

**SEMTEK INTERNATIONAL
INCORPORATED**
Plaintiff

v.

**LOCKHEED MARTIN
CORPORATION**
Defendant

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY, Part 20
* Case No.: 97183023/CC3762

MEMORANDUM OPINION

I. Background

The present dispute between Semtek International Incorporated (“Semtek”) and Lockheed Martin Corporation (“Lockheed”) has been in litigation for more than ten years. In anticipation of a trial in this Court which began on September 22, 2003, Semtek filed a first amended complaint on June 25, 2003, adding additional allegations and two new causes of action under Massachusetts law. The Court granted Lockheed’s motion to strike the first amended complaint on August 19, 2003, but modified that order at the beginning of trial and permitted Semtek to amend the complaint by alleging the additional facts relating to the single count before the Court for trial, i.e., intentional interference with prospective economic advantage.

The trial began as scheduled on September 22, 2003 and continued for eleven days. At the close of Semtek’s case, Lockheed moved for judgment under Md. Rule 2-519 and the Court granted the motion. Semtek filed a timely notice of appeal and the case was argued before the Court of Special Appeals of Maryland, which issued an unreported opinion on December 27, 2005, affirming the judgments entered by this Court¹ but remanding the matter for the Court to

¹ The Court of Special Appeals affirmed the judgment entered by the trial court on the sole count presented at trial. It also affirmed, on other grounds, the trial court’s summary

consider the unresolved counts of Semtek's first amended complaint, namely, the two additional Massachusetts causes of action.

Upon remand, Lockheed filed a motion to dismiss the first amended complaint or, in the alternative, for summary judgment on June 23, 2006. In response, Semtek engaged new counsel and filed a second amended complaint on September 25, 2006, which occasioned a motion by Lockheed to strike the second amended complaint or, in the alternative, to dismiss it. The latter motion was heard at oral argument on January 24, 2007, at which time the Court took the matter *sub curia* to permit an opportunity to review the briefs and submissions of counsel and their arguments. Additional briefs were submitted with the permission of the Court in February of 2007, dealing specifically with the issues addressed in the unreported opinion of the Court of Special Appeals of Maryland.

The Court having considered all of these matters, it will enter a separate order this date denying defendant's motion to strike the second amended complaint and granting with prejudice its motion to dismiss the second amended complaint, for the reasons set forth in this Memorandum Opinion.

II. Lockheed's Motion to Strike the Second Amended Complaint

Defendant moved to strike plaintiff's second amended complaint, arguing that the Court of Special Appeals' remand order was limited to a consideration of Semtek's first amended complaint and, specifically, the two additional Massachusetts causes of action contained therein.

The applicable remand rule states that "Upon remand, the lower court shall conduct any further

judgment entered on the claim of interference with contract. Opinion at pp. 36-42. All references to the Court of Special Appeals decision are to the unreported slip opinion filed on Dec. 27, 2005.

proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.” Md. Rule 8-604(d).

While the trial court’s authority is limited by the terms of the order of remand from the appellate court and the opinion upon which the order is based is conclusive as to points decided therein, there is ample but dated Maryland authority for the proposition that cases may be remanded in order for pleadings to be amended and then proof taken. *See e.g., Glenn v. Clark*, 53 Md. 580 (1880). The underpinning, in fact, of the Court of Special Appeals’ determination to remand this case is a settled Maryland principle that “leave to amend shall be freely granted in order to promote justice.” *Robertson v. Davis*, 271 Md. 708, 710 (1974), a principle cited specifically in the opinion of the Court of Special Appeals here. Opinion at p. 43.

Although the factual allegations have been expanded significantly in the second amended complaint, the causes of action remain the same as those asserted by Semtek in its first amended complaint. *Gensler v. Korb Roofers, Inc.*, 37 Md. App. 538, 543 (1977). Plaintiff seeks to have the Court consider whether it has pled sufficiently causes of action for violation of Massachusetts General Laws, Chapter 93A and a civil conspiracy count² under Massachusetts law. These are precisely the causes of action that the appellate court directed this Court to consider on their merits. Accordingly, Lockheed’s motion to strike the second amended complaint will be denied.

III. Lockheed’s Motion to Dismiss the Second Amended Complaint

A. Issues Conclusively Determined By the Court of Special Appeals

In order for the Court to determine whether Semtek has sufficiently set forth claims in its

² An additional count (three) alleging civil conspiracy under a coercion theory was included in plaintiff’s second amended complaint but abandoned by plaintiff’s counsel during oral argument on this motion.

second amended complaint upon which relief can be granted, the Court must begin by delineating those issues which were conclusively determined on appeal. The following issues were decided by the Court of Special Appeals, thereby becoming the law of the case,³ and may not be re-litigated upon remand: (1) Lockheed did not interfere with Semtek's prospective economic advantage; (2) Lockheed did not interfere with a contractual relationship between Semtek and Mercury; (3) Lockheed had no knowledge of Semtek's interest in a business relationship with Mercury prior to July 6, 1994; (4) Lockheed engaged in no tortious actions against Semtek after July 6, 1994; (5) Lockheed did not have a joint venture relationship with Transworld, Inc. ("Transworld");⁴ (6) Lockheed did not use improper means to eliminate Semtek from a business deal with Mercury after July 6, 1994; and (7) Lockheed's actions in competing with Semtek fell within the bounds of proper motive as defined by Massachusetts law.

The following issues were not conclusively determined by the appellate court and are properly before this Court on remand: (1) Can Semtek's claims under its Massachusetts causes of action withstand a motion to dismiss or summary judgment? (2) Are Semtek's Massachusetts

³ Questions properly presented on appeal and ruled upon become the law of the case in Maryland and bind the parties as well as the court. *Fidelity-Baltimore Nat'l. Bank & Trust Corp. v. Hancock*, 217 Md. 367, 372 (1957).

⁴ Semtek vigorously asserts that this Court never determined the joint venture issue, except indirectly in making an evidentiary ruling and that the Court of Special Appeals was therefore incorrect or merely creating dicta when it found that there was no joint venture relationship between Lockheed Martin and Transworld. Opinion at p. 35. Lockheed correctly counters that this Court has no authority to revisit upon remand matters decided by the appellate court. *Korotki v. Springer*, 218 Md. 191, 194 (1958) and cases cited therein. This Court believes that this issue was determined by the Court of Special Appeals on the record before it and is now foreclosed.

causes of action time barred?⁵

B. The Procedural Posture of the Case

In this case the Court of Special Appeals concluded that this Court had erred by striking Semtek's first amended complaint "rather than either dismissing Semtek's new legal theories for failing to state a claim upon which relief could be granted, or otherwise addressing the claims on their merits, or lack thereof." Opinion at p. 3. But for the filing of the second amended complaint, the Court would now have the opportunity to address the adequacy of Semtek's Massachusetts claims as a matter of pleading or on their merits because Lockheed promptly filed a motion to dismiss the first amended complaint or, in the alternative, for summary judgment when the case was remanded to this Court. That motion was rendered moot, however, by the filing of the second amended complaint on September 25, 2006.

After Semtek filed its second amended complaint, Lockheed moved to strike it or, in the alternative, to dismiss it under Md. Rule 2-322. Having denied defendant's motion to strike the second amended complaint, the Court must now address the issue of whether plaintiff has stated claims upon which relief can be granted, in light of the issues and factual determinations conclusively resolved as a result of the earlier trial and appeal.

In ruling on defendant's motion to dismiss under Md. Rule 2-322(b)(2) for failure to state a claim upon which relief can be granted, the Court must assume for purposes of the motion that all facts alleged in the second amended complaint are true. In disposing of the motion, the Court may consider not only all well pleaded facts contained in the second amended complaint but also

⁵ Because the Court is dismissing the second amended complaint on a motion under Md. Rule 2-322, it need not address Lockheed's limitations defense.

those facts that fairly may be inferred from the facts expressly alleged. *See Bennett Heating and Air Conditioning v. Nationsbank of Maryland*, 342 Md. 169, 174 (1996). The object of the motion is to argue that, as a matter of law, relief cannot be granted on the facts alleged. The motion may raise any question of law giving rise to a basis for dismissal of the action, including the negative and affirmative defenses set forth in sections (f) and (g) of Md. Rule 2-323. Those defenses include, *inter alia*, collateral estoppel, estoppel, res judicata and any other matter constituting an affirmative defense on legal or equitable grounds, which would include the law of the case doctrine under these circumstances. Consequently, the status of the present case is unique. In the judgment of this Court, the standard that must be applied is whether, excluding allegations barred expressly by the decision of the Court of Special Appeals, Semtek has stated claims under Massachusetts law upon which relief can be granted. Applying that standard, the Court finds that plaintiff has failed to meet it and the second amended complaint will be dismissed with prejudice.

C. The Massachusetts Claims Contained in the Second Amended Complaint

Before addressing on their merits the remaining counts of the second amended complaint, the Court notes that one of the specific reasons given by the Court of Special Appeals for declining to uphold this Court's striking of the first amended complaint was the fact that "Semtek's amended complaint was based upon the same operative fact pattern ..." Opinion at p. 47. In the judgment of the Court of Special Appeals that fact supported plaintiff's contention that the first amended complaint did not unduly expand the scope of the proceedings before the trial court and should have been allowed. Thus, the case was returned to this Court, the appellate court stating

Upon remand, the Circuit Court must consider the unresolved counts of Semtek's first amended complaint and address the two new asserted causes of action on their merits, if any. Although we express no view on whether Semtek stated viable new claims in its first amended complaint, we note that Semtek itself assured the Circuit Court that the new civil conspiracy and consumer protection claims would 'stand or fall with the ruling by the court on the summary judgment motion directed to the interference claims.' Because we have affirmed the Circuit Court's judgment in Lockheed's favor on both interference claims, we leave it to the Circuit Court to determine whether Semtek's prediction was correct.

Opinion at pp. 49-50.

In the context of these pronouncements by the intermediate appellate court, Semtek recognized that succeeding on the merits of its first amended complaint might present an uphill battle. It therefore chose to file a second amended complaint, attempting to capitalize on issues it deemed unresolved by the prior litigation. The Court now must evaluate Semtek's remaining claims against precisely that landscape.

1. Count One - Chapter 93A Claim

A . Vicarious Liability

The ruling by the Court of Special Appeals that there was no joint venture established between Transworld and Martin Marietta (now Lockheed), left Semtek with little upon which to allege a claim of vicarious liability against the defendant. In its second amended complaint, plaintiff has attempted to overcome that obstacle by asserting a principal-agent relationship between Transworld and Lockheed. In this Court's judgment, this effort too must fail when the allegations are measured against the Massachusetts pleading standards.

First of all, the existence of a principal-agent relationship is contradicted by the unambiguous written agreements between Transworld and Lockheed. Both the agreements executed on December 17, 1993 contain integration clauses. The MPWCS⁶ agreement specifically states that it “shall not be construed to constitute either party the *agent*, employee, attorney-in-fact, partner or joint venturer of the other.” Appellee’s Brief at p. 7 (referencing E. 2201 of appellate brief, ¶ 8). Another contract, the Fixed Price Contract,⁷ contained a similar clause and explicitly defined Transworld as an independent contractor of Lockheed. Opinion at pp. 34-35. Thus, the rationale employed by the Court of Special Appeals to rule out a joint venture relationship applies as well to the establishment of a principal-agent relationship.

Moreover, the allegations of the second amended complaint are insufficient as a matter of law to overcome this hurdle because they recite precisely the type of evidence on this point barred by the integration clauses in the December 1993 agreements. Second Amended Complaint ¶ 5. Other allegations merely place a different packaging on facts that were a part of the record before the Court of Special Appeals when it determined that there was no joint venture between Transworld and Lockheed. *See infra*, text pp. 10-13, comparing the record facts with the allegations of the complaint. Most importantly, the law of the case doctrine precludes Semtek from switching gears on remand and converting its joint venture theory to one of

⁶ The Multi-Purpose Wireband Communication Systems (MPWCS) was a signal compression technology developed by Lockheed. Transworld presented to Lockheed the opportunity to develop a telecommunication system in Russia utilizing MPWCS. Appellee’s Brief at p. 5.

⁷ Pursuant to this agreement, Lockheed agreed to pay Transworld \$8.5 million to modify and test a Louch II satellite. Appellee’s Brief at p. 7.

principal- agent.⁸ That doctrine forecloses relitigation of issues “expressly or impliedly decided by the appellate court.” *See South Atlantic Limited Partnership of Tennessee, L.P. v. Riese*, 356 F.3d 576, 584 (4th Cir. 2004); *see also County of Suffolk v. Stone & Webster Engineering Corp.*, 106 F.3d 1112, 1117 (2nd Cir. 1997). Therefore, even if Semtek did provide the Court with new facts to support its agency theory, Semtek is foreclosed from litigating the agency issue on remand because it could have raised this issue on appeal. *See Pasarew Construction Co. v. Tower Apartments, Inc.*, 208 Md. 396, 402 (1955) (stating that “when an appeal is taken, all the questions which may be properly raised in this Court on the then state of the record, as it might exist in the court of original jurisdiction, must be considered as embraced by the first appeal, and if not then raised and presented for decision, they must be considered waived.”).

The most recent articulation of the law of the case doctrine is found in *Reier v. Dept. of Assessments*, 397 Md. 2 (2007). While that case presented a different procedural issue, the Court of Appeals employed language which may cast some doubt upon the continuing vitality of the above cited rulings. For example, the decision recites: “It appears to us, however, that the doctrine of the law of the case, in its proper application, concerns appellate conclusions as to questions of law, not pure questions of fact.” *Id.* at 21. But this Court does not read the holding

⁸ The Court of Special Appeals quoted the sole authority offered by Semtek in support of its joint venture theory, *Gurry v. Cumberland Farms*, 550 N.E.2d 127 (Mass. 1989) at page 33 of its opinion: “The key requirement in finding [a joint venture’s] existence is an intent to associate.” *Gurry*, 550 N.E.2d at 133 (citations omitted). The primary determination of a principal-agent relationship under Massachusetts law is the existence of “mutual consent, express or implied, that the agent is to act on behalf and for the benefit of the principal and subject to the principal’s control.” *Brown-Forman Corp. v. Alcoholic Beverages Control Com.*, 841 N.E.2d 1263, 1270 (Mass. App. Ct. 2006). Because these pivotal determinations are virtually identical, the Court believes the latter to be subsumed within the former and therefore inescapably barred by the application of the law of the case doctrine to the claims in this case.

of that case so broadly as to permit the relitigation here of new factual allegations when it is clear that they are made in the context of legal theories rejected by the Court of Special Appeals earlier. Indeed, it is difficult to conceive of “pure matters of fact” that might be unconnected to conclusions of law, if the facts are relevant to the application of legal principles. In any event, in this Court’s judgment, Plaintiff has not presented new facts on the issue of agency which are sufficiently unrelated to the Court of Special Appeals’ conclusion that Lockheed and Transworld had merely a vendor-vendee relationship⁹ to place them beyond the binding effect of the law of the case doctrine. *Reier*, 397 Md. at 22.

For all these reasons, the Court finds that Semtek cannot as a matter of law make out a claim for vicarious liability against Lockheed based on its agency theory.

B. The Record Before the Court of Special Appeals Contained
Substantially the Same Allegations Presented by the Second
Amended Complaint

Although Semtek peppers its new complaint with examples of alleged bribes and kickbacks between Lockheed and Transworld in order to secure Transworld’s contract with Mercury for the Louch II satellites, these same facts were already matters of record, albeit in different form, when the Court of Special Appeals determined that Lockheed acted with a legitimate motive in its competition for this telecommunications business. For example, Semtek now raises the following allegations of unfair competition and deceptive trade practices:

1. Semtek alleges that Lockheed made a \$260,000 payment to Transworld and Smolsat in October, 1993 pursuant to a phony Fixed Price Contract, knowing full well that the monies were to be used for “bribes, kickbacks, improper and illegal

⁹ Opinion at p. 35.

payments and conduct in violation of the Foreign Corrupt Practices Act and/or other violations of the law.” Second Amended Complaint ¶¶ 89-97. The payment of the \$260,000 from Lockheed to Transworld and the fictitious contract entered by them to justify this payment is described in detail in plaintiff’s brief to the Court of Special Appeals. Appellant’s Brief at pp. 14-17.

2. Plaintiff alleges that Transworld entered into a fraudulent Consulting Agreement with an entity entitled “TV Services” in November, 1993. The agreement called for monthly payments of \$15,000 for the benefit of nine individuals, including Alexander Averianov, Mercury’s Program Manager. Semtek claims the payments were disproportionate to the work to be performed and that no reports of any such work exist. It asserts that five payments were made, totaling over \$75,000, beginning seven months before the Consulting Agreement was executed. The allegation is that the payments were actually an attempt to cover up “bribes, kickbacks, improper and illegal payments, conduct in violation of the Foreign Corrupt Practices Act and/or other violations of the law.” Semtek further alleges that Transworld made \$3000 monthly payments to a “bagman” for the same purposes. Second Amended Complaint ¶¶ 97-105. Substantially the same facts are contained in the record that was before the Court of Special Appeals, although presented in different form. Appellant’s Brief at pp. 17-18.¹⁰

3. Next, Semtek alleges a series of contracts coordinated by Lockheed and

¹⁰ These facts were also presented in Semtek’s Opposition to Lockheed Martin’s Motion for Summary Judgment at p. 6.

Transworld in an effort to “move forward with its plan to market telecommunications services through excess capacity on Russian satellites, using Martin Marietta technology.” Plaintiff contends that Lockheed was to pay Transworld \$8.5 million over four years for work that Transworld was not obligated to perform and Transworld, in turn, would pay \$7 million to Mercury for the exact same work, keeping \$1.5 million as its profit “for being a conduit for Martin Marietta.” Second Amended Complaint ¶¶ 107-110. These facts were also considered by the Court of Special Appeals when it made its decision that there was no improper conduct on the part of Lockheed. Appellant’s Brief at pp. 18-19.

4. Finally, Semtek alleges a series of three Implementation Agreements entered on December 17, 1993. The first was between Transworld and Mercury for \$7 million to perform the same work Transworld was supposed to perform under its Fixed Price Contract with Martin Marietta. The second was between Transworld and NPO, setting forth payments of 20% of net revenues for all services on the Russian satellites during the 20 year term of the contract. The third was between Transworld and Smolsat, calling for a payment to Smolsat of \$41,666 per month to act as Transworld’s marketing and sales representative in Russia. Semtek alleges that the first of these agreements was procured “as a direct result of bribes, kickbacks, improper and illegal payments, conduct in violation of the Foreign Corrupt Practices Act and/or other violations of law,” paid by Lockheed through Transworld. It further alleges that Lockheed knew Transworld would be unable to

make a required \$1.2 million payment due to Mercury by January 6, 1994 under Implementation Agreement No. 1. Semtek claims that Lockheed's initial \$2 million payment to Transworld under its Fixed Price Contract on December 24, 1993 was merely a "cover" to provide Transworld the funds needed to make its \$1.2 million payment to Mercury. Second Amended Complaint ¶¶ 110-116. These Implementation Agreements and the so-called "fronting" of the \$1.2 million by Lockheed are alleged generally in Semtek's brief. See Appellant's Brief at p. 19. An additional allegation concerning a wire transfer from Lockheed to Transworld of \$1.6 million in June, 1994 to cover another payment due from Transworld to Mercury is made in the Second Amended Complaint ¶ 117.¹¹ These factual allegations, although not detailed in Semtek's appellate briefs, arise from the same operative facts concerning payments due to Mercury from Transworld under the first Implementation Agreement and allegedly paid by Lockheed. See Appellant's Brief at 19.¹²

Consequently, the above referenced factual allegations were commingled with the legal conclusion reached by the Court of Special Appeals that the evidence in this case does not

¹¹ Semtek's second amended complaint sets forth more detail on the payments alleged to have been made by Lockheed to Mercury through Transworld as a result of Implementation Agreement No. 1. Second Amended Complaint ¶¶ 116-119. The issue, however, was clearly defined by the record when this case was heard and decided by the Court of Special Appeals. The additional allegations are insufficient to save the second amended complaint at this point in the proceedings.

¹² These allegations are not new. They appeared in a number of memoranda filed with this Court before trial, in deposition testimony from several witnesses (John Montague, Richard Millman and Bruce Dubinsky) and, thus, were a part of the record in this case when the appeal went forward.

establish unlawful motive behind Lockheed's legitimate competitive acts to obtain the Russian satellite rights.

C. Semtek's 93A Claim Fails to Meet the Requirements of Massachusetts Law

Under Massachusetts law, to allege sufficiently a Chapter 93A statutory claim, the plaintiff must show that a person or entity who engages in the conduct of trade or commerce suffers loss of money or property due to:

use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under paragraph (c) of section two...

Chapter 93A, § 11, Massachusetts General Laws Article.

The first problem with Semtek's Chapter 93A claim is that the Lockheed conduct alleged to be "unfair or deceptive" all occurred after July 6, 1994, the date after which the Court of Special Appeals held that Lockheed engaged in no tortious activity.¹³

The second and fatal problem with Semtek's Chapter 93A claim is that it cannot meet the

¹³ The Court of Special Appeals in determining that Lockheed did not engage in tortious activity stated that "there was no evidence that Lockheed conducted improper espionage, used leverage against Semtek, or spread false rumors about Semtek. Lockheed's actions fell well within the bounds of proper motive as defined by Massachusetts courts..." Opinion at p. 32. This determination encompasses "unfair or deceptive" conduct as defined by Massachusetts courts. *See Speakman v. Allmerica Financial Life Ins.*, 367 F.Supp.2d 122, 140 (D. Mass. 2005) (stating that "Chapter 93A provides no definition of an unfair or deceptive act or practice...conduct that comes within any recognized common law or statutory concept of unfairness is actionable under section 11."); *see also Tufankjian v. Rockland Trust Co.*, 57 Mass. App. Ct. 173, 179 (2003) (stating that unfair or deceptive conduct includes "an element of either bad faith and improper motive or a breach of fair dealing.").

statutory requirement¹⁴ that the alleged unfair competition or deceptive acts “occurred primarily and substantially within the commonwealth.” See *Kuwaiti Danish Computer Co. v. Digital Equipment Corp.* 781 N.E.2d 787, 797 (Mass. 2003) (stating that when virtually all the conduct that can be said to be unfair or deceptive occurs outside the Commonwealth, there can be no Chapter 93A liability.). On this point, the Massachusetts courts have been reluctant to find a “center of gravity” simply on the grounds that one of the parties resided within the state, that communications took place in the state, or that economic injury occurred in the state. For example, in *Kenda Corp. Inv. v. Pot O’Gold Money Leagues*, 329 F.3d, 216, 235 (2003), the court held that even though plaintiff’s office was in Massachusetts and certain communications were based in the state, the center of gravity was in Michigan, where two meetings between the parties occurred resulting in the deceptive conduct. Similarly, the conduct which plaintiff alleges took place in Massachusetts amounts only to communications involving Semtek, located in Massachusetts, i.e., correspondence from Semtek in Massachusetts to Lockheed, phone calls received in Massachusetts from agents of Lockheed and faxes received by Semtek in Massachusetts from agents of Mercury. See Semtek’s Opposition to Lockheed’s Motion to Dismiss Second Amended Complaint, at pp. 52-54.

Equally ineffective is Semtek’s claim that it “suffered extreme economic loss in Massachusetts as a consequence of losing its business opportunity and the expected benefits of

¹⁴Chapter 93A, §11 provides in relevant part

No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth.

its agreements with Mercury.” *Id.* at 54. Under Massachusetts law, financial injury alone is not enough to satisfy the Chapter 93A jurisdictional requirement. See *Garsham Co., Ltd. v. General Electric Co.*, 176 F.3d 1, 7 (1st Cir. 1999) (holding that “the trial court correctly recognized, however, that the place of injury is not determinative; otherwise in almost every case with a Massachusetts plaintiff, the defendant would be subject to Chapter 93A violations, regardless of how negligible the defendant’s activity in Massachusetts was. The fact that [plaintiff] incurred the loss in Massachusetts is not determinative in this case.”).

Moreover, Semtek now disavows its own admission that the center of gravity is not Massachusetts. In a different context, however, it previously stated that “it’s not aware of any acts undertaken by Lockheed to interfere with Semtek’s joint venture agreement with Mercury or its prospective economic relationship with Mercury which occurred in Massachusetts. Rather, Semtek asserted that those events occurred primarily in Maryland.” Semtek’s Memorandum in Support of Its Motion to Preclude Lockheed from Seeking Application of Massachusetts Law at pp. 8-9. The context notwithstanding, plaintiff cannot have it both ways. The Court believes that plaintiff is judicially estopped from taking such blatantly inconsistent positions in the course of this litigation. *Vogel v. Touhey*, 151 Md. App. 682, 707 (2003).

Accordingly, the Court finds that Semtek fails to meet the center of gravity requirement necessary to assert a 93A claim. The conduct alleged by Semtek was not unfair or deceptive as a matter of law; communications in the state and economic injury are insufficient to meet the Massachusetts test; and Semtek’s own admissions contradict its claim that the center of gravity is now in Massachusetts.

2. Count Two - Civil Conspiracy

The sole remaining count in Semtek’s second amended complaint alleges that Lockheed engaged in a concerted action with Transworld, “pursuant to a common design and/or with the defendant’s substantial assistance and/or encouragement, with knowledge that such assistance was contributing to a common tortious and/or wrongful plan.” Second Amended Complaint ¶ 133.

In order for Semtek to make out a cause of action for civil conspiracy under Massachusetts law, based on a concerted action theory, plaintiff must show that “two or more persons were acting in concert pursuant to a common design in order to commit a tortious act.” *Cusick v. Carver*, 67 Mass. App. Ct. 1, 5 (2006). It is “not sufficient to prove joint tortious acts of two or more persons” *Gutierrez v. Massachusetts Bay Transportation Authority*, 437 Mass. 396, 772 N.E.2d 552, 568 (Mass. 2002). Rather, Semtek must prove that Lockheed Martin “acted pursuant to an agreement to injure plaintiff.” *Id*; see also *Thrifty Financial Services, Inc. v. People’s Service Ins. Co.*, No. 022101, 2005 WL 3489878 at * 6 (Mass. Super. 2005). When alleging an aiding and abetting theory of conspiracy, a plaintiff must plead facts that show that a person “knows that the conduct of another person constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.” *Kurker v. Hill*, 44 Mass. App. 184, 189 (1998) (quoting a version of Restatement (Second) of Torts, § 876(b)(1977)).¹⁵ The key to this cause of action is that the defendant assists “with the knowledge that such assistance is contributing to a common tortious plan.” *Id*.

Thus, Semtek must allege sufficient facts to assert that Lockheed entered into an

¹⁵ Massachusetts has not explicitly adopted this section of the Restatement, but it has been cited frequently in its appellate decisions.

agreement to injure plaintiff; that the underlying conduct was tortious; and that defendant had knowledge of the tortious conduct. The second amended complaint, however, does not meet the Massachusetts pleading requirements for this claim because Semtek is now foreclosed from asserting that Lockheed was aware of Semtek or its Mercury interests before July 6, 1994. In *Cusick*, the Appeals Court of Massachusetts held that the plaintiff's civil conspiracy theory hinged on defendant's awareness of the alleged contract. The court concluded that since the plaintiff was not able to demonstrate that the "defendants knew of or intentionally interfered with" the contract, plaintiff's claim for civil conspiracy fails. *Cusick*, 67 Mass. App. Ct. 1110 at *5. As in *Cusick*, because the Court of Special Appeals has already determined that prior to July 6, 1994, defendant had no knowledge of Semtek's relationship with Mercury, plaintiff cannot claim that defendant entered into an agreement during that period to injure Semtek.

In order to make out a claim for conduct by Lockheed after July 6, 1994, Semtek must contend that the underlying conduct of the co-conspirators was tortious. *Thrifty Financial Services, Inc. v. People's Service Ins. Co.*, No. 022101, 2005 WL 3489878 at * 6; *Kibbe v. Potter*, 196 F. Supp. 2d 48, 76 (D. Mass. 2002) (granting summary judgment because "without any viable tort claim against Plaintiffs, there can be no civil conspiracy."). But the Court of Special Appeals also determined that Lockheed committed no tortious acts after July 6, 1994. Opinion at p. 32. Consequently, Semtek cannot plead a viable civil conspiracy count under Massachusetts law on the state of the record before this Court. Without new factual allegations to support this cause of action, it too must be dismissed.

IV. Conclusion

For all the above reasons, the second amended complaint will be **DISMISSED**, with

prejudice. Under the unique posture of this case, plaintiff cannot cure the pleading deficiencies in any manner that would state a cognizable claim under Massachusetts law.

ALBERT J. MATRICCIANI, JR.
Judge
Date: Apr. 12, 2007

cc: Stephen L. Snyder, Esquire

Francis B. Burch, Jr., Esquire
Anthony L. Meagher, Esquire
Brett Ingerman, Esquire