STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
NEW HANOVER COUNTY	16 CVS 900
AIR CLEANING EQUIPMENT, INC., Plaintiff, v. ROBERT CLEMENS, 4 STROKE INVESTMENTS, LLC, SEAIRA GLOBAL, LLC, AMY CLEMENS, DEBRA L. CLEMENS, ROBERT CLEMENS, JR., KEVIN YOW, and AMBER CLEMENS, Defendants.	**ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

1. **THIS MATTER** is before the Court on Plaintiff Air Cleaning Equipment, Inc.'s ("Plaintiff" or "ACE") Motion for Preliminary Injunction (the "Motion") in the above-captioned case.

2. The Court, having considered Plaintiff's Motion, briefs, affidavits, and other documents and exhibits filed in support of and in opposition to the Motion, and the arguments of counsel at the April 15, 2016 hearing in this matter, enters the following FINDINGS OF FACT and CONCLUSIONS OF LAW, for the limited purposes of deciding the Motion, as follows:

FINDINGS OF FACT[1]

I. Procedural History

3. Plaintiff filed its Complaint ("Complaint"), Motion for Preliminary Injunction, and Motion for Temporary Restraining Order against Defendants Robert Clemens ("Clemens"), 4 Stroke Investments, LLC ("4 Stroke Investments"), Seaira Global, LLC ("Seaira Global"), Amy Clemens, Debra L. Clemens ("Mrs. Clemens"), Robert Clemens, Jr., Kevin Yow, and Amber

[1] "It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits." *Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75, 620 S.E.2d 258, 265 (2005) (*citing Huggins v. Wake County Board of Education*, 272 N.C. 33, 40–41, 157 S.E.2d 703, 708 (1967)).

Clemens (collectively, "Defendants") on March 16, 2016, alleging claims against one or more Defendants for alleged breach of fiduciary duty, constructive fraud, conversion, tortious interference with prospective economic advantage, tortious interference with contract, civil conspiracy, misappropriation of trade secrets under N.C. Gen. Stat. § 66-152, *et seq*., unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, and punitive damages.

4. The case was designated a mandatory complex business case under N.C. Gen. Stat. § 7A-45.4(b) on March 17, 2016, as an action described in sections (1), (2), (3), (4), (5) or (8) of N.C. Gen. Stat. § 7A-45.4(a) in which the amount in controversy computed in accordance with N.C. Gen. Stat. § 7A-243 is at least five million dollars. The case was assigned to the undersigned that same day.

5. On March 18, 2016, the Court entered a Consent Temporary Restraining Order ("Consent TRO"), which provided in relevant part that:

> The Defendants and all other persons in active concert or participation with any Defendant are restrained from, directly or indirectly:
>
> a. Placing any order with Plaintiff's Chinese manufacturer/supplier of dehumidifiers for any dehumidifier units with the same or substantially same specifications as those units currently or formerly provided by such supplier to Plaintiff;
>
> b. Using any of Plaintiff's customer pricing data to "undercut" Plaintiff's pricing to its customers. Defendants are further prohibited from referencing Plaintiff's pricing data to Plaintiff's customers in an attempt to solicit business from such customers;
>
> c. Making any disparaging statements about Plaintiff to any third party, including but not limited to Plaintiff's customers, prospective customers, suppliers, vendors,

employees and service providers. This prohibition applies without regard to the veracity of any such disparaging statements.

(Consent TRO, ¶ 1.)

6. The Consent TRO further provided that the Consent TRO "shall remain in effect until ruling on Plaintiff's Motion for Preliminary Injunction." (Consent TRO, ¶ 2.)

7. The Court held a hearing on the Motion on April 15, 2016. All parties were represented by counsel at the hearing. Prior to the hearing, Plaintiff filed in support of Plaintiff's Motion for Preliminary Injunction the Affidavit of Farhad Shahryary ("Shahryary"), the Supplemental Affidavit of Farhad Shahryary, Affidavit of Charly Jabbour (Plaintiff's accountant), and the Affidavit of Farhad Shahryary in Reply to Defendants' Brief in Opposition to Preliminary Injunction. Also prior to the hearing, Defendants filed in opposition to the Motion the Affidavits of Amy Clemens, Debra L. Clemens, Robert Clemens, Jr., Amber Clemens, David Yow, and Christopher Yturralde.

II. Relevant Facts

8. Plaintiff is a North Carolina corporation with its principal place of business in Sanford, North Carolina. ACE manufactures and distributes humidifiers, dehumidifiers, and related products.

9. Defendant Clemens was the President of ACE from 2006 until his resignation in January, 2016. As President, Clemens was the key person entrusted to operate ACE for the sole and exclusive benefit of ACE and its shareholders. Clemens, as the President of ACE, was responsible for running the day to day operations of ACE. Shahryary was ACE's sole or majority shareholder and was largely uninvolved in the day-to-day operations of ACE. Day-to-day operational responsibilities were entrusted to Clemens.

10. Defendants Amy Clemens, Debra L. Clemens, Robert Clemens, Jr., Amber Clemens and David Yow are former employees of ACE. Debra Clemens ceased working for ACE in 2012. The remaining individual Defendants resigned from ACE contemporaneously with Robert Clemens in January, 2016.

11. ACE offers dehumidifiers under the trade name "Horizon Dehumidifiers" and filed and received trademark registration for the name "Horizon" on August 19, 2012 (trademark registration number 4190568).

12. ACE contracted with a manufacturer/supplier in China ("Supplier") to supply ACE with branded Horizon dehumidifiers. To begin manufacturing, ACE first needed certain molds created by Supplier for ACE's exclusive use and benefit. ACE paid in excess of $20,000 to Supplier for the manufacture of the molds for ACE's trademark registered Horizon brands or lines of businesses. ACE contends that the identity of Supplier, and the details of ACE's business arrangement with Supplier, is sensitive, confidential information of ACE.

13. ACE's customers, most of whom have been doing business with ACE for several years, are typically businesses that require a reliable and constant stream of dehumidifiers. ACE contends that the identity of ACE's customers, their contact information, their needs and preferences, their pricing information and ACE's business arrangements with such customers is, without limitation, sensitive, confidential and proprietary information of ACE.

14. Defendant 4 Stroke Investments is a North Carolina company formed in April 2008 by Clemens as its organizer and member manager. On April 14, 2008, Clemens, through 4 Stroke Investments, purchased a building located at 303 N. Main Street, Broadway, NC 27505. Clemens moved all of ACE's operations to this location, and ACE paid rent to 4 Stroke Investments. In December 2012, 4 Stroke Investments purchased a second building located in

Surf City, NC. Clemens moved a portion of ACE's operations to this second location, and ACE paid rent to 4 Stroke Investments for use of that building.

15. Near the end of 2015 or beginning of 2016, Clemens indicated to Shahryary that he intended to resign as President of ACE, depart the employ of ACE, and also evict ACE from 4 Stroke Investments' properties.

16. Unknown to Shahryary at that time, Clemens, with the knowledge, consent, agreement and/or assistance of the other individual Defendants and while still employed as President of ACE, had already formed the company Seaira Global, a business Clemens and the other Individual Defendants currently operate in direct competition with ACE. Seaira Global's Articles of Organization were created on December 7, 2015 and filed with the North Carolina Secretary of State on December 14, 2015. Clemens' wife, Debra L. Clemens, is Seaira Global's registered agent.

17. Contemporaneously with Clemens' resignation, the following ACE employees also gave notice of resignation: Defendant Robert Clemens, Jr., Defendant Kevin Yow, Dylan Gibson, James Thomas, Jeremy Wuske, Timothy Branch, Christopher Yturralde, Defendant Amber Clemens, and Defendant Amy Clemens.

18. When Clemens resigned from ACE, he also evicted ACE from the 4 Stroke Investments properties out of which ACE had been operating. Seaira Global now operates out of 4 Stroke Investments' Surf City, NC building. As ACE was moving out of the Surf City, NC building as instructed, representatives of ACE sought to remove certain equipment, namely conveyor belts and humidifying machines. This equipment is used to create a humid environment in which to test dehumidifiers. It was used as part of ACE's operations and acquired with ACE's funds. Clemens refused to allow ACE to remove this equipment,

maintaining that it constitutes a fixture of the building and thus belongs to 4 Stroke Investments. ACE contends that this equipment is presumably now being used to test Seaira Global's units and argues that this equipment is the rightful property of ACE.

19. In the second half of 2015, while Clemens and the other individual defendants were still employed with ACE, ACE began negotiating a potentially very lucrative contract (the "JCI Supply Contract") with Johnson Controls, Inc. ("JCI") whereby ACE was to develop and supply JCI with versions of ACE's "Horizon" dehumidifiers, to be rebranded by JCI for the exclusive use of JCI. Clemens, then acting in his capacity as ACE's President, served as the primary representative for ACE in ACE's negotiations with JCI.

20. On September 4, 2015, Clemens left Shahryary a voice mail message emphasizing the "major impact" the JCI Supply Contract would have on ACE's business in 2016. ACE has offered in evidence a transcription of that voicemail message, which provides, in pertinent part, as follows:

> There were 4 things that I thought could have a major impact on 2016, … Number 3 was Trion which I just talked to them today and he said they have another review with Johnson Controls on Tuesday and he was confident after that he would have the green light.

21. On September 9, 2015, Clemens left Shahryary another voicemail message regarding the JCI Supply Contract. ACE has offered in evidence a transcription of that voicemail message, which provides, in pertinent part, as follows:

> I just got an email from my contact at Trion, the subject is Surfboard which is the new nickname of our dehumidifier project. We got green light to arrange a supply agreement from Johnson Control, the parent company. And he's going to come down next week and we'll iron it out. So that's pretty cool news and thought you might like to hear it firsthand.

22. At the time of Clemens' resignation, the JCI Supply Contract between ACE and JCI had not yet been executed, but had been substantially negotiated and finalized. After resigning

from ACE, Clemens, acting on behalf of Seaira Global, entered into a supply contract with JCI. ACE contends that the ultimate JCI Supply Contract entered into between JCI and Seaira Global is substantially identical in terms to the contract Clemens previously negotiated and substantially finalized on behalf of ACE while he was ACE's President. No party has submitted a copy of the JCI Supply Contract between JCI and Seaira Global for the Court's review.

23. ACE contends that the JCI Supply Contract between ACE and JCI had been substantially negotiated and finalized as shown by the JCI Supply Contract draft and Clemens' voice mail messages about the "major impact" of the contract and the "green light to arrange the supply agreement" which they were "ironing out," and, thus, that the JCI Supply Contract would have been executed by JCI and ACE if Defendants had not induced JCI to enter into the same contract with Seaira Global instead. No party has offered any affidavit testimony or other evidence from JCI of any kind, including concerning the JCI Supply Contract or JCI's dealings with ACE or Seaira Global.

24. Near the time of Clemens' and the other departing employees' resignations, Shahryary and his wife undertook to review ACE's accounting system, called Peachtree. In doing so, they discovered what they believed were numerous accounting "irregularities" which suggested that Clemens and/or the other Individual Defendants had diverted money from ACE to 4 Stroke Investments on numerous occasions. Shahryary met with ACE's then-bookkeeper Amy Elliot and questioned her about these irregularities. When confronted by Shahryary, Elliot broke down crying, apologized and resigned. Elliot currently works for Seaira Global.

25. ACE has offered in support of the Motion a summary of a physical review of ACE's books and records by Charly Jabbour ("Jabbour"), a certified accountant retained by ACE, which ACE argues tends to show a typical but irregular purchasing pattern between ACE and the

Chinese Supplier while Clemens served as ACE's CEO. The summary suggests that Clemens would order dehumidifier units from ACE's Chinese Supplier. Clemens would then create or cause to be created an invoice from 4 Stroke Investments to ACE for those units, which would reflect a higher per unit price and/or unit quantity than the figures ACE's Chinese Supplier reflected on its invoices. Through this stratagem, Clemens caused 4 Stroke Investments to receive a "mark-up" payment as an intermediary between ACE and the Chinese Supplier and caused ACE to pay prices greater than the Supplier's invoice charges. Nonetheless, Clemens would cause these payments from ACE to 4 Stroke Investments to be characterized as "loans" or "consulting expenses" when there was no basis for either characterization.

26. Although ACE and Jabbour have offered specific evidence concerning only four "suspect transactions," they contend that they have identified at least 22 transactions that follow the same pattern described in the preceding paragraph (inflated payments, inflated invoices, and/or fictitious transaction descriptions) and that they are still gathering supporting data. ACE and Jabbour aver that there is no legitimate accounting basis for the four suspect transactions and contend that the suspect transactions are indicative of embezzlement by Clemens, 4 Stroke Investments, and/or the other Defendants.

27. In addition to diversion of money to 4 Stroke Investments, ACE has offered evidence that suggests that, while acting as President of ACE, Clemens inserted 4 Stroke Investments into transactions which should have been for the benefit of ACE. For example, in September, 2012, ACE was in negotiations with its Chinese Supplier to develop a line of dehumidifiers. In furtherance of those negotiations, Clemens entered into a "Contract for Project Development" and "Agreement for Confidentiality" with the Supplier; however, he caused those contracts to be executed in the name of 4 Stroke Investments rather than ACE. The Agreement for

Confidentiality acknowledged that ACE's trade secrets might be divulged via the transaction, yet ACE gained no benefit from the Agreement for Confidentiality because it was crafted by Clemens for the benefit of 4 Stroke Investments, not ACE. There is no apparent legitimate reason for Clemens to have negotiated these agreements with the Chinese Supplier on behalf of 4 Stroke Investments rather than on behalf of ACE.

28. ACE has also presented evidence through Shahryary's affidavits that Shahryary received an email on February 17, 2016 from Thomas Gray ("Mr. Gray"), general manager of Forshaw, an ACE customer, in which Mr. Gray stated as follows:

> Fred, I had a meeting 2/16/2016 Kevin Yow, Amber Clemens, and Bob Clemens in this meeting I was told you no longer have access to the overseas manufacturer of your dehumidifier, the units you have in stock have not been bench tested. You do not have the employees to handle repairs. I need assurances from Air Cleaning Equipment that A) this is not the case B) I need from you in writing business as usual with the same guarantee if you could send this to me in email thank you.

ACE has presented evidence that each of these statements attributed to Kevin Yow, Amber Clemens and Clemens are false.

29. Shahryary has also averred that he received another email from Mr. Gray on March 7, 2016, which stated as follows:

> Gentlemen I had a meeting with the owner, CFO and the regional sales team concerning air cleaning equipment and where we stand the consensus from everyone at the table was we need a press release from your company stating that nothing has changed as to the relationship we have and nothing will change going forward. Fred I have Kevin Yow visiting my branches talking about the line of dehumidifiers they have, please send me something in writing that shows we have confidence in Air Cleaning Equipment. Have a great day look forward to hearing from you.

30. ACE contends that Mr. Gray's emails show that Defendants have made, and are likely to make in the future, false statements to ACE's customers in an attempt to interfere with ACE's

relationships with those customers, to lose confidence in ACE, and to decline to follow through on orders to ACE. ACE has not presented evidence directly from Mr. Gray or any other ACE customer in connection with this Motion.

31. In early March, 2016, Shahryary personally travelled to China, where he met with Supplier. Shahryary avers in his affidavits that during this trip he "confirmed" that Clemens, acting on behalf of Seaira Global, had placed an order with the Supplier for the manufacture of the dehumidifier units needed for Seaira Global to fulfill the Supply Contract with JCI and that the dehumidifier units the Supplier shipped to Seaira Global are substantially identical to the Horizon units that Supplier has manufactured for ACE and would have manufactured for ACE to fulfill ACE's Supply Contract with JCI had that contract not been usurped by Defendants. ACE has not presented evidence directly from the Chinese Supplier (or any other supplier) in connection with this Motion.

32. ACE contends that Defendants' actions have caused and will continue to cause ACE a loss of business and the confidence of its existing customers.

33. Seaira Global and Defendants are currently in active competition with ACE and are acquiring units from ACE's Supplier and soliciting business from ACE's customers.

34. ACE contends that in competing with ACE, Seaira Global and the Individual Defendants are taking advantage of knowledge of ACE's customer identity, customer contacts, customer needs and preferences, suppliers, pricing schemes, business practices and contacts ("Confidential Information"). ACE further contends that knowledge of this Confidential Information is not information readily ascertainable. ACE also asserts that to the extent Defendants assert that such Confidential Information was not the subject of any efforts by ACE to maintain the confidentiality of such information, it would have been Clemens' duty as

President of ACE, to undertake such efforts because as President of ACE, Clemens knew everything there was to know about ACE.

35. ACE contends that it has offered evidence tending to show that Defendants have acted in an unethical and unscrupulous manner and their actions deceived Shahryary into believing that they were running ACE in an ethical and scrupulous manner that would benefit the company's interests, instead of their own personal interests and now are using the information gained to injure ACE.

CONCLUSIONS OF LAW

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

2. A Summons, Complaint and Notice of Hearing herein were duly served upon Defendants in accordance with Rule 4 of the North Carolina Rules of Civil Procedure.

3. Pursuant to N.C. Gen. Stat. § 7A-45.4, this case has been properly designated as a Mandatory Complex Business case.

4. A preliminary injunction "is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation," *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983), and "will not be lightly granted." *Travenol Lab., Inc. v. Turner*, 30 N.C. App. 686, 692, 228 S.E.2d 478 (1976) (citation omitted).

5. A preliminary injunction is appropriate when: (1) a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff 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 a plaintiff's rights during the course of litigation. *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (emphasis in original) (citing *Waff Bros., Inc. v. Bank*, 289 N.C. 198, 221 S.E.2d 273 (1976)).

6. A preliminary injunction may not issue unless the movant carries the burden of persuasion as to each of these prerequisites. *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975) ("The burden is on the plaintiffs to establish their right to a preliminary injunction.").

7. North Carolina courts have held that in assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

8. To establish irreparable injury under Rule 65, "it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that 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.*, 308 N.C. at 407, 302 S.E.2d at 763 (citing *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949)) (emphasis in original).

9. A party may show that it will suffer "irreparable injury" for which it has no adequate remedy at law where damages are difficult and cannot be ascertained with certainty. *See e.g.*, *A.E.P.*, 308 N.C. 393, 406-07, 302 S.E.2d 754, 762 ("[O]ne factor used in determining the adequacy of a remedy at law for money damages is the difficulty and uncertainty in determining the amount of damages to be awarded for defendant's breach.").

10. If irreparable injury is not shown, the preliminary injunction will be denied. *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975). In particular, "where there is

a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie." *Light and Water Comrs. v. Sanitary District*, 49 N.C. App. 421, 423, 271 S.E.2d 402, 404 (1980).

A. Violation of NCTSPA

11. Under the North Carolina Trade Secrets Protection Act ("NCTSPA"), "actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation . . . ." N.C. Gen. Stat. § 66-154(a) (2014). Actual or threatened misappropriation may be established by the introduction of "substantial evidence" that a person against whom relief is sought "[k]nows or should have known of the trade secret; and [h]as had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent of the owner [of the trade secret]." N.C. Gen. Stat. § 66-155 (2014). A defendant may rebut an owner's claim of misappropriation by proving that the defendant acquired the owner's trade secret information through independent development or reverse engineering, or by proving that the owner's "trade secret" information was received from another person with a right to disclose the information or is generally known in the industry. N.C. Gen. Stat. §§ 66-155, 66-152 (2014).

12. A trade secret is defined under the NCTSPA as:

> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method technique, or process that
>
> a. [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
>
> b. [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3).

13. In determining whether processes or information are trade secrets, the North Carolina courts generally consider six factors:

> the extent to which information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; (4) the value of information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr., 125 N.C. App. 174, 180-81, 480 S.E.2d 53, 56 (1997) (citations omitted). The factors overlap, and courts considering these factors do not always examine them separately and individually. *SCR-Tech LLC v. Evonik Energy Servs. LLC*, 2011 NCBC LEXIS 26 ¶ 41 (N.C. Super. Ct. Jul. 22, 2011).

14. Furthermore, in a trade secret misappropriation case, "an applicant for a preliminary injunction must do more than merely allege that irreparable injury will occur. The applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur." *N.C. Farm P'ship v. Pig Improvement Co.*, 163 N.C. App. 318, 323, 593 S.E.2d 126, 130 (2004) (citations and quotations omitted).

15. Plaintiff contends that its alleged trade secrets "include, but are not limited to ACE's customer list; customer contact information; customer preferences; supplier information; pricing schemes; vendor contacts; and marketing plans." (Compl. ¶ 91.) Plaintiff further contends that "the identity of ACE's customers, their contact information, their needs and preferences, their pricing information and ACE's business arrangements with such customers . . . constitute trade secrets of ACE. (Compl. ¶ 30.) Finally, Plaintiff contends that "the identity of ACE's supplier, and the details of ACE's business arrangement with the supplier . . . constitute trade secrets of ACE." (Compl. ¶ 27.)

16. Based on its review of the record evidence before the Court, the Court concludes that Plaintiff has failed to carry its burden at this stage of the litigation to show that ACE's claimed trade secrets constitute protectable trade secrets under North Carolina law. Although the Court is not yet convinced that Plaintiff's misappropriation claim cannot ultimately be sustained with adequate supporting proof, the limited evidence proffered on this issue—i.e., three affidavits from Mr. Shahryary with only brief, conclusory reference to ACE's alleged trade secrets—is insufficient to permit the "extraordinary remedy" of a preliminary injunction. Moreover, based on the record evidence from all parties, it appears to the Court that (i) ACE's customer list can be accessed through simple Google internet searches and is thus publicly available, (ii) customer, supplier, vendor, and pricing information resides in the memory of Defendants and other former ACE employees, this information was routinely disclosed to third parties in the regular course of ACE's business, and there is no evidence that any such information was the subject of non-disclosure or confidentiality agreements with any person or entity, was the subject of password or restricted access control of any kind, or was subject to any other efforts that were reasonable under the circumstances to maintain the secrecy of the information, and (iii) the identity of ACE's Supplier was advertised on ACE's website until this litigation commenced, and the identity of another of ACE's suppliers currently appears on Plaintiff's website, and thus each was made publicly available and was not subject to reasonable efforts to maintain the secrecy of such information. *See, e.g.*, *Edgewater Servs. v. Epic Logistics, Inc*., 2009 NCBC LEXIS 21, at *12–14 (N.C. Super. Ct. Aug. 11, 2009) (granting summary judgment where confidential information was kept in an unlocked file room, accessible to anyone); *Kadis v. Britt*, 224 N.C. 154, 162, 29 S.E.2d 543, 548 (1944) ("[T]he knowledge of a deliveryman, or other personal solicitor, of the names and addresses of his employer's customers, gained during the performance

of his duties, is not a trade secret . . . ."); *Asheboro Paper & Packaging, Inc. v. Dickinson*, 599 F. Supp. 2d. 664, 677 (M.D.N.C. 2009) ("Under North Carolina law, customer information maintained in the memory of a departing employee is not a trade secret.").

17. The Court thus concludes that Plaintiff has failed to show a likelihood of success on its claim for misappropriation of trade secrets under N.C. Gen. Stat. § 66-152, *et seq.*, and thus the Court denies Plaintiff's motion for preliminary injunction to the extent it is based on this claim.

B. Tortious Interference with Prospective Economic Advantage

18. "To establish tortious interference with prospective economic advantage, a plaintiff must show that the defendant, without justification, induced a third party to refrain from entering into a contract with the plaintiff, which would have been made absent the defendant's interference." *MLC Auto., LLC v. Town of S. Pines*, 207 N.C. App. 555, 571, 702 S.E.2d 68, 79 (2010).

19. Plaintiff's proof shows that ACE "almost certainly" would have entered into the JCI Supply Contract with JCI but for Defendants' interference with the JCI Supply Contract.

20. The Court concludes that Plaintiff has met its burden to show a likelihood of success on its tortious interference with prospective economic advantage claim. *See, e.g.*, *McKinney v. Phila. Hous. Auth.*, No. 07-4432, 2010 U.S. Dist. LEXIS 60410, at *66–67 (E.D. Pa. June 16, 2010) ("but for the alleged appointment and notice requirement, Plaintiffs almost certainly would have been out of the Scattergood property earlier and faced less exposure to the alleged dangers within the home; [t]hus, on their face, PHA's acts were but-for causes of Plaintiffs' harm").

21. The Court further concludes, however, that Plaintiff's alleged damages are not of such a "peculiar nature that compensation in money cannot atone for it," *Hodge v. N.C. DOT*, 137 N.C. App. 247, 252, 528 S.E.2d 22, 26 (2000). Thus, the Court concludes that Plaintiff is not

entitled to preliminary injunctive relief based on Plaintiff's tortious interference with prospective economic advantage claim because Plaintiff has an adequate remedy at law through a claim for the recovery of monetary damages for Defendants' alleged conduct. *See Whalehead Props. v. Coastland Corp.*, 299 N.C. 270, 283, 261 S.E.2d 899, 907–08 (1980) (discussing money damages as a legal remedy).

C. Violation of N.C. Gen. Stat. § 75-1.1

22. N.C. Gen. Stat. § 75-1.1(a) regulates "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Our courts have held that a claim under section 75-1.1 "requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant." *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 738, 659, S.E.2d 483, 488 (2008) (citation omitted).

23. Further, "'[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers,' and a 'practice is deceptive if it has the capacity or tendency to deceive.'" *Bumpers v. Cmty. Bank of Va.*, 367 N.C. 81, 91, 747 S.E.2d 220, 228 (2013). *Per se* defamation impeaching a party in its business activities is an unfair or deceptive trade practice. *Boyce & Isley v. Cooper*, 153 N.C. App. 25, 35–36, 568 S.E.2d 893, 901–02 (2002). *See also Nguyen v. Taylor*, 219 N.C. App. 1, 9, 723 S.E.2d 551, 558 (2012) (finding a section 75-1.1 violation where defendant "defam[ed] [plaintiffs] while profiting at their expense").

24. Injunctive relief is available to plaintiffs who bring private suits under N.C. Gen. Stat. § 75-1.1. *See generally* Noel L. Allen, *North Carolina Unfair Business Practice* § 12.01 (3d ed. 2015). *See also, e.g., Johnson v. Honeycutt*, No. COA05-295, 2006 N.C. App. LEXIS 249, at *4

(N.C. Ct. App. Feb. 7, 2006) (affirming trial court judgment where trial court issued a preliminary injunction based on unfair and deceptive trade practices claim); *Union Carbide Corp. v. Sunox, Inc.*, 590 F. Supp. 224, 227–28 (W.D.N.C. 1984) (applying preliminary injunction standard to claim brought under N.C. Gen. Stat. § 75-1.1).

25. Plaintiff has brought forward substantial evidence showing that Defendants have made false, defamatory and derogatory statements concerning Plaintiff in its trade or business in an effort to dissuade ACE's customers from conducting business with ACE.

26. The Court concludes that Plaintiff has carried its burden to show a likelihood that Defendants are liable to Plaintiff for engaging in conduct constituting a violation of N.C. Gen. Stat. § 75-1.1.

27. The Court further concludes that such conduct has resulted in irreparable harm to ACE, and if not enjoined, will continue to result in irreparable harm to ACE because there is no adequate remedy at law, there is substantial difficulty and uncertainty in determining the amount of damages to be awarded for Defendants' conduct, and the injury Defendants have inflicted and, unless enjoined, will continue to inflict on ACE, is one to which ACE should not be required to submit or Defendants permitted to inflict based on the record before the Court.

28. Additionally, the Court concludes that the injury to Defendants if an injunction is issued on this claim is slight. Indeed, Defendants have already agreed to a non-disparagement provision in the Consent Temporary Restraining Order.

D. Breach of Fiduciary Duty/Constructive Fraud

29. Under North Carolina law, corporate officers with discretionary authority must discharge their duties: (1) In good faith; (2) With the care an ordinarily prudent person in a like

position would exercise under similar circumstances; and (3) In a manner he reasonably believes to be in the best interests of the corporation. N.C. Gen. Stat. § 55-8-42(a) (2015).

30. "[C]orporate directors and officers act in a fiduciary capacity in the sense that they owe the corporation the duties of loyalty and due care." *Seraph Garrison, LLC v. Garrison*, 2016 N.C. App. LEXIS 384, at *6–7 (N.C. Ct. App. Apr. 19, 2016); *see also, e.g.*, *Belk v. Belk's Dep't Store, Inc*., 250 N.C. 99, 103, 108 S.E.2d 131, 135 (1959) (recognizing a director's "duty to honestly exercise[]" his powers "for the benefit of the corporation and all of its shareholders"); *Pierce Concrete, Inc. v. Cannon Realty & Const. Co*., 77 N.C. App. 411, 413–14, 335 S.E.2d 30, 31 (1985) (declaring that the fiduciary duty corporate officers owe to North Carolina corporations "is a high one"). "The corporate law duty of loyalty also imposes an affirmative obligation: a fiduciary must strive to advance the best interests of the corporation." *Seraph Garrison, LLC*, 2016 N.C. App. LEXIS 384, at * 8.

31. A claim for constructive fraud lies where (1) a relationship of trust and confidence exists, (2) the defendant takes advantage of that position of trust to benefit himself, and (3) the plaintiff was consequently injured. *White v. Consol. Planning, Inc*., 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (citation omitted). "[A]n essential element of constructive fraud is that defendants sought to benefit themselves in the transaction." *Sterner v. Penn*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003) (quoting *State ex rel. Long v. Petree Stockton, L.L.P*., 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998)). The existence of a fiduciary relationship is an element of a constructive fraud claim. *See White*, 166 N.C. App. at 294–95, 603 S.E.2d at 156; *see also Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823 (2002) (citation omitted).

32. Plaintiff has brought forward sufficient evidence to carry its burden to show a likelihood that Defendant Clemens had a fiduciary duty to Plaintiff as ACE's President and that Clemens breached his fiduciary duty to Plaintiff and is liable to Plaintiff for breach of fiduciary duty and for constructive fraud.

33. The Court concludes, however, that Plaintiff is not entitled to preliminary injunctive relief based on Clemens' breach of fiduciary duty and constructive fraud because Plaintiff has not offered sufficient evidence to show that ACE has suffered damages such that "compensation in money cannot atone for it," *Hodge*, 137 N.C. App. at 252, 528 S.E.2d at 26, and because Plaintiff appears to have an adequate remedy at law through a claim for the recovery of monetary damages for Clemens' alleged conduct. *See Whalehead Props.*, 299 N.C. at 283, 261 S.E.2d at 899.

E. Conversion

34. "[C]onversion 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." *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 488 (2008) (internal citations omitted). A plaintiff must prove two essential elements to establish a conversion claim under North Carolina law: (1) ownership in the plaintiff, and (2) a wrongful possession or conversion by the defendant. *Id.*; *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). "The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner . . . and in consequence it is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from the act." *Lake Mary L.P. v. Johnston*, 145 N.C. App. 525, 532,

551 S.E.2d 546, 552 (2001); *Bartlett Milling Co. L.P. v. Walnut Grove Auction & Realty Co*., 192 N.C. App. 74, 86, 665 S.E.2d 478, 488 (2008).

35. Plaintiff has brought forward sufficient evidence to carry its burden to show a likelihood that Defendants Clemens and 4 Stroke Investments are liable to Plaintiff for conversion of Plaintiff's property.

36. The Court concludes, however, that Plaintiff is not entitled to preliminary injunctive relief based on these Defendants' alleged conversion of Plaintiff's property because Plaintiff has not offered sufficient evidence to show that ACE has suffered damages such that "compensation in money cannot atone for it," *Hodge*, 137 N.C. App. at 252, 528 S.E.2d at 26, and because Plaintiff appears to have an adequate remedy at law through a claim for the recovery of monetary damages for Clemens' and 4 Stroke Investments' alleged conduct. *See Whalehead Props.*, 299 N.C. at 283, 261 S.E.2d at 899.

F. Tortious Interference with Contract

37. The elements of a claim for tortious interference with contract are well-established:

> To establish a claim for tortious interference with contract, a plaintiff must show: (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.

Bev. Sys. of the Carolinas, LLC v. Associated Bev. Repair, LLC, 762 S.E.2d 316, 323 (N.C. Ct. App. Aug. 5, 2014) (citation omitted), *rev'd on other grounds*, 2016 N.C. LEXIS 177 (N.C. Mar. 18, 2016).

38. Plaintiff has not brought forward sufficient evidence to show a likelihood that Defendants induced any third party to breach its contract with Plaintiff and thus that Plaintiff will

succeed on this claim. The Court therefore denies Plaintiff's motion for preliminary injunction to the extent it is based on this claim.

G. Civil Conspiracy

39. To recover for civil conspiracy, ACE is required to show: "(1) an agreement between two or more persons to do a wrongful act; (2) an overt act committed in furtherance of the agreement; and (3) damage to the plaintiff." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 657, 464 S.E.2d 47, 54 (1995). However, proof of the civil conspiracy

> does no more than associate the defendants together . . . . The gravamen of the action is the resultant injury, and not the conspiracy itself. To create civil liability for conspiracy there must have been a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the objective.

Henry v. Deen, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984) (internal citations omitted).

40. Plaintiff has brought forward sufficient evidence to carry its burden to show a likelihood that Defendants are liable to Plaintiff on Plaintiff's civil conspiracy claim.

41. The Court concludes, however, that Plaintiff is not entitled to preliminary injunctive relief based on Plaintiff's civil conspiracy claim because Plaintiff has not offered sufficient evidence to show that ACE has suffered damages such that "compensation in money cannot atone for it," *Hodge*, 137 N.C. App. at 252, 528 S.E.2d at 26, and because Plaintiff appears to have an adequate remedy at law through a claim for the recovery of monetary damages for Defendants' alleged conduct. *See Whalehead Props.*, 299 N.C. at 283, 261 S.E.2d at 899.

H. Summary

42. As explained in more detail above, based on the evidence of record at this preliminary stage of the litigation, the Court concludes that:

a. Plaintiff has failed to carry its burden of persuasion to show a likelihood of success on Plaintiff's claims for misappropriation of trade secrets under N.C. Gen. Stat. §66-152 *et seq.* and tortious interference with contract;

b. Plaintiff has satisfied its burden of persuasion to show a likelihood of success on Plaintiff's claims for breach of fiduciary duty, constructive fraud, conversion, tortious interference with prospective economic advantage, and civil conspiracy but has failed to carry its burden of persuasion to show irreparable injury if a preliminary injunction is not granted;

c. Plaintiff has satisfied its burden of persuasion to show a likelihood of success on Plaintiff's claim for violation of N.C. Gen. Stat. § 75-1.1 based on Defendants' false, defamatory, and derogatory statements to Plaintiff's' customers concerning ACE and Mr. Shahryary.

43. The Court concludes that Plaintiff has suffered and continues to suffer irreparable harm as a result of Defendants' false, defamatory, and derogatory statements and that Plaintiff will suffer irreparable harm if Defendants and all other persons in active concert or participation with any Defendant are not preliminarily enjoined from continuing to engage in such unlawful conduct.

44. The harm to ACE is immediate and ongoing and cannot later be redressed by the Court if allowed to continue during the course of litigation. Thus, the Court concludes that the issuance of a preliminary injunction is necessary for the protection of Plaintiff's rights during the course of this litigation.

45. The Court has engaged in a balancing process, weighing potential harm to Plaintiff if the injunction is not issued against the potential harm to Defendants if injunctive relief is granted, and finds that the potential harm to Plaintiffs outweighs that to Defendants.

46. Plaintiff is entitled to a preliminary injunction restraining and enjoining Defendants and all other persons in active concert or participation with any Defendant from engaging in unlawful behavior, as set forth below.

47. **WHEREFORE**, pending the final resolution of this civil action, and unless and until otherwise ordered by this Court, the Court hereby enters this preliminary injunction **ENJOINING** Defendants, their officers, directors, and employees, and anyone with notice of this Order acting with or on Defendants' behalf (collectively, the "Prohibited Parties") as follows:

a. The Prohibited Parties are hereby restrained and enjoined during the pendency of this action from making any false, defamatory, or disparaging statements about ACE, Mr. Shahryary or ACE's management to any third party, including but not limited to Plaintiff's customers, prospective customers, suppliers, vendors, employees and service providers.

b. Pursuant to N.C. Gen Stat. § 1A-1, Rule 65(c), this Order shall become effective upon Plaintiff posting a security with the New Hanover County Clerk of Superior Court in the sum of $500.00.

SO ORDERED, this 29th day of April, 2016.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases