PSKW, LLC v McKesson Specialty Arizona Inc.
2013 NY Slip Op 33257(U)
December 23, 2013
Supreme Court, New York County
Docket Number: 602921/07
Judge: Barbara R. Kapnick

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**
Justice

PART 39

Index Number : 602921/2007
PSKW, LLC ON BEHALF
vs.
MCKESSON SPECIALTY
SEQUENCE NUMBER : 013
SUMMARY JUDGMENT

INDEX NO. 602921/07
MOTION DATE ______
MOTION SEQ. NO. 0013

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______
Answering Affidavits — Exhibits ______ | No(s). ______
Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 12/23/13

______, J.S.C.
BARBARA R. KAPNICK
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

---------------------------------------X

PSKW, LLC, on behalf of itself and as assignee of Touch Tone Media, Inc.,

Plaintiff,

- against -

MCKESSON SPECIALTY ARIZONA INC.,

Defendant.

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DECISION/ORDER
Index No. 602921/07
Motion Seq. No. 013

BARBARA R. KAPNICK, J.:

Defendant McKesson Specialty Arizona Inc. ("McKesson") moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint.

Plaintiff, PSKW, LLC ("PSKW"), brought this action to recover damages for violation of a non-disclosure agreement and for wrongful misappropriation of trade secrets and other confidential and proprietary information. Specifically, PSKW alleges that its predecessor, Touch Tone Media, Inc. ("Touch Tone") disclosed certain proprietary information to defendant McKesson in connection with a contemplated joint collaboration. PSKW further alleges that in violation of the parties' written NDA, as well as common law, McKesson misappropriated Touch Tone's concept for a new pharmaceutical marketing product, as well as its pricing information and strategies, and marketing/business information.

Background

Touch Tone was founded in 2002 by Robert Previdi ("Previdi"), now the President and Managing Member of PSKW. Touch Tone provided marketing services and products to pharmaceutical companies, which included designing and managing various marketing, adherence and loyalty solutions, such as rebate programs, co-pay reduction programs and co-pay debit cards. (Previdi Aff. ¶ 5.) PSKW began operating in 2004 and also provides marketing and consulting services to the pharmaceutical industry. PSKW's services include patient loyalty card programs and other adherence solutions to encourage patients on prescription medications to continue to use a particular manufacturer's product rather than that of another pharmaceutical manufacturer. PSKW designs and manages loyalty card programs under the brand name "Loyalty Rx." (*Id.* ¶ 6.)

McKesson is a subsidiary of McKesson Corporation, the largest pharmaceutical distributor in the United States. McKesson focuses on "[c]ustomized solutions for various specialty market segments," (Setty Aff. ¶ 9) and promotes marketing in order to assist with the distribution of drugs. (Tr. 3:4-6, Feb. 1, 2012). McKesson currently offers its clients a loyalty card program called "LoyaltyScript."

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PSKW alleges that beginning in 2002, the first generation of "co-pay cards" were available from companies such as Touch Tone for sale to pharmaceutical companies. These were typically debit cards embossed with a pharmaceutical company's name and the name of a particular product, and were distributed through doctors' offices to patients who had been prescribed a particular drug. After receiving the card, the patient would call an 800 number to activate it. Once activated, the funds on the debit card were accessible for use to pay-in-full or reduce the patient's insurance co-payment obligation associated with filling the prescription. (Previdi Aff. ¶ 10.) The goal of these cards was to increase the likelihood that the patient would fill and re-fill his prescription by reducing his out-of-pocket expense for doing so. However, the problem with these cards was the lack of any mechanism to ensure that the funds would be used to fill a particular prescription. Once activated, the card was an unrestricted debit card and could be used to purchase unrelated items. (*Id.* ¶ 11.)

