiffs made no attempt to keep the program or its overall structure and curriculum secret. To the contrary, plaintiffs welcomed the attention it garnered in hopes of increased future enrollment. In reviewing the factors a court may consider in determining whether information qualifies as a trade secret, the Court finds the following dispositive: (a) the information was well within the public domain, (b) no measures were taken to ensure the secrecy of the information, and (c) the relative ease in which one could properly acquire and duplicate the information.[18] Accordingly, Count VI is dismissed.

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[17] "A conversion is the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." *Stevenson v. Economy Bank of Ambridge*, 197 A.2d 721, 726 (Pa. 1964).

[18] *Iron Age Corp. v. Dvorak*, 880 A.2d 657, 663 (Pa. Super. 2005).

Likewise, Count X (Uniform Trade Secrets Act) is dismissed because plaintiffs have failed to allege that the information they seek to protect constitutes a "trade secret." As defined in the statute, a "trade secret" is:

> Information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that:
> (1) 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.
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[19]

The information fails to meet this definition because it was generally known, having been marketed to the public, and very readily accessible by proper means. One would only have to enroll in the course in order to access all of the alleged "secret" information. Lastly, the plaintiffs made no effort to maintain that the information presented to those in attendance would remain "secret." Therefore, Count X is dismissed.

V. Plaintiffs' Count IX for Punitive Damages is Dismissed.

As for Count IX (punitive damages), punitive damages are an element of damages incidental to a cause of action itself. No independent cause of action exists for a claim of punitive damages.[20] Count IX of the complaint purports to state an independent claim for punitive damages. Punitive damages can only be demanded in an ***ad damnum*** clause to a separate claim. To the extent that Count IX seeks to allege an independent cause of action for punitive damages, the count is stricken. If discovery or trial testimony demonstrates a proper need to assess punitive damages, the court will permit plaintiff to seek such damages.

[19] 12 Pa.C.S. §5302 (2007).

[20] *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 802 (Pa. 1989).

CONCLUSION

For these reasons, defendants' Preliminary Objections are sustained, in part, as to Counts II (misrepresentation/fraud), III (theft of ideas), IV (conversion), VI (misappropriation of trade secrets), IX (punitive damages), and X (Uniform Trade Secrets Act). Plaintiffs are granted leave to amend Count VIII (intentional interference with prospective contractual relations) within twenty (20) days to identify by name at least one prospective business relation with which defendants allegedly interfered. Defendants' remaining Preliminary Objections are overruled.

An Order consistent with this Opinion will be issued.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.