Elior, Inc. v. Thomas, 2024 NCBC 27.

STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 12616
ELIOR, INC., Plaintiff, v. DENNIS THOMAS, Defendant.	**ORDER AND OPINION ON MOTION TO DISMISS**

1. **THIS MATTER** is before the Court on Defendant's Motion to Dismiss the Complaint (the "Motion") pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), (ECF No. 12).

2. The Court, having considered the Motion, the related briefing, and the arguments of counsel at a hearing on the Motion held 1 February 2024, concludes for the reasons stated below that the Motion should be **GRANTED in part** and **DENIED in part** as set forth below.

Littler Mendelson, P.C., by Stephen D. Dellinger and Matthew S. Brown, for Plaintiff Elior, Inc.

Bell, Davis & Pitt, P.A., by Marc E. Gustafson, for Defendant Dennis Thomas

Earp, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

3. The Court does not make findings of fact when ruling on a motion to dismiss. It recites below the factual allegations in the Complaint that are relevant to the Motion.

A. The Parties

4. Plaintiff Elior, Inc. ("Elior") is a Delaware corporation with its principal place of business in Charlotte, North Carolina. (Compl. ¶ 6, ECF No. 3.) Elior is the parent company of multiple subsidiaries operating in the food service management industry for public and private K-12 schools, colleges, universities, hospitals, correctional facilities, and senior living facilities across the United States. (Compl. ¶¶ 7, 16.)

5. Defendant Dennis Thomas ("Thomas") is a citizen and resident of the state of Illinois. (Compl. ¶ 8.) From August 2021 to October 2022, Thomas was employed by Elior, first as "Business Development Director of Growth, K-12," and then as "Senior Business Development Director." (Compl. ¶¶ 22, 39, 45.) Thomas is now employed by OrganicLife, LLC ("OrganicLife"), a direct competitor of Elior. (Compl. ¶¶ 2, 17, 54.)

B. Elior's K-12 Schools Food Services Division

6. Through its subsidiaries, Elior prepares and delivers meals for primary and secondary ("K-12") schools. (Compl. ¶ 16.) In the educational food service industry, "school districts typically issue requests for proposals ("RFPs") for food service contracts during the 'bid season' that begins in early February and continues

through the end of June each year." (Compl. ¶ 18.) These service contracts "are typically signed for a one-year period beginning on July 1 [of one year] and ending on June 30 [of the following year], with the option for up to four (4) one-year renewals[.]" (Compl. ¶ 19.) The contracts are usually renewed "unless there are serious concerns or unless a competitor persuades them to re-open the bidding process." (Compl. ¶ 19.)

7. Contracts are not awarded based solely on price. Customer goodwill and service play key roles in winning a bid for a K-12 contract. (Compl. ¶ 20.) For this reason, Elior alleges that it focuses resources on training its sales and marketing teams to develop strong relationships with its customers. (Compl. ¶ 50.) Elior uses the customer relationship management platform, Salesforce, to compile and manage customer information. (Compl. ¶ 50.) In addition, Elior has invested in a comprehensive cybersecurity infrastructure to ensure the secure storage of client data, project details, Elior's RFP process, and other confidential information. (Compl. ¶ 53.)

C. <u>Thomas's Employment with Elior</u>

8. On 30 August 2021, Thomas began work as Business Development Director of Growth in Elior's K-12 food services division. (Compl. ¶¶ 22, 24.) In this role, Thomas was responsible for "developing, growing, and marketing the K-12 segment by engaging in strategic initiatives to sell products into the self-operated market of the K-12 industry." (Compl. ¶ 23.) Thomas was primarily responsible "for the school sales function, including end user calls, school distributor calls, school promotional management, trade shows, and bids, and selecting, training, directing

and evaluating possible broker relationships in his assigned region." (Compl. ¶ 23.) Thomas's assigned region included Tennessee, Kentucky, Ohio, Indiana, Illinois, and Michigan. (Compl. ¶ 41.) He was permitted to work remotely from his home in Illinois. (*See* Dennis Thomas Offer Document ["Offer Letter"] Compl., Ex. 2.)

9. Thomas was promoted to Senior Business Development Director on 16 June 2022. Throughout his employment Thomas had access to Elior's confidential information, including its financial records, payment terms, marketing strategies, and customer lists. (Compl. ¶¶ 39-40.)

10. While employed by Elior, Thomas worked on a number of Elior's successful school district bids. Specifically, Thomas received a commission for successful bids he made with two school districts in Illinois, the East Aurora School District 131 ("EASD 131") and Cahokia School District 187 ("CSD 187"). Thomas also submitted a response to a request for proposal ("RFP") to renew a food services contract with EASD 131 for the 2022-2023 school year. (Compl. ¶¶ 42-44.) In addition, Elior alleges that Thomas solicited business from the Washington D.C. Public Schools in July 2022, even though it was outside of his assigned region. (Compl. ¶ ¶ 41, 57.)

D. <u>The Employment Agreement</u>

11. Thomas's offer letter from Elior dated 13 August 2021 stated that he would be provided with the details of the non-compete, non-solicitation, non-disparagement, and severance terms of the employment relationship in an Employment Agreement that he would receive "before or on [his] first day of

employment," and that he would be required to sign the Employment Agreement "no later than [his] first day of employment." (Compl. ¶ 3, Offer Letter.) However, Elior alleges that Thomas started work on 30 August 2021 and was not actually required to sign the Employment Agreement until 1 October 2021, a little over a month later. (Compl. ¶¶ 24-25, Ex. 1 ["Employment Agreement"].)

12. On 17 December 2021, Thomas acknowledged the Employment Agreement a second time when he executed Elior's FY22 Growth Team Commission Plan (the "Commission Plan"). The Commission Plan states, "to be eligible for earning under this and any prior or future plan, all employees have an executed Employment Agreement which includes without limitation [Elior's] Confidentiality, Non-Competition and Non-Solicitation policies." (Compl. ¶ 38; Compl. Ex. 3 ["Commission Plan"].)

13. The Employment Agreement requires Thomas "to treat all Confidential Information relating to [Elior] and its Affiliates[1] as confidential." Thomas further agreed "not to disclose Confidential Information, unless permitted by [the Employment Agreement] or as required by [his] position, both (a) during [his] employment and (b) for three (3) years thereafter." (Employment Agreement § 4(c).) The Employment Agreement defines "Confidential Information" broadly as:

> [A]ll trade secrets, designs, ideas, developments, software, methods, techniques, models, processes and other proprietary rights, disclosures, inventions, creations, programs, recipes, menus, financial records,

[1] "'Affiliates' refers to: (a) Elior's parent company (b) any Elior subsidiary, (c) Elior joint ventures or (d) any entity owned (in whole or part) by Elior. (Employment Agreement § 1.)

> payment terms, marketing strategies, contracts, agreements, customer lists, employee information, and data collected, created or developed by or for [Elior] or any of [Elior's] affiliates or subsidiaries.

(Employment Agreement § 4(c).)

14. The noncompetition provision provides that "[d]uring [Thomas's] employment and for twelve (12) months after [his] Separation Date[2] . . . [Thomas would] not [] engage in Competitive Activity within the Prohibited Territory." (Employment Agreement § 4(a).) "Competitive Activity" is defined to mean:

> engaging, or assisting others to engage in the same work, or substantially similar work, that [Thomas] performed on behalf of [Elior] or an Affiliate during the twelve (12) months' prior to [Thomas's] Separation Date either: (i) for a competitor; (ii) for a[n] [Elior] client, or (iii) as part of a service offering in competition with [Elior's] business.

(Employment Agreement § 4(a).) "'Prohibited Territory' means each: (i) city, (ii) county, (iii) parish, and (iv) state where, at any time twelve (12) months prior to [Thomas's] Separation Date, [Thomas]: (i) was assigned responsibility on [Elior] or Affiliate's behalf; or (ii) performed services on [Elior] or Affiliate's behalf. (Employment Agreement § 4(a).)

15. Finally, the Employment Agreement's non-solicitation provision provides that Thomas will not "[d]uring [his] employment and for twenty-four (24) months after [his] Separation Date:

> i. Solicit or employ: any [Elior] or Affiliate contractor, consultant, owner or employee with whom [he]: (A) worked with or (B) became aware through [his] employment by [Elior];
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> ii. Solicit or provide to any [Elior] or Affiliate customer, services or goods similar to those provided by [Elior] or Affiliate, where in the

[2] "Separation Date" is defined as the last day of employment. (Employment Agreement § 8(d).)

> twenty-four (24) months prior to [his] Separation Date, [he]: (A) had contact, communications, or performed work for that customer; (B) assisted that customer; or (C) obtained confidential information about that customer;
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> iii. Solicit or provide to any [Elior] or Affiliate prospective customer, services or goods similar to those offered by [Elior] or Affiliate, where in the twenty-four (24) months prior to [his] Separation Date, [he]: (A) had contact or communication with that prospective customer; (B) assisted with a proposal to that prospective customer; or (iii)(sic) obtained confidential information about [Elior's] sale to the prospective customer;
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> iv. Induce [Elior] or Affiliates supplier to cease being a supplier of [Elior] or any Affiliate;
>
> v. Make disparaging remarks about [Elior] or its Affiliates (except as permitted by law);
>
> vi. Encourage, facilitate or assist another party to engage in the conduct prohibited by this Section.

(Employment Agreement § 4(b).)

16. Elior contends that the twenty-four-month restriction protects its legitimate business interest "because it addresses the cyclical bidding process, the typical one year school district contract and at least one (1) of the up to four (4) one-year renewal options." (Compl. ¶ 32.)

17. In addition to the above restrictive covenants, Thomas also agreed: (1) to provide Elior with thirty days' prior written notice if he resigned; (2) to return "all property, documents, data, equipment, access cards, and keys," to Elior upon his resignation; and (3) to provide Elior "written notice five (5) days' prior to commencing any new position accepted within twelve (12) months after" his resignation. (Employment Agreement § 7.)

18. The Employment Agreement states that it "shall be governed by and construed by the laws of the state (sic) of North Carolina without regard to principles of conflict of laws." (Employment Agreement § 12.)

E. Thomas's Resignation and Subsequent Employment

19. Thomas voluntarily resigned from Elior on 10 October 2022, effective 14 October 2022. (Compl. ¶ 45.)

20. On 11 October 2022, while still employed by Elior, Elior alleges that Thomas forwarded emails from his Elior email account to his personal email account. The emails included correspondence with the Illinois Association of School Boards, the Illinois Association of School Business Officials, and the Chicago International Charter Schools. Elior contends these are all "entities with whom Thomas engaged, solicited, or otherwise performed work" for or on Elior's behalf. (Compl. ¶¶ 46-47.)

21. Elior alleges that Thomas also forwarded certain documents to his personal email address, including the Indiana Department of Education's Administrative Review Findings for the School City of East Chicago, the School City of East Chicago's Financial Audit Report, Elior's proposals and presentations to the Memphis Community School District, and Elior's case reimbursement documentation. (Compl. ¶ 48.)

22. Thomas allegedly began working for OrganicLife as a Vice President of Strategic Development almost immediately after he left work with Elior in October 2022. Elior alleges that Thomas's territories for OrganicLife include school districts in Illinois. (Compl. ¶¶ 54, 56.)

23. Elior alleges that, on 7 December 2022, Thomas attended a virtual pre-bid meeting for the Washington D.C. Public Schools on behalf of OrganicLife, despite having worked on Elior's bid to the same entity just five months earlier. (Compl. ¶ 57.)

24. Elior alleges that it lost a number of contracts to OrganicLife as a result of Thomas's efforts on behalf of his new employer. For example, it claims that CSD 187 declined to renew its contract with Elior and instead entered into a new contract with OrganicLife. (Compl. ¶¶ 58, 59.) In addition, Elior alleges that Thomas used its confidential pricing information on behalf of OrganicLife to undercut Elior on a proposal to EASD 131. OrganicLife won the bid, and Elior lost the contract with EASD 131, its long-time customer. (Compl. ¶¶ 60-61.)

25. On 20 July 2023, Elior initiated this action. The Complaint purports to assert claims against Thomas for breach of contract, breach of the covenant of good faith and fair dealing, conversion, violation of the North Carolina Trade Secrets Protection Act ("NCTSPA"), violation of the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"), and tortious interference with prospective business advantage. (*See generally* Compl.).

26. The case was designated as a complex business case on 18 August 2023 and assigned to the undersigned the same day. (ECF Nos. 1, 2.)

27. Thomas filed the Motion on 4 October 2023. After full briefing, the Court held a hearing on 1 February 2024. (*See* Not. Hr'g., ECF No. 40.)

28. The Motion is now ripe for disposition.

II. LEGAL STANDARD

29. Defendant moves to dismiss this action in its entirety pursuant to both Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. "Rule 12(b)(1) requires the dismissal of any action 'based upon a trial court's lack of jurisdiction over the subject matter of the claim.'" *Watson v. Joyner-Watson*, 263 N.C. App. 393, 394 (2018) (quoting N.C. R. Civ. P. 12(b)(1)). "The plaintiff bears the burden of establishing subject matter jurisdiction." *Lau v. Constable*, 2022 NCBC LEXIS 75, at **10 (N.C. Super. Ct. July 11, 2022).[3]

30. Pursuant to Rule 12(b)(6), dismissal of a claim is proper if "(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 discloses some fact that necessarily defeats the plaintiff's claim." *Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018). 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).

31. When deciding a motion to dismiss, the Court reviews the allegations in the light most favorable to the nonmoving party. *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). Nevertheless, 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.*,

[3] Although Thomas's motion states that he moves pursuant to both Rule 12(b)(1) and Rule 12(b)(6), Thomas does not reference Rule 12(b)(1) in his briefing.

174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)).

32. Furthermore, 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).

33. Both parties request that the Court consider certain evidence extraneous to the Complaint when deciding which State's law applies to the contract claims. Our Court of Appeals has stated:

> If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, *the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56*, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Bar v. Cooper, No. COA22-725, 2024 N.C. App. LEXIS 329 at *8-9 (Apr. 16, 2024) (quoting *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203-04 (2007) (citation omitted) (emphasis in original)).

34. It is well-established that summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. A "genuine issue" is one that can be maintained by substantial evidence. When reviewing such a motion, the

Court views the evidence in the light most favorable to the non-moving party. *Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc.*, 385 N.C. 250, 267 (2023).

35. Even when a claim cannot be fully adjudicated on motion, the Court "shall if practicable ascertain what material facts exist without substantial controversy . . . [i]t shall thereupon make an order specifying the facts that appear without substantial controversy[.]" N.C. R. Civ. P. 56(d).

III. ANALYSIS

36. Thomas argues that (1) the restrictive covenants contained in the Employment Agreement are unenforceable under both Illinois and North Carolina Law, and (2) Elior fails to allege that Thomas engaged in any other actionable wrong. (Def.'s Mem. Supp. of Mot. to Dismiss ["Def.'s Br. Supp"] ECF No. 13.) Elior responds that North Carolina law applies to both the contract and tort claims, and it argues that the facts alleged are sufficient to state the various claims brought. (Pl.'s Opp. to Def.'s Mot. to Dismiss ["Pl.'s Br. Opp."] ECF No. 27.) The Court addresses the claims *seriatim*.

A. Breach of Contract

37. Plaintiff's first three causes of action are for breach of the confidentiality, noncompetition, and non-solicitation provisions in the Employment Agreement.

1. Applicable Law

38. Despite a choice of law provision providing that the parties selected North Carolina as the governing state's law, Defendant argues that the Court should apply Illinois law to the restrictive covenant claims because Illinois's interest is

"materially greater" than North Carolina's interest in those claims. (Def.'s Br. Supp. 4.) Defendant contends because Thomas was and is a resident of Illinois, he received and executed the contract in Illinois, Thomas worked in Illinois, and the alleged harm involved Illinois school districts and information regarding Illinois schools, Illinois's interest is greater than North Carolina's interest. (Def.'s Br. Supp. 4.) This is important, Defendant maintains, because both the Illinois courts and its General Assembly "have expressed that it is the fundamental policy of Illinois that, absent other meaningful consideration, two years of employment is required for a restrictive covenant to be deemed supported by adequate consideration." (Def.'s Br. Supp. 5.)

39. Plaintiff responds that not only does the contract have a valid choice of law provision, but also the last act necessary to form the contract—Elior's signature—occurred in North Carolina. Therefore, Plaintiff contends, it must be interpreted according to North Carolina law. (Pl.'s Br. Opp. 5.)

40. North Carolina has adopted the approach sanctioned by Section 187 of the Restatement (Second) of Conflict of Laws. *Behr v. Behr*, 46 N.C. App. 694, 696 (1980). Section 187 provides in relevant part:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the

> determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187. Accordingly, "[t]he parties' choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental policy of the state of otherwise applicable law." *Behr*, 46 N.C. App. at 696.

41. Before considering whether a public policy exception to the Employment Agreement's choice of law provision applies, the Court must first determine whether another state's law would be "the state of otherwise applicable law" absent the choice-of-law provision. *Wachovia Bank v. Harbinger Cap. Partners Master Fund I, Ltd.*, 2008 NCBC LEXIS 6, at **30 (N.C. Super. Ct. Mar. 13, 2008). In this case, the Court concludes for the reasons below that North Carolina law would be the state of otherwise applicable law with respect to the contract claims even if a choice of law provision did not exist. Consequently, the public policy of the State of Illinois is not relevant.

42. North Carolina "follows the general rule that the validity and construction of a contract are to be determined by the law of the place where the contract is made." *Nytco Leasing Inc. v. Dan-Cleve Corp.*, 31 N.C. App. 634, 640 (1976); *see also Clapper v. Press Ganey Assocs., LLC*, No. COA23-372, 2023 N.C. App. LEXIS 697, at **11 (Nov. 7, 2023) ("The initial inquiry . . . depends on where the contract was entered into."); *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262 (1980) ("[T]he interpretation of a contract is governed by the law of the place where the

contract was made."). "Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365 (1986); *see also Bundy v. Commercial Credit Co.*, 200 N.C. 511, 515 (1931) ("[T]he test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of the minds.").

43. The Employment Agreement contains the following language immediately above the signature lines for both "Employee" and "Company": IN WITNESS WEREOF, the Parties, intending to be legally bound, execute this Agreement." (Employment Agreement 3.) Thus, the Employment Agreement, by its terms, requires the signatures of both parties, the Employee (Thomas) and the Company (Elior), to be binding.

44. It is undisputed that Thomas signed the Employment Agreement via DocuSign in Illinois on 1 October 2021. (Def.'s Br. Supp. 4; Pl.'s Br. Opp., Ex. 1 ["Williams Aff."] ¶¶ 3-4, ECF No. 27.2.; Williams Aff, Ex. 2 ["DocuSign Audit Trail"] ECF No. 27.4.) Forty-five seconds later, the Employment Agreement was signed in North Carolina by Edward Mendoza on behalf of Elior.[4] (Employment Agreement;

[4] Williams testified that Thomas signed the Employment Agreement at 9:58:11 a.m. Pacific Time and that Edward Mendoza subsequently signed it at 9:58:56 a.m. Pacific Time. (*See* Williams Aff. ¶ 3.) The DocuSign Audit Trail, however, shows that the Employment Agreement was signed by Thomas at 7:58:11 a.m. Pacific Time and then by Mr. Mendoza at 7:58:56 a.m. Pacific Time. Regardless of which time is correct, both the Affidavit and the accompanying Audit Trail evidence that Mr. Mendoza signed the contract *after* Thomas.

Williams Aff. ¶ 3; DocuSign Audit Trail.)[5] According to the undisputed evidence, then, the last act necessary to create a binding contract occurred in North Carolina.

45. Defendant relies on the Court of Appeals' decision in *Schwarz v. St. Jude Med., Inc.* for the proposition that an employer's countersignature is not necessary for an employment agreement to be binding. (Defs.' Reply in Supp. of Mot. to Dismiss 1-2, ECF No. 39.) However, unlike the agreement in *Schwarz*, which did not specify that the employer's signature was required to bind the parties, *Schwarz v. St. Jude Med., Inc.*, 254 N.C. App. 747, 759 (2017), the language immediately above the signature lines in the Employment Agreement specifies that each signature reflects that party's intention to be legally bound to its terms. The Court concludes that this case is more analogous to the facts of *Bundy v. Commercial Credit Co.*, in which a contract negotiated in North Carolina was not enforceable until it was signed by the company's officials. *Bundy*, 200 N.C. at 514-15.

46. Given that the last act necessary for the Employment Agreement to be enforceable occurred in North Carolina, Illinois would not be the "state of applicable law" even in the absence of the choice of law provision. Therefore, no basis exists

[5] With respect to the issue of where the contract was formed, both parties requested that extraneous evidence be considered and that this aspect of the Motion be treated as one for summary judgment. (Hr'g Trans. 28:1-18; 46:14-25; 47:1-4, ECF No. 47.) *See Fowler v. Williamson*, 39 N.C. App. 715, 717 (1979) ("Where extraneous matter is received and considered on a Rule 12(b)(6) motion to dismiss, the motion should be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in [N.C. R. Civ. P. 56]."). Because the Court has, at the urging of both parties, considered the Williams Affidavit, and because the Court has concluded that no genuine issue of material fact exists with respect to a determination that the last act necessary to form the contract occurred in North Carolina, this aspect of the Court's Order and Opinion is decided pursuant to Rule 56(d) of the North Carolina Rules of Civil Procedure.

upon which to entertain an argument regarding the public policy of Illinois. Accordingly, the Court gives effect to the choice of law provision and analyzes the restrictive covenants under North Carolina law to determine whether Plaintiff has stated claims that can withstand Defendant's Rule 12(b)(6) motion. *Troublefield v. Automoney, Inc.*, 284 N.C. App. 494, 498 (2022) ("When 'parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect.'" (quoting *Tanglewood Land Co.*, 299 N.C. at 262).)

2. Consideration

47. Defendant contends that the Complaint fails to allege that the Employment Agreement is supported by consideration. (*See* Def.'s Br. Supp. 7-8.) Specifically, Thomas argues that because he began working for Elior on 30 August 2021 and the Employment Agreement was not executed until 1 October 2021, his employment cannot serve as a consideration for the Employment Agreement. (Def.'s Br. Supp. 7.)

48. Elior responds that the parties agreed that Thomas would be subject to restrictive covenants prior to the start of his employment. It contends that the fact that execution of their written agreement did not occur until weeks later has no legal effect. (Pl.'s Br. Opp. 10-11.) The Court disagrees.

49. "[W]hen the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration." *Forrest*

Paschal Machinery Co. v. Milholen, 27 N.C. App. 678, 686-87 (1975) (quoting *Greene Co. v. Kelley*, 261 N.C. 166, 168 (1964)). However, "covenants not to compete which were part of the original verbal employment contract, are founded on valuable consideration." *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 468 (2001).

50. Here, Elior's offer letter to Thomas specified that he would receive and be required to execute "[b]efore or on [his] first day of employment," an Employment Agreement with restrictive covenants, as well as terms regarding severance. Importantly, however, the offer letter provided no further details. (*See* Offer Letter.) Unlike the facts in *Dunbar*, nothing in the Complaint suggests that the parties reached a verbal agreement with respect to the restrictions prior to the start of Thomas's employment. *See Dunbar*, 147 N.C. App. at 468; *Stevenson v. Parsons*, 96 N.C. App. 93, 97 (1989) ("We hasten to point out . . . that the terms of such an oral covenant later executed in writing must have been agreed upon at the time of employment in order for the latter written covenant to be enforceable.").

51. Here, Thomas accepted a written offer of employment and began work. For reasons not alleged, he did not sign the Employment Agreement until a month later. Therefore, although restrictive covenants were contemplated in general in the offer letter and Thomas's employment was conditioned on his acceptance of an Employment Agreement detailing those terms, there is no allegation that the restrictions themselves were even disclosed to Thomas, much less agreed upon, until a month after Thomas's employment began, when he signed the Employment

Agreement. Therefore, Thomas's employment does not provide consideration for the restrictive covenants.

52. However, Plaintiff alleges that Thomas received additional consideration after he started work that may support the restrictive covenants. The Employment Agreement not only detailed the confidentiality, noncompetition, and non-solicitation obligations, but also it provided for three to six months of severance, depending on the circumstances. (Employment Agreement § 8.) Furthermore, Thomas again acknowledged the restrictive covenants in his executed Employment Agreement when he was presented with, and accepted, Elior's Commission Plan on 17 December 2021, well before his resignation in October 2022. The Commission Plan specifies that Thomas's eligibility to earn commissions was conditioned on "an executed Employment Agreement which includes without limitation [Elior's] Confidentiality, Non-Competition and Non-Solicitation policies." (Compl. ¶ 38; Commission Plan.)

53. The Court concludes, therefore, that the Complaint adequately alleges the existence of consideration to support the restrictive covenants, and Defendant's Motion to Dismiss on that basis is **DENIED**.

3. Breach of Confidentiality Obligations

54. Turning to the confidentiality obligations in the Employment Agreement, Defendant argues that Plaintiff fails to state a claim for breach because Elior does not allege that Thomas emailed to himself the information he allegedly used to solicit customers in violation of the confidentiality provision. Thomas

concludes, therefore, that Elior's claim for breach must be based on an unrecognized theory of inevitable disclosure. (*See* Def.'s Br. Supp. 10-13.) The Court disagrees.

55. The Complaint alleges not only that Thomas emailed himself documents that contained Confidential Information, (Compl. ¶ 68(a)), but also that, upon information and belief, Thomas used "Plaintiff's customer lists, financial records and/or payment terms to undercut Plaintiff's contract terms with Plaintiff's then-current customers, including Cahokia School District 187 and East Aurora School District 131[.]" (Compl. ¶ 68(b); *see also* Compl. ¶¶ 58-61.) The definition of "Confidential Information" in the Employment Agreement includes all three types of information, and the described use of this information is alleged to be a breach of the confidentiality provisions of the Employment Agreement. (Compl. ¶¶ 69-70.) The allegations are sufficient to state a claim for breach.[6] *Poor v. Hill*, 138 N.C. App. 19, 26 (2000) (the elements of a breach of contract claim are "(1) [the] existence of a valid contract and (2) [a] breach of the terms of that contract.").

56. Accordingly, Defendant's Motion to Dismiss as to Plaintiff's claim for breach of the confidentiality obligations (Count I) is **DENIED**.

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[6] Contrary to Defendant's argument, it does not appear to the Court that Plaintiff relies on the theory of inevitable disclosure to support a breach of contract claim. Defendant is correct, however, that such a theory has not been recognized by the appellate courts of this State. *See, e.g., Se. Anesthesiology Consultants v. Charlotte-Mecklenburg Hosp. Auth.*, 2018 NCBC LEXIS 137, at *57-59 (N.C. Super. Ct. June 22, 2018) (observing that a federal district court's prediction that North Carolina would adopt and apply the inevitable disclosure doctrine "ha[d] still not come to fruition" nearly twenty-two years later (citing *Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1459 (M.D.N.C. 1996))); *NFH, Inc. v. Troutman*, 2019 NCBC LEXIS 66, at *44 (N.C. Super. Ct. Oct. 29, 2019) (holding that an allegation of inevitable disclosure is insufficient to state a breach of contract claim); *cf. Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 693 (1976) (declining to award injunctive relief on the basis of inevitable disclosure and observing that "North Carolina courts have never enjoined an employee from working for a competitor merely to prevent disclosure of confidential information.").

4. Breach of Noncompetition Provision

57. "In North Carolina, covenants not to compete are considered restraints on trade and are closely scrutinized." *Prometheus Grp. Enters., LLC v. Gibson*, 2023 NCBC LEXIS 42, at **11 (N.C. Super. Ct. Mar. 21, 2023); *see also 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.").

58. "[F]or a non-competition agreement to be valid and enforceable it must be: '(1) in writing; (2) part of an employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) designed to protect a legitimate business interest.' " *Aeroflow Inc. v. Arias*, 2011 NCBC LEXIS 21, at **16 (N.C. Super. Ct. July 5, 2011) (quoting *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 655 (2009)). "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." *Prometheus Grp. Enters., LLC*, 2023 NCBC LEXIS 42, at **12; *see also United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 652-53 (1988) ("When an employee, during the course of his or her employment, develops or improves customer relationships, the employee is establishing business goodwill, which is a valuable asset of the *employer*[.]" (emphasis in original)).

59. 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; *Keith v. Day*, 81 N.C. App. 185, 193 (1986). Therefore, the Court analyzes the noncompetition provision "keeping in mind that the ultimate determination depends on whether each restraint is no more restrictive than necessary to protect the legitimate business interest implicated." *Digit. Realty Trust, Inc. v. Sprygada*, 2022 NCBC LEXIS 71, at **24 (N.C. Super. Ct. July 1, 2022).

60. Defendant contends that the noncompetition provision in his Employment Agreement is overbroad and therefore unenforceable. The Court disagrees. The noncompetition provision limits Thomas from "engag[ing] in Competitive Activity within the Prohibited Territory" for twelve months following his separation from Elior. (Employment Agreement § 4(a).) "Competitive Activity" is limited to the "same" or "substantially similar work" that Thomas performed on behalf of Elior or an Elior Affiliate. (Employment Agreement § 4(a).) An "Affiliate" refers to "(a) Elior's parent company[,] (b) any Elior subsidiary, (c) Elior joint ventures or (d) any entity owned (in whole or in part) by Elior." (Employment Agreement § 1.) The "Prohibited Territory" is limited to "each: (i) city, (ii) county, (iii) parish, and (iv) state where, at any time twelve (12) months prior to [Thomas's] Separation Date, [he]: (i) was assigned responsibility on [Elior] or Affiliate's behalf; or (ii) performed services on [Elior] or Affiliate's behalf." (Employment Agreement § 4(a).)

61. Some elasticity exists when analyzing time and territory restrictions because they are read in tandem to determine their reasonableness. *Hartman v. W.*

H. Odell & Assocs., 117 N.C. App. 307, 311-12 (1994). Here, the temporal restriction requires a look-back for twelve months and then extends for twelve months. *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 280 (2000) (explaining that the "look-back" period must be added to the restrictive period to determine the length of the time limitation). It is still relatively short at two years. *Harwell Enters., Inc. v. Heim*, 276 N.C. 475, 481 (1970) (upholding a two-year restriction); *Dunbar*, 147 N.C. App. at 469 (same); *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 229 (1990) (observing that where the activity prohibited is "narrowly confined[,]. . . a two year time restriction is not improper.").

62. The reasonableness of the territorial restriction is evaluated using 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. Thomas's Employment Agreement restricts him from competing only in the cities, counties, parishes, and states where Thomas was assigned responsibility or performed services at any time twelve months prior to his Separation Date. At this stage, the Court does not conclude that such a restriction is unreasonable, particularly given its relatively short duration.

63. As for the scope of the restriction, while our appellate courts have consistently held that restrictions that purport to prohibit former employees from associating in any capacity with businesses providing similar services are

unenforceable, noncompetition provisions that restrict a former employee from engaging in *the same or similar work* for a competitor *that he performed* on behalf of his former employer are generally enforceable. *See e.g., Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 638-39 (2002) (enforcing covenant limited to prohibiting employee from working in an identical position for a direct competitor); *cf. Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 91-92 (2007) (enforcing covenant allowing employee to work for a competitor in a capacity unrelated to his former employer's business). In this instance, use of the word "similar" does not render the noncompetition provision unenforceable. The prohibition is on the type of work Thomas performed on behalf of Elior or its Affiliate, not on any position that he might take with a business that is similar.

64. Use of the word "affiliate" can also lead to overbreadth in some circumstances. *See e.g.*, *Med. Staffing Network, Inc.*, 194 N.C. App. 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.]"); *Prometheus Grp. Enters.*, 2023 NCBC LEXIS 42, at **16-17 (refusing to enforce noncompete that attempted to restrict former employee from joining a "related" business); *Digit. 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))). Indeed, in his brief, Thomas asks the Court to take judicial notice

of the fact that Elior is the parent of at least twelve subsidiaries that service numerous industries. (Def.'s Br. Supp. fn. 1.)

65. Here, however, the reference to "Affiliate" is again linked to Thomas's former duties. He must have been assigned responsibility for, or performed work on behalf of, the Affiliate for it to be relevant to the analysis. Thus, the word "Affiliate" is used to define the scope of the employee's former duties, not to limit Thomas's ability to take an unrelated position with a business that competes in some capacity with one of Elior's Affiliates. Used in that context, the reference to Elior's Affiliate does not create overbreadth.

66. As for breach, Plaintiff has alleged that Thomas is now employed by OrganicLife—Elior's direct competitor. Elior alleges that Thomas is currently working as Vice President of Strategic Development for OrganicLife in Illinois, a state in which Thomas performed services for Elior, and that he is "providing sales, marketing, and business development services to OrganicLife that are the same or similar to the function and services he provided to Plaintiff." (Compl. ¶¶ 77-78, 80.) As such, Plaintiff has sufficiently stated a claim for breach of contract with respect to the Employment Agreement's noncompetition obligations.

67. Accordingly, Defendant's Motion to Dismiss as to Plaintiff's claim for breach of the Employment Agreement's noncompetition provisions (Count II) is **DENIED**.

5. Breach of Non-Solicitation Obligations

68. Thomas's brief does not speak to the employee non-solicitation provision, so the Court does not address it. Instead, Thomas argues that Plaintiff's claim for breach of the customer non-solicitation obligations should be dismissed as overbroad because the provision extends, not to those customers with whom he had meaningful contacts, but to any customer with whom Thomas had any contact or communication at all, regardless of the extent or purpose of the contact or communication. (*See* Def.'s Br. Supp. 10.)

69. Elior responds that "the dispositive factor is not 'materiality' of contact with the customer, but whether the employee had contact with or knowledge about the customer during their employment." (Pl.'s Br. Opp. 14 (emphasis omitted).)

70. The same requirements used to analyze noncompetition restrictions apply to non-solicitation restrictions. *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 2018 NCBC LEXIS 42, at *27 (N.C. Super. Ct. May 8, 2018). However, non-solicitation agreements may be more easily enforced. *Asheboro Paper & Packaging, Inc. v. Dickinson,* 599 F. Supp. 2d 664 (M.D.N.C. Feb. 19, 2009); *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). This is because, in many cases, non-solicitation provisions are "more tailored and less onerous on employees' ability to earn a living" than noncompete restrictions. *McGriff v. Hudson*, 2023 NCBC LEXIS 4, at **17 (N.C. Super. Ct. Jan. 17, 2023) (quoting *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 WL 5316772, 2011 NCBC 41 at *10 (N.C. Super. Ct. Nov. 3, 2011)).

71. This Court has observed that "[a] customer-based restriction on solicitation is analyzed in much the same manner as a geographic restriction, taking into consideration many of the same factors and, particularly, the time period of the restriction." *Sandhills Home Care, L.L.C.*, 2016 NCBC LEXIS 61, at **26 (citing *Dunbar*, 147 N.C. App. at 469).

72. As for the time period, our Court of Appeals has held that, just as with noncompetition provisions, the "look-back" rule applies to a customer-based non-solicitation restriction. *Sterling Title Co. v. Martin*, 266 N.C. App. 593, 599 (2019) (citing *Farr Assocs., Inc.*, 138 N.C. App. at 280). Applying the look-back rule as stated above, the restricted period here is either three or four years,[7] neither of which is *per se* unreasonable.

73. However, when other language in the customer non-solicitation provision is considered, the overall result is problematic. Thomas is prohibited from soliciting or providing services or goods similar to those provided by Elior (or an Affiliate) if, in the two years prior to his Separation Date, he had any contact, communications, or performed work for the customer; assisted the customer; or obtained confidential information about the customer. (Employment Agreement § 4(b)(ii).) Similar language is used to restrict the solicitation of prospective customers. (Employment Agreement § 4(b)(iii).)

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[7] The Employment Agreement specifies that the post-employment restriction is twenty-four (24) months except "where state law prohibits [a post-employment duration of] twenty-four (24) months, then for the twelve (12) months after [the employee's] Separation Date." (Employment Agreement § 4(b), fn 1.)

74. To be enforceable, a customer non-solicitation provision should generally be limited to prohibiting the employee from soliciting customers with whom the employee "actually had contact during his former employment." *Lab. Corp. of Am. Holdings v. Kearns*, 84 F. Supp. 3d 447, 459 (M.D.N.C. Jan. 30, 2015); *see also Aesthetic Facial & Ocular Plastic Surgery Ctr., P.A. v. Zaldivar*, 264 N.C. App. 260, 273 (2019) (holding that non-solicitation clause in employment agreement was unreasonable where it foreclosed solicitation of potential clients "with whom [former employee] had no relationship"); *Farr. Assocs., Inc.,* 138 N.C. App. at 282 ("[A] client-based limitation cannot extend beyond contacts made during the period of the employee's employment."); *Akzo Nobel Coatings, Inc.*, 2011 WL 5316772, 2011 NCBC 41 at *11 ("Generally, covenants which seek to restrict a former employee from competing with future or prospective customers with whom they had no personal contact during employment fail as unnecessary to protect the legitimate business interests of the employer.").

75. In *Wells Fargo v. Link*, this Court observed that, especially when the customer-based restriction is tied to an affiliate of the former employer, a legitimate business interest does not arise unless the former employee's prior contact with the customer was significant: "[i]f [the defendants] had *significant* interactions with customers or prospective customers of affiliate companies of Wells Fargo, Wells Fargo may have a legitimate interest in restricting them from soliciting those customers." 2018 NCBC LEXIS 42, at *16 (N.C. Super Ct. May 8, 2018) (emphasis added), *aff'd per curiam*, 372 N.C. 261 (2019*); see also 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."); *Andy-Oxy Co., Inc. v. Harris*, No. COA10-10, 2019 N.C. App. LEXIS 902, at * (Nov. 5, 2019) ("By vaguely referring to all customers of Andy-Oxy within the restricted area without any limitations in scope to customers with whom Harris had *material c*ontact, the non-solicitation covenant was overly broad and did not protect a legitimate business interest, rendering it unenforceable."); *Rel. Ins. Inc.*, 2022 NCBC LEXIS 49, at *34-35 (holding that customer-based restriction that could preclude former employee from soliciting clients or prospective clients with whom they never actually had contact did not protect the legitimate business interests of the employer); *cf. 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.).

76. Our courts have occasionally found a customer non-solicitation provision to be enforceable without requiring an allegation that the employee had significant contact with the customers at issue, but only in situations where the employer's customer base was defined such that the employee could easily identify those customers that were off-limits. *See e.g., Triangle Leasing Co.*, 327 N.C. at 229 (upholding a non-solicitation provision where the contract did not "prohibit all competition by [Defendant] throughout North Carolina, but rather merely

restrain[ed] him from soliciting the business of plaintiff's known customers in areas in which the company operates."); *Dunbar*, 147 N.C. App. at 469 (upholding a two-year prohibition where the employee was prohibited "from soliciting any customers having an active account with plaintiff at the time of his termination or prospective customer whom defendant himself had solicited within the six months immediately preceding his termination."). No such allegation appears in Elior's Complaint.

77. Relatedly, a prohibition on the solicitation of customers about whom Thomas had any confidential information is problematic when the term "confidential information" (lower case) as it applies to customers is left undefined. *Cf. Wells Fargo Ins. Servs. USA*, 2018 NCBC LEXIS 42, at *19-20.

78. In summary, when, as here, the restriction is written to prevent Thomas from being able to solicit a customer (or a prospective customer) of Elior (or its Affiliates) with whom Thomas had even minimal contact, communication, or received any type of undefined "confidential information," the provision is too broad to protect Elior's legitimate business interests and is therefore unenforceable.

79. However, application of the blue pencil doctrine to narrow the restriction changes the result. The doctrine permits North Carolina courts to enforce divisible or separable sections of restrictive covenants while striking portions that are unenforceable. *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528 (1989) ("If the contract is separable, however, and one part is reasonable, the courts will enforce the reasonable provision." (*citing Welcome Wagon, Inc. v. Pender*, 255 N.C. 244 (1961)). The blue pencil doctrine is not a license to rewrite the contract, however. "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 Troutman*, 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.").

80. To be a "distinctly separable" provision, other restrictions in the covenant must not be dependent on the portion to be excised. *See Sec. Nat'l Invs., Inc. v. Rice*, No. COA16-215, 2016 N.C. App. LEXIS 1119, at *14 (Nov. 15, 2016). Ultimately, application of the blue pencil doctrine is within the discretion of the Court. *See McGriff Ins. Servs. v. Hudson*, 2023 NCBC LEXIS 4, at **32 (N.C. Super. Ct. Jan. 17, 2024) (citing *Tech. Ptnrs., Inc. v. Hart*, 298 F. App'x 238, 243 (4th Cir. 2008) (applying North Carolina law)).

81. Here, the provisions of section 4(b)(ii) and 4(b)(iii) are stated in the disjunctive (using the word "or"), making them separable. With respect to section 4(b)(ii), by striking subparts (B) and (C) and limiting subpart (A) to the performance of work for the customer, one is left with a restriction prohibiting Thomas from soliciting or providing to any customer of Elior, (or its Affiliate), services or goods similar to those provided by Elior (or its Affiliate), where in the twenty-four (24) months prior to Thomas's Separation Date, Thomas performed work for that customer. Narrowed in this way, the provision protects Elior's legitimate business interest in its goodwill with the customer and is therefore enforceable.

82. As for section 4(b)(iii), by striking subparts (A) and (B)[8], one is left with a restriction prohibiting Thomas from soliciting or providing to any prospective customer of Elior, (or its Affiliate), services or goods similar to those offered by Elior (or its Affiliate), where in the twenty-four (24) months prior to Thomas's Separation Date, he obtained confidential information about a (proposed) sale to the prospective customer. Again, by limiting the restriction to specific prospective customers about which Thomas had confidential information, Elior protects a legitimate business interest.

83. Accordingly, with respect to the non-solicitation obligations in the Employment Agreement, as blue-penciled, Defendant's Motion to Dismiss is **DENIED**.

B. Breach of Covenant of Good Faith and Fair Dealing

84. Elior's claim for breach of the implied covenant of good faith and fair dealing is based upon Thomas allegedly: (1) taking Plaintiff's property, including Plaintiff's Confidential Information; (2) working for OrganicLife, Plaintiff's direct competitor; and (3) soliciting Plaintiff's customers using, upon information and belief, Plaintiff's Confidential Information, all in violation of the Employment Agreement. (Compl. ¶ 95.)

[8] Subpart B is stricken in accordance with the reasoning in *Hejl v. Hood Hargett & Associates*, finding a noncompetition restriction unreasonable when it extended to potential clients for whom the defendant "had merely quoted a product or service." 196 N.C. App at 307. *But see Dunbar*, 147 N.C. App. at 469 (upholding a restriction on prospective customer "whom defendant himself had solicited within the six months immediately preceding his termination.")

85. North Carolina law has long recognized that a covenant of good faith and fair dealing is implied in every contract and requires the contracting parties not to "do anything which injures the rights of the other to receive the benefits of the agreement." *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228 (1985) (citation omitted). It is a "basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement." *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56 (2005) (quoting *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App. 743, 746 (1979)). The covenant requires parties to avoid "arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the [contract's] fruits." *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985) (interpreting Restatement 2d of Contracts § 205 (1981)).

86. The implied covenant of good faith and fair dealing has been called the "spirit of the contract." *Bicycle Transit Authority, Inc.*, 314 N.C. at 230 (defendant breached both the "letter and the spirit of the contract."); *accord Allen v. Allen*, 61 N.C. App. 716, 720 (1983) (party's actions were "clear violations of both the letter and spirit of the contract."). A material term, the implied covenant is the gap-filler that guides the parties in the performance of the express terms of the contract. *Howard v. IOMAXIS, LLC*, 2022 NCBC LEXIS 146, at **15 (N.C. Super. Ct. Dec. 5, 2022). "'Evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance' may

constitute breach of the implied covenant." *Intersal, Inc. v. Wilson*, 2023 NCBC LEXIS 29, at **67 (N.C. Super. Ct. Feb. 23, 2023) (quoting Restatement 2d of Contracts § 205 cmt. d (1981)).

87. Where, as here, a claim for breach of the implied covenant of good faith and fair dealing is based upon the same acts as a claim for breach of contract, our Court of Appeals treats "the former claim as 'part and parcel' of the latter." *Cordaro v. Harrington Bank, FSB*, 260 N.C. App. 26, 38-29 (2018) (citing *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19 (1996), *disc. review denied*, 345 N.C. 344 (1997)). This means that the fate of an implied covenant claim rises and falls with the fate of the breach of contract claim if it is based on the same underlying facts. In other words, if the breach of contract claim fails, there can be no breach of the implied covenant. *See, e.g., Suntrust Bank v. Bryant/Sutphin Prop., LLC*, 222 N.C. App. 821, 833 (2012) ("As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts."). However, the converse is also true. "Where the breach of contract claim survives, whether the implied covenant was one of the terms breached remains an issue to be determined." *Intersal, Inc.*, 2023 NCBC LEXIS 29, at **68-69.

88. In this case, Plaintiff's breach of contract claim survives. Accordingly, Defendant's Motion to Dismiss as to Plaintiff's claim for breach of the implied covenant of good faith and fair dealing (Count IV) is **DENIED**.

C. <u>Conversion</u>

89. In addition to Elior's contract claims, it asserts tort claims for conversion and for tortious interference with prospective economic advantage. As our Supreme Court has stated, "this Court's jurisprudence favors the use of the *lex loci* test in cases involving tort or tort-like claims." *Scigrip, Inc. v. Osae*, 373 N.C. 409, 420 (2020). *See also Terry v. Pullman Trailmobile, Div. of Pullman, Inc.*, 92 N.C. App. 687, 690 (1989) (citing *Boudreau v. Baughman*, 322 N.C. 331, 335 (1988)). "The law of the place where the injury occurs controls tort claims, because an act has legal significance only if the jurisdiction where it occurs recognizes that legal rights and obligations ensue from it." *Terry*, 92 N.C. App. at 690. Accordingly, "under North Carolina law, when the injury giving rise to a [tort] claim occurs in another state, the law of that state governs resolution of the substantive issues in the controversy." *Boudreau*, 322 N.C. at 335.

90. Elior bases its conversion claim on allegations that Thomas emailed Elior's Confidential Information to his personal email account. (Compl. ¶¶ 68(a), 100.) The Complaint does not allege whether the resulting injury occurred in Illinois or North Carolina. However, the Court need not determine which state's law applies because Plaintiff has failed to state a claim for conversion under either Illinois or North Carolina law.

91. Under Illinois law, "[t]o prove conversion, a plaintiff must establish that (1) [it] has a right to the property; (2) [it] has an absolute and unconditional right to the immediate possession of the property; (3) [it] made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion,

or ownership over the property." *Cirrincione v. Johnson*, 703 N.E.2d 67, 70 (S. Ct. Ill. 1998).

92. Under North Carolina law, conversion "is defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Addison Whitney, LLC v. Cashion*, 2017 NCBC LEXIS 51, at *15 (N.C. Super. Ct. June 9, 2017) (internal quotation marks and citation omitted).

93. In both states, the essence of the tort is deprivation of the property to its rightful owner. *Compare id.* ("The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner."), *with Roderick Dev. Inv. Co. v. Cmty. Bank*, 282 Ill. App. 3d 1052, 1057 (1st Dist. 1996) ("The essence of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held.").

94. Elior alleges that Thomas forwarded emails and other documents from his work email address to his personal email address, (Compl. ¶¶ 46-48), but there is no allegation that the information on Elior's computer system was deleted or that Elior was otherwise deprived of access to those emails or documents. As such, Elior has failed to state a claim for conversion under both North Carolina and Illinois law.[9]

[9] Given the Court's conclusion, it does not address Defendant's argument with respect to the economic loss rule.

95. Accordingly, Defendant's Motion to Dismiss as to Plaintiff's claim for conversion (Count V) is **GRANTED**, and this claim is **DISMISSED** without prejudice.[10]

D. Violation of the North Carolina Trade Secrets Protection Act

96. North Carolina also applies the *lex loci delicti* rule to misappropriation of trade secret claims. *See SciGrip, Inc.* 373 N.C. at 420 ("[T]he proper choice of law rule for use in connection with our evaluation of [Plaintiff's] misappropriation of trade secrets claim is the *lex loci* test.").

97. As previously discussed, under the *lex loci* rule, "[t]he law of the place where the injury occurs controls tort claims[.]" *Terry*, 92 N.C. App. at 690. "[O]rdinarily, the state where the last event necessary to make the actor liable or the last event required to constitute the tort takes place, applies." *Env't Holdings Grp., LLC v. Finch*, 2022 NCBC LEXIS 45, at **16 (N.C. Super. Ct. May 16, 2022) (quoting *SciGrip,* 373 N.C. at 420); *see also RoundPoint Mortg. Co. v. Florez*, 2016 NCBC LEXIS 18, at **57 (N.C. Super. Ct. Feb. 18, 2016) ("In applying the *lex loci* test, the plaintiff's injury is considered to be sustained in the state where the last act occurred giving rise to the injury." (cleaned up)).

98. Defendant contends that the alleged misappropriation took place in Illinois, and thus, the North Carolina Trade Secrets Protection Act is inapplicable. (Def.'s Br. Supp. fn. 11.) Elior responds that the Complaint does not contain

[10] "The decision to dismiss an action with or without prejudice is in the discretion of the trial court[.]" *First Fed. Bank v. Aldridge*, 230 N. C. App. 187, 191 (2013).

"allegations as to locations," and that the allegations leave open the possibility that the last act happened in North Carolina. (Pl.'s Br. Opp. 21.)

99. But the Complaint fails to allege any fact that would support an inference that the last act giving rise to the injury occurred anywhere other than in Illinios. Elior alleges that Thomas is currently a resident of Illinois, that Thomas was a resident of Illinois during his employment, that Thomas's position was remote, that his sales territory included Illinois, and that the alleged misappropriation occurred in connection with CSD 187 and EASD 131 (two Illinois school districts). (Compl. ¶¶ 8, 41, 60-61, 108; Offer Letter.) There are no allegations in the Complaint that Thomas engaged in misconduct in North Carolina, only that Elior, the allegedly injured party, maintains its principal place of business in North Carolina. (Compl. ¶ 6.)

100. Because Elior has not alleged that the last act, or indeed any act contributing to the alleged misappropriation, occurred in North Carolina, the North Carolina Trade Secrets Protection Act does not apply. Accordingly, Defendant's Motion to Dismiss Plaintiff's claim for violation of the North Carolina Trade Secrets Protection Act (Count VI) is **GRANTED**, and this claim is **DISMISSED** without prejudice.

E. Violation of the North Carolina UDTPA

101. To state a claim under the North Carolina UDTPA, a plaintiff must allege: "(1) 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 v. Manly*, 370 N.C. 602, 612 (2018).

102. Elior's UDTPA claim is premised upon Thomas's alleged breach of the confidentiality provisions of the Employment Agreement and Thomas's alleged misappropriation of trade secrets. (*See* Compl. ¶¶ 118-19.)

103. Plaintiff's claim for misappropriation of trade secrets pursuant to the NCTSPA fails, and its UDTPA claim premised on the misappropriation of trade secrets claim fails as well. *See, e.g., Krawiec*, 370 N.C. at 613; *Combs & Assocs. v. Kennedy,* 147 N.C. App. 362, 374 (2001); *AmeriGas Propane, L.P. v. Coffey*, 2015 NCBC LEXIS 98, at **40-41 (N.C. Super. Ct. Oct. 15, 2015).

104. Moreover, "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain [a UDTPA claim]." *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62 (1992). However, Elior alleges that Thomas engaged in deceptive conduct when he breached the confidentiality provisions of the Employment Agreement. While allegations of a simple breach alone will not support a UDTPA claim, allegations that the breach was accomplished through fraud or other deceptive conduct will. *Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 97 N.C. App. 511, 518 (1990) ("A mere breach of contract does not

constitute an unfair or deceptive trade practice. The conduct must be fraudulent or deceptive.").

105. Even so, as discussed above, Elior's injury for breach of the confidentiality provisions in the Employment Agreement was sustained in Illinois, the state where the last act occurred giving rise to the injury. Therefore North Carolina's Unfair and Deceptive Trade Practices Act does not apply.[11] Accordingly, Defendant's Motion to Dismiss as to Plaintiff's UDTPA claim (Count VII) is **GRANTED**, and this claim is **DISMISSED** without prejudice.

F. Tortious Interference with Prospective Advantage

106. North Carolina also applies the *lex loci delicti* rule to tortious interference claims. *See Soma Tech. v. Dalamagas*, 2017 NCBC LEXIS 43, *18-19 (N.C. Super. Ct. May 11, 2017). "North Carolina does not recognize a bright line rule that a plaintiff suffers its injury at its principal place of business[.]" *Id.* at *19. Instead, the Court "must analyze and determine where a plaintiff in fact sustained its alleged injury to determine choice of law." *Id.*

107. Elior contends that its alleged injury occurred when Thomas used its Confidential Information to solicit customers, including CSD 187 and EASD 131 on behalf of OrganicLife. (Compl. ¶ 127.) There is no allegation that Thomas has interfered with prospective or actual customer relationships outside of Illinois, and Plaintiff's conclusory allegation that Thomas is interfering in its relationships with

[11] The same would be true if the "most significant relationship" test were applied. *See Env't Holdings Grp., LLC,* 2022 NCBC LEXIS 45, at **13 ('[i]t is currently unsettled in North Carolina whether a UDTP claim . . . is analyzed under the *lex loci* test or the most significant relationship test.").

"other customers" is not enough. Since the named school districts are located in Illinois, Elior's alleged injury was in Illinois. *See Soma Tech.*, 2017 NCBC LEXIS 43, at *21-22 (holding that where defendants' conduct caused a business to cease doing business with plaintiff in India, plaintiff's injury occurred in India). Therefore, under the *lex loci delicti* rule, Illinois law applies to Plaintiff's tortious interference with prospective (economic) advantage claim.

108. To successfully plead tortious interference with prospective economic advantage under Illinois law, Elior must allege that "(1) [it] had a reasonable expectancy of a valid business relationship; (2) [Thomas] knew about the expectancy; (3) [Thomas] intentionally interfered with the expectancy and prevent[ed] it from ripening into a valid business relationship; and (4) the intentional interference injured the plaintiff." *Boffa Surgical Grp. LLC v. Managed Healthcare Assocs.*, 47 N.E.3d 569, 577 (1st Dist. 2015).

109. In September 2021, the Illinois First District Court of Appeals held in an unpublished opinion that "[i]t is not reasonable . . . to expect the existence of a current renewable service contract to serve as a guarantee that the agreement would continue indefinitely." *CD Consortium Corp. v. St. John Cap. Corp.*, 2021 Ill. App. Unpub. LEXIS 1677, at **7 (Sept. 30, 2021). The Court determined that alleging a "mere hope" that customers would not terminate the automatic renewal of their

contracts did not sufficiently allege the "reasonable expectancy" necessary to state a claim for tortious interference. *Id.* at **8.[12]

110. Here, Elior alleges that EASD 131 had been Elior's "long-time customer" since 2016—well before Thomas became employed by Elior. (Compl. ¶¶ 42, 60.) It alleges that Elior was awarded a Food Service Management Contract with EASD 131 in January 2022 "through the rebid process for which Thomas received a commission." (Compl. ¶ 42.) It alleges that on or around 26 July 2022, Thomas submitted a proposal to EASD 131 on Elior's behalf for a contract that was effective from 21 August 2022 through June 2023. (Compl. ¶ 44.) Elior alleges that school districts "typically re-new (sic) contracts without re-opening the bidding process" but it admits that a competitor may persuade them to do so. (Compl. ¶ 19.)

111. Elior alleges that on 23 March 2023, Thomas submitted a proposal on behalf of OrganicLife using Elior's confidential pricing information for the purpose of

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[12] In North Carolina, at the summary judgment stage, plaintiff's evidence of a "mere expectation" that it would continue a business relationship is insufficient to satisfy the "but for" causation element of a tortious interference claim. *See e.g., Beverage Sys. of the Carolinas, LLC v. Associated Bev. Repair, LLC,* 368 N.C. 693, 701 (2016). "Instead, a plaintiff must produce evidence that a contract would have resulted but for a defendant's malicious intervention." *Id.* (citing *Dalton v. Camp*, 353 N.C. 647, 655 (2001)). However, when considering allegations at the Rule 12(b)(6) stage, it is generally sufficient for a plaintiff to identify a customer by name and to allege that it would have obtained a contract with that customer but for the acts of the defendant. *See Lunsford v. Viaone Servs., LLC*, 2020 NCBC LEXIS 111, at *16 (N.C. Super Ct. Sept. 28, 2020); *see also Se. Anesthesiology Consultants, PLLC v. Rose,* 2019 NCBC LEXIS 52, at *36-37 (N.C. Super. Ct. Aug. 20, 2019) (concluding that plaintiff adequately alleged that it had a reasonable probability of entering into contracts with specific individuals); *cf. Velocity Sols., Inc. v. BSG Fin., LLC*, 2016 NCBC LEXIS 19, at **13 (N.C. Super. Ct. Feb. 22, 2016) (denying motion to dismiss even though plaintiffs did not identify a "specific contractual opportunity.").

undercutting Elior's rebid. Elior alleges that shortly thereafter it lost EASD 131 to OrganicLife as a customer. (Compl. ¶¶ 60-61.) Nowhere, though, does Elior allege why its hope that EASD 131 would not require it to rebid in 2023 rose to the level of a reasonable expectancy, particularly when it recognizes that whether a customer reopens the bidding process can be influenced by its competitors in the ordinary course of business. Nor does it allege that Thomas's actions caused it to lose EASD 131 as a customer.

112. Even construing the allegations in the light most favorable to Elior, as the Court must at this stage, under Illinois law, Elior has not sufficiently pled the elements of a tortious interference with prospective business advantage claim.[13]

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[13] In Illinois, as in North Carolina, a privilege exists for lawful competition. "The privilege to engage in business and to compete allows one to divert business from one's competitor generally as well as from one's particular competitors provided one's intent is, at least in part, to further one's business and is not solely motivated by spite or ill will." *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 615-16 (1st Dist. 1995) ("Acts of competition, which are never privileged, include fraud, deceit, intimidation, or deliberate disparagement."); *see also Galinski v. Kessler*, 134 Ill. App. 3d. 602, 610 (1st Dist. 1985) ("[T]he right to engage in a business relationship is not absolute, and must be exercised with regard to the rights of others."). Defendant contends that his actions were privileged because, on behalf of his new employer, he was engaged in lawful competition. Elior, on the other hand, contends that Thomas employed wrongful means including by breaching the confidentiality provisions of the Employment Agreement, and that "the reasonable inference is that Thomas acted with malice[.]" (Compl. ¶ 127; Pl.'s Br. Opp. 24.) At this stage, Elior's allegation that Thomas competed by breaching the confidentiality provisions of the Employment Agreement is sufficient to allege legal malice. *HPI HealthCare Servs., Inc. v. Mt. Vernon Hosp., Inc.,* 131 Ill. 2d. 145, 156-67 (1989) ("The term 'malicious,' in the context of interference with contractual relations cases, simply means that the interference must have been intentional and without justification.").

113. Accordingly, Defendant's Motion to Dismiss as to Plaintiff's tortious interference claim (Count VIII) is **GRANTED**, and this claim is **DISMISSED** without prejudice.

IV. CONCLUSION

114. **WHEREFORE**, Defendant's Motion is **GRANTED in part and DENIED in part**, and the Court **ORDERS** as follows:

i. Defendant's Motion to Dismiss the First Cause of Action (Breach of Contract – Breach of the confidentiality obligations) is **DENIED**.

ii. Defendant's Motion to Dismiss the Second Cause of Action (Breach of Contract – Breach of the non-compete obligations) is **DENIED**.

iii. Defendant's Motion to Dismiss the Third Cause of Action (Breach of Contract – Breach of the non-solicitation obligations as blue penciled) is **DENIED**.

iv. Defendant's Motion to Dismiss the Fourth Cause of Action (Breach of Covenant of Good Faith and Fair Dealing) is **DENIED**.

v. Defendant's Motion to Dismiss the Fifth Cause of Action (Conversion) is **GRANTED,** and this claim is **DISMISSED** without prejudice.

vi. Defendant's Motion to Dismiss the Sixth Cause of Action (Violation of the North Carolina Trade Secrets Protection Act) is **GRANTED**, and this claim is **DISMISSED** without prejudice.

vii. Defendant's Motion to Dismiss the Seventh Cause of Action (Violation of the North Carolina Unfair and Deceptive Trade Practices Act) is **GRANTED**, and this claim is **DISMISSED** without prejudice.

viii. Defendant's motion to dismiss the Eighth Cause of Action (Tortious Interference with Prospective Advantage) is **GRANTED**, and this claim is **DISMISSED** without prejudice.

SO ORDERED, this the 22nd day of April, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases