IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROMEY SCHWIETERMAN,

Plaintiff,

v.

CATERPILLAR INC.,

Defendant.

CIVIL ACTION FILE

No. 1:20-CV-2611-SCJ

ORDER

This matter appears before the Court on Defendant Caterpillar, Inc.'s Motion to Dismiss the Amended Complaint.[1] Doc. No. [32].

I. BACKGROUND

A review of the record shows that on February 10, 2021, Plaintiff Romey Schwieterman ("Plaintiff Schwieterman") filed a Verified Amended Complaint against Defendant Caterpillar, Inc. ("Defendant Caterpillar"). Doc. No. [31]. Plaintiff asserts five causes of action: Count I (Misappropriation of Trade Secrets);

---

[1] All citations are to the electronic docket unless otherwise noted, and all page numbers are those imprinted by the Court's docketing software.

Count II (Breach of Contract (Express Joint Venture); Count III (Breach of Contract (Implied Joint Venture); Count IV (Breach of Implied Duty of Good Faith and Fair Dealing); and Count V (Tortious Interference with Contractual Relations or Business Relations). Doc. No. [31].

The relevant facts (as derived from the Amended Complaint) are as follows. Plaintiff states that he has extensive experience in working with Caterpillar engines and generator products and became aware of issues with (and potential improvements to) Caterpillar's power and generator control system product offerings. Doc. No. [31], ¶ 13. Plaintiff states that because of his knowledge and experience, "he was able to independently develop his own new solution to at least one of the issues which would also substantially improve the performance and efficiency of current Caterpillar offerings, as well as reduce costs." Id. ¶ 15. He called his invention the Best Available Starting System (or "BASS"). Id. Plaintiff states that he "considered his BASS technology a trade secret and took reasonable steps to ensure its confidentiality." Id. ¶ 17.

Plaintiff states that in 2013, he began having conversations with Caterpillar employees, including product development engineers and "made Caterpillar aware that he had independently developed the BASS technology and the

general concept of how it might be beneficial to Caterpillar." Id. ¶ 20. Plaintiff states that he "did not disclose the design, makeup, and function of his invention to Caterpillar [and he] made it clear to Caterpillar that he would not disclose any detailed information regarding his BASS technology without assurances that Caterpillar would maintain the confidential nature of any information disclosed and that he would be reimbursed should Caterpillar eventually make use of the technology." Id. Plaintiff states that "Caterpillar assured [him] that his trade secret would be kept confidential because Caterpillar wanted to use the new technology for an advantage over its competitors." Id. ¶ 23.

Plaintiff states that both he and Caterpillar mutually expressed interest in working together "to further develop the system for incorporation into Caterpillar products and to license the trade secret system to Caterpillar should that occur." Id. ¶ 21. Plaintiff states that "the parties agreed to work together" and both he and Caterpillar "clearly understood that, once it was determined that the BASS technology was effective and reduced costs, they would move forward with incorporating it into Caterpillar products and Caterpillar would compensate Plaintiff for its use." Id. ¶ 22.

Plaintiff states that between late 2013 and mid-2016, he had numerous meetings, calls, emails, and other communications with individuals at Caterpillar and as part of these discussions and an "express promise" by Caterpillar to keep the trade secret technology information confidential, Plaintiff "provided Caterpillar with detailed designs, drawings, schematics, costs-estimates, and other material regarding his trade secret technology." Id. ¶ 25. Plaintiff "also explained that he had working prototypes and access to installations that incorporated certain aspects of his trade secret technology." Id.

Plaintiff utilizes the term "joint venture agreement" in his Amended Complaint and also alleges that "discussions as part of the joint venture agreement . . . involved working toward development of a cooperative platform or program that would encourage sharing of intellectual resources within the Caterpillar family by providing financial incentives to Caterpillar dealer engineers, sales representatives, technicians, project managers, and others who were willing to work with Caterpillar to invent and develop products." Id. ¶¶ 24, 30.

Plaintiff states that at some point during the 2013–16 discussions, Caterpillar began to "covertly incorporate Plaintiff's trade secrets into its

products." Id. ¶ 31. Plaintiff further states that "Defendant . . . later admitted that it should have advised Plaintiff and acknowledged it needed to compensate him for his contributions." Id. ¶ 33. Plaintiff states that Defendant eventually "ceased responding to Plaintiff altogether." Id.

Plaintiff states that on June 23, 2020, he was terminated from his employment with Yancy Bros. (the nation's oldest Caterpillar dealer) because he filed a lawsuit against Caterpillar. Id. ¶¶ 9, 41. Plaintiff states that "[p]rior to his termination on June 23, 2020, [he] was a party to an employment contract with Yancey Bros" and that Caterpillar was not a party to the agreement. Id. ¶¶ 46–47. Plaintiff states that "[u]pon information and belief, Caterpillar requested that Yancey Bros. fire [Plaintiff] because he filed this instant action against Caterpillar." Id. ¶ 42.

Plaintiff alleges that prior to his firing, he had been assured by Chief Legal Counsel for Yancey Brothers, Mr. Billy Holley, that he did not believe that Plaintiff would be fired for filing suit against Caterpillar "because he was too valuable to Yancey Bros." Id. ¶ 44.

Plaintiff filed this lawsuit on June 19, 2020 and an Amended Complaint on February 10, 2021. Doc Nos. [1], [31]. [2]

On February 24, 2021, Defendant Caterpillar filed a Motion to Dismiss Plaintiff's Amended Complaint. Defendant Caterpillar's Motion is based upon the following grounds: (1) the claim for "trade secret" misappropriation under the Georgia Trade Secrets Act ("GTSA") (Count I) fails to allege facts demonstrating that the "trade secret" Best Available Starting System was "the subject of efforts that [we]re reasonable under the circumstances to maintain its secrecy," as is required for a trade secret under O.C.G.A § 10-1-761(4)(B); (2) the claims for breach of contract (Counts II and III) must be dismissed because the Amended Complaint fails to allege that the parties entered into an enforceable agreement; (3) the claim for breach of the implied duty of good faith and fair dealing (Count IV) should be dismissed because it is preempted by the GTSA, and because it is not an independent cause of action from a breach of contract claim; and (4) the claim for tortious interference (Count V) should be dismissed

[2] For purposes of perfecting the record, the Court deems it prior show cause order concerning shotgun pleading in Plaintiff's original complaint satisfied by the filing of the Amended Complaint. Doc. No. [29].

because the Amended Complaint fails to plead any "independent wrongful act." Doc. No. [32], 1–2.

The motion has been fully briefed and the matter is now ripe for review. See Doc. Nos. [34], [35].

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Pleadings do not require any particular technical form. Fed. R. Civ. P. (8)(d)(1). However, labels, conclusions, and formulaic recitations of the elements of the case of action "will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

"To decide whether a complaint survives a motion to dismiss, [courts] use a two-step framework." McCullough v. Finley, 907 F.3d 1324, 1333 (11th Cir. 2018). First, the court identifies "the allegations that are 'no more than conclusions,' [as] [c]onclusory allegations are not entitled to the assumption of

truth. Id. (citations omitted). "Second, after disregarding conclusory allegations, [the Court] assume[s] any remaining factual allegations are true, [identifies the elements that the plaintiffs must plead to state a claim] and determine[s] whether those factual allegations 'plausibly give rise to an entitlement to relief.'" Id.; see also Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (beginning the 12(b)(6) analysis "by taking note of the elements a plaintiff must plead to state a claim . . . .") and Speaker v. U.S. Dep't. of Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010) ("In ruling on a 12(b)(6) motion, the Court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff.") and Fed. R. Civ. P. 8 (e) ("Pleadings must be construed so as to do justice.").

A complaint will be dismissed for failure to state a claim only if the facts as pled do not state a claim that is plausible on its face. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 555–56. In order to state a plausible claim, a plaintiff need only plead "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. "Asking for plausible grounds . . . does not impose a probability requirement at

the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claim]." Twombly, 550 U.S. at 556.

"[W]hile notice pleading may not require that the pleader allege a specific fact to cover every element or allege with precision each element of a claim, it is still necessary that a complaint contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Fin. Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276, 1282–83 (11th Cir. 2007) (quotations omitted).

III. ANALYSIS

The Court will consider each of the four grounds of Defendant's Motion to Dismiss as follows.

A. Count I: Georgia Trade Secrets Act

Defendant asserts that Plaintiff Schwieterman's claim for trade secret misappropriation under the Georgia Trade Secrets Act ("GTSA") (Count I) fails to allege facts demonstrating that the "trade secret" Best Available Starting System was "the subject of efforts that [we]re reasonable under the circumstances to maintain its secrecy," as is required for a trade secret under O.C.G.A § 10-1-761(4)(B)." Doc. No. [32], 1. More specifically, Defendant asserts that the

Amended Complaint makes clear that Plaintiff "had working prototypes and access to installations that incorporated certain aspects of his trade secret technology" but fails to allege that these prototypes and installations were subject to confidentiality measures. Doc. Nos. [32-1], 7; [35], 4.

"To obtain relief under the [Georgia Trade Secrets Act, "GTSA," O.C.G.A. § 10-1-760 *et seq*.], the Plaintiff must allege both that the [information at issue] [is] a 'trade secret' as defined by the Act and that the Defendant[] 'misappropriated' that trade secret." Meyn Am., LLC v. Tarheel Distribs., Inc., 36 F. Supp. 3d 1395, 1406–07 (M.D. Ga. 2014) (citing Wachovia Ins. Servs., Inc. v. Fallon, 299 Ga. App. 440, 445, 682 S.E.2d 657, 662 (2009)).

The party alleging a trade secrets claim is required to show that the alleged trade secrets fall within the following statutory definition of "trade secrets," as set forth in the GTSA. Amendia, Inc. v. Omni Surgical, LLC, No. 1:12-CV-1168-CC, 2012 WL 13014953, at *2 (N.D. Ga. Sept. 25, 2012). The GTSA defines the term trade secret as follows:

> "Trade secret" means information, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data,

> financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information:
>
> (A) Derives 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
>
> (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

O.C.G.A. § 10-1-761(4).

Subsection (B) of the GTSA's definition of trade secret is the subject of Defendant's pending Motion to Dismiss. As stated above, Defendant asserts that Plaintiff does not plausibly allege that he undertook steps to keep his alleged idea a secret. Doc. No. [32-1], 6.

However, in opposition, Plaintiff references his allegations concerning his existing "long-standing relationship" with Caterpillar through his position with Yancey Bros. and prior direct employment with Caterpillar. Doc. No. [34], 8; see also Doc. No. [31], ¶ 23. Plaintiff also references assurances from Caterpillar that "his trade secret would indeed be treated as such. Id.

It has been held that "[t]he disclosure of a trade secret to persons with whom the plaintiff has a confidential business relationship. . . generally does not destroy trade secret protection." Diamond Power Int'l, Inc. v. Davidson, 540 F. Supp. 2d 1322, 1333 (N.D. Ga. 2007).[3] It has also been held that determination as to whether a particular type of information is a trade secret involves a question of fact, Capital Asset Research Corp. v. Finnegan, 160 F.3d 683, 686 n.2 (11th Cir. 1998) (citations omitted). In addition, the Eleventh Circuit has recognized that "[e]ven if all of the information is publicly available, a unique compilation of that information, which adds value to the information, also may qualify as a trade secret." Id. at 686.

---

[3] Georgia law regarding confidential relationships is found in O.C.G.A. § 23-2-58 and states in relevant part:

> Any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners; principal and agent; guardian or conservator and minor or ward; personal representative or temporary administrator and heir, legatee, devisee, or beneficiary; trustee and beneficiary; and similar fiduciary relationships.

To this regard, the Court concludes that while the steps taken by Plaintiff "may not, standing alone, withstand a motion for summary judgment, the Court cannot conclude at this stage that each of [the actions taken by Plaintiff as alleged in his Amended Complaint], in combination with one another, fail as a matter of law to [plausibly] support a claim for violation of the GTSA under Rule 12(b)(6)." IPC Sys., Inc. v. Garrigan, No. 1:11-CV-3910-AT, 2012 WL 12872028, at *5 (N.D. Ga. May 21, 2012).

B. Counts II and III: Breach of Contract (Joint Venture and Implied Joint Venture)

Defendant asserts that Plaintiff Schwieterman's "claims for breach of contract (Counts II and III) must be dismissed because the Amended Complaint fails to allege that the parties entered into an enforceable agreement." Doc. No. [32], 2. Defendant states that Plaintiff's allegations describe an unenforceable "agreement to agree." Doc. No. [35], p. 3.

In contrast, Plaintiff alleges that he has plausibly alleged the existence of a valid contract between the parties and that Defendant's "agreement to agree" argument fails to consider whether the alleged joint venture at issue may be more appropriately considered analogous to a "contract to negotiate" —a type of contract that was recognized as enforceable in the Northern District of Georgia

in the case of Crystal Steel Fabricators, Inc. v. AMEC Foster Wheeler Programs, Inc., 349 F. Supp. 3d 1364 (N.D. Ga. 2017). Doc. No. [34], 12. Plaintiff also urges caution and asserts that the ultimate determination of exactly what type of agreement is at issue in this case is not appropriate at the motion to dismiss stage of the case. Id. at 13.

O.C.G.A. § 13–1–1 defines a contract as "'an agreement between two or more parties for the doing or not doing of some specified thing.'" O.C.G.A. § 13-1-1.[4] In addition, "[t]o constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." O.C.G.A. § 13-3-1. "A contract is unenforceable where there is no meeting of the minds between the parties regarding a material element thereof." Graham v. HHC St. Simons, Inc., 322 Ga. App. 693, 695, 746 S.E.2d 157, 160 (2013) (citations omitted).

[4] "[I]n determining whether a binding agreement arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts." Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1368 (11th Cir. 2005). In this diversity case, the Court therefore looks to Georgia law.

"The elements for a breach of contract claim [under Georgia law] . . . are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." Norton v. Budget Rent A Car Sys., 307 Ga. App. 501, 502, 705 S.E.2d 305 (2010) (citation omitted).

"To recover in a suit on a contract, the complaining party must establish both a breach of the contract and resulting damages." Graphics Prods. Distribs., Inc. v. MPL Leasing Corp., 170 Ga. App. 555, 555, 317 S.E.2d 623, 624 (1984); "A contract is breached by a party to it who is bound by its provisions to perform some act toward its consummation and who, without legal excuse on his part and through no fault of the opposite party, declines to do so." CCE Fed. Credit Union v. Chesser, 150 Ga. App. 328, 330, 258 S.E.2d 2, 4 (1979).

As correctly noted by the parties, the Honorable Mark H. Cohen recently issued a comprehensive, well-written opinion that provides an overview of Georgia contract law, inclusive of a discussion on agreements to agree and contracts to negotiate. As stated by Judge Cohen:

> Generally, a so-called "agreement to agree" is unenforceable in Georgia where the parties have not assented to the "essential" terms of the contract. See Kreimer v. Kreimer, 274 Ga. 359 363, 552 S.E.2d 826 (2001) ("If a contract fails to establish an essential term, and leaves the setting of that term to be agreed upon

> later by the parties to the contract, the contract is deemed an unenforceable 'agreement to agree.' ")
> . . . .
> The modern trend among courts has been to carve out an exception to the rule against enforcing "agreements to agree" for so-called "contracts to negotiate". . . .
>
> [C]ontracts to negotiate [are ones in which] "the parties exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time." Keystone Land & Dev. Co. v. Xerox Corp., 152 Wash.2d 171, 94 P.3d 945, 948 (Wash. 2004) (internal citation and quotation omitted); see also Butler, 736 F.3d at 613. "In contrast to an agreement to agree, under a contract to negotiate, no breach occurs if the parties fail to reach agreement on the substantive deal. The contract to negotiate is breached only when one party fails to conform to the specific course of conduct agreed upon." Keystone, 94 P.3d at 948.
>
> In light of this trend, there is ample support for enforcing contracts to negotiate—authority that the Georgia Supreme Court would likely find persuasive. See Butler, 736 F.3d at 614 ("There is . . . abundant support for the enforcement of contracts to negotiate in other sources that the Washington Supreme Court would be apt to find persuasive.").

Crystal Steel Fabricators, Inc., 349 F. Supp. 3d at 1368–70 (footnotes omitted).

Here, Plaintiff is correct that it is not necessary at the motion to dismiss stage to classify the exact type of contract at issue here; however, there are enough factual allegations in the Amended Complaint for the Court to conclude

that Plaintiff pled something more than an incomplete agreement to agree. Plaintiff has set forth plausible allegations that he and Caterpillar exchanged promises to conform to a specific course of conduct regarding a specific subject matter, such as the allegations concerning maintaining the secrecy of Plaintiff's technology. Issues surrounding whether Caterpillar assented to the terms of the alleged agreement are not for the motion to dismiss stage of the case.

In reply, Caterpillar asserts *inter alia* that if Plaintiff is correct that there was a contract to negotiate, "the contract claims must be dismissed for failing to allege any breach." Doc. No. [35], 7. However, the Court is unable to uphold this argument as a minimum, Plaintiff alleged breach of the secrecy and confidentially portions of the alleged agreement. Doc. No. [34], ¶ 59.

C. Count IV: Implied Duty of Good Faith and Fair Dealing

Under Georgia law, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." Tims v. LGE Cmty. Credit Union, 935 F.3d 1228, 1243 (11th Cir. 2019) (citations omitted).

Defendant asserts that Plaintiff Schwieterman's "claim for breach of the implied duty of good faith and fair dealing (Count IV) should be dismissed because it is preempted by the GTSA, and because it is not an independent cause

of action from a breach of contract claim." Doc. No. [32], 2. The Court will address each argument in turn.

1. Preemption[5]

As stated above, Defendant Caterpillar asserts that "[t]he good faith and fair dealing claim is preempted by the GTSA as a matter of law because it recites the 'same operative facts' as the GTSA claim." Doc. No. [35], 11.

"The GTSA generally supersedes 'conflicting' common-law theories of recovery predicated on misappropriation of trade secrets. It does not, however, affect claims sounding in contract or '[o]ther civil remedies that are not based upon misappropriation of a trade secret.'" Diamond Power Int'l, Inc., 540 F. Supp. 2d at 1344 (citing O.C.G.A. § 10–1–767(a)–(b).

---

[5] The Court recognizes that preemption is an affirmative defense and the Eleventh Circuit has stated that "[g]enerally, the existence of an affirmative defense will not support a motion to dismiss" unless the defense appears on the face of the complaint. Quiller v. Barclays Am./Credit, Inc., 727 F.2d 1067, 1069 (11th Cir. 1984), on reh'g, 764 F.2d 1400 (11th Cir. 1985) ("Generally, the existence of an affirmative defense will not support a motion to dismiss. Nevertheless, a complaint may be dismissed under Rule 12(b)(6) when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint."); cf. Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1352 (11th Cir. 2003) ("[O]rdinary preemption may be invoked in . . . federal court as an affirmative defense to the allegations in a plaintiff's complaint.").

More specifically, the GTSA states in relevant part:

> (a) Except as provided in subsection (b) of this Code section, this article shall supersede conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret.
> (b) This article shall not affect:
>
> > (1) Contractual duties or remedies, whether or not based upon misappropriation of a trade secret; provided, however, that a contractual duty to maintain a trade secret or limit use of a trade secret shall not be deemed void or unenforceable solely for lack of a durational or geographical limitation on the duty . . . .

O.C.G.A. § 10-1-767.

Defendant asserts that "[c]laims 'based on the same facts that comprise the trade secret misappropriation claim'—including a claim for breach of the duty of good faith and fair dealing—are preempted and, therefore, must be dismissed. Doc. No. [32-1], 18. Defendant cites the case of Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1297 n.13, 1298 (11th Cir. 2003) in support of its argument.

In opposition, Plaintiff asserts that Defendant Caterpillar mischaracterizes the nature of the alleged joint venture agreement (as Plaintiff has alleged that it is based upon additional terms which were independent of the alleged misappropriation of Plaintiff's trade secret) and that "[t]here is a distinct difference between the breach of a contract and the misappropriation of a trade

secret which serves as the basis for the explicit statement in O.C.G.A § 10-1-767 (b)(1) that contractual remedies are not affected by the GTSA." Doc. No. [34], 17. Plaintiff further acknowledges some factual overlap in the allegations concerning Caterpillar's promise to pay for use of the trade secret, Plaintiff asserts that such was not the sole focus of the agreement. Doc. No. [34], 18.

The Court agrees that the Eleventh Circuit case of Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1297–98 (11th Cir. 2003) addresses preemption; however, it does not appear to be determinative of the issue presently before the Court in the case *sub judice*. In the Penalty Kick Mgmt. case, the Eleventh Circuit was addressing the duty of good faith imposed by O.C.G.A. § 23-2-58 concerning confidential relationships. See Penalty Kick Mgmt., 318 F.3d at 1289 ("Count IV alleged that Coca–Cola breached its confidential relationship and duty of good faith imposed by O.C.G.A. § 23–2–58."). The case *sub judice*, however, concerns the contractual duty of good faith that is implied into every Georgia contract in accordance with the above-stated case law.[6] The Court is concerned that because

[6] As stated by one Georgia court: "It is a well-recognized principle of contract law that both parties are under an implied duty of good faith in carrying out the mutual promises of their contract. A duty of good faith and fair dealing is implied in all contracts in this state." Tommy McBride Realty, Inc. v. Nicholson, 286 Ga. App. 135, 136, 648 S.E.2d 468, 470 (2007) (citations and quotations omitted).

the good faith at issue here is an implied contractual duty, the Court may violate the plain language of the GTSA which indicates that the statute does not affect contractual duties or remedies. See O.C.G.A. § 10-1-767 (b) ("This article shall not affect: (1) Contractual duties or remedies, whether or not based upon misappropriation of a trade secret . . . ."). To this regard, the Court deems it proper to deny this portion of Defendant's motion concerning preemption without prejudice to raising the issue again (with additional briefing) at summary judgment.

2. Independent Cause of Action

Defendant argues that "the good faith and fair dealing claim fails because 'the common law requirement of good faith and fair dealing in the performance of a contract does not create an independent cause of action apart from breach of contract.'" Doc. No. [32-1], 20. See Morrell v. Wellstar Health Sys., Inc., 280 Ga. App. 1, 5, 633 S.E.2d 68, 72 (2006) ("Although each contract to pay for medical care contained an implied covenant of good faith and fair dealing in the performance of the contract, there is no independent cause of action for violation of the covenant apart from breach of an express term of the contract.").

As the Court has allowed the breach of contract claim to stand, the independent cause of action arguments by Defendant fail.

D. Count V: Tortious Interference

In Count V of his Amended Complaint Plaintiff asserts a claim for tortious interference with contractual or business relations. Doc. No. [31], 20. He states that Defendant acted improperly and wrongfully by contacting Plaintiff's employer with the intent to procure the termination of Plaintiff's employment. Id. ¶ 67.

In its motion to dismiss, Defendant Caterpillar asserts that Plaintiff's claim for tortious interference (Count V) should be dismissed because the Amended Complaint fails to plead any "independent wrongful act." Doc. No. [32], 2.

"Tortious interference with business relations is a distinct and separate tort from that of tortious interference with contractual relations, although some of the elements of the two torts are similar." Sweet City Landfill, LLC v. Lyon, 352 Ga. App. 824, 833, 835 S.E.2d 764, 774 (2019) (citations and quotations omitted).

Under Georgia law, a plaintiff may sustain a claim for tortious interference with a business relationship where the plaintiff establishes:

> (1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted

> purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Metro Atlanta Task Force for the Homeless, Inc. v. Ichthus Cmty. Tr., 298 Ga. 221, 230, 780 S.E.2d 311, 321 (2015) (citations omitted).

"An essential element of a tortious interference with business relations claim 'is that the alleged tortfeasor induced a third party or parties not to enter into or continue a business relationship with the plaintiff.'" Sweet City Landfill, LLC, 352 Ga. App. at 834 (citations omitted).

"A cause of action for intentional interference with contractual rights must be based on the intentional and non-privileged interference by a third party with existing contractual rights and relations." Id.[7] (citations and quotations omitted); see also Gordon Document Prod., Inc. v. Serv. Techs., Inc., 308 Ga. App. 445, 449, 708 S.E.2d 48, 53 (2011) ("Tortious interference claims, whether asserting interference with contractual relations [or] business relations, . . . share certain

[7] In its reply brief (Doc. No. [34]), Defendant appears to assert additional arguments regarding the contractual rights claim. The Court will not consider arguments raised for the first time in a reply brief.

common essential elements: (1) improper action or wrongful conduct by the defendant without privilege;[8] (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or their parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.").

"[I]mproper conduct means wrongful action that generally involves predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions." Gordon Document Prod., Inc. v. Serv. Techs., Inc., 308 Ga. App. 445, 449, 708 S.E.2d 48, 53 (2011) (citations omitted).

In response, Plaintiff asserts that he has plausibly alleged predatory actions by Defendant. Doc. No. [34], 21. Plaintiff asks the Court to take into consideration the allegations in his Amended Complaint that he had received assurances from

---

[8] "This privilege, 'while primarily applicable to claims of libel or slander, may also be asserted as a defense to a claim of tortious interference with contractual relations.'" Rema Tip Top/N. Am., Inc. v. Shaw-Almex Indus., Ltd., No. 1:15-CV-01838-AT, 2015 WL 11492540, at *6 (N.D. Ga. Nov. 18, 2015) (citing Choice Hotels Int'l, Inc. v. Ocmulgee Fields, Inc., 222 Ga. App. 185, 188, 474 S.E.2d 56, 59 (1996)).

his employer's legal counsel that his filing of a lawsuit against Caterpillar would not result in his termination. Doc. No. [34], 23; see also Doc. No. [31], ¶ 44. Yet, after Caterpillar contacted his employer, he was fired. Id.[9]

After review, the Court finds that Plaintiff has set forth a plausible tortious interference with business/contractual relations claim.

IV. CONCLUSION

For the foregoing reasons, Defendant Caterpillar, Inc.'s Motion to Dismiss the Amended Complaint (Doc. No. [32]) is **DENIED**. Defendant shall file an answer in accordance with the applicable Federal Rules of Civil Procedure.

IT IS SO ORDERED this 9th day of July, 2021.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

---

[9] The Court makes no ruling on Defendant's "truthful" and privilege assertions as the question of privilege involves consideration of good faith and cannot be determined at the motion to dismiss stage. See e.g., Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 132–33, 670 S.E.2d 818, 822 (2008) ("Construing, as we must, the complaint in the light most favorable to [plaintiff], she has alleged that [defendant] acted maliciously, without privilege, and with an intent to injure her by inducing [employers] to terminate her employment, causing her to suffer economic and emotional damage. At this stage in the proceedings, [plaintiff] has sufficiently alleged malice and, in turn, a question remains as to whether the privilege has been overcome.").