NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

COUNTY OF FAIRFAX CITY OF FAIRFAX

August 21, 2020

Nicholas M. DePalma, Esquire
Christian R. Schreiber, Esquire
Caleb E. McCallum, Esquire
Venable, LLP
8010 Towers Crescent Drive
Ste. 300
Tysons, VA 22182
Counsel for Plaintiff

Barry J. Miller, Esquire
Seyfarth Shaw, LLP
Seaport East
Two Seaport Lane, Ste.300
Boston, MA 02210
Counsel for Plaintiff

James R. Billings-Kang, Esquire
Seyfarth Shaw, LLP
975 F Street, N.W.
Washington, DC 20004
Counsel for Plaintiff

Mark B. Sweet, Esquire
Tara L. Ward, Esquire
Rebecca L. Saitta, Esquire
Wiley Rein, LLP
1776 K Street, NW
Washington, DC 20006
Counsel for Defendants

Re: *Futrend Technology, Inc. v. MicroHealth LLC, et al.*, CL-2018-14995

Dear Counsel:

In what has become an all too familiar tale, two government contractors, in an effort to maximize profits at the United States Government's expense, have found themselves embroiled in litigation. What was envisioned as a symbiotic relationship quickly devolved into a plethora of legal claims brought by Plaintiff Futrend Technology Inc. against Defendants MicroHealth LLC, Dawn Pilkington, Curtis Mayer, Chandrasekar Ramanan, Andrew Steinfeld, and Sachitha Saridena. This Opinion Letter serves to memorialize this Court's rulings on those claims. The Court thanks all Counsel for their patience in receiving this Opinion, and for the professionalism displayed throughout the course of the fourteen-day trial and the months preceding. The Court has considered the testimony of each witness, assessed their credibility, and has weighed all the materials properly entered into evidence. The following is the Court's ruling.

OPINION LETTER

BACKGROUND

Plaintiff Futrend Technology Inc. (hereinafter Futrend) is a government contracting entity, owned by Jerry and Yvonne Zhou. Futrend's primary government customer is the Department of Health and Human Services. In 2013, Futrend won a prime contract to modernize and maintain the Health Resources and Services Administration's (hereinafter HRSA or the Government) 340B program for the Office of Pharmacy Affairs, Information System (hereinafter OPAIS).[1] The 340B program operates to make discounted drugs available to underprivileged communities. Futrend performed this contract through September 26, 2018.

The 2013 OPAIS contract was set aside for an 8(a) business—Futrend was an 8(a) small business at the time of the prime contract award, but graduated from the program in 2015. Anticipating that it would not be able to serve as a prime contractor for the 2018 OPAIS contract recompete, Futrend began to search for a teaming partner in order to pursue the OPAIS contract in 2018. Futrend eventually sought to team with MicroHealth, an 8(a), Service-Disabled Veteran-Owned Small Business and Capability Maturity Model Integration Level 3 contractor, which met the HRSA's requirements for the 2018 OPAIS prime contractor. The two began discussions and entered into an initial teaming agreement, effective June 14, 2018, to compete for the 2018 OPAIS contract.

On June 28, 2018, the HRSA began taking quotes for the 2018 OPAIS contract. As anticipated, Futrend was not eligible to be the prime contractor for the contract as it was not an 8(a) business, nor certified as a CMMI Level 3 company—Futrend was certified Level 2. MicroHealth, eligible for the prime contract, worked along with Futrend to develop a proposal for the 2018 OPAIS contract, and the proposal was submitted on July 30, 2018. In response to the proposal, the HRSA sent a letter seeking clarification as to MicroHealth and Futrend's proposed roles for the contract to ensure that MicroHealth would be in charge of the contract, consistent with 8(a) program requirements. The companies thereafter executed a Second Teaming Agreement on August 23, 2018, backdated to June 11, 2018, clarifying the parties' positions to the Government. The parties sent this agreement as well as additional information to the Government on August 24, 2018.

On September 7, 2018, the HRSA awarded MicroHealth the 2018 OPAIS contract. The contract called for one year of performance with three one-year options. After the HRSA awarded the contract, MicroHealth informed Futrend that its anticipated project manager was no longer available. Futrend offered to "rebadge"[2] its OPAIS program manager, Dawn Pilkington, to MicroHealth. At the kickoff meeting between the companies on September 13, 2018, Pilkington rebadged and was announced as the new MicroHealth program manager.

---

[1] The Health Resources Services and Administration is an arm of the Department of Health and Human Services; OPAIS is the branch of the HRSA that deals with the customer service portion of the 340B program.
[2] "Rebadging" is a common practice among government contractors, wherein employees of one contractor are "rebadged" and become employees of the other contractor as may be required to support the contract.

On September 17, 2018, the Government contacted MicroHealth and expressed concern that Futrend, as a subcontractor, had too many managerial positions on the first Call Order under the 2018 OPAIS contract, in contrast to the two companies' proposed roles. In subsequent discussions, Futrend agreed to allow employee Andrew Steinfeld to rebadge to MicroHealth. The companies then met with the HRSA on September 19, 2018. There, the Government discovered that the client-oriented members of the OPAIS team were primarily Futrend employees. In response, the companies committed to arranging staffing such that MicroHealth would serve in its requisite project-leading capacity. In subsequent conversations, Futrend agreed to allow Curtis Mayer, a Futrend employee, to rebadge to MicroHealth. These rebadging discussions were anticipated as part of the parties' arrangement.

On September 24, 2018, Futrend requested that MicroHealth provide a draft subcontract as contemplated under the parties' Second Teaming Agreement. MicroHealth thereafter offered Futrend nine out of nineteen full-time equivalent staffing positions and one out of two lead personnel on each of the Call Orders. Further, Futrend was to receive 47% of overall workshare and 46% of revenue across the Call Orders. Futrend rejected this proposal, referring to previous workshare negotiations. A draft subcontract was submitted to Futrend on September 25, 2018, along with an Authorization to Proceed on work for Call Order 1. Turning towards negotiations for facilities costs, the relationship between the parties broke down. On September 27, 2018, MicroHealth informed the HRSA that it had severed its relationship with Futrend after informing Futrend of the same. The Government allowed MicroHealth to continue forward with the contract.

The same day, Futrend informed its remaining employees, including Defendants Chandrasekar Ramanan, Andrew Steinfeld (who had returned to Futrend), and Sachitha Saridena, that its previous OPAIS contract had expired, and that it did not receive a subcontract from MicroHealth under the 2018 OPAIS contract. Employees were not offered new substantive work for Futrend and were instructed to bill to overhead in the meantime. There were no other Futrend projects to work on, nor were there any concrete plans for future work. With that being the case, Defendants Ramanan, Steinfeld, and Saridena, each individually and of their own volition, decided to resign from Futrend and ultimately joined MicroHealth. This suit followed.

RULING AS TO COUNT I: BREACH OF CONTRACT (AGAINST MICROHEALTH)

Count I asserts that the Second Teaming Agreement (or "the Agreement") between the companies, entered into on August 23, 2018, was a valid, binding contract. Futrend argues that under the Second Teaming Agreement, it was due a subcontract from MicroHealth providing approximately 49% of workshare under the 2018 OPAIS contract, with a period of performance aligned with MicroHealth's performance under the same. In addition, the subcontract was to be on a firm-fixed-price basis and only terminable for cause. Futrend additionally asserts that the Second Teaming Agreement requires good faith negotiations prior to subcontracting and prevents MicroHealth from directly or indirectly soliciting Futrend employees during the period of the Second Teaming Agreement and for six months thereafter.

Futrend must prove the following to prevail on its breach of contract claim: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak v. George*, 267 Va. 612, 619 (2004). On the issue of failure to provide a subcontract or offer a subcontract, upon review of the Second Teaming Agreement, it is clear that Futrend fails to establish the first element—a legally enforceable obligation.

"Whether a contractual provision creates a legally enforceable obligation is a question of law . . . . In Virginia, it is well-settled that contractual provisions that 'merely set out agreements to negotiate future subcontracts' are unenforceable. . . . Such provisions are 'too vague and indefinite' to be enforceable." *CGI Federal Inc. v. FCi Federal, Inc.*, 295 Va. 506, 515 (2018) (internal citations omitted). Reading the Second Teaming Agreement as a whole reveals a level of indefiniteness and vagueness whereupon Futrend "could not rely on the agreement to obtain work . . . as a subcontractor." *Id.* at 516. The following terms demonstrate this indefiniteness:

- Article 1: Prime will offer and award a subcontract to Subcontractor within thirty (30) days after award of the prime OPAIS contract consistent with the workshare set forth in Exhibit A. The subcontract will align with the period of performance of the prime contract and shall be extended to ensure the alignment with any prime contract extensions. The Parties will negotiate terms and conditions in good faith; provided, however, that if the Parties are unable to reach preliminary agreement on the terms of a subcontract, the Prime shall at a minimum offer a subcontract to Subcontractor with terms consistent with this Agreement;
- Article 8: In the event Prime obtains a prime contract under the Program, the Prime shall . . . award a subcontract to the Subcontractor for that portion of the work set forth in Exhibit A . . . . Prior to offering and awarding a subcontract, the Prime shall in good faith coordinate with Subcontractor and seek mutually acceptable terms and conditions, including price, specifications, and delivery schedule, that are consistent with this Agreement. . . . Under no circumstances, however, shall the failure of the parties to agree to the preliminary terms and conditions of a proposed subcontract excuse Prime's obligation, at a minimum, to offer and award a subcontract to Subcontractor containing reasonable terms and the workshare and price reflected in Exhibit A.
- Exhibit A, Section 2.B: In the event that the [sic] MicroHealth is awarded a contract resulting from this solicitation, Subcontractor will receive approximately 49% of the workshare of the direct labor, measured by total revenue. Specific labor categories will be determined in further negotiations prior to proposal submission.
- Exhibit A, Section 3.0: If the [sic] MicroHealth is successful and wins the prime OPAIS contract, Prime will offer and award a subcontract to Subcontractor containing the workshare, pricing, and other terms reflected in this Exhibit A. The Parties will negotiate a final subcontract in good faith and will not propose or insist upon terms that are inconsistent with this Agreement or Exhibit A. In the event the Parties are unable to

> reach preliminary agreement on a final subcontract, Prime shall, at a minimum, offer a subcontract to Subcontractor containing the following material terms:
>
> - Workshare allocation stated in this Exhibit A;
> - Pricing agreed upon based on proposal submission;
> - A period of performance that aligns with the prime contract's period of performance (inclusive of option awards); and
> - The prime shall not terminate the subcontractor for convenience without sufficient or due cause.

Both the Agreement and Exhibit A contemplate the parties negotiating in good faith to arrive on a final subcontract. "Prior to offering and awarding a subcontract, the *Prime shall in good faith coordinate with Subcontractor and seek mutually acceptable terms . . . .*" Article 8.B (emphasis added). "*The Parties will negotiate a final subcontract in good faith . . . .*" Exhibit A, Section 3.0 (emphasis added). Further, Exhibit A explicitly contemplates the failure to agree on final subcontract terms. *Id.* ("In the event the Parties are unable to reach preliminary agreement on a final subcontract . . . ."). "Well-established precedent compels us not to impose a subcontract on parties to a teaming agreement when they have expressly agreed to negotiate the material terms of a subcontract in the future." *CGI Federal Inc.*, 295 Va. at 516. Likewise, the Court will not impose a legally enforceable obligation to offer a subcontract where the parties expressly agreed to negotiate the very terms of that contract and failed to specify definite terms otherwise.

Despite insistence that the "minimum offer" required under the Agreement establishes a floor legal obligation, the "minimum offer" is itself illusory and indefinite. Explicit contemplation of negotiation (revealing a failure to mutually assent to terms) notwithstanding, the "guaranteed" value of subcontract workshare in Exhibit A was *approximately* 49%. The use of the word "approximate" demonstrates a degree of indefiniteness. There is no way to determine, as a matter of law, if a proposed figure is "approximately 49% of the workshare." It is not a concrete term agreed upon by the parties. As the Supreme Court of Virginia has said,

> [W]e must take the contract as it is. We cannot, by judicial construction, in violation of the settled rules on the subject, make a contract for the parties which they have not made for themselves; and, as the contract they did make is, by itself, intelligible and certain, when its words are taken in their common or natural sense, the meaning of those words must be taken as the meaning of the parties.

CGI Federal Inc., 295 Va. at 516 (quoting *Holston Salt & Plaster Co. v. Campbell*, 89 Va. 396, 399 (1892)). The Court will not define the scope of a legal obligation and dictate definite terms where there are otherwise none. If the parties desired to require a minimum contract offer, they could have specified definite, ascertainable terms. They failed to do so and thus failed to create an enforceable "minimum offer" requirement.

The Second Teaming Agreement cannot serve as an enforceable legal obligation where the obligation is uncertain. Where the parties were required to negotiate the terms of the final subcontract, and in light of the indefinite nature of the Second Teaming Agreement, the Court

cannot assign liability to MicroHealth for failure to proffer a subcontract under the Second Teaming Agreement.

The subcontracting provision is not the only term of the Second Teaming Agreement, however. Under the Agreement, both Futrend and MicroHealth agreed to the following:

> Article 20: During the period of this Agreement, and for six (6) months thereafter, each party agrees not to directly or indirectly solicit or hire employees of the other party assigned to work in connection with this Agreement and the Program described herein without the prior written approval of the other party. The parties further agree to include a similar Non-Solicitation provision in any subcontract that results from this Agreement. However, neither party will be precluded from hiring any employee of the other party who responds to any public notice or advertisement of an employment opportunity unrelated to the Program.

Futrend demonstrated at trial that MicroHealth hired Futrend employees assigned to work in connection with the 2018 OPAIS contract without prior written approval of Futrend.[3] Of the individual Defendants, MicroHealth had Futrend's permission to hire Defendants Pilkington and Mayer through rebadging. MicroHealth did not have permission to hire Defendants Ramanan, Steinfeld, and Saridena after the breakdown of the relationship.

Futrend's measure of damages—lost profits—for the breach are nevertheless untenable. "[D]amages are recoverable for loss of profits prevented by a breach of contract 'only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.'" *TechDyn Systems Corp. v. Whittaker Corp.*, 245 Va. 291, 298 (1993). Damages "must not be 'contingent, speculative, or uncertain.'" *Preferred Systems Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 399 (2012). Moreover, in keeping with the prima facie elements for breach of contract, the breach must have been "caused by the breach of obligation." *Filak v. George*, 267 Va. at 619.

Here, Futrend offers damages not causally linked with MicroHealth's hiring of former Futrend employees and damages that are in themselves speculative. As to causation, each employee was an at-will employee. Similar to *Saks Fifth Avenue, Inc. v. James, Ltd.*, 272 Va. 177, 189-190 (2006), Futrend failed to link its damages to anything more than each employee no longer working for Futrend. Where each employee is an at-will employee, it cannot be said that MicroHealth's hiring of the employees is causally linked to Futrend's evidence on lost profits. Indeed, Futrend's claim to lost profits against MicroHealth would be the same damages Futrend would suffer were each employee to leave Futrend in alternate circumstances.[4]

---

[3] There was, however, no credible evidence of solicitation. The evidence offered in support of solicitation revealed only that rebadging conversations took place among the parties, which were expected in order to serve the Government customer and were not in violation of the Agreement.

[4] *Saks Fifth Avenue* is particularly instructive. There, Saks Fifth Avenue and another defendant appealed from a trial court judgment holding them jointly and severally liable for breach of fiduciary duty and statutory business

Furthermore, the damages offered on employee loss are impermissibly contingent. The incremental lost profits Futrend seeks based on MicroHealth's hiring of the employees at issue here assume that all option years of the 2018 OPAIS contract would be exercised. Although there is some evidence to suggest that the Government would exercise its option, it cannot be said that a damage award contingent on successive option exercises is sufficiently certain. More uncertainty becomes apparent in the context that even if the employees remained with Futrend, Futrend existed in a new paradigm. It was no longer working on OPAIS and did not have work for its employees, instructing them to bill to overhead in the immediate aftermath of the breakdown between Futrend and MicroHealth. To attempt to assert that lost profits are non-speculative under these conditions belies the reality of the situation Futrend faced.

Futrend was unable to offer causally connected, non-speculative evidence of lost profits. In absence of such evidence, and for the failure to establish a prima facie case of breach of contract, the Court finds in favor of Defendant MicroHealth as to Count I.

RULING AS TO COUNT IV: TORTIOUS INTERFERENCE WITH CONTRACT (AGAINST ALL DEFENDANTS)[5]

In Count IV, Futrend posits that MicroHealth and the individual Defendants each tortiously interfered with the Second Teaming Agreement and each of the individual Defendants' covenant agreements.

"In Virginia, the elements of a claim for tortious interference with contractual relations are typically recited as (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or

---

conspiracy on the basis that proof of damages—lost profits—"was not based on any causal connection to Defendants' wrongful conduct." The Supreme Court of Virginia, considering the evidence presented, stated that

> [B]y relying solely on Dubinsky's opinion evidence as to damages, James failed to carry its burden of proving that the wrongful conduct of Saks and Thompson proximately caused those damages. Dubinsky failed to connect the lost profits he claimed James incurred after Thompson's departure to anything other than the mere fact that Thompson was no longer working at James. This fact alone cannot be a basis for recovering damages, however, because Thompson was an at-will employee who was free to stop working at James at any time. . . . Dubinsky's calculation of damages focuses solely on a "but-for" model of what James' profits would have been had Thompson remained employed there. Under Dubinsky's analysis, James' damages were the same regardless of whether Thompson left to work at the Saks store in the same shopping mall or simply retired. Having neglected to show that its lost profits corresponded to the Defendants' wrongful conduct, James failed to show the necessary factor of proximate causation and thus did not carry its necessary burden of proof as to damages.

Saks Fifth Avenue, Inc., 272 Va. at 190. Although the cause of action here differs, the requirement of causation remains applicable. Futrend's damages fail for largely the same reasons as James' did in *Saks Fifth Avenue.*

[5] Counts II and III were nonsuited.

expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted." *Schaecher v. Bouffault*, 290 Va. 83, 106 (2015).

As a preliminary matter, "only a party *outside* the contractual relationship with the plaintiff is subject to liability as an interferor." *Francis Hospitality, Inc. v. Read Properties, LLC*, 296 Va. 358, 363 (2018). As such, "[a] person cannot intentionally interfere with his own contract." *Id.* at 364 (quoting *Fox v. Deese*, 234 Va. 412, 427 (1987)). Thus, to the extent that Futrend represents that MicroHealth interfered with the Second Teaming Agreement, or that any individual Defendant interfered with his or her own covenant agreement, such claims cannot stand as a matter of law.

The Court will consider the claims against MicroHealth and the individual Defendants separately. As to MicroHealth, the question before the Court is whether MicroHealth intentionally interfered with or induced any individual Defendant to breach his or her covenant agreement or terminate his or her relationship with Futrend such that Futrend was damaged.

Futrend established by a preponderance of the evidence that each individual Defendant had a covenant agreement with Futrend and that MicroHealth knew of each agreement. Futrend failed, however, by a preponderance of the evidence to show that MicroHealth intentionally interfered with any individual covenant such that the relationship terminated with damage to Futrend. As to Defendants Pilkington and Mayer, each was allowed to rebadge to MicroHealth during the relationship between Futrend and MicroHealth. It cannot be said that MicroHealth interfered with these two covenants in light of the express permission to rebadge, nor can it be said that Futrend was damaged when it agreed to these personnel decisions. As to Defendants Ramanan, Steinfeld, and Saridena, Futrend did not demonstrate by a preponderance of the evidence that MicroHealth induced a breach of contract or end of the employment relationship not specifically contemplated by the agreement. In each of the covenants for Ramanan, Steinfeld, and Saridena, the contracts state in Section 6.c that:

> Direct Hire by an Incoming/Successor Contractor. Nothing in this Agreement shall in any way prohibit Employee from being directly hired by an incoming/successor contractor in the even[t] that FUTREND does not win the re-compete of the contract on which Employee is currently staffed; provided, that FUTREND does not have a position for the employee on the contract, on the subcontract to the incoming/successor contractor under the new contract, or on any other contracts within FUTREND at a level of compensation that is commensurate with Employee's current compensation level.

As previously discussed, MicroHealth was the successor contractor, and Futrend did not win the recompete. Futrend did not have positions for these employees on the primary contract, on a subcontract with MicroHealth, or on any other Futrend contract commensurate with each employee's current compensation. Employees were told to bill to overhead during this time period. Thereafter, the employees, on their own volitions, left Futrend to work for MicroHealth in accordance with their contractual provisions permitting such conduct.

MicroHealth's hiring of these employees did not tortiously interfere with the individual covenants when the situation which ultimately unfolded was contemplated under each agreement's express terms, nor was Futrend damaged. As such, the Court finds in favor of Defendant MicroHealth as to Count IV.

Weighing all of the available evidence, Futrend furthermore failed to demonstrate that any individual Defendant intentionally interfered with the Second Teaming Agreement. The downfall of the Second Teaming Agreement cannot be attributed to any individual Defendant; the Court attributes the breakdown in relations to the conduct between Futrend and MicroHealth alone. Moreover, the Court finds that the weight of the evidence does not support a finding that any individual Defendant tortiously induced another Futrend employee to leave Futrend or otherwise breach a covenant agreement. Accordingly, the Court finds in favor of Defendants Dawn Pilkington, Curtis Mayer, Chandrasekar Ramanan, Andrew Steinfeld, and Sachitha Saridena as to Count IV.

RULING AS TO COUNT V: TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY (AGAINST ALL DEFENDANTS)

In Count V, Futrend posits that MicroHealth and the individual Defendants each tortiously interfered with Futrend's business expectancy of 49% of workshare under the 2018 OPAIS contract under similar factual allegations as made for Count IV.

To succeed on its claim for tortious interference with a business expectancy, Futrend must show that "(1) it had a contract expectancy; (2) [MicroHealth or an individual Defendant] knew of the expectancy; (3) [MicroHealth or an individual Defendant] intentionally interfered with the expectancy; (4) [MicroHealth or an individual Defendant] used improper means or methods to interfere with the expectancy; and (5) [Futrend] suffered a loss as a result . . . ." *Preferred Systems Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 403 (2012).

As a dispositive matter as to all Defendants, the Court finds that Futrend did not have a valid business expectancy. As discussed in Count I, the Second Teaming Agreement is indefinite such that Futrend does not have a legally enforceable right to workshare under the Second Teaming Agreement. Without a predicate business expectancy, no Defendant in this case can be held liable for tortious interference of the same.

This issue notwithstanding, Futrend cannot prevail on Count V due to its failure to establish two remaining elements by a preponderance of the evidence. The Court recognizes that MicroHealth and each individual Defendant knew of the Second Teaming Agreement. Nevertheless, Futrend failed to persuade the Court that any Defendant intentionally interfered with Futrend's hypothetical workshare expectancy through improper means. "Improper methods or means generally involve violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, breach of a fiduciary relationship, violation of an established standard of a trade or profession, unethical conduct, sharp dealing, overreaching or unfair competition." *Id.* at 404. As

discussed in this Court's rulings on Counts VI and XIV, trade secrets have not been misappropriated in this case, nor have any fiduciary duties been violated. Neither has Futrend shown by a preponderance of the evidence that any of the Defendants use the above or like improper means to interfere with Futrend's supposed expectancy. Therefore, the Court finds in favor of all Defendants as to Count V.

RULING AS TO COUNT VI: MISAPPROPRIATION OF TRADE SECRETS (AGAINST ALL DEFENDANTS)

Count VI posits that all Defendants misappropriated Futrend's trade secrets as the relationship between Futrend and MicroHealth broke down. "Generally, the law affords the owner of a trade secret protection 'against the disclosure or unauthorized use of the trade secret by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse.'" *MicroStrategy Inc. v. Li*, 268 Va. 249, 262 (2004). Va. Code § 59.1-338 provides that "a complainant is entitled to recover damages for misappropriation [of trade secrets]. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss." Punitive damages for willful and malicious misappropriation are also available.

Central to this Court's ruling is the definition of "trade secret." A trade secret is "information, including but not limited to, a formula, pattern, compilation, 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, and
2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Va. Code § 59.1-336.

The evidence shows that MicroHealth came into possession of Futrend materials during the course of the parties' relationship and in the course of Defendants Ramanan, Steinfeld, and Saridena's transfers to MicroHealth. In spite of all of the evidence presented, however, Futrend has not established that any of the materials in Defendants' possessions are trade secrets as statutorily defined.

The first category of materials at issue are those owned by the U.S. Government. The 2018 OPAIS contract contemplated a transition of materials from Futrend to MicroHealth.[6]

[6] All materials transferred in this capacity were not misappropriated. Misappropriation is statutorily defined as:
1. 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
2. Disclosure or use of a trade secret of another without express or implied consent by a person who
   a. Used improper means to acquire knowledge of the trade secret; or
   b. At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

Many of these materials, regardless of how they were ultimately acquired, were developed in support of Futrend's prior OPAIS contract, thereby making them Government property. As property not in Futrend's exclusive dominion, these materials were and remain "readily ascertainable by proper means by, other persons who can obtain economic value from [their] disclosure." Va. Code § 59.1-336.

The second category of materials at issue are those owned by Futrend. To the extent that any of the materials were exclusively owned by Futrend, they cannot be considered trade secrets as Futrend has not established a basis for independent economic value. The materials at issue, again, were developed in support of the 2013 OPAIS contract. At the time of transfer, these materials were either outdated or were unnecessary for MicroHealth or any other entity to perform within the OPAIS program. After considering all of the available evidence, the Court concludes that these materials did not derive independent value and were largely available through the Government. Futrend's claim for misappropriation of trade secrets therefore fails, and the Court finds in favor of all Defendants as to Count VI.

RULING AS TO COUNT VII: STATUTORY BUSINESS CONSPIRACY (AGAINST ALL DEFENDANTS)

In Count VII, Futrend asserts that Defendants engaged in a statutory business conspiracy, violating the Code of Virginia.

The Code provides that:

> Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be jointly and severally guilty of a Class 1 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

Va. Code § 18.2-499(A). Section 18.2-500 further allows, "[a]ny person who shall be injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a

---

1) Derived from or through a person who had utilized improper means to acquire it;
2) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;
3) Derived from or though a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
4) Acquired by accident or mistake.

Va. Code § 59.1-336.

reasonable fee to plaintiff's counsel, and without limiting the generality of the term, 'damages' shall include loss of profits."