Previdi alleges that throughout 2003, he spent hundreds of hours and substantial amounts of money developing a co-pay assistance product which included a method to ensure that the product could only be used for the specific pharmaceutical product for which it was intended (the "New Co-Pay Method"). The New Co-Pay Method involved using the pharmacy "adjudication" process,

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which is a national payor network through which a pharmacist determines a patient's health insurance coverage for a particular prescription. (*Id.* ¶ 14.) The loyalty program would involve offsetting all or a portion of a patient's co-pay obligation for a prescription drug purchase by first linking use of the card to the adjudication process/network, which would then enable the pharmacist to determine the patient's co-pay obligation. The New Co-Pay Method would then enable submission of a claim to a "secondary payor" (such as a pharmaceutical company) in real time, thereby enabling the patient to realize the co-pay offset at the pharmacy counter. Optionally, Previdi's program could provide follow-up information and/or services, including incentives and/or intervention, to further encourage persistence and adherence. (*Id.* ¶ 15.)

There were two alternative methods for remitting payment to the pharmacy for the co-pay offset: first, the pharmacy could be reimbursed on a monthly or other periodic basis for accrued co-pay offset charges; or second, the card could be used to link the pharmacy adjudication process to a banking network so that the card could be funded as a debit card in real time and swiped and depleted to reimburse the co-pay offset at the pharmacist's point-of-sale terminal. (*Id.* ¶ 16.)

In order to implement the New Co-Pay Method, Touch Tone required a vendor that provided pharmacy adjudication services within the national payor network. Companies that provide those services, known as adjudicators, operate extensive computer networks linking tens of thousands of pharmacies to hundreds of insurers and other payors. Previdi was introduced to McKesson's Director of Marketing, Philip Villavicencio ("Villavicencio"), and its Senior Vice President, Steven Hoffman ("Hoffman"), through another company that Touch Tone did business with, Verispan, LLC, owned in part by McKesson. After these individuals agreed to confidentiality, Previdi alleges that he generally discussed his idea for the New Co-Pay Method. According to Previdi, Villavicencio stated that he had never heard of a product like Touch Tone's and that it had great potential for success. (*Id.* ¶¶ 21-22.) In an email to Previdi dated June 4, 2002, Villavicencio stated as follows:

> Bob,
>
> Just wanted to send you a quick note of thanks for today's conference call. I think you have a great product and I hope that we can close a deal that is mutually beneficial to both organizations. The sooner you can give me something in writing on your model, the sooner we can move forward.
>
> Best Regards,
>
> Philip Villavicencio

(Previdi Aff. Ex. 1.)

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On June 16, 2004, Previdi submitted a "Request for Proposal" to McKesson, which described, in general terms, the New Co-Pay Method, as follows:

> If you have a bank card that is linked to the adjudication process and can only be used for the product indicated you have created a service that has a 100% guarantee that the pharma product indicated will be dispensed . . . or there will be no payment to the pharmacy. There is currently no other service available that can do this.

(Previdi Aff. Ex. 2 (emphasis in original)).

Villavicencio responded with a description of McKesson's pharmacy adjudication capabilities and its program fees for its "Health Solutions (MHS) Trial Script," which was a voucher program using the adjudication system.[1] In his letter to Previdi, Villavicencio stated, in part, as follows:

> As you are aware, designing pharmacy-based alternative sampling and coupon programs is one of MHS' primary businesses. We would be happy to work with your development team to marry our experience and technology with your team's product vision.

(Previdi Aff. Ex. 3).

[1] "TrialScript" was a voucher (free sample) program utilizing single payor functionality in use by McKesson at that time. The difference between TrialScript and LoyaltyScript, which is now used by McKesson, is that LoyaltyScript uses the adjudication process in much the same way as the New Co-Pay Method.

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Shortly thereafter, Villavicencio informed Previdi that McKesson wanted to be involved not merely as a provider of adjudication services to Touch Tone, but rather in a form of partnership with Touch Tone. (*Id.* ¶ 23, Ex 4.) Previdi agreed to discuss a possible partnership.

Villavicencio then requested that Previdi disclose Touch Tone's knowledge relating to the sales and marketing strategies of developing the New Co-Pay Method business model. Previdi advised Villavicencio that he would not disclose all of the details of Touch Tone's confidential and proprietary information without McKesson first entering into a formal nondisclosure agreement. Accordingly, on August 30, 2004, Touch Tone and McKesson entered into a "Mutual Nondisclosure Agreement" (the "NDA") that had been prepared by McKesson. (*Id.* ¶¶ 24-25.)

Pursuant to the NDA, Touch Tone and McKesson agreed not to use the other party's trade secrets or confidential or proprietary information for any purpose other than to evaluate their interest in working together to pursue a possible partnership. (*Id.* ¶ 25.) "Confidential Information" was defined broadly in the NDA as follows:

> all trade secrets or confidential or proprietary information, including, but not limited to, pricing, customer lists, client lists, specifications, programs, source or

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> object code, flow charts, and other materials (tangible or intangible, machine or human readable), techniques, know-how and procedures contained therein, any information about prototype products, beta products, or any other products not commercially available . . . .

(Previdi Aff. Ex. 5, ¶ 1.)

In September 2004, Touch Tone obtained a meeting with Pfizer Pharmaceutical Company ("Pfizer") at its headquarters in New York City. In preparation for this meeting, Previdi alleges that he disclosed additional confidential information relating to marketing and pricing of the New Co-Pay Method. Allegedly using this information, McKesson prepared a PowerPoint presentation claiming that Touch Tone's New Co-Pay Method was "the first and only program that can reward and educate a patient on therapy with a robust data stream that provides a feedback loop to physician, pharmacist, manufacturer and patient." (*Id.* ¶¶ 26-28, Ex. 7 at 5.)

At the conclusion of Previdi's presentation, Pfizer indicated that it wished to subscribe for programs employing Touch Tone's New Co-Pay Method. Pfizer indicated that they wanted to enter into a Master Services Agreement, which would contain the terms of an agreement that would govern co-pay programs to be provided for multiple Pfizer brands. Pfizer specifically asked for information regarding pricing of the program. (*Id.* ¶ 30.)

Previdi alleges that in September 2004, he provided McKesson with additional confidential information relating to pricing and program implementation, including information concerning business rules, printing and operation of cards, training of pharmacies, etc. Previdi claims that this represented confidential knowledge and information that Touch Tone had developed, at considerable expense, over a period of several years, based upon its creation, development and pricing of loyalty programs. Shortly thereafter, Pfizer indicated that it was interested in a Zyrtec loyalty card program. (*Id.* ¶¶ 33-34.)

Thereafter, the parties scheduled a meeting with Pfizer in Scottsdale, Arizona, which was attended by Hoffman. Previdi states that Hoffman and other McKesson attendees were at first skeptical that Touch Tone's New Co-Pay Method could work as Touch Tone claimed. However, by the end of the meeting, they were educated and convinced that it was feasible and was a substantial business opportunity for McKesson. (*Id.* ¶¶ 36-39.)

Previdi was then contacted by Ogilvy & Mather, the New York City advertising agency for Pfizer's Zoloft product. Ogilvy & Mather stated that it had been instructed by Pfizer to meet with him regarding a loyalty card program for Zoloft. Previdi states that he then attended two meetings on behalf of both Touch Tone and

McKesson. After those meetings, Pfizer stated that it was interested in moving forward with a Zoloft program of one million adjudicated debit cards that would be based on Touch Tone's New Co-Pay Method. (*Id.* ¶ 40.)

Previdi alleges that thereafter, McKesson began delaying both formalizing its relationship with Touch Tone and providing Pfizer with a Master Services Agreement. By February 2005, Previdi began to realize that McKesson was intentionally delaying a deal with Pfizer. (*Id.* ¶ 42.)

In June 2005, Previdi learned that McKesson was offering to the pharmaceutical industry the co-pay offset loyalty card known as LoyaltyScript, which utilized the New Co-Pay Method, but did not include or involve Touch Tone in any way. Previdi alleges that LoyaltyScript was developed with reference to and incorporated all of the Touch Tone confidential information that had been provided and disclosed to McKesson. Not coincidentally, LoyaltyScript was the name of the loyalty card that McKesson had supposedly been developing with Touch Tone. (*Id.* ¶ 47.)

Touch Tone then proceeded with the development of its own loyalty card, under the name "Loyalty Rx." Within a month, Previdi had located another company that could provide the adjudication

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services that were to have been provided by McKesson, and Touch Tone's Loyalty Rx card was on the market. Previdi alleges that McKesson's delaying tactics was a means to keep Touch Tone from getting to market before McKesson was ready with its competing card. (*Id.* ¶ 48.)

Thereafter, in March 2007, McKesson filed a patent application with the United States Patent and Trademark Office entitled: "Healthcare Provider, Administrator and Method for Effectuating a Medication Therapy Management, Adherence and Pharmacosurveillance Program" (the "McKesson Application"). The McKesson Application was published on or about October 4, 2007. It names Philip Villavicencio, Steve Hoffman and Steve Mink as inventors and defendant as sole assignee. (Second Amended Complaint ¶¶ 43-44.) PSKW asserts that the McKesson Application incorporates, discloses and claims ownership over some of Touch Tone's confidential information relating to co-pay offset loyalty card programs and methods that Touch Tone disclosed to McKesson in confidence. (*Id.* ¶ 45.)

PSKW commenced the within action in August 2007. Plaintiff's Second Amended Complaint, dated June 26, 2008, alleges causes of action for breach of contract (first cause of action), misappropriation of trade secrets (second cause of action), misappropriation of ideas (third cause of action), tortious interference with prospective contractual relations (fourth cause of action), unfair competition (fifth cause of action), breach of confidence (sixth cause of action), unjust enrichment (seventh cause of action), constructive trust (eighth cause of action), and a permanent injunction (ninth cause of action).

McKesson now moves for summary judgment dismissing the Complaint in its entirety.

Summary Judgment - Standard of Review

"[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue." *Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 (1978) (internal quotation marks and citations omitted). To obtain summary judgment, the proponent of the motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

Novelty

Defendant's motion assumes that each of plaintiff's causes of action are based on the unlawful use of plaintiff's New Co-Pay

Method idea and, therefore, argues that if the idea is not novel, then the entire case must be dismissed. *See Downey v. General Foods Corp.*, 31 NY2d 56, 61 (1972) ("Lack of novelty in an idea is fatal to any cause of action for its unlawful use.") Accordingly, defendant's motion *only* addresses the issue of novelty and does not address any of the other elements of the individual causes of action.

The definition of "novel" has developed in the case law of "submission of idea" cases, most often in the context of "misappropriation of idea" claims[2]. "Submission of idea" cases can sound in both contract or tort and the novelty requirement is defined as either "absolute" (novel to the world) or "specific"

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[2] Indeed, novelty is an element of a misappropriation of idea claim:

> [f]or an idea to be susceptible to a claim of misappropriation, two elements must be established. First a requisite legal relationship must exist between the parties, and second, the idea must be novel and concrete. The legal relationship between the plaintiff and defendant may be either a fiduciary relationship, or based on an express contract, an implied-in-fact contract, or a quasi-contract.

Oasis Music, Inc. v. 900 U.S.A., 161 Misc 2d 627, 631 (Sup Ct, NY Co 1994) (internal citations omitted); *see also Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F3d 368, 380 (2d Cir 2000) (". . . the idea at issue [must] be original and novel in absolute terms") (applying New York law); *Downey*, 31 NY2d at 61 (holding that the property right in an idea is based upon the two elements of novelty and originality).

(novel to the buyer of the idea) depending on whether the claim is based in tort or contract.[3] *Nadel*, 208 F3d at 375-380 (discussing *Apfel v. Prudential-Bache Sec.*, 81 NY2d 470, 477-478 (1993)).

The law is clear that "whether an idea is sufficiently novel or original to merit protection under New York law is amenable to summary disposition." *Ring v. Estee Lauder, Inc.*, 702 F. Supp. 76, 77 (SDNY 1988), *aff'd*, 874 F2d 109 (2d Cir. 1989) (citing *Murray v. Nat'l Broad. Co.*, 844 F2d 988, 992 (2d Cir. 1988)); *Kavanau v. Courtroom Television Network*, 1992 WL 197430, *4 (SDNY Aug. 3, 1992) (holding that "[w]hether an idea is novel is an issue of law which may be decided on a motion for summary judgment.").

It is also clear that "an idea which is a variation on a basic theme will not support a finding of novelty." *Ring*, 702 F. Supp. at 78 (citations omitted). To be protectable, an idea must:

> show genuine novelty and invention, and not merely clever or useful adaptation of existing knowledge. Improvement of standard technique or quality, the judicious use of existing means, or the mixture of known ingredients in somewhat different proportions - all the variations on a basic theme - partake more of

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[3] Here, the Court will only consider novelty in absolute terms, because plaintiff only alleges tort claims arising out of the unlawful use of its idea. Although it does allege a breach of contract cause of action for breach of the NDA, there can be no dispute that the NDA was entered into after the initial disclosure of the idea and does not contain terms for payment for use of the idea.

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> the nature of elaboration and renovation than innovation.

Kavanau, 1992 WL 197430, at *6 (quoting *Educ. Sales Programs v. Dreyfus Corp.,* 65 Misc.2d 412, 416 (Sup Ct, NY Co 1970)).

In *Kavanau,* the Court found that plaintiff's idea for

> (1) a 24-hour cable television network; (2) devoted to the nationwide broadcast of live crime-related trials and taped highlight segments; (3) [using] satellite uplink technology to permit switching between four trials in the style of ABC's "Wide World of Sports;" (4) [consisting of] a substructure of crime-related programming; and (5) [using] a host or anchorman at a central studio[]

was a "mere compilation of and expansion on existing television elements." 1992 WL 197430, at *6. While the Court found the idea to be "clever and useful, . . . the derivative nature of [the] idea demonstrate[d] its lack of novelty under New York law." *Id.*

Here, the idea is to create a bank card that is linked to the pharmacy adjudication process and can only be used to purchase the prescribed pharmacy product. (Tr. 29:8-12.) Specifically, the idea is based upon four principal elements:

(1) linkage of the card to the pharmacy adjudication process/ network;

(2) submission of the claim to a secondary payor to offset the patients' co-pay;

(3) real-time adjudication of the claim to the secondary

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payor (the pharmaceutical company); and

(4) realization of the co-pay offset at the time of sale.

(*See* Plaintiff's Second Amended Answers to Defendant's First Interrogatories, Answer to Interrogatory No. 3.) Defendant argues that the New Co-Pay Method was not novel because competitors in the field commercialized the same idea before McKesson's alleged use and before Previdi first approached McKesson in or about June 2004.

Moreover, McKesson argues that the New Co-Pay Method was not novel because it was improving on what was already in the marketplace, including its own product TrialScript. Hugh McCutchen, a McKesson business analyst, testified that the New Co-Pay Method was a next step from TrialScript:

> Q: When you left the meeting, what was your understanding of this new product?
>
> A: There was a new discount card offering. We had an existing business, TrialScript, which I had not been very involved in but I knew of it, and this was a kind of a revolutionary next step in that product.
>
> We were going to add on - the new product wasn't just about claims processing. What was particularly special about it was this . . . .

(McCutcheon Dep. 29:16-25, April 10, 2009.)

McKesson alleges that it introduced TrialScript in the early 1990s to allow patients to sample a prescription drug with no cost to the patient. McKesson points out that the TrialScript process requires computer systems to administer the program, which involves providing a suitable card to a patient through a physician, a patient presenting the card at the pharmacy, billing the drug maker for the cost over a financial network and providing the drug to the patient at the pharmacy counter. According to McKesson, it was one small step to the two-payor transaction used by McKesson in its current card, LoyaltyScript.

Next, McKesson argues that in 1999 the National Council for Prescription Drug Programs ("NCPDP"), a not for profit organization responsible for developing and introducing standards that pharmacies and pharmacy adjudication providers use to process prescription medicine claims, came up with the idea of handling two-payor systems (the "NCPDP v.5.1"). (Setty Aff. ¶¶ 55-56; Dufour[4] Aff. ¶¶ 23-26.) According to McKesson, the U.S. Department of Health and Human Services set October 16, 2003 as the date by which all retail pharmacies had to implement NCPDP v.5.1, but that deadline was then extended to 2005. (*Id.* ¶ 26.) It contends that at that point, a number of companies chose to use that second payor field to allow others to make those payments. Thus, McKesson contends, whether it was Medicare supplement insurance or the pharmaceutical company itself, the second payor field was already

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[4] Robert Dufour is McKesson's expert.

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in place and Previdi did not conceive of the idea. (Setty Aff. ¶ 64; Dufour Aff. ¶ 31; Tr. 5:12-14.)

McKesson next alleges that Opus Health ("Opus"), a competitor in the pharma adjudication and specialty pharma space, commercialized the New Co-Payment Method's principal elements as early as 2003. According to McKesson, Harvey Brofman, former Opus President, designed a program in 2001 to leverage the second payor field after studying NCPDP v.5.1. Opus then introduced a program called "DebitRx" in the fall of 2003, expressly using the New Co-Pay Method. McKesson argues that Brofman's DebitRx, as introduced in 2003, contained elements that correspond to the four principal elements of the New Co-Pay Method. Previdi, however, states that the Opus product was a "rewards card" that provided a patient with unrestricted cash on a debit card and which was specifically marketed as cash that the patient "can use anywhere in the store" for any purpose and that "can be used anywhere Visa/Mastercard is accepted." (Previdi Aff. ¶ 53; *see also* Bronfman Dep. 66:7-15, Dec. 12, 2008.)

McKesson next argues that TrialCard, another competitor, commercialized a program using the New Co-Pay Method by January 2004. McKesson states that David Cunningham ("Cunningham"), TrialCard's President, testified that he conceived of a program in

2001, also using the second payor field that NCPDP v.5.1 requires:

> Q: Has TrialCard ever offered a product that results in a co-pay reduction that utilized a debit card functionality?
>
> A: Yes, we did.
>
> Q: And in what time frame did TrialCard offer such a product?
>
> A: We started selling a product doing that in January '04 . . .
>
> Q: When did TrialCard stop offering a card that accomplished a co-pay reduction utilizing debit card functionality?
>
> A: I don't have the exact date, but it would have been during the 2005 time period, '04/'05 time period . . .
>
> Yeah, we - - we found it a very cumbersome product . . .
>
> Q: What about it was cumbersome?
>
> A: Multiple steps on behalf of the patient, on behalf of the pharmacy clerk and on behalf of the pharmacist. It was - they were forced to do and make efforts more so than they would with traditional just, you know, coordination of benefit claims.
>
> Specifically, the pharmacists would do a COB [coordination of benefits] transaction to TrialCard, that transaction then would kick off TrialCard loading a debit card at a bank processor with some value, returning a message to the pharmacist to tell the pharmacy - the pharmacist to tell the patient to use the card at checkout with the checkout clerk at the pharmacy. And then that whole process with the pharmacy clerk handling a swipe of a card was just a new adventure for them.

(Cunningham Dep. 20:7-14, 17-22, 21:10-11, 22:21-23:12, Jan. 8,

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2009.)

Based on all the evidence submitted, this Court finds that defendant has met its burden of showing that the New Co-Pay Method was not novel (in absolute terms) as a matter of law, and although it may have been a clever, useful idea, it was derivative of the various products that came before it. Indeed, plaintiff does not dispute that its idea was meant to address the problems or shortcomings of the earlier generation debit card programs. (Second Amended Compl. ¶ 6.) Accordingly, the Court finds that the New Co-Pay Method was an expansion and adaptation of existing knowledge, rather than the innovation of a new idea. Therefore, the third cause of action for misappropriation of ideas is dismissed.

The Court disagrees, however, with defendant's assertion that all of plaintiff's other claims arise out of the alleged unlawful use of its idea. In fact, plaintiff's claims also arise out of the alleged wrongful use of "Confidential Information" as defined by the parties' NDA. The Court will, therefore, not reach the merits of these claims as they have not been briefed on this motion.

Plaintiff's remaining claims, other than the third cause of action, are severed and continued. Counsel shall appear for a conference in IA Part 39, 60 Centre St. - Rm. 208 on February 5, 2014 at 10:00 a.m. to discuss going forward with the remainder of the claims.

This constitutes the decision and order of this Court.

Date: December 23, 2013

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.