

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AGILENT TECHNOLOGIES, INC., )  
 )  
 Plaintiff, )  
 )  
 v. ) C.A. No. 3512-VCS  
 )  
 JOSEPH J. KIRKLAND, JOSEPH J. )  
 DESTEFANO, TIMOTHY J. LANGLOIS, )  
 and ADVANCED MATERIALS )  
 TECHNOLOGY, INC., )  
 )  
 Defendants. )

MEMORANDUM OPINION

Date Submitted: December 1, 2008

Date Decided: January 20, 2009

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**STRINE, Vice Chancellor.**

## I. Introduction

The backdrop to this claim is the competitive world of scientific measuring devices, specifically equipment and materials used for high performance liquid chromatography (“HPLC”). This opinion deals with a counterclaim for unfair competition, tortious interference with prospective business relations, and deceptive trade practices that was made in response to the filing of a lawsuit for misappropriation of trade secrets.

At the center of both this counterclaim and the underlying lawsuit are certain superficially porous silica microparticles developed by defendant and counterclaim-plaintiff Advanced Materials Technology, Inc. (“AMT”) for use in HPLC and marketed under the brand name “Halo.” These “Halo Particles” are unique for their allegedly unprecedentedly small size, which confers a number of performance advantages. Three of the scientists behind the development of the Halo Particles are former employees of plaintiff and counterclaim-defendant Agilent Technologies, Inc., which also makes equipment and particles for use in HPLC and directly competes with AMT. Or, more accurately, AMT competes directly with Agilent, a dominant player in the scientific measurement industry. After the successful debut of the Halo Particles in the marketplace, Agilent brought suit against its former employees and AMT, claiming they had misappropriated proprietary information from Agilent and used it to develop the Halo Particles. This claim is not directly at issue on the motion addressed in this decision, but it is highly relevant because, according to AMT, Agilent has been using its dispute with AMT as a platform for spreading misinformation to AMT’s potential customers and

distributors, scaring business away from AMT, and clearing the market for Agilent's own products.

After Agilent filed its lawsuit in January 2008, AMT allegedly learned that Agilent representatives had made damaging and supposedly false statements about the long-term availability of AMT's products to potential AMT business partners. AMT claims that these statements were particularly damaging due to the importance of long-term product availability to AMT's potential customers. AMT filed a counterclaim in this action in March 2008 claiming unfair competition, tortious interference with prospective business relations, and violation of the Delaware Deceptive Trade Practices Act (the "Original Counterclaim"), and then amended the Original Counterclaim in July 2008 to allege more incidents of which it became aware (the "Amended Counterclaim").

To factually support its claims, the Amended Counterclaim pleads four specific incidents of purported misconduct: 1) in mid-2007, an Agilent sales representative told a potential customer that the Halo Particles had patent issues; 2) in late 2007, an Agilent employee told a university professor collaborating with AMT that AMT faced intellectual property issues; 3) in mid-2008, an Agilent sales representative told a major distributor that the Halo Particles could not be promoted or sold, referencing this litigation; and 4) in mid-2008, Agilent employees told a potential customer that the Halo Particles would soon be gone from the market due to this litigation.

Agilent has moved to strike and dismiss the Amended Counterclaim. In this opinion, I deny Agilent's motion to strike the Amended Counterclaim as improperly filed and its motion to dismiss the Amended Counterclaim for failure to state a claim.

Agilent's motion to strike is based on the fact that AMT's amendment to the Original Counterclaim contained supplemental pleading that required leave of the court to file. Because Agilent has not demonstrated that the supplemental pleading was unreasonably delayed or prejudiced Agilent in any way, I grant that leave now.

Agilent seeks dismissal of AMT's common law claims on the basis that they do not sufficiently plead the elements of unfair competition and tortious interference. I find that, although not all of the incidents AMT complains of constitute actionable conduct, AMT's claims are adequately supported by AMT's allegations that Agilent told a distributor that the Halo Particles could not be sold and told a potential AMT customer that the Halo Particles would soon be gone from the market. Agilent was free to make the marketplace aware of this litigation and inform customers that AMT faced the uncertainty that the filing of a lawsuit inevitably brings. But, Agilent was not, as it is alleged to have done, free to make factual statements regarding the effect of this litigation that were untrue, such as that this litigation definitively prevented distributors from carrying AMT products or that removal of AMT's products from the marketplace was certain.

Finally, Agilent seeks dismissal of AMT's statutory claim under the Deceptive Trade Practices Act ("DTPA") on the basis that the handful of incidents alleged by AMT do not constitute a pattern of misconduct as required by the statute. I find that AMT's allegations, if true, would indicate that Agilent has engaged in a pattern of misrepresentation. Where wrongful conduct is ongoing, as pled here, dozens of examples are not required to demonstrate a pattern for pleading purposes. Moreover, in a small

market like this one, where Agilent is a dominant — and therefore possibly intimidating — player, it is plausible that there are other, as-yet-undiscovered customers and distributors who have been subject to the unlawful sales tactics alleged by AMT.

## II. Factual Background

AMT is a three-year-old company that develops and sells particles for use in HPLC, which is a method of separating, identifying, and measuring chemical compounds. HPLC works by moving materials through a column packed with certain particles and measuring the results using HPLC equipment. AMT manufactures and sells HPLC columns packed with superficially porous silica microparticles under the brand-name “Halo.” AMT’s three founders, Dr. Joseph J. Kirkland, Dr. Joseph J. DeStefano, and Timothy Langlois, are all former employees of Agilent. Agilent is a leader in scientific measuring devices, including HPLC equipment and columns.

The HPLC market is a small but competitive one. AMT estimates the worldwide market to be \$500 million, and that the top three companies, which include Agilent, have a combined market share of about 60%.<sup>1</sup> Vendor reputation plays an important role in this market because HPLC applications tend to require a high degree of accuracy and reliability and involve long-term investments in a particular method. For example, AMT primarily sells its columns to the pharmaceutical industry, where they are used for research and development and quality control of pharmaceutical products.<sup>2</sup> To make their own regulatory approval processes easier, these customers want an HPLC system

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<sup>1</sup> Verified Amended Counterclaim (“Am. Countercl.”) ¶ 21.

<sup>2</sup> Am. Countercl. ¶ 22.

that will be readily accepted by regulatory agencies and that will be available for the life of their pharmaceutical products.<sup>3</sup>

The parties agree that Kirkland and DeStefano have multiple decades of experience and enjoy outstanding reputations in the fields of analytical chemistry and HPLC. In 1989, Kirkland and DeStefano formed Rockland Technologies, Inc., where they worked on superficially porous silica microparticles for use in HPLC. Hewlett-Packard acquired Rockland in 1997 and signed Kirkland and DeStefano on as employees. As part of that transaction, Kirkland and DeStefano signed non-competition agreements (the “Non-Compete Agreements”) that expired in 2002, and each signed HP’s standard confidentiality agreement, which did not contain a non-compete provision. That same year, Langlois joined HP and also signed a standard HP confidentiality agreement. Then, in 1999, HP spun off Agilent, and Kirkland, DeStefano, and Langlois became Agilent employees. The three scientists signed new confidentiality agreements with Agilent (the “Agilent Confidentiality Agreements”), but Agilent did not extend the term of Kirkland and DeStefano’s Non-Compete Agreements, the rights to which were assigned to Agilent in the spin-off.

While at HP and Agilent, Kirkland and DeStefano, along with Langlois, continued their work on superficially porous silica microparticles. One of their ongoing projects was to develop a commercially viable method for producing microparticles less than 3.5  $\mu\text{m}$  in diameter. Such particles are desirable because they yield faster and better results than larger particles. But, Kirkland and his colleagues were unable to find

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<sup>3</sup> Am. Countercl. ¶¶ 22-23.

solutions to various technical obstacles, and in 2001, Kirkland retired from Agilent without having developed a successful method for producing sub-3.5  $\mu\text{m}$  particles.

Kirkland's retirement proved temporary. Four years after Kirkland's departure, in April 2005, DeStefano and Langlois resigned from Agilent and formed AMT with Kirkland. AMT alleges that Agilent was aware that its former employees were launching an HPLC company based on memos sent to Agilent officers and the fact that Agilent sold over \$5,000 worth of chromatography equipment to AMT in May and September 2005.<sup>4</sup>

At AMT, the three scientists returned to the problem of manufacturing sub-3.5  $\mu\text{m}$  particles. This time their efforts were successful, and they developed a technique for producing particles with the desired characteristics. In October 2006, AMT introduced its sub-3.5  $\mu\text{m}$  particles to the market under the name "Halo Fused-Core Particles." The Halo Particles are also the subject of pending U.S. and international patent applications (the "Halo Patents"). According to AMT, the Halo Particles "were rapidly embraced and recognized in the chromatography industry as breakthrough new technology with highly desirable features."<sup>5</sup>

This was an unwelcome development to Agilent, which believes that Kirkland, DeStefano, and Langlois used proprietary information they learned while at Agilent to develop the Halo Particles in violation of the Agilent Confidentiality Agreements. In January 2008, Agilent brought suit in this court alleging that Kirkland, DeStefano, and

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<sup>4</sup> Am. Countercl. ¶¶ 12-13.

<sup>5</sup> Am. Countercl. ¶ 17.

Langlois had breached the Agilent Confidentiality Agreements and that all of the defendants had misappropriated trade secrets.

According to AMT, Agilent had another reason to be upset with the success of the Halo Particles besides the possible theft of its intellectual property. By mid-2007, Agilent had plans to release a sub-3.5  $\mu\text{m}$  particle of its own that would directly compete with the Halo Particles.<sup>6</sup> AMT alleges that Agilent, to ensure the success of its own product, embarked on a campaign of disparaging statements against AMT and the Halo Particles in the marketplace. AMT claims that these statements were particularly damaging due to the importance of reputation and long-term viability to its potential customers.<sup>7</sup>

As a result of reports that Agilent was making these comments in the marketplace, AMT filed the Original Counterclaim in March 2008, bringing claims of unfair competition, tortious interference with prospective business relations, and violation of Delaware's Deceptive Trade Practices Act. AMT then filed the Amended Counterclaim in July 2008 to add more specific allegations of the wrongful activities Agilent had engaged in. Agilent has now moved to strike the Amended Counterclaim as improper supplemental pleading and to dismiss the Amended Counterclaim in its entirety for failure to state a claim.

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<sup>6</sup> Am. Countercl. ¶ 31. AMT also claims that, because the Halo Particles allowed customers to perform chromatography on standard equipment at speeds previously only available on specialized equipment, the Halo Particles posed a "very significant threat" to Agilent's sales of this specialized equipment. Am. Countercl. ¶ 20.

<sup>7</sup> Am. Countercl. ¶¶ 22-24.



### III. Legal Analysis

#### A. Standard Of Review

In deciding this motion to dismiss, I apply the familiar standard under Court of Chancery Rule 12(b)(6). To state a claim, a plaintiff “must plead facts that plausibly suggest she will ultimately be entitled to the relief she seeks.”<sup>8</sup> In this regard, “the plaintiff is entitled to all reasonable inferences that logically flow from the face of the complaint.”<sup>9</sup> “[W]here it appears with ‘reasonable certainty’ that the plaintiff could not prevail on any set of facts that can be inferred from the pleadings,” a motion to dismiss will be granted.<sup>10</sup> In making my determination, I accept all well-plead facts as true and draw all reasonable inferences in the light most favorable to the plaintiff.<sup>11</sup>

#### B. Motion To Strike Amended Counterclaim

Agilent’s first attack on AMT’s Amended Counterclaim is that it contains supplemental pleading because it refers to events that occurred after the Original Counterclaim was filed, and the Amended Counterclaim was therefore improperly filed without leave of the court. That is in fact so, but Agilent has failed to demonstrate that AMT was not entitled to supplement its Original Counterclaim, so its motion to strike is denied.

Amended and supplemental pleadings are governed by Court of Chancery Rule 15. The defining difference between the two is that supplemental pleadings deal

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<sup>8</sup> *Desimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007).

<sup>9</sup> *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

<sup>10</sup> *In re Paxson Commc’n Corp. S’holders Litig.*, 2001 WL 812028, at \*3 (Del. Ch. July 12, 2001) (citing *Solomon v. Pathe Commc’ns Corp.*, 672 A.2d 35, 38 (Del. 1996)).

<sup>11</sup> *Haber v. Bell*, 465 A.2d 353, 357 (Del. Ch. 1983).

with events that occurred after the pleading to be revised was filed, whereas amendments deal with matters that arose before the filing.<sup>12</sup> Here, two of the eleven paragraphs that were added or materially modified in the Amended Counterclaim relate to events that occurred after the filing of the Original Counterclaim in March 2008. The first alleges that in April 2008, Agilent told a distributor that the distributor could not promote or sell the Halo Particles.<sup>13</sup> The second alleges that in June 2008, Agilent told an HPLC customer that the Halo Particles would soon be gone from the market.<sup>14</sup> These are properly classified as supplemental pleading.

For most purposes, the distinction between amended and supplemental pleadings is minimal.<sup>15</sup> But, a material procedural difference is that amended pleadings may, at times, be filed as a matter of right while supplemental pleadings always require leave of the court.<sup>16</sup> AMT did not seek leave to file its Amended Counterclaim, apparently in belief that it constituted an amendment as a matter of course under Rule 15(a).<sup>17</sup>

Inadvertent inclusion of supplemental pleading in an amendment as a matter of course is not uncommon, and requires this court to consider the supplemental pleading as

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<sup>12</sup> See Ct. Ch. R. 15(d); *Cal. Pub. Employees' Ret. Sys. v. Coulter*, 2004 WL 1238443, at \*7 (Del. Ch. May 26, 2004).

<sup>13</sup> Am. Countercl. ¶ 28.

<sup>14</sup> Am. Countercl. ¶ 29.

<sup>15</sup> See 6A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE ("WRIGHT & MILLER") § 1504 (2008).

<sup>16</sup> See Ct. Ch. R. 15(a); Ct. Ch. R. 15(d).

<sup>17</sup> When the Amended Counterclaim was filed in July 2008, Agilent had not yet filed any pleadings responsive to the Original Counterclaim. See Ct. Ch. R. § 15(a) ("A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . .").

if it had been brought through a regular Rule 15(d) motion to supplement.<sup>18</sup> Rule 15(d) is a highly permissive standard. As Chancellor Chandler explained in *Parnes v. Bally Entertainment Corp.*:

‘As a general rule, leave to amend is freely given . . . and there is no apparent reason why the same liberality should not apply to a motion to supplement.’ Leave to amend can be denied if plaintiff inexcusably delayed in making its request *and* defendant is prejudiced as a result. This exception to the general rule permitting liberal amendment is narrowly construed.<sup>19</sup>

Agilent has made no attempt to demonstrate that the supplemental pleading was inexcusably delayed or that Agilent was prejudiced by it. Instead, Agilent rests its objections on the argument that AMT’s Amended Counterclaim is futile, and this court cannot grant leave to make a futile amendment.<sup>20</sup>

An amendment is futile if it would not survive a Rule 12(b)(6) motion.<sup>21</sup> This type of futility analysis is necessarily in tension with notions of judicial efficiency that seek to limit the number of separate occasions on which a court must consider a matter. Here, AMT has already filed the Amended Counterclaim, the majority of which is comprised of amendments properly made as a matter of course, and Agilent has already raised a 12(b)(6) motion against the Amended Counterclaim as a whole. In this situation, where there merely has been a technical mistake in an otherwise permissible amendment, I see no reason to exclude allegations that are pertinent to matters already before the court.

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<sup>18</sup> See 6A WRIGHT & MILLER § 1504 .

<sup>19</sup> 2000 WL 193112, at \* 2 (Del. Ch. Feb. 8, 2000) (quoting *Citron v. Lindner*, 1985 WL 44689, at \*1 (Del. Ch. Nov. 14, 1985)) (citations omitted).

<sup>20</sup> See *Cartanza v. Lebeau*, 2006 WL 903541, at \*2 (Del. Ch. Apr. 3, 2006) (“A court will not grant a motion to amend . . . if the amendment would be futile.”).

<sup>21</sup> *Id.*

And, as we shall see in the discussion of Agilent’s 12(b)(6) motion, the allegations in AMT’s supplemental pleading do support claims of unfair competition, tortious interference with prospective business relations, and deceptive trade practices. Thus, in my view, Agilent has offered no compelling reason why leave to supplement should not be granted to AMT, and I therefore allow all of the revisions in the Amended Counterclaim.

### C. Unfair Competition And Tortious Interference

AMT claims that Agilent embarked on a campaign of reputational harm that constitutes unfair competition and tortious interference with prospective business relations. To state a claim for unfair competition, a plaintiff must allege “a reasonable expectancy of entering a valid business relationship, with which the defendant wrongfully interferes, and thereby defeats the plaintiff’s legitimate expectancy and causes him harm.”<sup>22</sup> Similarly, to state a claim for tortious interference with a prospective business opportunity, a plaintiff must allege: 1) the reasonable probability of a business opportunity; 2) the intentional interference by defendant with that opportunity; 3) proximate causation; and 4) damages.<sup>23</sup> All of these factors “must be considered in light of a defendant’s privilege to compete or protect his business interests in a fair and lawful manner.”<sup>24</sup>

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<sup>22</sup> *Rypac Packaging Mach. Inc. v. Poges*, 2000 WL 567895, at \*8 (Del. Ch. May 1, 2000).

<sup>23</sup> *DeBonaventura v. Nationwide Mut. Ins. Co.*, 419 A.2d 942, 947 (Del. Ch. 1980).

<sup>24</sup> *Id.*

AMT has alleged four separate interactions between Agilent representatives and potential AMT customers, distributors, and a research partner that it asserts meet these criteria:

26. In or about May 2007, an Agilent sales representative falsely stated to a potential customer at a major multi-national company that there were patent issues with respect to AMT's product. The potential customer then inquired with AMT's distributor about the situation and the distributor requested an explanation from AMT.<sup>25</sup>

27. In late-2007, a respected researcher and professor at a prestigious university in Europe was told by an Agilent employee that AMT faced intellectual property issues with respect to its particle technologies. This individual relayed this communication back to AMT and conceded that his conversation with the Agilent employee had caused him to be uncertain about AMT's products and how to handle his relationship with AMT, and he further questioned whether his relationship with AMT could even continue. Prior to Agilent's interference, AMT had been discussing a collaborative relationship with this researcher. However, as a result of Agilent's conduct, this researcher ceased communications with AMT regarding new product development activities and no technical interactions have occurred between AMT and this researcher since Agilent's wrongful conduct.<sup>26</sup>

28. In or about April 2008, an Agilent sales representative told another significant distributor of HPLC products that the distributor was not permitted to promote or sell AMT's Halo® product and referenced this litigation, which Agilent had recently brought against AMT. Agilent's false statements and wrongful conduct resulted in reduced sales of AMT's product and a reluctance on the part of distributors to promote it.<sup>27</sup>

29. Also, in June 2008, Agilent again attempted to poison the HPLC marketplace for AMT's products at a meeting between Agilent employees and a potential customer of HPLC columns. This particular customer had tested columns with AMT's Halo® particles and was planning to develop a method using such columns. Agilent's employees told this potential customer that because AMT's Halo® product would soon

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<sup>25</sup> Am. Countercl. ¶ 26.

<sup>26</sup> Am. Countercl. ¶ 27.

<sup>27</sup> Am. Countercl. ¶ 28.

be gone from the market due to this lawsuit, the customer should instead use Agilent's similar product. Upon hearing this falsehood from Agilent, this potential customer placed the development of its method using Halo® columns on hold.<sup>28</sup>

For the reasons stated below, I find that Paragraphs 28 and 29 sufficiently support claims for unfair competition and tortious interference with prospective business relations, and I therefore deny Agilent's motion to dismiss these claims. Because I find that only Paragraphs 28 and 29 sufficiently plead acts of unfair competition and tortious interference, I focus most of my analysis on them.

Paragraphs 28 and 29 allege that Agilent representatives made misleading statements regarding the effect of this litigation on the availability of the Halo Particles to a potential customer and a potential distributor. Agilent argues that Paragraphs 28 and 29 do not support AMT's claims because they fail to identify: 1) a reasonable business expectancy; 2) wrongful conduct by Agilent; and 3) damages proximately caused by Agilent's conduct. I address each of these arguments in turn.

1. Reasonable Probability Of Business Opportunity

Both parties agree that to plead a reasonable probability of a business opportunity, AMT must "identif[y] a specific party who was prepared to enter into a business relationship but was dissuaded from doing so by the defendant" and cannot rely on

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<sup>28</sup> Am. Countercl. ¶ 29.

generalized allegations of harm.<sup>29</sup> They disagree about whether this means the Amended Counterclaim must identify the specific party by name.

Under Agilent’s reading of the identification requirement, AMT must supply the names of its potential business affiliates because terms like “potential customer” or “significant distributor” could refer to any party and are tantamount to generalized allegations of harm. But, Agilent has offered no authority for the proposition that a party is only identified if it is named. Agilent has cited cases indicating the specific party is generally identified by name, but these cases do not suggest that the specific party *must* be named.<sup>30</sup> In fact, in one of the cases Agilent cites, *Kelly-Springfield*, it appears the court accepted allegations of both named and unnamed prospective business relations.<sup>31</sup>

Moreover, AMT’s allegations are not the type of vague statements about unknown customers that courts usually reject.<sup>32</sup> Instead, AMT has pled the alleged incidents in enough detail — including dates and, in the case of the potential customer, the detail that “[t]his particular customer had tested columns with AMT’s Halo particles”<sup>33</sup> — that I can

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<sup>29</sup> AMT Ans. Br. at 12-13 (citing *Lipson v. Anesthesia Servs. P.A.*, 790 A.2d 1261 (Del. Super. 2001); *Kelly-Springfield Tire Co. v. D’Ambro*, 596 A.2d 867 (Pa. Super. 1991)); Agilent Rep. Br. at 4.

<sup>30</sup> See, e.g., *Lipson*, 790 A.2d at 1284-86; *Kelly-Springfield*, 596 A.2d at 309.

<sup>31</sup> *Kelly-Springfield*, 596 A.2d at 309 (“Appellant further averred that potential buyers, including National Life Insurance Co., had expressed interest but had been deterred by the pending legal action commenced by Stradley, Ronon. These averments, we conclude, were sufficient to demonstrate the existence of prospective contractual relations.”).

<sup>32</sup> See, e.g., *Wolk v. Teledyne Indus., Inc.*, 475 F. Supp. 2d 491, 513 (E.D. Pa. 2007) (“Nowhere in his complaint, or in his response to these defendants’ motions to dismiss, has Wolk specified one prospective contract with which these defendants intentionally interfered.”); *Riddell Sports Inc. v. Brooks*, 872 F. Supp. 73, 79 (S.D.N.Y. 1995) (“Counterplaintiffs’ allegations are too vague to support a finding that they would have executed specific contracts but for interference by counterdefendants.”).

<sup>33</sup> Am. Countercl. ¶ 29.

reasonably infer that specific parties were involved. This level of descriptiveness is enough to support a claim that “specific prospective business relations” existed,<sup>34</sup> and AMT is not required to go further and name the parties involved in the Amended Counterclaim.

Agilent also argues that AMT has not adequately alleged that it had a reasonable probability of engaging in business with the unnamed parties in Paragraphs 28 and 29. To be reasonably probable, a business opportunity must be “something more than a mere hope or the innate optimism of the salesman”<sup>35</sup> or a “mere perception of a prospective business relationship.”<sup>36</sup>

Paragraph 28 refers to a “significant HPLC distributor.” Given the relatively small size of the HPLC market and limited number of manufacturers in it, one would expect a “significant” distributor to be aware of and highly interested in a product like the Halo Particles, which at the time they were released were apparently the only HPLC particles that offered certain desirable characteristics associated with their size.<sup>37</sup> Moreover, Agilent’s own behavior belies the likelihood that the distributor would do business with AMT. Agilent, a comparative giant in the HPLC field, would have little reason to talk about the offerings of a small company like AMT with a distributor unless Agilent, recognizing that the Halo Particles were a possible substitute for its own

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<sup>34</sup> *Lipson*, 790 A.2d at 1285.

<sup>35</sup> *Wolk*, 475 F. Supp. 2d at 512.

<sup>36</sup> *Lipson*, 790 A.2d at 1285 (internal quotation omitted).

<sup>37</sup> *See* Am. Countercl. ¶ 17 (“[The Halo Particles had] highly desirable features such as unusually high chromatographic efficiency not yet obtained with commercial particles.”).



products, wanted to discourage the distributor from making the Halo Particles available to customers.

Paragraph 29 offers an even stronger case for a reasonably probable opportunity. AMT claims that Agilent made false statements to a “potential customer of HPLC [products].”<sup>38</sup> This potential customer had allegedly tested the Halo Particles for use in its projects, suggesting the customer had a serious interest in the product.

Thus, the circumstances alleged in Paragraphs 28 and 29 give rise to a reasonable inference that AMT had a justifiable expectation of business with the unnamed parties.

## 2. Wrongful Conduct

Agilent next argues that the alleged statements in Paragraphs 28 and 29 were not wrongful and cannot be the basis of an unfair competition or tortious interference claim for that reason. An alleged interference in a prospective business relationship is only actionable if it is wrongful.<sup>39</sup> Agilent claims that its alleged statements were not wrongful because they constitute truthful opinions protected by the First Amendment under the standards set out in *Moldea v. New York Times Co.*<sup>40</sup> Under *Moldea*, a

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<sup>38</sup> Am. Countercl. ¶ 29.

<sup>39</sup> *Int'l Bus. Mach. Corp. v. Comdisco, Inc.*, 1993 WL 259102, at \*21 (Del. Super. June 30, 1993) (“Only wrongful interferences will satisfy the tort, as some interferences are seen as justified or privileged under the aegis of competition.”); *see also* RESTATEMENT (SECOND) OF TORTS § 767 cmt. c.

<sup>40</sup> 15 F.3d 1137 (D.C. Cir. 1994). Other courts addressing similar unfair competition claims have also recognized that truthful statements are not actionable. *See, e.g., Int'l City Mgmt. Ass'n Ret. Corp. v. Watkins*, 726 F.Supp. 1, 6 (D.D.C. 1989). (stating, in a case involving disclosure of ongoing litigation to one of the parties' customers, “[o]ne competitor is free to communicate truthful information about another competitor to a third person”); *C.R. Bard, Inc. v. Wordtronics Corp.*, 561 A.2d 694, 697 (N.J. Super. Ct. Law Div. 1989) (“It is not improper to give truthful information to a customer about someone else's product, and this is so even if the purpose is to interfere with an existing or prospective contractual relationship.”); *see also* RESTATEMENT

statement of fact, or a statement of opinion that implies an assertion of fact, is generally actionable, whereas a pure statement of opinion is not.<sup>41</sup> Thus, the determinative question here is how to classify Agilent’s alleged statements.

At argument, Agilent conceded that the alleged statement in Paragraph 28 — that the distributor “was not permitted to promote or sell AMT’s Halo product” — could be read as a statement of fact or opinion.<sup>42</sup> Because I must give AMT the benefit of all reasonable inferences, I read this as an actionable statement of fact.

Similarly, I give AMT the benefit of the reasonable inference that the statement alleged in Paragraph 29 — that “AMT’s Halo product would soon be gone from the market due to this lawsuit” — involved a factual assertion. Agilent argues that this was a constitutionally protected statement of opinion about the outcome of this litigation. But, under the *Moldea* standard that Agilent relies on, a statement of opinion is still actionable if it “impl[ies] an assertion of objective fact.”<sup>43</sup> At this stage in the proceedings, I cannot rule out the reasonable possibility that Agilent’s alleged statement, in the context it was made, implied that there had been a definitive ruling in this case that would soon be implemented by an injunction requiring the Halo Particles’ commercial withdrawal, which would have involved a factual assertion.

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(SECOND) OF TORTS §772 cmt. b. (“There is of course no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another.”).

<sup>41</sup> *Moldea*, 15 F.3d at 1144-45 (D.C. Cir. 1994).

<sup>42</sup> Tr. at 47-48.

<sup>43</sup> *Moldea*, 15 F.3d at 1144.

On this point, it is useful to contrast the allegations in Paragraphs 28 and 29 with those in Paragraphs 26 and 27, which I find fail to plead wrongful conduct and therefore do not constitute acts of unfair competition or tortious interference. Paragraphs 26 and 27 both allege that Agilent representatives told potential AMT business partners that the Halo Particles had patent issues in 2007, before Agilent commenced this litigation. Specifically, AMT alleges that Agilent representatives told a potential AMT customer that the Halo Particles had “patent issues,” and told a European professor who was collaborating on research with AMT that the Halo Particles had “intellectual property issues.”<sup>44</sup> As noted earlier, claims for unfair competition and tortious interference must necessarily be balanced against a party’s legitimate right to compete.<sup>45</sup> In regard to the allegations in Paragraph 28 and 29, that balance falls in favor of AMT because the alleged statements purportedly contained misrepresentations of fact, which are not legitimate vehicles of competition. In regard to Paragraphs 26 and 27, the balance is reversed. Agilent allegedly told certain parties that the Halo Particles have “patent issues.” This phrase does not convey a factual assertion like, “the Halo Patents have been deemed invalid.” It does convey that a threat of litigation surrounded the Halo Particles, but there is nothing untrue about that. Agilent believed its rights were infringed by the Halo Patents, and it was free to share that view with the marketplace. It may be that uncertainty about AMT’s intellectual property has a detrimental effect on its ability to

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<sup>44</sup> Am. Countercl. ¶¶ 26-27.

<sup>45</sup> See *DeBonaventura*, 419 A.2d at 947 (noting that elements of a tortious interference claim “must be considered in light of a defendant’s privilege to compete or protect his business interests in a fair and lawful manner”).

compete, but that is simply a reality of doing business in a market concerned about the long-term availability of products.

Despite the infirmity of Paragraphs 26 and 27, AMT has still sufficiently pled wrongful conduct on the basis of the statements alleged in Paragraphs 28 and 29. And, although not individually rising to an actionable level, Paragraphs 26 and 27 lend support to the overall inference flowing from the Amended Counterclaim that Agilent consciously marketed its own products by casting doubt and uncertainty on AMT's Halo Particles.

### 3. Damages

Finally, Agilent claims that Paragraphs 28 and 29 fail to plead facts indicating that the alleged business relationships were actually damaged, or that the damage was caused by Agilent's conduct. To prevail at trial, AMT must show that Agilent's wrongful conduct was the proximate cause of harm to AMT.<sup>46</sup> Now, AMT must simply plead facts that plausibly support an inference of commercial harm.

In Paragraph 28, AMT states that an Agilent representative told a specific distributor that it could not sell the Halo Particles, and this "resulted in reduced sales of AMT's product and a reluctance on the part of distributors to promote it."<sup>47</sup> This stops short of making the clearly sufficient claim that Agilent's statement caused the distributor who heard it to change its relationship with AMT. Nevertheless, it still gives rise to a reasonable inference that Agilent's statement caused the alleged harm of reduced sales

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<sup>46</sup> *Rypac*, 2000 WL 567895, at \*8; *DeBonaventura*, 419 A.2d at 947.

<sup>47</sup> Am. Countercl. ¶ 18.

and distributor reluctance to sell AMT products. For starters, it is reasonable to believe that if Agilent made this statement to one distributor, it made it to others who have not yet been discovered, perhaps because they are reluctant to come forward and antagonize one of their major suppliers. Read together, Paragraphs 26 through 29 imply that Agilent representatives employed a conscious strategy to market Agilent's products by, in part, convincing buyers and distributors not to purchase AMT products. It is therefore plausible that the tactic of saying that the Halo Particles could not be distributed was used with other distributors. Agilent's argument that AMT has not pled a reasonably probable business opportunity with these other distributors is unavailing. As discussed earlier, given the pled facts regarding the nature of the industry, the uniqueness of the Halo Particles, and especially the allegation that Agilent sales representatives felt it necessary or desirable as a sales tactic to suggest to customers that they could not buy the Halo Particles or would soon have no further ability to buy the Halo Particles, it is highly plausible that other distributors were aware of the Halo Particles and had a strong interest in distributing them.<sup>48</sup>

Agilent also challenges the sufficiency of the harm alleged in Paragraph 29. In this Paragraph, the issue is not one of causation, but rather the question of whether AMT was actually harmed. AMT alleges that a potential customer who had been testing a method for using the Halo Particles "placed the development of its method using Halo

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<sup>48</sup> By Agilent's own admission, "[t]his is a small enough industry that . . . if [something] was happening, we'd all be hearing about it." Tr. at 53.

[Particles] on hold.”<sup>49</sup> Agilent’s argument that a development project being placed “on hold” causes no harm or only speculative harm is not sustainable. There is no requirement that a business relationship be definitively terminated for there to be interference. Rather, wrongful conduct is “unfair action on the part of defendant by which he prevents plaintiff from legitimately earning revenue.”<sup>50</sup> A derailed opportunity to bring in business exposes a party to lost cash flow immediately and the risk that the potential customer will find another deal in the meantime, leaving the party with permanently lost revenue. Thus, when the derailment is caused by the wrongful acts of others, the harm is compensable.

\* \* \*

In sum, AMT has adequately pled all of the elements required to make out claims for unfair competition and tortious interference with prospective business relations with regard to its allegations that Agilent representatives misrepresented the status and legal effect of this litigation to potential AMT customers. AMT’s pleading barely passes muster, a reality that suggests that AMT may have difficulty ultimately prevailing on its Counterclaim. But, that assessment does not alter AMT’s legal right to proceed to discovery on a well-pled complaint.<sup>51</sup>

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<sup>49</sup> Am. Countercl. ¶ 29.

<sup>50</sup> *EDIX Media Group, Inc. v. Mahani*, 2006 WL 3742595, at \*11 (Del. Ch. Dec. 12, 2006).

<sup>51</sup> *See Bell Atlantic v. Twombly*, 550 U.S. --, 127 S. Ct. 1955, 1965 (2007) (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely.” (internal quotation omitted)).

#### D. Deceptive Trade Practices Act

In addition to its common law claims, AMT has brought a statutory claim under Delaware’s Deceptive Trade Practices Act. The DTPA prohibits “disparage[ment] of the goods, services or business of another by false or misleading representations of fact,” committed “in the course of a business, vocation, or occupation.”<sup>52</sup>

Because the DTPA is meant to address “‘patterns of deceptive conduct,’ not isolated incidents,”<sup>53</sup> relief under the statute is dependent on the plaintiff’s entitlement to injunctive relief.<sup>54</sup> “[A] claim for injunctive relief must be supported by the allegation of facts that create a reasonable apprehension of a future wrong.”<sup>55</sup> Agilent argues that the specific incidents alleged by AMT are isolated and do not constitute a pattern of misconduct that would entitle AMT to relief. That argument is unpersuasive.

As discussed above, AMT has pled two incidents involving purported factual misrepresentations made by Agilent, namely the allegations of Paragraphs 28 and 29 of the Amended Counterclaim. When read in context with other supporting facts in the Amended Counterclaim, Paragraphs 28 and 29 provide a strong enough basis from which to infer a pattern of misconduct.<sup>56</sup> As noted earlier, the reasonable import of the incidents described in Paragraphs 28 and 29 is that Agilent representatives embarked on a sales

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<sup>52</sup> *EDIX Media Group*, 2006 WL 3742595, at \*12 (citing 6 *Del. C.* §§ 2532(a)(8), 2532(a)).

<sup>53</sup> *Id.* (quoting *Grand Ventures, Inc. v. Whaley*, 662 A.2d 655, 661 (Del. Super. 1992)).

<sup>54</sup> *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 53 (Del. Ch. 2005) (“[T]he failure of a party to be able to state a claim for injunctive relief at the time the suit is brought is fatal to claims under the Deceptive Trade Practices Act.”).

<sup>55</sup> *Id.* at 536.

<sup>56</sup> *See State ex rel. Brady v. Fallon*, 1998 WL 283438, at \*6 (Del. Super. Feb. 27, 1998) (finding DTPA violation where attorney general presented two examples of violative trade practices at auto mechanic’s shop).

strategy that involved trash talking AMT to potential customers and distributors, and may have used this strategy with parties that will be revealed through discovery. Paragraphs 26 and 27, although not independently stating a claim of unfair competition or tortious interference, buttress the inference that disparaging comments by Agilent representatives may have been frequent.

Agilent's argument that the alleged misconduct is not ongoing because it is linked to this litigation is misplaced. Agilent essentially argues that all of its alleged misrepresentations were about this litigation, so the need for injunctive relief will be mooted when this litigation is resolved. But, whether the alleged misconduct may end at a fixed point in the future does not alter the fact that it may be ongoing now, and a post-trial injunction issued by this court might be justified during the pendency of later appellate proceedings. The cases Agilent relies on involved conduct that had clearly ended years before the DTPA claim was brought.<sup>57</sup> Here, the alleged misrepresentations were ongoing to the point that they occurred *after* the filing of the Original Counterclaim. The fact that a party chooses to make an inherently time-limited matter like litigation the subject of its misrepresentations does not give it a free pass to spread falsehoods during the entire pendency of that matter. AMT had a basis when it filed its Amended Counterclaim for a "reasonable apprehension" that the alleged misrepresentations would be ongoing, at least until there was a final determination in this case, and AMT may therefore bring a claim under the DTPA.

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<sup>57</sup> See, e.g., *Pettinaro*, 870 A.2d at 536 (misleading conduct ceased five years before claim was brought); *Dionisi v. DeCampi*, 1995 WL 398536, at \*14 (Del. Ch. June 28, 1995) (wrongful conduct ceased eight years before claim was brought).



V. Conclusion

For the foregoing reasons, Agilent's Motion to Strike and Dismiss AMT's Verified Amended Counterclaim is denied. IT IS SO ORDERED.