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| STATE OF NORTH CAROLINA<br><br>WAKE COUNTY | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>23 CVS 905 |
| NEW RESTORATION AND RECOVERY SERVICES, LLC, d/b/a AQUALIS CO.,<br><br>Plaintiff,<br><br>v.<br><br>DRAGONFLY POND WORKS, LLC,<br><br>Defendant. | **ORDER AND OPINION ON DEFENDANT'S MOTION TO DISMISS** |

1. **THIS MATTER** is before the Court upon Defendant Dragonfly Pond Works, LLC's Motion to Dismiss (the "Motion") under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), filed 24 March 2023 in the above-captioned case.[1]

2. After considering the Motion, the parties' briefs in support of and in opposition to the Motion, the relevant pleadings, and the arguments of counsel at the hearing on the Motion, the Court hereby **GRANTS in part** and **DENIES in part** the Motion as set forth below.

*McGuireWoods LLP, by T. Richmond McPherson, III, Abigail Golden, and Elizabeth Peters, for Plaintiff New Restoration and Recovery Services LLC d/b/a Aqualis Co.*

*Bell, Davis, & Pitt, P.A., by Marc E. Gustafson and Carson D. Schneider, for Defendant Dragonfly Pond Works, LLC.*

Bledsoe, Chief Judge.

[1] (ECF No. 8.)

## I.

## FACTUAL AND PROCEDURAL BACKGROUND

3. The Court does not make findings of fact on a motion to dismiss under Rule 12(b)(6). Rather, the Court recites the allegations asserted and documents referenced in Plaintiff New Restoration and Recovery Services, LLC's ("Aqualis") Complaint that are relevant to the Court's determination of the Motion.

4. This case arises from the alleged actions of a disgruntled former employee. Dragonfly Pond Works, LLC ("Dragonfly") and Aqualis are direct competitors who provide stormwater management services.[2] Aqualis performs its projects using a competitive bidding process, which involves technical drawings and sensitive pricing assumptions.[3]

5. On 20 May 2019, Aqualis hired P.J. Bogensberger ("Bogensberger") as a business development manager[4] and promoted him to the position of Vice President, Business Development – National Accounts on 1 January 2021.[5] As part of this promotion, Bogensberger signed and agreed to a non-competition, non-solicitation, and non-disclosure agreement with Aqualis (the "NDA"), in which he agreed to

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[2] (Compl. ¶ 12, ECF No. 3.)

[3] (Compl. ¶¶ 26–27.)

[4] (Compl. ¶ 29.)

[5] (Compl. ¶ 32.)

protect Aqualis's confidential trade information during and after his employment with the company.[6]

6. On 3 January 2022, Bogensberger was laid off by Aqualis.[7] Around that same time, Bogensberger began communicating with Dragonfly's CEO, Grant Todd ("Todd").[8] On 5 January 2022, without Aqualis's knowledge or consent, and in alleged violation of the NDA,[9] Bogensberger began emailing Aqualis's confidential documents, bids, and pricing information to Dragonfly.[10] In an email to Bogensberger, Todd referred to these documents as a "gold mine."[11]

7. At the same time, Bogensberger was negotiating with Aqualis over the terms of his termination. Ultimately, Bogensberger and Aqualis entered into a settlement agreement under which Bogensberger represented that he had not divulged any proprietary or confidential information, and that he would "continue to maintain the confidentiality of [Aqualis's confidential and proprietary information] consistent with [his] agreements with Aqualis (the "Settlement").[12] Bogensberger signed the Settlement on 17 March 2022, and joined Dragonfly in a senior sales

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[6] (Compl. ¶¶ 33–37.)

[7] (Compl. ¶ 39.)

[8] (Compl. ¶ 52.)

[9] Aqualis pleads that Bogensberger's actions violated the NDA, (*see* Compl. ¶ 100), but neither party has placed the full NDA and its terms into the record before the Court.

[10] (Compl. ¶ 41.)

[11] (Compl. ¶ 61.)

[12] (Compl. ¶¶ 46–48.)

position and as Director of Corporate Accounts less than a week later on 23 March 2022.[13] Before offering Bogensberger a job, Dragonfly reviewed the Settlement.[14] When Dragonfly hired Bogensberger, Todd texted Bogensberger that "[w]e're going to destroy Aqualis and Apex. So excited."[15]

8. Through March and April 2022, Bogensberger provided to Dragonfly at least 19 other Aqualis documents containing alleged trade secrets.[16] Aqualis alleges that Dragonfly used the confidential information from Bogensberger to solicit business from six of Aqualis's customers.[17] Dragonfly fired Bogensberger on 5 May 2022 and issued a statement that Dragonfly had only then become aware that Aqualis claimed that Bogensberger had provided Aqualis's confidential information to Dragonfly.[18]

9. Aqualis filed the above-captioned action on 20 January 2023.[19] Aqualis asserts six claims against Dragonfly: misappropriation of trade secrets,[20] tortious interference with contract,[21] tortious interference with prospective economic

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[13] (Compl. ¶¶ 47, 69.)

[14] (Compl. ¶ 70.)

[15] (Compl. ¶ 74.)

[16] (Compl. ¶ 77.)

[17] (Compl. ¶¶ 82–89.)

[18] (Compl. ¶¶ 93–94.)

[19] (*See* Compl.)

[20] (Compl. ¶¶ 97–108.)

[21] (Compl. ¶¶ 109–15.)

advantage,[22] unfair and deceptive trade practices under N.C.G.S. § 75-1.1 ("UDTPA"),[23] civil conspiracy,[24] and unjust enrichment.[25] Dragonfly moved to dismiss the Complaint on 24 March 2023.[26] After receiving full briefing in support of and in opposition to the Motion, the Court convened a hearing on 9 May 2023, at which all parties were represented by counsel (the "Hearing"). The Motion is now ripe for determination.

## II.

## LEGAL STANDARD

10. When deciding whether to dismiss for failure to state a claim under Rule 12(b)(6), the Court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016)).

11. "[D]ismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint

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[22] (Compl. ¶¶ 116–21.)

[23] (Compl. ¶¶ 122–26.)

[24] (Compl. ¶¶ 127–31.)

[25] (Compl. ¶¶ 132–37.)

[26] (Mot. Dismiss.)

discloses some fact that necessarily defeats the plaintiff's claim.' " *Id.* (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)).

12. When considering a motion under Rule 12(b)(6), "the complaint is construed liberally, viewing the allegations as true and in the light most favorable to the non-moving party, and the claim is not dismissed unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Krawiec v. Manly*, 370 N.C. 602, 618 (2018) (cleaned up). While "the well-pleaded material allegations of the complaint are taken as true[,] conclusions of law or unwarranted deductions of fact are not admitted." *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 599 (2018) (quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448 (2015)).

III.

ANALYSIS

13. Dragonfly has moved to dismiss all of Aqualis's claims.[27] The Court examines each claim in turn, beginning with misappropriation of trade secrets.

A. Misappropriation of Trade Secrets

14. To properly plead misappropriation of trade secrets, and in addition to meeting other definitional requirements under N.C.G.S. § 66-152, a plaintiff must "identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine

[27] (*See generally* Mem. Supp. Mot. Dismiss [hereinafter "Br. Supp."], ECF No. 9.) Dragonfly's brief is not paginated. Citations to specific pages of Dragonfly's brief are therefore to the pages of the PDF version on the Court's electronic docket.

whether misappropriation has or is threatened to occur." *Krawiec*, 370 N.C. at 609. The alleged trade secret must also be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." N.C.G.S. § 66-152(3)(b).

15. Dragonfly challenges Aqualis's trade secrets claim as failing to plead these two requirements: that Aqualis has not sufficiently described its trade secrets, and that Aqualis has failed to plead its reasonable efforts to maintain secrecy over the alleged trade secrets.[28] The Court finds each argument unpersuasive.

16. First, *Krawiec* clarified that "customer lists, pricing formulas[,] and bidding formulas" can be trade secrets. *Krawiec*, 370 N.C. at 610. Aqualis describes its alleged trade secrets as "large amounts of information relating to customers, including customer contact information, copies of bid proposals, client-specific spreadsheets containing Aqualis's pricing for all of the client's projects," and "bids on client projects and project completion summaries prepared by Aqualis after completing client projects."[29] Aqualis's description of its alleged trade secrets therefore falls well within the language of *Krawiec*.

17. Aqualis also identifies specific emails, sent on specific dates, which contain this information.[30] Aqualis's description is thus very similar to the language found sufficient to identify a trade secret in *Krawiec*, and the description is delineated and identified sufficiently under that decision and those that have followed.

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[28] (*See* Br. Supp. 4–9.)

[29] (Compl. ¶¶ 51, 78.)

[30] (Compl. ¶¶ 53–59, 77.)

18. Dragonfly contends, however, that none of the material Aqualis identifies can constitute a trade secret because much of the information was necessarily shared with at least one third party and that Aqualis has not alleged that it attempted to bind these third parties to any confidentiality agreements.[31] Specifically, Dragonfly argues that information known to a third party cannot constitute a trade secret; thus, because Aqualis's pricing information on a given project was necessarily shared with that project's customer, that information therefore was not kept secret.[32] This argument has an intuitive appeal at first glance but does not withstand scrutiny.

19. First, some of the cases Dragonfly cites for this proposition do not support the point. For example, in *Amerigas Propane LP v. Coffey*, 2015 NCBC LEXIS 98 (N.C. Super. Ct. Oct. 15, 2015),[33] this Court held merely that the *names and addresses* of the business's customers were not trade secrets, and resolved the plaintiff's trade secrets claims premised on "historical usage, credit information, and pricing information" on other grounds after expressly declining to reach the question of whether the plaintiff had adequately defined the information. *See id.* at *33–37. Names and addresses are inherently much more public than pricing and other information related to particular business projects, so *Coffey* is readily distinguishable.

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[31] (*See* Br. Supp. 5–6.)

[32] (Br. Supp. 5–6.)

[33] (Br. Supp. 5.)

20. Second, Dragonfly's primary support, *Edgewater Servs. v. Epic Logistics, Inc.*, 2009 NCBC LEXIS 21, at *11–16 (N.C. Super. Ct. Aug. 11, 2009), is in tension with then-extant and subsequently decided appellate precedent.[34]

21. For example, in *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371 (2001), the North Carolina Court of Appeals stated that "historical cost information" and bidding records could constitute trade secrets, even though they "may have been ascertainable by anyone in the [same] business[.]" *Id.* at 375–76. Thus, even if, as Dragonfly contends, Aqualis's bidding and project information were known to customers and thereafter conceivably ascertainable by others in the same business, even this broader range of third party knowledge does not necessarily preclude such information from constituting a trade secret under *Byrd's Lawn*.

22. Furthermore, the Supreme Court of North Carolina has recognized that some subsets of information that customers *would* know, such as customers' own social security numbers, account numbers, and financial status, might constitute trade secrets even by themselves. *See Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 280 (2019). Thus, *Link* belies Dragonfly's argument that information cannot constitute a trade secret if even a single third party, such as a customer, is privy to the information.[35]

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[34] The Court recognizes that *Edgewater* was affirmed on direct appeal. *See Edgewater Servs., Inc. v. Epic Logistics, Inc.*, No. COA11-176, 2011 N.C. App. LEXIS 2494 (N.C. Ct. App. 2011), *disc. rev. denied*, 366 N.C. 400 (2012) (mem.). However, the Court of Appeals declined to rule on the trade secrets issue due to a procedural default by the appellant. *See id.* at *8. The affirmance therefore lends *Edgewater* no additional weight on this particular issue.

[35] (Br. Supp. at 5.)

23. Third, *Link* held that "sprawling lists" of information can form trade secrets in the aggregate, even if some pieces of information do not qualify as trade secrets in isolation. *See id.* Therefore, even if Dragonfly's argument were correct that some parts of Aqualis's claimed trade secrets cannot qualify as such, the claimed secrets go beyond information actually shared with customers,[36] and thus may still qualify as trade secrets in the aggregate under *Link*. *See id.* The Court therefore rejects Dragonfly's argument that Aqualis's alleged trade secrets, as pleaded here, are insufficiently defined for this additional reason.

24. Next, Dragonfly argues that Aqualis did not plead that it made reasonable efforts to maintain the confidentiality of its trade secrets.[37] A trade secrets plaintiff must make reasonable efforts to maintain secrecy, N.C.G.S. § 66-152(3)(b), and must allege such efforts in its complaint. *See, e.g.*, *BIOMILQ, Inc. v. Guiliano*, 2023 NCBC LEXIS 24, at *20 (N.C. Super. Ct. Feb. 10, 2023).

25. Dragonfly contends that Aqualis's sole effort to maintain secrecy was to require Bogensberger to sign the NDA and that this limited measure does not satisfy Aqualis's pleading burden.[38] However, this contention does not accurately characterize Aqualis's pleaded efforts to maintain secrecy. Aqualis has alleged that it agreed to the NDA with Bogensberger, *and in addition* reminded him of his confidentiality obligations and attempted to reinforce "any" confidentiality

[36] (Compl. ¶¶ 58, 78.)

[37] (Br. Supp. 7–9.)

[38] (Br. Supp. 7–9.)

agreement(s) he had entered into with Aqualis by incorporating them into the Settlement.[39]

26. Thus, the Court need not consider Dragonfly's contention that the NDA, standing alone, did not constitute a reasonable effort to protect secrecy and instead holds that Aqualis's pleaded use of the NDA *and* repeated attempts to reinforce any confidentiality agreement(s) Bogensberger entered into with Aqualis were reasonable efforts to maintain secrecy sufficient to sustain Aqualis's trade secrets claim under Rule 12(b)(6). *See Thortex, Inc. v. Standard Dyes, Inc.*, 177 N.C. App. 814, 814 (2006) (affirming dismissal of a trade secret claim asserted "[w]ithout any allegation" of efforts to maintain secrecy); *Bldg. Ctr., Inc. v. Carter Lumber, Inc.*, 2016 NCBC LEXIS 79, at *14 (N.C. Super. Ct. Oct. 21, 2016) (noting that a trade secret claim should be dismissed at the 12(b)(6) stage only when "efforts to maintain secrecy of the allegedly misappropriated trade secrets were *completely absent*" (emphasis added)); *see also States Mortg. Co. v. Bond*, 2023 NCBC LEXIS 33, at *17 (N.C. Super. Ct. Mar. 6, 2023) (to similar effect); *AYM Techs., LLC v. Rodgers*, 2018 NCBC LEXIS 14, at *40–41 (N.C. Super. Ct. Feb. 9, 2018) (same).[40]

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[39] (Compl. ¶¶ 37, 44, 46–48.)

[40] Even if the pleaded facts placed at issue the sufficiency of the NDA alone as a reasonable method of maintaining secrecy, this Court's precedent would direct that Dragonfly's motion still be denied. *See, e.g.*, *Se. Anesthesiology Consultants, PLLC v. Charlotte-Mecklenburg Hosp. Auth.*, 2019 NCBC LEXIS 107, at *16 (N.C. Super. Ct. Dec. 13, 2019) (holding that signed confidentiality agreements alone were sufficient to sustain trade secrets claim under Rule 12(b)(6)); *Window Gang Ventures, Corp. v. Salinas*, 2019 NCBC LEXIS 24, at *44–45 (N.C. Super. Ct. Apr. 2, 2019) (concluding that obtaining a signed confidentiality agreement constituted reasonable efforts at the pleading stage).

Interestingly, courts across the nation have divided on whether a confidentiality agreement, standing alone, may supply the reasonable efforts to maintain secrecy necessary to support

27. In sum, the Court rejects Dragonfly's arguments that Aqualis does not advance its trade secrets claim with sufficient particularity or with accompanying allegations of reasonable efforts to maintain secrecy, and the Motion will therefore be denied insofar as it seeks dismissal of Aqualis's misappropriation claim.

B. Tortious Interference with Contract

28. To state a claim for tortious interference with contract, a plaintiff must allege that "(1) a valid contract between plaintiff and a third party [exists] . . . (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so he acts without justification; (5) resulting in actual damages to the plaintiff." *Link*, 372 N.C. at 282.

29. Dragonfly argues that Aqualis has failed to plead that Dragonfly knew of the NDA or that Dragonfly induced Bogensberger to breach it.[41]

30. The Court turns first to the knowledge element. Dragonfly argues that Aqualis pleaded that Dragonfly reviewed the Settlement, not the NDA, and that the

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a trade secrets claim. *Compare Steve Silveus Ins., Inc. v. Goshert*, 873 N.E.2d 165, 179–80 (Ind. Ct. App. 2007) (holding that information protected solely by a confidentiality agreement constituted trade secrets under Indiana's analogous trade secret statute), *Assessment Techs. Inst., LLC v. Parkes*, 588 F. Supp. 3d 1178, 1215–16 (D. Kan. 2022) (to similar effect under Kansas law), *and Pre-Paid Legal Servs., Inc. v. Harrell*, No. CIV-06-019, 2008 U.S. Dist. LEXIS 1773, at *29 (E.D. Okla. Jan. 8, 2008) (same under Oklahoma law), *with Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 901–02 (Minn. 1983) (holding that a confidentiality agreement alone is insufficient under Minnesota law), *Arcor, Inc. v. Haas*, 842 N.E.2d 265, 271 (Ill. App. Ct. 2005) (same under Illinois law), *and Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322, 1333 (N.D. Ga. 2007) (same under Georgia law).

[41] (Br. Supp. 10.)

Settlement cannot be read to impute knowledge of the NDA or its terms to Dragonfly.[42]

31. To evaluate this argument, the Court examines the specifics of the Settlement, as pleaded. The Settlement provides that "any" non-disclosure, non-solicitation, or similar agreements would remain "in full force and effect according to their terms[,]"[43] that Bogensberger had not disclosed any confidential information prior to the Settlement's 17 March 2022 execution,[44] and that Bogensberger had returned all of Aqualis's confidential information and property that had remained in his possession.[45]

32. The Court concludes that these terms do not impute knowledge of the NDA to Dragonfly. The plain language of the Settlement provides only that "any" non-disclosure agreements remained in force, not whether any such agreements existed or, if so, what their terms were, much less that Bogensberger had entered the NDA with Aqualis.

33. Aqualis places much weight on the Rule 12(b)(6) standard, which requires the Court to treat facts and inferences from the Complaint in the light most favorable to the non-movant.[46] But even under that generous standard, the plain language of

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[42] (Br. Supp. 10.)

[43] (Compl. ¶ 46.)

[44] (Compl. ¶ 47.)

[45] (Compl. ¶ 48.)

[46] (Pl.'s Mem. Opp'n Def.'s Mot. Dismiss 15–16 [hereinafter "Br. Opp'n"], ECF No. 16.)

the Settlement does not impute knowledge of the NDA to Dragonfly and the facts Aqualis pleads do not demonstrate that Dragonfly knew of the NDA—from the Settlement or otherwise.

34. Aqualis also relies upon *Sides v. Duke Univ.*, 74 N.C. App. 331, 346 (1985), which is similarly unpersuasive. Aqualis seizes upon language in *Sides* that "[t]hough not specifically alleged, that [defendants] knew about [plaintiff's] contract is clearly established by other allegations." *Id.*[47] But this brief statement was the only examination of the knowledge element in *Sides* and, even read in its full context, the meaning of the reference to "other allegations" is unclear. Given that no North Carolina decisions in the nearly forty years since *Sides* have adopted Dragonfly's proffered interpretation, the Court declines to do so here.[48]

35. Similarly, the Court rejects Aqualis's argument that emphasizes Todd's statement that information the company received from Bogensberger was a "gold mine."[49] The information's utility to Dragonfly does not speak to Dragonfly's knowledge of the NDA or its contents.

36. Finally, Aqualis cites language from *United Labs., Inc. v. Kuykendall*, 322 N.C. 643 (1988), that a defendant can be liable for tortious interference if he has

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[47] (Br. Opp'n 16.)

[48] That the appellants in *Sides* appear not to have raised the knowledge element in their appeal fortifies the conclusion that this sentence in *Sides* was dicta and not imbued with the interpretative force Dragonfly contends. *See Sides*, 74 N.C. App. at 346–48 (summarizing and lengthily examining the appellants' arguments on this claim *after* observing briefly that the knowledge argument was met).

[49] (Br. Opp'n 16.)

knowledge of the facts concerning the plaintiff's contractual rights, "even though he is mistaken as to their legal significance and believes that there is no contract or that the contract means something other than what it is judicially held to mean."[50] *Id.* at 663.

37. But that case arose at the directed verdict stage, after the "uncontradicted evidence" at trial had established that the defendant knew of the relevant contracts. *See id.* at 660. In addition, *United Labs.* drew the language Aqualis cites from an earlier case, *Childress v. Abeles*, 240 N.C. 667 (1954), which in turn expounded this principle in quotation directly from the original Restatement of Torts. *See id.* at 674. But the pertinent section of the Restatement provides that "the actor does not induce or otherwise purposely cause that [contractual] failure if he has no knowledge of the contract." Restatement of Torts § 766(e) (Am. Law. Inst. 1939).

38. In context, this language therefore stands for the point that the knowledge element is satisfied if an actor knows of a supposed contract, but believes it to be void or otherwise unenforceable, or incorrectly believes that its terms do not cover the situation at hand. Indeed, in *United Labs.* itself, the court applied this language to a party who knew the contracts in question existed but had a "good faith belief" that they "were unenforceable[,]" rather than to one who had no idea that the contracts existed in the first place. *See United Labs.*, 322 N.C. at 663.

39. This language, as carried forward to *Childress* and *United Labs.*, does *not* support the proposition that an actor can be liable for allegedly inducing breach of a

[50] (Br. Opp'n 17.)

contract of which that actor has no knowledge. Aqualis's interpretation of this ambiguous language would clash with our appellate courts' clear statements that "the defendant['s] know[ledge] of the contract" is an element of the claim. *E.g.*, *Link*, 372 N.C. at 282.

40. Courts from other jurisdictions have recognized this distinction. *See, e.g.*, *Daugherty v. Kessler*, 286 A.2d 95, 98–99 (Md. 1972) (quoting the Restatement language in a case in which the defendants knew of the contract and noting that a defendant "must know of the contract"); *Ginn v. Stonecreek Dental Care*, 30 N.E.3d 1034, 1041 (Ohio Ct. App. 2015) (noting that identical language from the Second Restatement is applicable only if the actor knows of the contract).

41. Finally, *Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137 (2001) does not save Aqualis's claim.[51] *Goel* upheld a tortious interference counterclaim when the plaintiff lacked actual knowledge of the contract between the defendant and the third party because the trial court made an uncontested finding of fact that the "[counterclaim defendant] knew of the business relationship between [counterclaim plaintiff] and [the third party]." *Id.* at 151. But here, nothing in Aqualis's Complaint demonstrates that Dragonfly knew of any ongoing business relationship between Bogensberger and Aqualis.

42. Because the Court concludes that the Complaint does not adequately plead that Dragonfly had knowledge of the NDA between Bogensberger and Aqualis, the Court will grant Dragonfly's Motion insofar as it seeks dismissal of the tortious

[51] Neither party raised *Goel* in briefing or at the Hearing, but the Court believes it prudent to discuss a case which could conceivably be read to control the result here.

interference with contract claim on this ground. The Court therefore need not reach Dragonfly's arguments for dismissal based on the inducement element.

C. Tortious Interference with Prospective Economic Advantage

43. To state a claim for tortious interference with prospective economic advantage, a plaintiff must plead that a defendant interfered with a business relationship "by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference, if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights." *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 368 N.C. 693, 701 (2016) (cleaned up).

44. Dragonfly contests only the malice element of Aqualis's claim.[52] Significantly for present purposes, "[i]t is not necessary . . . to allege and prove actual malice in the sense of personal hatred, ill will, or spite . . . the term 'malice' is used in this connection in its legal sense, and denotes the intentional doing of the harmful act without legal justification." *Childress*, 240 N.C. at 675. In this context, interference with a potential business relationship is justified if it is for a legitimate business purpose, such as competition. *Link*, 372 N.C. at 284. But this right to interfere with a business competitor is "lost if exercised for a wrong purpose . . . [such as] where the act is done other than as a reasonable and bona fide attempt to protect the interest of the defendant." *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 220 (1988).

[52] (Br. Supp. 13–17.)

45. Aqualis has pleaded facts here that, taken as true, are sufficient to show that Dragonfly competed against Aqualis through unlawful means. In particular, Aqualis pleads that Dragonfly competed against Aqualis through Dragonfly's receipt and use of Aqualis's trade secrets,[53] and as discussed above, Aqualis has adequately pleaded its misappropriation of trade secrets claim against Dragonfly. This Court has previously held, at least at the 12(b)(6) phase, that misappropriation of trade secrets is not a lawful means of competition. *See Marketplace 4 Ins., LLC v. Vaughn*, 2023 NCBC LEXIS 31, at *33–36 (N.C. Super. Ct. Feb. 24, 2023); *Mech. Sys. & Servs., Inc. v. Howard*, 2021 NCBC LEXIS 69, at *13 (N.C. Super. Ct. Aug. 11, 2021). Indeed, if a defendant could simply claim competitive justification regardless of the means it employed, "it would be virtually impossible for a plaintiff to *ever* succeed on a tortious interference claim[.]" *Vaughn*, 2023 NCBC LEXIS 31, at *35–36 (emphasis in original).

46. Because Aqualis has pleaded facts showing that Dragonfly's competitive conduct was not justified under North Carolina law, Dragonfly's motion to dismiss Aqualis's claim for tortious interference with prospective economic advantage must be denied.

D. Unjust Enrichment

47. A claim for unjust enrichment has five elements. First, one party must "confer a benefit upon the other party . . .; [s]econd, the benefit must not have been conferred officiously . . .; [t]hird, the benefit must not be gratuitous . . .; [f]ourth, the

[53] (Compl. ¶¶ 64–68, 82–90.)

benefit must be measurable . . .; [l]ast, the defendant must have consciously accepted the benefit." *JPMorgan Chase Bank, Nat'l Ass'n v. Browning*, 230 N.C. App. 537, 541–42 (2013) (cleaned up). Dragonfly challenges only conferral, the first element of Aqualis's claim.[54]

48. Dragonfly's argument is simple. Dragonfly contends that an unjust enrichment claim requires a conferral of the benefit *directly* from a plaintiff to a defendant, and that here, any benefits that Dragonfly received in the form of trade secrets or other commercially useful information came not from Aqualis, but from Bogensberger, a third party then unaffiliated with Aqualis.[55] As such, Dragonfly claims that Aqualis cannot sustain its unjust enrichment claim against Dragonfly.

49. The Supreme Court of North Carolina, however, has *not* imposed a requirement that a *plaintiff directly* confer the benefit required to state an unjust enrichment claim. *See Krawiec*, 370 N.C. at 615 ("[To sustain an unjust enrichment claim], *a* party must have conferred a benefit on the other party." (emphasis added)); *Booe v. Shadrick*, 322 N.C. 567, 570 (1988) ("*a* party" (emphasis added)).

50. Moreover, the North Carolina courts have upheld unjust enrichment claims even where a third party, rather than the plaintiff, conferred a benefit. For example, in *New Prime, Inc. v. Harris Transp. Co.*, 222 N.C. App. 732 (2012), a single purchaser contracted with two trucking companies to deliver bagged ice. The purchaser mistakenly paid the defendant company for deliveries the plaintiff company had

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[54] (*See* Br. Supp. 18–20.)

[55] (*See* Br. Supp. 18–20.)

made, and the Court of Appeals confirmed that the plaintiff company could bring an unjust enrichment claim against the defendant company, even though a third party, the purchaser, had conferred the benefit on the defendant company. *See id.* This Court has applied this principle in subsequent cases. *See, e.g.*, *Bandy v. Gibson*, 2017 NCBC LEXIS 66, at *12–16 (N.C. Super. Ct. July 26, 2017); *Lau v. Constable*, 2017 NCBC LEXIS 10, at *13–16 (N.C. Super. Ct. Feb. 7, 2017).[56]

51. The North Carolina cases are consistent with the overwhelming weight of authority from around the country. In the circumstances of this action, the Court finds cases addressing unjust enrichment arising from embezzlement especially instructive. For example, in *Bank of Am. Corp. v. Gibbons*, 918 A.2d 565 (Md. Ct. Spec. App. 2007), a husband embezzled over a million dollars from his employer, the plaintiff, and used the money to fund a "lavish lifestyle" for his wife and family. *Id.* at 567. Even though the wife had no knowledge of the embezzlement or any wrongdoing by her husband, *id.*, the Maryland court upheld the bank's unjust enrichment claim against the wife, concluding that "a cause of action for unjust enrichment may lie against a transferee with whom the plaintiff had no contract, transaction, or dealing, either directly or indirectly." *Id.* at 570. The Maryland court reasoned that the "benefit may be conferred by the wrongdoer *or* the plaintiff seeking

[56] The Court recognizes that *Effler v. Pyles*, 94 N.C. App. 349 (1989) appeared to create a direct benefit requirement. However, this Court and others have noted that *Effler* has been abrogated by *Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487 (1992), *New Prime*, and other cases. *See Bandy*, 2017 NCBC LEXIS 66, at *14–16; *Lau* 2017 NCBC LEXIS 10, at *14–15; *Metric Constructors, Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 72 F. App'x 916, 921 (4th Cir. 2003).

restitution[,]" and that to hold otherwise would result in inequitable windfalls for both the transferee and the wrongdoer. *See id.* at 573, 574 (emphasis in original).

52. Courts in other states have reached similar conclusions under similar fact patterns. *See, e.g.*, *In re Marriage of Allen*, 724 P.2d 651, 654, 659–60 (Colo. 1986) (upholding a claim for unjust enrichment and constructive trust against an innocent transferee who unknowingly benefited from the acts of a third-party wrongdoer); *Fed. Ins. Co. v. Smith*, 144 F. Supp. 2d 507, 516, 523 (E.D. Va. 2001) (upholding a claim for unjust enrichment under Virginia law against an innocent transferee who unknowingly benefitted from a third party's insurance fraud scheme), *aff'd*, 63 F. App'x 630 (4th Cir. 2003).[57]

53. Even in broader fact patterns, courts have overwhelmingly rejected any strict "directness of transfer" requirement.[58]

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[57] Although the Fourth Circuit's decision affirmed on an alternative ground which rendered a discussion of unjust enrichment unnecessary, one member of the panel addressed the unjust enrichment claim in full and voted to affirm specifically on that ground. *See Smith*, 63 F. App'x at 639–40 (Traxler, J., concurring in part) ("It is under the theory of unjust enrichment that I believe this case should be categorized.").

[58] *See, e.g.*, *Town of New Hartford v. Conn. Res. Recovery Auth.*, 970 A.2d 592, 618 (Conn. 2009) ("[Unjust enrichment] may be indirect, involving, for example, a transfer of a benefit from a third party to a defendant."); *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 525 (Tenn. 2005) ("[W]e conclude that to recover for unjust enrichment, a plaintiff need not establish that the defendant received a direct benefit from the plaintiff."); *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 155 (Iowa 2001) ("[B]enefits can be direct or indirect, and can involve benefits conferred by third parties."); *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989); *Lumford v. Yoshio Ota*, 434 P.3d 1215, 1222 (Haw. Ct. App. 2018); *Grimstad v. Knudsen*, 386 P.3d 649, 658 (Or. Ct. App. 2016) ("[Oregon precedent] unavoidably establishes that, in at least some circumstances, a plaintiff can bring an unjust enrichment claim even if the plaintiff did not confer a benefit on the defendant."); *Cox v. Microsoft Corp.*, 778 N.Y.S.2d 147, 149 (N.Y. App. Div. 2004); *Smith v. Whitener*, 856 S.W.2d 328, 330 (Ark. Ct. App. 1993) ("[T]he enrichment need not have come directly from [plaintiff], but could come from a third source[.]").

54. Finally, the North Carolina courts have emphasized that unjust enrichment is a claim based in equity. *E.g.*, *Whitfield v. Gilchrist*, 384 N.C. 39, 42 (1998); *Bartlett Milling Co, LP v. Walnut Grove Action & Realty Co., Inc.*, 192 N.C. App. 74, 80 (2008). The Court agrees with the Maryland court in *Gibbons* that accepting Dragonfly's argument would exalt form over substance by enabling parties to evade and defeat equitable remedies through creative technicalities. *See Gibbons*, 918 A.2d at 573. Because "[e]quity disregards mere forms, and looks at the substance of things[,]" *Moring v. Privott*, 146 N.C. 558, 558 (1908), the Court rejects Dragonfly's argument for the additional reason that it would subvert the purposes and application of equitable claims and remedies. *See also Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 462 (2022) ("[A]dministering equity . . . prohibits the elevation of form over substance.").

55. Thus, the Court rejects Dragonfly's argument that an unjust enrichment claim cannot stand on an indirect transfer of a benefit, and concludes that Aqualis has adequately alleged that Dragonfly received and used a measurable benefit, even indirectly through the alleged wrongdoing of Bogensberger. Aqualis states in its Complaint that the information Bogensberger conveyed from Aqualis to Dragonfly had value,[59] that Dragonfly consciously accepted the information,[60] and that Dragonfly used that value for its own gain.[61] Furthermore, neither the Complaint

[59] (*See* Compl. ¶¶ 61, 63.)

[60] (*See* Compl. ¶¶ 61, 63, 134.)

[61] (*See* Compl. ¶¶ 82–90.)

nor any argument from Dragonfly demonstrates that the benefit was officiously or gratuitously conferred. These allegations are sufficient to sustain an unjust enrichment claim, at least through the 12(b)(6) stage. *See PDF Elec. & Supply Co., LLC v. Jacobsen*, 2020 NCBC LEXIS 103, at *29–30 (N.C. Super. Ct. Sept. 9, 2020) (sustaining an unjust enrichment claim under Rule 12(b)(6) based on allegations that the defendant had derived value from its use of confidential information).

E. UDTPA

56. To sustain a UDTPA claim, a plaintiff must plead that "(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Krawiec*, 370 N.C. at 612. Aqualis's Complaint asserts that the first element is met because its claims for misappropriation of trade secrets and tortious interference with contract constitute unfair and deceptive acts.[62] Dragonfly's sole argument on the UDTPA claim is that because these claims should be dismissed, Aqualis's UDTPA claim does not satisfy the first element, and should also be dismissed.[63]

57. The Court has concluded, as discussed above, that Aqualis's claim for tortious interference with contract should be dismissed, but that its claim for misappropriation of trade secrets should proceed to discovery. It follows therefore that the UDTPA claim should be dismissed as it pertains to tortious interference with

[62] (Compl. ¶ 123.)

[63] (Br. Supp. 17–18.)

contract, but permitted to proceed to discovery insofar as it is based on a misappropriation of trade secrets.

F. Civil Conspiracy

58. There is no standalone claim for civil conspiracy under North Carolina law; instead, this claim requires a separate, underlying tort. *E.g.*, *Shope v. Boyer*, 268 N.C. 401, 405 (1966); *Williams v. United Comm. Bank*¸ 218 N.C. App. 361, 371 (2012). Aqualis bases its civil conspiracy claim on its underlying misappropriation of trade secrets claim.[64] In turn, Dragonfly's sole argument to dismiss the civil conspiracy claim is that, because the trade secrets claim should be dismissed, the civil conspiracy claim must meet the same end.[65] But because the Court has determined that Aqualis's trade secrets claim shall survive dismissal under Rule 12(b)(6), this argument fails, and the Court will correspondingly deny the Motion as it pertains to the civil conspiracy claim.

IV.

CONCLUSION

59. **WHEREFORE**, the Court **GRANTS in part** and **DENIES in part** the Motion and hereby **ORDERS** as follows:

a. The Motion is **DENIED** as to the following of Aqualis's claims, which shall proceed to discovery:

(1) Misappropriation of trade secrets;

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[64] (Compl. ¶ 129; Br. Opp'n 23–24 (arguing against dismissal of the civil conspiracy solely on grounds of the trade secrets claim).)

[65] (Br. Supp. 18.)

(2) Tortious interference with prospective economic advantage;

(3) Unjust enrichment;

(4) UDTPA insofar as it is based on Aqualis's misappropriation of trade secrets claim; and

(5) Civil conspiracy;

b. The Motion is **GRANTED** as to the following of Aqualis's claims, which are hereby **DISMISSED with prejudice**:

(1) Tortious interference with contract; and

(2) UDTPA insofar as it is based on Aqualis's tortious interference with contract claim.

**SO ORDERED**, this the 15th day of June, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge