STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23CVS005395-590
TRUIST FINANCIAL CORPORATION and GRANDBRIDGE REAL ESTATE CAPITAL, LLC, Plaintiffs, v. MATTHEW ROCCO; JOE LOVELL; JOHN RANDALL; and COLLIERS MORTGAGE HOLDINGS, LLC, Defendants.	**ORDER AND OPINION ON DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

1. Plaintiff Truist Financial Corporation ("TFC" or "Truist") and its wholly owned subsidiary, Grandbridge Real Estate Capital, LLC ("Grandbridge"), bring this action against three former Grandbridge senior executives, Defendants Matthew Rocco ("Rocco"), Joe Lovell ("Lovell"), and John Randall ("Randall"; each an "Executive Defendant" and collectively, the "Executive Defendants") and Grandbridge's direct competitor, Defendant Colliers Mortgage Holdings, LLC ("Colliers"), for allegedly "devis[ing] and execut[ing] a scheme to raid Grandbridge, tak[ing] virtually all of its key employees, clients, and revenues, and crippl[ing] its ability to compete."[1] Plaintiffs contend that, through "improper and unlawful means,"[2] "Defendants facilitated the mass departure of over 50 key employees of

[1] (Pls.' Br. Opp'n Executives' Mot. Dismiss Am. Compl. 1 [hereinafter, "Pls.' Br. Opp'n Executive Defs.' Mot."], ECF No. 68.)

[2] (First Am. Compl. ¶ 83 [hereinafter, "FAC"], ECF No. 33.) All exhibits to the FAC are appended to the end of the document in ECF No. 33.

Plaintiffs to Colliers,"[3] "caused Plaintiffs to lose over 300 contracts to service existing mortgages,"[4] and sought to "weaken[ ] Grandbridge's business in order to force [TFC] to sell the business, or to simply steal Grandbridge's business rather than pay for it."[5]

2. The Executive Defendants and Colliers have separately moved to dismiss Plaintiffs' Amended Complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rules") (respectively, the "Executives Motion" and the "Colliers Motion"; together, the "Motions").[6]

3. Having considered the Motions, the materials submitted in support of and in opposition to the Motions, the arguments of counsel at the hearing held on the Motions, and other appropriate matters of the record, the Court hereby **GRANTS in part** and **DENIES in part** the Motions as set forth below.

Buchanan Ingersoll & Rooney, PC, by Terry M. Brown Jr., Andrew Shapren, and Robert Fitzgerald, for Plaintiffs Truist Financial Corporation and Grandbridge Real Estate Capital, LLC.

Rayburn Cooper & Durham, P.A., by Ross R. Fulton and Ashley B. Oldfield, for Defendants Matthew Rocco, Joe Lovell, and John Randall.

Fox Rothschild, by Bradley M. Risinger, Jeffrey R. Whitley, and Nathan Wilson, for Defendant Colliers Mortgage Holdings, LLC.

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[3] (FAC ¶ 57.)

[4] (FAC ¶ 61.)

[5] (FAC ¶ 64.)

[6] (*See* Defs. Matthew Rocco, Joe Lovell, and John Randall's Mot. Dismiss Am. Compl. [hereinafter, the "Executives Motion"], ECF No. 63; Def. Colliers Mot. Dismiss Am. Compl. [hereinafter, the "Colliers Motion"; together with the Executives Motion, the "Motions"], ECF No. 65.)

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

4. The Court does not make findings of fact on motions presented under Rule 12(b)(6). Rather, the Court recites the allegations asserted and documents referenced in the pleadings that are relevant to the Court's determination of the Motions.

5. Grandbridge is "one of the nation's largest providers of comprehensive capital solutions for commercial and multifamily real estate."[7] Colliers is a direct competitor of Grandbridge in the real estate finance industry.[8]

6. Until December 2022, the Executive Defendants were Grandbridge's seniormost executives. Rocco served as Grandbridge's President and Chief Executive Officer ("CEO") and had responsibility for overseeing all aspects of Grandbridge's business.[9] Lovell served as a Grandbridge Executive Vice President and its Chief Operating Officer ("COO")[10] and was responsible for the direction and management of over 100 employees as well as asset management, operations, business systems

[7] (FAC ¶ 7.) Prior to 2019, Grandbridge was a wholly owned subsidiary of TFC's predecessor in interest, BB&T Corporation ("BB&T"). In 2019, BB&T merged with SunTrust Banks, Inc. to create TFC (the "Merger"), and Grandbridge became a wholly owned subsidiary of TFC. (FAC ¶ 9.)

[8] (FAC ¶¶ 3, 7.)

[9] (FAC ¶¶ 3, 10, 50.)

[10] (FAC ¶¶ 4, 16.)

and internet technology, third-party loan closing, and corporate initiatives for the company.[11] Randall served as a Grandbridge Executive Vice President and as its National Production Manager ("NPM")[12] and led all of Grandbridge's production offices throughout the country.[13] Each Executive Defendant served as a member of Grandbridge's Board of Managers (the "Board").[14]

7. The Executive Defendants were subject to various agreements that are at issue in this case.

8. First, Rocco and Randall (but not Lovell) electronically attested to separate but identical non-disclosure agreements (the "Non-Disclosure Agreements") with TFC's predecessor, BB&T Corporation ("BB&T"),[15] which prohibit the disclosure or use of any confidential information of BB&T or its "subsidiaries, affiliates, successors or assigns."[16] The Non-Disclosure Agreements define "confidential information" as "any proprietary and/or confidential information relating to customers, associates, products, services, sales, technologies or business affairs" and it includes, but is not

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[11] (FAC ¶ 16.)

[12] (FAC ¶¶ 5, 20.)

[13] (FAC ¶ 20.)

[14] (FAC ¶¶ 10, 16, 20.) Grandbridge is a North Carolina limited liability company. (FAC ¶ 2.)

[15] The Non-Disclosure Agreements were assigned to TFC at the time of the Merger. (*See* FAC ¶ 11 n.2.)

[16] (FAC ¶¶ 11, 21, 69; First Am. Compl. Ex. A. [hereinafter, the "Non-Disclosure Agreement"].)

limited to, "research, products, services, markets, software, developments, inventions, policies, models, processes, formulas, technology designs, drawings, engineering, security, decision making, marketing, finances or other business information[.]"[17]

9. Next, each Executive Defendant entered into a Restricted Stock Unit Agreement (the "RSU Agreement")[18] that contains the following non-solicitation covenant at paragraph 8(a) (the "RSU Non-Solicitation Covenant"):

> In consideration of the grant of this Award, Participant agrees that, during employment with TFC and for twelve (12) months after the termination of Participant's employment by either party and for any reason, Participant will not directly or indirectly solicit or recruit for employment or encourage to leave employment with TFC, on Participant's own behalf or that of any other person any employee of TFC with whom Participant worked during Participant's employment or about whom Participant came to know confidential information as a result of employment with TFC and who has not thereafter ceased to be employed by TFC for a period of at least three (3) months. This provision will not prohibit the Participant from soliciting or hiring any person who responds to a general advertisement or solicitation, including but not limited to advertisements or solicitations through newspapers, trade publications, periodicals, internet database, or recruiting or employment agencies, not specifically directed at employees of TFC. Participant acknowledges that by virtue of this provision, they are likewise restricted from being solicited or recruited for employment by current or former employee of Truist also bound by a similar provision, directly or indirectly and hereby knowingly consents to that restriction. This Section shall not prohibit Participant from responding to a general advertisement or solicitation, including but not limited to advertisements or solicitations through newspapers, trade publications, periodicals, internet databases, or recruiting or employment agencies,

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[17] (Non-Disclosure Agreement 1.)

[18] (FAC ¶¶ 12, 17, 21; First Am. Compl. Exs. C, F, J [hereinafter, the "RSU Agreement"], ECF No. 33.)

> not specifically directed at employees or consultants of Truist. which restricts the Executive Defendant from soliciting TFC's employees.[19]

10. Rocco also agreed to and participated in the 2022 Annual Incentive Award Program Summary (the "AIP Agreement"),[20] which contains a non-solicitation covenant that is nearly identical to the RSU Non-Solicitation Covenant (the "AIP Non-Solicitation Covenant"):

> In consideration of participation in AIP, Participant agrees that, during employment with TFC and for twelve (12) months after the termination of Participant's employment by either party and for any reason, Participant will not directly or indirectly solicit or recruit for employment or encourage to leave employment with TFC, on Participant's own behalf or that of any other person any employee of TFC with whom Participant worked during Participant's employment or about whom Participant came to know confidential information as a result of my employment with TFC and who has not thereafter ceased to be employed by TFC for a period of at least three (3) months. This provision will not prohibit the Participant from soliciting or hiring any person who responds to a general advertisement or solicitation, including but not limited to advertisements or solicitations through newspapers, trade publications, periodicals, internet database, or recruiting or employment agencies, not specifically directed at employees of TFC. Participant acknowledges that by virtue of this provision, they are likewise restricted from being solicited or recruited for employment by current or former employee[s] of Truist also bound by a similar provision, directly or indirectly and hereby knowingly consents to that restriction. This Section shall not prohibit Participant from responding to a general advertisement or solicitation, including but not limited to advertisements or solicitations through newspapers, trade publications, periodicals, internet databases, or recruiting or employment agencies, not specifically directed at employees or consultants of Truist.[21]

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[19] (FAC ¶ 12; RSU Agreement § 8(a).)

[20] (FAC ¶ 14; First Am. Compl. Ex. D [hereinafter, the "AIP Agreement"].)

[21] (FAC ¶ 14; AIP Agreement 5.)

11. Finally, Lovell and Randall agreed to and participated in the "Grandbridge Discretionary Incentive Plan" (the "DIP Agreement).[22] Like the RSU and AIP Agreements, the DIP Agreement contains a covenant prohibiting solicitation of certain of Plaintiffs' employees and customers (the "DIP Non-Solicitation Covenant"; together with the RSU and AIP Non-Solicitation Covenants, the "Non-Solicitation Covenants"):

> Participant agrees that, during employment with Truist and for twelve (12) months after the termination of Participant's employment by either party and for any reason, Participant shall not directly or indirectly solicit or recruit for employment or encourage to leave employment with Truist, on Participant's own behalf or that of any other person any full-time or temporary employee of Truist with whom Participant worked during Participant's employment and who performed services for Truist's clients or worked on Truist's products while employed by Truist and who has not thereafter ceased to be employed by Truist for a period of at least three (3) months. This plan provision shall not prohibit the Participant from soliciting or hiring any person who responds to a general advertisement or solicitation, including but not limited to advertisements or solicitations through newspapers, trade publications, periodicals, internet database, or recruiting or employment agencies, not specifically directed at employees of Truist. Participant acknowledges that by virtue of this plan provision, they are likewise restricted from being solicited or recruited for employment by current or former employee[s] of Truist, directly or indirectly and hereby knowingly consents to that restriction.
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> Participant agrees that, during employment with Truist and for twelve (12) months after the termination of Participant's employment by either party and for any reason, Participant will not directly or indirectly solicit, communicate with or otherwise contact any of Truist's customers, or actively sought prospective customers, with whom Participant had material contact during employment with Truist, for the purpose of conducting any business with them which is substantially similar to the business conducted by the business unit in which Participant last

[22] (FAC ¶¶ 18, 21; First Am. Compl. Ex. G [hereinafter, the "DIP Agreement"].)

> worked at Truist. "Material contact" means (a) actual contact with customers—such as through the provision of services or sales visits or calls—or (b) coming to know confidential information about a Truist customer—such as by obtaining pricing and sales information. This provision does not prohibit Participant from accepting as a client any person or entity who responds to a general advertisement or solicitation, including but not limited to advertisements or solicitations through newspapers, trade publications, periodicals, or internet databases, not specifically directed at customers of Truist.[23]

12. In addition to these contracts, each Executive Defendant attested annually to the Truist Code of Ethics, which provides in relevant part that:

> Confidential information must only be disclosed when the disclosure is specifically authorized by Truist or legally mandated. You may only use and access confidential and proprietary business or client information, including information gained while performing Truist job responsibilities, for legitimate purposes furthering Truist's business and under no circumstances for personal gain or to compete with Truist.[24]

13. The events giving rise to this dispute began in August 2022. At that time, Rocco and Lovell met with the CEO, COO, and other executives of Colliers "to discuss the companies potentially working together."[25] On 7 September 2022, Colliers sent TFC a non-binding indication of interest (the "IOI") proposing that Colliers purchase Grandbridge from TFC.[26] TFC directed Rocco to inform Colliers that TFC was not interested in selling Grandbridge.[27]

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[23] (FAC ¶ 18; DIP Agreement.)

[24] (FAC ¶ 23; First Am. Compl. Ex. M.)

[25] (FAC ¶¶ 26–27.)

[26] (FAC ¶ 28.)

[27] (FAC ¶ 29.)

14. Plaintiffs allege that the Executive Defendants and Colliers were unhappy that TFC rejected the IOI and set out to "devise and execute a scheme to raid Grandbridge, take virtually all of its key employees, clients and revenues, and cripple its ability to compete."[28] Defendants' alleged goal was to divert "entire Grandbridge offices" to Colliers by "target[ing] the leaders of Grandbridge's various offices [ ] to facilitate the departure of entire offices and thereby cripple Grandbridge's ability to compete in the relevant marketplaces."[29]

15. According to Plaintiffs, while the Executive Defendants were still employed at Grandbridge, they secretly used Plaintiffs' confidential information to forecast the number of employees and the amount of related revenue and profits Defendants would be able to "pirate away from Plaintiffs"[30] and disclosed this information to Colliers to both negotiate their own compensation deals with Colliers and to "form the most effective plan to swiftly divert Grandbridge's key revenue producers, support personnel, clients, revenues and profits to Colliers *en masse*."[31] The Executive Defendants began effectuating the purported raid while they were still employed at

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[28] (FAC ¶ 30.)

[29] (FAC ¶ 39.)

[30] (FAC ¶ 34.)

[31] (FAC ¶¶ 31–33.)

Grandbridge by soliciting the Production Office Managers of Grandbridge's "core" offices to leave Grandbridge and join Colliers.[32]

16. After resigning from Grandbridge in December 2022, the Executive Defendants began working for Colliers in positions similar to those they held at Grandbridge.[33] According to Plaintiffs, the Executive Defendants continued to solicit key employees of Grandbridge, after beginning their employment with Colliers, and the Executive Defendants and Plaintiffs' other former employees now working at Colliers began soliciting Plaintiffs' clients as well.[34] Plaintiffs allege that over 50 of Plaintiffs' employees have resigned and gone to work for Colliers, including 11 Production Office Managers,[35] and Plaintiffs have lost over 300 client customer contracts, at least 180 to Colliers.[36]

B. Procedural History

17. The complete procedural history of this matter is a bit convoluted. It is enough for present purposes, however, to note that Plaintiffs filed the Complaint initiating this action on 24 March 2023, asserting seven claims against the Executive

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[32] (FAC ¶¶ 39–40.)

[33] (FAC ¶¶ 49–54.) Colliers hired Rocco as its President, Lovell as an Executive Vice President and Chief Administrative Officer, and Randall as its Head of National Production.

[34] (FAC ¶¶ 54, 60.)

[35] (FAC ¶¶ 57–58.)

[36] (FAC ¶ 61.)

Defendants and Colliers,[37] and after motions practice, the Court deemed Plaintiffs' First Amended Complaint (the "Amended Complaint") against these same Defendants filed as of 19 September 2023.[38] Plaintiffs assert claims in the Amended Complaint against (i) the Executive Defendants for breach of contract[39] and breach of fiduciary duty,[40] (ii) Colliers for tortious interference with contract,[41] and (iii) all Defendants for violation of the North Carolina Trade Secrets Protection Act,[42] tortious interference with contract and business relations,[43] violation of the North Carolina Unfair and Deceptive Trade Practices Act,[44] civil conspiracy,[45] and unjust enrichment.[46]

18. On 26 September 2023, the Executive Defendants and Colliers filed the current Motions seeking to dismiss the Amended Complaint. After full briefing, the

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[37] (Compl., ECF No. 3.)

[38] (Order Pls.' Mot. Leave Amend Compl. and Defs.' Mots. Dismiss, Scheduling Order, and Notice Hearing ¶ 10, ECF No. 60.)

[39] (FAC ¶¶ 67–78.)

[40] (FAC ¶¶ 87–90.)

[41] (FAC ¶¶ 79–86.)

[42] (FAC ¶¶ 107–17.)

[43] (FAC ¶¶ 96–106.)

[44] (FAC ¶¶ 91–95.)

[45] (FAC ¶¶ 118–23.)

[46] (FAC ¶¶ 124–29.)

Court held a hearing on the Motions on 25 October 2023, at which all parties were represented by counsel (the "Hearing"). The Motions are now ripe for resolution.

II.

LEGAL STANDARD

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

20. "[D]ismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin*, 371 N.C. at 615 (quoting *Wood v. Guilford County*, 355 N.C. 161, 166 (2002)).

21. Under Rule 12(b)(6), "the trial court is to construe the pleading liberally and in the light most favorable to the plaintiff, taking as true and admitted all well-pleaded factual allegations contained within the [pleading]." *Donovan v. Fiumara*, 114 N.C. App. 524, 526 (1994) (cleaned up); *see also, e.g., Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019) (recognizing that, under Rule 12(b)(6), the allegations of the complaint should be "view[ed] as true and in the light most favorable to the non-moving party") (cleaned up).

22. When considering a motion to dismiss under Rule 12(b)(6), a court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Cap., L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001); *see, e.g.*, *Deluca v. River Bluff Holdings II, LLC*, 2015 NCBC LEXIS 12, at *8 (N.C. Super. Ct. Jan. 28, 2015) (stating that under Rule 12(b)(6), "a trial court may properly consider a contract that is the subject matter of the complaint, even if the plaintiff did not attach it to the complaint[ ]").

III.

ANALYSIS

A. Plaintiffs' Claims Against the Executive Defendants

1. Breach of the Non-Solicitation Covenants

23. Plaintiffs' claim for breach of contract is premised in part on the Executive Defendants' alleged breaches of the Non-Solicitation Covenants.[47] Plaintiffs allege that the Non-Solicitation Covenants prohibit the Executive Defendants from (i) "soliciting, recruiting, or encouraging certain of Plaintiffs' employees to leave" during the Executive Defendants' employment with Plaintiffs and for 12 months thereafter[48] and (ii) from permitting themselves to be solicited or recruited by any current or

[47] (FAC ¶¶ 71–78.)

[48] (FAC ¶ 72.)

former employee of Plaintiffs also bound by a similar non-solicitation covenant.[49] Plaintiffs allege that the Executive Defendants breached these covenants by soliciting one another and other employees of Plaintiffs to terminate their employment with Plaintiffs, by allowing themselves to be solicited by those under a similar non-solicitation covenant while they were employed at Grandbridge, and, after their departure from Grandbridge, by soliciting and recruiting Plaintiffs' employees to join Colliers.[50]

24. The Executive Defendants seek dismissal of Plaintiffs' claim for breach of the Non-Solicitation Covenants to the extent it is based upon alleged solicitation of Grandbridge employees, contending first, that the covenants restrict their solicitation of TFC and Truist employees but not Grandbridge employees,[51] and second, that the Non-Solicitation Covenants are unenforceable under North Carolina law.[52]

a. Application to Grandbridge Employees

25. Relying on language in the Non-Solicitation Covenants prohibiting solicitation of "any employee of TFC" (the RSU and AIP Non-Solicitation Covenants) or "any . . . employee of Truist" (the DIP Non-Solicitation Covenant), the Executive Defendants contend that the Non-Solicitation Covenants "do not prohibit the

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[49] (FAC ¶ 73.)

[50] (FAC ¶¶ 75–76.)

[51] (Defs. Matthew Rocco, Joe Lovell, and John Randall's Br. Supp. Mot. Dismiss Am. Compl. 8–9 [hereinafter "Executive Defs.' Br. Supp."], ECF No. 64.)

[52] (Executive Defs.' Br. Supp. 9–15.)

[Executive Defendants] from soliciting *Grandbridge* employees[,]" and thus that Plaintiffs' claim for breach should be dismissed to that extent.[53] But the Executive Defendants ignore that Plaintiffs have alleged throughout the Amended Complaint that the Executive Defendants and the employees they solicited were employees of both TFC and Grandbridge.[54] As a result, Plaintiffs do not allege that the Executive Defendants solicited any employees that were beyond the scope of the Non-Solicitation Covenants. Therefore, the Court will deny the Executive Defendants' Motion to Dismiss on this ground.

b. Enforceability of the Covenants

26. "To be enforceable under North Carolina law, a non-competition agreement 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." *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 655 (2009). Non-solicitation provisions generally must satisfy the same elements

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[53] (Executive Defs.' Br. Supp. 8–9.)

[54] (*See, e.g.*, FAC ¶¶ 3–5 (alleging each Executive Defendant "was, held himself out to be, and enjoyed the benefits of being an employee of both Truist and Grandbridge"); 43 ("The Executives actively solicited Plaintiffs' employees"); 54 ("After their resignations, the Executives continued to solicit key employees of Plaintiffs to leave Truist and Grandbridge and join Colliers."); 57 (Defendants "facilitated the mass departure of over 50 key employees of Plaintiffs"); 65 ("Defendants continue to solicit and hire Plaintiffs' employees"); 75 (Executives "solicit[ed] and encourage[ed] each other and other employees of Plaintiffs to leave the firms"); 76 (Executives "solicit[ed] and recruit[ed] employees of Plaintiffs to join Colliers"); 81 (Colliers directed Executives "to solicit, and assist Colliers to solicit, Plaintiffs' employees"); 82 (Executives breached the Non-Solicitation Covenants "by soliciting and encouraging other employees of Plaintiffs to leave their employment and join Colliers").)

to be enforceable. *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 2018 NCBC LEXIS 42, at *27 (N.C. Super. Ct. May 8, 2018) ("A restriction on solicitation of employees generally is subject to the same requirements as other restrictive covenants[ ]"), *aff'd per curiam*, 372 N.C. 260 (2019).

27. "Although their elements are identical, North Carolina courts are more willing to enforce non-solicitation provisions targeted to the former employer's customers or prospective customers than provisions prohibiting entirely the former employee from working for certain employers or in certain regions." *Sandhills Home Care, LLC v. Companion Home Care – Unimed, Inc.*, 2016 NCBC LEXIS 61, at *25 (N.C. Super. Ct. Aug. 1, 2016). In addition, our Supreme Court has recognized that "[w]hile the law frowns upon unreasonable restrictions, it favors the enforcement of contracts intended to protect legitimate interests. It is as much a matter of public concern to see that valid covenants are observed as it is to frustrate oppressive ones." *United Lab'ys, Inc. v. Kuykendall*, 322 N.C. 643, 649 (1988) (internal citation omitted).

28. The Executive Defendants contend that the Non-Solicitation Covenants are unreasonable as to time because, under *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276 (2000), they contain an overly "extensive look-back period."[55] *Id.* at 280 ("[W]hen a non-compete agreement reaches back to include clients of the employer during some period in the past, that look-back period must be added to the restrictive period to

[55] (Executive Defs.' Br. Supp. 10–11.)

determine the real scope of the time limitation.") (citing *Prof. Liab. Consultants, Inc. v. Todd*, 345 N.C. 176 (1996) (per curiam), *adopting* 122 N.C. App. 212 (1996) (Smith, J. dissenting)). Plaintiffs reply in opposition that a look-back period is inapplicable to employee non-solicitation covenants and that, even if it were, the covenants here are narrowly tailored and reasonable as to time.[56]

29. As an initial matter, this Court has recognized that "[a]n employer may choose to protect not only its employment relationships but also its customer relationships, as well as its confidential information, through the use of employee non-solicitation agreements." *McGriff Ins. Servs. v. Hudson*, 2023 NCBC LEXIS 4, at *21 (N.C. Super. Ct. Jan. 17, 2023). "[I]n general, non-solicitation provisions are more tailored and less onerous on [an] employee's ability to earn a living than noncompete restrictions." *Id.* at *17 (cleaned up). "Whether a restrictive covenant is reasonable and enforceable is a matter of law for the Court to decide." *Id.* at *17 (citing *Farr Assocs., Inc.*, 138 N.C. App. at 279.) Under North Carolina law, non-solicitation restrictions that extend no more than two years after employment has ended are routinely enforced. *See, e.g.*, *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 229 (1990) (holding covenant restricting defendant from soliciting plaintiff's known customers where plaintiff operated for a period of two years was not unreasonable); *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 469 (2001) (holding two-year covenant reasonable).

[56] (Pls.' Br. Opp'n Executive Defs.' Mot. 3–8.)

30. The AIP Non-Solicitation Covenant, signed by Rocco, and the RSU Non-Solicitation Covenant, signed by each of the Executive Defendants, each provide, in relevant part, that:

> Participant agrees that, during employment with TFC and for twelve (12) months after the termination of Participant's employment by either party and for any reason, Participant will not directly or indirectly solicit . . . any employee of TFC with whom Participant worked during Participant's employment or about whom Participant came to know confidential information as a result of employment with TFC and who has not thereafter ceased to be employed by TFC for a period of at least three (3) months.[57]

31. Similarly, the DIP Non-Solicitation Covenant, signed by Lovell and Randall, states that:

> Participant agrees that, during employment with Truist and for twelve (12) months after the termination of Participant's employment by either party and for any reason, Participant shall not directly or indirectly solicit . . . any full-time or temporary employee of Truist with whom Participant worked during Participant's employment and who performed services for Truist's clients or worked on Truist's products while employed by Truist and who has not thereafter ceased to be employed by Truist for a period of at least three (3) months.[58]

32. The Executive Defendants argue that the look-back rule causes the restrictions at issue here to encompass at least a seven-year period—a presumptively unreasonable time period—since the restrictions cover employees "with whom [the Executive] worked during [the Executive's] employment" and the most junior

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[57] (RSU Agreement § 8(a); AIP Agreement 5.) The Court notes that the AIP Non-Solicitation Covenant uses the language "came to know confidential information as a result of *my* employment with TFC[,]" and the RSU Non-Solicitation Covenant does not include the word "my." This difference is irrelevant to the Court's analysis.

[58] (DIP Agreement § 12.)

Executive Defendant's employment began in 2017.[59] *See, e.g.*, *Superior Performers, Inc. v. Phelps*, 154 F. Supp. 3d 237, 245 (M.D.N.C. 2016) (noting that "North Carolina courts recognize five years as the 'outer boundary' of a reasonable time restriction.") (quoting *Farr Assocs., Inc.*, 138 N.C. App. at 280)).

33. Plaintiffs first argue that the look-back rule does not apply to employee non-solicitation provisions. The Court disagrees. While it appears no North Carolina court has specifically addressed whether the look-back rule applies to employee non-solicitation provisions, at least one federal court in North Carolina has applied the look-back rule to determine the length of the restricted period outlined in an employee non-solicitation agreement. *See Superior Performers, Inc. v. Meaike*, 2014 U.S. Dist. LEXIS 50302, at *32 (M.D.N.C. 2014). Moreover, as noted above, our courts have repeatedly observed that "[a] restriction on solicitation of employees generally is subject to the same requirements as other restrictive covenants." *Wells Fargo Ins. Servs. USA, Inc.*, 2018 NCBC LEXIS 42, at *27. Since our courts have recognized that employee non-solicitation provisions, like customer non-solicitation provisions, are simply "another means of protecting the former employer's interest in the good-will it has with its customers," *id.* at *28, and our courts apply the look-back rule to customer non-solicitation provisions, *see Farr Assocs., Inc.*, 138 N.C. App. at 279, the Court concludes that the look-back rule may be applied to employee non-solicitation provisions, at least to the extent the provisions are intended to protect the employer's

[59] Randall's employment began in 2017 while Lovell and Rocco began their employment with TFC ten years earlier in 2007. (FAC ¶¶ 10, 16, 20.)

relationships with customers or clients. Accordingly, the Court rejects Plaintiffs' opposition on this ground.

34. Plaintiffs next contend that the look-back rule does not apply because the covenants "do not include any employee of Truist, but are narrowly tailored to include only employees with whom the Executives either worked or about whom they learned confidential information as a result of their employment."[60] Our Court of Appeals, however, has applied the look-back rule to a similar non-solicitation provision prohibiting solicitation of customers "with whom [the defendant] had contact during [the defendant's] employment, a period of roughly ten years." *Sterling Title Co. v. Martin*, 266 N.C. App. 593, 599 (2019). Since the Court of Appeals has applied the look-back rule to a covenant with restrictions similar to those here, Plaintiffs' argument that the look-back rule only applies to a restriction on the solicitation of all of TFC's employees necessarily fails.

35. Finally, Plaintiffs contend that, even if the look-back period applies, the restricted time period outlined by the covenants is reasonable because the restrictions "only apply to employees who were employed by Truist during the three months before the Executives left" and that "[a]dding the three-month 'lookback' to the twelve-month post-employment period amounts to a total restricted period of only fifteen months."[61] But Plaintiffs overstate the impact that the concluding phrase

[60] (Pls.' Br. Opp'n Executive Defs.' Mot. 5.)

[61] (Pls. Br. Opp'n Executive Defs.' Mot. 8.)

"who has not thereafter ceased to be employed by Truist for a period of at least three (3) months" has on the restricted time period. Reading each phrase of the covenant together, the concluding phrase precludes each Executive Defendant from soliciting a person with whom the Executive worked who did not cease to be employed by Truist for more than three months after that person performed services for Truist's clients or worked on Truist products while employed by Truist. Thus, the Executives are permitted to solicit a person with whom the Executive worked as long as that person's employment with Truist ceased for a period of three months after the person performed services for Truist's clients or worked on Truist's products while employed by the company.

36. While it appears, as Plaintiffs contend, that the concluding phrase is likely intended to preclude the solicitation of only those employees with whom the Executive worked who were current employees at the time of the Executive's termination or who ceased to be employed within the three months prior to the Executive's termination, the language of the restriction sweeps more broadly. Indeed, the restriction is not tied to the time of the Executive's departure but is instead tied to whether the employee "ceased to be employed by TFC for a period of at least three (3) months."

37. This de-linking of the timing of the Executives' departure from the identification of the employees who were protected from their solicitation causes the restriction to preclude the solicitation of persons with whom the Executives worked many years ago who then left TFC for three months or more and subsequently

returned years later to work in a different part of TFC.[62] For example, as the Executive Defendants point out, the restriction would preclude Rocco or Lovell from soliciting a person with whom they worked at Truist in 2007 who later transferred to, and remains continuously employed in, a position in an unrelated part of TFC today, even if Rocco or Lovell have had no contact with that person since 2007.[63] The restriction would also include a person who worked with Rocco or Lovell in 2007, left Truist in 2008, but unbeknownst to these Executives, became employed in a different part of Truist in the final three months of the Executives' employment in 2022.

38. Since the look-back rule extends the restricted time period to the beginning of the Executive's employment in these circumstances, the time periods for those

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[62] According to Truist's most recent Form 10-K, "Truist offers a wide range of products and services through its wholesale and consumer businesses, including consumer and small business banking, commercial banking, corporate and investment banking, insurance, wealth management, payments, and specialized lending businesses." Truist Financial Corporation, Form 10-K (Dec. 31, 2023) https://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=318109081&type=HTML&symbol=TFC&cdn=7d768d517512b94a3e8b53b6ad96eef7&companyName=Truist+Financial+Corporation&formType=10-K&dateFiled=2024-02-27. *See* N.C. R. Evid. 201(b)–(c) (providing that a trial court may take judicial notice of facts which "are not subject to reasonable dispute" and that are either "generally known within the territorial jurisdiction of the trial court" or "capable to accurate and ready determination by any resort to sources whose accuracy cannot reasonably be questioned.") Our courts routinely take judicial notice of public filings available on governmental agencies' official websites. *See e.g. Banc of Am. Merch. Servs., LLC v. Arby's Rest. Grp., Inc.*, 2021 NCBC LEXIS 60, at *5 n. 2–3 (N.C. Super. Ct. June 30, 2021) (taking judicial notice of filings available on agencies' official websites); *Langley v. Autocraft, Inc.*, 2023 NCBC LEXIS 95, at *2 n.2 (N.C. Super. Ct. Aug. 7, 2023) (same); *see also Brinkley-Caldwell v. Britthaven, Inc.*, 264 N.C. App. 637, 637 (2019) ("A court may consider publicly noticeable documents without converting a motion to dismiss to a motion for summary judgment.")

[63] (Defs.' Matthew Rocco, Joe Lovell, and John Randall's Reply Supp. Mot. Dismiss Am. Compl. 4 [hereinafter, "Executive Defs.' Reply"], ECF No. 72.)

restrictions would be 17 years for Rocco and Lovell and 7 years for Randall.[64] While our courts have held that *customer* non-solicitation restrictions of these lengths almost certainly do not protect a plaintiff's legitimate business interest and thus are unreasonable as a matter of law, *see, e.g.*, *Sterling Title Co.*, 266 N.C. App. at 599 (noting that "only 'extreme conditions' will support a five-year [customer non-solicitation] covenant"), the business justification for *employee* non-solicitation covenants is not as susceptible to such a hard and fast rule.

39. As Judge Earp of this Court has explained:

> While an employee's personal interaction with *customers* resulting in the development of customer goodwill plainly affords the employee the ability to sway customer allegiances, the same relationship-building activity may not be necessary to sway the allegiance of fellow *employees*. A departing employee who has seen what it is like to play for a new team may well be able to convince a former teammate—even one with whom he has not had previous personal interaction—to make the switch, creating a talent drain for his former employer. Indeed, the employer's protectible interest does not come from the departing employee's relationship with those employees he is attempting to solicit. It arises from the solicited employees' relationships with customers, their possession of confidential information, or the cost to replace them. Even a loner can disrupt those business interests by luring others to follow the breadcrumbs of an exit path he has laid.

McGriff Ins. Servs., Inc., 2023 NCBC LEXIS 4, at *24.

40. Viewing the allegations in the light most favorable to Plaintiffs, the Court concludes that Plaintiffs have alleged that the Non-Solicitation Covenants were

[64] The look-back period for Rocco and Lovell is nearly 16 years (from their December 2022 departure to 2007) and nearly 6 years for Randall (from his 2022 departure to 2017). Adding the post-employment restriction of 12 months results in restricted periods of 17 years for Rocco and Lovell and 7 years for Randall.

intended, in part, to protect Plaintiffs' client relationships and attendant revenues and profits.[65] But Plaintiffs also allege that the Covenants were intended to protect the "confidential information[ ] and trade secrets that the employees whom the Executives were prohibited from soliciting had access to, enjoyed and developed on behalf of Plaintiffs."[66] Plaintiffs also suggest that the Covenants were intended to protect Plaintiffs' ability to compete in the marketplace.[67] Unlike customer relationships, where personal relationships are paramount, the protection of a

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[65] Plaintiffs contend that the Executive Defendants' alleged breach of the Non-Solicitation Covenants caused them to lose customer relationships with resulting lost revenues and profits. (*See, e.g.*, FAC ¶¶ 33 (alleging that one of the Executive Defendants' two goals was "to collude with Colliers to form the most effective plan to swiftly divert Grandbridge's key revenue producers, support personnel, clients, revenues and profits to Colliers *en masse*."); 34 ("Colliers induced the Executives themselves to surreptitiously divert Grandbridge's employees, clients, and revenues to Colliers"); 35 ("Defendants hoped to divert 100% of Grandbridge's revenue producing employees"); 59 ("The employees that Defendants have pirated away from Plaintiffs generate tens of millions of dollars in annual revenue through their client relationships and goodwill."); 61 ("In addition to losing the tens of millions of dollars of annual origination revenues that the former employees of Plaintiffs are now generating at Colliers, Defendants diversion of these key employees and the clients they service has caused Plaintiffs to lose over 300 contracts to service existing mortgages, with 180 of those contracts being transferred to Colliers."); 77 (alleging Plaintiffs have lost "the benefit of their employment relationships with more than 50 of their key employees" and "the client relationships and goodwill those employees developed"); 106 (identifying Plaintiffs' damages as including "lost fees for the origination of new mortgage loans, lost fees on lost contracts to service existing mortgages and lost value of mortgage servicing rights").) The Court concludes that a factfinder could reasonably infer from these allegations that a purpose of the Non-Solicitation Covenants was to protect Plaintiffs' client relationships.

[66] (FAC ¶ 74; *see also* FAC ¶ 77 (alleging Plaintiffs have lost "the benefit of their employment relationships with more than 50 of their key employees . . . and the confidential information and trade secrets those employees had . . . by the Executive[Defendants'] breaches of contract").)

[67] (FAC ¶ 85 (alleging breach of the Non-Solicitation Covenants "disrupt[ed] their ability to compete"); *see also* FAC ¶ 58 (alleging breach of the Non-Solicitation Covenants "decimat[ed] Plaintiffs' ability to compete [in] those given markets").)

company's confidential information and the protection against disruption due to employee turnover are legitimate business interests that do not necessarily require a departing employee to exploit his or her personal relationships with other employees. As Judge Earp recognized in *McGriff Insurance Services, Inc.*, there are times when "the employer's protectible interest does not come from the departing employee's relationship with those employees he is attempting to solicit." 2023 NCBC LEXIS 4, at *24. Plaintiffs' pleading describes such a situation here, particularly given the status and influence that accompanied the Executive Defendants' leadership roles at Grandbridge.

41. In these circumstances, and even when applying the look-back rule, the Court cannot conclude as a matter of law on the pleaded facts that the Covenants do not protect a legitimate business interest of Plaintiffs. Accordingly, the Court will deny the Executive Defendants' Motion to Dismiss Plaintiffs' claim for breach of the Non-Solicitation Covenants at this stage of the litigation and permit this claim to proceed to discovery.

42. Plaintiffs' claim for breach of contract is also premised in part on the Executive Defendants' alleged breach of the Non-Disclosure Agreements. Plaintiffs purport to assert the claim against all three Executive Defendants but allege only that "Rocco and Randall violated their Non-Disclosure Agreements by disclosing to Colliers, and using for their own and Colliers' benefit, Confidential Information" and "by failing to return to Plaintiffs substantial amounts of company property, data, and

records upon the termination of their employment."[68] Since Plaintiffs have not alleged that Lovell entered into or breached a Non-Disclosure Agreement,[69] the Court agrees with the Executive Defendants that this claim should be dismissed against Lovell.

2. Breach of Fiduciary Duty

43. Plaintiffs' claim for breach of fiduciary duty against the Executive Defendants posits that, as corporate officers and members of Grandbridge's governing board, the Executive Defendants owed fiduciary duties to Grandbridge that they breached by "failing to discharge their duties on behalf of Grandbridge" and by disclosing and using Grandbridge's confidential information and trade secrets.[70] The Executive Defendants seek to dismiss this claim, first, to the extent it is asserted by TFC, on grounds that they did not owe a fiduciary duty to TFC and, second, to the extent the claim is asserted by Grandbridge, on grounds that Grandbridge's Articles of Incorporation expressly waive any fiduciary duties that they might otherwise owe to the company.[71]

44. Turning first to the Executive Defendants' challenge to TFC's claim, it is axiomatic that "[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651 (2001). "North

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[68] (FAC ¶¶ 69–70.)

[69] (*See* FAC ¶¶ 16–19, 68–69.)

[70] (FAC ¶¶ 87–90.)

[71] (Executive Defs.' Br. Supp. 15–18.)

Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship." *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 355 (2019).

45. Plaintiffs allege that the Executive Defendants were managers and company officials of Grandbridge, but they do not allege that the Executive Defendants were officers, directors, company officials, or majority shareholders of TFC. While Plaintiffs' allegations show that the Executive Defendants owed a *de jure* fiduciary duty to Grandbridge, those fiduciary duties are not, without more, owed as a matter of law to Grandbridge's parent, TFC. *See, e.g.*, *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 474 (2009) (holding that "managers of a[n LLC] [ ] owe a fiduciary duty to the company, and not to individual members [of the LLC].") As a result, Plaintiffs have failed to plead facts showing that the Executive Defendants owed a *de jure* fiduciary duty to TFC.

46. Plaintiffs' argument that the Executive Defendants owed a *de facto* fiduciary duty to TFC (and Grandbridge) arising out of what Plaintiffs claim was the "extraordinary circumstance in which an employer [is] subjugated to the improper influences or domination of his employee"[72] fares no better.

47. "The standard for finding a *de facto* fiduciary relationship is a demanding one: Only when one party figuratively holds all the cards—all the financial power or

[72] (Pls.' Br. Opp'n Executive Defs.' Mot. 18 (citation omitted).)

technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 636 (2016) (cleaned up). To give rise to a fiduciary relationship between an employee and an employer, the employer must somehow be "subjugated to the improper influences or domination of [its] employee." *Dalton*, 353 N.C. at 652.

48. Plaintiffs' allegations here do not assert, even in a conclusory manner, that the Executive Defendants exerted dominion over either Plaintiff. Indeed, Plaintiffs' allegations indicate the very opposite, as Plaintiffs aver that Rocco reported to the Head of Commercial Real Estate at TFC[73] and that TFC rejected Colliers' IOI over the Executive Defendants' objections.[74] As a result, Plaintiffs have failed to plead facts showing that the Executive Defendants owed a *de facto* fiduciary duty to either TFC or Grandbridge.

49. Given that Plaintiffs have not pleaded facts showing either a *de jure* or a *de facto* fiduciary relationship with TFC, the Court will dismiss TFC's claim against the Executive Defendants for breach of fiduciary duty.

50. Despite having acknowledged that they otherwise owe a *de jure* fiduciary duty to Grandbridge as officers and managers of the company, the Executive Defendants nevertheless contend that Grandbridge's claim must be dismissed

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[73] (FAC ¶ 25.)

[74] (FAC ¶ 30.)

because "[t]he unambiguous language of [Grandbridge's] Articles of Organization [(the "Articles")] eliminates any [such] liability[.]"[75]

51. Plaintiffs disagree, contending that since Grandbridge's Operating Agreement (the "Operating Agreement") does not contain a waiver of fiduciary duty, its lack of a waiver controls.[76] But the Operating Agreement is not referenced, attached, or otherwise incorporated into the Amended Complaint.[77] And a trial court "may not consider materials that are not mentioned, contained, or attached in or to the pleading; otherwise, a Rule 12(b)(6) motion will be converted into a Rule 56 motion and subject to its standards of consideration and review." *Alamance Fam. Prac., P.A. v. Lindley*, 2018 NCBC LEXIS 83, at *8 (N.C. Super. Ct. Aug. 14, 2018)

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[75] (Executive Defs.' Br. Supp. 15–17; Executives Motion Ex. A [hereinafter, the "Articles"], ECF No. 63.2.) The Executive Defendants ask the Court to take judicial notice of the Articles. When a party requests that the Court take judicial notice of a fact and supplies the Court with the necessary information, the Court is required to take judicial notice of the fact if it otherwise satisfies Rule 201(b) of the North Carolina Rules of Evidence. *See* N.C.R. Evid. 201(d). Rule 201(b) states that a court may take judicial notice of adjudicative facts that are not subject to reasonable dispute if they are either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C.R. Evid. 201(b). Plaintiffs do not contest the accuracy or authenticity of the Articles, and the Articles are a public record available through the North Carolina Secretary of State. Further, "[a] court may consider publicly noticeable documents without converting a motion to dismiss to a motion for summary judgment." *Brinkley-Caldwell*, 264 N.C. App. at 637. Accordingly, the Court will take judicial notice of the Articles and consider them in its determination of the Motions.

[76] (Pls.' Br. Opp'n Executive Defs.' Mot. 14–15; Pls.' Br. Opp'n Executives' Mot. Dismiss Am. Compl. Ex. A [hereinafter, the "Operating Agreement"], ECF No. 69.) *See* N.C.G.S. § 57D-2-30(d)(1) ("In the event of a conflict between the operating agreement and a provision in any document of an LLC filed by the Secretary of State…[t]he operating agreement shall prevail as to parties to the operating agreement and company officials.")

[77] (*See generally* FAC.)

(citing *Fowler v. Williamson*, 39 N.C. App. 715, 717 (1979)). Because the Court declines to exercise its discretion to treat the Motion as one under Rule 56 at this early stage of the litigation, the Court may not consider the Operating Agreement in resolving the Motions.[78] Accordingly, the Court will focus its analysis on whether the Articles eliminate the Executive Defendants' statutorily imposed duties.

52. The Articles specifically provide as follows:

> To the full extent from time to time permitted by law, *no person who is serving or who has served as a manager of the limited liability company shall be personally liable in any action for monetary damages for breach of his or her duty as a manager*, whether such action is brought by or in the right of the limited liability company or otherwise. Neither the amendment or repeal of this Article, nor the adoption of any provision of these Articles of Organization inconsistent with this Article, shall eliminate or reduce the protections afforded by this Article to a manager of the limited liability company with respect to any matter which occurred, or any cause of action, suit or claim which but for this Article would have accrued or arisen, prior to such amendment, repeal or adoption.[79]

53. Plaintiffs contend that the Articles waive liability only for managers—not for officers and company officials—and that because Plaintiffs have alleged that the Executive Defendants were officers and company officials as well as managers,[80] the

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[78] Although the parties devoted portions of their briefs, (*see* Pls.' Br. Opp'n Executive Defs.' Mot. 15–17; Executive Defs.' Reply 8–9), and significant argument at the Hearing on whether the Operating Agreement conflicts with the Articles, the Court concludes it may not consider these arguments in resolving the Motions for the reasons set forth above.

[79] (Articles (emphasis added).)

[80] (Pls.' Br. Opp'n Executive Defs.' Mot. 15; *see, also, e.g.*, FAC ¶¶ 10 (alleging that "Rocco was the officer of the company responsible for overseeing all aspects of Grandbridge's business" and that he was "both a manager and a company official"); 16 (alleging that Lovell was an "officer of the company" with broad responsibility and "both a manager and a company

Articles do not eliminate the Executive Defendants' fiduciary duties as officers and company officials of Grandbridge. The Executive Defendants, however, argue that the term "manager" is interchangeable with the terms "officer" and "company official" under Chapter 57D and thus that the Articles eliminate any fiduciary duties they might otherwise have to Grandbridge.[81] *See, e.g.*, *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *17–18 (N.C. Super. Ct. June 19, 2019) (recognizing that LLC members "may depart from statutory default rules . . . and impose or eliminate fiduciary duties for members and managers") (cleaned up).

54. The Court finds that Plaintiffs have the better of this dispute. First, a "company official" is defined under Chapter 57D as "[a]ny person exercising any management authority over the [LLC] whether the person is a manager or referred to as a manager, director, or officer or given any other title." N.C.G.S. § 57D-1-03(5). In addition, an LLC's "operating agreement may provide that the LLC is to be managed by one or more company officials who are not designated as managers." N.C.G.S. § 57D-3-20(d). Chapter 57D further provides that managers "may delegate authority to act on behalf of the LLC to persons other than managers[,]" N.C.G.S. § 57D-3-22, and certain of the Act's provisions "shall apply to company officials who are

official"); 20 (alleging that Randall "held the company officer title of Executive Vice President" and was "both a manager and a company official").)

[81] (Executive Defs.' Br. Supp. 17.)

not managers[,]"[82] N.C.G.S. § 57D-3-23. These provisions therefore make plain that "company officials," "officers," and "managers" are separate and distinct terms and, in particular, "company officials" and "officers" are not required to be "managers" of the LLC.

55. As a result, without definitional guidance in the Articles themselves, the Court rejects the Executive Defendants' contention that the term "manager" is interchangeable with the terms "officer" and "company official." Accordingly, the Court finds that the Articles do not waive the Executive Defendants' personal liability for monetary damages for their alleged breach of their duties as officers and company officials of Grandbridge. The Executive Defendants' Motion on this ground will therefore be denied.

B. Plaintiffs' Claims Against Colliers

1. Tortious Interference with Contract (Non-Disclosure Agreements and Non-Solicitation Covenants)

56. Plaintiffs allege that Colliers tortiously interfered with the Non-Disclosure Agreements and Non-Solicitation Covenants[83] by (i) "directing the [Executive Defendants] to disclose confidential information and trade secrets about Truist and Grandbridge" and to "solicit, and assist Colliers to solicit, Plaintiffs' employees" and (ii) "offer[ing] the [Executive Defendants] lucrative employment terms, including

[82] *See* N.C.G.S. § 57D-3-23 ("[N.C.G.S. §] 57D-20(e), 57D-3-21, and 57D-3-22 shall apply to company officials who are not managers by substituting the term 'company official' in lieu of the term 'manager' in each place where the term appears in those provisions.")

[83] (FAC ¶¶ 79–86.)

millions in guaranteed compensation, success bonuses for diverting Plaintiffs' employees and revenues, and equity awards expected to be in the tens of millions of dollars based on the increased value of Colliers' business attributable to the employees, clients, and revenues Defendants were able to divert from Plaintiffs."[84]

57. To state a claim for tortious interference with contract, a plaintiff must allege:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant kn[ew] of the contract; (3) the defendant intentionally induce[d] the third person not to perform the contract; (4) and in doing so act[ed] without justification; (5) resulting in actual damage to the plaintiff.

Embree Constr. Grp., Inc. v. Rafcor, Inc., 330 N.C. 487, 498 (1992) (citation omitted).

58. Colliers contends that Plaintiffs' claim cannot meet the fourth element because Plaintiffs' allegations reveal that Colliers had a "plainly articulated business reason to acquire Grandbridge and to listen to, and negotiate with, the Executives when they expressed an interest in joining Colliers[.]"[85] The Court finds this argument without merit.

59. A claim for tortious interference with contract should be dismissed "when the complaint reveals that the interference was justified or privileged." *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 220 (1988). "If the defendant's only motive is a

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[84] (FAC ¶¶ 80–81.)

[85] (Def. Colliers Mortgage Holdings, LLC's Mem. Supp. Mot. Dismiss Am. Compl. 6–9 [hereinafter, "Colliers' Br. Supp."], ECF No. 66.)

malicious wish to injure the plaintiff, [the defendant's] actions are not justified. If, however, the defendant is acting for a legitimate business purpose, his actions are privileged." *Id.* at 221. "The privilege to interfere is conditional or qualified; that is, it is lost if exercised for a wrong purpose. In general, a wrong purpose exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the defendant which is involved." *Id.* at 220 (cleaned up).

60. "The malice required to overcome a justification of business competition is legal malice, and not actual malice." *Wells Fargo Ins. Servs.*, 2018 NCBC LEXIS 42, at *47. Plaintiffs must allege a factual basis to support a claim of legal malice; "general allegations of malice are insufficient as a matter of pleading." *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 605 (2007).

61. Colliers contends that it was justified to interfere by its legitimate interest in competing with Plaintiffs. Although interference may be justified when the plaintiff and defendant are competitors, *Hooks*, 322 N.C. at 221, this Court has recognized that "the distinction between seeking to destroy a competitor and a lawful competitive interest may be blurry," *Sandhills Home Care, LLC*, 2016 NCBC LEXIS 61, at *48. *See also Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC* (*Sunbelt Rentals I*), 2002 NCBC LEXIS 2, at *36 (N.C. Super. Ct. July 10, 2002) ("Stifling competition . . . is not contemplated by our laws. Only when competition is itself threatened—by actions taken to further some monopolistic purpose—do legal protections obtain.").

62. Plaintiffs allege here that Colliers and the Executive Defendants planned and executed a scheme to use Plaintiffs' confidential and trade secret information to solicit Plaintiffs' key employees and clients *en masse* to cripple Plaintiffs' ability to compete with Colliers and destroy Grandbridge's business.[86] Our courts have permitted a tortious interference claim to lie on such allegations. *See, e.g.*, *Sand Hills Home Care, LLC*, 2016 NCBC LEXIS 61, at *48 (holding that "[p]laintiff's allegation of a specific plan or scheme to destroy [p]laintiff's business goes beyond reasonable competitive behavior"); *McGriff Ins. Servs., Inc.*, 2023 NCBC LEXIS 4, at *52 (holding that allegations of a consulting arrangement which was designed to "circumvent [ ] contractual commitments and to solicit [plaintiff's] customers and use [plaintiff's] trade information, all in an effort to disrupt [plaintiff's] business operations[]" did not constitute lawful competition.); *see also Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC* (*Sunbelt Rentals II*), 2003 NCBC LEXIS 6, at *144 (N.C. Super. Ct. May 2, 2003) (holding that defendants' "surreptitious recruitment of *en masse* defections timed to disrupt [plaintiff's] business and take advantage of the employees' knowledge of confidential business information [ ] crosses over the line of fair competition.").

63. Colliers next contends that Plaintiffs' tortious interference claim should be dismissed for failure to plead the claim's third element—inducement. Colliers argues, first, that Plaintiffs' allegations are conclusory and unsupported by specific

[86] (*See, e.g.,* FAC ¶¶ 30, 35, 39–40, 48, 66, 83, 93, 105, 115.)

alleged facts[87] and, second, that those allegations show only that Colliers offered Plaintiffs more money in a "reasonable and *bona fide* attempt . . . to enter an industry segment."[88] Plaintiffs vigorously disagree.

64. This Court has interpreted "induce" to mean "purposeful conduct, active persuasion, request, or petition." *Se. Anesthesiology Consultants, PLLC v. Rose*, 2019 NCBC LEXIS 52, at *28 (N.C. Super. Ct. Aug. 20, 2019) (cleaned up); *see also Charah, LLC v. Sequoia Servs. LLC*, 2019 NCBC LEXIS 18, at *18 (N.C. Super. Ct. Mar. 11, 2019) (same). Conclusory allegations that merely state that a defendant has "induced" or "caused" a third party to breach a contract with a plaintiff, however, are insufficient to satisfy the inducement element. *See, e.g.*, *Prometheus Grp. Enters., LLC v. Gibson*, 2023 NCBC LEXIS 42, at *28 (N.C. Super. Ct. Mar. 21, 2023); *Se. Anesthesiology Consultants, PLLC*, 2019 NCBC LEXIS 52, at *29.

65. Plaintiffs allege that Colliers interfered with the Non-Disclosure Agreements by "directing the [Executive Defendants] to disclose confidential information about Truist and Grandbridge."[89] Plaintiffs further allege that the Executive Defendants compiled Plaintiffs' confidential information and provided it to Colliers in part for the purpose of negotiating compensation offers with Colliers.[90]

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[87] (Colliers' Br. Supp. 9–13.)

[88] (Colliers' Br. Supp. 12 (cleaned up).)

[89] (FAC ¶ 81.)

[90] (FAC ¶ 82.)

66. Contrary to Colliers' contention, the allegation that Colliers "directed" the Executive Defendants to disclose confidential information in derogation of their duties under the Non-Disclosure Agreements is not conclusory, as it does more than merely restate the element of the claim at issue and instead reflects Colliers' purposeful conduct. Neither is Plaintiffs' allegation that, in essence, Colliers paid the Executive Defendants to breach the Non-Disclosure Agreements to obtain Plaintiffs' confidential information. This allegation likewise reflects Colliers' active and intentional conduct. Accordingly, the Court concludes Colliers' Motion to Dismiss Plaintiffs' claim for tortious interference with the Executive Defendants' Non-Disclosure Agreements will be denied.

67. The Court reaches the same conclusion concerning Colliers' Motion to Dismiss Plaintiffs' claim that Colliers tortiously interfered with the Executive Defendants' Non-Solicitation Covenants. In particular, Plaintiffs allege that Colliers incentivized the Executive Defendants to breach the Non-Solicitation Covenants by offering them a "success bonus specifically determined by whether [the Executive Defendants] were successful in diverting employees from Plaintiffs[.]"[91] A reasonable factfinder could conclude that such alleged conduct constitutes purposeful inducement and therefore Plaintiffs' allegations are sufficient to satisfy the tortious interference claim's third element under Rule 12(b)(6). *See Sandhills Home Care LLC*, 2016 NCBC LEXIS 61, at *47–48 (holding that plaintiffs' allegations that

[91] (FAC ¶ 34.)

defendants encouraged plaintiffs' former employees to solicit plaintiffs' current employees, if proven, would go beyond reasonable competitive behavior).

68. For each of these reasons, therefore, the Court will deny the Colliers Motion to dismiss Plaintiffs' claim for tortious interference with contract.

C. Plaintiffs' Claims against All Defendants

1. Misappropriation of Trade Secrets

69. Plaintiffs assert a claim against all Defendants for misappropriation of trade secrets under North Carolina's Trade Secret Protection Act (the "NCTSPA").[92] *See* N.C.G.S. §§ 66-152–157. The NCTSPA provides that the owner of a trade secret "shall have a remedy by civil action for misappropriation of his trade secret." N.C.G.S. § 66-153. The NCTSPA defines a "trade secret" as:

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

Id. § 66-152(3).

70. "To plead misappropriation of trade secrets, a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which

[92] (FAC ¶¶ 107–117.)

he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Krawiec v. Manly*, 370 N.C. 602, 609 (2018) (citation omitted). While "[t]his 'sufficient particularity' standard does not require a party to define every minute detail of its trade secret down to the finest detail[,]" *Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2015 NCBC LEXIS 40, at *25 (N.C. Super. Ct. Apr. 23, 2015) (cleaned up), "[a pleading] that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is insufficient to state a claim for misappropriation of trade secrets." *Krawiec*, 370 N.C. at 610 (cleaned up).

71. In determining whether information identified in a complaint constitutes a trade secret, courts consider the following factors:

> (1) 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.

Sterling Title Co., 266 N.C. App. at 601 (citation omitted).

72. Plaintiffs identify their trade secrets in the Amended Complaint as falling into two broad categories: (1) compilations of "proprietary financial information"

concerning specific Grandbridge offices,[93] and (2) compilations of information about Plaintiffs' employees.[94]

73. More specifically, Plaintiffs allege that their trade secrets include:

> information regarding Plaintiffs' offices, revenue-producing employees, support staff, compensation, expenses, historical revenues, profits, product mix and business plans….[including] names, locations, contact information past and anticipated production performance, compensation history and targets, compensation structure, contract, forgivable loan balances, roles, responsibilities, and client relationships of various groups of Plaintiffs' employees.[95]

74. Plaintiffs also allege that their trade secrets include "Grandbridge's business plans . . . and finances including revenue, operating cost, product mix and profit-loss information pertaining to particular Grandbridge offices that the [Executive Defendants] considered to be especially susceptible to a raid by Colliers."[96]

75. Defendants contend first, that Plaintiffs' "sweeping and conclusory" allegations fail to identify a trade secret with the requisite particularity required under North Carolina law,[97] and second, that the information Plaintiffs identify is not a protectable trade secret.[98] The Court disagrees with both contentions.

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[93] (Pls.' Br. Opp'n Executive Defs.' Mot. 24.)

[94] (Pls.' Br. Opp'n Executive Defs.' Mot. 25.)

[95] (FAC ¶ 108.)

[96] (FAC ¶ 32.)

[97] (Executive Defs.' Br. Supp. 24–26; Colliers' Br. Supp. 22–23.)

[98] (Executive Defs.' Br. Supp. 25–26, Colliers' Br. Supp. 22–24.)

76. Turning first to the compilations of "proprietary financial information," the Court concludes that Plaintiffs' allegations are sufficiently specific to put Defendants on notice of the information Plaintiffs claim they misappropriated and are therefore sufficient to meet Plaintiffs' pleading burden under Rule 12(b)(6). *See, e.g.*, *The Bldg. Ctr., Inc. v. Carter Lumber, Inc.*, 2016 NCBC LEXIS 79, at *10–13 (N.C. Super. Ct. Oct. 21, 2016) (holding allegations that defendants misappropriated "confidential and proprietary business information such as: names and contacts of customers; customer preferences . . . sales and marketing strategies; pricing structures; margins and profits; manufacturing technologies; and other confidential business information" were sufficient to survive dismissal under 12(b)(6) (cleaned up)); *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 234 (2013) (holding plaintiff's allegations of "chemical formulations, pricing information, customer proposals, historical costs, and sales data that individual defendants were exposed to [while employed by plaintiff]" were sufficiently particular to survive dismissal).

77. Moreover, the compilations of financial information—which include lists of the revenue producing employees, historical revenues, operating costs, product mix, and expenses of particular Grandbridge offices—are precisely the kind of information which, taken together, may constitute a protectible trade secret under North Carolina law. *See, e.g.*, *Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC* (*Sunbelt Rentals III*), 174 N.C. App. 49, 56 (2005) (holding that plaintiff's compilation of "special pricing information . . . personnel and salary information, organizational structure, financial projections and forecasts, utilization rates, [product mix] by market, capital

and branch budget information, and cost information" was sufficient to constitute a trade secret); *GE Betz, Inc.*, 231 N.C. App. at 234 (holding that plaintiff's descending sales reports and customer proposals were sufficient to constitute trade secrets); *Comput. Design & Integration, LLC v. Brown*, 2018 NCBC LEXIS 216, at *42 (N.C. Super. Ct. Dec. 10, 2018) (holding that the plaintiff's "financial history, profit and loss information, [and] revenues data" was sufficient to constitute a trade secret). Accordingly, the Court concludes that Plaintiffs' compilations of financial information are sufficiently identified as protectible trade secrets to survive Defendants' challenge under Rule 12(b)(6).

78. The Court reaches the same conclusion concerning the Executive Defendants' compilations of information about Plaintiffs' employees. Plaintiffs plead that the Executive Defendants compiled information that included key employees' "names, locations, contact information, past and anticipated production performance, compensation history and targets, compensation structure, contracts, forgivable loan balances, roles, responsibilities, [and] product mix and client relationships[.]"[99] Like the allegations regarding Plaintiffs' financial information, these allegations identify the employee information Defendants are accused of misappropriating with sufficient particularity to survive Rule 12(b)(6) scrutiny. *See, e.g.*, *Med. Staffing Network, Inc.*, 194 N.C. App. at 658–59 (finding a database with employee's "phone numbers, pay rates, specializations, and preferences regarding shifts and facilities" constituted a

[99] (FAC ¶ 31.)

trade secret); *Sunbelt Rentals III*, 174 N.C. App. at 55 (finding a compilation of information which included employees' salaries constituted a trade secret); *Comput. Design & Integration, LLC*, 2018 NCBC LEXIS 216, at *43–44 (finding a spreadsheet which included employee's hours, earnings, tax withholdings, employee benefit deductions, addresses, hire dates, pay frequencies, and the date of the employees' last raises constituted a trade secret); *Glover Constr. Co. v. Sequoia Servs., LLC*, 2020 NCBC LEXIS 76, at *45 (N.C. Super. Ct. June 18, 2020) (finding a compilation which included employee contact information and compensation constituted a trade secret).

79. Defendants make two additional arguments for dismissal of Plaintiffs' trade secret claim as to the employee compilations, neither of which the Court finds persuasive.

80. First, Defendants contend that the employee compilations cannot constitute trade secrets because "Plaintiffs have not alleged that they gathered this information outside of the routine course of business or otherwise uniquely compiled it" and because Plaintiffs have pleaded that the compilations were created by the Executive Defendants rather than Plaintiffs.[100] But Defendants have not identified a North Carolina decision, nor has the Court's research revealed one, requiring either that a

[100] (Executive Defs.' Br. Supp. 26; Colliers' Br. Supp. 23–24.)

trade secret be created outside the ordinary course of a plaintiff's business or by someone other than the former employee defendants.[101]

81. Next, Defendants argue that the employee compilations reflect only "basic demographic information" and thus are not protectible trade secrets.[102] But Defendants ignore that the compilations, as described, include much more than demographic information and include the employees' salaries, performance histories, client relationships, and more. Defendants also ignore that it would be extremely difficult and time-consuming to assemble the alleged trade secret information without access to Plaintiffs' information systems. As such, Defendants' argument is without merit. *See, e.g., Safety Test & Equip. Co., Inc.*, 2016 NCBC LEXIS 40, at *31 ("There may be protected value in the historical compilation upon an adequate showing that the information is not easily acquired or cannot be easily assembled in the same fashion[ ]"); *Comput. Design & Integration, LLC*, 2018 NCBC LEXIS 216, at *44 (holding that a spreadsheet reflecting employee records constituted a trade secret).

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[101] This Court's decision in *Edgewater Servs. v. Epic Logistics, Inc.*, 2009 NCBC LEXIS 21 (N.C. Super. Ct. Aug. 11, 2009), on which Defendants rely, does not hold to the contrary. While the court noted that the trade secret information was "compiled in the course of doing business," *id.* at *13–14, it did not require that the information be compiled in the ordinary course of doing business to merit trade secret protection.

[102] (Colliers' Br. Supp. 23–24.)

82. Defendants next contend that Plaintiffs have failed to allege sufficient facts showing that Plaintiffs engaged in reasonable efforts to protect the secrecy of their alleged trade secrets to survive 12(b)(6) dismissal.[103] The Court disagrees.

83. Plaintiffs have alleged that their trade secret information "was not widely distributed to all employees and was shared on a need-to-know basis,"[104] that the information was accessible to the Executive Defendants only "by virtue of their high-ranking positions at Truist and Grandbridge,"[105] that the Executive Defendants attested to the Truist Code of Ethics which provided that confidential information may only be used or accessed "for legitimate purposes furthering Truist's business, and under no circumstances for personal gain or to compete with Truist,"[106] and that Rocco and Randall each signed a Non-Disclosure Agreement.[107] The Court finds Plaintiffs' allegations sufficient to withstand Defendants' Motions under Rule 12(b)(6). *See, e.g.*, *The Bldg. Ctr., Inc.*, 2016 NCBC LEXIS 79, at *14 (finding "password-protected login[s], controlled and permission-restricted access on a need-to-know basis, and confidentiality policies and/or agreements[]" sufficient under Rule 12(b)(6) and noting that "[g]enerally, only where efforts to maintain secrecy of the allegedly misappropriated trade secrets were completely absent have North Carolina

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[103] (Executive Defs.' Br. Supp. 26–28; Colliers' Br. Supp. 24–25.)

[104] (FAC ¶ 22.)

[105] (FAC ¶ 31.)

[106] (FAC ¶ 23.)

[107] (FAC ¶¶ 11, 21.)

courts dismissed claims at the 12(b)(6) stage.") (citation omitted); *Aym Techs., LLC v. Rogers*, 2018 NCBC LEXIS 14, at *39–40 (N.C. Super. Ct. Feb. 9, 2018) (finding "physical security, computer password protection, and limited access to the information on a need to know basis" sufficient under Rule 12(b)(6)); *States Mortg. Co. v. Bond*, 2023 NCBC LEXIS 33, at *16–17 (N.C. Super. Ct. Mar. 6, 2023) (finding nondisclosure agreements and confidentiality policies sufficient under Rule 12(b)(6)); *New Restoration & Recovery Servs., LLC. v. Dragonfly Pond Works, LLC*, 2023 NCBC LEXIS 80, at *10–11 (N.C. Super. Ct. June 15, 2023) (finding the use of a non-disclosure agreement and repeated attempts to reinforce confidentiality agreements sufficient under Rule 12(b)(6)).

84. For each of these reasons, the Court will deny the Motions to the extent Defendants seek to dismiss Plaintiffs' claim for misappropriation of trade secrets.

2. Tortious Interference with Contract and Business Relations

85. Defendants next seek to dismiss Plaintiffs' claim against Defendants for tortious interference with contract and business relations.[108] "A claim for tortious interference with business relations embraces claims for interference with both existing contracts and prospective future contracts." *E-Ntech Indep. Testing Servs. v. Air Masters, Inc.*, 2017 NCBC LEXIS 2, at *14 (N.C. Super. Ct. Jan. 5, 2017). A claim for tortious interference with prospective economic advantage focuses on alleged interference with future contracts. A claim for tortious interference with

[108] (FAC ¶¶ 96–106.)

contract concerns alleged interference with existing contracts. Each claim has different elements. The Court will therefore analyze Plaintiffs' tortious interference claim as asserting these two distinct claims.

a. Tortious Interference with Prospective Economic Advantage

86. Plaintiffs' claim for tortious interference with prospective economic advantage is premised upon Defendants' alleged interference with Plaintiffs' future contracts with existing and prospective employees and customers.[109] Defendants contend that this claim should be dismissed because Plaintiffs allege only an expectation of future contracts, which is insufficient under North Carolina law.[110] The Court agrees.

87. A claim for tortious interference with prospective economic advantage "arises when a party interferes with a business relationship by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference, if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights." *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 368 N.C. 693, 701 (2016)

[109] (FAC ¶¶ 97–98.)

[110] (Executive Defs.' Br. Supp. 22–23; Colliers' Br. Supp. 18–19.)

(cleaned up). A plaintiff must show that "a contract would have resulted but for a defendant's malicious intervention." *Id.*

88. "[A] plaintiff's mere expectation of a continuing business relationship is insufficient[.]" *Id.* at 701. Rather, "a plaintiff must identify a *specific* contractual opportunity that was lost as a result of the defendant's allegedly tortious conduct in order to sustain a claim for interference with prospective economic advantage." *MarketPlace 4 Ins., LLC v. Vaughn*, 2023 NCBC LEXIS 31, at *37 (N.C. Super. Ct. Feb. 24, 2023) (emphasis in original) (holding that plaintiff could not sustain a claim for tortious interference with prospective economic advantage because the complaint was "devoid of any reference to specific contracts that would have resulted but for [the] alleged tortious conduct.")

89. Plaintiffs allege here only that they had "valid, protectable contractual and business relationships" with prospective customers[111] and "valid contractual and business relationships with various employees that Colliers has hired away from Plaintiffs with the aid and assistance of the [Executive Defendants]."[112] These allegations, however, fail to identify either the "prospective customers" or the "various employees" with whom Plaintiffs claim they would have contracted but for the Executive Defendants' interference. Nor do Plaintiffs otherwise allege facts showing the basis for Plaintiffs' alleged expectation of future contracts. As such, Plaintiffs'

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[111] (FAC ¶ 98.)

[112] (FAC ¶ 97.)

claim is fatally deficient and will be dismissed. *See Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 701–02 (affirming dismissal based on plaintiff's "expectation that [its] former customers would continue to do business with plaintiff[ ]") (cleaned up).

b. Tortious Interference with Contract

90. Defendants next seek to dismiss Plaintiffs' claim for tortious interference with contract, which is premised on Defendants' alleged interference with Plaintiffs' contracts with certain existing employees and customers, including, in particular, contracts with "over 50 key employees who have already been diverted by Defendants to Colliers"[113] as well as "a number of insurance loans and service contracts that have left Plaintiffs and gone to Colliers after Colliers commenced its raid on Plaintiffs' employees and business."[114]

91. As stated above, to state a claim for tortious interference with contract, a plaintiff must allege:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant kn[ew] of the contract; (3) the defendant intentionally induce[d] the third person not to perform the contract; (4) and in doing so act[ed] without justification; (5) resulting in actual damage to the plaintiff.

Embree Constr. Grp., Inc., 330 N.C. at 498 (citation omitted).

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[113] (FAC ¶¶ 97–106.)

[114] (FAC ¶¶ 100–103.)

92. Colliers first contends, relying on *RLM Commc'ns, Inc. v. Tuschen*, 66 F.Supp.3d 681, 694 (E.D.N.C. 2014), that the "hiring of a competitor's employee, where the employee is working under an at will employment contract, cannot form the basis of a claim for tortious interference with contract."[115] The North Carolina appellate courts, however, have reached a different conclusion both before and after the federal court's interpretation of North Carolina law, and these decisions bind the Court here. *See, e.g.*, *Hooks*, 322 N.C. at 221 ("The mere fact that the plaintiff's employment contracts with the employees in question were terminable at will does not provide the defendant a defense to the plaintiff's claim for tortious interference."); *Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 745 (2007) ("A plaintiff may maintain a claim for tortious interference with contract even if the employment is terminable at will.") (citation omitted); *see also The Bldg. Ctr., Inc.*, 2016 NCBC LEXIS 79, at *18 ("[E]mployment contracts terminable at-will may serve as the basis for a tortious interference with contract claim in North Carolina[.]")

93. Defendants next contend that Colliers, as a direct competitor of Plaintiffs, and the Executive Defendants, as employees of Colliers, each had a legitimate business interest in competing with Plaintiffs, justifying their alleged interference.[116] But Plaintiffs have alleged that Defendants used Plaintiffs' trade secrets to draw and

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[115] (Colliers' Br. Supp. 19.)

[116] (Executive Defs.' Br. Supp. 23–24; Colliers' Br. Supp. 20–21.)

execute their plan to recruit Plaintiffs' revenue producing employees *en masse*,[117] and, as discussed above, Plaintiffs have adequately pleaded their claim for misappropriation of trade secrets against the Executive Defendants. Since "misappropriation of trade secrets is not a lawful means of competition[,]" *New Restoration & Recovery Servs., LLC*, 2023 NCBC LEXIS 80, at *17, Plaintiffs have adequately pleaded facts that would permit a jury to find that the Executive Defendants acted without justification in interfering with Plaintiffs' contracts with its employees.

94. Defendants' next argument posits that Defendants' hiring of Plaintiffs' employees, which Plaintiffs allege resulted in their loss of over 300 customer contracts, is too attenuated a causal chain to satisfy the inducement element of Plaintiffs' claim for tortious interference with its customer contracts. The Court disagrees. First, the "protection of customer relationships and good will against misappropriation by departing employees is well recognized as a legitimate protectable interest of the employer." *Kuykendall*, 322 N.C. at 651; *see, e.g.*, *The Bldg. Ctr., Inc.*, 2016 NCBC LEXIS 79, at *20–23 (denying 12(b)(6) motion where plaintiff alleged that defendants solicited plaintiff's key employees in order to "pirate" those employees and their customers). Moreover, Plaintiffs' allegations do not require an extraordinary inferential leap. To the contrary, Plaintiffs allege that "[u]sing lucrative financial compensation packages that the [Executive Defendants] had

[117] (*See* FAC ¶¶ 33, 37, 39.)

negotiated and crafted, Defendants facilitated the mass departure of over 50 key employees of Plaintiffs to Colliers[,]" including 11 of Plaintiffs' Production Office Managers, most of whom "had been with Plaintiffs and their predecessors for well over a decade."[118] Plaintiffs then tie their loss of customer contracts to Defendants' diversion of Plaintiffs' key employees, alleging that:

> Defendants['] diversion of these key employees and the clients they service has caused Plaintiffs to lose over 300 contracts to service existing mortgages, with 180 of those contracts being transferred to Colliers. These contracts generated nearly $1 Million in annual servicing fees and represent the loss of mortgage servicing rights valued at over $3.4 MM with approximately $2.9 MM of that value now at Colliers. Specifically, Defendants' unlawful conduct has caused the loss of servicing contracts with lenders including Voya Retirement Insurance and Annuity Company (loss of over 15 contracts, all to Colliers), Ameritas Companies (loss of over 125 contracts, most to Colliers) and Ohio National Financial Services (loss of over 15 contracts; all to Colliers).[119]

95. Plaintiffs further allege that "[t]he employees that Defendants have pirated away from Plaintiffs generate tens of millions of dollars in annual revenue through their client relationships and goodwill[]"[120] and that Defendants are acting with "intent to cause harm to Plaintiffs by disrupting their ability to compete to gain an unfair advantage over Plaintiffs and coopt their business."[121] Taken together, these

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[118] (FAC ¶¶ 57–58.)

[119] (FAC ¶ 61.)

[120] (FAC ¶ 59.)

[121] (FAC ¶ 105.)

allegations are sufficient to plead the inducement element of Plaintiffs' claim based on alleged interference with its customer contracts.

96. For all these reasons, the Court will deny the Motions as to Plaintiffs' claim for tortious interference with contract.

3. Unfair and Deceptive Trade Practices

97. Defendants also seek the dismissal of Plaintiffs' claim for unfair and deceptive trade practices. "To plead a valid claim for [unfair and deceptive trade practices], a plaintiff must show: (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*, 370 N.C. at 612 (citation omitted).

98. The Executive Defendants seek dismissal on grounds that their alleged conduct giving rise to Plaintiffs' claim occurred while they were Grandbridge employees and thus was not "in or affecting commerce."[122] *See, e.g.*, *White v. Thompson*, 364 N.C. 47, 53 (2010) (holding that section 75-1.1 does not "extend to a business's internal operations" and only applies "to interactions between market participants.") But our courts have made clear that a competitor's solicitation of a plaintiff's employees and customers like that alleged here is "in or affecting commerce" for purposes of section 75-1.1. *See, e.g.*, *Sunbelt Rentals III*, 174 N.C. App.

[122] (Executive Defs. Br. Supp. 20.)

at 59 (concluding that employee raiding was "in or affecting commerce" where the parties were competitors).

99. Moreover, Plaintiffs premise their section 75-1.1 claim, at least in part, on their claims for tortious interference with contract and misappropriation of trade secrets.[123] Since the Court has concluded that these claims shall survive the Motions, Plaintiffs' section 75-1.1 claim shall also be sustained for this independent reason at this stage of the litigation. *See, e.g.*, *Charah, LLC v. Sequoia Servs., LLC*, 2020 NCBC LEXIS 52, at *18–19 (N.C. Super Ct. Apr. 17 2020) ("[O]ur courts have long recognized that claims for misappropriation of trade secrets and tortious interference with contract may form the basis of a UDTP claim." (alteration in original) (citation omitted)).

4. Unjust Enrichment

100. Defendants next seek dismissal of Plaintiffs' claim for unjust enrichment, which rests on Plaintiffs' contention that Defendants obtained "substantial measurable benefits[,]" consisting of multi-million-dollar compensation packages and bonuses received by the Executive Defendants and profits received by Colliers, as a result of their misconduct, including their alleged misappropriation of Plaintiffs' trade secrets.[124]

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[123] (FAC ¶¶ 92–93.)

[124] (FAC ¶¶ 124–129.)

101. Unjust enrichment "is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another." *Atl. Coast Line R.R. Co. v. State Highway Comm'n*, 268 N.C. 92, 96 (1966). "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Booe v. Shadrick*, 322 N.C. 567, 555–56 (1988) (cleaned up). "[Restitution] is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep . . . The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep even though plaintiff may have suffered no demonstrable losses." *Booher v. Frue*, 86 N.C. App. 390, 393–94 (1987).

102. To state a claim for unjust enrichment, a plaintiff must allege that "(1) a measurable benefit was conferred on the defendant, (2) the defendant consciously accepted that benefit, and (3) the benefit was not conferred officiously or gratuitously." *Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co.*, 211 N.C. App. 252, 259–60 (2011). Under North Carolina law, the alleged benefit need not be conferred upon the defendant directly by the plaintiff to state a claim for unjust enrichment. *See New Restoration & Recovery Servs.*, 2023 NCBC LEXIS 80, at *17–18 ("The Supreme Court of North Carolina [ ] has *not* imposed a requirement that a *plaintiff directly* confer the benefit required to state an unjust enrichment claim.") (emphasis in original).

103. Plaintiffs have alleged that the Executive Defendants received benefits "in the form of millions of dollars of compensation . . . as a result of their misconduct[,]"[125] that Colliers received profits "due to the Defendants' unlawful conduct[,]"[126] and that Plaintiffs are entitled to restitution in the form of disgorgement of these profits.[127] Further, there are no allegations in the Amended Complaint demonstrating that the alleged benefit was conferred officiously or gratuitously, and Defendants make no argument to this effect. Therefore, Plaintiffs' allegations sufficiently describe each element of unjust enrichment to survive dismissal under Rule 12(b)(6). Accordingly, the Motions will be denied as to this claim.

5. Civil Conspiracy

104. Finally, Defendants seek dismissal of Plaintiffs' claim for civil conspiracy,[128] first, on grounds that Plaintiffs' claims for tortious interference, breach of fiduciary duty, misappropriation of trade secrets, and unfair and deceptive trade practices should be dismissed,[129] and second, because Plaintiffs have failed to allege an

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[125] (FAC ¶ 125.)

[126] (FAC ¶¶ 125, 129.)

[127] (FAC ¶ 129.)

[128] (FAC ¶¶ 118–123.)

[129] (Executive Defs.' Br. Supp. 28; Colliers' Br. Supp. 25–26.)

agreement between the Executive Defendants and Colliers to commit an unlawful act.[130]

105. Given the Court's conclusions above, Defendants' first argument is without merit. So, too, is Defendants' second contention. "In North Carolina, in order to state a claim for civil conspiracy, a complaint must allege '(1) a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a result of that conspiracy.' " *BDM Invs. v. Lenhil, Inc.*, 264 N.C. App. 282, 300 (2019) (quoting *State ex rel Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444 (2008)). While "sufficient evidence of the agreement must exist to create more than a suspicion or conjecture[,]" *BDM Invs.*, 264 N.C. App. at 300, "[a] party may prove an action for civil conspiracy by circumstantial evidence," *id.* Indeed, this Court has noted that "it is difficult to dismiss a conspiracy claim summarily because the elements of a conspiracy claim are broadly stated." *Safety Test & Equip. Co.*, 2015 NCBC LEXIS 40, at *48.

106. Here, Plaintiffs allege that:

> [T]he [Defendants] entered into an agreement, and actively participated in that agreement, to work and act together in a common plan pursuant to which (a) the [Executive Defendants], with the assistance, advice, support, and encouragement of Colliers, would breach the contractual, statutory and common law duties owed to Plaintiffs by engaging in the unlawful acts described herein and (b) Colliers, with the assistance, advice, and support of the [Executive Defendants], would raid Plaintiffs' employees and business.[131]

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[130] (Executive Defs.' Br. Supp. 29.)

[131] (FAC ¶ 120.)

107. The Amended Complaint is also replete with allegations of Defendants' "scheme" or "plan" to "raid" Plaintiffs' business by engaging in the conduct which gives rise to Plaintiffs' underlying claims.[132] The Court therefore concludes that Plaintiffs have adequately pleaded their claim for civil conspiracy. *See, e.g.*, *Kelly v. Nolan*, 2022 NCBC LEXIS 78, at *30–31 (N.C. Super. Ct. July 19, 2022) (denying 12(b)(6) dismissal where plaintiffs alleged a "plan or scheme" to commit unlawful acts); *Lau v. Constable*, 2017 NCBC LEXIS 10, at *22–23 (N.C. Super. Ct. Feb. 7, 2017) (denying 12(b)(6) dismissal where plaintiff alleged defendant was "aware of and complicit in" the alleged unlawful acts).

IV.

CONCLUSION

108. **WHEREFORE**, for the reasons set forth above, the Court hereby **GRANTS in part** and **DENIES in part** the Motions as follows:

a. The Motions are **DENIED** as to Plaintiffs' claims against all Defendants for tortious interference with contract (within Claim Five), misappropriation of trade secrets (Claim Six), unfair and deceptive trade practices (Claim Four), unjust enrichment (Claim Eight), and civil conspiracy (Claim Seven), and these claims shall proceed to discovery;

b. Defendants' Motions to Dismiss Plaintiffs' claim against all Defendants for tortious interference with prospective economic advantage within

[132] (*See e.g.* FAC ¶¶ 30, 32–33, 39, 57, 64, 66, 93.)

Claim Five is **GRANTED** and that claim is hereby **DISMISSED with prejudice**;

c. Colliers' Motion to Dismiss Plaintiffs' claim against Colliers for tortious interference with contract (Claim Two) is **DENIED** and that claim shall proceed to discovery;

d. The Executive Defendants' Motion to Dismiss TFC's claim for breach of fiduciary duty within Claim Three is **GRANTED** and that claim is hereby **DISMISSED with prejudice**;

e. The Executive Defendants' Motion to Dismiss Grandbridge's claim for breach of fiduciary duty within Claim Three is **DENIED** to the extent that claim is premised upon the Executive Defendants' conduct as company officials of Grandbridge and that claim shall proceed to discovery; and

f. The Executive Defendants' Motion to Dismiss Plaintiffs' claim against Lovell for breach of his Non-Disclosure Agreement within Claim One is **GRANTED** and that claim is hereby **DISMISSED with prejudice**. The Executive Defendants' Motion to Dismiss Plaintiffs' breach of contract claim against them is otherwise **DENIED** and that claim shall proceed to discovery.

SO ORDERED, this the 25th day of April, 2024.

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