UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRANSPERFECT GLOBAL, INC., Plaintiff, -vs- LIONBRIDGE TECHNOLOGIES, INC., and H.I.G. MIDDLE MARKET, LLC,, Defendants.	Index No.: 19-cv-03283 (DLC)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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Defendants Lionbridge Technologies, Inc. ("Lionbridge") and H.I.G. Middle Market, LLC ("H.I.G.") respectfully submit this memorandum of law in support of their motion to dismiss the Complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

This action is only the most recent example of vexatious and frivolous litigation initiated by Philip Shawe, owner and CEO of Plaintiff TransPerfect Global, Inc. ("TransPerfect"), arising from a Delaware Chancery Court auction process (a forced sale of TransPerfect precipitated by Shawe's egregious misbehavior), through which Shawe ultimately purchased the remaining 50% of TransPerfect from his co-founder. During the course of the auction process and related litigation, not only did Delaware Chancellor Bouchard find—in issued opinions—Shawe's conduct to be "reprehensible" and "disturbing," but the Chancellor also specifically found that Shawe made "repeated false statements under oath during the course of [the] litigation," intentionally spoliated evidence, "obstructed discovery, concealed the truth, and impeded the administration of justice."

In response to Shawe's pervasive misconduct, Chancellor Bouchard issued sanctions against Shawe of over $7 million. Shawe has filed scores of baseless lawsuits regarding the auction process, including actions against his co-founder's lawyers and financial advisors, the Custodian appointed by the Chancellor to sell TransPerfect, and against the State of Delaware. In a December 2017 order dismissing yet another lawsuit brought by Shawe against his co-founder's lawyers, a Delaware federal district court noted that Shawe was on "strike two" towards a nationwide filing injunction, and that "any future court plagued by subsequent frivolous lawsuits brought by Shawe to collaterally attack the Delaware rulings should very seriously consider imposing an injunction to put a final end to this behavior."

The latest victims of Shawe's unhealthy obsession with the auction process, the defendants in the present frivolous action, were one of several bidders in the TransPerfect auction. H.I.G., an affiliate of private equity investment firm H.I.G. Capital, indirectly owns a majority interest in Lionbridge, a provider of language and digital communications solutions and a competitor with TransPerfect. H.I.G. and Lionbridge were invited by the Custodian and his advisors to participate as a potential strategic buyer in the auction for TransPerfect (along with 90 or so other potential bidders). As an invited participant in the auction, H.I.G. executed a confidentiality agreement and a clean room agreement with the Custodian, which provided for H.I.G./Lionbridge to have access to certain TransPerfect information and limited their use of such information to the purpose of due diligence in preparing bids for TransPerfect. H.I.G./Lionbridge submitted six different bids during the months-long auction process for TransPerfect, and H.I.G./Lionbridge and Shawe were ultimately the two final bidders competing for ownership of TransPerfect. In November 2017, the Custodian accepted Shawe's final bid for TransPerfect over the final bid by H.I.G./Lionbridge and Chancellor Bouchard affirmed the Custodian's decision.

Now, in a flagrant effort to retaliate against a competitor for participating in the auction process, Shawe has initiated this action alleging, without any basis, the farcical claim that H.I.G./Lionbridge (which, again, submitted six bids, came in second out of 90-plus bidders, and even legally challenged the Custodian's final decision) participated in the auction only in order to access TransPerfect proprietary information and to compete unfairly.

Plaintiff's Complaint is legally defective in virtually every respect.

First, Plaintiff fails to plead any viable claim under the Defend Trade Secrets Act ("DTSA"). Plaintiff's allegations (Counts I through III) are devoid of any reference to any information that H.I.G./Lionbridge may have reviewed from the data room or otherwise received

that is a trade secret of TransPerfect, how such information was protected as secret by TransPerfect, and how H.I.G./Lionbridge misappropriated any such information. The complaint makes reference, for example, to allegedly misappropriated TransPerfect customer names, but names of TransPerfect's customers are not a trade secret and are in fact prominently featured on the company's website.

Second, Plaintiff's attempt to plead a trade secret claim under New York common law (Count IV) is futile. In addition to being substantively defective for the same reasons as the DTSA claims, this claim must be dismissed because Delaware law is plainly applicable here. The confidentiality agreement entered by H.I.G. and TransPerfect mandates application of Delaware law: H.I.G. is a Delaware limited liability company, Lionbridge is a Delaware company, TransPerfect was a Delaware company during the relevant time period, and all of the relevant events here occurred in connection with an auction process directed by the Delaware Chancery Court. It is beyond doubt that Delaware's Uniform Trade Secret Act, which differs substantially from New York's common law on trade secrets, would apply to a state trade secret claim here.

Finally, Plaintiff's unjust enrichment and fraud claims both fail as a matter of law. Plaintiff cannot state a claim for unjust enrichment where, as here, it has an adequate remedy at law through the confidentiality agreement entered into with H.I.G in connection with the auction. And, Plaintiff does not and cannot plead facts to support a plausible fraud claim, much less plead a fraud claim with the specificity required by Federal Rule of Civil Procedure 9(b).

SUMMARY OF ALLEGATIONS

A. The Forced Sale of TransPerfect

TransPerfect is a provider of translation, website localization and litigation support services, which was founded in 1992 by Shawe and Elizabeth Elting ("Elting"). Compl. ¶¶ 21, 22. In April 2014, Elting, who had been 50% owner and co-CEO with Shawe since the company's

founding, filed a petition in the Delaware Court of Chancery seeking dissolution and the forced sale of TransPerfect, based largely on persistent and gross misconduct by Shawe. *Id.* ¶ 27. In August 2015, the Chancery Court (Chancellor Bouchard) ordered TransPerfect to be sold, over Shawe's objections. *Id.* ¶ 28. Chancellor Bouchard's August 2015 opinion detailed a number of reasons for granting Elting's request, including a substantial emphasis on extraordinary misconduct by Shawe: "Shawe engaged in a secret campaign to spy on Elting and invade her privacy by intercepting her mail, monitoring her phone calls, accessing her emails (including thousands of privileged communications with her counsel), and entering her locked office without permission on numerous occasions . . . ." *In re Shawe & Elting LLC*, No. 9686-CB, 2015 WL 4874733, at *27 (Del. Ch. Aug. 13, 2015). After further litigation, Chancellor Bouchard appointed a Custodian to conduct the sale of TransPerfect, and approved the implementation of an auction process. *In re TransPerfect Glob., Inc.*, Nos. 9700-CB, 10449-CB, 2016 WL 3949840 (Del. Ch. Jul. 18, 2016).[1]

B. The Auction Process

From March to November 2017, the Custodian and his advisors conducted an extensive sale process. "Approximately 97 financial and strategic firms were solicited to participate, 65 of

[1] Two days after issuing the Sale Order, Chancellor Bouchard issued a scathing opinion sanctioning Shawe for his egregious misconduct in connection with the litigation. *In re Shawe & Elting LLC*, No. 9661-CB, 2016 WL 3951339 (Del. Ch. Jul. 20 2016), *aff'd sub nom Shawe v. Elting*, 157 A.3d 142 (Del. 2017). The sanctions order established that "Shawe acted in bad faith and vexatiously during the course of the litigation in three respects: (1) by intentionally seeking to destroy information on his laptop computer after the Court had entered an order requiring him to provide the laptop for forensic discovery; (2) by, at a minimum, recklessly failing to take reasonable measures to safeguard evidence on his phone, which he regularly used to exchange text messages with employees and which was another important source of discovery; and (3) by repeatedly lying under oath—in interrogatory responses, at deposition, at trial, and in a post-trial affidavit—to cover up aspects of his secret deletion of information from his laptop computer and extraction of information from the hard drive of Elting's computer." *Id.* at *1.

which entered into confidentiality agreements." *In re TransPerfect Glob., Inc.*, Nos. 9700-CB, 10449-CB, 2018 WL 904160, at *1 (Del. Ch. Feb. 15, 2018). H.I.G. entered into a confidentiality agreement with TransPerfect (executed by the Custodian) on June 2, 2017 (the "Confidentiality Agreement"). Compl. ¶ 60. The Confidentiality Agreement has a two-year term and provides for governance by the laws of the State of Delaware. Ex. 1 (Confidentiality Agreement, ¶¶ 18, 19).[2]

On August 7, 2017, the Custodian's advisor, Credit Suisse, provided ten bidders, including H.I.G./Lionbridge, with access to a data room and invited the bidders to meet with members of TransPerfect's management. Compl. ¶ 67. On October 26, 2017, H.I.G. and the Custodian entered into a "Clean Room Agreement," Ex. 2, pursuant to which "certain advisors for H.I.G. agreed to review the information in the Clean Room and to provide a written summary . . . to Defendants, which did not include customer names, pricing, cost or other similar Proprietary Information." Compl. ¶ 89. "After three formal rounds of bidding and an informal fourth round to elicit 'final' bids, two leading bidders emerged: Shawe and H.I.G. Middle Market, LLC, the owner of TransPerfect's leading competitor." *In re TransPerfect Glob., Inc.*, 2018 WL 904160, at *1. The Custodian chose to finalize a transaction with Shawe rather than H.I.G./Lionbridge because "the Custodian believed that Shawe ultimately would offer greater consideration than H.I.G. with fewer closing conditions and better terms (*e.g.,* indemnification and releases), while retaining virtually all of the Company's employees . . . ." *Id*. Chancellor Bouchard approved the Custodian's decision, and Shawe closed the transaction in May 2018 by purchasing the remaining shares of TransPerfect from Elting.

[2] All Exhibits are attached to the concurrently-filed Marks Declaration.

C. Continued Frivolous Auction-Related Litigation and Then This Action

According to the Custodian, Shawe and close colleagues of his at TransPerfect filed over a dozen lawsuits related to the auction process. *Id*. at *20. Chancellor Bouchard, in his opinion approving the Custodian's decision choosing to finalize a transaction with Shawe, referred to Shawe's "proclivity to litigate at the drop of a hat," labeled Shawe a "serial litigator," and observed that Shawe "seems to engage in litigation as a way of life." *Id*. at *2, *20–21.

Several of the auction-related actions initiated by Shawe were dismissed with very strong language by the courts. For example, Shawe filed a complaint in Delaware federal court against Elting's Delaware counsel alleging that the law firm had "maliciously and intentionally" misrepresented certain fees incurred in connection with the Court of Chancery sale litigation.[3] The district court dismissed Shawe's complaint in its entirety, with prejudice, and granted the law firm's Rule 11 sanctions motion against Shawe and his counsel, ordering them to pay the defendant law firm's fees. The Delaware district court noted the following regarding the monetary sanction against Shawe: "We specifically find that imposition of attorneys' fees and costs is necessary to deter Shawe from continuing his harassing litigation behavior; it is clear from the three dismissals in the New York Supreme Court and the dismissal in a fellow Delaware District Court that mere dismissal of the action would be insufficient for deterrence." *Shawe v. Potter Anderson & Corroon LLP*, No. 1:17-CV-1348-JEJ, 2017 WL 6397342, at *4 (D. Del. Dec. 8, 2017). The Delaware district court further observed that "it appears that Shawe may not be adequately deterred by dismissal and an order of sanctions, as he has faced both in the history of his litigation efforts related to these matters," advised that "any future court plagued by subsequent frivolous lawsuits

[3] The law firm had submitted its fees to the Delaware Chancery Court in connection with the sanctions order against Shawe.

brought by Shawe to collaterally attack the Delaware rulings should very seriously consider imposing a[] [filing] injunction to put a final end to this behavior." *Id*. at *5.

In the Complaint filed on its behalf here, TransPerfect alleges (again, notwithstanding H.I.G./Lionbridge having made six bids, becoming a finalist in the auction, and seeking to intervene to challenge the Custodian's declaration of Shawe as the winning bidder, *etc.*) that H.I.G./Lionbridge participated and submitted bids in the auction in bad faith and only to gain access to the Company's business information—that H.I.G./Lionbridge "downloaded [TransPerfect's] top client lists, pricing information, commission schedules, employee files, and sales strategies" and have somehow used TransPerfect's information to compete unfairly. Compl. ¶¶ 6-8. TransPerfect conclusorily alleges that "Lionbridge has revamped its sales strategy, product offerings and pricing to mirror that of [TransPerfect] and continues to use [TransPerfect's] trade secrets to poach [TransPerfect's] clients." *Id*. ¶¶ 8, 112-122.

TransPerfect purports to plead in the Complaint causes of action under the Defend Trade Secrets Act (Counts I to III) and claims for misappropriation of trade secrets under New York common law (Count IV), unjust enrichment (Count V) and fraud (Count VI).

Shawe announced that he was commencing this action in a Richard Johnson *Page Six* New York Post article, in which he stated that "winter is coming for Lionbridge." Ex. 3.[4]

ARGUMENT

To survive a motion to dismiss, a plaintiff must allege facts sufficient "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim

[4] Shawe's "winter is coming" quote was given with the backdrop of the season premiere of Game of Thrones. According to the Game of Thrones Wiki site, the phrase "winter is coming" in the context of the Games of Thrones are words "of warning and constant vigilance." *See* https://gameofthrones.fandom.com/wiki/Winter_Is_Coming_(motto) (last visited June 24, 2019).

is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Conclusory allegations are "not entitled to be assumed [to be] true." *Id*. at 681. A complaint cannot survive a motion to dismiss if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id*. at 679.

The factual allegations must be "sufficient to raise a right to relief above the speculative level." *Elsevier Inc. v. Doctor Evidence, LLC*, No. 17-CV-5540 (KBF), 2018 WL 557906, at *5 (S.D.N.Y. Jan. 23, 2018) (citing *ATSI Commc'ns Inc. v. Shaar Fund Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)). The court should give "no effect to legal conclusions couched as factual allegations." *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (citing *Twombly*, 550 U.S. at 555). "In addition to the allegations in the complaint itself, a court may consider documents attached as exhibits, incorporated by reference, or relied upon by the plaintiff in bringing suit, as well as any judicially noticeable matters." *Ace Sec. Corp. Home Equity Loan Tr. v. DB Structured Prods. Inc*., 5 F. Supp. 3d 543, 551 (S.D.N.Y. 2014).

I. Plaintiff's DTSA Claims Should Be Dismissed Because The Complaint Fails To Adequately Plead Various Elements.

TransPerfect's DTSA claims (Counts I through III) must be dismissed because they fail to plead any information that H.I.G./Lionbridge may have reviewed or otherwise received that constitutes a trade secret owned by TransPerfect under the DTSA, what steps TransPerfect took to protect the confidentiality of that particular information, or how such information has been misappropriated by H.I.G./Lionbridge.

A. The Complaint Does Not Adequately Identify Any Information That Rises To The Level Of A Trade Secret Under The DTSA.

The DTSA protects trade secrets, which are defined as "all forms and types of financial, business, scientific, technical, economic, or engineering information" that "the owner thereof has

taken reasonable measures to keep such information secret," and that has an economic value because it is not "generally known." 18 U.S.C. § 1839(3). "Trade secrets are a narrow category of confidential information; to survive a motion to dismiss, a party alleging that it owns a trade secret must put forth *specific allegations* as to the information owned and its value." *Elsevier Inc.*, 2018 WL 557906, at *4 (emphasis added) (citing *IDX Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581, 583 (7th Cir. 2002); *Next Commc'ns v. Viber Media, Inc.*, 2016 WL 1275659, at *3 (S.D.N.Y. Mar. 30, 2016)).

Information is not a "trade secret" merely because it is confidential. New York federal courts (interpreting the DTSA) generally consider the following factors in defining a trade secret: "(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Elsevier Inc.*, 2018 WL 557906, at *3-*4 (citing *In re Document Techs. Litig.*, 275 F. Supp. 3d 454, 461-62 (S.D.N.Y. 2017)). The Complaint falls short of this standard in multiple respects.

1. The Complaint Fails to Identify Any Trade Secrets.

TransPerfect claims in the most conclusory manner the following trade secrets were misappropriated by H.I.G./Lionbridge: "information regarding TPG's"

- "business"
- "operations"
- "services"

- "clients (including annual revenue from particular clients, and client preferences)"
- "pricing"
- "sales and marketing strategies"
- "other Proprietary Information," which is defined as "sales models, marketing strategies, unique cost and pricing structures, compensation models and commission schedules[,]" and "unique customer and vendor relationships based on particularized presentations and embodied in separately negotiated customer and vendor contracts," and
- "financial information".

Compl. ¶¶ 23, 126. None of these broadly pled categories of information, however, can support a claim under the DTSA. While TransPerfect "need not plead the trade secret claim with specificity in the complaint," "it must do more than simply list general categories of information" to comply with *Twombly* and *Iqbal*. *Elsevier Inc.*, 2018 WL 557906, at *6 (citing *Bancorp Servs., LLC v. Am. Gen. Life Ins. Co.*, No. 14-cv-9687, 2016 WL 4616969, at *11 (S.D.N.Y. Feb. 11, 2016)). TransPerfect has failed to do so.

Consider, for example, TransPerfect's claims regarding its "Proprietary Information" with respect to pricing and compensation. The Complaint provides no explanation regarding how TransPerfect's compensation models or pricing structures somehow qualify as trade secrets; TransPerfect offers no explanation of what components of this information make them trade secrets, the time or resources TransPerfect dedicated to establishing them, how they are valuable to TransPerfect as trade secrets, or how difficult it might be for another company to derive the same information without access to TransPerfect's models. *See* Compl. ¶¶ 116-117 (alleging that

Lionbridge gained "the unfair advantage of knowing TPG's proprietary pricing information" and alleging that Lionbridge is "revamping its *sales force and strategy* to better match TPG's proprietary methodology" without indicating how or why those general categories of information are proprietary or constitute trade secrets under the DTSA) (emphasis added); *id.* ¶ 117 (alleging "Lionbridge is also revamping its *sales force and strategy* to better match TPG's proprietary methodology[,]" but failing to describe what TransPerfect's methodology is or how it is proprietary) (emphasis added).

The broad categories of so-called "proprietary" information listed in the Complaint cannot support a claim under the DTSA. Such "[g]eneral allegations regarding 'confidential information' and 'processes' simply do not give rise to a plausible trade secrets claim." *Elsevier Inc.*, 2018 WL 557906 at *6; *see also id*. at *4 (citing *Next Commc'ns, Inc. v. Viber Media Inc.*, No. 14-cv-8190, 2016 WL 1275659, at *3 (S.D.N.Y. Mar. 30, 2016) ("New York and Second Circuit law . . . requires the trade secret claimant to describe the secret with sufficient specificity that its protectability can be assessed.") (citation omitted)).

2. The Complaint Does Not Allege Adequate Steps Taken To Preserve The Confidentiality Of TransPerfect's "Proprietary Information."

The Complaint likewise falls short in alleging steps taken by TransPerfect to maintain the confidentiality of its purported trade secrets. "For good reason, the law requires that before information or processes may be accorded trade secret status, it must be shown that it is truly trade secret—a standard far greater than the standard for confidentiality of business information." *Elsevier Inc.*, 2018 WL 557906, at *5.

At least some of the information identified in the Complaint is public information that cannot support a claim for misappropriation of trade secrets. TransPerfect's customer list, for

example, appears prominently on the company's website on a page entitled "Client List."[5] *See* Compl. ¶ 112. As another example, the Complaint alleges that "[a]fter accessing TPG's Proprietary Information and trade secrets," "Lionbridge's website no longer casts a wide net to service the automotive, industrial manufacturing, travel and hospitality and retail sectors; rather the cite [sic] has been refocused on particular industries it learned were the largest revenue generators for TPG" *Id*. ¶ 114-115. But the industries TransPerfect services are again publicly disclosed on TransPerfect's website.[6] And, it is entirely unclear from the face of the Complaint how identification of the industries TransPerfect serves constitutes confidential information or why these industries are not obvious markets for the two largest companies in the translation services business. Such allegations cannot support a claim for misappropriation of trade secrets. *See In re Document Techs. Litig*., 275 F. Supp. 3d 454, 462 (S.D.N.Y. 2017) ("Putting aside for a moment that [plaintiff's] website publicly states that it operates in these regions, . . . , there is nothing 'confidential' about the fact that [the regions] are obvious markets. [Plaintiff] does not have a monopoly on entire geographic regions, and cannot prevent competition in such areas by twisting the contours of trade secrets law.").

As to other categories identified in the Complaint, TransPerfect asserts in conclusory fashion that its proprietary information is confidential without explaining the steps taken to preserve the confidentiality of that information. The Complaint lists a variety of generalized security measures TransPerfect broadly takes to protect the confidentiality of its business information, *see* Compl. ¶ 24, but fails to connect these general measures with any of the specific

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5 *See* Ex. 4 (Client List, TransPerfect.com, https://www.transperfect.com/about/experience.html (last visited June 25, 2019)).

6 *See* Ex. 5 (What we do, TransPerfect.com, https://www.transperfect.com/what_we_do/what_we_do (last visited June 24, 2019)).

trade secrets it seeks to put at issue. Indeed, the court in *CPI Card Group, Inc. v. Dwyer*, found that the plaintiff asserting DTSA claims was unlikely to succeed on the merits because although it "generally point[ed] to the measures it takes to protect confidential information, [it] has not shown a likelihood of proving that it took reasonable measures to protect the secrecy of the contents of *this* particular presentation," which it claimed contained trade secrets. 294 F. Supp. 3d 791, 808-09 (D. Minn. 2018) (emphasis in original) (denying motion for preliminary injunction for plaintiff's DTSA claims). So too here, TransPerfect's generalized assertions are insufficient to establish the confidentiality requirement under the DTSA. *See Dichard v. Morgan*, No. 17-cv-00338-AJ, 2017 WL 5634110, at *2 (D.N.H. Nov. 22, 2017) (recognizing the "general consensus among courts that a party asserting a DTSA claim must sufficiently allege in its complaint that it has taken reasonable measures to keep secret *the information it believes was misappropriated*") (emphasis added) (collecting cases).

The Complaint does not explain, for example, the specific steps tak[en] to protect the confidentiality of TransPerfect's "unique cost and pricing structures, compensation models[,] commission schedules," or "unique customer and vendor relationships" such that they should be treated as trade secrets. Compl. ¶ 23. TransPerfect's vague and conclusory allegations that it has a firewall and that its computer systems are password-protected are insufficient to allege the existence of trade secrets. *See Elsevier Inc.*, 2018 WL 557906, at *3-*4 (citing *In re Document Techs. Litig.*, 275 F. Supp. 3d at 462 (listing factors considered in determining what constitutes a trade secret)).

3. The Complaint Does Not Establish The Value Of Its "Proprietary Information."

Furthermore, TransPerfect has not established that its alleged "Proprietary Information" "derives independent economic value, actual or potential, from not being generally known to, and

not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information," as required by the DTSA. 18 U.S.C. § 1839(3)(B). TransPerfect's conclusory allegation that its "Proprietary Information" is "valuable in the industry," *see* Compl. ¶¶ 126, 138, 150, is insufficient to survive a motion to dismiss. TransPerfect has not "proffered facts concerning the value and competitive advantage that [its purported trade secrets] could provide to others." *Universal Processing LLC v. Weile Zhuang*, No. 17 CV 10210-LTS, 2018 WL 4684115, at *3 (S.D.N.Y. Sept. 28, 2018) (granting motion to dismiss DTSA claim).

B. The Complaint Fails to Allege Misappropriation.

Although the initial pleading standard on the element of misappropriation does not require particularity, the facts alleged in the Complaint fail to raise a plausible inference that a misappropriation has occurred here. Plaintiff cites in its Complaint, for example, a Slator.com article in support of its allegation that H.I.G./Lionbridge engaged in the auction process in bad faith in order to misappropriate TransPerfect trade secrets. Compl. ¶ 113. However, the cited quotation from Lionbridge CEO John Fennelly about Lionbridge becoming a "very different company" refers explicitly to Fennelly taking over as CEO in July 2017,[7] and explains that "[s]ince arriving at Lionbridge, Fennelly has been restructuring the company's senior ranks, hiring executives he had worked with in previous companies."[8] The changes to Lionbridge alleged in the Complaint, Paragraphs 117-122, are wholly consistent with changes in Lionbridge's management ***in 2017***. Moreover, TransPerfect has not adequately alleged how the purported

[7] *See* Ex. 6 (Lionbridge Will be a "Very Different Company", Says CEO John Fennelly, Slator.com, https://slator.com/ma-and-funding/lionbridge-will-different-company-says-ceo-john-fennelly/ (last visited June 24, 2019)).

[8] *Id*.

changes such as how leanly staffed Lionbridge's sales force is, *see* Compl. ¶ 120, suggests that Lionbridge is using information from TransPerfect that might be trade secret. Plaintiff does not allege that the changes at Lionbridge amount to anything more than "mere competition," and not misappropriation under the DTSA. *Xavian Ins. Co. v. Marsh & McLennan Cos., Inc.*, No. 18CV8273 (DLC), 2019 WL 1620754, at *5 (S.D.N.Y. Apr. 16, 2019) (Cote, J.) (DTSA's "narrow definition of a trade secret make[s] it clear that we are talking about extraordinary theft, not mere competition").

C. The Court Should Dismiss Plaintiff's Claims Based on "Proprietary Information."

At a minimum, the Court should dismiss Plaintiff's DTSA claims to the extent they are based on the alleged misappropriation of its "Proprietary Information." According to TransPerfect's broad categorical definitions of what constitutes its "Proprietary Information," such materials are not subject to protection under the DTSA. *See* Compl. ¶ 23 (defining "Proprietary Information"); *see also id.* ¶¶ 127-31, 138-44, 149-58 (basing Counts I-III -- Plaintiff's DTSA claims -- on the purported misappropriation of TransPerfect's "Proprietary Information"). As discussed *supra*, I.A.1, the DTSA does not protect general categories of purported confidential information. Indeed, "the law requires that before information or processes may be accorded trade secret status, it must be shown that it is truly trade secret—a standard far greater than the standard for confidentiality of business information." *Elsevier Inc.*, 2018 WL 557906 at *5-*6 (finding allegations of "the existence of general categories of 'confidential information' . . . does not give rise to a plausible allegation of a trade secret's existence"). The Court should therefore dismiss Plaintiff's DTSA claims to the extent they are based on its "Proprietary Information."

II. The State Trade Secret Misappropriation Claim Is Not Governed By New York Law, And Therefore Should Be Dismissed.

Count IV, pled as misappropriation of trade secrets under New York state common law, should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, because Delaware law, and not New York law, applies here.

A. The Confidentiality Agreement Is Governed By Delaware Law.

Although TransPerfect's state law claims are pled in tort, their allegations arise from a contract, the Confidentiality Agreement signed by H.I.G. and the Custodian, on behalf of TransPerfect, on June 2, 2017. The Confidentiality Agreement states that it "shall be governed by, and construed in accordance with, the laws of the State of Delaware, without regard for the principles of the conflicts of law thereof." The Agreement goes on to state that "[e]ach party hereto submits to the exclusive jurisdiction of any federal or state court with subject matter jurisdiction in the State of Delaware in respect of any action or proceeding ***arising out*** of this Agreement . . . ." (emphasis added).[9]

New York courts generally give effect to a choice of law clause as long as it bears a reasonable relationship to the parties or transaction. *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 7 N.Y.3d 624, 629 (2006). The Second Circuit has found that when contractual choice of law provisions are drafted broadly, they may govern tort claims "arising out of" the contracts. In *Turtur v. Rothschild Registry International, Inc.*, 26 F.3d 304, 310 (2d Cir. 1994), the Second Circuit found that a choice of law provision almost identical to the one agreed to by H.I.G. and

[9] Although H.I.G. has chosen to waive the forum selection clause and submit to the jurisdiction of New York courts, it may enforce the choice of law provision. *See PNCEF, LLC v. OZ Gen. Contracting Co*., No. CV 11-724 (SJF) (ARL), 2012 WL 4344538, at *4 (E.D.N.Y. Aug. 2, 2012), *report and recommendation adopted sub nom*. *OZ Gen. Contracting Co. v. Timesavers, Inc.*, No. 11-CV-724 (SJF)(ARL), 2012 WL 4344500 (E.D.N.Y. Sept. 21, 2012) (waiving Minnesota forum selection clause, but enforcing Minnesota choice of law provision).

TransPerfect governed the common law fraud claims that had arisen out of the contract between the parties. Accordingly, the Court should give effect to the choice of law provision here and apply Delaware law to Plaintiff's state law claims.

B. New York Courts Apply The Law Of The Jurisdiction With The Greatest Interest In The Litigation.

Even putting the Confidentiality Agreement's choice of law provision to the side, under New York choice of law rules, Delaware law applies here. In deciding which state's substantive body of law to apply, a court must first determine whether a conflict exists between the laws of the two states being considered. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155, 157 (2d Cir. 2012). As Delaware has adopted the Uniform Trade Secrets Act (DUTSA), while New York has not, such a conflict exists here. *Stanacard, LLC v. Rubard, LLC*, No. 12 Civ. 5176, 2016 WL 462508, at *17 (S.D.N.Y. Feb. 3, 2016) (finding that the definition of trade secret and certain prerequisites to a claim differ between the DUTSA and a New York common law trade secret claim).

Since a true conflict exists, the Court must determine between New York and Delaware, the jurisdiction with the greatest interest in or relationship to the dispute. *White Plains Coat & Apron Co. v. Cintas Corp.*, 460 F.3d 281, 284–285 (2d Cir. 2006); *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.,* 933 F.2d 131, 137 (2d Cir. 1991). In analyzing which state has the greatest interest in a tort dispute, New York distinguishes conduct-regulating rules, which are intended to guide behavior ex-ante, and loss-allocating rules, which are intended to "prohibit, assign, or limit liability after the tort occurs." *Licci*, 672 F.3d at 158 (quoting *DeMasi v. Rogers*, 34 A.D.3d 720, 721 (2d Dep't 2006). New York courts consider trade secret misappropriation rules to be conduct-regulating. "If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest

interest in regulating behavior within its borders." *Licci*, 672 F.3d at 158 (quoting *GlobalNet Financial.Com, Inc. v. Frank Crystal & Co.*, 449 F.3d 377, 384 (2d Cir. 2006)).

Here, Delaware undeniably has the greatest interest in regulating the behavior at issue, because the alleged misappropriation occurred through a Delaware-administered transaction. This dispute, albeit manufactured by Shawe, revolves around an auction overseen by the Delaware Court of Chancery, which occurred as a result of extensive litigation between Shawe and Elting in the Delaware Court of Chancery and the Delaware Supreme Court. Additionally, Defendants Lionbridge and H.I.G. are both Delaware corporations, and throughout the auction and period where the alleged misconduct occurred, TransPerfect was also a Delaware corporation, only recently having moved its domicile to Nevada in August 2018. The Confidentiality Agreement, which, as discussed, is governed exclusively by Delaware law, was signed by H.I.G. and TransPerfect. Furthermore, Delaware has an interest in assuring that its court-ordered auction processes are appropriately and fairly conducted.

It is well established that claims based on one state's laws should be dismissed when the laws of another state govern. *See Coscarelli v. Esquared Hosp. LLC*, 364 F. Supp. 3d 207, 226 (S.D.N.Y. 2019) (dismissing contract claims under California law because a New Yok choice of law provision applied); *Rostropovich v. Koch Int'l Corp.*, No. 94 CIV. 2674 (JFK), 1995 WL 104123, at *9 (S.D.N.Y. Mar. 7, 1995) (dismissing publicity rights claims under California law because New York law governed); *Zoll v. Ruder Finn, Inc.*, No. 02 Civ. 3652(CSH), 2003 WL 22283830, at *11 (S.D.N.Y. Oct. 2, 2003) (dismissing privacy claims under California law because New York law governed). Here, since Delaware law applies, TransPerfect's claims under New York law should be dismissed.

III. The Unjust Enrichment Claim Is Displaced By The Confidentiality Agreement.

Count V, unjust enrichment, should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, because it is displaced by remedies available under a valid, binding contract, the Confidentiality Agreement between TransPerfect and H.I.G. *See* Compl. ¶ 60. Under Delaware law, unjust enrichment is an equitable remedy requiring proof of "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law." *Fitzgerald, L.P. v. Cantor*, No. C.A. 16297, 1998 WL 326686, at *6 (Del. Ch. June 16, 1998).[10]

The final element requires the absence of a remedy provided by law. Here, there are contract remedies. "It is a well-settled principle of Delaware law that a party cannot recover under a theory of unjust enrichment if a contract governs the relationship between the contesting parties that gives rise to the unjust enrichment claim." *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 58 (Del. Ch. 2012). As a quasi-contract remedy, an unjust enrichment claim cannot be brought when a contract represents the intentions of the parties. *Moon Express, Inc.*, 2017 WL 4217335,

[10] In the event that TransPerfect seeks to replead its state misappropriation claim under Delaware law, the unjust enrichment claim will also be preempted by the Delaware UTSA (DUTSA), which explicitly states that "this chapter displaces conflicting tort, restitutionary and other law of this State providing civil remedies for misappropriation of a trade secret." 6 Del. C. § 2007(a). "[DUTSA] Section 2007 was intended to preserve a single tort cause of action under state law for misappropriation as defined in 6 Del. C. § 2001(2) and thus to eliminate other tort causes of action founded on allegations of trade secret misappropriation." *Moon Express, Inc. v. Intuitive Machs., LLC*, No. 16-344-LPS-CJB, 2017 WL 4217335, at *10 (D. Del. Sept. 22, 2017); *Yeiser Research & Dev. LLC v. Teknor Apex Co.*, 281 F. Supp. 3d 1021, 1052 (S.D. Cal. 2017) ("to the extent the claim rests on Teknor's alleged misappropriation of such information, the claim is grounded in the same facts as YRD's trade secrets misappropriation claim and is preempted by the DUTSA"). Here, TransPerfect does not plead any facts distinct from the misappropriation claims. Just six sentences long, TransPerfect's unjust enrichment claim repeats the same misappropriation allegations from the previous counts.

at *8 ("In short, if there is a contract between the complaining party and the party alleged to have been enriched unjustly, then the contract remains 'the measure of [the] plaintiff's right.'"); *see also Restatement (Third) of Restitution & Unjust Enrichment* § 2 (2011) ("A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.").

When there is a governing contract, an unjust enrichment claim is to be dismissed. *See Moon Express, Inc.,* 2017 WL 4217335, at *9; *Res. Ventures, Inc. v. Res. Mgmt. Int'l, Inc.*, 42 F. Supp. 2d 423, 440 (D. Del. 1999) (dismissing an unjust enrichment claim under Delaware law because there was a valid contract between the parties); *Albert v. Alex Brown Mgmt. Servs., Inc.*, No. Civ.A. 762-N, Civ.A 763-N, 2005 WL 2130607, at *8 (Del. Ch. Aug. 26, 2005) (dismissing an unjust enrichment claim "when the existence of a contractual relationship [was] not controverted"); *Bakerman v. Sidney Frank Importing Co.*, No. CIV.A. 1844-N, 2006 WL 3927242, at *18 (Del. Ch. Oct. 10, 2006) ("When the complaint alleges an express, enforceable contract that controls the parties' relationship, however, a claim for unjust enrichment will be dismissed.").

Given the existence of the Confidentiality Agreement, which delineates the relationship between TransPerfect and H.I.G. regarding confidential information, TransPerfect cannot maintain an unjust enrichment claim outside of that contract.[11]

[11] Even under New York law, which does not apply here, TransPerfect's unjust enrichment claim would be duplicative of its trade secret misappropriation claim and subject to dismissal. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012).

IV. The Fraud Claim Has Not Been Adequately Pled.

A. TransPerfect Has Not Pled Facts to Support a Plausible Fraud Claim.

TransPerfect's fraud claim (Count VI) should be dismissed because it has not been pled with sufficient facts to support a claim that is "plausible on its face."[12] *Twombly*, 550 U.S. at 570. As previously discussed, a claim must be pled with "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. A complaint cannot survive a motion to dismiss if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id.* at 679.

Here, TransPerfect pleads only bald, conclusory allegations that H.I.G. did not genuinely intend to purchase TransPerfect and that it deceived TransPerfect into providing it with confidential proprietary information. TransPerfect alleges that H.I.G. believed it would be "imprudent" to bid against Shawe unless it knew that Shawe would be excluded from the translation industry by a non-compete requirement. Compl. ¶¶ 4-5. TransPerfect claims, with no basis, that H.I.G. valued a non-compete from Shawe at "hundreds of millions of dollars" and that during the auction process H.I.G. "switched gears" to participate in the auction for the purpose of misappropriating trade secrets rather than attempting to buy that company. *Id.* ¶ 70. TransPerfect further alleges that H.I.G.'s "representations" in its bids and in the Clean Room Agreement, were fraudulent, as they "were intended to, and did, deceive [TransPerfect] and induce it to provide H.I.G. with access to confidential Proprietary Information and trade secrets . . . ." *Id.* ¶ 177, 178.

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[12] If TransPerfect were to replead its state trade secret misappropriation claim under Delaware law, like unjust enrichment, its fraud claim would be displaced by a DUTSA claim. *See Ethypharm S.A. France v. Bentley Pharms., Inc.*, 388 F. Supp. 2d 426, 434 (D. Del. 2005) (fraud claim alleging that "false statements, assurances and omissions resulted in plaintiffs permitting [defendant] continued access to plaintiffs' trade secrets" was grounded in the same factual basis as plaintiff's DUTSA claim, and therefore was dismissed).

None of these conclusory allegations suggest more than the "mere possibility of misconduct." *See 456 Corp. v. United Nat. Foods, Inc.*, No. 3:09CV1983 (JBA), 2011 WL 87292, at *2 (D. Conn. Jan. 11, 2011) (dismissing fraud claim because plaintiff failed to plead facts sufficient for the court to plausibly infer that defendants misrepresented their intentions); *Yee Ting Lau v. Pret A Manger (USA) Ltd.*, No. 17-CV-5775 (LAK), 2018 WL 4682014, at *5 (S.D.N.Y. Sept. 28, 2018) (finding facts "insufficient to nudge the plaintiffs' allegations of intent 'across the line from conceivable to plausible.'") (quoting *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007)).

Furthermore, what facts are pled do not amount to a plausible inference of fraud, as required by *Twombly* and *Iqbal*. TransPerfect references the fact that H.I.G. submitted multiple bids, substantially higher than Shawe's bids in terms of headline number, in order to purchase TransPerfect. Compl. ¶ 98. As TransPerfect admits, H.I.G. was the last bidder remaining with Shawe, and H.I.G. even attempted to intervene in the Delaware action to challenge Shawe's auction win because H.I.G. believed that its bid was superior. *Id.* ¶¶ 105–106. Additionally, throughout the process, H.I.G. considered and proposed alternatives to restrictive covenants, such as an earn-out provision to incentivize Shawe's cooperation with a management transition, should H.I.G. win the auction. *Id.* ¶ 110.

All of these pled facts are contrary to TransPerfect's conclusory allegations that H.I.G.'s bids and the Clean Room Agreement somehow constituted misrepresentations of H.I.G.'s intent. It is simply not plausible that that H.I.G. would participate in multiple rounds of bidding, invest significant time and resources in that process, put forth a higher headline bid than other bidders, and then challenge the bid process itself when it lost the auction if it were not interested in acquiring TransPerfect. With such bare factual allegations, TransPerfect's fraud claim cannot survive the plausibility requirement of *Twombly* and *Iqbal*.

B. The Fraud Claim Does Not Meet the Particularity Requirement.

TransPerfect's fraud claim should also be dismissed for failure to plead with requisite particularity. Fraud claims are subject to the heightened pleading standards of Federal Rule of Civil Procedure 9(b), which requires that "[i]n all alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Fed. R. Civ. P. 9(b). Accordingly, in pleading a fraud claim, the plaintiff must identify "(1) specific statements that plaintiff contends were fraudulent; (2) the speaker; (3) where and when the statements were made; and (4) why the statements were fraudulent." *Soroof Trading Dev. Co. v. GE Fuel Cell Sys. LLC*, 842 F. Supp. 2d 502, 513 (S.D.N.Y. 2012) (citing *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000)). "[W]hile Rule 9(b) permits scienter to be demonstrated by inference, this must not be mistaken for license to base claims of fraud on speculation and conclusory allegations. An ample factual basis must be supplied to support the charges." *Wood ex rel. U.S. v. Applied Research Assocs., Inc*., 328 F. App'x 744, 747 (2d Cir. 2009) (quoting *O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991)); *see also Stern v. Leucadia Nat'l. Corp.*, 844 F.2d 997, 1004 (2d Cir. 1988) (finding that allegations that the defendant did not truly intend to enter the merger transaction were without sufficient factual support, but were instead "conclusory suspicions"); *Gerstenfeld v. Nitsberg*, 190 F.R.D. 127, 132 (S.D.N.Y. 1999) (dismissing RICO fraud claims under Rule 9(b) for lack of specific facts giving rise to a strong inference of fraudulent intent).

TransPerfect cannot identify any particular *statements* made by Defendants that were allegedly fraudulent. The fact that H.I.G. participated in the auction does not amount to a statement sufficiently particularized to withstand Rule 9(b). In *First Hill Partners, LLC v. BlueCrest Capital Management Limited*, 52 F. Supp. 3d 625 (S.D.N.Y. 2014), the court dismissed fraud claims under Rule 9(b) because the plaintiff could only cite actions taken by the defendants participating in a buyer selection process, including offering feedback on negotiating strategies and referring

potential purchasers to the plaintiff. The court stated that the plaintiff "treats these 'actions' as tantamount to misstatements. They are not. If mere 'actions' were sufficient to satisfy the 'material misstatement' element, there would be no such thing as an 'omission.'" *Id*. at 637; *Champions League, Inc. v. Woodard*, 224 F. Supp. 3d 317, 324 (S.D.N.Y. 2016) (finding the plaintiff's allegation insufficiently particularized because it did not identify specific statements); *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) (same); *Abraham v. Am. Home Mortg. Servicing, Inc.*, 947 F. Supp. 2d 222, 231 (E.D.N.Y. 2013) (same). Likewise, TransPerfect has not cited any fraudulent statements from Defendants, only H.I.G.'s continued participation in the auction.

Nor has TransPerfect supplied any factual support for a claim that material omissions were made by Defendants. *See e.g. In re Sterling Foster & Co., Inc., Sec. Litig.*, 222 F. Supp. 2d 216, 281 (E.D.N.Y. 2002) (dismissing fraud claim because insufficient factual allegations under a material omission theory). Rather, TransPerfect has only made conclusory allegations that H.I.G.'s participation in the auction was "intended to, and did deceive TPG." Compl. ¶ 178.

These allegations utterly fail to support the claim that H.I.G. made any fraudulent misrepresentations through its statements or omissions. Instead, TransPerfect offers mere speculation and conclusory, nonsensical allegations, belied by other allegations in the Complaint. As such, this fraud claim is subject to dismissal not only pursuant to the pleading standards established by *Twombly* and *Iqbal*, but also the heightened particularity requirements of Rule 9(b).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's Complaint in its entirety.

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