After considering the weight of the testimony and evidence in this case, it is apparent that Futrend has not established by a preponderance of the evidence that any of the Defendants engaged in a statutory business conspiracy for which the Virginia Code provides recompense. The evidence shows that many of the Defendants in varying combinations had discussions regarding work-related and personal matters both during the relationship of the corporate litigants (mainly concerning rebadging) and in the aftermath of the relationship's dissolution. Absent from any of these discussions, however, is evidence of any association or undertaking for the specific purpose of willfully and maliciously injuring Futrend's reputation, trade, business, or otherwise. To be clear, the evidence in this case does not establish any concerted action, nor does it establish a statutorily prohibited aim with the requisite intent. As such, the Court finds in favor of all Defendants as to Count VII.

RULING AS TO COUNT VIII: COMMON LAW CONSPIRACY (AGAINST ALL DEFENDANTS)

In Count VIII, Futrend asserts that MicroHealth and the individual Defendants mutually undertook to injure Futrend in its business through facilitating the Individual Defendants' breach of their covenant agreements, breach of fiduciary duties of loyalty, tortious interference with both the Second Teaming Agreements and the individual covenant agreements, tortious interference with Futrend's business expectancy, and misappropriation of trade secrets.

"A common law conspiracy consists of two or more persons combined to accomplish, by some concerted action, some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means." *Gelber v. Glock*, 293 Va. 497, 533 (2017). Special damages as well as proof of the underlying tort must be shown to prevail on a claim for common law conspiracy. *Id.* at 533-34. "In a civil context . . . the purpose of a conspiracy claim is to impute liability—to make X jointly liable with D for what D did to P. Thus, a civil conspiracy plaintiff must prove that someone in the conspiracy committed a tortious act that proximately caused his injury; the plaintiff can then hold other members of the conspiracy liable for that injury." *Id.* at 534 (internal citations omitted) (quoting *Beck v. Prupis*, 162 F.3d 1090, 1099 n.18 (11th Cir. 1998)).

In weighing all of the testimony and available evidence, the Court must find in favor of the Defendants for one simple reason: Futrend has not established by a preponderance of the evidence that there was a combination of any two or more Defendants acting in concert to achieve an unlawful purpose, or a lawful purpose by criminal or unlawful means. Again, the Court recognizes that the Defendants in varying groups held discussions both during the relationship of the corporate litigants and after the relationship dissolved. None of the discussions or actions, however, constitute the requisite concerted action to achieve an unlawful purpose or lawful purpose through unlawful means such that the law would permit imputing liability amongst any combination of Defendants. Nor has Futrend established proof of any

applicable underlying tort, as discussed in this Opinion Letter's discussion of Futrend's various allegations. The Court therefore finds in favor of all Defendants as to Count VIII.

RULING AS TO COUNT IX: BREACH OF CONTRACT (AGAINST DAWN PILKINGTON)

In Count IX, Futrend asserts that former employee Dawn Pilkington materially breached an individual covenant with Futrend. Futrend must prove the following to prevail on its breach of contract claim: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak*, 267 Va. at 619.

Pilkington signed a covenant agreement on February 20, 2018. This agreement provided, among other provisions, for the following:

- That the signatory was not to disclose any confidential information while under Futrend's employ and for three years after (Section 2.b); and
- That the signatory was not to interfere directly or indirectly with Futrend's relationship with any customer or prospective customer during the signatory's employment with Futrend and for twelve months after (Section 5.b); and
- That the signatory was not to solicit or induce Futrend employees or contractors from ending their relationships with Futrend, hire Futrend employees or contractors, or assist any other person or entity in the solicitation, inducement, hiring or engagement of any Futrend employee or contractor, where the hiring entity provides competitive services to Futrend, during the signatory's employment with Futrend and for twelve months after (Section 5.c).

The evidence shows the Pilkington rebadged as a member of MicroHealth on September 13, 2018. During her role on the 2018 OPAIS contract, she coordinated rebadging discussions appropriately within the context of the corporate relationship and in accordance with the Government's missive that MicroHealth serve as the prime contractor in-fact. Many employees expressed their preferences to Pilkington regarding whether they would be comfortable rebadging between Futrend and MicroHealth. This was an expected part of her role on the project, and these interactions did not breach the covenant agreement; they were a mutual endeavor. As she credibly described it,

> This is—these are two companies *working together*. This is one team, and we—everybody was having these conversations. Both companies were having these conversations, and employees were, obviously, interested in which company they were going to be working for. This is not a solicitation. This is a discussion of re-badging in the context of partnering on a—on a program.

October 9, 2019 Transcript, 1233:21-1234:7 (emphasis added).

Further considering all available evidence and the circumstances leading up to and following the breakdown of the parties' relationship, Futrend has not established by a preponderance of the evidence that Pilkington assisted MicroHealth in hiring, soliciting, or otherwise engaging any Futrend employee or contractor in breach of her covenant agreement. The Court found Pilkington's testimony on the issue to be credible.[7] To the extent that Pilkington interacted with others outside of the rebadging context, the discussions were either innocently personal or did not run afoul of any obligations Pilkington owed to Futrend. Moreover, Futrend has not met its burden of proof in demonstrating that Pilkington personally interfered with Futrend's relationship with MicroHealth such that her actions constitute a breach of contract. Finally, as discussed in this Court's ruling as to Count VI, none of the information at issue in this case can be considered a trade secret, nor did Pilkington disclose any confidential information to Futrend's detriment.

Given that Futrend failed to establish by a preponderance of the evidence in this case that Pilkington breached any of the obligations owed to Futrend under her covenant agreement, the Court finds in favor of Defendant Dawn Pilkington as to Count IX.

RULING AS TO COUNT X: BREACH OF CONTRACT (AGAINST CURTIS MAYER)

In Count X, Futrend asserts that former employee Curtis Mayer materially breached an individual covenant with Futrend. Futrend must prove the following to prevail on its breach of contract claim: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak*, 267 Va. at 619.

Mayer signed a covenant agreement on March 16, 2017. This agreement provided, among other provisions, for the following:

- That the signatory was not to disclose any confidential information while under Futrend's employ and for three years after (Section 2.b); and
- That the signatory was not to provide competitive services to any customer or prospective customer during the signatory's employment with Futrend and for twelve months after (Section 5.a); and
- That the signatory was not to interfere directly or indirectly with Futrend's relationship with any customer or prospective customer during the signatory's employment with Futrend and for twelve months after (Section 5.b); and
- That the signatory was not to solicit or induce Futrend employees or contractors from ending their relationships with Futrend, hire Futrend employees or contractors, or assist

[7] Pilkington testified at various points in the trial that she did not engage in solicitation. In her words, "No, I wasn't soliciting anyone . . . ." October 21 Transcript, 1299:8, "I did not solicit people", and "No, I did not solicit anybody." October 30, 2019 Transcript, 2947:18, 2948:2. Considering her statements in the context of the total evidence, her testimony is credible and her assessment correct; she did not solicit anyone during rebadging discussions or at any point thereafter.

any other person or entity in the solicitation, inducement, hiring or engagement of any Futrend employee or contractor, where the hiring entity provides competitive services to Futrend, during the signatory's employment with Futrend and for twelve months after (Section 5.c).

The weight of the evidence shows that Mayer rebadged to MicroHealth with Futrend's consent in the course of the corporate relationship on the 2018 OPAIS contract. This decision was confirmed in writing by Futrend via email on September 25, 2018. *See, e.g.*, Def. Exhibit 234. To the extent that Futrend suggested that Mayer did not have permission to rebadge—through the testimony of its owner, Jerry Zhou—the Court did not find such testimony credible. MicroHealth's officer, Colonel Hines, spoke with Mr. Zhou prior to Mayer's rebadging, and in their speaking, Mr. Zhou agreed that Mayer could move to MicroHealth. *See, e.g.*, October 21, 2019 Transcript, 1589:18. Mayer credibly testified that Mr. Zhou ultimately left the decision to rebadge to Mayer. After Mayer expressed a willingness to rebadge, Mr. Zhou agreed. The evidence supported this version of events. *See, e.g.*, October 8, 2019 Transcript, 934-939.

Considering all available evidence presented during the course of trial, Futrend did not establish by a preponderance of the evidence that Mayer personally assisted MicroHealth in hiring, soliciting, or otherwise engaging any Futrend employee or contractor in breach of his covenant agreement. To be clear, Mayer's actions before and after joining MicroHealth did not run afoul of the covenant agreement. He did not solicit others to join MicroHealth in violation of any legal obligation owed or coordinate any mass departure of employees. Moreover, Futrend has not met its burden of proof in demonstrating that Mayer personally interfered with Futrend's relationship with MicroHealth such that his actions constitute a breach of contract. Finally, as discussed in this Court's ruling as to Count VI, none of the information at issue in this case can be considered a trade secret, nor did Mayer disclose any confidential information to Futrend's detriment. As Futrend failed to show through a preponderance of the evidence that Mayer breached any of the obligations he owed to Futrend under his individual covenant agreement, the Court finds in favor of Defendant Curtis Mayer as to Count X.

RULING AS TO COUNT XI: BREACH OF CONTRACT (AGAINST CHANDRASEKAR RAMANAN)

In Count XI, Futrend asserts that former employee Chandrasekar Ramanan materially breached an individual covenant with Futrend. Futrend must prove the following to prevail on its breach of contract claim: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak*, 267 Va. at 619.

Ramanan signed a covenant agreement on March 10, 2017. This agreement provided, among other provisions, for the following:

- That the signatory was not to disclose any confidential information while under Futrend's employ and for three years after (Section 2.b); and

- That the signatory was not to provide competitive services to any customer or prospective customer during the signatory's employment with Futrend and for twelve months after (Section 5.a); and
- That the signatory was not to interfere directly or indirectly with Futrend's relationship with any customer or prospective customer during the signatory's employment with Futrend and for twelve months after (Section 5.b); and
- That the signatory was not to solicit or induce Futrend employees or contractors from ending their relationships with Futrend, hire Futrend employees or contractors, or assist any other person or entity in the solicitation, inducement, hiring or engagement of any Futrend employee or contractor, where the hiring entity provides competitive services to Futrend, during the signatory's employment with Futrend and for twelve months after (Section 5.c).

The evidence before the Court demonstrates that Ramanan was hired by MicroHealth following the conclusion of the relationship between the corporate parties. This work is specifically allowed under Ramanan's employment agreement. Section 6.c of the covenant agreement provides:

> Direct Hire by an Incoming/Successor Contractor. Nothing in this Agreement shall in any way prohibit Employee from being directly hired by an incoming/successor contractor in the even[t] that FUTREND does not win the re-compete of the contract on which Employee is currently staffed; provided, that FUTREND does not have a position for the employee on the contract, on the subcontract to the incoming/successor contractor under the new contract, or on any other contracts within FUTREND at a level of compensation that is commensurate with Employee's current compensation level.

Ramanan was hired by MicroHealth, a successor contractor to the OPAIS contract, after Futrend did not win the re-compete and did not obtain a subcontract from MicroHealth. Futrend, furthermore, did not have a position on a contract for Ramanan commensurate with Ramanan's compensation level.[8] Indeed, in discussions with employees following the dissolution of the relationship between Futrend and MicroHealth, Futrend told employees to bill to overhead and did not offer any substantive work under a contract commensurate with Ramanan's compensation. As such, Ramanan's working for MicroHealth did not breach the covenant agreement—the agreement specifically contemplates Ramanan's working for MicroHealth.

Futrend moreover has not established by a preponderance of the available evidence that Ramanan interfered with the Second Teaming Agreement, solicited, induced, or otherwise assisted in encouraging others from ending their relationships with Futrend, or disclosed

[8] The implication that Futrend had an NIH Project Manager position available for Ramanan was illusory. Mr. Zhou conceded the position was already filled. October 1, 2019 Transcript, 419:4-420:7. Ramanan was merely told to bill to overhead and study for the PMP exam after the relationship between the corporations fell apart. October 7, 2019 Transcript, 600:12-22.

confidential information to Futrend's detriment. As discussed in this Court's ruling as to Count VI, none of the information at issue in this case can be considered a trade secret. As Futrend failed to show through a preponderance of the evidence that Ramanan breached any provisions of the individual covenant agreement at issue, the Court finds in favor of Defendant Chandrasekar Ramanan as to Count XI.

RULING AS TO COUNT XII: BREACH OF CONTRACT (AGAINST ANDREW STEINFELD)

In Count XII, Futrend asserts that former employee Andrew Steinfeld materially breached an individual covenant with Futrend. Futrend must prove the following to prevail on its breach of contract claim: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak*, 267 Va. at 619.

Steinfeld signed a covenant agreement on March 10, 2017. This agreement provided, among other provisions, for the following:

- That the signatory was not to disclose any confidential information while under Futrend's employ and for three years after (Section 2.b); and
- That the signatory was not to provide competitive services to any customer or prospective customer during the signatory's employment with Futrend and for twelve months after (Section 5.a); and
- That the signatory was not to interfere directly or indirectly with Futrend's relationship with any customer or prospective customer during the signatory's employment with Futrend and for twelve months after (Section 5.b); and
- That the signatory was not to solicit or induce Futrend employees or contractors from ending their relationships with Futrend, hire Futrend employees or contractors, or assist any other person or entity in the solicitation, inducement, hiring or engagement of any Futrend employee or contractor, where the hiring entity provides competitive services to Futrend, during the signatory's employment with Futrend and for twelve months after (Section 5.c).

The evidence before the Court demonstrates that Steinfeld was hired by MicroHealth following the conclusion of the relationship between the corporate parties. This work is specifically allowed under Steinfeld's employment agreement. Section 6.c of the covenant agreement provides:

> Direct Hire by an Incoming/Successor Contractor. Nothing in this Agreement shall in any way prohibit Employee from being directly hired by an incoming/successor contractor in the even[t] that FUTREND does not win the re-compete of the contract on which Employee is currently staffed; provided, that FUTREND does not have a position for the employee on the contract, on the subcontract to the incoming/successor contractor under the new

contract, or on any other contracts within FUTREND at a level of compensation that is commensurate with Employee's current compensation level.

Steinfeld was ultimately hired by MicroHealth, a successor contractor to the OPAIS contract, after Futrend did not win the re-compete and did not obtain a subcontract from MicroHealth. Futrend furthermore did not have a position on a contract for Steinfeld commensurate with Steinfeld's compensation level.[9] Again, in discussions with employees following the dissolution of the relationship between Futrend and MicroHealth, Futrend told employees to bill to overhead and did not offer any substantive work under a contract commensurate with Steinfeld's compensation. As such, Steinfeld's working for MicroHealth did not breach the covenant agreement—the agreement specifically contemplates the actions Steinfeld took.

Futrend, moreover, has not established by a preponderance of the available evidence that Steinfeld interfered with the Second Teaming Agreement, solicited, induced, or otherwise assisted in encouraging others from ending their relationships with Futrend, or disclosed confidential information to Futrend's detriment. The Court has considered all of the evidence regarding the circumstances of Steinfeld's employment with Futrend and subsequent departure, including Steinfeld's own testimony, which the Court found to be credible. The evidence does not establish that Steinfeld engaged in any prohibited conduct. Moreover, as discussed in this Court's ruling as to Count VI, none of the information at issue in this case can be considered a trade secret. As Futrend failed to show through a preponderance of the evidence that Steinfeld breached any provisions of the individual covenant agreement at issue, the Court finds in favor of Defendant Andrew Steinfeld as to Count XII.

RULING AS TO COUNT XIII: BREACH OF CONTRACT (AGAINST SACHITHA SARIDENA)

In Count XIII, Futrend asserts that former employee Sachitha Saridena materially breached an individual covenant with Futrend. Futrend must prove the following to prevail on its breach of contract claim: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak*, 267 Va. at 619.

Saridena signed a covenant agreement on March 13, 2017. This agreement provided, among other provisions, for the following:

- That the signatory was not to disclose any confidential information while under Futrend's employ and for three years after (Section 2.b); and

[9] Mr. Zhou testified that Steinfeld's other viable option for work within Futrend was on a project with the Smithsonian. That project only generated two or three hours of work a week; the project was not full time. October 1, 2019 Transcript, 418:19-419:3. Of work available at Futrend, Mr. Zhou conceded that nothing was commensurate with Steinfeld's salary. October 1, 2019 Transcript, 403:6-9. Steinfeld took away from the meeting wherein he was told to bill to "indirect overhead" that Futrend "didn't have a position, a billable position available . . ." for him. October 7, 2019 Transcript, 564:1-565:5. Steinfeld's understanding was correct.

- That the signatory was not to provide competitive services to any customer or prospective customer during the signatory's employment with Futrend and for twelve months after (Section 5.a); and
- That the signatory was not to interfere directly or indirectly with Futrend's relationship with any customer or prospective customer during the signatory's employment with Futrend and for twelve months after (Section 5.b); and
- That the signatory was not to solicit or induce Futrend employees or contractors from ending their relationships with Futrend, hire Futrend employees or contractors, or assist any other person or entity in the solicitation, inducement, hiring or engagement of any Futrend employee or contractor, where the hiring entity provides competitive services to Futrend, during the signatory's employment with Futrend and for twelve months after (Section 5.c).

The evidence before the Court demonstrates that Saridena was hired by MicroHealth following the conclusion of the relationship between the corporate parties. This work is specifically allowed under Saridena's employment agreement. Section 6.c of the covenant agreement provides:

> Direct Hire by an Incoming/Successor Contractor. Nothing in this Agreement shall in any way prohibit Employee from being directly hired by an incoming/successor contractor in the even[t] that FUTREND does not win the re-compete of the contract on which Employee is currently staffed; provided, that FUTREND does not have a position for the employee on the contract, on the subcontract to the incoming/successor contractor under the new contract, or on any other contracts within FUTREND at a level of compensation that is commensurate with Employee's current compensation level.

Saridena was hired by MicroHealth, a successor contractor to the OPAIS contract, after Futrend did not win the re-compete and did not obtain a subcontract from MicroHealth. Futrend, furthermore, did not have a position on a contract for Saridena commensurate with Saridena's compensation level. Again, in discussions with employees following the dissolution of the relationship between Futrend and MicroHealth, Futrend told employees to bill to overhead and did not offer any substantive work under a contract commensurate with Saridena's compensation.[10] As such, Saridena's working for MicroHealth did not breach the covenant agreement—the agreement specifically contemplates the actions Saridena took.

---

[10] Saridena was told that there was no work, and it was suggested that she do email cleanup or go for a walk. October 29, 2020 Transcript, 2814:11-19. Thereafter, Saridena inquired about joining MicroHealth. Considering the totality of credible evidence, the Court does not find the assertion that there was work for Saridena credible. Moreover, Mr. Zhou testified that Saridena was to receive a promotion. The promotion, with a 10 percent raise, was not commensurate with the work Futrend allegedly had available. October 1, 2019 Transcript, 407:5-8. Saridena confirmed that she was pending a promotion and raise. She also confirmed that the supposed position Futrend had available was not commensurate with her skillset—it would have actually been a demotion. October 29, 2020

Futrend moreover has not established by a preponderance of the available evidence that Saridena interfered with the Second Teaming Agreement, solicited, induced, or otherwise assisted in encouraging others from ending their relationships with Futrend, or disclosed confidential information to Futrend's detriment. As discussed in this Court's ruling as to Count VI, none of the information at issue in this case can be considered a trade secret. As Futrend failed to show through a preponderance of the evidence that Saridena breached any provisions of the individual covenant agreement at issue, the Court finds in favor of Defendant Sachitha Saridena as to Count XIII.

RULING AS TO COUNT XIV: BREACH OF FIDUCIARY DUTY (AGAINST DAWN PILKINGTON, CURTIS MAYER, CHANDRASEKAR RAMANAN, ANDREW STEINFELD, AND SACHITHA SARIDENA)

In addition to breach of contract claims against each individual Defendant, Futrend asserts that each also violated fiduciary duties owed to Futrend—in particular, the fiduciary duty of loyalty. Each employee allegedly violated the duty of loyalty by misappropriating trade secrets and confidential information, by soliciting Futrend employees to leave Futrend, by soliciting Futrend customers to work with MicroHealth, and by tortiously interfering with the Second Teaming Agreement and/or Futrend's business expectancy of a subcontract.

"[U]nder the common law an employee, including an employee-at-will, owes a fiduciary duty of loyalty to his employer during his employment." *Williams v. Dominion Technology Partners, L.C.C.*, 265 Va. 280, 289 (2003). Under their fiduciary obligations, employees may not act in a manner adverse to their employer's interests. *Hilb, Rogal and Hamilton Co. of Richmond v. DePew*, 247 Va. 240, 246 (1994).

Futrend has failed to establish by a preponderance of the evidence that any individual Defendant violated a duty of loyalty. As discussed in this Court's ruling as to Count VI, the materials at issue in this case cannot be considered trade secrets, nor did any employee disclose information both confidential and adverse to Futrend's interests. Thus, any use or disclosure of this information did not breach a fiduciary duty of loyalty. In discussing Counts IX–XIII, this Court found that Futrend failed to establish that any Defendant had solicited Futrend employees to leave. The failure to do so precludes a finding that any individual Defendant violated an associated fiduciary duty. In the rulings for Counts IV–V, this Court concluded that none of the individual Defendants tortiously interfered with the Second Teaming Agreement or any business expectancy. Accordingly, the individual Defendants did not breach a fiduciary duty of loyalty on either basis. Finally, Futrend has not shown by a preponderance of the evidence that any individual Defendant solicited a Futrend customer to work with MicroHealth over Futrend. Based on the weight of the evidence and in accordance with this Court's rulings on related

---

Transcript, 2818:3-19. The evidence supports Saridena's position that there were no contract positions available within Futrend commensurate with her compensation level.

counts within this case, the Court finds in favor of Defendants Dawn Pilkington, Curtis Mayer, Chandrasekar Ramanan, Andrew Steinfeld, and Sachitha Saridena as to Count XIV.

RULING AS TO COUNT XV: UNJUST ENRICHMENT (AGAINST MICROHEALTH)

In the alternative to Count I, Futrend claims that "by appropriating Futrend's trade secret and Confidential Information in connection with the OPAIS Re-compete, OPAIS BPA, and Call Orders 1 and 2; poaching Futrend's employees subject to the Covenant Agreements; winning the OPAIS BPA and Call Orders 1 and 2, and refusing to award a subcontract to Futrend, MicroHealth will be unjustly enriched at the expense of Futrend." Second Amended Complaint ¶ 285.

To succeed on its claim for unjust enrichment, Futrend must prove that "(1) [plaintiff] conferred a benefit on [defendant]; (2) [defendant] knew of the benefit and should reasonably have expected to repay [plaintiff]; and (3) [defendant] accepted or retained the benefit without paying for its value." *T. Musgrove Construction Company, Inc. v. Young*, 840 S.E.2d 337, 341 (Va. 2020) (quoting *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116 (2008)). Moreover, "[o]ne may not recover under a theory of implied contract simply by showing a benefit to the defendant, without adducing other facts to raise an implication that the defendant promised to pay the plaintiff for such benefit." *Nedrich v. Jones*, 245 Va. 465, 476 (1993).

As a preliminary issue, the Second Teaming Agreement at 7.C provides that "Each party shall bear all costs, risks and liabilities incurred by it arising out of its performance of this Agreement." "The existence of an express contract covering the same subject matter of the parties' dispute precludes a claim for unjust enrichment." *CGI Federal Inc. v. FCi Federal, Inc.*, 295 Va. 506, 519 (2018). As each party, at minimum, agreed to individually shoulder the risks of negotiating with and teaming with the other, Futrend's claim for unjust enrichment preliminarily fails on that basis.[11] The Second Teaming Agreement notwithstanding, the claim fails as Futrend did not prove the required elements.

To the extent that any unjust enrichment is premised upon MicroHealth's possession of trade secrets, the claim fails because the information at issue in this case cannot be considered a trade secret, as discussed in this Court's ruling as to Count VI.

Futrend also failed to establish that MicroHealth was unjustly enriched through the award of the OPAIS contract or by its failure to offer Futrend a subcontract. Futrend did not confer unto MicroHealth the 2018 OPAIS contract, so it cannot be compensated for MicroHealth's failure to remit payment on that basis. Futrend, furthermore, failed to establish that MicroHealth would not have been awarded the 2018 OPAIS contract but for Futrend's involvement in MicroHealth. Finally, the unenforceable language of the Second Teaming Agreement reinforces the fact that

[11] *CGI Federal Inc.* is instructive. In that case, CGI sought to "disgorge FCi of any profits it realized from performing work promised to CGI." Nevertheless, the teaming agreement between the parties "required the parties to bear their own costs of performance and precluded them from recovering lost profits for a breach." CGI conceded that the provision was an express contract covering the parties' dispute. *CGI Federal Inc.*, 295 Va. at 519.

neither party gave nor owed anything to the other. The parties had yet to decide whether they would enter a subcontract; indeed, the Second Teaming Agreement anticipated further negotiations. To circumvent the parties' negotiations and find that MicroHealth has been unjustly enriched would be to impermissibly imply a contract and assign definite terms where the parties had yet to agree to any form of contractual arrangement or compensation. As such, Futrend has failed to show that it conferred a benefit to MicroHealth for which MicroHealth reasonably should have expected to repay Futrend.

As to the issue of employee movement, the Second Teaming Agreement has express provisions on each party's hiring of the other's employees, precluding the unjust enrichment claim. Even if the claim was not precluded, it is not clear that MicroHealth's hiring of former Futrend employees represents a benefit Futrend conferred unto MicroHealth for which MicroHealth would be expected to pay; indeed, each employee was an at-will employee of Futrend. The claim for unjust enrichment fails, and the Court finds in favor of MicroHealth as to Count XV.

CONCLUSION

For the reasons previously stated, the Court finds in favor of the Defendants on each count as applicable. Enclosed with this Opinion Letter is an order reflecting this Court's ruling.

Sincerely,

[redacted]

Daniel E. Ortiz
Circuit Court Judge

OPINION LETTER

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FUTREND TECHNOLOGY INC.,	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	CL NO. 2018-14995
	)	
MICROHEALTH LLC, *et al.*,	)	
	)	
DEFENDANTS.	)	

ORDER

THIS CAUSE came to be heard for trial from September 30 through November 12, 2019.

Having considered all the available evidence and the arguments of counsel, is it

ADJUDGED, ORDERED, and **DECREED** for the reasons stated in this Court's Opinion Letter issued contemporaneously with this Order that the Court finds for the Defendants on Count I, and on Counts IV–XV.

THIS ORDER IS FINAL.

ENTERED this 21 day of August [redacted], 2020.

[redacted]

Judge Daniel E. Ortiz

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.