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Order on the Brookstone Defendants' Motion for Partial Summary Judgment (RIVER'S EDGE PHARMACEUTICALS, LLC)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

RIVER'S EDGE PHARMACEUTICALS, LLC	)(	
Plaintiff,	)(	
v.	)(	**Civil Action File No. 2008CV147347**
RHETT DANIELS, ELIZABETH TREZZA, JAMES MARK PUGH, HAROLD A. DEAS, Jr., BROOKSTONE PHARMACEUTICALS, LLC	)(	
Defendants.	)(	

FILED IN OFFICE
SEP 16 2009
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON THE BROOKSTONE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

On August 13, 2009, counsel appeared before this Court to present oral argument on Defendants Brookstone Pharmaceuticals, LLC ("Brookstone"), James Mark Pugh, and Harold A. Deas, Jr.'s (collectively "the Brookstone Defendants") motion for partial summary judgment[1]. After hearing the arguments made by counsel and reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows:

I. **Facts**

Defendant Rhett Daniels resigned from his employment with Plaintiff River's Edge Pharmaceuticals, LLC ("River's Edge") on June 29, 2007. Daniels's employment with River's Edge was governed by an employment contract that included a non-disclosure clause. Pursuant to the non-disclosure clause, Daniels was forbidden from disclosing any of River's Edge's confidential information and trade secrets during his employment and for a 2-year period following termination of his employment.

[1] While their motion is captioned as one for summary judgment, at oral argument, the Brookstone Defendants acknowledged that it is only for partial summary judgment as to Plaintiff's claim for misappropriation of trade secrets.

In October 2007, Daniels accepted employment with Brookstone. Both River's Edge and Brookstone are in the business of selling generic pharmaceuticals. River's Edge alleges that Daniels disclosed its trade secrets to Brookstone and that Brookstone used that information to launch six products. The Brookstone Defendants have filed a motion arguing that the information at issue does not constitute trade secrets.

II. Standard

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

III. The Brookstone Defendants' Motion for Partial Summary Judgment

River's Edge claims the following items are trade secrets:

a. New Product Pipeline Reports which are comprised of Abbreviated New Drug Application ("ANDA") products, authorized generics, and other products that River's Edge is in the process of formulating, manufacturing, testing, packaging, and releasing to market.

b. ANDA Lists which are comprised of products with limited exclusivity or soon to expire patents and meet River's Edge's criteria for favorable market conditions, number of units sold, and anticipated cost.

c. New Product Lists (now known as Request for Quote Reports) which are comprised of products for which River's Edge has requested quotes from manufacturers with the capability to produce such products.

d. Company Watch Lists which are comprised of companies for which River's Edge has observed and tracked their *modus operandi* ("MO") as it relates to the marketing of new products.

e. Product Watch Lists which are comprised of products that River's Edge reviews on a monthly basis evaluating sales growth, declines, launches, removals, and price changes.

f. Manufacturing Capabilities Report which is comprised of the capabilities and strengths of certain manufacturers in producing products with different methods of delivering active ingredients, e.g., topical, capsule, liquid, suspension, etc.

g. Requests for Samples which is an itemization of requests that River's Edge has sent to manufacturers for samples of the brand product in which River's Edge has an interest.

River's Edge's also contends that its pricing formula constitutes a trade secret. The Brookstone Defendants argue that they are entitled to summary judgment on Count V of River's Edge's Complaint because the information claimed by River's Edge as trade secrets does not constitute trade secrets under Georgia law.

Not all confidential business information rises to the level of a trade secret. The Georgia Trade Secrets Act defines a trade secret as:

> 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).

"Whether a particular type of information constitutes a trade secret is a question of fact." Douglas Asphalt Co. v. E.R. Snell Contractor, Inc., 282 Ga. App. 546, 549 (2006); see also Hilb, Rogal & Hamilton Co. of Atlanta, Inc. v. Holley, 284 Ga. App. 591, 597 (2007) (holding that sufficient evidence existed to create a genuine issue of fact as to whether customer lists constituted trade secrets under Georgia law).

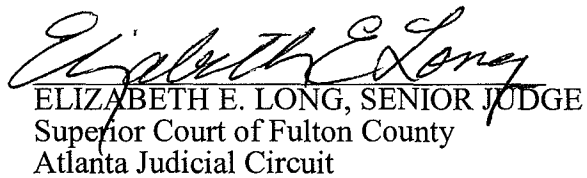
The Brookstone Defendants make three arguments as to why River's Edge's information should not be considered trade secrets as River's Edge claims. First, they argue that River's Edge's information is a manipulation of public information that has no value to anyone other than River's Edge and, therefore, does not constitute trade secrets. However, even information that is taken entirely from the public domain may be considered a trade secret if such information is held in a "unique combination of that information, which adds value to the information." Douglas Asphalt, 282 Ga. App. at 550. Thus, even if River's Edge's information is made up of publically-available information, this does not automatically disqualify it for trade secret status if the way in which River's Edge compiles the information adds value to it. River's Edge has provided an affidavit claiming that River's Edge derives economic value from the information not being generally known by competitors.

Second, the Brookstone Defendants argue that Brookstone's conduct with respect to the six products at issue in this case could not have been substantially derived from River's Edge's information because such information did not exist at the time Daniels departed from River's Edge, allegedly taking the information with him. Again, River's Edge has provided an affidavit showing that 5 of the 6 contested products were on River's Edge New Product List and one was on River's Edge's Company Watch List.

Finally, the Brookstone Defendants contend that they are entitled to judgment as a matter of law on River's Edge's misappropriation of trade secrets claim because Brookstone decided on its own which products to launch. However, a jury could conclude that Brookstone used River's Edge's information in deciding to launch the six products at issue in this case.

Whether River's Edge information is a trade secret, whether Brookstone misappropriated it, and whether River's Edge can prove damages are questions to be resolved by a jury. The Brookstone Defendants' Motion for Partial Summary Judgment is DENIED.

SO ORDERED this 16th day of September, 2009.



ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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