

**SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
HONORABLE EDWARD M. COLEMAN  
DOCKET NO.: SOM-C-12013-15  
RETURN DATE: April 30, 2015**

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LifeCell Corp.,

Plaintiff

v.

Tela Bio, Inc., Antony Koblisch,  
and Maarten Persenaire,

Defendants.

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**Memorandum**

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Plaintiff's Application for Injunctive Relief

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**I. Introduction**

This matter comes before the Court by way of Plaintiff LifeCell Corporation's application for an Order to Show Cause with Temporary Restraints against Defendants TELA Bio, Inc., and two of its founders, Defendants Antony Koblisch and Maarten Persenaire ("the Individual Defendants"; collectively, "Defendants"). LifeCell is a regenerative medicine company founded in 1986 and based in Branchburg and Bridgewater, New Jersey. Tela Bio is a new venture based in Pennsylvania and incorporated on April 17, 2012 by the Individual Defendants, and allegedly, also by Dr. David McQuillan, LifeCell's former Director of Research and Development. LifeCell's Complaint alleges that Defendants, acting together with Dr. McQuillan, willfully misappropriated LifeCell's trade secrets and proprietary information to develop a hernia repair product that LifeCell alleges is being introduced to replace LifeCell's existing Strattice Reconstructive Tissue Matrix product. LifeCell also alleges that Defendants pirated ten of its sales representatives, all of whom are bound by non-competition covenants, to sell Defendants' product in competition with Strattice. On March 12, 2015, this Court granted Plaintiff's application for temporary restraints, *ex parte*, and Defendants were thereafter served with a copy of the Order and Decision entered by this Court.

Defendants subsequently moved for dissolution of the restraints pursuant to R. 4:52-1(a). Defendants agreed not to commence commercial sales of the product, and to refrain from hiring any additional LifeCell or former LifeCell employees, until the April 30 return date. Tela Bio submits that these undertakings will preserve the status quo and eliminate any potential harm to LifeCell while allowing Tela Bio to continue to operate without any detriment to its future business prospects, should it be determined that its product and practices are lawful and not unfair to LifeCell. On March 23, 2015, this Court heard oral argument on Defendants' motion, and the Court granted a modification to the Temporary Restraints. With regard to Defendants' arguments to modify the Order granting the Temporary Restraints, and in light of Plaintiff's representation that all they seek "is to stop [Defendants] from hiring our sales people, stop them from launching this product," and only sought restraints that are the "least restrictive as possible," the Court agreed given that Tela Bio does not intend to engage in commercial sales of TELAMax prior to the return date of the Order to Show Cause, April 30, 2015, the status quo can be fairly preserved by less restrictive means than those that had been previously granted. Tela Bio agreed to voluntarily undertake to the Court that it will refrain from engaging in commercial sales of TELAMax, or from hiring additional LifeCell employees prior to April 30, 2015.

By way of background, Dr. McQuillan was the director of R&D at LifeCell for over a decade. Plaintiff avers that from its inception, Dr. McQuillan played a substantial role in the development of Strattice, and he was one of a limited number of individuals with full access to LifeCell's trade secrets and other proprietary information related to Strattice. He was responsible for overseeing technological innovation and development generally at LifeCell, and was involved with a number of product development projects generally related to the same technology as Strattice.

Mesynthes is a biotechnology company founded in 2008. In 2009, it patented extracellular matrix (ECM) technology based on ovine rumen (sheep forestomach), and developed two product lines based on this technology which differ with respect to their final intended use. The first, called EDT, is for topical applications and received clearance from the FDA in 2010. The second, called ERT, is intended for surgical applications but could not be marketed for hernia repair. The Individual Defendants, who were looking to invest in promising medical technologies, learned about the patented ERT technology and met with the CEO of Mesynthes, Brian Ward, in early 2012. They decided to pursue collaboration with Mesynthes for the development of a product

based on ERT, and one that could be marketed in the United States. Accordingly, the Individual Defendants formed Tela Bio as the vehicle for their proposed investment in the proprietary ERT technology. The Individual Defendants then allegedly contacted Dr. McQuillan, due to his experience and technical expertise in order to evaluate the Mesynthes technology. This resulted in the creation of TELAMax.

The products at issue in this case are ECM, designed principally for use in hernia repair. As mentioned, Defendants' product is called TELAMax, and is derived from sheep tissue. LifeCell's tissue repair products have been considered the "gold standard" in the industry. One such product is AlloDerm, developed in the 1990s and continues to be sold today for a variety of applications. AlloDerm is derived from human dermis. In the early 2000s, LifeCell began to experiment with ECMs fabricated from pig skin, the efforts of which culminated in the release of Strattice. Strattice has been sold since 2008 and is derived from porcine dermine (pig skin). Defendants allege that certain key elements of the Strattice process, such as the composition of the decellularization solution, were simply carried over without modification from the publicly-known AlloDerm process. Defendants have made changes to every single one of the key seven steps in the manufacturing process of TELAMax, Plaintiffs allege, such that Defendants' process mirrors that of Strattice.

Plaintiff's six-count Complaint alleges misappropriation of trade secrets, misappropriation of proprietary information, unfair competition, tortious interference with contract and prospective economic advantage, civil conspiracy, and unjust enrichment. The parties have engaged in expedited discovery and have submitted additional supplemental briefs to the Court in anticipation of the April 30 hearing. The Court will discuss the arguments made by both parties below.

## **II. Standard**

The issue before the Court is whether to grant Plaintiff's request for injunctive relief. In order to grant such extraordinary relief, Plaintiff must demonstrate that (1) the temporary restraints are necessary to prevent irreparable harm; (2) the legal right underlying the Plaintiff's claim is settled; (3) the material facts are uncontroverted and demonstrate a reasonable probability of ultimate success on the merits; and (4) the relative hardship to the parties in granting or denying relief favors granting the relief. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). The Court must find clear and convincing evidence that an injunction is warranted under these standards. Am. Employers' Ins. Co. v. Elf Atochem N. Am., 280 N.J. Super. 601, 611 (App. Div. 1995) (citing

Dolan v. DeCapua, 16 N.J. 599, 614 (1954)). This clear and convincing standard must be accompanied by “evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction without hesitancy, of the truth of the precise facts in issue.” Cruzan by Cruzan v. Director, Missouri Dep’t of Health, 497 U.S. 261, 285 n. 11 (1990).

### **III. Analysis**

#### **a. Plaintiff’s Application for Injunctive Relief**

Plaintiff contends that since the March 23, 2015 hearing and with the Court’s assistance in ordering Defendants to provide an expedited discovery, its case has become even stronger, and Plaintiff has obtained new evidence from Tela Bio that confirms that the Court should maintain the status quo until trial because LifeCell is likely to succeed on the merits of its claims.

Plaintiff avers that the evidence makes it clear that as LifeCell alleged in its Verified Complaint, Tela Bio is a venture capital vehicle, designed to generate profit by leveraging LifeCell’s technology and commercial reputation before making a “nice little exit.” Plaintiff alleges that Tela Bio was not founded to develop an innovative ECM product, but rather, as seen in Defendant Koblisch’s deposition, Tela Bio “looked at 75 different technologies, everything from prostate treatments in Europe to intensive care devices; a myriad of different technologies.” Defendants’ earliest presentations allegedly contemplate an early market exit through a purchase by a “strategic acquirer” such as KCI, LifeCell’s parent company. As such, Plaintiff maintains that, contrary to Defendants’ arguments, Defendants created Tela Bio specifically to compete with LifeCell.

Plaintiff notes that to date, it has received little to no discovery from Tela Bio related to the early development of Tela Bio’s company and tissue matrix product between April 2012 and December 2012, the time period immediately following the founding of Tela Bio and the commencement of Dr. McQuillan’s participation in Tela Bio. It is undisputed that Dr. McQuillan was hired to evaluate the Mesynthes ECM product and process. LifeCell addresses various emails and correspondences which serve as evidence of Tela Bio’s true motives and its exploitation of LifeCell’s name. For example, Jim Gorman, LifeCell’s former Vice President of Sales and who has since been hired by Tela Bio, references in an email to Dr. McQuillan Tela Bio’s business plan to “‘stick’ it to LIFC!” Plaintiff alleges that Tela Bio’s purported business plan includes purposefully harming LifeCell, such as Mr. Gorman’s mass depletion of LifeCell’s sales team, a team he formerly led prior to being let go by LifeCell. Dr. McQuillan responded to Mr. Gorman’s

email and stated, “I think it might be fun to ‘stick’ it to LIFC and APAX; and at a minimum, we will have fun trying.” Tela Bio’s document production also revealed that eighteen former LifeCell employees were hired, all in breach of their non-competition and non-solicitation covenants, which evidences Tela Bio’s business plan to extract former LifeCell employees in order to gain access to LifeCell’s proprietary information and good will.

LifeCell’s ECM manufacturing process is at the core of the trade secrets and proprietary information claims. LifeCell explains that the ECM is a biologic scaffold that provides structure to human and other animal tissues, and the use of ECM from human and animal donor tissue is increasingly common in regenerative medicine. Production of clinical products composed of ECM requires at least three basic steps: (1) decellularization, (2) sterilization, and (3) preservation. Plaintiff contends that there are numerous ways to accomplish each step in an ECM manufacturing process, and there is no industry consensus on an optimized or even preferred manufacturing process. Companies that develop ECM products base their choices on years of experimentation and experience with what works. LifeCell avers that the details of a manufacturing process for an ECM product have a significant impact on the quality of the ECM. It is the details of LifeCell’s processes that LifeCell alleges to be trade secrets. Dr. Nathaniel Bachrach, Vice President of R&D for LifeCell, certifies that “[e]very step of LifeCell’s manufacturing process contributes to the end product, and it is for that reason that I consider each step in LifeCell’s manufacturing process to be a valuable trade secret.” LifeCell provides detailed descriptions about its decellularization, sterilization, and preservation regimens and related research, and provides a description about the changes to Tela Bio’s manufacturing process, which match LifeCell’s own processes. Plaintiff alleges that Tela Bio made significant changes to the established manufacturing process of the Mesynthes product, and contends that the documents received from Defendants during discovery fully confirm these allegations.

Plaintiff avers that the document production proves its allegations that its former employees have actually disclosed LifeCell proprietary information and trade secrets to Defendants. For example, via email correspondence from Ben Kibalo to Dr. McQuillan, who are both key former members of LifeCell’s R&D group, Mr. Kibalo asked Dr. McQuillan what [REDACTED], and suggested [REDACTED] since “we know ‘it works’”. LifeCell notes that Strattice’s [REDACTED] and LifeCell alleges that upon information and belief, LifeCell is the

only company that [REDACTED]. LifeCell avers that its [REDACTED] decellularization extends back nearly two decades, over which time LifeCell experimented with its use and amassed an enormous amount of data that [REDACTED] while simultaneously preserving the native ECM structure. Therefore, LifeCell alleges that Mr. Kibalo and Dr. McQuillan decided to use exactly the same [REDACTED] because they “know it works,” from years of experience at LifeCell. Additionally, by email dated June 8, 2013, Dr. McQuillan told a Mesynthes employee to switch to [REDACTED] [REDACTED], just like the one utilized by LifeCell. Plaintiff avers that it developed and optimized its ECM products through almost three decades of research and development, resulting in millions of pages of archived research that LifeCell incorporates into its commercial manufacturing process. Plaintiff alleges that Defendants misappropriated this information, thereby bringing a low-cost product into line with LifeCell’s market-leading technology.

Not only does TELAMax utilize the same [REDACTED], but LifeCell alleges that TELAMax’s decellularization solution is the [REDACTED] [REDACTED]. Plaintiff has retained expert Dr. Badylak, who has for over the past 25 years spent the majority of his time on research in the field of ECM biology, and while he has consulted for several companies that commercially develop ECM product he has never provided such services for LifeCell. He certifies that he is familiar with LifeCell’s Strattice product and that prior to working with LifeCell’s counsel, he was not able to find any information about how Strattice is manufactured in research papers or otherwise. To the best of his knowledge, LifeCell has never disclosed publicly how Strattice is manufactured. He certifies that there is no industry standard or preferred method for manufacturing ECM products, and to the best of his knowledge, no two ECM products are manufactured in the same way as companies that manufacture ECM products generally withhold as confidential the details of their manufacturing process. There are thousands of potential ways to manufacture a clinical ECM product. Dr. Badylak discusses Tela Bio’s TELAMax product, which he contends is a modified version of the pre-existing product called ERT. He avers that the changes that Tela Bio made to ERT are not “tweaks” but are significant and directly impact clinical performance of the product. For example, as Plaintiff has discussed at length, LifeCell’s decellularization solution [REDACTED] [REDACTED]; in the development of TELAMax, Tela Bio changed its established decellularization

solution [REDACTED] in terms of ingredients, concentration, combination, and pH. TELAMax’s decellularization solution during development consisted of [REDACTED]. As already mentioned, there are thousands of combinations of agents, concentrations, and pH values that could be used for decellularization. Dr. Badylak certifies that it is extremely unlikely, if not practically impossible, [REDACTED]

Contrary to Tela Bio’s argument that it is generally known or readily ascertainable from public information that [REDACTED], Dr. Badylak asserts that it is not generally known or readily ascertainable from public information that [REDACTED]

[REDACTED]. He further states that LifeCell’s [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] Dr. Badylak points out that Tela Bio asserts in its own documents that its decellularization method is “proprietary,” and given that Tela Bio’s decellularization method [REDACTED] it makes no sense that Tela Bio’s process should be considered a proprietary trade secret but LifeCell’s [REDACTED] process should not be. Dr. Badylak further describes the similarities regarding the sterilization, preservation, and manufacturing methods for LifeCell’s Strattice and Tela Bio’s TELAMax, and concludes that in his opinion, it is very unlikely if not impossible that Dr. Sun did not use the work that he developed at LifeCell as a starting point for developing Tela Bio’s preservation solution; and that it would be nearly impossible for Dr. McQuillan to work on Tela Bio’s product without applying the process elements that he helped optimize at LifeCell for more than a decade.

Plaintiff argues that not only did Mesynthes not know that [REDACTED] but Mesynthes strongly resisted Dr. McQuillan’s order to [REDACTED]. Although the CEO of Mesynthes has certified to this Court that it was Mesynthes’ opinion that [REDACTED] [REDACTED] to Mesynthes prior to Dr. McQuillan’s suggestions, Plaintiff contends that this is clearly false. Both Dr. McQuillan and Dr. Darryl Roberts, former LifeCell employee who served as Vice President of Quality, Regulatory Affairs

and Tissue Services and who has since been hired by Tela Bio, testified that Mesynthes did not want to [REDACTED] and that “[t]here was a strong belief – yes, there was a strong belief at Mesynthes that we didn’t [REDACTED]” Mesynthes did not have its own recipe [REDACTED]

Additionally, LifeCell’s Strattice product is preserved in hydrated form and it is “ready to use” in surgical procedures with relatively minimal preparation. Strattice is packaged in hydrated form in a proprietary storage solution, which it refers to as Solution E. LifeCell contends that the “team leader” at LifeCell for developing Solution E was Dr. Wendell Sun. He is a named inventor on the patent relating to LifeCell’s preservation solutions. In March 2013, which is before Dr. Sun left his employment at LifeCell, Dr. McQuillan asked for Dr. Sun’s input on a Tela Bio tissue shipping procedure. Plaintiff provides to the Court Dr. Sun’s response email to Dr. McQuillan, in which he states [REDACTED] and then recommends a procedure based on that. Therefore, Plaintiff alleges that Dr. Sun clearly disclosed LifeCell’s confidential information with respect to an unpublished patent application, because at the time of the disclosure, all of the information in that unpublished patent application was trade secret information to LifeCell. Plaintiff alleges that Dr. Sun volunteered to use that trade secret information to design a “go around” preservation solution for Tela Bio. By email dated April 2013, a month after Dr. Sun left LifeCell and shortly after he joined Tela Bio, Dr. Sun himself acknowledged and told Dr. McQuillan that he is “digging the LifeCell’s foundation. ☺ I will not mention it to anyone.”

LifeCell contends that all of the changes that Dr. McQuillan, Dr. Sun, Dr. Roberts, and Dr. Nag<sup>1</sup> made to Tela Bio’s manufacturing process either (1) directly correspond to elements of LifeCell’s manufacturing process or (2) derive from LifeCell’s research and development work. Plaintiff points out to the Court that nowhere in Defendants’ brief do they disclose that their files contain multiple LifeCell proprietary documents related to [REDACTED] and tissue testing methods, as well as a copy of LifeCell’s “Process Master Validation Plan” for Project

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<sup>1</sup> Through discovery, Plaintiff notes that it was surprised to learn that Dr. Abhijit Nag, one of the founders of LifeCell in the 1980s and who retired from LifeCell in 2011, is also associated with Tela Bio and played a substantial role in setting up Tela Bio’s manufacturing process. Dr. Nag signed a consulting agreement that lasted into 2012, which provided a non-compete covenant that Dr. Nag, in light of his special circumstances as a founder of LifeCell, would not help “set up a business as a competitor of the Company,” and that covenant lasted for a period of five years. Plaintiff alleges that Dr. Nag has clearly violated his non-compete covenant by assisting Tela Bio in setting up a business to compete with LifeCell.

Gemini, which LifeCell contends is part of its Design History File for Strattice and is kept under physical lock-and-key. Plaintiff also alleges that Dr. Roberts has updated Tela Bio's version of LifeCell's "Process Master Validation Plan" documents by replacing porcine dermis with "ovine forestomach," the material which Tela Bio's ECM product is made. LifeCell alleges that Defendants used LifeCell's former Strattice team to transform Tela Bio's failing product into a marketable product.

As to LifeCell's sales force, Plaintiff contends that although its tissue repair products are the "gold standard" in the industry, "they do not sell themselves." LifeCell employs sales representatives to sell Strattice and AlloDerm to hospitals and physicians who use them in surgery. Because of the importance of LifeCell's sales representatives to its business, Plaintiff contends that it works hard to ensure that its sales force exceeds its competitors in quality and training. It also devotes significant resources to training its sales representatives to have a deep understanding of its products, and LifeCell avers that the complex training also enables the sales representatives to accompany doctors during actual surgical procedures. LifeCell also maintains a "Sales Portal" which serves as a repository for documents that sales representatives rely on in their day-to-day activities. Plaintiff considers all of this data to be confidential, and includes competitively sensitive customer and pricing information and employee performance data. LifeCell also maintains "LifeCell Connect" which allows representatives to access information about LifeCell products in the field. Plaintiff alleges that this contains proprietary marketing strategies about how best to sell LifeCell products.

Plaintiff alleges that Tela Bio's raid on LifeCell's sales and marketing employees appears to have begun at least as early as September 2013, when it engaged the services of Mr. Gorman, who worked at LifeCell for over thirteen years. Upon leaving LifeCell, Mr. Gorman was under an obligation pursuant to his employment agreement to maintain the secrecy of any marketing strategies, customer requirements, and employee performance and compensation information; he was also subject to a one-year non-compete period and a two-year non-solicitation period. Mr. Gorman was let go by LifeCell, but was allegedly paid a separation package of \$400,000. One day after he left LifeCell, on September 12, 2013, evidence shows that Mr. Gorman received an email from Mr. McQuillan thanking him for visiting Tela Bio the previous day, the day he left LifeCell, and suggesting that they "get the band back together." Plaintiff maintains that the evidence produced to date provides strong reason to believe that Mr. Gorman was involved in much of the

subsequent hiring of Tela Bio's sales and marketing team, given both his influential position at LifeCell before he left and his willingness to violate his covenants with LifeCell. After Tela Bio engaged Mr. Gorman, Plaintiff alleges that Tela Bio continued to hire LifeCell employees, such as Rene Snowden, LifeCell's Vice President of Marketing, Paul Talmo, who is now Tela Bio's Vice President of Commercial Development, and sales representatives Karim Benhamida and Findlay Long. Plaintiff contends that Tela Bio engaged all the aforementioned individuals before their non-competition agreements expired. Tela Bio allowed Mr. Gorman to solicit LifeCell sales representatives even before his non-compete agreement with LifeCell expired, which Defendants were very well aware of-because they were even able to have the time period reduced from two to one year.

Plaintiff also alleges that Tela Bio met with and convinced ten LifeCell sales representatives to join Tela Bio, who eventually resigned in unison on February 6, 2015. Plaintiff alleges that as part of its recruiting process, Tela Bio signed non-disclosure agreements with these individuals in the summer and fall of 2014, which is long before they left LifeCell on February 6, 2015. These agreements allegedly created a conflict of interest by requiring LifeCell employees to withhold information about an emerging competitive product while part of their job at LifeCell was to share information with colleagues, doctors, and hospitals to sell against LifeCell's competitors. The ten individuals were spread out geographically and their assigned regions at LifeCell covered most of the United States. Plaintiff alleges that rather than actually leave LifeCell, these sales representatives, at Tela Bio's request, remained at LifeCell, without disclosing that they had already switched loyalties. Further, Plaintiff alleges that on November 10, 2014, Tela Bio invited these ten individuals to a "Workshop" for the Tela Bio Sales and Marketing Team, which took place on December 8, 2014-two months before the individuals left LifeCell. Plaintiff contends that based on the limited discovery received, it appears that the workshop was designed to introduce the LifeCell sales representatives to the Tela Bio marketing and sales strategy, and to discuss ways to market against Strattice. In an email from Mr. Long, he explains that the anti-Strattice strategy is [REDACTED] In these emails, Plaintiff notes that no other product is mentioned as competition for TELAMax, and every strategy discussed focuses on denigrating Strattice to the benefit of TELAMax.

Plaintiff held its own annual sales meeting in January 2015, a month after Tela Bio's "workshop." Plaintiff contends that this sales meeting is a vehicle for its sales representatives to

learn and share confidential sales and marketing strategies for LifeCell products for the coming year. Plaintiff alleges that all ten of Tela Bio's newly hired sales representatives, without disclosing the fact that they were already working on behalf of Tela Bio to LifeCell, attended this meeting and therefore obtained highly confidential material about LifeCell's marketing and product strategies. Less than two weeks later, all ten individuals quit simultaneously. Plaintiff alleges that Tela Bio's entire sales force is now composed of former LifeCell employees, and that Rene Snowden heads its marketing arm. This mass hiring of LifeCell employees causes significant injury to LifeCell, and has put it at a significant disadvantage in the marketplace, especially in light of the time of their departure-a few weeks after the annual sales meeting. Plaintiff argues that this gives Tela Bio an unfair informational advantage for several reasons, such as an unfair advantage in competing with LifeCell on price. Additionally, former LifeCell employees at Tela Bio will have an unfair advantage by knowing whom LifeCell regards as key opinion leaders (KOLs) in the tissue matrix industry. Plaintiff contends that KOLs are well-respected and influential individuals, such as scientists and doctors, who frequently present information about products in a particular industry. KOLs help drive adoption and sales of new and existing tissue matrix products. Therefore, former LifeCell employees at Tela Bio will be well positioned to attempt to persuade those KOLs that LifeCell deems to be most valuable to advocate Tela Bio's products as alternatives to LifeCell's products.

Plaintiff alleges that Tela Bio's so-called protective measures do not prevent the injury to LifeCell. Although Tela Bio asserts that it took precautions to prevent disclosure and use of LifeCell proprietary information at Tela Bio-instructing employees not to keep any LifeCell proprietary information and relocating some of the former LifeCell sales representatives to different regions-LifeCell contends that these precautions are insufficient and cannot prevent injury to LifeCell. LifeCell argues that Tela Bio admits it did not relocate all of LifeCell's former sales representatives, and even if it did, the relocation was in name only. Regardless, LifeCell contends that relocation would not even matter, as Tela Bio's entire sales force is from LifeCell and from regions throughout the country. LifeCell maintains that it is inevitable that the collective sales force will have contacts with key customers throughout the country. LifeCell alleges that discovery has also demonstrated that Tela Bio's new sales representatives are not avoiding making introductions to their former client contacts. For example, as evidenced through an email from Seth Schreiber, one of the ten sales representatives that left on February 6, 2015, to Defendant

Persenaire dated June 3, 2014, Schreiber was already providing introductions to surgeons with whom he was familiar as far back as June 2014. In the email, Schreiber states to Persenaire that he has “a surgeon from the NW that I would like to connect you with.” The “NW,” Plaintiff contends, is the same Seattle region that Schreiber was then currently assigned to on behalf of LifeCell. In another email, which Schreiber sent to “Customers, Surgeons, and Friends I have met during my time at LifeCell,” one of the doctors responded, and Schreiber informed her that he “will be heading to a startup called Tela Bio. I hope to introduce you to the product later in the year!”

Plaintiff maintains that Tela Bio’s deception and wrongdoing is clear from Tela Bio’s documents. First, LifeCell alleges that Dr. McQuillan has already testified falsely under oath about when he became involved in Tela Bio. He was deposed on September 23, 2014, in an unrelated litigation, and stated that he is a “cofounder” of Tela Bio, which he co-founded in 2013. However, Dr. McQuillan has declared in his certification that he did not found Tela Bio and rather, that Defendant Koblisch persuaded him to help out as a consultant. Defendant Koblisch also certified that Dr. McQuillan was not hired by Tela Bio until December 2012. However, in an email from Defendant Persenaire to a Daniel Vargo, Persenaire states that Tela Bio “was started in June 2012 by Antony Koblisch, former CEO of Orthovita, a biosurgery company focused on bone healing and hemostasis, David McQuillan, who led the development of Strattice for LifeCell, and myself, former CMO of Orthovita.” Plaintiff points out that the other certifications provided to this Court by Defendants are full of falsities as well.

Plaintiff further notes out that Dr. McQuillan also fraudulently concealed his involvement with Tela Bio from LifeCell while still collecting paychecks from LifeCell. Moreover, LifeCell alleges that Dr. McQuillan and Defendant Persenaire explicitly schemed to mislead LifeCell about the nature of Tela Bio’s business. Specifically, Tela Bio described itself as intending “to develop novel materials and implants for use in reconstruction procedures performed in orthopedics, oncology, plastic, and general surgery. The plan calls for the company to seek and evaluate new materials, combinations of materials, or existing materials for new applications. ...” When Dr. Roberts sought clarification on his non-compete obligations as he was looking at other opportunities for employment, he sent LifeCell’s in-house counsel Rich Traynor a request for a waiver of his obligations, and Mr. Traynor responded that he would “run it by a couple folks here ... and will let you know if we have any questions about any of these opportunities (for example, might need to hear more about Tela to confirm it would not be directly competitive with LC).” Dr.

Roberts forwarded this message to Dr. McQuillan, who responded that “[y]ou could certainly volunteer that Tela is looking for help establishing quality systems as well as guidance on regulatory pathways for novel technologies. But hopefully they just say it is all ok.” Dr. Roberts then sent to Dr. McQuillan a draft of a response to LifeCell’s counsel, and stated that “Tela Bio plans to license permanent and absorbable synthetics and combine with Biologics. They do not intend to directly compete in LifeCell markets. Assure confidentiality is maintained in my agreement.” However, Dr. McQuillan responded with a “modified version” and altered the text about competition. LifeCell avers that this evidences Dr. McQuillan’s understanding at the time that Tela Bio would compete with LifeCell, while drafting a document to persuade LifeCell that Tela Bio would not compete with LifeCell. The modified response read, “Tela Bio plans to license and develop permanent and absorbable synthetics and combine with non-dermal Biologics. They do not intend to directly compete by selling in current LifeCell markets during my non-compete period.” LifeCell’s in-house counsel then stated that “based on the information [Dr. Roberts] provided, [LifeCell] would not look to enforce the non-compete.” LifeCell contends that it made this decision without knowing that Dr. McQuillan and Dr. Sun was involved with Tela Bio, that Tela Bio was developing a product for hernia repair, and that Tela Bio was actively planning to compete with LifeCell, all facts which LifeCell alleges were known to Tela Bio at the time of the misrepresentations.

LifeCell maintains that discovery has revealed that Tela Bio was aware that it was employing former LifeCell employees in breach of restrictive covenants, that Tela Bio believed what it was doing was legally improper, and that use of LifeCell’s employees and LifeCell information was dishonest and ethically improper. For example, in an email from Ben Kibalo, a former LifeCell employee, to Timothy Roock, also LifeCell employee, Kibalo stated “our [Tela Bio’s] legal team wants to stay away from life cell for the time being. I think it is retarded and I continue to push.” Plaintiff contends that Tela Bio ignored its own legal team’s advice to stay away from LifeCell. Plaintiff also cites document evidence provided by Tela Bio involving discussions about a KOL list put together by LifeCell employee Dr. John Harper and received by Defendant Koblisch. Remarkably, Dr. McQuillan later told everyone in the email thread that “we need to kill this string ... I’m getting nervous...” In another email stemming from the same email thread, Defendant Persenaire mentioned that he “[w]ill call kent and have him delete the email.” Plaintiff argues that this is clear evidence that Tela Bio knew what it was doing was wrong, and that

Defendant Persenaire even stated he would instruct his employees to destroy evidence. Dr. McQuillan further wrote to Defendant Persenaire that it was “[p]robably not good to quote harpers name. I’m sure his advice to us is in serious breach of his employee contract. We don’t want him fired until we are ready!”

Plaintiff argues that Tela Bio’s post-litigation story cannot survive the facts and alleges that: Tela Bio made changes to its manufacturing process because Dr. McQuillan and the other former LifeCell employees told it to make those changes, and it wanted to quickly create a product that would displace Strattice; and that Tela Bio, prior to this litigation, believed the changes to its manufacturing process were trade secrets and touted that to investors. Given all of the evidence, Plaintiff maintains that its application for injunctive relief should be granted. As a starting point, Plaintiff contends that the Court’s analysis should be tempered against the backdrop that (1) LifeCell seeks to maintain the status quo, and (2) if Tela Bio commercially launches its tissue matrix product, Tela Bio will alter the market irreversibly and the harm to LifeCell’s business cannot be remedied by money, if Tela Bio is even able to pay.

### **1. Irreparable Harm**

As one of the preliminary matters, Defendants argued that the Court does not have the power to enjoin LifeCell’s former sales representatives; however, LifeCell contends that this argument is completely misplaced, because LifeCell only seeks an injunction against the named Defendants in this case- Tela Bio, Antony Koblish, and Maarten Persenaire. Additionally, and as further discussed below with regard to the fourth Crowe factor-balance of the hardships-Plaintiff argues that there is no evidence that any significant interest of any former LifeCell employees would be affected if Tela Bio is enjoined from employing them. None of the employees’ certifications submitted assert that they would suffer if enjoined. Plaintiff also avers that laches does not bar any claims for relief in this action, and that it has not delayed in bringing this case. Even so, Plaintiff contends that laches is not applicable in this cause because in a court of equity, “the rule of laches is never applied in favor of a carefully designed and studied scheme of fraud ...” In re Estate of Tanksley, 2013 N.J. Super. Unpub. LEXIS 121 (App. Div. 2013) (citing Gallagher v. New England Mut. Life Ins. Co. of Boston, 19 N.J. 14, 23 (1955)).

Plaintiff contends that there can be no doubt that LifeCell will be irreparably harmed if Tela Bio is permitted to market and sell its competing product. There is allegedly no way to quantify the full damage that will be done to LifeCell in terms of lost market share, sales, and

reputation if Tela Bio began marketing and selling its product. There would also allegedly be no way to repair the goodwill, respect, and market presence that LifeCell has built over three decades in the business. Tela Bio contends that misappropriation of sales and marketing information “could at best justify an injunction prohibiting Tela Bio from accessing or reviewing any LifeCell proprietary information actually removed by former LifeCell employees upon their departure from the company.” However, Plaintiff argues that this argument completely leaves out Plaintiff’s tortious interference and unfair competition claims, and ignores the fact that Tela Bio’s entire sales force is from LifeCell.

## **2. Probability of Success on the Merits**

First, Plaintiff disputes Defendants’ allegation that LifeCell does not identify trade secrets. In its Verified Complaint, Plaintiff alleged the following: Strattice is manufactured and processed using proprietary technology that avoids damaging the tissue matrix, and the key advantage of LifeCell’s tissue processing method is that it strikes a “perfect balance” that LifeCell’s competitors have failed to achieve, and perfecting such a process required years of development and testing to know what to do and what not to do to the tissue; Tela Bio has developed an Ovine Tissue Matrix (“OTM”) that will compete with LifeCell’s tissue graft products, including Strattice, and that OTM is a hybrid product consisting of sheep tissue that is stitched with a synthetic material; OTM is an improved version of an existing sheep tissue-derived product produced by Mesynthes, and on information and belief, Tela Bio’s product was improved and made cost efficient through Dr. McQuillan’s unlawful use and disclosure of LifeCell’s trade secrets and proprietary information, including proprietary information that Dr. McQuillan learned and/or developed at LifeCell or developed at Tela Bio within the scope of his invention assignment covenant. LifeCell argues that its allegations were prescient. Plaintiff contends, as Defendants have also mentioned, that every nuance of the manufacturing process for an ECM product is consequential. Thus, Plaintiff considers all details of its manufacturing process valuable and confidential, as alleged, and it was not feasible to list all research and development that LifeCell has done over the decades in its Verified Complaint. Plaintiff’s reliance on the inevitable disclosure doctrine, Plaintiff maintains, was well-placed, and as described at length, Tela Bio has in fact actually used information about and research related to LifeCell’s manufacturing process in the modification of its own manufacturing process.

LifeCell alleges that its information about the [REDACTED] a trade secret and is proprietary, confidential information. Defendants argue that the fact [REDACTED] and LifeCell agrees, but maintains that this is irrelevant. Specifically, Plaintiff contends that Defendants fail to understand the difference between [REDACTED]

[REDACTED] Plaintiff also points out that the trade secret nature of LifeCell's information about [REDACTED] supported by industry reality: LifeCell is the only company that [REDACTED] its ECM product. Plaintiff contends that this is unsurprising, since [REDACTED] Plaintiff further points out that in the only case cited by Defendants in support of their trade secret arguments, Rycoline Products, the Appellate Division explained, "[t]he selection of particular ingredients for a formula from a vast array of publicly known possible ingredients may result in trade secret protection for the specific selection made." Rycoline Prods., Inc. v. Walsh, 334 N.J. Super. 62, 75 (App. Div. 2000).

Plaintiff contends that knowing the conclusion that [REDACTED] Defendants attempt to collect research papers in search of a rationale other than the fact that Dr. McQuillan "made the suggestion [REDACTED]" However, the New Jersey Trade Secret Act, Plaintiff argues, prevents exactly this type of hindsight argument that Defendants advance. N.J.S.A. 56:15-5 provides, "A person who misappropriates a trade secret shall not use as a defense to the misappropriation that proper means to acquire the trade secret existed at the time of the misappropriation."

Plaintiff argues that it should receive a preliminary injunction on the basis of inevitable disclosure alone. Although Defendants have argued that the inevitable disclosure does not apply in this case, Plaintiff avers that their argument is irrelevant in light of the overwhelming evidence of actual disclosure by former LifeCell employees Dr. McQuillan, Dr. Sun, Dr. Roberts, and Ben Kibalo. Plaintiff cites to National Starch & Chem Corp. v. Parker Chem Corp., 219 N.J. Super. 158, 162-163 (App. Div. 1987), where the Appellate Division affirmed the trial court's decision to grant a preliminary injunction on the basis of inevitable disclosure and explained,

The defendants say that a finding of 'inevitability' would be no more than a 'prophecy' here. Nonetheless, in the context of determining whether a threat of disclosure exists, it is but a finding as to the

probable future consequences of a course of voluntary action undertaken by the defendants. Courts are frequently called upon to draw such conclusions based on a weighing of the probabilities, and while a conclusion that a certain result will probably follow may not ultimately be vindicated, courts are nonetheless entitled to decide or 'predict' the likely consequences arising from a given set of facts and to grant legal remedies on that basis.

LifeCell urges that the National Starch decision should control the outcome here. Defendants make two additional arguments: (1) LifeCell has "acquiesced" in Tela Bio's misappropriation, and (2) pigs and sheep are different and therefore LifeCell's process for pigs cannot be used on Tela Bio's process for sheep. Plaintiff argues that as to the first argument, Tela Bio succeeded in deceiving LifeCell about Tela Bio's business, including through Dr. McQuillan's deception under oath. Further, LifeCell admits that it became aware of Tela Bio's business plans in late 2014, and it expeditiously conducted an investigation and engaged in business correspondence with Tela Bio in an effort to avoid litigation. LifeCell alleges that its efforts were met with additional tortious conduct-the mass departure of ten sales representatives-and LifeCell then initiated litigation. As to Defendants' second argument, Plaintiff contends that this is contradicted by the fact [REDACTED] Plaintiff argues that the case relied upon by Defendants, Rycoline Products, cuts against them. The Appellate Division explained, "[t]he trial court's determination that [the products] are not identical is not dispositive of the issue as to whether there was misappropriation of a trade secret." Rycoline Prods., *supra*, 334 N.J. Super. at 71.

Plaintiff continues to discredit Defendants' arguments regarding their contention that there was no misappropriation. Defendants aver that TELAMax "was developed independently of Strattice," "at no point did Dr. McQuillan reveal any confidential LifeCell information or attempt to exploit such information," and Mesynthes helped develop TELAMax, and Mesynthes did not believe LifeCell confidential information ... would be desirable or useful." Plaintiff avers that Tela Bio may have developed TELAMax independently of Strattice, but the evidence shows that it later optimized its manufacturing process with LifeCell's trade secrets and proprietary information. Plaintiff alleges that Defendants' second and third arguments are belied by the facts, such as Dr. McQuillan's Certification, in which he acknowledges that he made the suggestion [REDACTED] Further, Plaintiff contends that Tela Bio actually implemented changes to the established Mesynthes manufacturing process that match LifeCell's process or research conclusions related to

LifeCell's process. If LifeCell's information was not "desirable or useful," Plaintiff avers that it is curious that it was implemented in the manufacturing process changes. After Dr. McQuillan, Dr. Roberts, Dr. Sun, and Mr. Kibalo became involved with Tela Bio, the company took the pre-existing Mesynthes process and made a series of rapid and critical changes, which Plaintiff alleges line up completely with LifeCell proprietary information [REDACTED]. Plaintiff points out that the Individual Defendants were helpless, as neither had prior experience with manufacturing an ECM product, and thus needed the knowledge of former LifeCell employees to develop a marketable product. In his testimony, Dr. Roberts agreed that Dr. McQuillan was involved in a lot of the "technical discussions to bring the changes to the Mesynthes product." Dr. Roberts further admits that changes were made to "every single one of the seven steps in the manufacturing process of the Mesynthes product."

Additionally, Plaintiff refers to Tela Bio's incorporation of a [REDACTED] [REDACTED], as Tela Bio agrees that the [REDACTED] [REDACTED] is a [REDACTED] secret. Plaintiff refers to Dr. Roberts' testimony, where he said [REDACTED] Plaintiff avers that its [REDACTED] [REDACTED] is LifeCell's trade secret, as evidenced through LifeCell's project leader Micheal Honey's instruction to his team-which included Dr. McQuillan, Dr. Nag, and Dr. Sun-that they "do not mention the intended use of [REDACTED] [REDACTED]" However, evidence shows that Dr. Nag sent an email to Dr. Roberts indicating that he "contacted [REDACTED] to get some information about the company." Thus, Plaintiff avers that Dr. Nag contacted the [REDACTED] on behalf of Tela Bio, and Defendants now claim to be their own trade secret the [REDACTED] [REDACTED] The use of this [REDACTED] [REDACTED]

Plaintiff contends that Defendants misappropriated two discrete categories of proprietary information: (1) Inventions and Contributions that must be disclosed and assigned to LifeCell pursuant to invention assignment covenants, and (2) sales and marketing-related information. Defendants allege, without citing anything, that LifeCell's misappropriation claim is not cognizable under New Jersey law. However, Plaintiff maintains that its claim is based on a well-established case decided by the New Jersey Supreme Court, Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609 (1988), a case which analyzes whether and under what circumstances New Jersey

enforces so-called holdover covenants, which are covenants that provide that an employee must assign to a previous employer intellectual property that the former employee develops (1) within a reasonable time period post-employment and (2) related to the employee's work at the previous company. The Supreme Court held that such agreements are enforceable and subject to the same analysis as non-competition agreements under New Jersey law. That analysis requires consideration of three factors, (1) whether the invention assignment covenant protects a legitimate business interest of the employer, (2) whether the invention assignment covenant imposes an undue hardship on the employee, and (3) whether the public interest is negatively affected by the invention assignment covenant. Ingersoll-Rand, supra, 110 N.J. at 892.

The text of Dr. McQuillan's invention assignment covenant, and Dr. Roberts is bound by substantially the same agreement, clearly states that all Inventions and Contributions that Dr. McQuillan developed before July 1, 2013, with respect to Tela Bio's ECM product, is the property of LifeCell already because it has been assigned to LifeCell by operation of contract. Specifically, the covenant reads,

2. Contributions and Inventions. While employed by the Company, I may have previously or may in the future make Contributions and Inventions deemed by the Company to have value to it. The terms "Contributions" and "Inventions" are understood to include all technology, improvement, discoveries, formulae, inventions, creations, discoveries, techniques, designs, methods, trade secrets, technical specification and data, works, modifications, processes, know-how, show-how, expressions, improvements, works of authorship (including computer programs) and other developments, whether or not they are patentable or copyrightable or subject to analogous protection and regardless of their form or state of development and whether or not I have made them alone or with others, together with any and all rights to U.S. or foreign applications for patents, inventor's certifications or other industrial rights that may be filed thereon, including divisions, continuations in-part, reissues and/or extensions thereof.

(a) With respect to any Contributions and Inventions of any kind that are conceived or made by me, alone or with others, while I am employed by the Company, regardless of whether they are conceived or made during regular working hours at my place of work (whether located at the Company, customer facilities, at home or elsewhere) and that (i) relate to the Company's business or potential business or that of its affiliates, (ii) result from tasks assigned to me by the Company, or (iii) are conceived or made with the use of the

Company's time, facilities, resources, or materials, I agree that:

(A) I will disclose Contributions and Inventions promptly to the Company. I will not disclose Contributions and Inventions to anyone other than authorized Company personnel;

(B) Contributions and Inventions will belong solely to the Company from conception as "works made for hire" (as that term is used under U.S. copyright law) or otherwise. To the extent that title to any such Contributions and Inventions do not, by operation of law, vest in the Company, I hereby irrevocably assign to the Company all right, title and interest, including, without limitation, tangible and intangible rights such as patent rights, trademarks, and copyrights, that I may have or may acquire in and to all such Contributions and Inventions, benefits and/or rights resulting therefrom, and agree to promptly execute any further specific assignments related to such Contributions or Inventions, benefits and/or rights to the request of the Company. If the Company wants more specific or formal evidence of this, I will sign written documents of assignment at the Company's request. I also hereby assign to the Company, or waive if not assignable, all "moral rights" in and to any Contributions and Inventions and agree promptly to execute any further specific assignments or waivers related to moral rights at the request of the Company; and

(b) Any Contributions or Inventions that are conceived or made by me, alone or with others, during the two-year period following my termination of employment with the Company or any of its affiliates for any reason, which relate to the business of the Company shall also be deemed to fall within the provisions of this Section 2 and shall be subject to the provisions of Sections 2(a) above. ...

Plaintiff contends that this invention assignment covenant should be enforced under the analysis in Ingersoll-Rand. Specifically, Plaintiff avers that each covenant can be construed to cover only technology related to animal-derived ECM products for hernia repair that are preserved hydrated. So construed, Plaintiff maintains that the covenant covers only precisely the technology that Dr. McQuillan, Dr. Sun, and Dr. Roberts developed at LifeCell. Further, Plaintiff argues that the covenants are enforceable because, among other things:

- Dr. McQuillan and Dr. Roberts' covenants are not only in consideration of employment but significant additional payments including stock options;
- Drs. McQuillan, Roberts, and Sun each chose to leave LifeCell to pursue other opportunities;
- Dr. McQuillan received monthly payments from LifeCell for a year after he resigned;
- LifeCell reasonably construed Dr. McQuillan's restrictive covenants to allow him to work for two other companies, Polynovo and Humacyte;
- Dr. McQuillan led the development of Strattice at LifeCell, and was Vice President of Research when he left;
- Dr. McQuillan oversaw LifeCell's R&D effort to develop a hybrid biologic/synthetic mesh for hernia repair;
- Dr. McQuillan evaluated business opportunities at LifeCell, including a request that he evaluate Mesynthes, as a potential business partner, as well as evaluated market opportunities like "low cost" alternatives to Strattice and AlloDerm, the very market opportunity he is now pursuing at Tela Bio;
- Dr. Sun was a senior scientist at LifeCell and had an agreement to work for Tela Bio only one day after he left LifeCell;
- Dr. Roberts was intimately involved with LifeCell's technology.

Enforcement of the covenants, Plaintiff contends, protects LifeCell's legitimate interest in preventing exactly what happened here-senior R&D employees walking away from LifeCell and using LifeCell proprietary information to develop new products that directly compete with LifeCell. Enforcement does not impose undue hardship on the former LifeCell employees either, because they had and took employment opportunities other than with Tela Bio after they left LifeCell, they chose to leave LifeCell to pursue other opportunities, and they received equity and other payments as consideration for the covenants. Third, Plaintiff avers that enforcement is not against the public interest.

Plaintiff contends that Defendants have misappropriated and continue to misappropriate LifeCell's proprietary information, and aver that like any other confidential information, the Inventions and Contributions are misappropriated by Defendants if they use that information knowing or having reason to know that they should not have access to it. Misappropriation "tends to arise where an ex-employee uses confidential information to assist a competitor," and a

subsequent employer misappropriates the proprietary information if it uses the information “and is aware of the information holder’s interest in protecting the information.” Torsiello v. Strobeck, 955 F.Supp. 2d 300, 314 (D.N.J. 2013). Further, Plaintiff avers it is not disputed that Dr. McQuillan was subject to non-compete and innovation assignment covenants with LifeCell which did not expire until July 2012, yet he engaged with Tela Bio as early as April 2012 in violation of his agreements.

Plaintiff also alleges that Defendants misappropriated LifeCell’s proprietary sales information, and aver that Tela Bio does not dispute that LifeCell’s customer contacts, marketing strategies, customer requirement information, product pricing information, strategic marketing plans, and information about its sales department, including lists of top performers and compensation, are the types of confidential and proprietary information protected in New Jersey. Platinum Mgmt., Inc. v. Dahms, 285 N.J. Super. 274, 295 (Law Div. 1995). Rather, Tela Bio argues that LifeCell has not shown actual misappropriation by Tela Bio, because there is no evidence that any confidential information was passed on to or used by Tela Bio. However, Plaintiff argues that the evidence completely undermines Defendants’ argument, and that Defendants did in fact make copious use of LifeCell’s proprietary sales and marketing information. Plaintiff avers that Tela Bio’s misappropriation is not limited to interactions with individual LifeCell employees, but that the whole purpose of hiring LifeCell employees appears to be to exploit their intimate knowledge of LifeCell’s sales and marketing strategies.

Plaintiff asserts that it is also likely to prevail on its unfair competition claim, and that this claim is not duplicative of its misappropriation and tortious interference claims. As detailed at length, Plaintiff alleges that Tela Bio engaged in a wide ranging and systematic scheme to leverage LifeCell’s technical team to create a competitive product and then use LifeCell’s sales force to sell said product. Tela Bio’s conduct, Plaintiff maintains, goes far beyond the boundaries of Plaintiff’s claims that Tela Bio misappropriated both technical and marketing information, and tortuously interfered with LifeCell’s business relationships. “The judicial goal should be to discourage, or prohibit the use of misleading or deceptive practices which renders competition unfair. The law must be sufficiently flexible to accommodate those goals.” Ryan v. Carmona Bolen Home for Funerals, 341 N.J. Super. 87, 92 (App. Div. 2001). LifeCell avers that because its claims go well beyond mere misappropriation and tortious interference, there is no basis to dismiss its unfair competition claims as duplicative. For example, Plaintiff alleges that Tela Bio intentionally

induced LifeCell's sales representatives to violate the duty of loyalty they owed to LifeCell. By successfully dividing the loyalty of LifeCell employees, Plaintiff contends that Tela Bio is engaging in precisely the type of misleading or deceptive practice that unfair competition law is designed to prevent. See Ryan, supra, 341 N.J. Super. at 92. Tela Bio's response to this is that the fact that a number of employees were all hired on the same date does not implicate New Jersey unfair competition law, and simply reflects that Tela Bio believed it had to get its job offers out prior to product launch in order to avoid losing the potential hires to other employers. Plaintiff alleges that this purported defense, however, is actually an admission of wrongdoing; and taken as a whole, Tela Bio's predatory business and hiring practices demonstrate bad faith and unfair competition. Additionally, Plaintiff avers that Tela Bio exploited LifeCell's reputation, unfairly free-riding on LifeCell's goodwill. Given that Tela Bio's entire sales force is from LifeCell, Plaintiff contends that it is inevitable that surgeon-customers will associate Tela Bio with the goodwill of LifeCell. Plaintiff points out that Tela Bio does not really address this issue, and instead argues that there will not be confusion between Tela Bio's and LifeCell's products, and in any event, that Tela Bio's new sales representatives have changed territories. Plaintiff argues that Defendants' assertion is not only factually incorrect, as Plaintiff has mentioned that not all sales representatives have changed territories, but it misses the point: Tela Bio's entire sales force comes from LifeCell, so Plaintiff contends that there is no way to associate them, regardless of region, with anyone other than LifeCell.

Plaintiff has also argued that under New Jersey law "misappropriation of confidential information" can itself constitute unfair competition. Torsiello, 955 F.Supp. 2d at 314. Plaintiff notes that Tela Bio's only argument is that this category of unfair competition is subsumed with LifeCell's misappropriation claims; however, as already mentioned, Plaintiff avers that Tela Bio's behavior goes beyond mere misappropriation.

With regard to its tortious interference claim, which requires plaintiff to prove (1) a protectable right (contractual or prospective economic advantage), (2) intentional and malicious interference with the protectable right, (3) the interference caused a loss, and (4) the loss resulted in damages, Printing Mart-Morristown v. Sharp Elecs., 116 N.J. 739, 751-752 (1989), Plaintiff states that as an initial matter, under an employee piracy claim, the "mere persuasion of an employee to change jobs is not wrongful; but if it is done to injure the employer, it is wrongful." Avtec Indus., Inc. v. Sony Corp. of Am., 205 N.J. Super. 189, 193 (App. Div. 1985). Plaintiff

contends that there is direct evidence of Tela Bio's desire to injure, or "stick it to" LifeCell, and that there is evidence that Tela Bio acted on this desire to injure LifeCell. Among other things, Plaintiff alleges that Tela Bio sought to have LifeCell continue to pay Tela Bio's future employees while it focused on refining a marketing strategy with the covert assistance of those same employees. Next, Tela Bio's employment contracts anticipated that the LifeCell employees would all leave at once, when TELAMax was ready for release. Plaintiff avers that Tela Bio well knows that replacing the lost sales representatives, and training and developing their replacements, will be time-consuming and expensive and will necessarily detract from LifeCell's ability to achieve its full sales potential. Tela Bio argues it cannot be liable for tortious interference because (1) Tela Bio's hiring "was solely designed to advance its own business interests;" (2) the new Tela Bio employees are not presently competing with LifeCell and will not be doing so for some time;" and (3) Tela Bio did not engage in "predatory conduct such as deceit or intended harm to" LifeCell. However, Plaintiff argues that each of these excuses are demonstrably false. First, Plaintiff avers it cannot reasonably be argued that Tela Bio's hiring was solely designed to advance its own business interests. Plaintiff maintains that the evidence shows that Tela Bio pirated LifeCell's employees through improper means in order to injure LifeCell. Further, Plaintiff contends that the fact that Tela Bio's entire sales force comes from LifeCell proves that Tela Bio was more interested in using LifeCell as a talent pool than in canvassing the medical device industry for the best applicants for Tela Bio. Although Defendants aver that they were looking at candidates from companies other than LifeCell, the fact is that Tela Bio only hired sales representatives that were former LifeCell employees. Next, Plaintiff avers that Tela Bio's own behavior belies its claims that its employees are not presently competing with LifeCell. Plaintiff has described how emails serve as evidence that Tela Bio's employees were strategizing how to market Tela Bio's product even before they left LifeCell. Third, Plaintiff maintains that Tela Bio, indeed, engaged in predatory and deceitful conduct intended to harm LifeCell.

Plaintiff argues that rather than address its civil conspiracy claim on the merits, Defendants argue that this claim cannot succeed because LifeCell is unlikely to succeed on the merits of its misappropriation claims. Therefore, Plaintiff contends that it is likely to succeed on its civil conspiracy claims for all the same reasons that it is likely to succeed on its misappropriation claims.

### **3. Balancing the Hardships**

With regard to the final Crowe factor, Plaintiff contends that its request for interim relief is nothing more than a request to maintain the status quo pending final resolution of this action. Without the relief, Plaintiff argues that the harm to LifeCell would be great and irreparable; further, Plaintiff questions whether Tela Bio would even be able to pay any judgment even if a damages number could be calculated. Defendants argue that an injunction would block Tela Bio's only product and only potential revenue source; however, Plaintiff points out that this is not LifeCell's fault. Plaintiff contends that Tela Bio only has itself to blame for its deception and the consequences of that deception. Tela Bio further alleges that an injunction will halt the operations of a New Zealand manufacturing facility, to the detriment of a company under that sovereign's jurisdiction. However, Plaintiff contends that this argument is misplaced. First, TELAMax is not Mesynthes' only product; nor is there any information provided to reasonably ascertain any harm to Mesynthes. Plaintiff avers that Mesynthes' CEO Mr. Ward never addresses this issue in his certification. Plaintiff also notes that Mr. Ward was and still may be the fourth largest shareholder in Tela Bio, and therefore he is not simply an innocent third party. Tela Bio also argues that an injunction would throw its sales representatives out of a job. Plaintiff avers that this argument fails for two reasons: first, the former LifeCell sales representatives that left LifeCell in unison were fully complicit in Tela Bio's unlawful scheme; second, Tela Bio's implication that these sales representatives would be out of work for very long is inconsistent with its assertion that it hired the sales representatives when it did to avoid them going to other competitors. Plaintiff asserts that if Tela Bio's argument is true, then each representative will easily find appropriate work elsewhere.

As to Tela Bio's assertion that an injunction should not issue because it would damage the public by removing from the market a promising new treatment for hernia patients, Plaintiff argues that this is both factually incorrect and unsupported. Plaintiff avers that Tela Bio also attempts to minimize the harm to LifeCell if the status quo is not maintained. Tela Bio argues that Strattice is one of many products that LifeCell sells; however, Plaintiff contends that Tela Bio never explains why LifeCell should suffer irreparable harm to one product just because it has positioned itself as a multiple-product company. Next, Tela Bio argues that the drop in sales of Strattice predates this lawsuit; however, Plaintiff alleges that this argument does not offer a reason for harming Strattice even more, nor does it account for the effect of Tela Bio's double-agent sales representatives who worked at LifeCell while they simultaneously conspired to undermine Strattice. Finally, Tela Bio argues that if it is allowed to proceed with sales of TELAMax, at worst LifeCell would have a new

rival that saved some money and effort in the development process. However, Plaintiff argues that Tela Bio ignores the fact that neither TELAMax nor Tela Bio's entire sales force would exist but for Tela Bio's unlawful behavior.

**b. Defendants' Argument**

Defendants argue that contrary to Plaintiff's allegations that TELAMax's origin should be traced to the hiring of Dr. McQuillan, the essential attributes of TELAMax were in fact developed years before Tela Bio existed and without the involvement of Dr. McQuillan. In 2009, Mesynthes, a New Zealand biotechnology company founded in 2008, patented extracellular matrix (ECM) technology based on ovine rumen (sheep forestomach). Mesynthes developed two product lines based on this technology, called EDT and ERT. Defendant contends that Tela Bio was not engaged in the development of either EDT or ERT, and that the development of those products took place prior to Tela Bio's founding. Defendants allege that Mesynthes' work on ERT came to the attention of Individual Defendants in early 2012. The Individual Defendants worked together for many years at Orthovita, and then left in 2011. They were looking to invest in promising medical technologies and became interested in Mesynthes' patented ERT technology. The Individual Defendants met with CEO of Mesynthes Brian Ward on March 14, 2012, to discuss ERT, and thereafter they decided to pursue collaboration with Mesynthes for the development of a product based on ERT. At the time of this decision, Defendants contend that Tela Bio did not yet exist, nor did the Individual Defendants even know of the name Dr. McQuillan. The Individual Defendants formed Tela Bio in April 2012, allegedly as a vehicle for their proposed investment in the ERT technology. In August 2012, Tela Bio contends that it signed a development and licensing agreement with Mesynthes, acquiring rights to the intellectual property relating to the ERT technology.

At the time of Tela Bio's founding, the Individual Defendants contend that they sought to bring in someone with the technical expertise to evaluate the Mesynthes technology. They contacted a former board member of Orthovita, who recommended Dr. McQuillan. Tela Bio subsequently signed a non-disclosure agreement and then a consulting agreement with McQuillan and Associates, the consulting firm formed by Dr. McQuillan after he left the employ of LifeCell's corporate parent KCI in July 2011. Dr. McQuillan advised Tela Bio on the Mesynthes technology. In December 2012, Tela Bio hired Dr. McQuillan as an employee, and Defendants allege that this was the first time that Dr. McQuillan held securities in Tela Bio. Defendants contend that Dr. McQuillan did not attempt to conceal his work for Tela Bio, and that in early 2013, he told many

of his friends who were current LifeCell employees about his involvement with Tela Bio. Dr. McQuillan allegedly informed LifeCell, by no later than March 2014, of the fact of his employment at Tela Bio. Defendants aver that LifeCell did not raise any concerns at that time.

Defendants contend that the manufacture of TELAMax involves few changes from the originally licensed process, and that the few changes made resulted from testing and trial and error, as Mesynthes and Tela Bio worked together to optimize a process suitable for the specific source tissue. Defendants aver that the actual manufacture of TELAMax is carried out at Mesynthes' New Zealand facilities, and that Tela Bio does not have a plant or the capability to manufacture the product itself. Defendants further admit that one of the modifications made in the licensed process was to change [REDACTED]. Defendants contend that decellularization is a commonplace process and an essential part of the manufacturing process for the many acellular matrix products on the market. Further, Defendants allege that the [REDACTED] has been known for decades, and its use had been anticipated by Mesynthes long before it licensed the technology to Tela Bio. Defendants point out that LifeCell's own [REDACTED]. Therefore, Defendants aver that the decision to [REDACTED] was based on the well-known and long-existing research endorsing the [REDACTED].

Defendants aver that LifeCell was founded in 1986, and its marquee product is AlloDerm which was initially released in 1994. In or around 2002, LifeCell began investigating the development of an alternative to AlloDerm, which culminated in the development and release of Strattice, a tissue matrix product derived from pig skin tissue. Defendants point out that Plaintiff does not make any allegations in this case concerning trade secrets associated with AlloDerm. This is noteworthy because Defendants allege that [REDACTED].

Defendants further point out that Strattice is not the only reconstructive tissue matrix product in the market, and excluding the soon to be released TELAMax, there are approximately 30 other significant products presently competing with Strattice in the market. Defendants maintain that both Strattice and the independently developed TELAMax are tissue matrix products and both use a decellularization process [REDACTED]. However,

Defendants argue that this is the extent of the relevant similarities between the products. Defendants allege that given these differences and given the uncontested fact of ERT's independent development by Mesynthes, LifeCell cannot point to any "trade secrets" or other proprietary information it alleges are incorporated into TELAMax, and Defendants maintain that the only possible overlap in processing method between the two products is [REDACTED]

The composition of [REDACTED] [REDACTED]. LifeCell alleges that this is a trade secret and at the heart of its alleged misappropriation claims; however, as mentioned, Defendants argue that LifeCell's [REDACTED] [REDACTED].

Defendants argue that Plaintiff has presented vague allegations about unspecified "recipes" and that Plaintiff demands sweeping injunctive relief. Defendant argues that Plaintiff fails to present any compelling evidence of highly valuable trade secrets, and that LifeCell continues to keep the Court and Defendants in the dark about what exactly it claims to be trade secrets. Tela Bio avers that the uncontested evidence demonstrates that TELAMax derives from technology and a core manufacturing process developed independently by a third-party, Mesynthes. Defendant maintains that the composition and production methods and processes of TelaMax are radically different from those of Strattice. With regard to LifeCell's concern about its former employee Dr. McQuillan, Defendants contend that such concern is misplaced. Defendant alleges that Dr. McQuillan was brought on board for his general expertise, and not for any particularized knowledge of LifeCell trade secrets or recipes. Defendants argue that the over-reaching nature of Plaintiff's demands for injunctive relief are clear, and that LifeCell seeks to shut down Tela Bio indefinitely and likely irreversibly; the ramifications of this injunctive demand, Defendant argues, have international implications as well, as Plaintiff seeks to close down a foreign manufacturing line and cripple the New Zealand-based concern that operates it, as well as block consumers from getting the benefit of TELAMax. With regard to LifeCell's allegations about Defendants hiring a number of former LifeCell sales representatives, Defendant contends that the issue here is not whether TELAMax should be sold, but how, and once again, Defendant alleges that LifeCell over-reaches in its request for relief which demands that Tela Bio dismiss the employees outright rather than consider reasonably limited restrictions on the conditions of their employment as permitted by New Jersey law. Defendant points out that the individual sales representatives were "at-will"

employees, and therefore LifeCell must overcome the presumption under New Jersey law that it is legitimate for a company to target a competitor's employees for recruitment.

Defendants allege that based on IMS market research data, Strattice sales declined from a peak of over \$160 million in 2012 to slightly over \$131 million in 2014. Tela Bio asserts upon information and belief that LifeCell employee morale is and has been low and its sales representatives are discouraged by the lack of product innovation. Tela Bio, as a new venture, naturally needed to hire a significant number of people, and alleges that it attempted to hire employees from a number of companies and retained recruiters to look for potential R&D and sales and marketing employees. Defendants allege that a number of LifeCell employees were actively looking for new positions at the same time Tela Bio was looking to hire, in part because there were numerous layoffs from LifeCell. Defendants point out that Dr. Roberts was demoted, and Ms. Snowden, Mr. Gorman, and Mr. Talmo were all fired. Defendants aver that the timing was fortuitous for Tela Bio, and contend that Tela Bio took reasonable steps to avoid harm in legitimately hiring LifeCell employees. With regard to LifeCell's emphasis on the fact that a group of its sales representatives were hired on the same day, Defendants contend that Tela Bio decided to accelerate the job offers in advance of project launch, and that on the day all the candidates were told they could come aboard-February 6-each candidate allegedly decided to do so right away.

### **1. Irreparable Harm**

With regard to the first Crowe factor, which requires a finding of "substantial, immediate, and irreparable harm," Subcarrier Communications Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997), Defendants argue that Plaintiff's purported harm arises from Tela Bio's alleged theft of trade secrets and proprietary information relating to LifeCell's manufacturing process for Strattice and LifeCell's confidential marketing techniques and customer information. Plaintiff alleges that it will suffer "impairment of its business and diversion of its customers" unless Tela Bio is enjoined from launching its product and employing former LifeCell employees. However, Defendants contend that Plaintiff does not clearly specify the trade secrets or proprietary information allegedly misappropriated, and therefore Plaintiff does not provide any basis for evaluating alleged harm. Defendants maintain that Plaintiff cannot show irreparable harm based on misappropriation of its alleged trade secrets, and at best, LifeCell's alleged trade [REDACTED] [REDACTED] relates merely to a small substep in the overall production process of the respective products. Defendants maintain that this is not the kind of trade secrets case

warranting injunctive relief, and that Plaintiff does not allege the “classic trade secrets” theory. Instead, Plaintiff’s claim concerns the background knowledge informing Tel Bio’s manufacturing process, and the knowledge that Dr. McQuillan and the other former LifeCell employees had when implementing changes to the manufacturing process. Therefore, Defendants contend that any harm, if proven, can be compensated after a trial with monetary damages.

Additionally, Defendants allege that laches bars injunctive relief and negates a finding of irreparable harm. Plaintiff became aware of Dr. McQuillan’s employment at Tela Bio at least more than one year before bringing suit. Thus, if Tela Bio’s theft of LifeCell’s trade secrets was really inevitable as a result of Dr. McQuillan’s employment at Tela Bio, Defendants argue that Plaintiff’s irreparable harm argument is negated by the laches doctrine.

Defendants also argue that LifeCell’s requested injunction barring Tela Bio from employing its former employees it already hired is legally improper. “It is fundamental that an injunction will not be granted that directly affects the rights of persons who are not parties and who are not represented in the action.” Markwardt v. New Beginnings, 304 N.J. Super. 522, 537 n.4 (App. Div. 1997) (quoting Slater v. Slater, 223 N.J. Super. 511, 519 (App. Div. 1988)). Defendants contend that by forcing Tela Bio to fire the sales representatives who relocated from LifeCell, it would directly and adversely affect their employment rights; therefore, Defendants argue that it is essential to deny or modify any proposed injunctive relief to the extent necessary to protect those rights. See NuVasive, Inc. v. Lanx, Inc., 2012 Del. Ch. LEXIS 150, \*1 (2012). Defendants aver that because the employees’ employment cannot be adversely affected without their opportunity to be heard, the preliminary injunction barring Tela Bio from employing them should be denied.

## **2. Probability of Success on the Merits**

Defendants argue that Plaintiff cannot demonstrate entitlement to relief based on the law or fact. Defendants aver that Plaintiff’s trade secret misappropriation allegation is based on mere suspicion, and to date, LifeCell has not actually identified any particular trade secret. Defendants contend that and to the extent LifeCell has articulated any alleged trade secrets, these are materials in the public domain. To qualify as a trade secret, information or data must derive “independent economic value” 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.”

N.J.S.A. 56:15-2. “Proper means” includes “observation of the information in public sue or on public display” or “obtaining the trade secret from published literature.” Id.

Defendants assert that the alleged trade secrets identified in LifeCell’s application are namely [REDACTED]

[REDACTED] First, Defendants maintain that LifeCell cannot meet the criteria, given the extensive published literature on decellularization and already known in the public domain. Further, Defendants aver that LifeCell relies on the inevitable disclosure doctrine, and LifeCell contends that the Court can presume that Dr. McQuillan must have used and imparted his knowledge of LifeCell trade secrets in his work for Tela Bio. However, Defendants point out that LifeCell was aware of Dr. McQuillan’s employment by Tela Bio for more than a year prior to commencement of its complaint, and so if Dr. McQuillan’s mere presence created an unavoidable and inevitable threat to LifeCell’s trade secrets, Defendants argue that it is hard to see why LifeCell waited before seeking relief. Regardless, Defendants argue that the inevitable disclosure doctrine does not apply here because it is undisputed that TELAMax was developed independently by Mesynthes prior to the existence of Tela Bio and prior to Dr. McQuillan’s employment at Tela Bio. LifeCell has cited to the Superior Court case of Nat’l Starch and Chem. Corp. v. Parker Chem. Corp., 219 N.J. Super. 158 (Law Div. 1987), where the court found disclosure inevitable where the misappropriation would have allowed the defendant to duplicate plaintiff’s formula “without the necessity for the usual trial and error process.” Id. at 161. However, Defendants contend that this is not the case here, and because Strattice and TELAMax are so different in composition, and since each derives from a different starter tissue, and even if Tela Bio and Mesynthes had access to the “lockbox” for LifeCell’s “Solution D” trade secret, this would not have provided Defendants with any benefit since they had to arrive at a method and process suited for their own fundamentally different product.

Defendants maintain that Tela Bio did not misappropriate proprietary information, and argue that LifeCell’s accusation that Tela Bio developed trade secrets and proprietary information over the past three years, all of which should be deemed to be the sole and exclusive property of LifeCell because of their former employees’ invention assignment agreements, borders on frivolity. Such a claim, Defendants argue, is wrong and made in bad faith. Defendants aver that the changes made to TELAMax were done after extensive testing and trial and error, as Tela Bio and Mesynthes worked together to optimize a process suitable for the specific source tissue. These

changes, Defendants contend, were not based on trade secrets and proprietary information of LifeCell. Defendants aver that there is no evidence of actual misappropriation or of any concrete harm, and that inevitable discovery is inapplicable on these facts.

Defendants argue that LifeCell cannot succeed on the merits of its claim that Tela Bio misappropriated its proprietary sales information by hiring former LifeCell employees. Defendants argue that LifeCell doesn't provide any evidence or allegations to suggest that Tela Bio, as opposed to the former LifeCell employees, misappropriated LifeCell's proprietary information, and that LifeCell's allegations could, at best, suggest that its former employees were exposed to confidential information during the course of their employment with LifeCell that could theoretically be used later in their new positions at Tela Bio. However, Defendants point out that this is always the case when an employee changes jobs in the same industry. LifeCell suggests that misappropriation can be implied from the mere fact that Tela Bio was aware that sales and marketing employees it hired were subject to restrictive covenants. However, Defendants contend that New Jersey law requires actual proof of misappropriation. See e.g. Strikeforce Technologies, Inc. v. Whitesky, Inc. 2013 U.S. Dist. LEXIS 81561 (D.N.J. 2013). Defendants also aver that Plaintiff does not cite any authority for the proposition that merely hiring an employee to work in the same field, even with knowledge of a restrictive covenant, is in itself misappropriation of proprietary information. Defendants maintain that Tela Bio took and is taking reasonable precautions to ensure that former LifeCell employees do not inadvertently disclose confidential information during the course of their employment with Tela Bio.

With regard to LifeCell's unfair competition claim, Defendants contend this is redundant of Plaintiff's other claims and should be disregarded. Under New Jersey law, unfair competition is not a "distinct cause of action," but rather a "general rubric which subsumes various other cause of action." Diversified Indus., Inc. v. Vinyl Trends, Inc., 2014 U.S. Dist. LEXIS 61131, \*20 (D.N.J. 2014). See also DG3 N. Am., Inc. v. Labrador Regulated Info. Transparency, Inc., 2014 U.S. Dist. LEXIS 159259 (D.N.J. 2014) (applying New Jersey law and dismissing statutory and common law unfair competition claims where unfair competition claim was duplicative of tortious interference claim). Defendants argue that Plaintiff's unfair competition claim is based on facts identical to those underlying its claims for Misappropriation of Proprietary Information (Count II) and Tortious Interference with Contract and Prospective Economic Advantage (Count IV). In any event, Defendants also argue that Plaintiff does not allege that Tela Bio attempted to pass off

LifeCell's goods, name, or goodwill/reputation as its own to customers or to confuse customers as to the origin of Tela Bio's products. LifeCell argues that Tela Bio's actions amount to unfair competition because hiring its former employees "gives Tela Bio bulk access to LifeCell's proprietary information and trade secrets." However, Defendants contend that the duplicative nature of the unfair competition claim is clear and this claim should therefore be dismissed.

LifeCell also alleges that Tela Bio tortiously interfered with contracts and prospective economic relations between LifeCell and thirteen sales and marketing employees hired by Tela Bio. Defendants argue that these claims are also not viable. To plead a claim for tortious interference a plaintiff must show (a) a protectable right, either a contract or prospective economic advantage; (b) intentional and malicious interference with the protectable right; and (c) that such malicious interference caused a loss with resulting damages. See Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751-752 (1989). Defendants contend that LifeCell admits the contracts of its employees, and thus its prospective economic advantages stemming from the continuation of those contracts, were terminable at will. Defendants aver that New Jersey has adopted the Restatement approach regarding tortious interference claims involving at-will employees between competitors, which provides a safe harbor for defendants facing such claims.

One who intentionally causes a third person ... not to continue an existing contract terminable at will does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other.

EZ Sockets, Inc. v. Brighton-Best Socket Screw Mfg. Inc., 307 N.J. Super. 546, 559 (Ch. Div. 1996), aff'd, 307 N.J. Super. 438 (App. Div. 1997).

Defendants maintain that Tela Bio's hiring of former LifeCell employees satisfies each and every element required for the safe harbor.

Defendants argue that LifeCell's tortious interference claim also fails because Tela Bio did not use "wrongful means" to hire any of the employees. "Wrongful means" is interpreted narrowly, and limited to egregious conduct like "violence, fraud, intimidation, misrepresentation, criminal or civil threats, and/or violations of the law." Id. at 559. Lesser sorts of behavior do not constitute wrongful means. Tela Bio maintains that it has not engaged in fraud or deceit with regard to any restrictive covenants.

With regard to Plaintiff's argument about "inevitable discovery," Defendants contend that if LifeCell's theory were correct, Dr. McQuillan's hiring by Tela Bio three years ago must have already resulted in harm, and hence LifeCell cannot satisfy the immediacy requirement for a preliminary injunction. See, e.g., Trico Equip., Inc. v. Manor, 2009 U.S. Dist. LEXIS 50524, \*23 (D.N.J. June 15, 2009) ("if the employee has already disclosed confidential information, the harm may be irreparable, but it is not immediate"); Scholastic Funding Grp., LLC v. Kimble, 2007 U.S. Dist. LEXIS 30333, \*21 (D.N.J. April 24, 2007) ("Plaintiff appears to concede that Defendants have already utilized and disclosed Plaintiff's allegedly confidential information. This appears to indicate that any harm, if realized, is already completed and cannot thus be considered immediate."). Defendants aver that the doctrine has no application to the facts here, because first, it applies in the specific circumstances where an employee with technical skills has just been hired by a competitor but has yet to begin significant work or, for that matter, any work at all. See E.I. DuPont de Nemours & Co. v. American Potash & Chem. Corp., 200 A.2d 428 (Del. Ch. 1964). There is no misappropriation *per se* in such circumstances, only a prospect of future misappropriation; absent misappropriation, courts are compelled to make "a finding as to the probable future consequences ... based on a weighing of the probabilities." Id. at 436. Second, Defendants contend that because the doctrine is limited to situations where a key employee is on the verge of beginning work for a competitor, the relief sought is always directed to the specific person or persons whose knowledge presents the risk of disclosure. Defendants aver that the doctrine does not provide a basis for more general injunctions against the competing employer.

Defendants contend that with regard to Dr. McQuillan's agreements with LifeCell, Plaintiff fails to acknowledge that Dr. McQuillan's non-compete agreement executed in 2008 was in fact superseded, as a new one was entered in 2010 in connection with a new stock option plan created after LifeCell was acquired by KCI. Tela Bio understood that following a corporate takeover in 2010, LifeCell rolled up all the legacy non-compete agreements, including the 2008 agreements, into new non-compete agreements. In particular, Tela Bio alleges that it had seen a copy of the newer 2010 agreement that Dr. Roberts retained, which contained a complete integration clause superseding all prior agreements. Upon reviewing LifeCell's initial production of documents, Defendants could not locate copies of Dr. McQuillan's 2010 non-compete agreement; subsequently, on April 1, 2015, Tela Bio's counsel sent a letter to LifeCell's counsel requesting that LifeCell prioritize the production of four specific document categories, "particularly including

those from Kinetic Concepts Inc, and any associated restrictive covenants.” LifeCell assured Tela Bio that the requested documents would be produced, but one week later, Tela Bio alleges that they still did not receive the 2010 agreement. When Tela Bio’s counsel sent urgent emails to LifeCell’s counsel on the day of Dr. McQuillan’s deposition, LifeCell’s counsel responded by email stating, “We might not be able to provide the documents for which you are looking because it is no longer available to the company.” The 2010 non-compete and related agreements were maintained online at eTrade, and LifeCell itself did not have copies in its own possession, and had been unable to secure copies from eTrade.<sup>2</sup>

With regard to the other former LifeCell employees that are now involved with Tela Bio, Defendants contend that they reviewed each individual’s application agreements with LifeCell to make sure they were not unwittingly in violation of those agreements. In Mr. Kibalo’s case, Tela Bio allegedly did not commence employment until months after the restrictive covenant expired; Dr. Roberts sought and obtained an express waiver of his restrictive covenant from LifeCell; Dr. Sun moved to China immediately after leaving LifeCell, and merely worked for Tela Bio as a consultant and allegedly did not disclose any proprietary information regarding LifeCell. Defendants maintain that they were not aware of any restrictive covenant agreement between LifeCell and Dr. Sun. Mr. Gorman was fired by LifeCell in 2013, and Defendants contend that his non-compete agreement had expired at the time that Tela Bio hired him as a consultant, and the only remaining limitation was against him soliciting LifeCell employees and customers.

LifeCell, Defendants allege, seeks to portray the hiring of the ten sales representatives as the handiwork of Mr. Gorman, who was out to hurt LifeCell for firing him. Defendants maintain that the record does not support this contention. Defendants contend that Jennifer Barretta, an Operating Partner with HighCape Partners, which is a growth equity firm that invests in companies that are commercializing high-margin life science products, met with Defendant Koblisch and members of his leadership team in August of 2013 and began the process of building out his commercial team. She certifies that she was involved in some of the “workshops” that were held, and was in fact in charge of setting them up from April 2014 onward. These workshops, Ms. Barretta contends, were interviewing and recruiting sessions where they asked sales representative

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<sup>2</sup> In response, LifeCell certifies that it produced all of Dr. McQuillan’s non-competition and other restrictive covenant agreements that it has available to produce, and that it is willing to assume that Dr. McQuillan’s agreement is identical to the one signed by Dr. Roberts. LifeCell further avers that KCI/LifeCell discontinued its use of eTrade years ago.

recruits, allegedly from both LifeCell and other companies, to visit Tela Bio not to seek information from them but to convey information to them about Tela Bio so they could decide whether they may be interested in joining the company. Ms. Barretta avers that it is surprising to her that LifeCell is “attempting to infer a nefarious motive in the fact that Tela Bio hired a number of the sales representatives at the same time,” and in her experience, sales representatives are always hired in classes because medical device companies need to do a substantial amount of training and education when they roll out a new product.

Thus, Ms. Barretta allegedly identified potential targets for hire, including the ten representatives at issue; Mr. Gorman’s role was limited principally to responding to inquiries about career options from his former LifeCell workmates by referring them to Ms. Barretta. Defendants maintain that there was no nefarious plan drawn up by Tela Bio to raid LifeCell’s employees and thereby cripple LifeCell’s ability to compete. Defendant Koblish certifies that Tela Bio’s hiring of the former LifeCell employees had nothing to do with harming LifeCell, nor could it as it is his understanding that LifeCell still had approximately 150 sales representatives available to sell their products and the new Tela Bio representatives would not even be offering a competing product for at least a month or two.

By no later than September 2014, Defendants allege that LifeCell was aware that Tela Bio was “a future competitor that [was] very active” and believe that Tela Bio was preparing to launch a product by the middle of November. LifeCell was allegedly also aware that a number of former LifeCell personnel, including Drs. McQuillan and Roberts and Paul Talmo, were working at Tela Bio, and knew specifically that Tela Bio had been talking to members of the LifeCell sales team. Defendants contend that in October 2014, LifeCell described Tela Bio and its hybrid mesh product as a “Risk” to LifeCell.

Finally, Defendants aver that Plaintiff is unlikely to prevail on its civil conspiracy claim because it has failed to establish the underlying misappropriation of trade secrets claim. Under New Jersey law, the gist of the civil conspiracy claim “is not the unlawful agreement, but the underlying wrong which, absent the conspiracy, would give a right of action.” Banco Popular N. Am. v. Gandi, 184 N.J. 161, 164 (2005). Defendants aver that a civil conspiracy claim will fail unless the plaintiff can establish that the defendant “committed an unlawful act or a wrong against him that constitutes a tort entitling him to recovery.” G.D. v. Kenny, 205 N.J. 275, 312 (2011). Plaintiff’s civil conspiracy claim is dependent on the underlying trade secrets claim, which

Defendants maintain is defective, and therefore Plaintiff's civil conspiracy claim cannot be sustained.

### **3. Balance of the Hardships**

Third, Defendants aver that an injunction barring the sale of TELAMax would be devastating to the Defendants and innocent third parties, as well as damaging to the public by removing from the market a promising new treatment for hernia patients. Defendants stress that it would be contrary to the public interest to grant Plaintiff's requested relief. Defendants argue that the clinical and economic advantages of their product are distinct and that the product will primarily target a different market than LifeCell's products.

On the other hand, Defendants argue that the impact to LifeCell if the injunction is denied is much less severe. Defendants contend that Strattice is but one of LifeCell's seven product configurations, and that LifeCell still retains a majority of its employees and is still a market leader in complex hernia products. Further, the harm alleged by LifeCell consists principally of alleged misappropriation of one specific recipe of a treatment used, and Defendants argue that the impact at its worst is having to face a new rival product.

Defendants, arguably admitting that some sort of restraints is reasonable and necessary, have proposed the following:

- Third party monitor to oversee elimination of any remaining confidential LifeCell documents on computers and servers
- Year delay before any further hiring of current LifeCell employees
- Must wait six months from point of termination or resignation of any former LifeCell employees before hiring them within the next year
- Year delay before former LifeCell sales reps may solicit former customer contacts to make commercial sales.

#### **c. The Court's Findings**

##### **1. Irreparable Harm**

Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages after the fact. Crowe, supra, 90 N.J. at 133. The irreparable harm must be imminent, concrete, non-speculative, and the harm must occur in the near, not distant future. Subcarrier Communications, supra, 299 N.J. Super. at 639. The Court does find that Plaintiff has established by clear and convincing evidence that absent injunctive relief, LifeCell will suffer immediate and irreparable harm.

Defendants discuss at length the differences between Strattice and TELAMax, referring to Strattice as a “niche product” focusing primarily on the most complex and difficult operations whereas TELAMax is allegedly intended to for use in non-complicated hernia repair operations. Defendants further argue that LifeCell has suffered enormous market pressures over the past two years, experiencing a drop in sales of its complex hernia repair products and by no fault of Tela Bio, who has yet to release a product into the market. On the other hand, Plaintiff argues that Defendants created Tela Bio specifically to compete with LifeCell, and that they leveraged LifeCell’s misappropriated proprietary technology to transform a failing product into a marketable product. The Court finds that Defendants’ arguments directly contradict evidence submitted by Plaintiff where Defendants explicitly plan “to compete with LifeCell,” and further, Defendants themselves stated that they view Strattice as a quality leader and exemplar, and therefore, in accessing the quality of TELAMax throughout the development process, it often benchmarked the product performance against Strattice. During Tela Bio’s presentation to banks and private equity investors on July 30, 2012, the company represented that its primary competitors were to be Strattice and AlloDerm; as Plaintiff argued, the law requires that these statements made by Defendants to be true, and therefore it is clear that from the very beginning, Defendants intended to compete in the market with LifeCell’s products.

Accordingly, the Court does find that Plaintiff meets the first Crowe factor. Further, injunctive relief is statutorily permitted in this case, as “actual or threatened misappropriation may be enjoined.” N.J.S.A. 56:15-3. Additionally, as Plaintiff points out, every former LifeCell employee now at Tela Bio has language in their employment contracts similar as the language evidenced in National Starch, where the defendant acknowledged the inadequacy of money damages in his employment contract. See Nat’l Starch, supra, 219 N.J. Super. at 163. Here, for example, Dr. McQuillan’s 2011 Consulting Agreement with KCI provides

Consultant acknowledges that the breach or threatened breach of this Consulting Agreement can cause irreparable damage to Company or its Affiliates, and that in addition to and not in lieu of all other rights available at law or in equity, Company shall have the right to temporary and permanent injunctive relief to prevent the breach of this Consulting Agreement by Consultant, without posting of bond and proving actual damages.

In the context of non-competition agreements, irreparable injury may be shown if the former employee may avail himself of sensitive product strategies both as to development and marketing,

which may be of extreme value to the competitor. Scholastic Funding Grp., LLC v. Kimble, 2007 U.S. Dist. LEXIS 30333, \*20 (D.N.J. April 24, 2007).<sup>3</sup> Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of goodwill. Id.

Therefore, the Court does find that Plaintiff meets the first Crowe factor. The question of whether this “immediate and irreparable harm” is due to wrongful acts on the part of Defendants, or are merely part of the risks inherent in business and innovation, will require an analysis of the third Crowe factor regarding a reasonable probability of success on the merits of Plaintiff’s claims. As Defendants contend, if Defendants have employed no wrongful means, then the Court should not be used as a vehicle to prevent market competition. See Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 199 (App. Div. 1995) (“While competition may constitute justification, a defendant-competitor claiming a business-related excuse must justify not only its motive and purpose but also the means used. . . . Conversely, where a plaintiff’s loss of business is merely the incident of healthy competition, there is no compensable tort injury.”).

## **2. Reasonable Probability of Success**

Injunctive relief should not be granted where all the material facts are controverted. Crowe, supra, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 305-06 (E. & A. 1878)). Thus, to prevail on an application for temporary restraints, a plaintiff must demonstrate a reasonable probability of success on the merits. Ibid. (citing Ideal Laundry Co v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E & A 1930). However, “mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo.” Ibid. (citing Naylor v. Harkins, 11 N.J. 435 (1953)). In fact, the point of temporary relief is to maintain the parties in substantially the same condition when the final decree is issued as when the litigation began. Ibid. (citing Peters v. Public Service Corp. of N.J., 132 N.J. Eq. 500 (E. & A. 1942).

The Court will analyze the various counts contained in Plaintiff’s Complaint. While the Court acknowledges that Plaintiff has “cherry-picked” portions of testimony from depositions as well as language in particular cases to support its arguments, thereby at times not providing the Court the full picture and context, the Court is nonetheless satisfied that given the overwhelming

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<sup>3</sup> The Court further agrees with Plaintiff’s contention that Defendants’ argument that there is no “immediacy” because LifeCell’s trade secrets have already been disclosed is meritless, and the Scholastic case does not support Defendants’ position because an injunction issued in that case on the non-compete and non-solicitation claims. Therefore, the Court finds that injunctive relief may appropriately be considered in the present case.

amount of evidence, Plaintiff has established by clear and convincing evidence that it has a reasonable probability of success on the merits of its Complaint.

**a. Count One- Misappropriation of Trade Secrets**

Defendants characterize Plaintiff's trade secrets claim to be a "constantly moving target," and that Plaintiff has taken a vastly expansive view of its proprietary rights. However, the Court agrees with Plaintiff's assertion that in reality, Plaintiff has been discovering new evidence that allows LifeCell to assert additional support for its allegations of misappropriation of trade secrets. Therefore, it is not the case that LifeCell is continually changing what it asserts to be trade secrets, but that LifeCell is continuously discovering more trade secrets that have been misappropriated.

New Jersey Trade Secrets Act, N.J.S.A. 56:15 et seq. defines "trade secret" as

information, held by one or more people, without regard to form, including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that: (1) derives independent 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 (2) is the subject of effects that are reasonable under the circumstances to maintain its secrecy."

N.J.S.A. 56:15-2.

"Misappropriation" means:

- (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (2) Disclosure or use of a trade secret to another without express or implied consent of the trade secret owner by a person who:
  - (a) used improper means to acquire knowledge of the trade secret; or
  - (b) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was derived or acquired through improper means; or
  - (c) before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired through improper means.

Id.

To prevail in New Jersey upon a claim for misappropriation of a trade secret, a trade secret owner must establish that: (1) a trade secret exists; (2) the information comprising the trade secret was communicated in confidence by plaintiff to the employee; (3) the secret information was

disclosed by that employee and in breach of that confidence; (4) the secret information was acquired by a competitor with knowledge of the employee's breach of confidence; (5) the secret information was used by the competitor to the detriment of plaintiff; and (6) the plaintiff took precautions to maintain the secrecy of the trade secret. Rycoline Prods., supra, 334 N.J. Super. at 71. At issue here is whether Plaintiff meets the first factor, which is whether a trade secret exists. Defendants submit a wealth of documents within the public domain and the crux of their argument is that everything Plaintiff alleges to be a trade secret fails to even meet the statutory definition of a trade secret since such information is publicly available.

The following are among what Plaintiff alleges to be its "trade secrets," misappropriated by Defendants:

i. [REDACTED] The Court acknowledges that [REDACTED], may very well have been an open and notorious fact for years. Defendants argue that the alleged [REDACTED] did not have any impact on Tela Bio's decision to [REDACTED] Defendants' own [REDACTED] motivated by the simple fact that Tela Bio believed [REDACTED] too damaging, and because its attempt to use a [REDACTED] ultimately did not provide consistent results after four months of continuous testing. During Dr. McQuillan's tenure at Tela Bio, the company allegedly first tried and then rejected two alternatives [REDACTED] Koblisch has certified that

The [REDACTED] did not result from any disclosure of LifeCell trade secrets by Dr. McQuillan. We undertook an extensive research and development effort (with Mesynthes) to perfect decellularization of our sheep tissue product, and any information Dr. McQuillan might have retained in his head about LifeCell's pig skin based product would not have been useful to us. The key point to decellularization compounds used by companies in this market are well (and publicly) known-the challenge is actually conducting the body of experimentation to get the process by which these compounds are used to achieve the decellularization end point.

The Court also acknowledges the difference between using [REDACTED]

[REDACTED]

[REDACTED] Plaintiff's allegations and claims are

undoubtedly strong and supported by the evidence: that Tela Bio switched to [REDACTED] Dr. McQuillan insisted upon it, as evidenced in the facts presented; Dr. McQuillan knew from over a decade at LifeCell that [REDACTED]; and prior to Dr. McQuillan's suggestions, Defendants were resistant to switch [REDACTED] "seen [any] data which would support [REDACTED] compared to [Mesynthes'] current method." Defendants provide a defense and cite to various publications that discuss the [REDACTED] [REDACTED] arguing that they switched [REDACTED] because of information in available in the public domain, and not because of any alleged trade secret that Dr. McQuillan learned at LifeCell. Given this dispute over material facts, the Court cannot find by clear and convincing evidence that Plaintiff has a reasonable probability of success on the merits of its trade secret claim relating to the [REDACTED].

ii. [REDACTED] ( [REDACTED] [REDACTED] )- Defendants allege that this exact decellularization formula has been [REDACTED] [REDACTED] and that the key components of the solution, including the [REDACTED] were not discovered by LifeCell at all, but derive from the [REDACTED]. Defendants further allege that certain key elements of the Strattice process, [REDACTED] [REDACTED]

Defendants' allegations directly contradict the Certification of Plaintiff's expert, Dr. Badylak.

Contrary to the facts of Rycoline Prods., Defendants contend that LifeCell has repeatedly and deliberately disclosed the [REDACTED], including [REDACTED]. Thus, the LifeCell solution is not a "secret selection and combination of ingredients." Defendants aver there is no affirmative evidence demonstrating actual taking and use of particularized trade secrets, and further, that disclosure in a patent negates trade secret protection. The Trade Secrets Act defines "proper means" as "discovery by independent invention, discovery by reverse engineering, discovery under a license from the owner of a trade secret, observation of the information in public use or on public display, obtaining the trade secret from published literature, or discovery or observation by any other means that is not improper." N.J.S.A. 56:15-2.

Defendants have retained Professor Robert Langer, who certifies that he disagrees with many of Dr. Badylak's conclusions; specifically, much of the alleged trade secrets and confidential information were established in the public domain. He contends that LifeCell's [REDACTED]



Mesyntes' view that there was "no data" to support a [REDACTED] is consistent with Dr. Badylak's point regarding industry literature teaching away [REDACTED]. It is undisputed that Defendants made changes to every single one of the key seven steps such that TELAMax [REDACTED] [REDACTED]. Defendants have dedicated a large portion of their briefs, as well as time during oral argument, on the fact that Mesyntes already had a product even before Tela Bio or Dr. McQuillan entered the picture. However, this argument does not explain the subsequent changes made to that starting product, and it is these subsequent changes that are at issue.

Additional points of concern that LifeCell raises are LifeCell's "trade secret and proprietary information on the [REDACTED] as a sterilization method, generated through years of research." LifeCell contends that through years of research and development, [REDACTED] [REDACTED] [REDACTED] While Defendants aver that LifeCell's work on [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] Drs. McQuillan, Persenaire, and Roberts testified to the uniqueness of [REDACTED] and Tela Bio's "unusual, immediate adoption of that experimental technology." During his deposition, when asked whether "other than now Tela Bio, do you know of any other company using [REDACTED] on products like TELAMax?", Dr. McQuillan stated that "No, I think it's quite unique." The existence of LifeCell's documents concerning [REDACTED] within Tela Bio's files only further raises the Court's concerns and supports Plaintiff's allegations.

Plaintiff avers that LifeCell trade secret documents in Tela Bio's files alone justifies a preliminary injunction so the parties can determine the full extent of the problem. LifeCell avers that Tela Bio repeatedly represented and certified to the Court that it does not have any LifeCell documents in its possession and it has taken all conceivable steps to eradicate LifeCell documents from its company; however, LifeCell's reproductions and representation to this Court suggest otherwise.

The Court finds that the threshold issue of whether Plaintiff can establish that a trade secret even exists is highly in dispute given the wealth of information within the public domain. However, even if the Court finds that the facts are controverted such that Plaintiff does not have a reasonable likelihood of success on the merits of its trade secret claim, proprietary information "need not rise

to the level of the usual trade secret, and indeed, may otherwise be publicly available.” Torsiello, supra, 955 F. Supp. 2d at 314. Accordingly, as will be addressed below, the Court is fully satisfied that Plaintiff has a reasonable likelihood of success on the merits of its misappropriation of proprietary information claim.

**b. Count Two-Misappropriation of Confidential and Proprietary Information**

Plaintiff contends that Defendants misappropriated two discrete categories of proprietary information: (1) Inventions and Contributions that must be disclosed and assigned to LifeCell pursuant to invention assignment covenants, and (2) sales and marketing-related information.

The Court finds that there is no doubt as to Plaintiff’s ability to establish by clear and convincing evidence that Defendants misappropriated LifeCell’s proprietary and confidential information. Thus, even if what Plaintiff alleges to be trade secrets do not meet the statutory definition of a trade secret, the Court finds that they are still subject to protection as confidential and proprietary information. Although there is no statutory definition of “confidential” or “proprietary” information, the case law provides guidance in determining what might constitute confidential or proprietary information. Under New Jersey law, “to be judicially protected, misappropriated information need not rise to the level of the usual trade secret, and indeed, may otherwise be publicly available. The key to determining the misuse of the information is the relationship of the parties at the time of disclosure, and its intended use.” Platinum Mgmt., supra, 285 N.J. Super. at 295 (internal citations omitted). “This tort tends to arise where an ex-employee uses confidential information to assist a competitor.” Torsiello, supra, 355 F. Supp. 2d at 314. The Court finds the foregoing to be highly applicable to the present case. The Court should consider the time and circumstances of the disclosure and the intended use of the information, even if the information is publicly available to a limited extent. See Lamorte, supra, 167 N.J. at 297 (concluding that the information was confidential and proprietary, given that it was information shared between plaintiff and its clients, that plaintiff’s competitors did not have knowledge of it, the information was confidential and defendants were not at liberty to take it for their own business purposes, and that defendants would not have generally known the information but for their employment with plaintiff).

Additionally, the Court along with Plaintiff points out that Defendants did not even address the misappropriation of proprietary information claim during oral argument, and their whole

defense was simply that Defendants did not misappropriate any of LifeCell's trade secrets because everything is already in the public domain. Accordingly, Defendants do not seem to dispute that the information is in fact proprietary and confidential.<sup>5</sup> During oral argument, Defendants' counsel argued that Plaintiff is not saying that "these steps in the manufacturing process [] are trade secrets. It's the knowledge in the background that Dr. McQuillan and others had when they thought about implementing them as part of Tela Bio's products. So this is a case that's three steps removed from a classic trade secrets case. It's not the product itself that contains the trade secret. It's not the manufacturing process. It's the background knowledge informing the decision about developing certain aspects of that manufacturing process." However, the Court finds that Plaintiff establishes by clear and convincing evidence that such knowledge, possessed by the former LifeCell employees due to their employment at LifeCell, constitutes confidential and proprietary information subject to protection.

With regard to the first discrete category of proprietary information, which Plaintiff refers to as Inventions and Contributions, Defendants argue that Dr. McQuillan's and Dr. Robert's invention assignment covenants with LifeCell are nullified by the KCI Stock Options agreement which did not include such a covenant. However, Plaintiff contends that this argument fails when tested against the language of the agreement and the deposition testimony. Plaintiff contends that the 2010 Stock Options Agreement states:

b. Entire Agreement. This Agreement sets forth the entire agreement and understanding between the Company and me relating to the subject matter herein and supersedes all prior discussions between us. No modification of or amendment to this Agreement, nor any waiver of any rights under this Agreement, will be effective unless in writing signed by the General Counsel of the Company. Any subsequent change or changes in my duties, salary or compensation will not affect the validity or scope of this Agreement. (Emphasis added by Plaintiff).

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<sup>5</sup> The Court acknowledges Defendants' assertion that "LifeCell made no effort to identify and segregate out truly valuable proprietary knowledge for special protection. Rather, they treated *the entire manufacturing process* from the slaughter of the pig at the abattoir to the shipment of the product out the facility door as a trade secret." (Emphasis by Defendants). The defense to the misappropriation of proprietary information claim is essentially that LifeCell's view of its proprietary rights is too expansive. However, as discussed, the Court does find that Plaintiff has proven by clear and convincing evidence that Defendants misappropriated specific categories of proprietary and confidential information.

Plaintiff admits that the 2010 Stock Options Agreement does not cover the subject matter of inventions and contributions. Therefore, applying common sense, Plaintiff avers that the 2010 Agreement does not supersede previous agreements concerning inventions and contributions by application of its clear terms, as the 2010 Agreement does not cover “inventions.” Plaintiff argues that if Defendants’ argument is accepted, that means that the granting of stock options by KCI operated to nullify LifeCell’s employment agreement with its executives. Defendants have not argued that LifeCell’s invention assignment covenants are not enforceable under New Jersey law, but simply argue that they were nullified as to Drs. McQuillan and Roberts.

Even if the Court concludes that the invention assignment covenants were in force and that Drs. McQuillan and Roberts breached these covenants, Defendants point out that the covenants otherwise do not apply to Tela Bio or any of the named Defendants, as they were not parties to any agreement with LifeCell. However, misappropriation “tends to arise where an ex-employee uses confidential information to assist a competitor,” and a subsequent employer misappropriates the proprietary information if it uses the information “and is aware of the information holder’s interest in protecting the information.” Torsiello, *supra*, 955 F.Supp. 2d at 314. Therefore, as a preliminary point, the Court notes that Plaintiff still has a legitimate misappropriation claim against Defendants despite the fact that Defendants were not parties to the agreement. Defendant Persenaire acknowledged that

Developing the process the other way, i.e. modifying one step at the time and for each step perform a test to see its effect, is far more time consuming and in the end less likely to result in the best possible product. It is for this reason that David and Daryl came up with the proposed process they shared with Barney. Their proposal is based on their collective 40 years of experience, and is formulated to yield an ECM with the best possible mechanical and biological performance.

Defendant was aware that Drs. McQuillan and Roberts’ “proposed process” was the result of knowledge they gained during their work at LifeCell. This is not a situation where enforcement of a covenant would enjoin “a former employee ... from using his or her experience in the industry as a basis for earning a living.” Subcarrier Communications, *supra*, 299 N.J. at 643. Instead, what the evidence and facts strongly indicate is that the former LifeCell employees utilized intimate knowledge gained while working at LifeCell and on the Strattice product in particular, and transformed Defendants’ product into a marketable one by employing ██████████



business and one for which Tela Bio's employees could not work post-termination. The evidence suggests that Defendants were well aware of the dangerous waters they were treading and were actively trying to formulate ways to avoid legal liability. One of many examples of such evidence are emails between Dr. McQuillan and Defendant Koblisch, wherein Dr. McQuillan states, "Find attached Non-compete agreement from LifeCell. The good news is that it is a bit narrower than the one I was subject to. I wonder if we can argue that by focusing on Grade 1 and 2 hernia, we are not in direct competition with LifeCell and therefore there is no issue?" Defendant Koblisch responded, "Great news on the non-compete. We should be able to argue that our work will be centered around synthetic replacement. Keep it simply and broad and well away from LIFC. We should have enough to build a strong rationale with employment lawyer involvement and crafting as well as test our strategy. Seems good though." Further, Dr. McQuillan testified falsely under oath about when he became involved in Tela Bio, the nature of his involvement in Tela Bio, and the nature of Tela Bio's business. In an email from Defendant Persenaire to a Daniel Vargo, Persenaire states that Tela Bio "was started in June 2012 by Antony Koblisch, former CEO of Orthovita, a biosurgery company focused on bone healing and hemostasis, David McQuillan, who led the development of Strattice for LifeCell, and myself, former CMO of Orthovita." This directly contradicts Defendants' representations that Dr. McQuillan was not a founding member of Tela Bio, and directly contradicts Defendant Koblisch's certification that Dr. McQuillan became an employee of Tela Bio on December 3, 2012.

Defendants have also argued that Dr. McQuillan did not hide his work with Tela Bio from LifeCell. However, the Court finds that the weight of the evidence suggests otherwise. For example, during his deposition, when asked if he "still [has] not disclosed to LifeCell that you were doing this nor did you ask for a waiver of your noncompete, did you?", Dr. McQuillan responded an unequivocal "No." When asked if he "ever, from the moment you left until today, tell LifeCell in any official way that you were making ECM mesh product to treat hernia to compete with Strattice," Dr. Quillan against responded "No." When asked if he was "hiding the fact that you worked at Tela Bio from LifeCell, aren't you, sir?", Dr. McQuillan responded, "I was hiding it from everybody. We had a stealth strategy." Even further, in an email dated April 29, 2013, from Dr. McQuillan to Dr. Sun, he advised Dr. Sun to not "mention to anyone from LifeCell [that Dr. Roberts is now head of RA/QA], as they may get nervous. they gave Darryl a waiver to work for TelaBio, but they don't know that you and I are associated with the company." Notably,

Dr. McQuillan certifies that he consulted with two other unrelated companies, Humacyte and Calzada, and advised LifeCell of both engagements. However, nowhere in Dr. McQuillan's certification does he mention that he actually advised LifeCell of his work with Tela Bio. Therefore, the Court cannot find that Dr. McQuillan and Tela Bio actually disclosed his work and the nature of this work to LifeCell.

Plaintiff has also provided evidence that Dr. McQuillan and the other former LifeCell employees were using LifeCell proprietary information at their new positions with Tela Bio, including the Process Master Validation Plan, under physical lock and key with LifeCell, and which Dr. Roberts allegedly "updated" for use at Tela Bio; as well as documents concerning [REDACTED] and what LifeCell refers to as proprietary documents from their files "TB0019180 through TB0019185" and "TB00006980 through TB 00006986." The metadata from the documents indicate that it was created on December 4, 2009, which LifeCell contends is one month after the draft document from LifeCell's files. Plaintiff further points out that Tela Bio did not even exist on December 4, 2009. These documents were produced by Defendants during this litigation, and Plaintiff argues that the way these documents came to be within Tela Bio's files are even more curious. Although Defendants argue that these documents are within their files because a LifeCell employee, Jerome Connor, emailed the files to Dr. McQuillan, Plaintiff avers that this shows that Dr. McQuillan was contacting current LifeCell employees, and discussing Tela Bio with these employees. Defendants' possession of these documents is highly concerning to the Court, and strongly supports Plaintiff's allegations of actual misappropriation of Plaintiff's proprietary and confidential information.

With regard to the sales and marketing-related information, the Court does find that LifeCell alleges legitimate sales or marketing trade secrets, such as pricing information, which is available in LifeCell's Sales Portal and LifeCell Connect. In New Jersey, customer lists of service businesses have been afforded protection as trade secrets. Lamorte, supra, 167 N.J. at 298. However, Defendants allege that LifeCell did not cut off the former employees' access to the Sales Portal until February 16, 2015, and Defendants maintain that LifeCell has not produced any evidence that Tela Bio has misused any identifiable proprietary information. The Court finds that Plaintiff offers clear and convincing evidence that Defendants have already misappropriated Plaintiff's sales and marketing-related information. For example, during the February 2014 Tela Bio update meeting, Mr. Gorman presented the list of LifeCell's top 20 accounts and the sales for

each for the years 2009-2011. This is the type of information Plaintiff avers is available on LifeCell's Sales Portal and to which Mr. Gorman had access. Defendant Koblish was in attendance at this meeting. The Court notes that Mr. Gorman's non-compete agreement with LifeCell was not set to expire until September 2014, and the Individual Defendants were aware of this. In Mr. Gorman's presentation during that meeting, he proposed a Tela Bio sales plan-LifeCell has obtained copies of the slides from this presentation and notes that the proposed Tela Bio sales plan is LifeCell's own sales plan. The Court notes that Defendants did not address this clear misappropriation during oral argument.

Further, there are genuine disputes over the nature of Tela Bio's "workshops" and the Court does not have sufficient information to know exactly what occurred during the workshops, but it appears clear to the Court that the workshops were not simply "interviewing and recruiting sessions" as Defendants portray the workshops to be. Again, the Court notes that Plaintiff has "cherry-picked" pieces of evidence to highlight to this Court in order to support its allegations, but the Court is troubled by much of the evidence presented by Plaintiff, for example, the email exchange between former LifeCell sales representative Schreiber to Defendant Persenaire.

Additionally, Tela Bio required the former LifeCell employees to sign confidential disclosure agreements months before they were even hired by Tela Bio, and while they were still employed by LifeCell. Moreover, former Regional Manager for LifeCell Finlay Long, whose employment with LifeCell ended on October 14, 2014, emailed Paul Talmo on December 9, 2014, following Tela Bio's December 8, 2014 workshop. This email demonstrates that at this time, he and other LifeCell sales representatives were engaging in developing market strategies for TELAMax, including against Strattice, and that these workshops were more than what Defendants allege them to be. Plaintiff alleges that it also demonstrates that the sales representatives were misappropriating confidential marketing strategies from LifeCell, specifically Mr. Long's statement that "it's similar to the argument that we used to [REDACTED]." Tela Bio was undoubtedly aware of this misappropriation, as Mr. Talmo responded, "Good stuff Fin...Thanks!" This evidence highly supports Plaintiff's allegations.

As to the alleged strength of the customer relationships and contacts their sales representatives have built over the years, and the risk that Tela Bio might exploit those relationships, Tela Bio contends that it respects these business interests and therefore attempted to accommodate LifeCell's concerns by moving sales representatives into new geographical

territories where those sales representatives would have to develop new customer relationships from scratch. Tela Bio maintains that it took prudent measures to prevent the disclosure or use of proprietary information by LifeCell's former sales and marketing employees and to protect legitimate LifeCell interests. Plaintiff alleges that Defendants' alleged safeguards were untimely and ineffective, and further argues that record evidence reveals that LifeCell sales representatives took advantage of their unfettered access to LifeCell data to misappropriate confidential information. The Court agrees with Plaintiff's concerns, and given that the entirety of Tela Bio's sales force consists of former LifeCell employees, and that Plaintiff sells Strattice all over the nation, the purported steps that Tela Bio took to ensure that the sales representatives are not in breach of any agreements are insufficient to protect LifeCell's legitimate interests.

In sum, information not technically meeting the strict requirements of trade secrets may be protected as "confidential information" and may serve as the basis for a tort action, Lamorte, *supra*, 167 N.J. at 300; and in this case, the Court finds that Plaintiff shows by clear and convincing evidence that the Individual Defendants, as the chief executives of Tela Bio, were aware of the misappropriation of LifeCell's information by Tela Bio. Therefore, Plaintiff has a reasonable probability of success on the merits of its misappropriation of proprietary and confidential information claim.

**c. Count Three-Unfair Competition; Count Four-Tortious Interference with Contract and Prospective Economic Advantage; Count Five-Civil Conspiracy; and Count Six-Unjust Enrichment**

Pursuant to New Jersey common law and the New Jersey Unfair Competition Act, N.J.S.A. 56:4 *et seq.*, "No merchant, firm or corporation shall appropriate for his or their own use a name, brand, trade-mark, reputation or goodwill of any maker in whose product such merchant, firm or corporation deals." N.J.S.A. 56:4-1. As an initial matter, the Court rejects Defendants' arguments that Plaintiff's unfair competition claim should be dismissed as duplicative, and the Court does believe that Plaintiff has a legitimate claim separate and distinct from its other claims. The Court already found that Plaintiff has a reasonable probability of success on the merits of its misappropriation claims, and "[m]isappropriation of confidential information may constitute unfair competition under New Jersey law." Torsiello, *supra*, 955 F. Supp. 2d at 314 (*internal citations omitted*). For the following reasons, the Court finds that Plaintiff also has a reasonable probability of success on the merits of its unfair competition claim.

Defendants aver that concerns about trade secrets are not really the underlying motivation for this case and rather, the trigger for this lawsuit is the simultaneous resignation of ten LifeCell sales employees in February 2015. Defendants provide a plain explanation for this simultaneous departure, and contend that in 2013 and into 2014, LifeCell was experiencing significant employee turnover and morale problems. Defendants aver that the catastrophic collapse of Strattice sales revenue in this period put pressures on a sales team that is compensated according to volume; thus, in Defendants' own words, what resulted was a "veritable Saturday Night Massacre of the LifeCell sales force." On January 1, 2014, 115 out of 165 of LifeCell's sales representatives had their territories re-aligned or changed; twenty sales representatives were terminated in the first quarter of 2014 alone. LifeCell management observed that in the first quarter of 2014, Strattice revenue declined in approximately 75% of territories, more than 50% of its customer relationships had been displaced, and more than 70% of the sales territories had been changed. Defendants maintain that LifeCell sales representatives left not due to any special inducement by Tela Bio, but because they were not happy with LifeCell, and as a result, they were aggressively pursuing any and every opportunity to leave.

On the other hand, the Court acknowledges Plaintiff's assertion that on top of the simultaneous departure of ten sales representatives, as well as the fact that 100% of Tela Bio's sales force now consists of former Lifecell employees, six of Tela Bio's seven business divisions- Science, Operations, Commercial Development, Strategic Marketing, Intellectual Property, and Clinical Research-are led by a former LifeCell executive or employee. The Court has already acknowledged and Defendants have argued that "sticking it" to a competitor is part of the rough and tumble of competition in a market economy. Even so, these facts taken together as well as the overwhelming amount of evidence in support of Plaintiff's allegations, in light of the principle that the essence of unfair competition is fair play, are quite troubling. Although Ms. Barretta certifies that "sales representatives are always hired in classes because medical device companies need to do a substantial amount of training and education when they roll out a new product," the Court finds that "not all sanctioned conduct or customs of a specific industry will be immune from claims of tortious interference." *Lamorte, supra*, 167 N.J. at 307-308. Here, given that Tela Bio was communicating with the former LifeCell sales representatives, at times while these individuals were still employed by LifeCell, and given all of the other evidence, the Court does find that Plaintiff is likely to prevail on the merits of its tort claims.

However, the Court again takes note that these former LifeCell sales representatives are not named Defendants and that the Defendants in this matter did not have any contractual obligations to Plaintiff. There is also a dispute over whether these non-compete agreements are enforceable as written, as Defendants have argued that LifeCell's restrictive covenants are overbroad and unenforceable. Defendants contend that New Jersey does not favor restraints of trade. J.H. Renarde, Inc. v. Sims, 312 N.J. Super. 195, 206 (1998). Under New Jersey law, an employer "has no 'legitimate' interest in preventing competition as such," Karlin v. Weinberg, 77 N.J. 408, 417 (1978), and restrictive covenants cannot be used to stifle legitimate competition, including "competition from a former employee." Ingersoll-Rand, *supra*, 110 N.J. at 635. A restrictive covenant may not be enforced unless it "(i) protects the legitimate interest of the employer, (ii) imposes no undue hardship on the employee, and (iii) is not injurious to the public." Karlin, *supra*, 77 N.J. at 423. Restrictive covenants must be "narrowly tailored to ensure the covenant is no broader than necessary to protect the employer's interests." Cnty. Hosp. Grp, Inc. v. More, 183 N.J. 36, 58-59 (2005).

Here, Defendants argue that the restrictive covenants that LifeCell attempts to impose on its employees are unreasonably overbroad, since for example, the non-solicitation clause of the 2008 Restrictive Agreement has no geographic limitations even though LifeCell employees worked limited geographic territories. Such overbroad covenants, Defendants contend, also impose undue hardship on employees. See e.g. Subcarrier Communications, *supra*, 299 N.J. at 643 ("[E]ven when there is a restrictive covenant, a former employee cannot be enjoined from using his or her experience in the industry as a basis for earning a living."). Defendants also argue that while courts on occasion will "blue-pencil" overbroad covenants, rather than holding them unenforceable in all respects, this remedy is not automatic and a court will not blue pencil unless to do so is reasonable given all the facts and circumstances. See Laidlaw, Inc. v. Student Transp. of Am., Inc., 20 F.Supp. 2d 727, 757 (D.N.J. 1998).

At this time, the Court need not make a finding as to the enforceability of the non-compete agreements, given that the individuals remain non-parties to this action. However, in light of all the evidence, the Court does find that Defendants' actions such as their plan to have Dr. Roberts' time limitations reduced, as well as Defendants' actual knowledge of the existence of these non-compete agreements, further support Plaintiff's claims for unfair competition and tortious interference. Although Defendants dispute whether the invention assignment agreements were

nullified, they do not seem to question the validity and enforceability of the non-compete agreement of Dr. McQuillan, which was not set to expire until July 2012.

LifeCell maintains that Tela bio employed wrongful means by inducing LifeCell employees to violate their duty of loyalty to LifeCell, induced current and former LifeCell employees to violate their non-compete covenants with LifeCell, coordinated the resignation of ten sales representatives, and acted with explicit malice towards LifeCell. Plaintiff argues that Tela Bio's scheme violates "fair play" because Defendant designed a misleading strategy to induce LifeCell sales representatives to leave LifeCell and breach non-compete covenants; Tela Bio openly, consciously, and repeatedly ignored a competitor's reasonable restrictive covenants with its employees; and the sheer volume of senior former LifeCell employees that Tela Bio poached or recruited evidences malice and an unethical strategy to gain access to LifeCell's proprietary information and appropriate LifeCell's reputation, rather than the mere hiring of available talent. Deposition testimony by the Individual Defendants convinces the Court by clear and convincing evidence that Plaintiff has a reasonable likelihood of success on the merits of its unfair competition and tortious interference claims. During Defendant Persenaire's deposition, he admitted the following:

Q: Right? And one of the ways to hire an experienced team who has made all the mistakes and knows what need to be corrected already is hiring Jim Gorman who was the former head of sales for LifeCell, right?

A: Correct.

Q: LifeCell was the prime target of Tela Bio hiring, correct?

A: Correct.

Q: And LifeCell was the prime target of Tela Bio hiring because of all the information that LifeCell employees had gained over the time that they worked at LifeCell, right?

A: Correct.

Similarly, during Defendant Koblisch's deposition, he admitted the following:

Q: And Tela Bio intentionally hired LifeCell's sales representatives because they were extremely knowledgeable about the ECM market, correct?

A: I agree.

Q: And Tela Bio hired former LifeCell – hired LifeCell sales representatives because LifeCell sales representatives were extremely knowledgeable about Strattice and AlloDerm, correct?

A: Correct.

Q: And Life – Tela Bio hired LifeCell sales representatives to be able to use the knowledge that they had about Strattice and AlloDerm to help sell Tela Bio’s products?

A: Correct.

The Court notes that there are heavily disputed facts surrounding the employment of these individuals, many of whom have also provided certifications to this Court acknowledging that their decision to leave LifeCell was their sole decision and by their own motivations. For example, Sharon Rhodes and Julie Sermersheim, two former LifeCell sales representatives now employed by Tela Bio, both certify that while working at LifeCell and prior to being hired by Tela Bio, they were actively looking for other employment opportunities, and that they did not keep it a secret from LifeCell that they sought other employment. Both certify that when they were informed that Tela Bio could move forward with their employment, they accepted immediately, and both were ready to begin employment at Tela Bio as soon as possible.

The Court finds that the fact that many former LifeCell employees are now employed by Tela Bio, in fact 100% of Tela Bio’s sales force (its leadership and field representatives) is comprised of former LifeCell executives of sales representatives, and that Tela Bio had these individuals sign confidential disclosure agreements with Tela Bio while they were still employed by LifeCell and before Tela Bio even offered them positions, in conjunction with all of the other evidence presented to this Court, is sufficient for the Court to find by clear and convincing evidence that Plaintiff is likely to succeed on the merits of its claims for unfair competition or, based on the same facts, tortious interference. See Wear-Ever Aluminum, Inc. v. Towncraft Indus., Inc., 75 N.J. Super. 135, 144-145 (Ch. Div. 1962) (finding that “the fact that contracts were terminable at will cannot and does not provide the basis for justification where a third party tortuously interferes with an employment relationship. Justification must be found in facts independent of the nature of the relationship which the law affords protection. The right to terminate a contract at will is one which is peculiarly personal to the contracting parties, and a stranger to the contract may not exercise his will in substitution for the will of either of the parties to the contract.”).

With regard to the alleged acts of Mr. Gorman, the Court again notes that he is not a named Defendant in this matter, and therefore Plaintiff’s allegations that Mr. Gorman was reaching out to Mr. Talmo to solicit him to work at Tela Bio, as well as any of Mr. Gorman’s other alleged efforts to solicit LifeCell employees to work for Tela Bio, are actionable against the named Defendants if they were aware, complicit, and engaged in such misconduct and unfair play. The

Court is satisfied that Plaintiff shows by clear and convincing evidence that Defendants were in fact aware, and that their actions are actionable. One example in support of Plaintiff's allegations is an email dated September 30, 2013 from Defendant Koblisch to a Vince Burgess, in which he states, "Big news on fri. Jim Gorman former VP of sales at LIFC got his non compete cut back to 12 months (which is now 11) based on our strategy. Plus he got his severance raised to 12 months. He wants into Tela in some capacity in Sept 2014. Which suits our timing. He is the guy that built the life sales force from the time Paul Thomas started. He can assemble talent rapido. More news as it develops." The Court notes that Mr. Gorman was in contact with several individuals affiliated with Defendants, such as Ms. Barretta, between September 2013 and September 2014. Ms. Barretta certifies that "in some cases, current and former LifeCell sales representatives contacted Mr. Gorman for mentoring and career advice. He would then direct them to me as the person they should be in touch with regarding hiring. This was the case with Finlay Long and Jay Tawil. I spoke with both of these individuals in December 2013 and continued working to recruit them to Tela Bio including helping draft their resumes and presenting their backgrounds to the Tela Bio Board of Directors." This evidence satisfies the Court that Defendants were aware of the fact that Mr. Gorman had a non-compete agreement with LifeCell, effective until September 2014, and which he breached, and which Defendants were aware of. As stated during Defendant Koblisch's deposition,

Q: So on this date, February 27, 2014, Jim Gorman is providing you with a list of LifeCell sales reps to recruit, true?

A: Laundered again means former. Yes, with that caveat.

Q: And on February 27, 2014, Jim Gorman's noncompete is still in place, right?

A: Yes.

Q: And his nonsolicit is still in place, right?

A: Yes.

...

Q: And at the date of this e-mail, June 18, 2014, when you were planning a commercial planning meeting, Jim Gorman's noncompete and nonsolicit are both still in effect, right?

A: Yes.

Q: And you did, in fact, have that meeting, didn't you?

A: Yes.

...

Q: So you agree, do you not, that at the time you hired Mr. Gorman as a consultant, his nonsolicitation restrictive covenant was still in force and effect?

A: I do.

Tela Bio held a meeting, scheduled by Defendant Koblisch, on February 2014-and Mr. Gorman was not only in attendance, but he prepared a presentation which began with a “LifeCell Overview-Core elements of success.” For these reasons, the Court is also unconvinced at this time that Defendants are protected by the “safe harbor” as provided by the Restatement approach regarding tortious interference claims.

LifeCell has provided evidence which shows by clear and convincing evidence that Defendants were engaging in actionable conduct. For example, an email from Defendant Koblisch to Ms. Barretta references “Laundered Life reps list via linked in.” Plaintiff also contends that Mr. Gorman provided a list of the representatives to Ms. Barretta, and this email indicates that Defendant Koblisch was very much aware of this fact. It is clear from Plaintiff’s proofs that Tela Bio used Mr. Gorman to build its sales force. Plaintiff also provides evidence that LifeCell’s sales representatives helped develop Tela Bio’s sales and marketing strategies, during and after each of Tela Bio’s “workshops.” As referenced earlier, emails between Seth Schreiber and Defendant Koblisch show Schreiber thanking Koblisch “for the opportunity to come to Malvern this past Monday and contribute ideas to the direction of Tela Bio. It was a rewarding program to be a part of.” Then, in an email from Schreiber to Stu Henderson, Tela Bio’s director of marketing, Schreiber writes, “Your hernia, material, and competitor knowledge was phenomenal and it was easy to understand your value in the company. I would like to touch base with you about a couple ideas I have that can continue to contribute to growing your knowledge base and understanding of the current hernia market.”

Further inappropriate conduct, which supports Plaintiff’s unfair competition and tortious interference claims, are seen through Defendants’ deliberate, self-described “stealth strategy” of keeping Tela Bio’s work a secret from everybody, including LifeCell. For example, during Defendant Koblisch’s deposition, he was asked if “Tela Bio was intentionally keeping from the market, including LifeCell ... that it was going to be making an ECM mesh product, and that they were going to be targeting the hernia market, and that they were going to be competing with Strattice?” Koblisch responded, “We were stealth in all ways, or tried to be, and that subset, LifeCell would be a subset of that, absolutely.” Similarly, at Defendant Persenaire’s deposition, when asked if “Tela Bio has done everything it possibly could to prevent LifeCell from learning about the actual business that Tela Bio intended to engage in,” Persenaire responded, “Yes.” All of this

testimony directly contradicts Defendants' arguments that Dr. McQuillan never hid from LifeCell the work he was doing at Tela Bio.

This evidence also indicates to this Court that Tela Bio's description of its "workshops" is quite inaccurate, and that as Plaintiff argues, the type of information presented at the sales workshops indicates that Tela Bio was not just conducting "interviews." The Individual Defendants were also aware that the LifeCell employees had non-compete agreements when they were invited to Tela Bio's workshops. When asked whether he "knew at the time that you embarked on this plan [of inviting current LifeCell employees to the Tela Bio workshop] that each and every one of those people had an employment agreement with LifeCell that prevented them from competing with LifeCell, prevented them – prevented them from solicitation and from being otherwise unloyal to their company," Defendant Koblisch responded, "Yes." The Court is also cognizant that the principles of tortious interferences are "amorphous" and each case must be decided on its own facts. Avtec Indus., supra, 205 N.J. Super. at 194. "In its flexibility, the law must be equal to its task whatever the form of improper conduct." Id. In other words, "was the interference by defendant 'sanctioned by the "rules of the game.'" Sustick v. Slatina, 487 N.J. Super. 134, 144 (App. Div. 1957) (quoting Trautwein v. Harbourt, 40 N.J. Super. 247, 267 (App. Div. 1956) (quoting 1 Harper and James [Torts], op. cit. §6.11, p. 510 (1956)). Therefore, the Court is satisfied that it has sufficient evidence to find that Plaintiff proves by clear and convincing evidence that it has a reasonable probability of success on the merits of its claims regarding unfair competition, tortious interference, and unjust enrichment.

The Court also shares in Plaintiff's concerns regarding Defendants' clear destruction of documents. Plaintiff has provided evidence proving that Defendants have in fact undertook destruction of documents. Plaintiff points to Dr. Persenaire's testimony, when asked if "[p]art of the effort to prevent LifeCell from learning about Tela Bio's activities was destroying e-mails, correct?" and Dr. Persenaire answered, "Correct." The Court further acknowledges the email to Defendant Persenaire in which Dr. McQuillan concedes that Harper was "in serious breach of [his] employment contract," as well as Plaintiff's allegations that despite repeated requests, Defendants refuse to produce the actual content of several emails including correspondence between Mr. Gorman and Ms. Barretta, and therefore Plaintiff cannot know what evidence of violations said emails contain. This evidence, Plaintiff avers, demonstrates (1) knowledge that Defendants were acting unlawfully, (2) active efforts to conceal the activity, and (3) continued disregard for those

actions. The Court tends to agree. While the Court also acknowledges that there are genuine issues as to what extent Defendants' actions are actionable, but see Avtec Indus., supra, 205 N.J. Super. at 196 (Court endorsed the principle that "it has never been thought actionable to take away another's employee, when the defendant wants to use him in his own business, however much the plaintiff may suffer," and that interference requires "egregious conduct" such as "fraud or coercion"), the Court is satisfied that Plaintiff has presented sufficient evidence to allow the Court to find that Plaintiff has a reasonable probability of success on the merits.

With regard to civil conspiracy, which requires a plaintiff to show both an agreement to inflict a wrong and an underlying wrong that would give a right of action even in the absence of the conspiracy, Banco Popular, supra, 184 N.J. at 178, because the Court does find that Plaintiff has a reasonable likelihood of success on the merits of the "underlying wrong," Plaintiff may also succeed on its civil conspiracy claim. However, the Court need not reach a conclusive finding with regard to Plaintiff's reasonable probability of success on the merits of its civil conspiracy claim because the Court is satisfied that the weight of the evidence presented supports a finding that Plaintiff has a reasonable probability of success on the merits on its other claims.

### **3. Balancing of the Equities**

Lastly, temporary relief requires a balancing of the relative hardship to the parties in granting or denying relief. Crowe, supra, 90 N.J. at 134. The party moving for a temporary restraint or preliminary injunction must demonstrate that "the public interest will not be harmed." See, e.g., Waste Mgmt. of N.J., supra, 399 N.J. Super. at 520. In this case, the Court does find that a balance of the hardships weighs in favor of Plaintiff.

If the injunctive relief is granted, Tela Bio will be prevented from selling its only product on the market, thereby preventing Defendants from deriving potentially millions of dollars in revenue on a product that they purportedly have spent millions of dollars and many years of experimentation and research to create. Further, the former LifeCell sales representatives who are already hired by Tela Bio and are non-parties to this action will be affected by the injunction. The Court recognizes the very tangible harm posed to Tela Bio, its employees, and allegedly innocent third parties, if the preliminary injunction is granted. However, the Court does agree with Plaintiff's assertion that granting the relief it seeks would maintain the status quo, in which Tela Bio has not launched, sold, sampled, or otherwise distributed its product, and has not fully unleashed its LifeCell sales force against LifeCell. The Court has found that Plaintiff has a

reasonable probability of success on the merits of its claims. The Court is convinced that the balance of the hardships falls in favor of Plaintiff, and that injunctive relief would serve to preserve the status quo pending litigation. The relief sought is as to the named Defendants only, and enforceable against them. The relief that this Court is granting is to enjoin Defendant Tela Bio from releasing its TELAMax product into the United States market, which would compete with Strattice, while litigation in this matter is pending. This restriction does not prevent non-party Mesynthes from selling its product in other countries, nor does the preliminary injunction directly bind any other non-parties to this action.

While the public has an interest in free competition, its interest is also furthered by protection of private contractual rights. Scholastic, supra, 2007 U.S. Dist. LEXIS 30333, at \*33. “Judicial enforcement of non-competition provisions of employment contracts serves the public interest by promoting stability and certainty in business and employment relationships.” Id. (quoting Wright Med. Tech., Inc. v. Somers, 37 F.Supp. 2d 673, 684 (D.N.J. April 9, 1999) (internal citations omitted)). The Court does not find that granting the injunction would be against the public interest. As Plaintiff contends, Defendants have not submitted any certifications by experts or anyone else and offer nothing but their counsel’s allegations that the Court should not enjoin Defendants from releasing a “promising new treatment for hernia patients.” Defendants have argued that the clinical and economic advantages of their product are distinct from any of LifeCell’s trade secrets or proprietary and confidential information, and even if there was misappropriation, this misappropriation would not be what drives the sales of the product. The Court rejects this argument, and maintains that an injunction would not damage the public.

Accordingly, the Court finds that Plaintiff meets all four Crowe factors.

#### **IV. Conclusion**

For the foregoing reasons, Plaintiff’s Application for Preliminary Injunctive Relief is **GRANTED**. The Court has not made any final rulings and the grant of Plaintiff’s application is based on the Court’s finding that Plaintiff has offered clear and convincing evidence that it has a likelihood of success on the merits of its claims. A trial will follow for final determination on the merits of Plaintiff’s claims.