

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 14236

PROMETHEUS GROUP
ENTERPRISES, LLC,

Plaintiff,

v.

RANDY GIBSON and PROSPECTA
SOFTWARE,

Defendants.

**ORDER AND OPINION ON
DEFENDANTS' MOTION TO DISMISS
AND
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

1. Prometheus Group Enterprises, LLC (“Prometheus”) complains that Randy Gibson, its former employee, left work to join a competitor, allegedly breaching his restrictive covenants and taking confidential information in the process. The competitor he joined, Prospecta Software (“Prospecta”), is alleged to have connived with Gibson to acquire Prometheus’ trade secret and other confidential information.

2. Prometheus filed its verified Complaint on 16 November 2022, (ECF No. 3), along with a contemporaneously filed Motion for Preliminary Injunction (the “PI Motion”), (ECF Nos. 5, 14).¹ On 18 January 2023, Defendants countered with their Motion to Dismiss Plaintiff’s Verified Complaint (the “Motion to Dismiss”), (ECF No. 16), (together, the “Motions”).

¹ Plaintiff’s first Motion for Preliminary Injunction was filed without a supporting brief, (ECF No. 5). The Court notified Plaintiff of its deficiency, and Plaintiff filed its Amended Motion for Preliminary Injunction on 2 January 2023 with the requisite brief, (ECF No. 14). See BCR 7.2.

3. For the following reasons, the Court **GRANTS in part** and **DENIES in part** Defendants' Motion to Dismiss and **DENIES** the Plaintiff's Motion for Preliminary Injunction.

Brown Rudnick, LLP, by Kelsey D. Bond, Aaron C. Lang, Marshall Jones, and Dylan P. Kletter, for Plaintiff Prometheus Group Enterprises, LLC.

Bradley Arant Boult Cummings, LLP, by Matthew S. DeAntonio and Hanna E. Eickmeier, for Defendants Prospecta Software and Randy Gibson.

Earp, Judge.

I. BACKGROUND

4. The following background is a recitation of the allegations in the Complaint for the purpose of evaluating the Motions.²

5. Prometheus is a Delaware LLC with its principal place of business in Raleigh, North Carolina. It describes itself as “the leading provider of enterprise asset management software.” Prometheus researches, designs, and develops its asset management software to “enhance enterprise resource planning-based asset maintenance systems[.]” Prometheus also provides training and consulting

² For purposes of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (“Rule(s)”), the Court is limited to a review of the Complaint and any documents incorporated in the Complaint. *Moch v. A. M. Pappas & Assoc., LLC*, 251 N.C. App. 198, 206 (2016). *See also Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775 (2017) (“Perhaps the most fundamental concept of motions practice under Rule 12 is that evidence outside the pleadings . . . cannot be considered in determining whether the Complaint states a claim on which relief can be granted.”). Accordingly, the Court does not consider the affidavits of Jay Golonka, (ECF Nos. 25, 39), Randy Gibson, (ECF No. 21), or Julian Blackley, (ECF No. 20), in its analysis of the Motion to Dismiss. The affidavits are considered only for their evidentiary value with respect to the Motion for Preliminary Injunction, discussed below.

regarding its software. Its offerings are “used in various industries around the world to drive cost savings, productivity, uptime, and reliability.” (Compl. ¶¶ 9, 12, ECF No. 3.)

6. Randy Gibson (“Gibson”) is an individual who resides in Raleigh, North Carolina. (Compl. ¶ 10.) In January 2018, Prometheus hired Gibson to work as a “Master Data Consulting Manager” in its Raleigh office. As a condition of Gibson’s employment, he executed a Proprietary Information, Inventions and Non-Solicitation Agreement (the “Employment Agreement”). (Compl. ¶¶ 13-14, Ex. A.) Because Gibson was allegedly given “unlimited access” to Prometheus’ confidential proprietary information, the Employment Agreement contains prohibitions on competing, soliciting customers, and disclosing confidential information. (Compl. ¶¶ 14-21.)

7. The non-compete clause in the Employment Agreement states:

To protect Proprietary Information, I agree that during my employment with the Company and for a period of one (1) year after my last day of employment with the Company, I will not directly or indirectly engage in (whether as an employee, consultant, proprietor, partner, director or otherwise), or have any ownership interest in, or participate in the financing, operation, management or control of, any person, firm, corporation or business that engages in a Restricted Business in a Restricted Territory. It is agreed that ownership of no more than one percent (1%) of the outstanding voting stock of a publicly traded corporation shall not constitute a violation of this provision.

(Compl. Ex. A, § 4 [“Employment Agreement”].)

8. The Employment Agreement defines a Restricted Business as “any business related to the creation, development, distribution or servicing of enterprise application software designed to improve enterprise asset management capabilities

and related operations, or conducting research or development with regard thereto[.]”

The definition also includes businesses Prometheus was actively researching, developing, or marketing at the time of Gibson’s termination, if he was involved in the research. (Employment Agreement § 4.2(a).)

9. The Restricted Territory encompasses:

(i) the entire world; (ii) North America; (iii) the United States of America; (iv) each state in which the Company does business or did business at any time within two (2) years prior to the termination of my employment with the Company; (v) the States of Maryland, Virginia, North Carolina, South Carolina and Georgia; (vi) the State of North Carolina; and (vii) Wake County.

(Employment Agreement § 4.2(b).)

10. The customer non-solicitation clause in the Employment Agreement reads:

To protect the Company’s Proprietary Information . . . I also agree that for the period of my employment by the Company and for one (1) year after the date of termination of my employment with the Company I will not, either directly or through others: . . . (c) solicit or attempt to solicit (i) any customer to which the Company sold any product, or for which the Company performed any service, within two (2) years prior to the termination of my employment with the Company; or (ii) any prospective customer that the Company called on at any time within two (2) years prior to the termination of my employment with the Company (collectively, a “Company Customer”)[.]

(Employment Agreement § 3.)

11. The nondisclosure clause states, in relevant part:

I recognize that all Proprietary Information (as defined below) is and shall remain the sole and exclusive property of the Company. At all times during my employment and thereafter, I will hold in strictest confidence and will not disclose or use any Proprietary Information, except as such disclosure or use may be required in connection with my

work for the Company or unless the Company expressly authorizes such disclosure or use in writing.

(Employment Agreement § 1.1.)

12. “Proprietary Information” is defined as “all confidential and/or proprietary knowledge, data or information of the Company.” This sentence is followed by a lengthy list of categories of information that encompass almost every type of business information conceivable. (Employment Agreement § 1.2.)

13. Over his years with Prometheus, Gibson worked “with hundreds of customers and solicited potential customers located around the world, with a significant number throughout North America and the United States in particular.” (Compl. ¶ 22.)

14. However, on 29 June 2022, Gibson voluntarily resigned from Prometheus. Later that year he began working as a Senior Solutions Architect for Prospecta, an Australian LLC with its principal place of business in Chatswood, Australia. Prospecta allegedly advertises this position as one in which the incumbent “designs and drives Prospecta’s business outcomes and works directly with Prospecta’s customers to design, implement and support customer solutions as a part of the sales-engagement and pre-sales processes.” (Compl. ¶¶ 11, 23, 25.)

15. Prometheus alleges that Prospecta “is engaged in substantial business activity within North Carolina including . . . marketing to and servicing customers and employing key staff within the state[.]” (Compl. ¶ 7.) Prospecta advertises itself as “a leading platform for Master Data Management and Data Governance[.]” Its

software “orchestrates your enterprise data strategy . . . [to] propel your business growth and advancements[.]” (Compl. ¶ 26.)

16. Prometheus contends that Gibson’s new job with Prospecta violates the Employment Agreement’s non-compete clause. (Compl. ¶ 27.) And, Prometheus alleges, “[g]iven the nearly identical nature of Gibson’s role and responsibilities at Prometheus and his new business-generating and customer-facing role and responsibilities at Prospecta, Plaintiff reasonably believes that Defendants have used Prometheus’ confidential information . . . to solicit or attempt to solicit Prometheus’ customers and prospects[.]” (Compl. ¶28.)

17. When Prometheus discovered that Gibson was working for Prospecta, it sent a letter to both Prospecta and Gibson highlighting the Employment Agreement’s prohibitions on competing, soliciting customers, and disclosing confidential information. (Compl. ¶ 29.) The letter “demanded that Prospecta immediately terminate Gibson through the period of the Agreement’s non-compete and non-solicitation provisions.” (Compl. ¶ 30.) Although Prometheus has followed up multiple times, it alleges that neither Gibson nor Prospecta has responded. (Compl. ¶ 31.)

18. Prometheus believes that Gibson is still employed by Prospecta, and it further believes that the two “continue to improperly use Prometheus’ confidential information to directly or indirectly solicit or attempt to solicit Prometheus’ customers and prospective customers in contravention of the terms Agreement [sic].” (Compl. ¶¶ 32-33.)

19. Prometheus lists the allegedly purloined information as “confidential and proprietary records via Salesforce” that include “information regarding existing clients, client contracts and proposals, identified and/or actively pursued prospective clients and business opportunities, contact information for existing and prospective clients, notes and files relating to interactions and communications with existing and prospective clients, and information relating to closed sales and closed lost business opportunities[.]” (Compl. ¶ 28.) Prometheus alleges that the information at issue is “not available from general sources or otherwise known outside the business and that [it] cannot be derived and developed independently.” (Compl. ¶ 21.)

20. Prometheus filed this suit asserting claims for: (1) injunctive relief, (2) breach of contract, (3) tortious interference with contract, (4) misappropriation of trade secrets, and (5) violation of the North Carolina Unfair and Deceptive Trade Practices Act (“UDTPA”). It seeks an injunction to prevent Prospecta from employing Gibson through 29 June 2023, and to prevent both Defendants from using or disclosing its confidential information. (Compl. ¶¶ 34-39, Prayer for Relief B, C.) Defendants move to dismiss all of Prometheus’ claims. (*See generally* Mot. Dismiss, ECF No. 16.)

21. After briefing was complete on the Motions, the Court held a hearing on 28 February 2023, at which all parties participated through counsel. The Motions are now ripe for disposition.

II. ANALYSIS

A. Motion to Dismiss

22. Dismissal of a claim is appropriate “(1) when the Complaint on its face reveals that no law supports plaintiff’s claim; (2) when the Complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the Complaint necessarily defeats the plaintiff’s claim.” *Oates v. JAG, Inc.*, 314 N.C. 276, 278 (1985). Otherwise, “a Complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.” *Sutton v. Duke*, 277 N.C. 94, 103 (1970) (emphasis omitted).

23. The Court construes the Complaint liberally and accepts all factual allegations as true. *See Laster v. Francis*, 199 N.C. App. 572, 577 (2009). Nonetheless, the Court is not required “to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs.*, 174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)). The Court may consider documents attached to the pleadings, to which the Complaint specifically refers, including a contract that forms the basis of an action. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60-61 (2001).

Breach of Contract – against Gibson³

24. Prometheus alleges that Gibson has breached his Employment Agreement by violating its prohibitions on competing, soliciting customers and prospects, and disclosing confidential proprietary information. (Compl. ¶¶ 27-28, 41-48.)

25. In response, Gibson contends that the claim should be dismissed because the Employment Agreement’s non-compete and non-solicit provisions are overbroad and therefore unenforceable. (Defs.’ Br. Supp. Mot. Dismiss 8-15 [“Defs.’ Supp. Br.”], ECF No. 17; Defs.’ Reply Br. Further Supp. Mot. Dismiss 2-9 [“Defs.’ Reply Br.”], ECF No. 42.) He also argues that Prometheus has not alleged facts sufficient to plead a breach of the Employment Agreement’s nondisclosure provision. (Defs.’ Supp. Br. 15-17; Defs.’ Reply Br. 9.)

26. In response, Prometheus defends the scope of its restrictive covenants and alternatively recommends that the Court blue pencil the language of the non-compete to rid it of any excess that might exist. (Pl.’s Br. Opp. Defs.’ Mot. Dismiss 3-14 [“Pl.’s Opp. Br.”], ECF No. 38.)

27. To state a claim for breach of the Employment Agreement, Prometheus must allege the existence of a valid contract and breach of its terms. *Poor v. Hill*, 138 N.C. App. 19, 26 (2000). To be valid, a covenant not to compete must be: “(1) in writing; (2) part of an employment contract; (3) based on valuable consideration; (4)

³ Prometheus’ first claim seeks injunctive relief. Although styled as a claim, it is a request for a remedy and will be treated that way. See *Window World of St. Louis, Inc. v. Window World of Bloomington, Inc.*, 2021 NCBC LEXIS 88, at **36 (N.C. Super. Ct. Oct. 6, 2021).

reasonable as to time and territory; and (5) designed to protect a legitimate business interest.” *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 655 (2009).

28. In North Carolina, covenants not to compete are considered restraints on trade and are closely scrutinized. *Hartman v. W.H. Odell & Assocs.*, 117 N.C. App. 307, 311 (1994) (“A covenant in an employment agreement providing that an employee will not compete with his former employer is not viewed favorably in modern law.”) (cleaned up); *Washburn v. Yadkin Valley Bank & Trust Co.*, 190 N.C. App. 315, 323 (2008) (“Covenants not to compete restrain trade and are scrutinized strictly.”); *ChemiMetals Processing, Inc. v. McEneny*, 124 N.C. App. 194, 197 (1996) (“Our Courts have a long history of carefully scrutinizing . . . covenants that prevent an employee from competing with his former employer.”).

29. To be enforceable, non-competition covenants must be narrowly tailored to protect a legitimate business interest of the employer. *See Sterling Title Co. v. Martin*, 266 N.C. App. 593, 597 (an “otherwise procedurally valid covenant not to compete” must still be “designed to protect a legitimate business interest of the employer”); *Hartman*, 117 N.C. App. at 316 (restrictive covenant cannot be “wider in scope than is necessary to protect the business of the employer”). If the covenant is “too broad to be a reasonable protection to the employer’s business[,] it will not be enforced.” *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528 (1989). *See also Horner Int’l Co. v. McKoy*, 232 N.C. App. 559, 566 (2014) (finding unenforceable covenant that was too broad in scope to protect the legitimate business interests of former employer).

30. Legitimate business interests include, *inter alia*, protecting the goodwill that arises from the former employee's contacts with customers and safeguarding the confidential information to which the former employee had access. *See United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 652-53 (1988).

31. While non-solicitation agreements must meet the same requirements as covenants not to compete, non-solicitation agreements are more easily enforced. *See, e.g., McGriff Ins. Servs. v. Hudson*, 2023 NCBC LEXIS 4, at **16-17 (N.C. Super. Ct. Jan. 17, 2023); *Sandhills Home Care, L.L.C. v. Companion Home Care - Unimed, Inc.*, 2016 NCBC LEXIS 61, at **36 (N.C. Super. Ct. Aug. 1, 2016).

32. Ultimately, whether a restrictive covenant is reasonable and enforceable is a matter of law for the Court to decide. *See, e.g., Med. Staffing Network, Inc.*, 194 N.C. App. at 655 (2009). Therefore, the Court analyzes the covenants at issue keeping in mind that the restraint should be no more restrictive than necessary to protect the legitimate business interest implicated. *Digital Realty Trust, Inc. v. Sprygada*, 2022 NCBC LEXIS 71, at **24 (N.C. Super. Ct. July 1, 2022).

33. Prometheus avers that the non-competition provision in Gibson's employment agreement is necessary to protect its proprietary information. (Employment Agreement § 4.) Although protecting proprietary information is a legitimate business interest, *see A.E.P. Industries v. McClure*, 308 N.C. 393, 408 (1983), this restriction is not sufficiently tailored to that interest.

34. Instead of using language directly prohibiting Gibson from providing a competitor with the proprietary information that he accessed while working in his

role for Prometheus, the non-compete uses imprecise language that has a much broader sweep. It purports to prohibit Gibson from *directly or indirectly* engaging in, having an ownership interest in, or participating in the financing, operation, management or control of, *any business that engages in a Restricted Business* in a Restricted Territory. (Employment Agreement § 4.)

35. North Carolina courts have repeatedly warned the drafters of restrictive covenants about the dangers of using the phrase “directly or indirectly” when defining the scope of a non-compete. *See, e.g., VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508 (2004) (non-compete with “directly or indirectly” competing clause was unenforceable because it blocked “wholly unrelated work”); *Power Home Solar, LLC v. Sigora Solar, LLC*, 2021 NCBC LEXIS 55, at *24-25 (N.C. Super. Ct. June 18, 2021) (North Carolina courts have routinely refused to enforce noncompete provisions that prevent a prior employee from “indirectly” working for a competitor or similar business); *Cty. of Wake PDF Elec. & Supply Co. v. Jacobsen*, 2020 NCBC LEXIS 103, at *18 (N.C. Super. Ct. Sept. 9, 2020) (“Particularly problematic are covenants that restrict an employee from ‘directly or indirectly’ having any association with a competing business.”); *NFH, Inc. v. Troutman*, 2019 NCBC LEXIS 66, at *38-39 (N.C. Super. Ct. Oct. 29, 2019) (non-compete prohibiting employee from competing “directly or indirectly” with a former employer “in any manner” was unreasonably broad); *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at **31-32 (N.C. Super. Ct. Nov. 3, 2011) (“North Carolina courts have refused to enforce noncompetition clauses using the terms ‘directly or indirectly.’ ”). *Cf. CNC/Access, Inc. v. Scruggs*, 2006

NCBC LEXIS 22, at *23-26 (N.C. Super. Ct. Nov. 17, 2006) (prohibiting a party “from even indirect ownership of a competing company . . . cannot be seen as protecting a legitimate business interest of the employer”).

36. Not only does this non-compete use the disfavored “directly or indirectly” phrase, it compounds the problem by purporting to prohibit Gibson from accepting employment of *any* kind with *any* business if that business engages in a “Restricted Business” in *any* way. Even before one gets to the definition of Restricted Business, the problem with this approach is apparent. The language utilized would prohibit Gibson from taking a wholly unrelated position with a company that produces and services IT products if one of its products falls within the definition of Restricted Business. Consequently, even working as a line cook in the cafeteria at IBM, Oracle, or SAP would be forbidden.

37. This is unquestionably overbroad. *See, e.g., CopyPro, Inc. v. Musgrove*, 232 N.C. App. 194, 201-02 (2014) (covenant preventing former salesperson from working in any capacity, including as a custodian, was unenforceable because it far exceeded the restriction necessary to protect former employer’s legitimate business interests); *Med. Staffing Network, Inc.*, 194 N.C. App. at 656 (“we have held that restrictive covenants are unenforceable where they prohibit the employee from engaging in future work that is distinct from the duties actually performed by the employee”); *Hartman*, 117 N.C. App. at 317 (holding unenforceable covenant that would prevent former employee from having any association whatsoever—including working as a custodian—for any business that provides actuarial services); *Digital*

Realty Trust, Inc., 2022 NCBC LEXIS 71, at **39 (“When the language describing the restricted duties strays from the employee’s own duties and essentially restricts the employee from taking positions with a competitor that would not harm his former employer’s legitimate business interests, it is too broad to be enforceable.”).

38. When the definition of Restricted Business is considered, Prometheus’ problems with overbreadth do not improve. A Restricted Business is “any business *related* to the creation, development, distribution or servicing of enterprise application software designed to improve enterprise asset management capabilities and *related* operations[.]” (Employment Agreement § 4.2(a).) Webster’s dictionary lists the words “affiliated,” “allied,” “kindred,” and “akin” as synonyms for the word “related.” See *Related*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/related> (last visited Mar. 21, 2023). By adding this layer, Prometheus attempts to widen its prohibition to restrict Gibson from accepting any type of position with any business that is related or connected to a business that creates, sells, or services asset management products or services among its other data management products or services.⁴ The result is manifestly overbroad. *Cf. Digital Realty Trust, Inc.*, 2022 NCBC LEXIS 71, at **37-38 (“Defining the scope of a noncompete by including unnamed affiliates and subsidiaries . . . is a perilous course.” (citing *Rel. Ins. Inc. v. Pilot Risk Mgmt. Consulting, LLC*, 2022 NCBC LEXIS 49, at *35 (N.C. Super. Ct. May 25, 2022)); *Med. Staffing Network, Inc.*, 194 N.C. App.

⁴ Indeed, in support of its Motion for Preliminary Injunction, Prometheus explains, “there is no enterprise asset management without data management; it is an integral component of any enterprise.” (Aff. Jay Golonka Supp. Pl.’s Reply Supp. Am. Mot. Prelim. Inj. ¶ 3 [“Golonka Aff.”], ECF No. 25.)

at 657 (finding no “legitimate business interest in preventing competition with . . . an unrestricted and undefined set of [the employer’s] affiliated companies that engage in business distinct from the” former employer); *VisionAIR, Inc.* 167 N.C. App. at 508-09 (refusing to enforce non-compete when the scope of the restriction purported to prevent the employee from “doing even wholly unrelated work at any firm similar to” his former employer); *Henley Paper Co. v. McAllister*, 253 N.C. 529, 534-35 (1960) (holding restrictive covenant not tailored to employee’s position to be too wide to enforce).

39. Exacerbating the problem even more, the Restricted Territory in this non-compete is as broad as it gets, covering “the entire world[.]” (Employment Agreement § 4.2(b).) Although a worldwide covenant not to compete is not *per se* invalid, the facts must be such that a worldwide restriction is reasonable and necessary. *Compare Biesse Am., Inc. v. Dominici*, 2019 NCBC LEXIS 50, at *24-25 (N.C. Super. Ct. Aug. 19, 2019) (finding unlimited territory unreasonable), *with Digital Realty Trust, Inc.*, 2022 NCBC LEXIS 71, at **33 (finding restriction that covered the United States, North and South America, Europe, Asia, Australia and Africa to be supported by facts in sale of business context).

40. The reasonableness of a geographic restriction is evaluated based on six factors:

- (1) the area, or scope, of the restriction;
- (2) the area assigned to the employee;
- (3) the area where the employee actually worked or was subject to work;
- (4) the area in which the employer operated;
- (5) the nature of the business involved; and
- (6) the nature of the employee’s duty and his knowledge of the employer’s business operation.

Hartman, 117 N.C. App. at 312. Some elasticity exists when analyzing time and territory restrictions because they are read in tandem to determine their reasonableness. *Id.* at 311-12.

41. Here, the time limitation is relatively short (one year post employment) but, even so, Prometheus' alleged facts do not support a worldwide restriction. Broadly stating that Gibson "worked with hundreds of customers and solicited potential customers around the world, with a significant number throughout North America and the United States in particular[,]” (Compl. ¶ 22), does not give the Court enough information to evaluate the reasonableness of a worldwide restriction. Moreover, including language in the Employment Agreement that the parties agree that the restriction is “reasonably necessary” to protect Prometheus' interests does not end the question because deciding the reasonableness of a restrictive covenant is the Court's domain. *See Med. Staffing Network, Inc.*, 194 N.C. App. at 655 (“The reasonableness of a non-competition covenant is a matter of law for the court to decide.”).

42. Additionally, North Carolina's blue pencil rule cannot be used to salvage this far-reaching non-compete. The rule is one of excision, not modification. “A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant.” *Hartman*, 117 N.C. App. at 317. *See also NFH, Inc.*, 2019 NCBC LEXIS 66, at *33 (North Carolina's strict blue pencil doctrine allows the court to “avoid scrapping an entire covenant” by “enforc[ing] the divisible parts of [the] covenant that

are reasonable.”); *cf. Whittaker Gen. Med. Corp.*, 324 N.C. at 528 (“The courts will not rewrite a contract if it is too broad but will simply not enforce it.”).

43. To be a “distinctly separable” provision, other restrictions in the covenant must not be dependent on the portion to be excised. *See Nat’l Investments, Inc. v. Rice*, 2016 N.C. App. LEXIS 1119, 1120 (2016) (unpublished) (citing Jon P. McClanahan & Kimberly M. Burke, *Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants Not to Compete in North Carolina*, 90 N.C. L. REV. 1931, 1955-56 (Sept. 2012)).

44. Furthermore, application of the blue pencil rule is within the discretion of the Court. *See McGriff Ins. Servs.*, 2023 NCBC LEXIS 4, at **32 (citing *Tech. Ptnrs., Inc. v. Hart*, 298 F. App’x 238, 243 (4th Cir. 2008) (applying North Carolina law)).

45. Here, the geographical restrictions are presented as a list, but they are joined by the conjunctive “and”—preventing them from being “distinctly separable.” (Employment Agreement 4.2(b): “(i) the entire world . . . (vi) the State of North Carolina; *and* (vii) Wake County”) (emphasis added). *See Wells Fargo Ins. Servs. USA v. Link*, 2018 NCBC LEXIS 42, at *23 (N.C. Super. Ct. May 8, 2018) (holding that the term “and/or” should be “read in the conjunctive sense for the purpose of applying the ‘blue pencil’ doctrine” and declining to strike part of a list).

46. Furthermore, Plaintiff’s argument that the parties contracted in paragraph 6 of the Employment Agreement to give the Court power to revise its territorial limits to make them reasonable does not rescue it. The parties cannot contract to give a court power that it does not have. *See Welcome Wagon Int’l, Inc. v.*

Pender, 255 N.C. 244, 248 (1961) (“The court is without power to vary or reform the contract by reducing either the territory or the time covered by the restrictions.”); *Penn v. Standard Life Ins. Co.*, 160 N.C. 399, 402 (1912) (“Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must, therefore, determine what they meant by what they have said—what their contract is, and not what it should have been.”).

47. Similarly, the Court declines Prometheus’ invitation to excise the word “indirectly” from the covenant. Despite use of the disjunctive “or,” the structure of the provision does not clearly establish that the drafter intended for the words in this modifying phrase to be used alternatively. The Court will not exercise its discretion to blue pencil a provision that was not clearly drafted to be divisible.⁵ *Cf. Bev. Sys. of the Carolinas, LLC*, 368 N.C. at 700 (“Allowing litigants to assign to the court their drafting duties as parties to a contract would put the court in the role of scrivener, making judges postulate new terms that the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation. We see nothing but mischief in allowing such a procedure.”).

48. Given its vast breadth, Prometheus’ non-compete provision is unenforceable as a matter of law. Because it is not a valid contractual provision,

⁵ This is not the first time a court applying North Carolina law has determined that a Prometheus restrictive covenant was too broad to be enforced. *See Prometheus Group Enters., LLC v. Viziya Corp.*, 2014 U.S. Dist. LEXIS 107231, at *15-19 (E.D.N.C. Aug. 4, 2014) (finding restrictive covenant “unreasonable and therefore unenforceable as a matter of law”).

Prometheus' claim for breach of contract on this basis fails.⁶ The Court therefore **GRANTS** Defendants' Motion to Dismiss the breach of contract claim asserted against Gibson to the extent Prometheus alleges that Gibson has violated the non-competition provision in the Employment Agreement, and this aspect of the claim is **DISMISSED** with prejudice.

49. The customer non-solicitation provision fares no better. For a year after Gibson left employment, the provision purports to restrict him from soliciting or attempting to solicit:

(i) any customer to which the Company sold any product, or for which the Company performed any service, within two (2) years prior to the termination of [Gibson's] employment with the Company; or (ii) any prospective customer that the Company called on at any time within two (2) years prior to the termination of [Gibson's] employment with the Company (collectively, a "Company Customer")[]

(Employment Agreement § 3(c).)

50. While North Carolina courts are generally more willing to enforce a targeted non-solicitation clause, again Prometheus has overreached. The restriction covers any customer to which the Company sold any product or performed any service (within two years prior to Gibson's resignation date) without regard to whether Gibson himself had any contact with, or even knowledge of, the customer. Prometheus' failure to limit the non-solicitation provision to customers with whom

⁶ Prometheus argues that the position Gibson has taken with Prospecta involves some of the same duties he had with it and, therefore, directly violates the non-compete. But before the Court can address any similarities between Gibson's old position and his new one, as the party seeking to enforce a non-compete, Prometheus has the burden to prove that the covenant itself is reasonable in scope. This, it has not done.

Gibson had some contact or ability to influence makes the provision impermissibly overbroad. *See, e.g., Andy-Oxy., Inc. v. Harris*, 2019 N.C. App. LEXIS 902, at *14-16 (2019) (finding a covenant unenforceable that prohibited former employee from “soliciting *any* customer within the restricted territory, irrespective of whether [he] had contact with that customer during his employ or whether that customer was even known to” him); *Mech. Sys. & Servs. v. Howard*, 2021 NCBC LEXIS 69, at *9-10 (N.C. Super. Ct. Aug. 11, 2021) (finding facially unreasonable non-solicitation clause purporting to bar former employee from soliciting customers in any field, whether or not he had any knowledge of them or contact with them). *Cf. Sterling Title Co.*, 266 N.C. App. at 598-99 (customer non-solicit covering current or former customers with whom defendant had “any form of ‘contact’” during employment, regardless of extent, “suggests that the [restriction] is unreasonable.”).⁷

⁷ This case differs from *Sandhills Home Care, L.L.C.*, 2016 NCBC LEXIS 61. In *Sandhills*, this Court considered the enforceability of a non-solicitation provision that restricted former employees from soliciting any of the employer’s customers, regardless of whether the particular employee had any contact with a customer. Because the employer had “a relatively small and easily identified set of customers” and the duration of the restriction was relatively short (one year), the Court could not conclude at the Rule 12(b)(6) stage that the restriction was unreasonable as a matter of law. Our appellate courts have held similarly. *See Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 229 (1990) (enforcing restrictive covenant prohibiting former employee from “soliciting the business of plaintiff’s known customers in areas in which the company operates” when area was limited to eastern and central North Carolina and defendant and his wife were employed by the company in Wilmington); *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 469 (2001) (following sale of business, enforcing covenant that restricted former owner from soliciting any customer with an active account at the time of defendant’s termination).

Here, however, Plaintiff alleges that its products and services are used in “various industries around the world[,]” (Compl. ¶ 12), and that “Gibson worked with hundreds of customers and solicited potential customers located around the world,” (Compl. ¶ 22). There is no small, identifiable set of customers. *See NFH, Inc.*, 2019 NCBC LEXIS 66, at *36-37 (enforcing non-solicitation provision where plaintiff alleged that it operated in a relatively small geographic area, Iredell County, and defendant was “the face of the company”). Furthermore, the

51. Indeed, this non-solicitation provision, as phrased, would prohibit Gibson from soliciting business from Prometheus' prospective customers that Gibson has never met, in countries Gibson has never visited (virtually or otherwise), for products and services Gibson has never handled. And, because it contains a "look back" provision to include any customer Prometheus solicited or attempted to solicit for any product or service within two years prior to Gibson's resignation, (Employment Agreement § 3(c)), two years must be added to the one-year duration of the restriction, making the time restriction three years. *See Farr Assoc., Inc. v. Baskin*, 138 N.C. App. 276, 280-81 (2000) (explaining that the "look-back" period must be added to the restrictive period to determine the length of the time limitation). A three year limitation is a significant undertaking, even for a narrowly drawn non-solicitation provision. And this one is not narrowly drawn.

52. Simply put, the non-solicitation provision is far too expansive to be enforceable under North Carolina law. *See, e.g., Hejl v. Hood, Hargett & Assocs.*, 196 N.C. App. 299, 307 (2009) (finding impermissible a non-solicitation agreement that included prospective customers for whom defendant had merely quoted a product or service and extending to areas where plaintiff had no connections or personal knowledge of customers).

restriction is not limited to the solicitation of established customers. *See Aesthetic Facial & Ocular Plastic Surgery Ctr., P.A. v. Zaldivar*, 264 N.C. App. 260, 272-73 (2019) (where a non-solicitation clause "reaches not only clients, but potential clients, and extends to areas where [p]laintiff had no connections or personal knowledge of customers, the [provision] is unreasonable.").

53. Like the non-compete, because the non-solicitation provision is unenforceable as a matter of law, Prometheus' claim for breach of contract on this basis fails. Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss the breach of contract claim asserted against Gibson to the extent Prometheus alleges that Gibson has violated the non-solicitation provision in the Employment Agreement, and this aspect of the claim is **DISMISSED** with prejudice.

54. Finally, the Court addresses the sufficiency of Prometheus' claim for breach of the nondisclosure provision in the Employment Agreement. Unlike non-competition and non-solicitation provisions, a nondisclosure provision is generally not considered to be a restraint on trade. *See Chemimetals Processing, Inc.*, 124 N.C. App. at 197 ("An agreement is not in restraint of trade, however, if it does not seek to prevent a party from engaging in a similar business in competition with the promisee, but instead seeks to prevent the disclosure or use of confidential information."); *McElmurry v. Alex Fergusson, Inc.*, 2006 U.S. Dist. LEXIS 10760, at *40 (M.D.N.C. Mar. 8, 2006) ("In contrast to covenants not to compete, confidentiality agreements are not restraints of trade if their purpose and effect is merely to prevent disclosure or use of confidential information."). Non-solicitation provisions are "more tailored and less onerous on employees' ability to earn a living" than noncompete restrictions. *Akzo Nobel Coatings, Inc.*, 2011 NCBC LEXIS 42, at **31. Thus, the nondisclosure provision is not subjected to the same level of scrutiny as the non-competition and non-solicitation provisions. *See id.* ("[s]uch agreements may, therefore, be upheld even though the agreement is unlimited as to time and area").

55. The nondisclosure provision in the Employment Agreement requires Gibson to “hold in strictest confidence and . . . not [to] disclose or use any Proprietary Information” without prior approval. (Employment Agreement § 1.1.)

56. Prometheus alleges that Gibson, while employed, had “unlimited access to Prometheus’ confidential and proprietary records[.]” (Compl. ¶ 21.) It alleges, “[u]pon information and belief, [that] Gibson and Prospecta [have and] continue to improperly use Prometheus’ confidential information to directly or indirectly solicit or attempt to solicit Prometheus’ customers and prospective customers in contravention of the terms Agreement [sic].” (Compl. ¶ 33.)

57. As this Court has previously observed, “stating a claim for breach of contract is a relatively low bar.” *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *11 (N.C. Super. Ct. June 19, 2019). Alleging the existence of a valid contract and breach of its terms is sufficient. *See Poor*, 138 N.C. App. at 26 (2000). Prometheus has alleged the existence of a valid contract. (*See generally* Compl. ¶¶ 14-20; Employment Agreement.) Allegations of Gibson’s breach, even though stated upon information and belief, will suffice at this early stage. *See Myrtle Apartments, Inc. v. Lumbermen's Mut. Casualty Co.*, 258 N.C. 49, 51 (1962) (a plaintiff “may allege facts based on actual knowledge, or upon information and belief”); *Link*, 2018 NCBC LEXIS 42, at *31-32 (allegations “upon information and belief,” that defendant used “Confidential Information . . . to identify, contact, solicit, and induce” former customers was sufficient on a motion to dismiss).

58. The Court therefore **DENIES** Defendants' Motion to Dismiss the breach of contract claim asserted against Gibson, to the extent Prometheus alleges that Gibson has violated the nondisclosure provision in the Employment Agreement.

Tortious Interference – Against Prospecta

59. Focusing on Gibson's new employer, Prometheus alleges that Prospecta "knowingly induced Gibson to violate his [Employment] Agreement with Prometheus without justification." (Compl. ¶¶ 29-30, 52, 54.)

60. In response, Prospecta first argues that the claim should be dismissed because the Employment Agreement on which the action is premised is unenforceable. Prospecta then argues that Prometheus has insufficiently pled two elements of the claim: Gibson's breach of the Employment Agreement and the existence of actual damages. (See Defs.' Supp. Br. 17-18; Defs.' Reply Br. 10.)

61. To plead tortious interference, Prometheus must allege: "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (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 acts without justification; (5) resulting in actual damage to plaintiff." *United Labs., Inc.*, 322 N.C. at 661 (citing *Childress v. Abeles*, 240 N.C. 667 (1954)). "The pleading standards for a tortious interference with contract claim are strict." *Urquhart v. Trenkelbach*, 2017 NCBC LEXIS 12, at *15 (N.C. Super. Ct. Feb. 8, 2017).

62. There can be no claim for tortious interference when there is no contract. See *Bev. Sys. of the Carolinas*, 368 N.C. at 700 ("plaintiff must first establish the

existence of a valid contract”). Therefore, Prometheus’ claim that Prospecta interfered with its non-competition or non-solicitation clauses fails because those clauses are unenforceable. The Court’s analysis, then, turns to whether Prometheus has stated a claim for interference with its nondisclosure provision.

63. Prometheus short shrifts the requirement that it plead that Prospecta intentionally induced Gibson to breach the nondisclosure provision. Without supporting facts, Prometheus pleads in conclusory fashion only that, “Prospecta has knowingly induced Gibson to violate his [Employment] Agreement with Prometheus without justification.” (Compl. ¶ 54.) This is not enough. *See, e.g., Gallaher v. Ciszek*, 2020 NCBC LEXIS 124, at *16 (N.C. Super. Ct. Oct. 16, 2020) (dismissing claim for tortious interference because it contained no allegations of any “purposeful conduct,” “active persuasion,” “request,” or “petition” to induce a party not to perform its contract); *Charah, LLC v. Sequoia Servs., LLC*, 2020 NCBC LEXIS 52, at *22, n.2 (N.C. Super. Ct. Apr. 17, 2020) (declining to address defendant’s alleged breach of a nondisclosure provision in analysis of tortious interference claim because plaintiff did not sufficiently allege that new employer induced former employee to breach the nondisclosure provision after becoming aware of its existence).

64. The same conclusory allegation fails to satisfy Prometheus’ obligation to plead legal malice, particularly where, as here, the Complaint alleges that Prometheus and Prospecta are competitors. (*See* Compl. ¶¶ 37, 53). The Complaint must have “a factual basis to support the claim of malice[.]” since “general allegations of malice are insufficient[.]” *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 605

(2007) (citing *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559 (1965)). Further, “the complaint must admit of no motive for interference other than malice.” *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 674 (2001) (citing *Privette v. Univ. of N.C. at Chapel Hill*, 96 N.C. App. 124, 134-35 (1989)). Malice in this instance refers to legal malice, not actual malice. See *Lunsford v. Viaone Servs., LLC.*, 2020 NCBC LEXIS 111, at *14 (N.C. Super. Ct. Sept. 28, 2020) (“A plaintiff must plead legal malice, which is just another way of saying ‘the intentional doing of the harmful act without legal justification.’” (quoting *Childress*, 240 N.C. at 675)).

65. Interference with a contract is “justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors.” *Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 498 (1992). However, a defendant’s interference is without privilege or justification if it is “not reasonably related to the protection of a legitimate business interest[.]” *Privette*, 96 N.C. App. at 134 (quoting *Smith v. Ford Motor Co.*, 289 N.C. 71, 94 (1976)). “If the defendant’s only motive is a malicious wish to injure the plaintiff, his actions are not justified.” *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 221 (1988).

66. Further, the means by which the competition takes place must be lawful. “Competition in business constitutes justifiable interference in another’s business relations and is not actionable so long as it is carried on in furtherance of one’s own interests and by *means that are lawful.*” *Hooks*, 322 N.C. at 221 (emphasis added). See also *MarketPlace 4 Ins., LLC v. Vaughn*, 2023 NCBC LEXIS 31, at **35-36 (N.C. Super. Ct. Feb. 24, 2023) (stating that “[t]his limitation on a defendant’s

ability to assert justification is eminently logical” and determining that defendant’s alleged unlawful use of confidential information, among other things, was not justified).

67. In this case, the Complaint alleges, in conclusory fashion, only that, “Prospecta has knowingly induced Gibson to violate his [Employment] Agreement with Prometheus without justification.” (Compl. ¶ 54.) Conclusory allegations are not enough. *See, e.g., Charah, LLC*, 2020 NCBC LEXIS 52, at *16-17 (claim dismissed for lack of factual allegations to support legal malice). *Cf. Myrtle Apartments, Inc.*, 258 N.C. at 51 (“In testing the sufficiency of a complaint, the court ignores the conclusions and looks to the facts.”). Pleading legal malice is not a “toothless requirement[.]” *Lunsford*, 2020 NCBC LEXIS 111, at *14. *See Harris*, 184 N.C. App. at 605 (“general allegations of malice are insufficient” (citing *Spartan Equip. Co.*, 263 N.C. at 559)).

68. Without sufficient factual allegations to support legal malice, Prometheus’ claim for tortious interference with contract fails. Therefore, the Court **GRANTS** Prospecta’s Motion to Dismiss Count III (Tortious Interference – Against Prospecta). However, the Court elects to dismiss this claim without prejudice. *See, e.g., First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013) (“[t]he decision to dismiss an action with or without prejudice is in the discretion of the trial court”).

Misappropriation of Trade Secrets – Against Defendants

69. Prometheus alleges that during his employment, Gibson “was required to have and did have unlimited access to Prometheus’ confidential and proprietary

records via Salesforce⁸, which included information regarding existing clients, client contracts and proposals, identified and/or actively pursued prospective clients and business opportunities, contact information for existing and prospective clients, notes and files relating to interactions and communications with existing and prospective clients, and information relating to closed sales and closed lost business opportunities, and which includes information not available from general sources or otherwise known outside the business and that cannot be derived and developed independently.” (Compl. ¶ 21.)

70. Prometheus further alleges that “Prometheus and Gibson understood that he would have access to [this] confidential and commercially sensitive information. Accordingly, the [Employment] Agreement contained express provisions to protect such proprietary information.” (Compl. ¶ 15.)

71. However, Prometheus alleges, “Defendants have disclosed and/or acquired Prometheus’ confidential information . . . by improper means because it knew that the confidential information was secret and that the disclosure of confidential information by Gibson constituted a breach of the [Employment] Agreement with Prometheus.” (Compl. ¶ 60.) It titles Count IV of the Complaint, “Misappropriation of Trade Secrets – North Carolina Trade Secrets Protection Act – Against Defendants.”

⁸ Salesforce is “cloud-based software designed to help businesses connect to their customers[.]” SALESFORCE, *What is Salesforce*, <https://www.salesforce.com/products/what-is-salesforce/> (last visited Mar. 21, 2023).

72. Defendants counter that Prometheus has neither sufficiently identified a trade secret nor adequately pleaded the acts of misappropriation required to state a claim. (Defs.' Supp. Br. 18-21; Defs.' Reply Br. 10-13.)

73. A trade secret in North Carolina is “business or technical information” that “[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use” and “[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” N.C.G.S. § 66-152(3). This can include “a formula, pattern, program, device, compilation of information, method, technique, or process[.]” *Id.*

74. Misappropriation is defined as the “acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent[.]” N.C.G.S. § 66-152(1). Misappropriation does not occur, however, when a trade secret is discovered by “independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.” *Id.*

75. To survive a motion to dismiss, Prometheus 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 whether misappropriation has or is threatened to occur.” *Washburn*, 190 N.C. App. at 326 (quoting *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468 (2003)). General, sweeping, and conclusory allegations are inadequate. *See Krawiec v. Manly*, 370 N.C. 602, 610 (2018).

76. Defendants argue that the lengthy list of descriptors that Prometheus uses to describe its confidential information (“information regarding existing clients, client contracts and proposals, identified and/or actively pursued prospective clients and business opportunities, contact information for existing and prospective clients, notes and files relating to interactions and communications with existing and prospective clients, and information relating to closed sales and closed lost business opportunities,” (Compl. ¶ 21)), is not sufficiently particular to put them on notice of what they are accused of misappropriating and otherwise to satisfy *Washburn*.

77. Although it is true that North Carolina courts have found that some of the descriptions of information Prometheus lists are, standing alone, too imprecise to meet its pleading requirement, the difference here is that Prometheus also alleges that this is a compilation of confidential information housed in Salesforce. This Court has previously determined that compilations of data stored and capable of manipulation in Salesforce may qualify as a trade secret. *Compare Power Home Solar, LLC*, 2021 NCBC LEXIS 55, at *35-37 (information compiled in Salesforce platform could qualify as a trade secret); *Addison Whitney, LLC v. Cashion*, 2017 NCBC LEXIS 23, at **13-18 (Salesforce database treated as trade secret on motion for preliminary injunction); and *Koch Measurement Devices, Inc. v. Armke*, 2015 NCBC LEXIS 45, at *13 (N.C. Super. Ct. May 1, 2015) (“where an individual maintains a compilation of detailed records over a significant period of time,” creating value for the business as a compilation, “those records could constitute a trade secret”), *with Aecom Tech. Corp. v. Keating*, 2012 NCBC LEXIS 9, at **7-8 (N.C.

Super. Ct. Feb. 6, 2012) (“customer lists, customer contract information, pricing information, and product information” was insufficient); *and Washburn*, 190 N.C. App. at 327 (“confidential client information and confidential business information” along with clients’ “specific requirements and needs [] and other confidential information” about the business was insufficient). Thus, the Court determines that Prometheus has sufficiently pleaded the existence of a trade secret to withstand scrutiny at this stage.

78. Having alleged the existence of a trade secret Prometheus must also allege sufficient facts to support its contention that there has been misappropriation. Alleging that it “reasonably believes” that Defendants are using its trade secrets to solicit customers because Gibson had “unlimited access to Prometheus’ confidential and proprietary records via Salesforce” and given the “nearly identical nature of Gibson’s role and responsibilities at Prometheus and his new business-generating and customer-facing role and responsibilities at Prospecta” is not enough. (Compl. ¶¶ 21, 28.) *See Am. Air Filter Co. v. Price*, 2017 NCBC LEXIS 9, at *22-23 (N.C. Super. Ct. Feb. 3, 2017) (“access to, and therefore an ‘opportunity to acquire,’ an employer’s trade secrets, without more, is not sufficient to establish a prima facie case of misappropriation”); *Daniel Grp., Inc. v. Am. Sales & Mktg.*, 2016 NCBC LEXIS 112, at *27-28 (N.C. Super. Ct. Dec. 15, 2016) (dismissing claim when plaintiff did not allege how defendants misappropriated its trade secrets).

79. As in *Wells Fargo Ins. Servs. USA v. Link*, “there is no allegation that [Gibson] accessed or acquired trade secrets at any time when [he] was not authorized

to do so.” 2018 NCBC LEXIS 42, at *38. But unlike *Link*, Prometheus does not allege that clients have changed their allegiances, nor does Prometheus offer any other facts to support a “significant inferential leap” that Gibson or Prospecta is using its trade secrets. *Id.* at *40-41. Prometheus alleges only its conclusion that, because Gibson’s new position is “nearly identical” to his former position, “[u]pon information and belief, Gibson and Prospecta continue to improperly use Prometheus’ confidential information to directly or indirectly solicit or attempt to solicit Prometheus’ customers and prospective customers[.]” (Compl. ¶¶ 28, 33.) This is insufficient.⁹

80. Therefore, the Court **GRANTS** Defendants’ Motion to Dismiss Count IV (Misappropriation of Trade Secrets – Against Defendants) and **DISMISSES** this claim without prejudice.

⁹ The doctrine of inevitable disclosure, upon which Prometheus appears to rely, has not been adopted in North Carolina, and the Court declines to adopt it on the allegations presented here. *See, e.g., Analog Devices, Inc.*, 157 N.C. App. at 470-71 (declining to adopt the doctrine to support an injunction that would act as an “absolute barrier” to defendant working in a particular field when the covenant was not limited by factors that would establish the relevance of the trade secrets at issue). *See also Southeast Anesthesiology Consultants v. Charlotte-Mecklenburg Hosp. Auth.*, 2018 NCBC LEXIS 137, at *57-58 (N.C. Super. Ct. June 22, 2018) (declining to adopt the inevitable disclosure doctrine and summarizing cases).

To the extent the doctrine has been recognized by other courts, more was alleged than has been alleged here. *See, e.g., Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1460 (MDNC 1996) (“In finding a likelihood of disclosure, other courts that have applied the inevitable disclosure theory have considered the degree of competition between the former and new employer, and the new employer’s efforts to safeguard the former employer’s trade secrets, and the former employee’s lack of forthrightness both in his activities before accepting his job and in his testimony, as well as the degree of similarity between the employee’s former and current position.”) (cleaned up).

Violations of North Carolina Unfair or Deceptive Trade Practices Act

81. Prometheus bases its UDTPA claim on the same facts it alleges to support its claims for breach of contract, misappropriation of trade secrets, and tortious interference with contract. (Compl. ¶¶ 63-66; Pl.'s Opp. Br. 19.)

82. “To establish a prima facie case of unfair and deceptive trade practices, a plaintiff must show that (1) the defendant committed an unfair or deceptive act or practice, (2) the act was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.” *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 303 (2004).

83. Defendants contend that the claim should be dismissed because no aggravating circumstances have been alleged with respect to Prometheus’ breach of contract claim, and neither the misappropriation nor the tortious interference claim survives dismissal. (Defs.’ Supp. Br. 21-24; Defs.’ Reply Br. 13.)

84. The Court agrees. Although claims for tortious interference with contract and misappropriation of trade secrets can form the basis of a UDTPA claim, *see, e.g., Med. Staffing Network, Inc.*, 194 N.C. App. at 659-60; *Bldg. Ctr., Inc. v. Carter Lumber, Inc.*, 2016 NCBC LEXIS 79, at *30 (N.C. Super. Ct. Oct. 21, 2016), here those claims have been dismissed. *See, e.g., Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 374 (2001) (“Having determined that the trial court properly granted summary judgment on [the misappropriation of trade secrets, tortious interference with contract and civil conspiracy] claims, we likewise conclude that no claim for unfair and deceptive trade practices exists.”); *Salon Blu, Inc. v. Salon Lofts Grp., LLC*, 2018 NCBC LEXIS 72, at *19-20 (N.C. Super. Ct. July 16, 2018) (dismissing

UDTPA claim when premised on claim for tortious interference with contract that did not survive motion to dismiss); *Link*, 2018 NCBC LEXIS 42, at *49-51 (dismissing UDTPA claim when the underlying misappropriation of trade secrets and intentional interference with contract claims were dismissed).

85. Finally, because Chapter 75 creates “an independent claim that stands alone as a distinct action[,]” *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 2003 NCBC LEXIS 6, at **138 (N.C. Super. Ct. May 2, 2003), the Court reviews the allegations to determine if there are sufficient facts of potentially unfair or deceptive conduct for Prometheus to maintain a UDTPA claim notwithstanding dismissal of its tortious interference and misappropriation of trade secret claims. *See, e.g., Velocity Sols., Inc. v. BSG Fin., LLC*, 2016 NCBC LEXIS 19, at **7-8 (N.C. Super. Ct. Feb. 22, 2016) (granting motion to dismiss breach of contract claim but denying motion to dismiss UDTPA claim where plaintiff alleged defendant had “specifically engaged and directed [plaintiff’s former employee] to utilize [p]laintiff’s confidential and proprietary information in order to achieve competitive gain”).

86. The remaining allegations are Prometheus’ “reasonable belief” that Gibson breached the nondisclosure provision in the Employment Agreement because of the similarity of the work he is doing and conclusory allegations that Defendants are using Prometheus’ confidential information to solicit customers. (*See generally* Compl.) While sufficient to state a claim for breach of the nondisclosure provision “a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.” *Branch Banking & Trust Co. v.*

Thompson, 107 N.C. App. 53, 62 (1992). “North Carolina law requires a showing of ‘substantial aggravating circumstances’ to support a claim under the [UDTPA].” *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 347 (4th Cir. 1998). Prometheus’ contentions here fall short of that mark.

87. Accordingly, the Court **GRANTS** Defendants’ Motion to Dismiss Count V (Violations of North Carolina Unfair or Deceptive Trade Practices Act – Against Defendants) and **DISMISSES** the claim without prejudice.

B. PI Motion

88. A preliminary injunction is an “extraordinary measure taken by a court to preserve the status quo of the parties during litigation.” *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701 (1977). Plaintiff bears the burden to establish the “right to a preliminary injunction[.]” *Pruitt v. Williams*, 288 N.C. 368, 372 (1975), and it must show: (1) a likelihood of success on the merits, and (2) that it is likely to sustain irreparable loss unless the injunction is issued or, “if, in the opinion of the Court, issuance is necessary for the protection of [Plaintiffs’] rights during the course of litigation.” *A.E.P. Indus., Inc.*, 308 N.C. at 401. *See also Bd. Of Provincial Elders v. Jones*, 273 N.C. 174, 182 (1968) (the burden is on the applicant); *VisionAIR, Inc.*, 167 N.C. App. at 508 (a preliminary injunction will issue only upon the movant’s showing of these two factors); N.C.G.S. § 1-485; N.C.G.S. § 1A-1, R. 65.

89. “Likelihood of success means a ‘reasonable likelihood.’” *Am. Air Filter Co.*, 2017 NCBC LEXIS 9, at *11 (quoting *A.E.P. Indus., Inc.*, 308 N.C. at 404). Irreparable injury exists when “the injury is one to which the complainant should not

be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law.” *A.E.P. Indus., Inc.*, 308 N.C. at 407 (emphasis omitted).

90. An injunction is proper only “when irreparable injury is real and immediate.” *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 586 (2002). Plaintiff “must do more than merely allege that irreparable injury will occur.” *United Tel. Co. of Carolinas v. Universal Plastics, Inc.*, 287 N.C. 232, 236 (1975). It must “set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur.” *Id.*

91. In addition, the potential harm Prometheus will suffer if no injunction is entered must outweigh the potential harm to Gibson if an injunction is entered. *See Addison Whitney, LLC*, 2017 NCBC LEXIS 23, at **12-13 (citing *Williams v. Greene*, 36 N.C. App. 80, 86 (1978)).

Findings of Fact

92. Unlike its consideration of the Motion to Dismiss, which was limited to consideration of the Complaint and its attachments, the Court may properly consider both the pleadings and the affidavits filed by the parties in its review of Prometheus’ Motion for Preliminary Injunction. Therefore, in addition to the factual background above, the Court finds the following facts for purposes of Prometheus’ motion. These findings are not binding at later stages of the litigation, including but not limited to a trial on the merits. *See Lohrmann v. Iredell Mem’l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005); *Daimlerchrysler Corp.*, 148 N.C. App. at 578.

93. Prospecta operates in the data management space, whereas Prometheus operates in the enterprise asset management space. (Aff. Jay Golonka Supp. Pl.’s Reply Supp. Am. Mot. Prelim. Inj. ¶ 3 [“Golonka Aff.”], ECF No. 25.)

94. However, among other things, Prospecta offers master data management and migration tools that may compete in some respects with Prometheus’ Master Data as a Service (“MDaaS”) software. Likewise, Prospecta’s “MDO FUSE: Data-Driven Process Platform” may compete with “The Prometheus Platform.” (Golonka Aff. ¶ 3.) Prospecta does not sell or produce enterprise asset management software itself. The “vast majority” of its projects are not enterprise asset management projects. (Aff. Julian Blackley ¶ 22 [“Blackley Aff.”], ECF No. 20.)

95. While working at Prometheus, Gibson was a “subject matter expert for Prometheus master data solutions and software tools.” (Golonka Aff. ¶ 5.) He did not have responsibility for identifying customers or closing sales, but he did meet with customers as-needed¹⁰ to discuss and demonstrate these solutions. (Aff. Randy Gibson ¶¶ 25-26 [“Gibson Aff.”], ECF No. 21.)

96. While at Prometheus, Gibson had access to Prometheus’ confidential information. (Golonka Aff. ¶ 6.) He occasionally used Salesforce to perform normal and routine aspects of his job. (Gibson Aff. ¶ 27.)¹¹ However, he did not take any

¹⁰ Golonka adds in a second affidavit that Gibson had contact with customers or prospective customers that operate in all 50 states and in at least seven provinces in Canada. He adds that Gibson had contact with customers or prospective customers located in at least eight countries. (Golonka Aff. Opp. Mot. Dismiss ¶¶ 7-8, ECF No. 39.) The Court does not deem it necessary to determine the extent of Gibson’s role to determine the pending motion.

¹¹ Gibson testified by affidavit that before he left Prometheus, he accessed his HR file and the only version of an Employment Agreement he found was an unsigned version that contains

Prometheus property or information with him when he left. He returned the company computer and did not retain any digital files from it. (Gibson Aff. ¶ 34.)

97. When Gibson joined Prospecta, he was instructed not to disclose any confidential information from any past employer. (Gibson Aff. ¶¶ 33-34, Blackley Aff. ¶¶ 27-30.)

98. Gibson has been assigned to work with Prospecta's European customers. (Gibson Aff. ¶¶ 47-48.)

99. Gibson, on behalf of Prospecta, attended the ASUG Best Practices in Oil and Gas conference in September 2022 that Prometheus also attended. Both companies are focused on their master data offerings. (Golonka Aff. ¶ 12, Gibson Aff. ¶ 50.)

100. Importantly, nowhere in the record is there any evidence that Gibson, or anyone at Prospecta, has used Prometheus' confidential information to solicit Prometheus' customers or otherwise, despite the fact that Gibson left Prometheus' employ almost nine months ago.

no non-solicitation or non-competition provisions. (Gibson Aff. ¶¶ 8-10.) Golonka contests this assertion. He testified that he, too, accessed Gibson's HR file and verified that the Employment Agreement in Gibson's file is the same as the one attached to Prometheus' Complaint in this action. (Golonka Aff. Opp. Mot. Dismiss ¶ 4.) Because the primary difference between the document Gibson found and the one Golonka says is in the file and also attached to the Complaint lies only in the existence of the non-competition and non-solicitation provisions, and because the nondisclosure provision, upon which the Motion for Preliminary Injunction turns, exists in both documents, the Court needs not resolve this disputed fact for purposes of this motion. (*Compare* Gibson Aff., Ex. 3, ECF No. 21.3, *with* Compl., Ex. A.)

Conclusions of Law

101. The Court has jurisdiction over the parties and the subject matter of this action.

102. For the same reasons the Court dismisses the claims stated above, the Court concludes that Prometheus is unlikely to succeed on its claims for breach of the non-competition and non-solicitation provisions in the Employment Agreement, as well as its claims for tortious interference with contract, misappropriation of trade secrets, and unfair and deceptive trade practices.

103. As for the sole remaining claim, Count II, Gibson's breach of the Employment Agreement's nondisclosure provision, the Court concludes that although Prometheus' bare-bones allegations are sufficient for Rule 12(b)(6) purposes, neither they, nor the evidence presented, satisfies Prometheus' burden either to establish a reasonable likelihood of success on the merits or that it is likely to sustain irreparable loss unless an injunction is issued. Gibson has testified that he did not retain or take any Prometheus property or information. Prometheus, on the other hand, alleges only that it reasonably believes that Defendants are using its confidential information. Noticeably absent are any facts to support Prometheus' belief that Gibson has breached, or is even contemplating a breach of his nondisclosure obligation.

104. To warrant the extraordinary relief that Prometheus requests, more is needed than the fact that Gibson had access to confidential information when he worked for Prometheus and speculation arising from Gibson's attendance on behalf

of Prospecta at a conference also attended by Prometheus. *See Digital Recorders, Inc. v. McFarland*, 2007 NCBC LEXIS 23, at **20-21 (N.C. Super. Ct. June 29, 2007) (court denied a preliminary injunction, in part, because there was a “dearth of evidence in [the] record that [defendants] used any confidential information or trade secrets”); *Aeroflow Inc. v. Arias*, 2011 NCBC LEXIS 21, at **20 (N.C. Super. Ct. July 5, 2011) (preliminary injunction denied when plaintiff failed to present “any specific evidence to bolster its suspicion that [defendant] has or will violate the non-disclosure provision”).

105. Because Prometheus has failed to demonstrate both that it would likely succeed on the merits of its claim and that it would be likely to sustain irreparable harm in the absence of the issuance of an injunction, it has not carried its burden of establishing a right to extraordinary relief. The Court therefore **DENIES** Prometheus’ Motion for Preliminary Injunction.

III. CONCLUSION

106. WHEREFORE, the Court hereby **ORDERS** as follows:

a. Defendants’ Motion to Dismiss is **GRANTED in part** and **DENIED in part**.

i. Defendants’ Motion to Dismiss Count I (Injunctive Relief) is **GRANTED**, and Count I (Injunctive Relief) is dismissed without prejudice to Prometheus’ ability to seek injunctive relief if otherwise warranted;

- ii. Defendants' Motion to Dismiss Count II (Breach of Contract) is **GRANTED** as it pertains to the non-competition and non-solicitation provisions of the Employment Agreement, and as to those provisions, the breach of contract claim is dismissed with prejudice. Except as stated, Defendants' Motion to Dismiss Count II (Breach of Contract) is **DENIED**.
- iii. Defendants' Motion to Dismiss Count III (Tortious Interference), Count IV (Misappropriation of Trade Secrets), and Count V (Violations of North Carolina Unfair or Deceptive Trade Practices Act) is **GRANTED**, and Count III (Tortious Interference), Count IV (Misappropriation of Trade Secrets), and Count V (Violations of North Carolina Unfair or Deceptive Trade Practices Act) are dismissed without prejudice.
- b. Prometheus' Motion for Preliminary Injunction is **DENIED**.

IT IS SO ORDERED, this the 21 day of March, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases