STATE OF NORTH CAROLINA

GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 4285

RELATION INSURANCE, INC. and RELATION INSURANCE SERVICES OF NORTH CAROLINA, INC.,

Plaintiffs,

v.

PILOT RISK MANAGEMENT CONSULTING, LLC; PILOT FINANCIAL BROKERAGE, INC. d/b/a PILOT BENEFITS; KYLE SMYTHE; ROBERT CAPPS; LYNETTE KINNEY; EDWARD MILES GURLEY; SEAN KELLY; TYLER CROOKER; MICHELLE LINTHICUM; LINDA MICHELLE SNEED; TONI KING; and JOHNATHAN LANCASTER,

Defendants.

ORDER AND OPINION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND PLAINTIFFS' MOTION FOR ADVERSE INFERENCE AT SUMMARY JUDGMENT AND TRIAL BASED ON SPOLIATION OF EVIDENCE [PUBLIC][1]

THIS MATTER is before the Court on Defendants' Motion for Partial Summary Judgment (ECF No. 187), Plaintiffs' Motion for Partial Summary Judgment (ECF No. 189), and Plaintiffs' Motion for Adverse Inference at Summary Judgment and Trial Based on Spoliation of Evidence ("Motion for Adverse Inference," ECF No. 213) (collectively, the "Motions").

THE COURT, having considered the Motions and exhibits, the parties' briefs, the arguments of counsel, the applicable law, and all appropriate matters of record,

[1] The Court elected to file this Order and Opinion under seal on 12 July 2024. The Court then permitted the parties an opportunity to propose redactions to the public version of this document. The parties proposed the redactions contained herein, and the Court finds that those redactions are narrowly and appropriately tailored. Accordingly, the Court now files the redacted, public version of this Order and Opinion.

CONCLUDES that Defendants' Motion for Partial Summary Judgment should be **GRANTED** in part and **DENIED** in part, Plaintiffs' Motion for Partial Summary Judgment should be **GRANTED** in part and **DENIED** in part, and Plaintiffs' Motion for Adverse Inference should be **GRANTED.**

> *Fox Rothschild LLP, by Kip D. Nelson, Ashley Barton Chandler, Gray I. Mateo-Harris, and Kelsey Schmidt, for Plaintiffs Relation Insurance, Inc., and Relation Insurance Services of North Carolina, Inc.*
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> *Rossabi Law PLLC, by Amiel J. Rossabi, for Defendants Pilot Risk Management Consulting, LLC, Pilot Financial Brokerage Inc. d/b/a Pilot Benefits, Kyle Smythe, Robert Capps, Lynette Kinney, Edward Miles Gurley, Sean Kelly, Tyler Crooker, Michelle Linthicum, Linda Michelle Sneed, Toni King, and Johnathan Lancaster.*

Davis, Judge.

INTRODUCTION

1. This case involves a hotly litigated series of disputes between an insurance agency, one of its competitors, and a group of employees who left the agency to join its competitor. In a nutshell, the agency primarily contends that its former employees unlawfully used its confidential information and trade secrets to solicit employees and clients for the benefit of the competitor—their new employer. In addition, the agency asserts that the former employees intentionally destroyed evidence relevant to this lawsuit. The former employees, in turn, claim that the agency failed to pay them the correct amount of wages they had earned.

FACTUAL AND PROCEDURAL BACKGROUND

2. "The Court does not make findings of fact on motions for summary judgment; rather, the Court summarizes material facts it considers to be

uncontested." *McGuire v. Lord Corp.*, 2021 NCBC LEXIS 4, at **1–2 (N.C. Super. Ct. Jan. 19, 2021) (cleaned up).

A. Background on Relation

3. Plaintiff Relation Insurance, Inc. ("Relation Insurance") was formerly known as Ascension Insurance, Inc. ("Ascension").[2] (*See* Lancaster Aff. I, Ex. B, ECF No. 38.) Plaintiff Relation Insurance Services of North Carolina, Inc. ("Relation NC"), is a subsidiary of Relation Insurance. (R. 562.)[3] Relation Insurance exists as the holding company for Relation NC, as well as for other similar subsidiaries located in other states.[4] (R. 561.)

4. Relation serves as an "independent insurance agency and broker engaged in the business of the sale, marketing and provision of various insurance products and services to individuals and institutional, governmental and business clients[.]" (Kelly Aff. I, Ex. A, at 1, ECF No. 83.) As an independent insurance agency and broker, this includes offering property and casualty, risk management, benefits, and third-party administrator consulting services across the United States. (Cooper Aff. III ¶ 4, ECF No. 189.1.) In sum, "Relation serves as an intermediary between

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[2] Ascension was founded in July of 2007. (R. 890.)

[3] Relation filed a compilation of exhibits cited in its Brief in Opposition to Defendants' Motion for Summary Judgment as a single "Record." To enhance readability and eliminate duplicative citations, the Court will cite to the Record as "R." followed by the corresponding page numbers when possible. Please refer to Plaintiffs' Index of Exhibits Submitted with Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment (the "Record Index") for more information. (*See* R. Index, ECF No. 226; *see also* R. Exs. 1–9, ECF Nos. 226.1–226.14.)

[4] Throughout this Opinion, Relation Insurance and Relation NC are referred to collectively as either "Relation" or "Plaintiffs."

insureds and insurance carriers to identify, negotiate, place, and service the right coverage best suited to meet the specific needs of each policyholder." (Cooper Aff. III ¶ 5.)

5. Relation—like other insurance agencies—acts as "the 'Broker of Record' ('BOR') for its clients, which is a term of art in the insurance industry used to establish and/or identify a relationship between an insurance broker and a policyholder to the insurance company." (Cooper Aff. I ¶ 4, ECF No. 7.1.) In other words, a BOR refers to the broker designated by the policyholder to represent and manage a policyholder's insurance policy.[5]

6. Relation's salespersons are known as "Producers." Producers "are individuals licensed to sell, service, and negotiate insurance products and services, including insurance policies." (Cooper Aff. I ¶ 8.) In addition to Producers, Relation employs "Account Managers," who "work alongside producers to manage client relationships and service accounts in more of a customer service role." (Cooper Aff. III ¶¶ 9–10.)

B. Formation of Pilot Risk and Smythe Lawsuit

7. The origins of this lawsuit can be traced to early 2020, when Defendant Kyle Smythe, who at that time was employed by Relation as a Producer, left Relation to form a new company, Defendant Pilot Risk Management Consulting, LLC ("Pilot Risk"), a direct competitor of Relation. (Cooper Aff. I ¶¶ 21–22.) Pilot Risk was formed by Smythe on 12 February 2020 and began operating on 5 March 2020. (R.

[5] In the insurance industry, a BOR is sometimes referred to as the "Agent of Record."

715.) Smythe, as well as Defendants Robert A. Capps III and Lynette Kinney, are members (collectively, the "Pilot Members") of Pilot Risk. (R. 830.) Capps and Kinney are also "part-owners" of a related entity, Defendant Pilot Financial Brokerage, Inc. d/b/a Pilot Benefits ("Pilot Benefits") (collectively with Pilot Risk, the "Pilot Entities").[6] (Kinney Aff. I ¶ 6, ECF No. 58; Capps Aff. I ¶ 6, ECF No. 55.)

8. Smythe's formation of Pilot Risk as a competing entity was the subject of a prior lawsuit, *Relation Insurance, Inc. v. Smythe*, Case No. 20-CVS-4168, filed on 16 March 2020 in Guilford County Superior Court (the "Smythe Lawsuit"), in which Relation brought claims against Smythe for breach of his employment agreement, tortious interference, and unfair and deceptive trade practices ("UDTP"). (Smythe Aff. I, Ex. A, ECF No. 29; Smythe Aff. I, Ex. B, ECF No. 30.)

9. On 4 September 2020 the Honorable Susan E. Bray entered an order dismissing all of Relation's claims in the Smythe Lawsuit, except for the breach of employment agreement claim. (Smythe Aff. I, Ex. E, ECF No. 33.)

10. The Smythe Lawsuit was subsequently resolved on 11 March 2021 through a settlement agreement (the "Settlement Agreement") that was entered into with Relation by Smythe, Capps, Kinney, Pilot Risk, and Pilot Benefits (collectively, the "Pilot Defendants"). (Smythe Aff. I, Ex. F, ECF No. 34.) Per the terms of the Settlement Agreement, the Pilot Defendants agreed to: (a) pay Relation a nominal

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[6] Smythe, Capps, and Kinney are all listed as managing members of Pilot Risk on its 2022 Limited Liability Company Annual Report that was filed with the North Carolina Secretary of State on 4 April 2022. (R. 830.) However, Smythe testified at his deposition that he is the sole *managing* member of Pilot Risk, and that Kinney and Capps are only members but not managers of Pilot Risk. (R. 715.)

amount of money; (b) not solicit any customers of Relation through 31 May 2021; (c) not solicit any employees of Relation through 31 March 2021; (d) not disclose or use any of Relation's confidential information through 4 March 2022; and (e) not disclose or use any of Relation's trade secrets "for so long as the information qualifies as a trade secret under North Carolina law." (Smythe Aff. I, Ex. F § 3(a)–(d).) In consideration of these terms, the parties agreed to dismiss with prejudice all claims and counterclaims in the Smythe Lawsuit. (Smythe Aff. I, Ex. F § 4.) Furthermore, the parties agreed to "release and discharge" each other and their employees from "all claims, demands, actions, causes of action, suits, damages, losses, and expenses, whether known or unknown, of any and every nature whatsoever, as a result of actions or omissions occurring through the execution date of this [Settlement] Agreement." (Smythe Aff. I, Ex. F §§ 4–6.)

11. Smythe, Capps, and Kinney are all named as individual defendants in the present action. (*See* Compl. ¶¶ 6–8, ECF No. 3.)

C. Former Employees' Employment at Relation

12. The remaining individual defendants in this case are Edward Miles Gurley, Sean Kelly, Tyler Crooker, Michelle Linthicum, Linda Michelle Sneed, Toni King, and Johnathan Lancaster (collectively, the "Former Employees"), all of whom previously worked at Relation for varying amounts of time as either Producers or Account Managers. (Cooper Aff. I ¶ 7.) Gurley, Kelly, Crooker, and Lancaster were employed by Relation as Producers, while Sneed, King, and Linthicum were employed as Account Managers. (Butler Aff. ¶¶ 7, 11, 14, 19, 25, ECF No. 189.4.)

13. Prior to the beginning of their employment with Relation, each of the Former Employees executed a written employment agreement. (*See* Dobens Aff. ¶ 5, ECF Nos. 189.3 (sealed), 195 (redacted).) "Relation maintains a personnel file for each of the Former Employees, which houses his/her employment agreement, offer letters, and documentation for any discretionary bonuses or merit increases (i.e., raises)." (Butler Aff. ¶¶ 5–6.)

14. The employment agreements for the seven Former Employees can be classified into two categories—those for Producers ("Producer Agreements") and those for Account Managers ("Invention, Confidentiality and Non-Solicitation Agreements"; referred to herein as "Account Manager Agreements", and collectively with the Producer Agreements as "Employment Agreements"). (*See* Compl., Exs. I–O, ECF Nos. 5.9–5.15.)

15. All of the Employment Agreements contained non-solicitation clauses (the "Non-Solicitation Clauses"). (*See* Compl., Exs. I–O.) While the Non-Solicitation Clauses for the Former Employees are not completely identical, they are all substantially similar in that they each contained provisions that prohibit the solicitation of Relation's clients or employees upon an employee's departure from Relation.

16. Account Managers at Relation are salaried employees and do not rely on commissions. However, this is not the case for Producers. As set out in the Producer Agreements, the compensation of Relation's Producers varies. It can be determined by "stabilized base pay," "strictly variable compensation," or some "combination of the

two." (Dobens Aff. ¶ 6.) "Stabilized base pay" is typically the form of compensation provided to newly hired Producers because it serves as a salary that "does not depend on revenue received by Relation" so as to "ensure a steady flow of income" for the new Producer. (Cooper Aff. III ¶ 7.)

17. "After a period of time or once a [P]roducer's book of business reaches a certain threshold, a [P]roducer can become eligible for higher compensation in the form of straight commissions[,]" which is also referred to as "strictly variable compensation." (Cooper Aff. III ¶ 8.)

18. "For [P]roducers paid via variable compensation, their compensation comes in the form of commissions classified at typically two different rates—a higher rate for securing 'new' policies, and a lower rate for retaining 'renewal' policies." (Dobens Aff. ¶ 7.) Historically, Relation's Producer compensation plans offered a range of renewal commission rates from 23% to 27%. (Cooper Aff. III ¶ 12.) The historical tiered commission rate a Producer received depended on the size of the Producer's book of business—the larger the book of business, the higher the commission rate. (Cooper Aff. III ¶ 12.)

19. However, by 2019, Relation's historical tiered commission rate "approach was replaced with a standard 25/40[%] split (i.e., 40% on new business and 25% on renewal)[.]" (Cooper Aff. III ¶ 12–13.) The new 25/40% split commission rate did not vary based upon the size of a Producer's book of business. Although Relation informed some Producers of this change in the commission rate structure, it did not communicate this change to all of its Producers. (*See* Defs.' Br. Opp. Pls.' Mot. Summ.

J., at 30:3–31:20, ECF Nos. 224.32 (sealed), 237 (public); Kelly Aff. I ¶ 34, ECF No. 81.)

20. Relation's failure to inform all of its Producers of this change caused some degree of confusion and led to complaints about the company's lack of transparency in calculating commissions. Complaints about Relation's lack of transparency did not end with the Producers. At least one Account Manager, Linthicum, claims she was not given a raise and bonus as she was promised in exchange for taking on more responsibilities. Several Account Managers and Producers alike believed their workload at Relation was too heavy. (*See* Kelly Aff. I ¶¶ 8–10, 52; Crooker Aff. I ¶ 43, ECF No. 74; Lancaster Aff. I ¶¶ 13, 15, 18, 53, ECF No. 35; Sneed Aff. I ¶ 10, ECF No. 52; Linthicum Aff. I ¶ 16, ECF No. 64; King Aff. I ¶ 5, ECF No. 78.)

21. Moreover, Relation instituted a freeze on all pay raises in the spring of 2020 because of the COVID-19 pandemic. (Zewalk Aff. II ¶ 12, ECF No. 189.2; Butler Aff. ¶ 22.) On 1 April 2020, Relation held a conference call for all employees during which the employees were presented with written notice of the pay freeze via a PowerPoint presentation. (Zewalk Aff. II ¶ 13; Butler Aff. ¶ 22; Pls.' Mot. Summ. J., Ex. 23, ECF No. 189.23.) The employees were told, however, that this pay freeze would not affect the payment of 2019 discretionary bonuses. (Zewalk Aff. II ¶ 13.)

D. Former Employees Leave Relation for Pilot

22. The Former Employees' dissatisfaction with their positions at Relation ultimately resulted in their exodus from Relation beginning in the fall of 2021.

23. The Former Employees now all work at either Pilot Risk or Pilot Benefits, "performing comparable, if not identical, roles . . . that they performed at Relation." (Cooper Aff. I ¶¶ 27–28.)

24. Smythe first communicated with Crooker about the possibility of Crooker leaving Relation for Pilot Risk in late August of 2021. (R. 581–82, 718.) Crooker was the first Former Employee to leave Relation when he resigned on 30 November 2021. (Butler Aff. ¶¶ 4, 26.) Crooker was subsequently hired by Pilot Risk and began working there on 3 December 2021. (R. 717–718, 776, 781.)

25. Sneed swiftly followed Crooker and resigned from Relation on 1 December 2021. (R. 598.) She began working at Pilot Risk on 6 December 2021. (R. 595, 1648.)

26. Pilot Risk first communicated with Kelly about the possibility of him working at Pilot in September of 2021. (R. 719.) Pilot Risk formally offered Kelly a job in the middle of January of 2022, which he accepted on 18 February 2022—the same day he resigned from Relation. (R. 721.) Kelly's first day of employment with Pilot Risk was 21 February 2022. (R. 721–722.)

27. Like Kelly, Gurley was formally offered a job at Pilot Risk in the middle of January of 2022. (R. 721.) Gurley resigned from Relation on 18 February 2022 and accepted a job with Pilot Risk that same day. (R. 721; Butler Aff. ¶ 8.) Gurley's first day of employment with Pilot Risk was also 21 February 2022. (R.721–722.)

28. Also on 18 February 2022, Linthicum provided Relation with her notice of resignation. (Butler Aff. ¶ 23.) That same day, Relation relieved Linthicum of all

of her duties and paid her for her time through 4 March 2022. (Butler Aff. ¶ 23.) Linthicum was hired by Pilot Risk on 21 February 2022. (R. 1644.)

29. Although King notified Relation of her resignation on 25 February 2022, she accepted a position with Pilot Benefits eight days earlier on 17 February 2022. (R. 415, 418.) King began working at Pilot Benefits on 14 March 2022. (R. 1651.)

30. Also on 25 February 2022, "Lancaster's employment with Relation was terminated." (Butler Aff. ¶ 15.) Cooper testified at his deposition that Lancaster was fired for violating "his responsibilities as manager in the company." (R. 531.) Lancaster was assigned a Pilot Benefits email address that same day. (R. 1655.)

31. During this period of time in which the Former Employees were leaving Relation to begin working at the Pilot Entities, a flurry of communications occurred between the Former Employees themselves, as well as between certain Former Employees and Relation clients. Additionally, prior to resigning, each Former Employee forwarded documents from their Relation email account to their personal email accounts, which, as discussed below, Relation contends was not only a violation of the Former Employees' Employment Agreements, but also—in certain instances—amounted to a misappropriation of Relation's trade secrets. (*See, e.g.*, R. 612–619.)

32. Between 23 February 2022 and 1 March 2022, Relation sent letters to each of the Former Employees reminding them of their obligations under their respective Employment Agreements. Relation demanded that the Former Employees cease and desist from engaging in conduct prohibited by their Employment Agreements and requested that they immediately return any confidential

information in their possession. (*See* Compl., Ex. FF, ECF No. 5.32.) Additionally, Relation requested that the Former Employees return a signed acknowledgment verifying that they had not used any of Relation's confidential information and did not currently have any in their possession. (*See* Compl., Ex. FF.)

33. In this action, Plaintiffs assert that the Former Employees have solicited—and continue to solicit—Relation's clients and employees for the benefit of Pilot Risk and Pilot Benefits. (*See, e.g.*, Compl., Exs. B–H, P–EE, ECF Nos. 5.2–5.8, 5.16–5.31; Perkins Aff. ¶¶ 4–18, ECF No. 7.3; Zewalk Aff. I ¶¶ 4–7, ECF No. 7.4; Toran Aff. ¶¶ 4–5, ECF No. 7.2; Cooper Aff. II ¶¶ 7–9, ECF No. 89.) For example, Kathy Perkins, an Employee Benefits Consultant for Relation, learned on 10 March 2022 that Lancaster had unilaterally sent forms to a Relation client in an attempt to move the client's business to Pilot. (Perkins Aff. ¶ 14–17.)

34. Although Defendants deny that the Former Employees have improperly solicited Relation's clients and employees, they have acknowledged various communications between them and clients or employees of Relation following their departure from Relation. Crooker admitted that he does not "know which of [his] clients [he] called after leaving Relation and which ones called [him,]" (Crooker Aff. I ¶ 44); Linthicum stated that "several account managers on [her] former team at Relation asked [her] to keep them in mind if Pilot Risk needed to hire additional employees[,]" (Linthicum Aff. I ¶ 19); and multiple Former Employees admit that they reached out to Relation's clients to let them know they were leaving Relation, (*see, e.g.,* Gurley Aff. I ¶ 29, ECF No. 67; Kelly Aff. I ¶ 41; Lancaster Aff. I ¶ 57).

35. All of the Former Employees testified that they believed the restrictive covenants contained in their Employment Agreements were—and continue to be—unenforceable. (King Aff. I ¶ 48; Sneed Aff. I ¶ 14; Lancaster Aff. I ¶ 58; Linthicum Aff. I ¶ 37; Gurley Aff. I ¶ 43; Crooker Aff. I ¶ 45; Kelly Aff. I ¶ 53.)

36. Relation contends that the acts of Defendants have caused Relation to lose over 100 accounts to the Pilot Entities, resulting in a steady decline in the Relation Greensboro office's annual revenue since December of 2021. (R. 387.)

37. Furthermore, Relation claims that it was harmed by Defendants' actions because they resulted in a significant decrease in its number of producers within the span of a few months, which caused Relation to lose its only personal lines producer, its only employee benefits producer, its only employee benefits manager, and two of its four commercial lines producers. (R. 390.) As a result, Relation asserts that "[m]orale among employees has still not recovered[,]" and that Relation's "Greensboro location, and Relation's Eastern Region more generally, will never be the same." (R. 397.)

E. The Present Lawsuit

38. On 11 April 2022, Relation initiated this action by filing a Complaint in Guilford County Superior Court. (*See* Compl., ECF No. 3.)

39. Plaintiffs asserted the following claims in the Complaint: (a) four breach of contract claims—one against the Former Employees for breach of confidentiality provisions in their employment agreements; two against the Former Employees for breach of non-solicitation clauses in their employment agreements; and one against

the Pilot Defendants for breach of the 11 March 2021 Settlement Agreement; (b) two misappropriation of trade secrets claims against all Defendants—one under the Federal Defend Trade Secrets Act, 18 U.S.C. § 1832 *et seq*., and one under the North Carolina Trade Secrets Protection Act, N.C.G.S. § 66-152 *et seq*.; (c) an unjust enrichment claim against all Defendants; (d) two computer-related claims against the Former Employees—one for computer trespass under N.C.G.S. § 14-458 and one for violation of the Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030; (e) two tortious interference claims against all Defendants—one for current "business and contractual relations" and one for "prospective economic advantage"; and (f) a claim for UDTP under N.C.G.S. § 75-1.1 *et seq*. against all Defendants. (Compl. ¶¶ 154–270.)

40. On 5 July 2022, Defendants filed various counterclaims against Relation. Gurley, Kelly, Lancaster, Linthicum, and Crooker asserted counterclaims for violation of the North Carolina Wage & Hour Act, breach of contract, and breach of the implied covenant of good faith and fair dealing.[7] (Countercl. ¶¶ 22–47, 55–60, 78–86, ECF No. 117.) Additionally, the Pilot Defendants asserted a counterclaim against Relation for UDTP.[8] (Countercl. ¶¶ 68–77.)

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[7] Originally, Defendants also alleged a counterclaim for tortious interference with prospective economic advantage, (Countercl. ¶¶ 61–67), and Lancaster brought a counterclaim for defamation, (Countercl. ¶¶ 48–54). However, Defendants voluntarily dismissed these claims without prejudice on 23 August 2022. (*See* Vol. Dismiss., ECF No. 127.)

[8] Counsel for Defendants has since informed the Court that the UDTP counterclaim is now being asserted solely on behalf of Pilot Risk.

41. Following the completion of discovery, the parties filed cross-Motions for Partial Summary Judgment on 28 July 2023, and Plaintiffs filed the Motion for Adverse Inference on 31 August 2023.

42. The Motions have been fully briefed and the Court held a hearing on the Motions on 18 and 20 December 2023. The Motions are now ripe for resolution.

LEGAL STANDARD

43. It is well established that "[s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018) (quoting N.C. R. Civ. P. 56(c)). "[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534 (1971). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187 (2019) (cleaned up).

44. On a motion for summary judgment, "[t]he evidence must be considered 'in a light most favorable to the non-moving party.' " *McCutchen v. McCutchen*, 360 N.C. 280, 286 (2006) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470 (2004)). "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491 (1985).

45. The party moving for summary judgment may satisfy its burden by proving that "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . or by showing through discovery that the opposing party cannot produce evidence to support an essential element of [the] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth specific facts showing that there is a genuine issue for trial.' " *Lowe v. Bradford*, 305 N.C. 366, 369–70 (1982) (quoting N.C. R. Civ. P. 56(e)). If the nonmoving party does not satisfy its burden, then "summary judgment, if appropriate, shall be entered against [the nonmovant]." *United Cmty. Bank (Ga.) v. Wolfe*, 369 N.C. 555, 558 (2017) (quoting N.C. R. Civ. P. 56(e)).

ANALYSIS

I. Motion for Adverse Inference

46. The Court elects to first address Plaintiffs' Motion for Adverse Inference.

47. In this Motion, Plaintiffs argue that each individual Defendant spoliated evidence and, as a result, "an adverse inference should be drawn against Defendants when considering their motion for summary judgment and at trial." (Mot. Adv. Inf., at 3.)

48. Spoliation occurs when "relevant evidence [i]s lost or destroyed by the opposing party." *Outlaw v. Johnson*, 190 N.C. App. 233, 245 (2008). In short, Plaintiffs allege that spoliation occurred because, "after receipt of a preservation

notice and the initiation of this action, every individual Defendant deleted data from his/her electronic devices." (Pls.' Br. Supp. Mot. Adv. Inf., at 1, ECF No. 216.)

49. Between 23 February and 1 March 2022—after the Former Employees left Relation for the Pilot Entities—Relation sent cease-and-desist letters to each Defendant informing them of Relation's belief that all of them were acting in violation of their legal obligations as set out in either the Settlement Agreement or in their respective Employment Agreements. (*See* Compl., Ex. FF.) Each cease-and-desist letter also included a preservation notice advising each individual Defendant "to preserve any and all information relevant to the facts surrounding the topics in this letter." (*See* Compl., Ex. FF.)

50. After filing the Complaint in this action on 11 April 2022, Relation subsequently served all Defendants with process over the next several days. (*See* Service Affs., ECF Nos. 15–26.)

51. Two days after filing the Complaint, Relation filed a Motion for Preliminary Injunction ("PI Motion," ECF No. 6). Among other things, Plaintiffs requested in the PI Motion that the Court order Defendants to

> preserve all data currently stored on computers over which they have possession, custody, or control, including personal digital assistants or mobile telephones, including any information stored on backup media, which currently stores, or which has stored, Plaintiffs' confidential information, proprietary information, or trade secrets; and . . .
>
> preserve all emails on any computer under their control, including internet mail servers, personal digital assistants, and other hardware, that was at any time related to the solicitation or contact of Plaintiffs' current or former clients or employees[.]

(PI Mot., at 4.)

52. On the same day that the PI Motion was filed, Linthicum reset her cellphone. (Shelton Aff. III, Ex. B-5, at 6, ECF No. 217.5.) Over the course of the week following the filing of the PI Motion, Smythe, Lancaster, Capps, King, and Sneed all did so as well. More specifically, Smythe reset his cellphone on 15 April 2022, (Shelton Aff. III, Ex. B-3, at 7, ECF No. 217.3); Lancaster reset his cellphone on 16 April 2022, (Shelton Aff. III, Ex. B-2, at 3, ECF No. 217.2); Capps reset his cellphone on 18 April 2022, (Shelton Aff. III, Ex. B-1, at 5, ECF No. 217.1); and King and Sneed both reset their cellphones on 21 April 2022, (Shelton Aff. III, Ex. B-6, at 4, ECF No. 217.6; Shelton Aff. III, Ex. B-9, at 21, ECF No. 217.9).

53. Later, on 5 May 2022, Gurley completely "wiped" his personal computer. (Shelton Aff. III, Ex. B-7, at Ex. A, ECF No. 217.7.) A few days later, Lancaster switched out the SIM card in his cellphone. (Shelton Aff. III, Ex. B-2, at 2.)

54. On 13 May 2022, the parties entered into the following Stipulation regarding the PI Motion:

> Prior to the deletion of any information pursuant to the paragraph below, the Former Employees will make their electronic devices available for digital imaging. Plaintiffs will, at their sole expense, provide an independent third-party company to digitally image the devices. The digital images will be maintained by the third-party company and will not be available to Plaintiffs or counsel for Plaintiffs unless and until counsel agree otherwise or as ordered by the Court.
>
> As to intangible information obtained from Plaintiffs, not including names and contact information of any persons in the Former Employees' cell phones (whether present or former clients) or the Former Employees' personal photos, identification numbers, financial information, protected health information, or attorney-client privileged information, the Former Employees will take all reasonable steps to locate and, then, permanently delete all such

> information from their computers, cell phones, tablets, external drives, cloud storage platforms, and any and all other places (within the Former Employees' possession, custody or control) stored or accessible within seven days of the completion of the digital imaging described above.
>
> The Former Employees agree that they will not use or disclose to others any tangible documents or intangible information obtained from Plaintiffs, except in connection with the litigation of the [sic] captioned matter. Further, the Former Employees have not disclosed to others (except their counsel) tangible documents or intangible information obtained from Plaintiffs and have not, since receipt of the "preservation notices" from Plaintiffs' counsel, destroyed or permanently deleted any such information.
>
> Each of the Former Employees will file separate acknowledgements, signed under oath, of their compliance with this stipulation within seven days of the completion of the digital imaging referred to above.
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> Other than the documents and intangible information that is permanently deleted, all parties will preserve all emails, documents, data, and other information related to the opposing parties or their clients, vendors, insurance carriers and/or employees.

(Stipulation, ECF No. 94.)

55. Relation retained David Shelton, the owner of Advantage Technology Investigations, LLC, to conduct the digital imaging of Defendants' devices as provided for in the Stipulation.[9] (Shelton Aff. III, ECF No. 217.) This round of imaging began in May of 2022. (Shelton Aff. III ¶ 6.)

56. On 18 May 2022, the following was produced to Shelton for imaging pursuant to the Stipulation: Linthicum's iPhone 13 Max and Apple MacBook Pro laptop, (Shelton Aff. III, Ex. B-5, at 1); Sneed's Apple iPhone 8, (Shelton Aff. III, Ex.

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[9] Shelton testified that he has over thirty-five years of experience in the field of information technology and that he has been retained as a forensic expert in nearly one hundred civil and criminal matters. (Shelton Aff. III ¶¶ 3–4.)

B-6, at 1); Gurley's Chromebook laptop, (Shelton Aff. III, Ex. B-7, at Ex. A); and Crooker's Motorola One cellphone, (Shelton Aff. III, Ex B-10, at 1, ECF No. 217.10).

57. Less than a month after the Stipulation was executed, Kinney reset her phone on 1 June 2022. (Shelton Aff. III, Ex. B-4, at 5–6, ECF No. 217.4.)

58. On 27 June 2022, the Court entered a Case Management Order ("CMO"), which "reminded [the parties] of their obligations to preserve and retain all potentially relevant documents, including but not limited to documents stored electronically, and the need to suspend all automatic deletions of electronic documents or overwriting of backup tapes that may contain potentially relevant information." (CMO, at 6, ECF No. 114.)

59. Pursuant to Business Court Rule ("BCR") 10.9, Relation emailed the Court on 3 October 2022 regarding an ongoing discovery dispute related to Defendants' responses to Relation's first set of interrogatories and requests for production of documents, which included, among other issues, Plaintiffs' access to the previously conducted forensic imaging of Defendants' devices (the "3 October Email"). (Mot. Adv. Inf., Ex A., ECF No. 213.1.)

60. On 30 September 2022, prior to emailing the Court, counsel for the parties participated in a phone call to address the dispute, which they failed to resolve at that time. Relation's email to the Court described the nature of the dispute, in pertinent part, as follows:

> On that September 30, 2022, call, Defendants would only agree to supplement their response to Global Interrogatory No. 1 and any other responses for which Defendants may deem supplementation necessary. Defendants also admitted that they did not even *look* for responsive

> information and documents. Nor did they provide any search terms or culling criteria in accordance with the ESI Protocol.
>
> Further, many of Defendants' discovery responses referred to information contained within devices that were digitally imaged at Plaintiffs' expense pursuant to the Stipulation. Yet, on the call Defendants would only agree to allow Plaintiffs to "access" the devices to the extent they expressly mention Plaintiffs, Plaintiffs' clients, or Alleged Confidential Information. This limitation is unreasonable and inconsistent with the ESI Protocol. Defendants should search for all relevant information and ESI, including on the imaged devices, and allow Plaintiffs to obtain all responsive information on the imaged devices (excluding any privileged communications). In addition, Defendants have refused to search their Pilot-issued devices or provide those devices to Plaintiffs.
>
> During the call, Defendants also reiterated that they would not identify or produce communications between themselves, claiming that anything from before they left Plaintiffs' employment would be captured on Plaintiffs' devices, and that anything after they left Plaintiffs' employment would be *per se* privileged because they "all" would have involved Defendants' counsel or been at the direction of Defendants' counsel. Again, Defendants take this position without performing any ESI search.
>
> Given Defendants' recalcitrance, Plaintiffs are forced bring this dispute to the Court. Plaintiffs respectfully request that the Court compel Defendants to provide full and complete responses to all interrogatories, produce the requested documents and tangible things (in accordance with the ESI Protocol), and allow Plaintiffs to search the imaged devices in accordance with the discovery requests, as well as award Plaintiffs their costs and fees associated with this dispute and grant such other relief as the Court deems just and proper.

(Mot. Adv. Inf., Ex. A (emphasis in original).)

61. On 13 October 2022, the Court conducted a BCR 10.9 conference (the "13 October Conference") to address the issues raised by Relation in the 3 October Email. During the 13 October Conference, the Court informed the parties that it would permit Shelton (on behalf of Relation) to conduct digital imaging of certain of

Defendants' electronic devices, which was then scheduled to begin on 25 October 2022. (Mot. Adv. Inf., Ex. E, ECF No. 213.5.)

62. This impending digital imaging of Defendants' devices appears to have set off another round of deletions by Defendants, beginning with Gurley resetting his phone on the very same day on which the 13 October Conference was conducted. (Shelton Aff. III, Ex. B-7.)

63. The day after the 13 October Conference, Smythe and Crooker deleted cell phone data files from their laptop computers. (Shelton Aff. III, Ex. B-3, at 6; Shelton Aff. III, Ex. B-10, at 6.)

64. Further, between 17 and 24 October 2022, Sneed reset her laptop computer, (Shelton Aff. III, Ex. B-6, at 11); Kelly reset his cell phone, (Shelton Aff. III, Ex. B-8, at 2, ECF No. 217.8); Linthicum installed a new SIM card on her phone, (Shelton Aff. III, Ex. B-5, at 2); and files were deleted from Gurley's laptop on two separate occasions, (Shelton Aff. III, Ex. B-7, at 11).

65. On 25 and 26 October 2022, the following electronic devices were produced to Shelton for digital imaging: Lancaster's iPhone 12 and Dell laptop, (Shelton Aff. III, Ex. B-2, at 1); Kinney's Apple iPhone XR, (Shelton Aff. III, Ex. B-4, at 1); Linthicum's Lenovo laptop, (Shelton Aff. III, Ex. B-5, at 1); Sneed's Apple iPhone 8 and HP laptop, (Shelton Aff. III, Ex. B-6, at 1, 7); Gurley's iPhone 14 Max and a Lenovo ThinkPad laptop, (Shelton Aff. III, Ex. B-7, at 1); Kelly's iPhone 14 Pro Max, HP laptop, and iPad Air, (Shelton Aff. III, Ex. B-8, at 1, 14); King's Dell desktop

computer, (Shelton Aff. III, Ex. B-9, at 1); Crooker's Motorola One cellphone, (Shelton Aff. III, Ex B-10, at 1); and Crooker's HP laptop, (Shelton Aff. III, Ex B-10, at 5).

66. Finally, on 3 November 2022, Capps' iPhone and MacBook laptop, as well as Smythe's iPhone 12 and HP laptop, were produced to Shelton for examination. (*See* Shelton Aff. III, Ex. B-1, at 1; Shelton Aff. III, Ex. B-3, at 1.)

67. Upon completing his analysis of the digitally imaged devices, on 30 November and 16 December 2022, Shelton "provided to counsel for Defendants external drives containing the data captured on the devices successfully imaged to that point." (Shelton Aff. III ¶ 23.) Shelton has testified that "[t]he data was provided in the form of searchable HTML reports[,]" which "included information about the documents and files contained on the imaged devices and their properties." (Shelton Aff. III ¶ 23.)

68. On 30 December 2022, Shelton "provided copies of the HTML reports to counsel for Plaintiffs, but without items that [he] deemed potentially privileged or personal." (Shelton Aff. III ¶ 25.) Shelton explained the scope of data included in these HTML reports as follows:

> The HTML reports from the Defendants' cell phones captured all message data, whether it was from an Android phone or an iPhone, that existed on each device. Any messages that were sent or received on that device would show up in the HTML report unless they were deleted—either as a part of the device's automatic deletion settings or through manual deletion.
>
> . . .
>
> Text messages sent from an iPhone to an iPhone (iMessages) do not always show up on a call log from a phone provider like Verizon or AT&T because they are sent directly through Apple's proprietary system as

> internet data, rather than through a wireless carrier. Depending on the service signal strength that is available, some iPhone-to-iPhone messages (iMessages) may show up on a call log. Thus, a phone provider call log for an iPhone user does not contain the majority of text messages sent to another iPhone user.

(Shelton Aff. III ¶¶ 24, 26.)

69. Following several delays resulting from discovery disputes between the parties, discovery in this matter finally closed on 2 June 2023. (*See* 24 April 2023 Order, ECF No. 176.)

70. In their Motion for Adverse Inference, Relation essentially contends that the above-described series of events shows that "Defendants engaged in systematic spoliation of evidence on at least 20 electronic devices and failed to preserve potentially relevant evidence once they were on notice of their duty." (Pls.' Br. Supp. Mot. Adv. Inf., at 13.)

71. Relation filed an affidavit of Shelton in support of the Motion for Adverse Inference, which summarized his conclusions drawn from the forensic analysis and digital imaging of Defendants' devices. (*See* Shelton Aff. III.) Shelton attached as exhibits to his affidavit the Cell Phone and Computer Summary Analyses for Capps, Lancaster, Smythe, Kinney, Linthicum, Sneed, Gurley, Kelly, King, and Crooker's devices. (*See* Shelton Aff. III, Exs. B-1–B-13.) In his affidavit, Shelton opined that "[i]n [his] 35+ years of experience, [he] ha[s] never seen such extensive and coordinated deletions of evidence across so many electronic devices as [he] discovered in [his] forensic examination in this matter. The deletions have destroyed what the full picture of data would have been in this case." (Shelton Aff. III ¶ 22.)

72. "Evidence of spoliation by a party allows the trier of fact to make an inference that the spoliated evidence was detrimental to that party's case." *Sunset Beach Dev., LLC v. Amec, Inc.*, 196 N.C. App. 202, 220 (2009). Our Supreme Court over a century ago explained the nature of an inference premised on spoliation as follows:

> It is therefore laid down in the books as a well settled principle that where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control, and offers in lieu of their production secondary or other evidence of inferior value, there is a presumption or at least an inference that the evidence withheld, if forthcoming, would injure his case.
>
> . . .
>
> "If a man by his own tortious act withhold evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted, for where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him."

Yarborough v. Hughes, 139 N.C. 199, 209 (1905) (internal citation omitted).

73. To prevail on their assertion that Defendants spoliated evidence, Plaintiffs must show that Defendants "(1) intentionally destroyed or failed to preserve (2) potentially relevant materials (3) while aware of the possibility of future litigation." *SCR-Tech LLC v. Evonik Energy Servs. LLC*, 2014 NCBC LEXIS 72, at **14 (N.C. Super. Ct. Dec. 31, 2014).

74. "If, however, the evidence withheld or destroyed was equally accessible to both parties or there was a fair, frank, and satisfactory explanation for the nonproduction of the evidence, the principle is inapplicable and no inference arises." *Holloway v. Tyson Foods, Inc.*, 193 N.C. App. 542, 547 (2008) (cleaned up). "On the

other hand, if no satisfactory explanation is forthcoming, the maxim of the law will apply, and the jury must pass upon the case, aided by the inference, giving to it such force and effect as they may think it should have under all of the facts and circumstances." *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 184 (2000) (cleaned up).

75. This Court has provided the following guidance on how a claim of spoliation should be analyzed:

> This rule of evidence is based on the common sense notion that individuals do not normally withhold or destroy evidence useful to their case. *See Kronisch*, 150 F.3d at 126. The inference serves to restore the prejudiced party to the same position he would have been in had the destruction of relevant documents not occurred. *See id.*
>
> The standard for applying the spoliation inference is evidence that the party intentionally destroyed potentially relevant materials while aware of the possibility of future litigation. *See McClain*, 137 N.C. App. at 716, 527 S.E.2d at 716. Whether materials were intentionally destroyed depends on the awareness of the party in possession of the documents. Therefore, a party is entitled to the spoliation inference, if he shows that the party having control over the evidence had an obligation to preserve it at the time it was destroyed. *See* 150 F.3d at 126. Such an obligation arises when the party in possession of the evidence is on notice that the evidence may be relevant to future litigation. *See id.* Thus, where the party was "aware of circumstances that were likely to give rise to future litigation" but nevertheless destroyed potentially relevant documents, the jury may draw an adverse inference against such party. *McClain*, 137 N.C. App. at 187, 527 S.E.2d at 718. A showing of such awareness satisfies the requirement that the evidence was intentionally destroyed; bad faith or even awareness of impending trial need not be shown. *Id.* at 8–9.
>
> Furthermore, "the prejudiced party may be permitted an inference in his favor so long as he has produced some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files." *Kronisch*, 150 F.3d at 128. Stated simply, the material destroyed must be potentially relevant to the issues presented at trial. *See id.* To ascertain relevancy, the party seeking the spoliation inference must show that "there is [a] likelihood

> that the destroyed evidence would have been of the nature alleged by the party affected by its destruction." *See id*[.] at 127. Therefore, while it is often difficult to ascertain the relevancy of the materials destroyed, evidence identifying the types of documents destroyed may provide the court with sufficient information to make the relevancy determination.

Praxair, Inc. v. Airgas, Inc., 2000 NCBC LEXIS 5, at **57–58 (N.C. Super. Ct. Aug. 14, 2000).

76. This Court addressed a similar spoliation issue in *Kixsports, LLC v. Munn*, 2019 NCBC LEXIS 62 (N.C. Super. Ct. Sept. 30, 2019). Discovery in *Kixsports*, as in the present matter, "proved to be contentious[,]" which resulted in the defendants bringing a motion that sought sanctions for discovery abuses that were discovered after the plaintiffs "were ordered to produce their electronic devices for inspection by a forensic expert[.]" *Kixsports*, 2019 NCBC LEXIS 62, at *1, *3. The defendants "contend[ed] that the forensic expert retrieved highly relevant evidence and also detected intentional deletion of evidence by" two of the plaintiffs. *Id*. at *2.

77. First, the *Kixsports* forensic expert determined that potentially relevant files located on one plaintiff's computer, which were "associated with the process of backing up a mobile device through Apple's iTunes software[,]" were intentionally deleted after the lawsuit was initiated. *Id*. at *14–15. This Court agreed with the forensic expert's findings and concluded that it was "more likely than not that [plaintiff] intentionally deleted backup files for his mobile device during the pendency of th[e] lawsuit." *Id*. at *15. In reaching this conclusion, the Court emphasized that all of the forensic expert's testimony as to this issue was unrebutted. The plaintiffs did not address the issue in their opposition brief or file an affidavit denying or

explaining the deletion, or hire their own expert to rebut or comment upon the forensic expert's analysis. *Id.*

78. Next, the *Kixsports* forensic analysis revealed that the plaintiffs "frequently sent and received text messages, yet scores of these messages [we]re missing." *Id.* at *15–16. Moreover, some text messages between the parties appeared on the defendant's phone, but did not appear on the plaintiffs' phones, which the forensic expert concluded "shows intentional deletion" by the plaintiffs. *Id.* at *16. In response, the plaintiffs argued that the forensic expert "failed to consider alternatives to intentional deletion, such as software settings that automate deletion of text messages." *Id.*

79. This Court in *Kixsports* was not persuaded by the plaintiffs' argument because the evidence was "consistent with intentional deletion[,]" and the plaintiffs did not proffer any expert testimony in support of their position. *Id.* at *17. The Court's reasoning underlying this conclusion was as follows:

> For one thing, the default setting for these devices is to retain text messages forever. Automated deletion requires action by the user to alter the setting. (3d Walton Aff. ¶ 13.) In addition, automated deletion works by scheduling the deletion of *all* text messages over a certain age (one year, for example), not by selecting and deleting messages with a specific user. (3d Walton Aff. ¶ 19.a.)
>
> The evidence here is consistent with intentional deletion. Pye's smartphones contained thousands of messages from 2017 but none exchanged with Carr, even though it is undisputed that such messages once existed. This cannot be explained by a theory of automated deletion; it is strong evidence of *selective* deletion of messages between Pye and Carr. Likewise, Pye and Carr altered their smartphones' default settings so that they would delete text messages more than one year old. (*See* 3d Walton Aff. ¶¶ 15, 19.b.) These were intentional acts, resulting in the deletion of an unknown number of text messages sent and received before May 22, 2017.

> Walton notes that the relevant devices do not record and store the exact dates of these deletions. (3d Walton Aff. ¶ 17; *see also* 3d Walton Aff. ¶ 19.b.) Thus, it is possible that Carr or Pye changed the default settings before litigation began. Even so, that would not excuse their failure to preserve evidence after litigation became likely. *See Tumlin v. Tuggle Duggins P.A.*, 2018 NCBC LEXIS 51, at *33 (N.C. Super. Ct. May 22, 2018) ("The obligation to preserve evidence begins when 'a party is aware of circumstances that are likely to give rise to future litigation.' " (quoting *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 187, 527 S.E.2d 712, 718 (2000))). Carr and Pye either caused or allowed their smartphones to delete messages after the complaint was filed (in September 2017), after Defendants requested the communications (in November 2017), after Defendants filed their motion to compel (in March 2018), and even after Judge Lewis issued his ruling (in April 2018). As to Pye, the evidence is even more clear: a comparison with Carr's device shows that Pye deleted messages that were exchanged with Carr while the litigation was pending, even as late as February 2018 when the discovery dispute was coming to the fore. (*See* 2d Walton Aff. ¶ 12.)

Id. at *17–18.

80. In the present case, as in *Kixsport*, the Court concludes that the evidence supports Relation's contention that the Individual Defendants intentionally destroyed or failed to preserve potentially relevant materials while aware of the possibility of future litigation. Therefore, given the mass of deleted text messages and emails, as well as the circumstances in which such deletions occurred, it may be inferred that the deleted documents were harmful to Defendants.

81. First, when considering the timeline of the deletions, Defendants cannot seriously dispute that they were aware of the possibility of future litigation. Relation sent each Defendant a preservation notice between 23 February and 1 March 2022. Indeed, most of the deletions occurred *after* the Complaint was filed on 11 April 2022. Moreover, with respect to any deletions occurring before litigation commenced, "[w]here there has been improper destruction of documents even without notice of a

claim, there can exist spoliation, particularly when the wholesale document destruction flies in the face of legal standards for document retention." *Clark v. Alan Vester Auto Group, Inc.*, 2009 NCBC LEXIS 13, at **24 (N.C. Super. Ct. July 17, 2009). As shown above, Defendants were certainly aware of the possibility of future litigation prior to the actual filing of the Complaint.

82. Defendants—at worst—intentionally destroyed relevant evidence or—at best—failed to preserve it. However, the method of spoliation does not affect the outcome because "[i]n attempting to meet their burden of establishing spoliation, Plaintiffs need not show intentional misconduct[.] Whether the evidence was destroyed or lost accidentally or in bad faith is irrelevant, because the opposing party suffered the same prejudice." *Id.* at **24–25. As explained above, there are multiple instances in the record of Defendants deleting materials from their devices or completely "wiping" their devices. Accordingly, Defendants—at a minimum—failed to preserve evidence.

83. Moreover, the evidence Defendants failed to preserve is pertinent, or potentially relevant, because the subject matter of at least some of the text messages and email communications directly address issues raised in this case.

84. Finally, the parties did not have equal access to the spoliated evidence because the evidence was deleted from Defendants' devices before the applicable round of digital imaging occurred. Notably, Defendants do not deny the deletions and have failed to offer any credible explanation for them.

85. Instead, Defendants argue that Relation is impermissibly asking the Court to effectively consider the spoliated evidence as the sole evidence of wrongdoing on the part of Defendants for purposes of deciding whether to grant or deny Defendants' Motion for Partial Summary Judgment.[10] (Defs.' Br. Opp. Mot. Adv. Inf., at 1–3, ECF No. 254.)

86. Our Court of Appeals has held that "it is improper to base the grant or denial of a motion for summary judgment on evidence of spoliation[,]" because "[i]t is not an issue to be decided as a matter of law, and cannot, by its mere existence, be determinative of a claim." *Sunset Beach Dev.*, 196 N.C. App. at 220. "[T]he inference does not supply the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced." *McLain*, 137 N.C. App. at 184.

87. Put differently, "[a]lthough the destruction of evidence, standing alone, is insufficient to allow a party producing such evidence to support a summary judgment claim, such destruction may push a claim that might not otherwise survive summary judgment over the line." *Praxair*, 2000 NCBC LEXIS 5, at **61 (internal quotation omitted).

88. Defendants' argument is based on an incorrect understanding of the above-quoted cases. Defendants contend that the above-quoted language from

[10] The deleted evidence relates solely to Plaintiffs' claims (rather than Defendants' counterclaims) and thus only implicates Defendants' Motion for Partial Summary Judgment as to Plaintiffs' claims.

McLain and *Sunset Beach* categorically precludes the use of an adverse inference at the summary judgment stage in this case. But Plaintiffs are not arguing that Defendants' summary judgment motion should be denied on that ground *alone*. Rather, as discussed below in detail, with regard to those claims asserted by Plaintiffs as to which the Court is denying Defendants' Motion for Partial Summary Judgment, Plaintiffs have offered extensive evidence (separate and apart from their evidence of Defendants' spoliation) as to why those claims should survive Defendants' summary judgment motion.

89. Accordingly, for the reasons set out above, Plaintiffs have met their burden of establishing that the Individual Defendants intentionally destroyed or failed to preserve potentially relevant evidence despite being aware of either actual litigation or the possibility of future litigation. Therefore, Plaintiffs' Motion for Adverse Inference is **GRANTED**.[11]

II. Defendants' Motion for Partial Summary Judgment

90. Defendants argue that summary judgment in their favor is appropriate on all claims brought against them by Relation. The Court will address each of these claims below.

A. Misappropriation of Trade Secrets

91. Relation claims that each Defendant misappropriated its trade secrets in violation of both the federal Defend Trade Secrets Act ("DTSA"), 18 U.S.C. §§ 1832–

[11] Moreover, Plaintiffs shall be entitled to an adverse inference jury instruction at trial.

1839, and the North Carolina Trade Secrets Protection Act ("NCTSPA"), N.C.G.S. §§ 66-152–66-157.

92. In broad strokes, Relation describes the nature of its claimed trade secrets as being a combination of "information about clients, carriers, and internal processes" that Relation claims is protectable under both the DTSA and NCTSPA. (Pls.' Br. Opp. Defs.' Mot. Summ. J., at 23, ECF No. 223.)

93. In response, Defendants generally contend that Relation's claims under both statutes "should be dismissed because [Relation] failed to adduce competent evidence: (1) of the existence of any trade secrets or (2) that any Defendant misappropriated any such alleged trade secret." (Defs.' Br. Supp. Mot. Summ. J., at 14, ECF No. 188.)

94. Under the NCTSPA, "[t]he owner of a trade secret shall have remedy by civil action for misappropriation of his trade secret." N.C.G.S. § 66-153. Like the NCTSPA, the DTSA permits "[a]n owner of a trade secret that is misappropriated [to] bring a civil action under [the DTSA] if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b).

95. At the outset, the Court notes that the parties have not identified any differences in the analysis to be applied to a claim under the DTSA as compared to one under the NCTSPA. Nor has the Court been able to discern any material differences between the two statutes for the purposes of analyzing Relation's claims, except with regard to the requirement under the DTSA that the trade secret at issue

be related to a product or service used in, or intended for use in, interstate or foreign commerce.[12] "Therefore the Court addresses [Relation]'s claims pursuant to the NCTSPA and the DTSA in tandem." *Power Home Solar, LLC v. Sigora Solar, LLC*, 2021 NCBC LEXIS 55, at *30 (N.C. Super. Ct. June 18, 2021); *see also Herrmann Int'l, Inc. v. Herrmann Int'l Eur.*, 2021 U.S. Dist. LEXIS 42277, at *34–38 (W.D.N.C. Mar. 6, 2021) (analyzing claims pursuant to the DTSA and the NCTSPA together).

96. As an initial matter, "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Krawiec v. Manly*, 370 N.C. 602, 609 (2018) (cleaned up). This means that a plaintiff must do more than make "general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated[.]" *Washburn v. Yadkin Valley Bank & Tr. Co.*, 190 N.C. App. 315, 327 (2008).

97. Following the identification of the alleged trade secrets, "[a] threshold question in any action involving allegations of misappropriation of trade secrets is whether the information in question constitutes a trade secret[.]" *Koch Measurement Devices, Inc. v. Armke*, 2015 NCBC LEXIS 45, at *10 (N.C. Super. Ct. May 1, 2015) (citing *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 369 (2001)).

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[12] Defendants make no argument that this element of a DTSA claim has not been met. Moreover, there is evidence in the record that the trade secrets Defendants allegedly misappropriated were related to services used, or intended for use, in interstate commerce. (*See e.g.*, R. 663, 672, 1062.)

98. The DTSA defines a trade secret as

> all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if —
>
> (A) the owner thereof has taken reasonable measures to keep information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information[.]

18 U.S.C. § 1839(3).

99. In turn, 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 for its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C.G.S. § 66-152(3).

100. In applying the definition provided in N.C.G.S. § 66-152(3), North Carolina courts consider the following six factors:

> (1) the extent to which the 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 the information to 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.

TSG Finishing, LLC v. Bollinger, 238 N.C. App. 586, 591–92 (2014). "The factors overlap, and courts considering these factors do not always examine them separately and individually." *Comp. Design & Integration, LLC v. Brown*, 2017 NCBC LEXIS 8, at *23 (N.C. Super. Ct. Jan. 27, 2017).

101. Essentially, Relation argues that its claimed trade secrets are protectable under both the DTSA and NCTSPA because "in the insurance brokerage industry, [the combination of] information about clients, carriers, and internal processes *is* the secret formula." (Pls.' Br. Opp. Defs.' Mot. Summ. J., at 23 (emphasis in original).)

102. Generally, "[i]nformation will not merit trade secret protection where the information is 'either generally known in the industry . . . or [is] readily ascertainable by reverse engineering.' " *Sterling Title Co. v. Martin*, 266 N.C. App. 593, 601 (2019) (citing *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 470 (2003)).

103. However, compilations of data may be protectable as trade secrets if certain criteria are met. *See Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2015 NCBC LEXIS 40, at *25–27 (N.C. Super. Ct. Apr. 23, 2015). In *Safety Test & Equip.*

Co. v. Am. Safety Util. Corp., this Court explained what types of data compilations deserve protection as trade secrets:

> [C]ompilations comprised solely of publicly available information are generally not recognized as trade secrets. *See Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 370–71 (2001) (citing *Glaxo Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280 (E.D.N.C. 1996), *aff'd*, 110 F.3d 1562 (4th Cir. 1997)). A compilation of publicly available information may, however, receive trade secret protection where the claimant encountered some difficulty in assembling each of the public components. *SCR-Tech LLC v. Evonik Energy Servs., LLC*, 2011 NCBC LEXIS 27, at *47 (N.C. Super. Ct. July 22, 2011) ("[A] process comprised of published components turns on how easy or difficult it is to assemble the relevant elements into the secret combination." (internal quotations omitted)). To qualify for trade secret protection, any such compilation must have independent commercial value to the claimant and be subject to reasonable efforts to maintain its secrecy. *Market Am., Inc. v. Rossi*, No. 1:97CV00891, 1999 U.S. Dist. LEXIS 9793, at *43 (M.D.N.C. Apr. 15, 1999).

Id. at *26.

104. In *Krawiec*, our Supreme Court addressed the specific issue of whether "customer lists and contact information are protectable trade secrets as a matter of law." *Krawiec*, 370 N.C. at 608.

105. The Supreme Court stated that "[p]rovided that the information meets the two requirements for a trade secret as defined in subsection 66-152(3), we agree with the determination of the Court of Appeals that '[i]nformation regarding customer lists, pricing formulas and bidding formulas *can* qualify as a trade secret under G.S. § 66-152(3).' " *Id*. at 610 (emphasis added) (citing *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 525 (2003)).

106. However, the Supreme Court ultimately concluded that the complaint in that case failed to sufficiently allege that the plaintiff employer's customer lists met the two requirements of N.C.G.S. § 66-152(3), reasoning as follows:

> In their amended complaint, plaintiffs described their trade secrets only as their "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information." Plaintiffs provided no further detail about these ideas, concepts, strategies, and tactics sufficient to put defendants on notice as to the precise information allegedly misappropriated. In addition, plaintiffs' failure to describe a specific idea, concept, strategy, or tactic with respect to their marketing plan or to provide any detail about their dance productions renders their claim too general for this Court to determine—even taking plaintiffs' factual allegations as true—whether there is a "formula, pattern, program, device, compilation of information, method, technique, or process" at issue that "[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering." N.C.G.S. § 66-152(3)(a). Similarly, plaintiffs' amended complaint, on its face, does not show that plaintiffs' customer lists constituted a protected trade secret because plaintiffs failed to allege that the lists contained any information that would not be readily accessible to defendants. Like the Ohio Court of Common Pleas in an often cited case involving a dispute between a dance studio and its former employee, we recognize that "[t]here is no presumption that a thing is a secret," and emphasize the shortcomings of "general allegations" in making a case for misappropriation of trade secrets. *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 105 N.E.2d 685, 709-10 (Ohio Ct. Com. Pl. 1952) (citing *Super Maid Cook-Ware Corp. v. Hamil*, 50 F.2d 830, 832 (5th Cir. 1931)).

Id. at 611.

107. More recently, our Court of Appeals, citing *Krawiec*, held that a guest list composed of 51 names of the plaintiff's "contacts" was not a trade secret. *See Sterling Title Co.*, 266 N.C. App. at 602. In that case, the plaintiffs alleged that the defendant, a former employee of the plaintiff, "saved to her personal Dropbox folder a document titled 'Happy_Hour_with_Carolina_Bank_Sterling_-guest_list-03-22-12

(1).xlsx,' which is purportedly 'a list of 51 names and email addresses and is consistent with being a contact list for [the plaintiff].' " *Id.* The Court of Appeals determined that this guest list was not a trade secret because nothing in the complaint supported the proposition that such information would not have been readily accessible to the defendant-former employee but for her employment with the plaintiff-employer. *Id.*

108. Notably, however, North Carolina courts have held "that 'sprawling lists' of information can form trade secrets in the aggregate, even if some pieces of information do not qualify as trade secrets in isolation." *New Restoration & Recovery Servs., LLC v. Dragonfly Pond Works, LLC*, 2023 NCBC LEXIS 80, at **9 (N.C. Super. Ct. June 15, 2023). For example, in *Sunbelt Rentals, Inc. v. Head & Engquist Equip.*, *L.L.C.*, 174 N.C. App. 49 (2005), the Court of Appeals affirmed the trial court's conclusion that the plaintiff's "compilation of information, including its special pricing information, customer information (identity, contacts and requirements of its rental customers), personnel and salary information, organizational structure, financial projections and forecasts, utilization rates, fleet mix by market, capital and branch budget information, and cost information, when taken together constitute[] trade secrets[.]" *Sunbelt Rentals, Inc.*, 174 N.C. App. at 56.

109. Conversely, this Court has ruled that a plaintiff-logistic company's freight carrier files, rate information, and customer files did not constitute trade secrets based, in part, on the fact that the "information contained therein is such that [it] can be learned directly from carriers and customers of" the plaintiff-logistic

company. *Edgewater Servs. v. Epic Logistics, Inc.*, 2009 NCBC LEXIS 21, at **14 (N.C. Super. Ct. Aug. 11, 2009). *See also Combs*, 147 N.C. App. at 370 ("[R]egarding the customer database stored on [defendant]'s computer, the record shows that defendants could have compiled a similar database through public listings such as trade show and seminar attendance lists."); *Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 478 (2000) (holding that customer lists were not considered "trade secrets" where information would have been easily accessible through a local telephone book).

110. The above-referenced cases demonstrate that this issue is highly fact-specific based on the specific evidence existing in a particular case. Moreover, they make clear that compilations such as customer lists and contact information can be protectable as trade secrets if those compilations have independent commercial value to the claimant and are subject to reasonable efforts to maintain their secrecy. *See Krawiec*, 370 N.C. at 610.

111. The documents identified by Relation that form the basis for its trade secrets include the following: (i) an Excel spreadsheet titled "Customer List 2020.xlsx" ("Gurley's Customer List"); (ii) an Excel spreadsheet identified as "JL Client Renewal List for TK Accts.xlsx" ("Client Renewal List"); (iii) an Excel spreadsheet called "Carrier Contacts List 7.28.2020.xlsx" ("King's Carrier Contact List"); (iv) an Excel spreadsheet called "FS-1 Codes.xls" ("Linthicum's FS-1 List"); (v) an Excel spreadsheet titled "Net rate calculations.xlsx" ("Linthicum's Net Rate Calculation Spreadsheet"); (vi) a PDF document identified as "Lancaster new.pdf"

("Lancaster's Production Analysis"); (vii) a PDF document titled "Lancaster.pdf" ("Lancaster's Production Report"); and (viii) a PDF document titled "Production Analysis Report – Production-Crooker" ("Crooker's Production Analysis").

112. Relation asserts that the information contained in these documents "would allow a competitor to contact Relation's clients, analyze their contractual data, renewal history, and cost pricing and provide them with a quote to undercut and outright steal Relation's business." (Cooper Aff. I ¶ 34.) Furthermore, Relation contends that "[s]uch information, if used in competition with Relation, would create an unfair and unwarranted advantage for a competitor at the expense of Relation and/or would place Relation at a significant competitive disadvantage." (Cooper Aff. I ¶ 33.)

113. Relation argues that competition in the insurance brokerage industry requires it to "invest[ ] a significant amount of time, money, and resources [in] developing its client base and identifying the needs and preferences of its clients." (R. 396.) Relation further contends that

> [m]uch of this information is gathered by the [P]roducers and [A]ccount [M]anagers themselves, as the client-facing employees of Relation who engage directly with clients to learn the clients' unique needs and preferences. Relation relies upon and invests in its employees—with competitive salaries, bonuses, trainings, expense reimbursements, sales meetings, and similar initiatives—to develop and maintain its client base.

(R. 396.)

114. Defendants contend that Relation has failed to offer evidence that any of the above-described documents actually contain trade secrets. Defendants assert that the first five documents are not trade secrets because they were created by

certain Defendants for their own personal use and contain only publicly available information that can be easily duplicated, thereby lacking any significant independent value. With respect to the last three documents, Defendants argue that they are not trade secrets because they merely contain information about Crooker's and Lancaster's personal compensation and that these documents were provided to them by Relation (and not kept confidential by Relation).

115. Defendants' arguments can be summarized as follows: (i) the client information in the documents is publicly available; (ii) Relation has failed to show any actual value that could be derived by Relation's competitors from this information; (iii) there is no evidence in the record of effort or money expended by Relation in developing the information; (iv) client, policy, and insurer information can be easily ascertained by others in the insurance agency industry; and (v) Relation did not undertake adequate secrecy measures to protect its claimed trade secrets. (*See* Defs.' Br. Supp. Mot. Summ. J., at 12, ECF No. 188.)

116. Based on the legal principles set forth above, the Court must consider each of these eight documents to determine whether a jury could reasonably find that they qualify as trade secrets. The Court will first determine whether a genuine issue of material fact exists as to whether the nature of the information contained in each document is of a type previously recognized by our courts as possessing the characteristics of a trade secret. With regard to any of the documents that satisfy this test, the Court will then address the issues of (1) whether a factual dispute exists as to the reasonableness of the measures taken by Relation to protect the secrecy of

these documents; and (2) whether Relation has offered sufficient evidence of Defendants' misappropriation of such trade secrets to survive summary judgment.

1. Nature of Information Contained

a. Gurley's Customer List

117. The document referred to as "Gurley's Customer List," (ECF Nos. 187.3 (sealed), 200 (redacted)), is an Excel spreadsheet, which contains the names and mailing addresses of 98 customers. Gurley is the only Producer listed on this document.

118. The first two rows in the spreadsheet contain the following information: "Customers - Active Status"; "Department: Commercial Lines"; and "Division - North Carolina." The third row reads as follows: "*Please only mark the customers that EXPECT AND USES Relation Wall Calendars." The fourth row of Gurley's Customer List contains the following column headers: "Producer"; "QUANTITY"; "Customer – Firm Name"; "Customer – DBA Name"; "Customer – Last name, First Name"; "Address 1"; "Address 2"; "City"; "State"; and "Zip." The bottom of the spreadsheet contains a tallied "Calendar Count" of 93.

119. Relation contends that Gurley's Customer List qualifies as a trade secret because it is a compilation of client information, arguing that "[a] list of Relation's clients is not broadly accessible companywide, nor can it be found from any public source such as the internet." (R. 393.) Relation further asserts that "[t]he same is true for each [P]roducer's specific list of clients." (R. 393.)

120. In attempting to rebut Relation's contentions regarding the value of such information, Smythe testified that it "would have little or no value to [him] or another agent[,]" because "it would be nothing more than a prospect list." (Smythe Aff. I ¶ 18.) Smythe further stated that similar lists of business owners' information can be purchased from third-party companies. (Smythe Aff. I ¶ 19.)

121. In addition, Lancaster testified that the client information contained in this type of document is outdated and that some of the clients listed may not even be in business anymore. (Lancaster Aff. I ¶ 39.)

122. The Court is unpersuaded that Gurley's Customer List should be characterized as a trade secret. Based on *Krawiec* and its progeny, the basic compilation of client information found in Gurley's Customer List is not the type of compilation that is deserving of trade secret protection.

123. Therefore, the Court **CONCLUDES** that Gurley's Customer List cannot properly be characterized as a trade secret.

b. Client Renewal List

124. The Client Renewal List, (ECF Nos. 187.5 (sealed), 202 (redacted)), is an Excel spreadsheet containing a table that includes the account names of 37 clients and four associated insurance policy renewal dates titled "Medical," "Early Renew," "Dental," and "Ancillary."

125. As with Gurley's Customer List, Relation contends that the Client Renewal List is a trade secret because it is a compilation of client information, which includes business line and client renewal dates. Relation asserts that "[a]

consolidated client list which contains the respective renewal information is imperative for the renewal process and enables [its] employees to prioritize accordingly and ensure each client's renewal is timely handled and managed." (R. 394.) Relation further represents that a "compilation of [renewal dates] is not generally known and cannot be found from any public source such as the internet." (R. 394.)

126. Once again, however, Relation has failed to demonstrate—based on the case law discussed above—that the information contained in the Client Renewal List is sufficient to warrant trade secret protection.

127. Therefore, the Court **CONCLUDES** that the Client Renewal List is not a protectable trade secret.

c. King's Carrier Contact List

128. King's Carrier Contact List, (ECF Nos. 187.4 (sealed), 201 (redacted)), is an Excel spreadsheet that contains insurance "carrier name and contact information, group numbers and online access information, client contact information, seventeen prospects with contact information, and group plan codes." (Defs.' Br. Supp. Mot. Summ. J., at 16; *see also* Pls.' Br. Opp. Defs.' Mot. Summ. J., at 27.) Relation contends that "Relation's Employee Benefits service team (including King while she was employed by Relation) has used a document known as a carrier contact list that includes a compilation of information about insurance carriers with whom Relation does business[,]" and "[t]he information includes group numbers, plan codes, and online access information." (R. 394.)

129. Specifically, King's Carrier Contact List has ten different tabs. The first tab is titled "Carrier Contacts" and contains the names of insurance carriers, as well as the names, phone numbers (including some mobile numbers), fax numbers, and email addresses of contacts associated with the insurance carrier. Many of the insurance carriers have multiple individual contacts listed. Additionally, the Carrier Contacts tab of King's Carrier Contact List includes some producer login information for the insurance carriers' websites.

130. The second tab of King's Carrier Contact List is named "Broker Online Access" and includes the following data fields: client names, group numbers of clients, Group EIN numbers, information concerning a client's "[redacted]," information concerning a client's "[redacted]," the client's "Cobra Admin," the name of the Relation producer working with the client, Relation producer login information for carrier websites, the names of carriers, and links to the carriers' websites. The third tab is named "Clients-EEs Contact Info" and contains client contact information. Some of these client contacts have their spouses listed as alternate contacts.

131. The fourth tab is titled "Prospects-Leads" and contains the names of 16 companies and contains contact information listed for eight of those companies. The fifth tab is named "Group Plan Codes" and lists client names, the insurance carrier with whom the client is insured, the client's group number, and the various plans the client possesses—such as a [redacted]

132. The next tab of King's Carrier Contact List is named "Renewals Listing" and includes hundreds of client names, the number of employees that certain clients have, the carriers that insure the clients, the type of insurance the clients purchase, and the renewal dates for those insurance policies. The seventh tab is titled "COBRA Calc" and includes miscellaneous mathematical formulas. The eighth and final tab of King's Carrier Contact List is named "VF Passwords" and includes login information for carrier portals.

133. Relation contends that King's Carrier Contact List is properly classified as a trade secret because it is a compilation of detailed and confidential data about clients and carriers with whom they worked and that "[t]hese group and customer codes and identifying numbers are not available online or available for purchase." (R. 394; *see also* Pls.' Br. Opp. Defs.' Mot. Summ. J., at 27.) Relation asserts that "[e]ven if someone could gather pieces of carrier information one by one, this compilation of information cannot be gathered or compiled without substantial time and expense. In other words, nobody could easily acquire or duplicate the information." (R. 395.)

134. In response, Defendants argue that King's Carrier Contact List was merely "derived from publicly available information as a convenience to King." (Defs.' Br. Opp. Pls.' Mot. Sanctions, Ex. B, at 108:17–109:1, ECF No. 160.22.)

135. Based on its careful review of King's Carrier Contact List, the Court is unable to say that it does not deserve trade secret protection as a matter of law. This document contains significantly more detailed information than either Gurley's

Customer List or the Client Renewal List and could reasonably be found by a jury to merit trade secret status in accordance with the cases discussed above.

136. Accordingly, the Court **CONCLUDES** that a genuine issue of material fact exists as to whether the compilation of information contained in King's Carrier Contact List constitutes a trade secret.

d. Linthicum's FS-1 List

137. Linthicum's FS-1 List, (ECF Nos. 187.6 (sealed), 203 (redacted)), is an Excel spreadsheet comprised of FS-1 codes for 67 insurance companies. At the bottom of the document, there is a notation that states: "Revised 5/17/07 C. Jones." Relation claims that Linthicum's FS-1 List was compiled by multiple account managers, while they were employed by Relation. (R. 395.)

138. Relation asserts that Linthicum's FS-1 List is a trade secret because it is a compilation of data about insurance carriers with whom the Former Employees worked at Relation and that "[t]his compilation of information is not generally known and cannot be found from any public source such as the internet." (R. 395; *see also* Pls.' Br. Opp. Defs.' Mot. Summ. J., at 27.)

139. Moreover, Relation contends that this information is valuable because "it makes it much easier to issue FS-1s if you have it rather than having to call the carrier and get the actual code." In support of its argument, Relation notes that Linthicum utilized the FS-1 List daily while working for Relation and has also used this document at Pilot. Furthermore, Relation states that such information could not be easily acquired or duplicated because "[e]ven if someone could gather an FS-1 code

one by one, this compilation of information cannot be gathered or compiled without substantial time and expense." (R. 395.)

140. Defendants argue that Relation has offered no evidence that there is anything proprietary about FS-1 codes and that, to the contrary, these codes are issued by the North Carolina Department of Insurance. As such, Defendants contend, this document merely contains information that is publicly available, easily duplicated and lacking in significant independent value.

141. Defendants are correct that FS-1 codes are assigned to insurance companies by a North Carolina state agency and are utilized to identify such companies on a "[p]roof of insurance Form FS-1" regarding vehicle liability insurance in North Carolina. *See* 19A NCAC 03D.0221(a)(4).

> Form FS-1 is provided by insurance companies in the State and requires the following: (A) vehicle year, make and identification number; (B) insurance company name and company code; (C) insurance policy number; (D) registered owner's name and effective date of insurance; (E) owner's driver license number and date of birth; (F) owner's address; (G) preparation date and authorized signature of insurance company representative.

Id.

142. The Court does not believe that Linthicum's FS-1 List contains the kind of information that is protectable as a trade secret because this document simply consists of information that can be easily obtained and duplicated and has no significant independent value.

143. Therefore, the Court **CONCLUDES** that Linthicum's FS-1 List is not a protectable trade secret.

e. Linthicum's Net Rate Calculations Spreadsheet

144. Linthicum's Net Rate Calculations Spreadsheet, (ECF Nos. 187.7 (sealed), 204 (redacted)), is an Excel spreadsheet containing various mathematical formulas and calculations. Relation asserts that this spreadsheet was created by a Relation employee (who is not named in this litigation) and "is used in connection with Relation's quotes and proposals." (R. 395.) Relation further contends that client information can be plugged into Linthicum's Net Rate Calculations Spreadsheet to generate insurance proposals and quotes.

145. Relation argues that such information constitutes a trade secret because it involves the kind of "pricing policies, formulas, and information" that North Carolina courts have protected as trade secrets. Relation further contends that Linthicum's Net Rate Calculation Spreadsheet was created by an employee at Relation to "create workers' compensation quotes and proposals." (Cooper Aff. II, at Ex. 19.) Moreover, Relation represents that Linthicum's Net Rate Calculations Spreadsheet is "replete with formulas, [that] cannot be found from any public source such as the internet." (R. 395.)

146. In response, Defendants contend that this document simply consists of "formulas to do the basic mathematical calculations to determine a 'Total Estimated Premium.' " (Defs.' Br. Supp. Mot. Summ. J., at 17.)

147. It is clear that a factual dispute exists as to the purpose of the information contained in Linthicum's Net Rate Calculations Spreadsheet as well as the nature (and value) of the mathematical calculations and formulas contained

therein. At the summary judgment stage, the Court cannot resolve such a factual dispute.

148. The Court therefore **CONCLUDES** that the determination of whether the information contained in Linthicum's Net Rate Calculations Spreadsheet qualifies as a trade secret must be made by the finder of fact at trial.

f. Lancaster's Production Analysis and Lancaster's Production Report

149. The parties make overlapping arguments with respect to the trade secret status of Lancaster's Production Analysis, (ECF Nos. 187.8 (sealed), 205 (redacted)), and Lancaster's Production Report, (ECF Nos. 187.9 (sealed), 206 (redacted)), (collectively, "Lancaster's Reports"). Accordingly, the Court elects to address both documents together.

150. Lancaster's Reports "were emailed by Plaintiffs to Lancaster monthly for his use in reviewing and determining his compensation." (Defs. Br. Supp. Mot. Summ. J., at 17.)

151. Lancaster's Production Analysis accounts for the month of December 2021 and is a three-page document containing eleven data fields, which are titled as follows: "Exec/Cust/LOB," "Premium Volume," "NonPrem Comm Vol," "Total Volume," "% Tot Vol," "Agency Comm," "% Comm/Vol," "ProdComm Prem," "ProdComm NonPrem," "Broker Comm," and "Gross Profit." The column titled "Exec/Cust/LOB" identifies Lancaster's clients and the types of insurance those clients have acquired through him. The "Premium Volume" comes "from the actual policy of record itself" and is determined by looking at customer invoices. (Defs.' Br.

Opp. Pls.' Mot. Summ. J., Ex. 39, at 100:7–14, ECF No. 224.47.) "Agency Comm" represents the amount of money received by Relation from that policy. The column named "ProdComm Prem" "is the commission generated from the premium commission lines" and goes to the producer listed on the report. (Kopp Dep. 28:9–15, ECF No. 224.45.)[13]

152. Lancaster's Production Report is a 31-page document that likewise covers the month of December 2021, but also contains some different information than that set out in Lancaster's Production Analysis. Among other things, Lancaster's Production Report includes the names of clients, the types of insurance purchased by the client, the name of the servicing insurance carrier, and the policy or group number. Additionally, Lancaster's Production Report includes Relation's agency revenue, the producer split percentage, and the amount of commission received by the Producer. Lancaster's Production Report also specifies the month for which a commission should be applied and the date the amount is posted.

153. Relation asserts that Lancaster's Reports constitute trade secrets because they contain compilations of various types of proprietary information, including policy numbers, business lines, commission amounts, financial data, and client renewal dates.

154. Ray Dobens, Relation's Vice President of Finance and Sales Operations, explained the nature and purpose of producer reports as follows:

> Each month, producers receive an email with reports that detail the commissions they received for the previous month's pay period. This

[13] With regard to the remaining columns, Relation's counsel has represented that they are not material to the resolution of this issue.

information allows producers to verify that their commissions are accurate.

The monthly email contains the following documents:

a. A **"Total" Production Analysis** that includes: each client name, the type of coverage the client receives, the premium volume amount, the commission amount (in dollars) received by Relation, the commission amount (in dollars) attributed to the producer as part of his or her wages, and the gross profit Relation received (which is the commission received by the agency minus the commission amount that the producer receives);

b. A **"New" Production Analysis**, which is targeted toward new business. This report contains similar information as the "Total" Production Analysis but is limited to accounts for new business;

c. A **Producer Account Balances & Trends** spreadsheet that provides the producer's year-to-date balance snapshot, including how much commission the producer has earned, any compensation adjustments, any draws (advancements) he or she has requested, the amount of compensation that has been paid, and any remaining balance. This spreadsheet also includes Relation's agency revenue, which is provided to the producer for "information purposes only"; and

d. A **Producer Account Disbursement Request**, which is a blank form that allows a producer to request money from any balance in addition to the predetermined draw, as explained above.

(Dobens Aff. ¶¶ 15–16 (emphasis in original).)

155. Based upon the evidence in the record, the Court cannot say as a matter of law that the compilation of information in Lancaster's Reports does not deserve protection as trade secrets. Therefore, the Court **CONCLUDES** that this issue must be decided by a jury.

g. Crooker's Production Analysis

156. Crooker's Production Analysis, (ECF No. 187.10), is a thirteen-page document, which accounts for the month of November 2021. Relation emailed

Crooker's Production Analysis to Crooker after he resigned from Relation. (*See* Landacre Aff., ECF No. 253; Landacre Aff., Ex. A, ECF Nos. 253.1 (sealed), 260 (public).)

157. Crooker's Production Report reflects his final commission earned at Relation. Like Lancaster's Production Analysis, Crooker's Production Analysis contains eleven data fields, which are also titled as follows: "Exec/Cust/LOB," "Premium Volume," "NonPrem Comm Vol," "Total Volume," "% Tot Vol," "Agency Comm," "% Comm/Vol," "ProdComm Prem," "ProdComm NonPrem," "Broker Comm," and "Gross Profit."

158. Relation argues Crooker's Production Report is a trade secret because it is a compilation of client information, including policy numbers, business lines, commission amounts, financial data, and client renewal dates.

159. Once again, the Court **CONCLUDES** that a reasonable jury could find that the compilation of information contained in Crooker's Production Analysis qualifies as a trade secret.

160. Therefore, for the reasons set forth above, the Court concludes as a matter of law that Gurley's Customer List, the Client Renewal List, and Linthicum's FS-1 List are not protectable as trade secrets. Conversely, the Court concludes that a genuine issue of material fact exists concerning whether King's Carrier Contact List, Linthicum's Net Rate Calculations Spreadsheet, Lancaster's Production

Analysis, Lancaster's Production Report, and Crooker's Production Analysis qualify as trade secrets under the NCTSPA and the DTSA.[14]

2. Reasonableness of Security Measures

161. Next, Defendants argue that none of the documents that Relation characterizes as trade secrets were the "subject of efforts that are reasonable under the circumstances to maintain [their] secrecy." N.C.G.S. § 66-152(3)(b); *see also* 18 U.S.C. § 1839(3)(A).

162. It is well established that "[n]o trade secret will be found if . . . there is no evidence indicating that the plaintiff undertook efforts to ensure the information's secrecy." *Safety Test*, 2015 NCBC LEXIS 40, at *26 (citing *Bank Travel Bank v. McCoy*, 802 F. Supp. 1358, 1360 (E.D.N.C. 1992)). Accordingly, Defendants are correct that "[e]ven if information was initially secret and the claimant intended that trade secret information be confidential, trade secret protection can be lost if adequate measures were not taken to insure that the information was, in fact, kept confidential." *Id.* at *27.

163. In *Encompass Servs., PLLC v. Maser Consulting P.A.*, this Court reviewed the analysis utilized by North Carolina courts in evaluating the reasonableness of efforts undertaken to protect the secrecy of an alleged trade secret.

> In assessing whether information that would otherwise qualify as a purported trade secret "is the subject of efforts that are reasonable . . . to maintain its secrecy," our courts have recognized that the "inquiry is fact-specific, and 'courts that have addressed it closely examine the circumstances surrounding the trade secret to determine what

[14] However, as discussed below, the Court finds that Relation has failed to show sufficient evidence of misappropriation with regard to Crooker's Production Analysis so as to withstand Defendants' summary judgment motion as to that claim.

measures are reasonable.' " *Comput. Design & Integration, LLC v. Brown*, 2018 NCBC LEXIS 216, at *46 (N.C. Super. Ct. Dec. 10, 2018) (quoting *Koch Measurement Devices Inc. v. Armke*, 2015 NCBC LEXIS 45, at *15 (N.C. Super. Ct. May 1, 2015)). "The critical question in deciding this issue on summary judgment is 'whether [plaintiffs are] entitled to ask the jury to undertake an analysis of the reasonableness of [plaintiffs'] efforts to maintain the confidentiality of the information.' " *Id.* at *48–49 (citation omitted).

As cited by the parties in their briefs, this Court has, on numerous occasions, addressed on summary judgment a defendant's argument that plaintiffs failed to make reasonable efforts to maintain the secrecy of its information. *See, e.g., Hopkins v. MWR Mgmt. Co.*, 2017 NCBC LEXIS 47, at *73 (N.C. Super. Ct. May 31, 2017) (holding plaintiff's efforts sufficient to create jury issue and denying summary judgment where confidential documents were stored on a community computer with generic login information written down on a sticky note attached to the screen, access was restricted to only certain employees, and employees executed employment agreements detailing the handling of confidential data); *TaiDoc Tech. Corp. v. OK Biotech Co.*, 2016 NCBC LEXIS 26, at *21–25 (N.C. Super. Ct. Mar. 28, 2016) (denying summary judgment where there were multiple measures to protect the confidentiality of the information, including confidentiality acknowledgements on every page, confidentiality labels on disclosed documents, a draft confidentiality agreement to be executed, and restricted access to full disclosure); *Koch Measurement Devices, Inc*, 2015 NCBC LEXIS 45, at *16 (denying summary judgment where plaintiff kept its confidential material in locked facilities and included a nondisclosure provision in its employment agreements); *Safety Test & Equip. Co., Inc. v. Am. Safety Util. Corp.*, 2015 NCBC LEXIS 40, at *32–33 (N.C. Super. Ct. Apr. 23, 2015) (denying summary judgment where plaintiff kept its confidential material in locked facilities under video surveillance, maintained a password-protected database, included confidentiality agreements with some suppliers, and included a nondisclosure provision in its employment agreements); *Edgewater Servs. v. Epic Logistics, Inc.*, 2009 NCBC LEXIS 21, at *11–15 (N.C. Super. Ct. Aug. 11, 2009), *aff'd*, 217 N.C. App. 399, 720 S.E.2d 30 (2011) (holding plaintiff's efforts not reasonable as a matter of law and granting summary judgment for defendant where plaintiff maintained confidential files in an "unlocked file room, accessible to anyone" without safeguards to ensure security).

Notably, the only case cited by Defendants in which this Court granted summary judgment on the grounds that the plaintiff failed to take reasonable measures to protect the secrecy of a trade secret

> is *Edgewater*. In their briefs, both Defendants attempt to analogize the facts of this case to those in *Edgewater*. (ECF No. 125, at pp. 17–19; ECF No. 126 [SEALED], redacted at ECF No. 137, at pp. 13–14.) However, the Court is not persuaded that Encompass' password protected Egnyte server, coupled with confidentiality provisions in employment agreements, is tantamount to an "unlocked file room, accessible to anyone." *Edgewater*, 2009 NCBC LEXIS 21, at *12.

Encompass Servs., PLLC v. Maser Consulting P.A., 2021 NCBC LEXIS 59, at **27–29 (N.C. Super. Ct. June 28, 2021).

164. In sum, "[a]lthough the reasonableness of measures taken to protect the confidentiality of information claimed to be a trade secret is often appropriate for resolution by a jury, the absence of evidence of such measures can result in the dismissal of the claim as a matter of law." *Campbell Sales Grp., Inc. v. Niroflex by Jiufeng Furniture, LLC*, 2022 NCBC LEXIS 148, **23–24 (N.C. Super. Ct. Dec. 5, 2022).

165. Here, Relation has pointed to a series of confidentiality measures it utilized to protect its confidential information. For example, Jon Cooper, the President of the Eastern Region of Relation NC, testified that "[t]o protect the Company's trade secret and confidential information, the Company takes certain measures including requiring its employees to execute confidentiality agreements and executing confidentiality agreements with vendors." (Cooper Aff. I ¶¶ 2, 36.)

166. Furthermore, the head of Relation's IT department, Michael Toran, explained the following security measures implemented by Relation:

> To ensure that the Company's confidential and trade secret information remains confidential and secure from unauthorized disclosure, use, or modification, the Company has implemented certain technical,

administrative, and physical security measures that include the following:

a. Employee-specific unique credentials (username and password) managed by Microsoft Active Directory;

b. User password management which specifies password complexity, length, and change requirements including automatic password suspension after a certain number of failed login attempts;

c. Multi-factor authentication (MFA) required for employees in order to gain access to the Company network and systems including to Company email and its internal agency management system;

d. Role-based permissions allowing access to Company data only on a need-to-know basis;

e. Promptly cutting off access to the Company's network upon an employee's resignation and/or termination from the Company;

f. Restrictions on remote user access to the Company's network (e.g., requiring access through the Company's virtual private network (VPN));

g. Removable media management including restricted use of external hard drives and USB drives to, in part, prevent exfiltration of confidential information;

h. Full disk encryption on Company-issued portable devices (e.g., laptops);

i. Encryption of Company Data;

j. Audit log records maintained for information systems; and

k. Anti-virus software, patch management, and network firewall maintenance.

(Toran Aff. ¶ 6.)

167. Additionally, Relation's Employee Handbook states that "employees and contractors with remote access privileges to Relation's Group corporate network must not use non-Relation Group email accounts (i.e., Hotmail, Yahoo, AOL), or other

external resources to conduct Relation Group business, thereby ensuring that official business is never confused with personal business." (R. 959–960.)

168. Relation's Employee Handbook also contains the following confidentiality provision:

> Relation Group's client lists—current, former, and potential; customer information; medical histories of clients and clients' members; employee information; and employee lists are to be treated as highly confidential in all cases. This information may not be disclosed to any third party or used for any purpose other than performance of job duties for the Company, either during employment or after employment. Unauthorized use or duplication of this confidential information, including copies in electronic form, is expressly forbidden. Please refer to your Employment Agreement and Non-solicitation for detailed information.

(R. 955.)

169. Moreover, telecommuting agreements signed by the Former Employees require that telecommuting employees ensure that "[w]ork-related materials must be kept in a locked/secured location while not in use." (R. 982.)

170. Although Defendants attempt to downplay the adequacy of these measures, the Court **CONCLUDES** that Relation has put forth sufficient evidence from which a jury could find that its security measures were reasonable and adequate to protect its trade secrets.

3. Evidence of Misappropriation

171. Finally, Defendants contend that, even if any of the documents at issue could be properly classified as trade secrets, Plaintiffs have put forth no actual evidence of misappropriation.

172. With respect to those documents the Court has now found that a jury could reasonably deem to be trade secrets, Defendants argue that the only evidence proffered by Relation of misappropriation consists of the following: (i) King emailing the carrier contact list she created to herself; (ii) Lancaster emailing his production reports to himself after he received them from Relation; and (iii) Crooker's retention of a copy of his Production Report that was emailed to him after he left Relation.

173. In response, Relation contends that—in addition to the three acts of misappropriation described above—it has proffered evidence of Defendants' misappropriation through circumstantial evidence. Furthermore, Relation asserts that it is not required to show that Defendants actually disclosed or used Plaintiffs' trade secrets—only that Defendants had a specific *opportunity* to do so. *See*, *e.g.*, *Safety Test*, 2015 NCBC LEXIS 40, at *41 (recognizing that "evidence of misappropriation [was] sufficient where a former employee ha[d] access to pricing proposals through former employment, move[d] to another company, and cause[d] the same customers to move their business to the new company") (discussing *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 376–77 (2001)).

174. The NCTSPA defines misappropriation as the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C.G.S. § 66-152(1). For purposes of the DTSA,

the term "misappropriation" means--

> (A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (B) disclosure or use of a trade secret of another without express or implied consent by a person who--
>
> > (i) used improper means to acquire knowledge of the trade secret;
> >
> > (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was--
> >
> > > (I) derived from or through a person who had used improper means to acquire the trade secret;
> > >
> > > (II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or
> > >
> > > (III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or
> >
> > (iii) before a material change of the position of the person, knew or had reason to know that--
> >
> > > (I) the trade secret was a trade secret; and
> > >
> > > (II) knowledge of the trade secret had been acquired by accident or mistake[.]

18 U.S.C. § 1839(5).

175. Moreover, the NCTSPA specifically sets out the following regarding the burden of proof required to prevail on a misappropriation of trade secrets claim:

> Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:
>
> > (1) Knows or should have known of the trade secret; and

> (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

N.C.G.S. § 66-155.

176. This Court has further explained as follows:

> Evidence that a former employee had access to, and therefore an "opportunity to acquire," an employer's trade secrets, without more, is not sufficient to establish a prima facie case of misappropriation. Rather, the employer must establish either that the former employee accessed its trade secrets without authorization or provide other sufficient evidence of misappropriation to raise an inference of actual acquisition or use of its trade secrets.

Am. Air Filter Co. v. Price, 2017 NCBC LEXIS 9, at *23 (Feb. 3, 2017).

177. Finally, "[o]nce a plaintiff satisfies its burden in this regard, Defendants may elect to defend by introducing 'substantial evidence' that they 'acquired the information comprising the trade secret by independent development, reverse engineering, or . . . from another person with a right to disclose the trade secret.' " *Safety Test*, 2015 NCBC LEXIS 40, at *29 (citing N.C.G.S. § 66-155).

178. Based on a thorough review of the evidence in the record, the Court is satisfied that there is sufficient evidence of misappropriation to allow Relation's trade secrets claim to go to the jury with respect to King's alleged misappropriation of the Carrier Contact List, Lancaster's alleged misappropriation of his Reports, and Linthicum's alleged misappropriation of the Net Rate Calculations spreadsheet.

179. On 18 February 2022—the day after accepting a position at Pilot—King sent multiple emails from her Relation email address to her personal email address.

These emails attached a copy of the Carrier Contact List. (Compl., Ex. Z, ECF No. 5.26; R. 382, 436.)

180. Subsequently, on 10 March 2022, King sent the Carrier Contact List from her personal email address to her Pilot email address and to another Pilot employee's Pilot email address. (Pls.' Mot. Sanctions, Ex. 2, ECF No. 141.) Examination of the metadata associated with the Carrier Contact List revealed that "this document was last modified on March 10, 2022, and last accessed on March 15, 2022." (R. 382.) King also admitted to using this document in her work at Pilot.

181. On 7 February 2022, Lancaster emailed the Lancaster Reports for December 2021 and January 2022 to his personal email address. (Compl., Ex. V, ECF No. 5.22.) He states that his reason for doing so was to verify that he was paid correctly for the month and to compare his "year over year annual income against [his] W2[.]" (Lancaster Aff. I ¶ 30.) He contends that he has not used any of the Relation information he sent to his personal account since working at Pilot, including the Relation commission reports. (Lancaster Aff. I ¶ 36; R. 526.) Despite these assertions, however, the forensic analysis of Lancaster's laptop revealed that on 19 May 2022, Lancaster attached these documents to an email to himself where both the sender and recipient address were Lancaster's personal email address. (*See* Shelton Aff. I ¶¶ 20–21.)

182. On 17 February 2022, Linthicum emailed the Net Rate Calculations spreadsheet to her personal email address. (Cooper Aff. II ¶ 8.) On 5 April 2022, Linthicum sent the Net Rate Calculations spreadsheet from her personal email

account to her Pilot email account. (R. 382.) The HTML report for Linthicum's imaged laptop "showed that this file was accessed from an Outlook exchange server account in offline mode." (R. 382.)

183. The Court reaches a different conclusion as to Crooker. Relation appears to contend that he remained in possession of a paper copy of Crooker's Production Analysis. (*See* Landacre Aff. ¶ 15; Landacre Aff., Ex. A.) However, there is no evidence that he ever forwarded, printed or accessed the document following his termination. (Landacre Aff. ¶ 15.) Therefore, the Court **CONCLUDES** that Relation failed to put forth sufficient evidence from which a jury could reasonably find misappropriation on the part of Crooker. Nor is there adequate evidence of any other Individual Defendant's misappropriation of Crooker's Production Analysis.

184. Therefore, the Court **CONCLUDES** that Defendants' Motion for Partial Summary Judgment regarding Relation's trade secrets claim is **GRANTED** in part and **DENIED** in part. Summary judgment on this claim is **GRANTED** as to all of the Former Employees, except for King, Lancaster, and Linthicum. As to those three, summary judgment is **DENIED**. The four documents that the jury may consider at trial as potential trade secrets are King's Carrier Contact List, Linthicum's Net Rate Calculations Spreadsheet, Lancaster's Production Analysis, and Lancaster's Production Report.

B. Breach of Non-Solicitation Clauses of Employment Agreements

185. The Former Employees next seek summary judgment on Relation's claims for breach of the non-solicitation provisions in their respective employment

agreements (the "Non-Solicitation Clauses"), arguing that the "unenforceability of the Non-Solicitation provisions is established as a matter of law" because the provisions are "legally overbroad[.]" (Defs.' Br. Supp. Mot. Summ. J., at 13.)

186. The Former Employees contend that "this Court independently demonstrated the legal infirmity of those non-solicitation provisions of the Employment Agreements" in its Amended Preliminary Injunction Order ("Amended PI Order," ECF No. 116).

187. In response, Relation asserts that "as the Court has already told Defendants, rulings made at the preliminary injunction stage have no bearing on the rest of the litigation[,]" and "[t]he preliminary injunction decision was based on limited information and incomplete evidence, prior to discovery." (Pls.' Br. Opp. Defs.' Mot. Summ. J., at 36.)

188. Relation is correct that a ruling on a motion for preliminary injunction is not a final ruling on the issues addressed therein. *USConnect, LLC v. Sprout Retail, Inc.*, 2017 NCBC LEXIS 71, at *4 (N.C. Super. Ct. Aug. 10, 2017) (noting that a "preliminary-injunction order is not a final judgment on the merits").

189. Here, however, the Court finds that the analysis contained in its Amended PI Order remains legally correct and is not altered by the additional information that has been obtained during discovery in this case and made a part of the record.

190. In the Amended PI Order, this Court determined that Relation had not established a likelihood of success on its breach of contract claims pertaining to the

Non-Solicitation Clauses based on the likely unenforceability of those provisions. (Am. PI Order ¶¶ 34–46.) In reaching this conclusion, the Court summarized the key portions of those Non-Solicitation Clauses as follows:

> Here, the Non-Solicitation Clauses preclude the Former Employees from (a) soliciting "Clients" or "Prospective Clients" of Relation "with whom [the Former Employees] had material contact or about whom [the Former Employees] obtained Confidential Information during the last (12) months" (hereinafter, the "Customers Restriction"); and (b) soliciting employees of Relation "or any other member of the Ascension Group" that the Former Employees "came into contact [with] during Employee's last (12) months of employment . . . or about whom [the Former Employees] obtained Confidential Information" and "who [are] known by [the Former Employees] at the time of such . . . solicitation . . . to then be employed by [Relation] or any other member of the Ascension Group" (hereinafter, the "Employees Restriction"). (*See, e.g.*, ECF No. 5.12, at § 8(a); ECF No. 5.14, at § 4(b).)

(Am. PI Order ¶ 37.)

191. The Court then analyzed the Non-Solicitation Clauses under the framework set out in *Wells Fargo Ins. Servs. USA v. Link*, 2018 NCBC LEXIS 42 (N.C. Super. Ct. May 8, 2018), *aff'd per curiam*, 372 N.C. 261 (2019), which this Court deemed "to be particularly instructive." (Am. PI Order ¶ 38.)

192. Relying on *Wells Fargo*, this Court ultimately "reache[d] a similar conclusion with respect to the Non-Solicitation Clauses at issue here[,]" and stated the following:

> First, with respect to the Customers Restriction, the Former Employees are not only prohibited from soliciting the clients or prospective clients "with whom [they] had material contact," but also "about whom [they] obtained Confidential Information." The definition of "Confidential Information" includes identifying information of "Clients" and "Prospective Clients." In effect, the Customers Restriction could apply to preclude the Former Employees from soliciting clients or prospective clients of Relation with whom they were shown contact information, but never actually had any contact. Such restrictions fail as unnecessary to

> protect the legitimate business interests of the employer. *See Link*, 2018 NCBC LEXIS 42, at *19; *see also Aesthetic Facial & Ocular Plastic Surgery Ctr., P.A. v. Zaldivar*, 264 N.C. App. 260, 272 (2019) (holding that non-solicitation clause in employment agreement was unreasonable where it foreclosed solicitation of potential clients "with whom [former employee] had no relationship"); *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at **33 (N.C. Super. Ct. Nov. 3, 2011) ("Generally, covenants which seek to restrict a former employee from competing with future or prospective customers with whom they had no personal contact during employment fail as unnecessary to protect the legitimate business interests of the employer."); *Laboratory Corp. of America Holdings v. Kearns*, 84 F. Supp. 3d 447, 459 (M.D.N.C. 2015) ("In North Carolina, covenants prohibiting competition for a former employer's customers are only enforceable when they prohibit the employee from contacting customers with whom the employee actually had contact during his former employment.").
>
> Second, with regard to the Employees Restriction, the Former Employees are similarly not only prohibited from soliciting employees "with whom [they] had material contact," but also "about whom [they] obtained Confidential Information." The definition of "Confidential Information" includes "information about and personnel files of employees." Further, the Employees Restriction does not only apply to employees of Relation, but also to employees of "any other member of the Ascension Group." Plaintiffs argue that the Employees Restriction is tailored to only restrict the solicitation of employees that are "known by [the Former Employees] at the time of such . . . solicitation . . . to then be employed by the Company or any other member of the Ascension Group." Nevertheless, as noted above, the Employment Agreements do not identify the members of the Ascension Group. In effect, the Employees Restriction would foreclose the solicitation of an employee of any of Plaintiffs' unnamed affiliate companies, potentially precluding solicitation of employees who are engaged in business activities wholly distinct from those as to which the Former Employees had been engaged. Again, such broad restrictions have been found to be unenforceable in that they do not protect the legitimate business interests of the employer. *See Link*, 2018 NCBC LEXIS 42, at *26–30; *Medical Staffing Network, Inc.*, 194 N.C. App. at 656–57.

(Am. PI Order ¶¶ 45–46.)

193. The Court has carefully considered Relation's arguments that the analysis in the Amended PI Order is no longer correct based on new information that

has been obtained during discovery. For the sake of brevity, the Court will not recite the details of that argument. Instead, it suffices to say that the Court continues to have the same concerns about the enforceability of the Non-Solicitation Clauses that existed at the preliminary injunction stage. Guided by the principles espoused in *Wells Fargo*, the Court **CONCLUDES** that the Non-Solicitation Clauses in the Employment Agreements here are unenforceable as a matter of law.

194. In an alternative argument, Relation asks the Court to use the "blue pencil" doctrine to allow the unobjectionable portions of the covenants to be enforced.

195. Our Supreme Court has stated the following regarding this doctrine:

> [T]he Court of Appeals, citing *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961), acknowledged that North Carolina has adopted the "strict blue pencil doctrine" under which a court cannot rewrite a faulty covenant not to compete but may enforce divisible and reasonable portions of the covenant while striking the unenforceable portions. *Beverage Sys.*, 235 N.C. App. at 443, 762 S.E.2d at 321.
>
> . . .
>
> [B]lue-penciling is the process by which "a court of equity will take notice of the divisions the parties themselves have made [in a restrictive covenant] and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable." *Welcome Wagon*, 255 N.C. at 248, 120 S.E.2d at 742 (majority opinion).

Beverage Sys. of the Carolinas, LLC v. Associated Bev. Repair, LLC, 368 N.C. 693, 696, 699 (2016).

196. In the present case, the Court declines to consider application of the "blue pencil" doctrine because Relation (as the party seeking application of the doctrine) has not met its burden of demonstrating precisely how it can, or should, be

applied on these facts. It is the duty of a litigant—not the Court—to show with specificity how the application of the blue pencil doctrine on a particular set of facts is warranted.

197. Therefore, the Court **CONCLUDES** that Defendants are entitled to summary judgment on Relation's claims for breach of the Non-Solicitation Clauses contained in the Former Employees' Employment Agreements.

C. Breach of Confidentiality Provisions of Employment Agreements

198. Relation also asserts that the Former Employees disclosed or used its confidential information in their employment with Pilot in violation of the confidentiality provisions (the "Confidentiality Provisions") contained in their respective Employment Agreements. (Compl. ¶¶ 154–61.)

199. The Former Employees seek summary judgment on this claim, contending that this Court's analysis in the Amended PI Order likewise demonstrates that the "confidentiality provisions of the Employment Agreements are unenforceable as a matter of law." (Defs.' Br. Supp. Mot. Summ. J., at 6.)

200. A claim for breach of an employment agreement provision is a species of breach of contract. Breach of contract claims require the "(1) existence of a valid contract and (2) breach of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26 (2000).

201. Importantly, when assessing the validity of an employment agreement, North Carolina law distinguishes between restrictive covenants (which restrain trade) and confidentiality agreements (which are only meant to prevent the disclosure

or use of confidential information). *See Amerigas Propane, L.P. v. Coffey*, 2015 NCBC LEXIS 98, at **10 (N.C. Super. Ct. Oct. 15, 2015).

202. "Unlike non-competition and non-solicitation provisions, a nondisclosure provision is generally not considered to be a restraint on trade." *Prometheus Grp. Enters., LLC v. Gibson*, 2023 NCBC LEXIS 42, at **24 (N.C. Super. Ct. Mar. 21, 2023). Accordingly, a "nondisclosure provision is not subjected to the same level of scrutiny as the non-competition and non-solicitation provisions." *Id.* at **25. For this reason, "[s]uch agreements may, therefore, be upheld even though the agreement is unlimited as to time and area[.]" *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at **31 (N.C. Super. Ct. Nov. 3, 2011).

203. Nevertheless, "North Carolina courts will treat a non-disclosure agreement as a contract in restraint of trade in appropriate circumstances." *Amerigas Propane, L.P.*, 2015 NCBC LEXIS 98, at **23 (citing *Chemimetals Processing v. McEneny*, 124 N.C. App. 194, 197 (1996)). This Court has explained that

> [a] non-disclosure provision equates to a restrictive covenant in restraint of trade and is subject to the same analysis as a covenant not to compete if "the anticipated and intended effect of the prohibition on [an employee's] disclosure . . . is not to protect [the company's] confidential business information" but rather to prevent a former employee from competing with the former employer. *See Amerigas Propane, L.P.*, 2015 NCBC LEXIS 98, at *24–25 (compiling cases).

Cty. of Wake PDF Elec. & Supply Co., LLC v. Jacobsen, 2020 NCBC LEXIS 103, at *19 (N.C. Super. Ct. Sept. 9, 2020).

204. It therefore follows that

> [a] non-disclosure provision in an employment agreement is enforceable "if it does not seek to prevent a party from engaging in a similar business in competition with the [employer], but instead seeks to prevent the disclosure or use of confidential information." *Chemimetals Processing v. McEneny*, 124 N.C. App. 194, 197, 476 S.E.2d 374, 376 (1996). To be enforceable, such a non-disclosure agreement requires only "a showing that it protects a legitimate business interest of the [employer]"; time and durational limitations are irrelevant. *Id*. at 197, 476 S.E.2d. at 377; *Eye Dialogue LLC v. Party Reflections, Inc.*, 2020 NCBC LEXIS 90, at *14–19 (N.C. Super. Ct. July 28, 2020).

Id. at *20–21.

205. Under North Carolina law, the "protection of customer relationships and goodwill against misappropriation by departing employees is well recognized as a legitimate protectable interest of the employer." *United Lab., Inc. v. Kuykendall*, 322 N.C. 643, 651 (1988); *see also S. Fastening Sys. v. Grabber Constr. Prods.*, 2015 NCBC LEXIS 42, at *19 (N.C. Super. Ct. Apr. 28, 2015) (holding that requiring employees to sign confidentiality agreements for the purpose of protecting both the company's and the customer's confidential information protected a legitimate business interest of the company).

206. Each of the seven Employment Agreements at issue here contained Confidentiality Provisions. While not all of the Confidentiality Provisions at issue are completely identical, they are all substantially similar. (*See* Compl., Exs. I–L.)

207. For example, the Confidentiality Provision in Crooker's Producer Agreement provided as follows:

> Employee agrees that during Employee's employment with the Company and thereafter, Employee shall not (other than as required by Employee's job duties) reveal to anyone any Trade Secrets or other Confidential Information, and Employee further agrees that Employee will not use in any way any Trade Secrets or other Confidential

> Information, other than as is necessary to perform Employee's work for the Company and other members of the Ascension Group. The obligations of confidentiality and restrictions on use set forth in the immediately preceding sentence shall remain in effect for the duration of Employee's employment with the Company and for a period of thirty-six (36) months thereafter, provided that as to any item of Confidential Information that continues to be a Trade Secret under applicable law, such obligations of confidentiality and restrictions on use shall remain in effect as to such item for the maximum time allowed by applicable law. Employee agrees to deliver to the Company at the termination of Employee's employment, or at any other time the Company may request, all Confidential Information (including all copies thereof and any electronic versions of such materials) that Employee may then possess or have under Employee's control (including all such Confidential Information in electronic form).

(Compl., Ex. I § 7.)

208. With respect to the definition of "Confidential Information," there are two different iterations that appear in the Employment Agreements. For example, the following definition of "Confidential Information" taken from Crooker's Producer Agreement is practically identical to the definitions found in both Kelly and Gurley's Producer Agreements:

> "Confidential Information" means all information of a confidential or proprietary nature (whether or not specifically labeled or identified as "confidential" or "proprietary"), in any form or medium, including, without limitation, Seller Confidential Information, that relates to or results from the business of Seller (with respect to the Insurance Offices), the Company or any member of the Ascension Group, disclosed to Employee or of which Employee became aware as a consequence of Employee's relationship with the Company or Seller, including, without limitation, all Trade Secrets [sic] any other information developed or used by Seller (with respect to the Insurance Offices), the Company or the Ascension Group that is not known generally to the public and that gives the Company or any member of the Ascension Group an advantage in the marketplace (or gave Seller an advantage in the marketplace), as well as all notes memoranda, compilations, reports and other documents prepared by Employee or other employees of Seller, the Company or of any member of the Ascension Group containing any such information.

> The term "Confidential Information" shall not include any information which has been publicly disclosed without any active or passive assistance or involvement of Employee.

(Compl., Ex. I § 3(d)(iv).)

209. Comparatively, Linthicum, Sneed, King, and Lancaster's Employment Agreements contain lengthier definitions of "Confidential Information" that are substantially similar to one another. By way of example, Linthicum's Account Manager Agreement includes the following definition of "Confidential Information":

> "Confidential Information" shall mean all information of a confidential or proprietary nature (whether or not specifically labeled or identified as "confidential" or "proprietary"), in any form or medium, that relates to or results from the business, historical or projected financial results, budgets, strategies, know-how, sales products, services, research or development, acquisitions, acquisitions under consideration or acquisition targets, divestitures or divestitures under consideration, or trade secrets of the Company or of any other member of the Ascension Group. Confidential Information includes, but is not limited to, (i) the Company's and other Ascension Group member's programs, analyses, sales and marketing strategies, marketing and promotional plans and practices, pricing, rate structures and profit margins, (ii) Clients and Prospective Clients of the Company and other members of the Ascension Group, including, without limitation, Client and Prospective Client lists, the following information regarding Clients and Prospective Clients: identifying information, risk characteristics and requirements, identity and preferences of key personnel, loss and claims histories, financial data and performance, payroll, employee information, policy and contract renewal and expiration dates and data, policy terms, conditions and rates, underwriting data, and specialized needs, and the confidential information of Clients and Prospective Clients, (iii) information about and personnel files of employees of the Company or any other member of the Ascension Group, former employees of the Company or any other member of the Ascension Group, prospective employees of the Company or any other member of the Ascension Group, or independent contractors, suppliers, or distributors of the Company or any other member of the Ascension Group, or other third parties with whom the Company or any member of the Ascension Group has or had contractual relationships, and (iii) [sic] any other information developed or used by the Company or the Ascension Group that is not known

> generally to the public and that gives the Company or any member of the Ascension Group an advantage in the marketplace, as well as all notes[,] memoranda, compilations[,] reports and other documents prepared by Employee or other employees of Company or any member of the Ascension Group containing any such information.

(Compl., Ex. N § 3(b).)

210. Having carefully reviewed the Confidentiality Provisions at issue, the Court is satisfied that they are intended to protect Relation's confidential business information as opposed to being restrictive covenants in disguise.

211. The Former Employees do not devote much attention to this claim in their summary judgment briefs. To the extent they address this claim at all, they essentially contend that—as with the Non-Solicitation Clauses— the Court's analysis in its Amended PI Order demonstrates the unenforceability of the Confidentiality Provisions.

212. But the Court's Amended PI Order did not consider the enforceability of the Confidentiality Provisions. Rather, the Court's analysis was focused on the reasonableness of the Non-Solicitation Clauses as restraints on trade.

213. Thus, Defendants have failed to demonstrate the legal invalidity of this claim.

214. Relation, conversely, has put forward evidence that would permit a jury to conclude that the Former Employees acted in violation of the Confidentiality Provisions by using Relation's confidential information for purposes other than those related to their employment with Relation.

215. The forensic examination of the Former Employees' devices revealed multiple examples of them forwarding documents from their Relation email addresses to their personal email addresses and then to their Pilot email addresses. (Shelton Aff. I ¶¶ 5–6; *see e.g.*, R. 605–06, 1404, 1485, 1519, 2387–2401, 2403–2533, 2535–63, 2565–89, 2591–94, 2596–2632, 2634–36, 2638–40, 2642–43, 2645–47, 2649–79, 2987–97, 2999–3426, 3428–44, 3446–71, 3473–3699, 3701–55, 3757–75, 3777–79, 3781–93, 3795–3920, 3927–52, 3954–69, 3971–73, 3975–76.)

216. For example, King emailed various documents, including the Carrier Contact List, from her Relation email address to her personal email address on 18 February 2022. (R. 382, 436, 440, 1518.) Subsequently, King emailed the Carrier Contact List from her personal email account to her Pilot email account on 10 March 2022. (Shelton Aff. I ¶ 5.) The applicable metadata showed that the Carrier Contact List was last modified on 10 March 2022, and last accessed on 15 March 2022. (R. 382.)

217. Furthermore, the forensic examination revealed that on 21 February 2022, Gurley sent an email from his personal account to his Pilot account attaching a group of Relation documents. (R. 383–84.) Gurley admitted to emailing these documents from his Relation email address to his personal address, although he denies having used them since emailing them. (R. 705–06.) On 19 and 20 May 2022, Gurley sent additional emails from his personal email address to his Pilot email address, attaching other documents that Relation contends are confidential. (Shelton Aff. I ¶¶ 9–15; R. 1098–1230.) Many of these documents were contained in an email

sent from Gurley's Relation email account to his personal email account on 11 August 2021. (R. 1230.)

218. In another example, Lancaster admitted that he emailed his producer production reports for December 2021 and January 2022 from his Relation email address to his personal email address on 7 February 2022. (R. 505.) Moreover, Lancaster sent an email from his personal email address to his Pilot email address with the subject line "Fwd: Print help please!" and attached Relation documents entitled "NCU UHC Alternate 2 2022.xls," "NCU UHC Alternate 1 2022.xls," and "NCU UHC Renewal 2022.xls." (R. 383.) The forensic examination also revealed that on 19 May 2022, Lancaster sent multiple emails to his personal email address, which attached documents Relation contends are confidential.

219. On 19 May 2022, Sneed emailed documents from her Relation email address to her personal email address and then from her personal email address to her Pilot email address. (R. 1576.) Additionally, the examination of Sneed's laptop revealed the existence of multiple documents that—according to Relation—contained confidential information, although, due to various deletions, the source of these documents is presently unknown. (*See* Shelton Aff. I ¶¶ 22–39.) Sneed, however, admitted in her deposition that she sent some forms and checklists from her Relation email address to her personal email address. (R. 612–23.) When asked why she sent such documents to her personal email address, Sneed replied that she "thought [she] might need it later[.]" (R. 613.)

220. In her deposition, Linthicum admitted that she sent the Net Rate Calculations spreadsheet, among other documents, from her Relation email address to her personal email address on 17 February 2022. (R. 674–81.) Moreover, the forensic examination revealed that Linthicum emailed the Net Rate Calculations spreadsheet from her personal account to her Pilot email account on 5 April 2022, and she admitted to having subsequently used the spreadsheet since that time. (R. 382, 679.) Linthicum testified that she chose to email these documents to herself "[b]ecause [she] was thinking, if [she] ever left, these are documents [she] might want to have." (R. 680.)

221. The record also reflects that on 12 March 2021, Kelly forwarded an email from his Relation account to his personal email account that contained Relation client information. (R. 2987.)

222. Furthermore, Zewalk testified that Crooker took with him "expiration lists" containing Relation client information that he proceeded to use in his new employment with Pilot. (R. 474.)

223. These examples clearly suffice in and of themselves to create an issue of fact with regard to this claim.

224. Therefore, the Court **DENIES** Defendants' Motion for Partial Summary Judgment as to Relation's claim for breach of the Confidentiality Provisions of the Former Employees' employment agreements.

D. Breach of Settlement Agreement

225. Relation also contends that the Pilot Defendants breached the March 2021 Settlement Agreement in the Smythe Lawsuit "by soliciting Relation's clients and employees and using Relation's confidential information during the prohibited periods." (Compl. ¶¶ 170–175.)[15]

226. Relation's claim for breach of the Settlement Agreement is another iteration of a claim for breach of contract, which, as noted above, requires the "(1) existence of a valid contract and (2) breach of that contract." *Poor*, 138 N.C. App. at 26.

227. Defendants do not challenge the validity of the Settlement Agreement or the fact that Smythe, Capps, Kinney, Pilot Risk, and Pilot Benefits were bound by the obligations set out therein. Rather they contend that Relation has failed to offer evidence that any of the Pilot Defendants actually breached the Settlement Agreement. In support of their argument, the Pilot Defendants rely on their testimony that "they did not solicit employees or clients during the covered period or use, disclose or disseminate Plaintiffs' confidential information." (Defs.' Reply Br. Supp. Mot. Summ. J., at 4, ECF No. 257.)

228. As noted earlier in this opinion, the Smythe Lawsuit concluded with the entry of a Settlement Agreement between Relation, Smythe, Capps, Kinney, Pilot Risk, and Pilot Benefits. The Settlement Agreement provided in pertinent part as follows:

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[15] For clarity, this claim lies only against Defendants Smythe, Capps, Kinney, Pilot Risk, and Pilot Benefits, and not against the Former Employees.

This Confidential Settlement Agreement ("***Agreement***") is made and entered into between Relation Insurance, Inc. and Relation Insurance Services of North Carolina, Inc. ("***Plaintiff***" or "***Relation***") on the one hand and Kyle S. Smythe, Robert A. Capps III, Lynette W. Kinney, Pilot Risk Management Consulting, LLC, and Pilot Financial Brokerage, Inc. on the other hand ("***Defendant***" or "***Pilot***") (collectively the "***Parties***" and each individually a "***Party***").

. . .

Therefore, it is agreed Pilot shall not:

(i) through and including May 31, 2021, solicit, attempt to solicit, accept, or attempt to accept as a customer any of the customers of Relation with whom Smythe or Robin Turner ("Turner") had Material Contact during Smythe's or Turner's employment with Relation for the purpose of selling, offering or providing such customers or prospective customers any product or service in competition with those products or services offered or provided by Relation, nor may Pilot do any of the foregoing on or prior to May 31, 2021 even if the effective date of such efforts would be after May 31, 2021; nor shall it,

(ii) through and including March 31, 2021, solicit, attempt to solicit, hire, or attempt to hire any employee of Relation or independent contractor working for or with Relation.

(c) <u>Acknowledgement</u>: Pilot acknowledges the restrictions against solicitation in this Agreement apply to all forms of solicitation, including, without limitation, written communications, verbal communications, email communications, and all forms of electronic communications through social media websites or applications that may be broadly disseminated, including, but not limited to, status updates, posts, direct/personal messages, tweets, or retweets on Linkedln, Twitter, Google+, Facebook, or any other form of electronic communication.

(d) <u>Confidentiality, Return and Non-Disclosure</u>. Pilot shall not disclose, publish or disseminate any Company Information to any third party, or use any Company Information. Pilot represents and warrants that Pilot has returned to Relation all tangible Company Information in Pilot's possession, custody, or control. As to intangible Company Information, Pilot herby certifies to Relation that all such information has been deleted from all computers, cell phones, tablets, external

> drives, cloud storage platforms, and any and all other places stored or accessible. Relation acknowledges that nothing herein shall preclude Pilot's use of information held in the mind of Smythe or Turner or developed by them after March 4, 2020. The restrictions contained herein shall remain in place as to Confidential Information through and including March 4, 2022, and as to Trade Secrets for so long as the information qualifies as a trade secret under North Carolina law.

(Smythe Aff. I, Ex. F § 3 (b)–(d) (emphasis in original).)

229. In sum, the Settlement Agreement prohibited the Pilot Defendants from (1) soliciting Relation's employees, (2) soliciting Relation's clients, and (3) using Relation's confidential information.

230. Relation first contends that the following actions of the Pilot Defendants demonstrate that they did, in fact, solicit Relation's *employees* in violation of the Settlement Agreement:

> [W]ithin *days* of the Settlement Agreement, Pilot had the Former Employees meet with Pilot's attorney, refer business to Pilot, and send themselves Relation information. Although deleted from the computers, Pilot even had a "Crooker/Kelly SpreadSheet" and a "growth plan" to guide its efforts to recruit the Former Employees. By April, the Former Employees were regularly meeting with Pilot—surreptitiously.

(Pls.' Br. Opp. Defs.' Mot. Summ. J., at 21 (emphasis in original) (internal citations omitted).)

231. However, the Court's review of the record fails to reveal any evidence of solicitations of Relation employees by the Pilot Defendants during the period from 11 March 2021 and 31 March 2021 (the "Employee Solicitation Restriction Period").

232. Despite asserting that "Pilot had the Former Employees meet with Pilot's attorney," Relation has offered no evidence of either of the Pilot Entities doing so. Rather, Relation has merely shown that Crooker, Pilot Risk, and Pilot Benefits

were clients of the same attorney at the same time. Moreover, there is no evidence that either of the Pilot Entities directed the Former Employees to refer business to Pilot Risk or Pilot Benefits during the Employee Solicitation Restriction Period.

233. In addition, although the record reflects several chance encounters between a Relation employee and one of the Managing Members of the Pilot Entities in a public place, there is no evidence that any attempts at solicitation occurred on these occasions.

234. Therefore, summary judgment is **GRANTED** as to all Pilot Defendants on Relation's claim for breach of the Employee Solicitation Restriction Period of the Settlement Agreement.

235. Next, Relation asserts that the Pilot Defendants solicited Relation's *clients* in violation of the Settlement Agreement, contending that "Smythe was 'quoting' these clients soon after the Settlement Agreement was executed[,]" and that "Pilot solicited numerous clients from Relation during the restricted period." (Pls.' Br. Opp. Defs.' Mot. Summ. J., at 20–21.)

236. As quoted above, the Settlement Agreement provided that between 11 March 2021 and 31 May 2021, the Pilot Defendants were prohibited from soliciting, attempting to solicit, accepting, or attempting to accept as a customer any of the customers of Relation with whom Smythe or Robin Turner had Material Contact during their employment with Relation for the purpose of selling, offering or providing such customers or prospective customers any product or service in competition with those products or services offered or provided by Relation. (*See*

Smythe Aff. I, Ex. F § 3(b)(ii).)[16] The Settlement Agreement also restricted Pilot Benefits from doing "any of the foregoing on or prior to May 31, 2021 even if the effective date of such efforts would be after May 31, 2021[.]" (Smythe Aff. I, Ex. F § 3(b)(ii).)

237. For purposes of the Settlement Agreement, "Material Contact" is defined as "contact or interaction that was intended (at least in part) to further the business interests of Relation with or to facilitate the sale of products or the performance of services by Relation for such Person." (Smythe Aff. I, Ex. F § 2(b).)

238. There is no evidence in the record of Kinney, Capps, or Pilot Benefits soliciting any Relation clients during the Client Solicitation Restriction Period.

239. However, Relation has put forth evidence of three of its customers who terminated their relationship with Relation and obtained new insurance policies through Pilot Risk the very same day, raising an inference that Smythe was responsible.

240. First, Relation "lost" Company A[17] as a client on 14 March 2021. Smythe had serviced Company A during his employment with Relation. (R. 397.) Company A was shown as a client of Pilot Risk's in its 2021 Book of Business Report, which reflects that Company A had "[n]ew" policies go into effect on 14 March 2021. Smythe

[16] The Court will refer to the period of time from 11 March 2021 and 31 May 2021 as the Client Solicitation Restriction Period.

[17] Pursuant to the parties' request, the Court will avoid listing these clients by name in order to preserve their confidentiality.

is listed as the associated producer on these "[n]ew" policies. (R. 1732.) 14 March 2021 is within the Client Solicitation Restriction Period.

241. Second, Relation "lost" Client B (another client who Smythe had serviced during his employment with Relation) on 20 March 2021. Pilot's 2021 Book of Business Report lists Client B as a client (along with Smythe as the associated producer) and states that Client B had "[n]ew" policies go into effect on 20 March 2021—which falls within the Client Solicitation Restriction Period. (R. 397, 1760.)

242. As a third example, Relation "lost" Company C as a client on 17 April 2021. Once again, Smythe had serviced Company C during his employment with Relation. (R. 397.) Company C is shown as a client of Pilot Risk's in its 2021 Book of Business Report, which reflects that Company C had "[n]ew" policies go into effect within the Client Solicitation Restriction Period on 17 April 2021. Smythe is listed as the associated producer. (R. 1750.)

243. Accordingly, Defendants' Motion for Summary Judgment based on violations of the Client Solicitation Restriction Period of the Settlement Agreement is **DENIED** with respect to Smythe and Pilot Risk, but **GRANTED** as to Kinney, Capps, and Pilot Benefits.

244. Finally, Relation contends that the Pilot Defendants violated the section of the Settlement Agreement providing that "Pilot shall not disclose, publish or disseminate any Company Information to any third party, or use any Company Information." "Company Information" is defined so as to include "Confidential Information."

245. The Settlement Agreement restricts Pilot's use of Relation's Confidential Information between 11 March 2020 and 4 March 2022[18] and defines "Confidential Information" as follows:

> [D]ata and information, regardless of the form or medium in which it is or was created, stored, reflected or preserved, and whether or not labeled as "confidential", relating to Relation's Business (which does not rise to the status of Trade Secret Information) which was disclosed to Kyle S. Smythe ("Smythe") or of which Smythe became aware as a consequence of or through Smythe's relationship with Relation and which has value to Relation and is not generally known to its competitors. Confidential Information shall not include any data or information that has been voluntarily disclosed to the public by Relation or that has been independently developed and disclosed by others (except where such public disclosure has been made by Pilot without authorization), or that otherwise enters the public domain through lawful means without breach of any obligations of confidentiality owed to Relation by Pilot.

(Smythe Aff. I, Ex. F § 2(d).)

246. Notably, this definition of "Confidential Information" limits what qualifies as "Confidential Information" to information disclosed to Smythe of which he became aware as a consequence of—or through his relationship with— Relation and which has value to Relation and is not generally known to its competitors.

247. In support of this portion of its claim, Relation points to a document found on Smythe's Pilot computer that is labeled "Smythe Documents Summary" and "Potential confidential documents of Relation Insurance." (R. 2123.) This document contains a list of 23 documents identified by Smythe as potentially confidential. Furthermore, there is a column labeled "to help me find again" and directions for accessing these documents on the computer they were taken from. (R. 2123.)

[18] The Court will refer to the period of time from 11 March 2020 and 4 March 2022 as the Confidential Information Restriction Period.

248. The presence of these documents on Smythe's Pilot Risk computer (and the manner in which Smythe labeled them) would permit a jury to find that Smythe used Relation's confidential information in violation of the Settlement Agreement in furtherance of his employment with Pilot Risk such that summary judgment is improper as to Smythe and Pilot Risk. However, Relation has failed to point to any evidence that would allow a reasonable jury to find that Pilot Benefits, Capps, or Kinney breached the Settlement Agreement with regard to the use of Relation's Confidential Information.

249. Therefore, Defendants' Motion for Summary Judgment based on violations of the Confidential Information Restriction Period of the Settlement Agreement is **DENIED** with respect to Smythe and Pilot Risk, but **GRANTED** as to Kinney, Capps, and Pilot Benefits.

E. Unjust Enrichment

250. Defendants further seek summary judgment on Relation's claim for unjust enrichment. (Compl. ¶¶ 205–213.) In support of this claim, Relation essentially contends that Defendants used Relation's confidential information for the benefit of the Pilot Entities.

251. Our Supreme Court has explained that a claim for unjust enrichment "is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law." *Booe v. Shadrick*, 322 N.C. 567, 570 (1988). "The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the

law will imply a promise to pay a fair compensation therefor." *Atlantic C. L. R. Co. v. State Highway Comm'n*, 268 N.C. 92, 95–96 (1966) (citations omitted). "The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated." *Collins v. Davis*, 68 N.C. App. 588, 591 (1984).

252. In order to recover on an unjust enrichment claim, a "[p]laintiff must prove: (1) that it conferred a benefit on another party; (2) that the other party consciously accepted the benefit; and (3) that the benefit was not conferred gratuitously or by an interference in the affairs of the other party." *Jacobsen*, 2020 NCBC LEXIS 103, at *29 (citing *Southeastern Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330 (2002)). Additionally, the conferred benefit must be measurable. *Booe*, 322 N.C. at 570.

253. The Court is not convinced that an unjust enrichment claim exists on these facts. This Court recently rejected a similar argument:

> The Bayatronics Defendants further argue that ACI has provided no evidence that it actually conferred any benefit on Defendants, or that there is any contract implied in law between ACI and the Bayatronics Defendants. (Br. Supp. 29.) They contend that ACI's unjust enrichment claim focuses on the Bayatronics Defendants having conferred a benefit upon themselves, given that it is alleged that Mr. Patel—a member of Bayatronics—retained trade secret information when he left ACI and allegedly shared that information with the Bayatronics Defendants. (Br. Supp. 29.)
>
> ACI, however, contends that it conferred "the benefit of access to its confidential information upon [Jayesh] Patel," because he and ACI entered into the Confidentiality Agreement, and that through the Defendants' conspiracy, all Defendants obtained the benefit of that

> confidential information, and it would be inequitable for them to retain that benefit. (Br. Opp. 28.)
>
> However, ACI has alleged a taking of information in violation of Jayesh Patel's Confidentiality Agreement, not a willing transfer of that information to the Bayatronics Defendants. *See, e.g., Albritton v. Albritton*, 2021 NCBC LEXIS 53, at **33–36 (N.C. Super. Ct. June 7, 2021) ("Neither the allegations nor the facts in evidence support a claim for unjust enrichment. Movants have not alleged that [Plaintiffs] conferred benefits upon Defendants, but, rather, that Defendants took assets belonging to [Plaintiff]." (emphasis in original)); *Klos Constr., Inc. v. Premier Homes & Props., LLC*, 2020 NCBC LEXIS 85, at *48–51 (N.C. Super. Ct. July 21, 2020) (dismissing a claim for unjust enrichment where "it is undisputed that the [ ] Defendants took any benefit of Plaintiff's goodwill"); *KNC Techs., LLC v. Tutton*, 2019 NCBC LEXIS 72, at *36–37 (N.C. Super. Ct. Oct. 9, 2019) (stating that "a claim for unjust enrichment must be based on a contract implied in law in which one party has provided a benefit to another, such as goods or services, for which the first party should rightfully be compensated").
>
> The access granted to Jayesh Patel as a benefit of his Confidentiality Agreement, and his alleged wrongful taking and disseminating of that information to the Bayatronics Defendants, does not support a claim for unjust enrichment against the Bayatronics Defendants. ACI did not voluntarily confer a benefit on the Bayatronics Defendants. Rather, the evidence is clear that, at most, Jayesh Patel wrongly misappropriated or retained trade secret information which the Bayatronics Defendants ultimately received.

Am. Cirs., Inc. v. Bayatronics, LLC, 2023 NCBC LEXIS 165, at **38–40 (N.C. Super. Ct. Dec. 8, 2023).

254. The same logic applies here. Furthermore, to the extent this claim is based upon the Former Employees' alleged misuse of Relation's confidential information, it is well settled that "a claim for unjust enrichment cannot stand where an express contract exists covering the same subject[.]" *Jacobsen*, 2020 NCBC LEXIS 103, at *29 (cleaned up).

255. As discussed above, the Court is denying summary judgment on Relation's claims for breach of the Confidentiality Provisions of the Former Employees' Employment Agreements. Therefore, because that claim encompasses the same subject matter as the unjust enrichment claim, the latter claim cannot survive. *See Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, disc. review denied 350 N.C. 379 (1999) ("It is well established that if there is a contract between the parties, the contract governs the claim and the law will not imply a contract[; in such cases] an action for breach of contract, rather than unjust enrichment, is the proper cause of action" (internal citations and quotation marks omitted)).

256. Therefore, the Court **GRANTS** Defendants' Motion for Summary Judgment on Relation's claim for unjust enrichment.

F. Computer Trespass

257. The Former Employees also seek summary judgment on Relation's claims for computer trespass under both federal and North Carolina law, arguing that these claims fail because their use of the computers was authorized by Relation. (Defs.' Br. Supp. Mot. Summ. J., at 28.) They contend that Relation "granted the Former Employees access to [Relation's] computer system" and that "[t]here is neither allegation nor evidence that any Former Employee evaded security protocols to gain access to unauthorized areas." (Defs.' Br. Supp. Mot. Summ. J., at 29.)

258. Relation asserts that the Former Employees exceeded the access they were provided to Relation's computers. (Compl. ¶¶ 214–223; Pls.' Br. Opp. Defs.' Mot. Summ. J., at 50.)

259. The federal Computer Fraud and Abuse Act of 1986 ("CFAA"), among other things, renders liable a person who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer[.]" 18 U.S.C. § 1030(a)(2)(C). The Fourth Circuit has previously discussed the background and application of the CFAA in both civil lawsuits and criminal proceedings:

> In 1984, Congress initiated a campaign against computer crime by passing the Counterfeit Access Device and Computer Fraud and Abuse Act of 1984. Pub. L. No. 98-473, 98 Stat. 2190. Shortly thereafter, in 1986, it expanded the Act with a revised version, the Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213. Today, the CFAA remains primarily a criminal statute designed to combat hacking. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 645 (4th Cir. 2009). Nevertheless, it permits a private party "who suffers damage or loss by reason of a violation of [the statute]" to bring a civil action "to obtain compensatory damages and injunctive relief or other equitable relief." 18 U.S.C. § 1030(g). Notably, although proof of at least one of five additional factors is necessary to maintain a civil action, a violation of any of the statute's provisions exposes the offender to both civil and criminal liability.

WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199, 201 (4th Cir. 2012) (internal footnote omitted).

260. In that same case, the Fourth Circuit succinctly explained what it means under the statute to intentionally access a computer without authorization or exceed authorized access and thereby obtain information from any protected computer.

> The CFAA is concerned with the unauthorized access of protected computers. Thus, we note at the outset that "access" means "[t]o obtain, acquire," or "[t]o gain admission to." *Oxford English Dictionary* (3d ed. 2011; online version 2012). Moreover, per the CFAA, a "computer" is a high-speed processing device "and includes any data storage facility or communications facility directly related to or operating in conjunction with such device." § 1030(e)(1). A computer becomes a "protected computer" when it "is used in or affecting interstate or foreign commerce." § 1030(e)(2).
>
> With respect to the phrase, "without authorization," the CFAA does not define "authorization." Nevertheless, the Oxford English Dictionary defines "authorization" as "formal warrant, or sanction." *Oxford English Dictionary* (2d ed. 1989; online version 2012). Regarding the phrase "exceeds authorized access," the CFAA defines it as follows: "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter." § 1030(e)(6).
>
> Recognizing that the distinction between these terms is arguably minute, *see Citrin*, 440 F.3d at 420, we nevertheless conclude based on the "ordinary, contemporary, common meaning," *see Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979), of "authorization," that an employee is authorized to access a computer when his employer approves or sanctions his admission to that computer. Thus, he accesses a computer "without authorization" when he gains admission to a computer without approval. *See Brekka*, 581 F.3d at 1133. Similarly, we conclude that an employee "exceeds authorized access" when he has approval to access a computer, but uses his access to obtain or alter information that falls outside the bounds of his approved access. *See id*. Notably, neither of these definitions extends to the improper *use* of information validly accessed.

Id. at 204 (internal footnotes omitted).

261. In other words,

> a violation for accessing "without authorization" occurs only where initial access is not permitted. And a violation for "exceeding authorized access" occurs where initial access is permitted but the access of certain information is not permitted. . . . Stated differently, a violation does not depend upon the defendant's unauthorized use of information, but rather upon the defendant's unauthorized use of access.

Diamond Power Int'l, Inc. v. Davidson, 540 F. Supp. 2d 1322, 1343 (N.D. Ga. 2007).

262. With respect to the meaning of the phrase "exceeds authorized access," the United States Supreme Court in *Van Buren v. United States*, 141 S. Ct. 1648 (2021), recently addressed this issue. In *Van Buren,* a police officer "used his patrol-car computer to access a law enforcement database to retrieve information about a particular license plate number in exchange for money." *Id.* at *1649. The police officer "used his own, valid credentials to perform the search, [but] his conduct violated a department policy against obtaining database information for non-law-enforcement purposes." *Id.* As a result, the police officer was charged with, and convicted of, a felony violation of the CFAA. *Id.*

263. On appeal, the officer "argu[ed] that the 'exceeds authorized access' clause applies only to those who obtain information to which their computer access does not extend, not to those who misuse access that they otherwise have." However, the Eleventh Circuit affirmed his conviction. *Id.* at *1653.

264. The Supreme Court subsequently overturned the officer's conviction, adopting a narrower meaning of "exceeds authorized access."

> In sum, an individual "exceeds authorized access" when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him. The parties agree that Van Buren accessed the law enforcement database system with authorization. The only question is whether Van Buren could use the system to retrieve license-plate information. Both sides agree that he could. Van Buren accordingly did not "excee[d] authorized access" to the database, as the CFAA defines that phrase, even though he obtained information from the database for an improper purpose.

Id. at *1662.

265. Here, there is no evidence of any unauthorized access by the Former Employees, as they were authorized to initially access the computers they used at Relation. There is also no dispute that their level of access included permission to obtain the specific information at issue. Therefore, the Former Employees did not access this information "without authorization" or in a manner that "exceed[ed] authorized access," while employed at Relation, and, as a result, there was no violation of the CFAA.

266. Accordingly, summary judgment is **GRANTED** in favor of the Former Employees on Relation's CFAA claim.

267. The Court reaches a different conclusion, however, with regard to Relation's claim for computer trespass under North Carolina law.

268. Section 14-458 of our General Statutes provides for both civil and criminal liability against individuals who commit a computer trespass in violation of the statute. "To synthesize, the statute has two elements: (1) a person must 'use a computer or computer network without authority,' with (2) the intent to engage in one of the enumerated prohibited actions." *CHGYM LLC v. Unify Ath., LLC*, 2022 U.S. Dist. LEXIS 6249, at *12 (M.D.N.C. Jan. 12, 2022).

269. N.C.G.S. § 14-458(a) states, in pertinent part, as follows:

> Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network without authority and with the intent to do any of the following:
>
> > (1) Temporarily or permanently remove, halt, or otherwise disable any computer data, computer programs, or computer software from a computer or computer network.

> . . .
>
> (3) Alter or erase any computer data, computer programs, or computer software.
>
> . . .
>
> (5) Make or cause to be made an unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network.

N.C.G.S. § 14-458(a)(1), (3), (5).

270. For purposes of this statute, "a person is 'without authority' when (i) the person has no right or permission of the owner to use a computer, or the person uses a computer in a manner exceeding the right or permission[.]" N.C.G.S. § 14-458(a).

271. Here, Relation alleges that the Former Employees "used" Relation's computers in a manner exceeding their rights or permission.

272. Although there is not an abundance of case law interpreting N.C.G.S. § 14-458, there are a few decisions that provide some degree of guidance.

273. A federal court in North Carolina has held that N.C.G.S. § 14-458 "prohibits erasing computer data without authorization and making an unauthorized copy of computer data." *Sirona Dental, Inc. v. Smithson*, 2018 U.S. Dist. LEXIS 54568, at *30 (W.D.N.C. Mar. 30, 2018). In that case, the defendant-employee refused to initially return his employer-issued laptop after he was terminated. When he returned the laptop the next day, all of the computer data had been deleted. The employee "admitted deleting the data by mistake and copying the contents of the laptop onto [a] drive, although the company had not authorized him to do so." *Id.*

Based on the employee's admission, the court determined that the plaintiff-employer had "produced sufficient evidence to defeat summary judgment on its computer trespass claim." *Id.*; *see also McKeown v. Tectran Mfg.*, 2018 U.S. Dist. LEXIS 81743, (W.D.N.C. May 14, 2018) (finding allegations sufficient to state a claim for violation of N.C.G.S. § 14-458 where a former employee, after resigning but prior to returning his work-issued laptop, uploaded his employer's documents and information to a thumb drive and then proceeded to delete those same files from his work-issued laptop).

274. In *CHGYM LLC v. Unify Ath., LLC*, a federal court in North Carolina addressed whether a former employee "used" his then-employer's computer in a manner exceeding his right or permission. The court determined that the employee did, in fact, exceed his right or permission when he used his employer's database to generate reports containing customer information prior to beginning his own business. The court reasoned as follows:

> When the reports were generated, [the employee] had full access to Plaintiff's ICP databases. However, just because [the employee] had unlimited access did not mean he had unlimited authorization. While he could access all of ICP, he was only authorized to use that access to the extent it was necessary to perform his CHGYM tasks and duties. Any greater utilization of that access would exceed his "right or permission," thus qualifying as "without authority" for purposes of the North Carolina computer trespass statute. N.C. Gen. Stat. § 14-458(a).

CHGYM LLC, 2022 U.S. Dist. LEXIS 6249, at *13–14 (internal citations omitted).

275. In the present case, Relation provides the following examples of the Former Employees exceeding the access they were provided:

> King accessed carrier portals after leaving Relation. (R. 480, 2064–65, 2981–85). She also made unauthorized copies. (R. 4035–62). Gurley changed a file name and deleted it. (R. 1094). Crooker took expiration lists by impermissibly accessing Relation's computers. (R. 474, 475–76). And the Former Employees emailed confidential documents to their personal emails and took screenshots of information from Relation's computers.

(Pls.' Br. Opp. Defs.' Mot. Summ. J., at 50.)

276. The Court has carefully reviewed the evidence in the record relevant to this claim along with the arguments of the parties. Based on this review, the Court is satisfied that a genuine issue of material fact exists as to whether the Former Employees acted in violation of N.C.G.S. § 14-458.

277. Therefore, summary judgment is **DENIED** as to Relation's claim pursuant to N.C.G.S. § 14-458.

G. Tortious Interference with Existing or Prospective Contract

278. Relation has alleged claims against all Defendants for both tortious interference with business and contractual relations and for tortious interference with prospective economic advantage. (Compl. ¶¶ 224–243.)

279. Although these two claims are legally distinct, they are related. The Court elects to consider them together.

280. The Court notes that in its Complaint, Relation limits its claim for tortious interference with business and contractual relations to "existing and long-standing contractual relationships with its clients and vendors."[19] (Compl. ¶ 225.)

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[19] In its briefing, Relation also argues that "Pilot has tortiously interfered with agreements between Relation and the Former Employees." (Pls.' Br. Opp. Defs.' Mot. Summ. J., at 15.) However, Relation did not plead this theory in its Complaint and cannot now raise it for the first time at the summary judgment stage of this case.

With respect to its claim for tortious interference with prospective economic advantage, the Complaint alleges that this claim is limited to its "future expectation of long-standing relationships with its clients." (Compl. ¶ 235.)

281. Our Supreme Court has articulated the following elements of a tortious interference with contract claim:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Kuykendall, 322 N.C. at 661.

282. In order "[t]o state a claim for tortious interference with prospective economic advantage, a plaintiff must show that the defendant, without justification, induced a third party to refrain from entering into a contract with the plaintiff and which would have been entered into absent the defendant's interference." *Silverdeer, LLC v. Berton*, 2013 NCBC LEXIS 21, at **31 (N.C. Super. Ct. Apr. 24, 2013).

283. In addition, "[t]o maintain an action for tortious interference with prospective economic advantage, a plaintiff must identify a specific contract between itself and a third party." *Plasman v. Decca Furniture (USA), Inc.*, 2016 NCBC LEXIS 80, at **70–71 (N.C. Super. Ct. Oct. 21, 2016) (dismissing claim for tortious interference with prospective economic advantage where plaintiff failed to identify a particular contract that would have been entered but for the defendant's interference).

284. As an initial matter, the Court has thoroughly reviewed the record and has not found any evidence that supports Relation's claim that Defendants tortiously

interfered with its existing and long-standing contractual relationships with vendors. Accordingly, to the extent Relation's claim for tortious interference with contract is based on contractual relationships with vendors, Defendants' Motion for Summary Judgment is **GRANTED**.

285. The remainder of the Court's analysis addresses the validity of Relation's two tortious interference claims with regard to its client relationships.

286. Both types of tortious interference claims require that a defendant act "without justification." "[T]he 'without justification' element of a tortious interference claim is satisfied where the defendant's conduct involved the use of unlawful means." *MarketPlace 4 Ins., LLC, v. Vaughn*, 2023 NCBC LEXIS 31 at **35–36 (N.C. Super. Ct. Feb. 24, 2023). It follows then that "interference with a contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors." *Bev. Sys. Carolinas*, 368 N.C. at 700 (cleaned up).

287. Such interference is without justification where the defendant—even if it is a competitor of the plaintiff—acts by use of unlawful means. This Court has recently explained the rationale behind this rule as follows:

> This limitation on a defendant's ability to assert justification is eminently logical. After all, if a defendant could automatically escape liability on a tortious interference claim simply by claiming that it was engaged in a competitive relationship with the plaintiff during the time period referenced in the complaint, then it would be virtually impossible for a plaintiff to ever succeed on a tortious interference claim in this context.

MarketPlace 4 Ins., LLC, 2023 NCBC LEXIS 31, at **35–36.

288. Defendants' primary argument in support of their summary judgment motion as to these claims is that their actions were justified because they are "business competitors" with Relation. Defendants acknowledge that they "have never denied that they took substantial business from" Relation, but claim that Relation has not "show[n] that Defendants competed through some illegal means." (Defs.' Reply Br. Supp. Mot. Summ. J., at 6.)

289. As discussed in detail earlier in this Opinion, the Court has concluded that a jury question exists as to whether Defendants tortiously used Relation's confidential information, misappropriated its trade secrets, and engaged in computer trespass. As a result, a jury could reasonably conclude that Defendants' acts were without justification. Moreover, Defendants have failed to convince the Court that Relation has not put forth sufficient evidence to survive summary judgment as to the remaining elements of its tortious interference claims.[20]

290. Accordingly, Defendants' Motion for Summary Judgment is **DENIED** as to Relation's claims for both tortious interference with business and contractual relations and tortious interference with prospective economic advantage as those claims relate to interference with Relation's client relationships.

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[20] On the present record, it is difficult to make a precise determination as to which of the contracts of Relation's with which Defendants allegedly interfered are more appropriately characterized as existing contracts or future contracts. This issue is further complicated by the unique aspects of the insurance brokerage industry. Such a determination can be made by the jury at trial in connection with these claims.

H. Unfair Competition and Unfair and Deceptive Business Practices

291. The final claim asserted by Relation for which Defendants seek summary judgment is its claim for unfair competition and unfair and deceptive business practices ("UDTP") in violation of N.C.G.S. § 75-1.1.

292. This Court has previously stated that

> Chapter 75 of the North Carolina General Statutes [the "UDTPA"] provides, in pertinent part, that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful . . . To successfully state a claim under [the UDTPA]. . . a plaintiff must allege (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business.

Poluka v. Willette, 2021 NCBC LEXIS 105, at **13 (N.C. Super. Ct. Dec. 2, 2021) (cleaned up).

293. This Court has previously held "that the existence of valid underlying claims for misappropriation of trade secrets or tortious interference with contract is sufficient to give rise to liability on a UDTP theory." *MarketPlace 4 Ins., LLC*, 2023 NCBC LEXIS 31, at **39; *see also Power Home Solar, LLC*, 2021 NCBC LEXIS 55, at *51 ("Our Courts have long recognized that claims for misappropriation of trade secrets and tortious interference with contract may form the basis of a UDTPA claim." (cleaned up)).

294. Here, as discussed above, the Court has held that Relation's claims for tortious interference and misappropriation of trade secrets—at least in part—are

sufficient to proceed to trial. As a result, on that ground alone, Defendants' Motion for Summary Judgment as to Relation's UDTP claim is **DENIED**.[21]

III. Relation's Motion for Summary Judgment

295. The final motion that the Court must address is Relation's Motion for Partial Summary Judgment, which seeks the dismissal of each of the counterclaims asserted by various Defendants in this case.

296. Five of the Former Employees—Gurley, Kelly, Crooker, Linthicum, and Lancaster (the "Counterclaiming Former Employees")—have brought counterclaims against Relation for violation of the North Carolina Wage and Hour Act ("NCWHA"), breach of contract, and breach of the implied covenant of good faith and fair dealing.[22] (Countercl. ¶¶ 22–47, 55–60, 78–86.) Additionally, Pilot Risk has asserted a counterclaim against Relation for UDTP. (Countercl. ¶¶ 68–77.)

297. The Court will address each of these claims in turn.

A. Claims Under North Carolina Wage and Hour Act

298. The specific bases for the Counterclaiming Former Employees' claims under the NCWHA largely vary as to each individual claimant. However, they all involve commissions or bonuses that they claim were owed to them by Relation but were never paid.

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[21] The Court need not—and does not—decide at the present time whether Relation may be able to show other bases for a UDTP claim at trial.

[22] Originally, these counterclaims also included a claim for tortious interference with prospective economic advantage against Relation along with a claim for defamation. (Countercl. ¶¶ 48–54, 61–67.) However, Defendants subsequently took a voluntary dismissal of these latter two claims. (*See* Vol. Dismiss., ECF No. 127.)

299. This Court has previously stated the following regarding the NCWHA:

> "The Wage and Hour Act was enacted to safeguard the hours worked by and the wages paid to 'the people of the State without jeopardizing the competitive position of North Carolina business and industry.' " *Horack v. S. Real Estate Co. of Charlotte*, 150 N.C. App. 305, 309, 563 S.E.2d 47, 51 (2002) (*quoting* N.C. Gen. Stat. § 95-25.1(b) (2001)).
>
> An employee may sue under the Act to recover wages due and owing pursuant to the terms of the employment. N.C. Gen. Stat. § 95-25.22(a) (2007).
>
> A " '[w]age' paid to an employee means compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation," and it includes (among other things) "bonuses, and other amounts promised when the employer has a policy or a practice of making such payments." N.C. Gen. Stat. § 95-25.2(16).
>
> An employer who violates the Act is liable for the unpaid wages with interest from the date each amount first comes due. N.C. Gen. Stat. § 95-25.22(a). The trial court also must double any such judgment as a form of liquidated damages unless the employer proves that it acted in good faith and that it had reasonable grounds for withholding payment, in which case the Court may decline to award liquidated damages or award a lesser sum. N.C. Gen. Stat. § 95-25.22(a1).
>
> Finally, if the Court finds a violation of the Act, it may order the employer to pay costs and a reasonable attorneys' fee. N.C. Gen. Stat. § 95-25.22(d).

A-1 Pavement Marking, LLC v. APMI Corp., 2009 NCBC LEXIS 16, **9–10 (N.C. Super. Ct. June 26, 2009).

300. It is undisputed that the commissions and bonus payments at issue fall under the broad definition of "wages" for purposes of the NCWHA. *See* N.C.G.S. § 95-25.2(16).

301. At the outset, the Court elects to address a threshold issue concerning the statute of limitations governing claims under the NCWHA.

302. A claim brought pursuant to the NCWHA is subject to a two-year limitations period. N.C.G.S. § 95-25.22(f) ("Actions under this section must be brought within two years pursuant to G.S. 1-53."). Our Court of Appeals has held that "the statute begins to run on the date the promise is broken." *Kornegay v. Aspen Asset Grp., LLC*, 204 N.C. App. 213, 233 (2010). "[W]hen the party moving for summary judgment pleads the statute of limitations, 'the burden is then placed upon the [non-movant] to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action.' " *PharmaResearch Corp. v. Mash*, 163 N.C. App. 419, 424 (2004) (quoting *Pembee Mfg. Corp.*, 313 N.C. at 491).

303. The validity of a statute of limitations defense is sometimes an issue that must be resolved at trial:

> Whether a claim is barred by the statute of limitations is a mixed question of law and fact. *Stratton v. Royal Bank of Can.*, 211 N.C. App. 78, 81 (2011). "If a plaintiff's claim is barred by the running of the applicable statute of limitations, summary judgment in favor of a defendant is appropriate." *Lockerman v. S. River Elec. Membership Corp.*, 794 S.E.2d 346, 354 (N.C. Ct. App. 2016). "When, however, the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury." *Baum v. John R. Poore Builder*, Inc., 183 N.C. App. 75, 81 (2007).

Zagaroli v. Neill, 2018 NCBC LEXIS 25, at **33 (N.C. Super. Ct. Mar. 28, 2018).

304. Here, the NCWHA counterclaims were filed on 5 July 2022. However, the parties disagree as to when these claims accrued.

305. The Court of Appeals addressed a similar issue under the NCWHA in *Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1 (1995). In that case, the plaintiffs brought an action pursuant to the NCWHA to recover vacation pay that their former

employer had allegedly failed to pay each of them upon termination of their employment. *Id.* at 7–8. The defendant employer contended that the statute of limitations had begun to run on the day it gave notice of the change in the vacation policy. *Id.* at 9. The Court of Appeals rejected the employer's argument and held as follows:

> As was recently made plain in *Glover v. First Union National Bank*, 109 N.C. App. 451 (1993), defendant's argument is meritless. In that case the plaintiff sued the defendant to recover retirement benefits he was allegedly owed. The defendant argued that the statute of limitations barred his claim because any loss the plaintiff had suffered had occurred over twenty years previously when the retirement plan was amended. This Court rejected that argument, stating: "The statute begins to run on the date the promise is broken. In no event can the limitations period begin to run until the injured party is at liberty to sue." *Id.* at 455, 428 S.E.2d 208 (citation omitted).
>
> In this case, the plaintiffs suffered no injury until the defendant failed to pay them for the vacation days they had allegedly earned in 1988. Defendant's policy did not require it to pay cash for any unused vacation days until the employment was terminated. Therefore, no individual plaintiff had a cause of action until the next pay day after termination. The trial court correctly found that only those plaintiffs whose pay date next following termination preceded 3 April 1989 (two years prior to the filing of this action) were barred by section 95-25.22. We reject defendant's first argument.

Id.

306. Therefore, the statute of limitations for the NCWHA claims here began to run each time one of the payments at issue first became due and was not paid. This means that the Counterclaiming Former Employees can only recover owed wages that first became due after 5 July 2020.

307. The Court will now address the specific counterclaims that have been asserted by each Counterclaiming Former Employee.

i. Gurley

308. Gurley's NCWHA claim is premised on his contention that he is owed commission payments that Relation has wrongfully withheld. He asserts that because his book of business for certain years at Relation exceeded $500,000, he was entitled—under Relation's tiered commission structure—to receive a commission rate of 27% but instead was paid a commission rate of only 25% during those years. As a result, Gurley contends, he is entitled to receive the 2% difference for the years in question.

309. Relation argues that it is entitled summary judgment as to Gurley's NCWHA claim because it changed its commission rates prior to the years when his book of business met or exceeded the requisite $500,000 threshold. Relation further asserts that Gurley never qualified for the 27% rate while the 27% tier remained in effect. (Cooper Aff. III ¶¶ 11, 14, 18.)

310. Gurley's Producer Agreement, dated 5 February 2013, provided the following terms of compensation:

> While employed by the Company pursuant to this Agreement, the Company will pay to Producer compensation in accordance with Exhibit A to this Agreement, the initial form of which follows this Agreement and is incorporated herein by this reference. The company may at any time in its sole discretion change any or all aspects of Producer's compensation without need to amend this Agreement in writing. Any reference in Exhibit A to compensation for any specified period of time shall not entitle Producer to payment of compensation (i) beyond any compensation earned through Producer's performance of services under this Agreement through the date of termination of this Agreement, or (ii) after such specified period of time. Producer's compensation shall be paid in accordance with the Company's usual payroll procedures in effect from time to time[.]
>
> . . .

> The Company may offset any bona fide amounts that Producer then owes to the Company or any other member of the Ascension Group against any amounts the Company then owes Producer hereunder, except that no offset shall be made from any amount if the offset would violate the requirements of Section 409A of the Internal Revenue Code of 1986, as amended.

(Compl., Ex. J § 4(a), (d), ECF No. 5.10.) In turn, Exhibit A to Gurley's Producer Agreement stated in pertinent part as follows:

> If Producer's employment hereunder continues after January 31, 2015, instead of the compensation described in Sections 2 and 3 of this Exhibit A, Producer shall be entitled to payment of commissions earned according to the terms of the Company's applicable producer compensation plan, as that plan exists from time to time, subject to the Company's sole discretion as to the nature, content, terms and conditions of such plan (the "Standard Plan"). Subject to the rights of offset set forth in Section 4(d) of the Agreement, after January 31, 2015, any commission payments to Producer under the Agreement shall be payable to Producer in accordance with the terms of the Standard Plan and payroll practices of the Company, as that Standard Plan and those practices exist from time to time. The Company may in its sole discretion revise or replace the Standard Plan or any portion thereof without need to amend the Agreement or this Exhibit A in writing.
>
> . . .
>
> Notwithstanding any other provision of the Agreement, including this Exhibit A, to fully earn and be eligible for payment of any compensation under Section 3 and 4 of this Exhibit, Producer must remain employed by the Company as of the applicable compensation payment date. Producer forfeits any right to any compensation not yet paid under Sections 3 and 4 as of Producer's employment termination date, if employment by the Company terminates at any time for any reason. Upon termination of Producer's employment with the Company, Producer shall no longer be entitled to payment of any compensation under Sections 3 and 4, and all Agency Net Revenue shall remain the exclusive property of the Company.

(Compl., Ex. J, at Ex. A.)

311. The most recent written producer compensation plan contained in the record is from 2016 (the "2016 Producer Compensation Plan").[23] The 2016 Producer Compensation Plan provided as follows:

> **1. Renewal Compensation Tiers:**
>
> A Producer's 2016 adjustable draw will be set based on their 2015 Book of Business measured on December 31, 2015. The Book of Business will exclude known lost accounts. Additionally, the Book of Business will determine the Renewal Compensation Tier a Producer falls in for 2016. The thresholds and associated renewal income splits for each Production Tier are:

Production Tier	**2015 Total Book of Business**	**Renewal %**
Tier 1	Up to $300,000	23%
Tier 2	$300,001 to $499,999	25%
Tier 3	$500,000 and up	27%

> An illustrative example of how the Production Tier plan will work is shown below:
>
> Producer A has a December 31, 2015 total book of business of $325,000 before deleting lost accounts. The revenue from lost business totals $30,000, resulting in a final book of business for tier and draw setting of $295,000. The 2016 Production Tier for Producer A is 1 and the 2015 renewal % for this Producer is 23%. The monthly draw will be $295,000 x 23% divided by 12 or $5,654.00.
>
> **2. Producer Compensation - Actual Earned or Adjustable Base Draw:**
>
> Based on the "Total Book of Business" as of December 31, 2015, a suggested adjustable base will be calculated, based on the producer's current book of business and renewal tier. This adjustable base draw will be presented to the producer and an agreement will be reached, and the adjustable base set for the next year. This adjustable base will be

[23] However, at the hearing on the present Motions, counsel for Relation acknowledged that written plans for later years existed but were not contained in the record.

> paid in accordance with Ascension NC's pay schedule in effect for that year.
>
> Alternately, a producer may elect to be paid on the "actual earned" basis rather than receiving a draw. In this basis of compensation, a producer is paid on the first payroll of the month the total account balance in his producer account as of the end of the preceding month. The account balance is equal to the actual earned commissions credited to the producer's account.
>
> **3. Producer Accounts:**
>
> An individual commission account will be set up for each producer. All commission credits and debits will be entered into this account monthly. Renewal transaction commissions will be multiplied by the producer's renewal tier factor (23%, 25% or 27%). New business commissions will be multiplied by the appropriate new business rate in section 4 of the 2016 Producer Compensation Plan. The total of these two calculations will be the producer's total compensation earned for the month.
>
> The agreed monthly draw will be debited against this account monthly. At the end of each month, the producer can draw down on excess earned commission in addition to the monthly draw. Requests for additional payouts should be made on the attached form and emailed to East Region Finance. Negative draw balances must be cleared on a quarterly basis by a revision to the adjustable base draw amount.
>
> **4. New business:**
>
> The commission rate for recurring new business is 40% for all new business sold effective 1/01/2016 and later. Non-recurring new business (i.e. surety accounts, etc.) will be paid at a rate of 30% for year 1.

(Gurley Aff. I, Ex. D, ECF No. 72.)

312. Gurley testified that his book of business exceeded the $500,000 threshold in the "third to fourth quarter of 2017ish, timeframe." (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 33, at 207:7–24, ECF Nos. 224.38 (sealed), 238 (redacted), 224.39.) He further stated his belief that the revenue that came into Relation for his clients exceeded $500,000 in at least 2018, 2019, and 2020. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 33, at 208:17–24.)

313. However, Relation argues that the tiered commission structure (i.e., 27%/25%/23%) was not in place during the years when Gurley's book of business was greater than $500,000. Relation contends that "[w]hile historical producer compensation plans offered a range of renewal rates from 23% to 27%, depending on the producer's respective book size, this tiered approach was replaced with a standard 25/40 split (i.e., 40% on new business and 25% on renewal) by 2019." (Cooper Aff. III ¶ 12.) Cooper testified that the old 27%/25%/23% structure was replaced by a new commission plan effective on 1 January 2019. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 29.) Cooper further stated that "[f]rom 2019 to present date, this 40/25 split has remained the standard producer compensation plan." (Cooper Aff. III ¶ 12.)

314. In response, Gurley asserts that he was never notified of this change in Relation's commission plan prior to the years in which he met the $500,000 cutoff. Moreover, Gurley testified that after 2019 Cooper continued to represent to him that the 27% rate remained in place and falsely assured Gurley that he was, in fact, receiving a 27% commission on renewal business. (Gurley Aff. II ¶ 23; Nelson Aff., Ex. A-1, at 26–27, ECF No. 183.1.) Defendants contend that "Relation has never produced: (1) any document that shows that Relation ever actually modified the Standard Plan to reduce the top rate to 25% or (2) ever provided any producer with a copy of the modified Standard Plan or with any other written notice that the top rate had been reduced[,]" in violation of the NCWHA. (Defs.' Br. Opp. Pls.' Mot. Summ. J., at 7.)

315. Gurley testified that he first learned about the discrepancy between the 27% and 25% commission rates around the beginning of the COVID-19 pandemic in 2020. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 33, at 223:11–24.) In addition, Gurley stated that he was never "officially" notified of this change and that Cooper continued to represent to him that the 27% rate remained in place. (*See* Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 33, at 203:21–24.)

316. Relation concedes that it did not give Gurley notice of this change in the compensation plan before the change was implemented. (*See* Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 29; Defs. Br. Opp. Pls.' Mot. Summ. J., Ex. 9, ECF No. 224.10.) Instead, it argues that it was only required to give such notice to producers who (unlike Gurley) had actually qualified for the higher 27% commission rate prior to the agency's decision to change the commission structure.

317. The NCWHA requires employers to "[n]otify employees, in writing, at least one pay period prior to any changes in promised wages." N.C.G.S. § 95-25.13(3). With respect to this required notice to employees, our Court of Appeals has stated the following:

> Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer can cause a loss or forfeiture of such pay if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned.

Narron v. Hardee's Food Sys., Inc., 75 N.C. App. 579, 583, *disc. rev. denied*, 314 N.C. 542 (1985).

318. North Carolina courts have addressed the sufficiency of notice under the NCWHA on several occasions. For example, in *Gallaher v. Ciszek*, employees alleged that they were underpaid for the months of January through April of the year in question. *Gallaher v. Ciszek*, 2022 NCBC LEXIS 131, at **26 (N.C. Super. Ct. Nov. 4, 2022). The employer provided its employees with their January paychecks, which were for the amount set out in their original employment agreements but were for a lesser amount than the employees had been previously paid. *Id.* at **26–27. A memo accompanied the January paychecks, stating in its entirety that "[c]ompensation has been adjusted to meet the terms of your employment agreement." *Id.* This Court held that the content of the memo did not satisfy the NCWHA notice requirements for the month of January. *Id.* However, the memorandum—in conjunction with the employees' contemporaneous receipt of the January paycheck at the pay rates set in their employment agreements—provided the requisite notice under the NCWHA for all future wages. *Id.*

319. In *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518 (2005), our Court of Appeals determined that evidence supported a jury's finding that the defendant employer had failed to give the plaintiff employee proper notice of a modification of the formula used to calculate the plaintiff's annual bonus in violation of the NCWHA. The plaintiff offered the following evidence at trial:

> (1) when initially hired, he and Simpson orally agreed that plaintiff would receive twenty percent of the Structured Product Group's net income; (2) the agreement did not include an expiration date; (3) this agreement was separate from incentive plans offered to other employees; (4) defendants paid plaintiff's bonuses from 1997 to 1999 according to the terms of the agreement; (5) at no time did defendants

> modify the agreement, orally or in writing; and (6) defendants breached this agreement by retroactively reducing plaintiff's year 2000 bonus.

Id. at 522–23. The Court of Appeals explained that although the defendant gave the plaintiff notice of the bank's incentive compensation program ("ICP"), which began and ended each calendar year, these notices did not apply to the plaintiff because the evidence showed that his bonus and compensation structure was unique to him and different from the generic ICP plans applicable to the defendant's other employees. *Id*. at 524–25.

320. In the present case, the Court is unable to agree with Relation's argument on this issue. Neither Relation's briefs nor the Court's own research has disclosed any legal authority allowing an employer to avoid giving notice to an employee of a change in the employer's compensation plan for the reason claimed by Relation. The fact that Gurley's book of business had never reached the requisite $500,000 amount prior to the change in the company's commission structure did not excuse Relation from its obligation to notify Gurley (and every other producer) of the modification. Because the new commission structure changed the amounts to which Gurley would be entitled if he later met the $500,000 threshold, he was entitled to such notice.

321. Accordingly, Relation's Motion for Summary Judgment is **DENIED** as to Gurley's claim under the NCWHA based on this issue.

322. Gurley also contends that he is owed an additional $10,000 to $15,000 from commissions that were earned, but not paid to him, after his resignation. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 40, ECF No. 224.48.) However, there is no

supporting evidence in the record with respect to this allegation. Moreover, in his deposition, Gurley confirmed that in his NCWHA claim he was only seeking the 2% difference in commissions. (Pls.' Mot. Summ. J., Ex. 10, at 205:21–206:3, ECF No. 189.10.)

323. Therefore, to the extent that Gurley is asserting other grounds for relief under the NCWHA in his counterclaim, Relation's Motion for Summary Judgment is **GRANTED** as to any such additional theories of recovery.

ii. Kelly

324. Kelly's NCWHA claim is largely identical to Gurley's. Like Gurley, Kelly contends that Relation never gave him notice that the commission rates were being changed as of 2019, that he subsequently produced a book of business that exceeded $500,000, and that he was only paid a commission rate of 25% (rather than 27%) during the year (or years) for which he was entitled to the higher rate. (Defs.' Br. Opp. Pls.' Mot. Summ. J, Ex. 35, at 230:5–22, ECF Nos. 224.41–.42.)

325. Relation's argument in support of its summary judgment motion as to this claim is identical to its argument as to Gurley's claim. (Cooper Aff. III ¶¶ 11, 14, 18.)

326. The relevant portion of Kelly's Producer Agreement, dated 13 September 2010, provided the following terms of compensation:

> <u>Standard Producer Compensation Plan</u>. If Producer's employment hereunder continues after December 31, 2012, Producer shall then then convert to the Company's standard producer compensation plan in effect at that time (without need to amend this Agreement in writing), subject to the Company's sole discretion as to the nature, content, terms and conditions of such plan. The Company may in its sole discretion revise

> or replace the standard producer compensation plan or any portion thereof. Any such replacement or revised incentive compensation program shall replace the then existing incentive compensation program for such subsequent incentive period without need to amend this Agreement in writing.
>
> Effect of Termination of Employment upon Incentive Compensation. Upon termination of Producer's employment with Company, Producer shall no longer be entitled to payment of any commissions or other incentive compensation, and all commission or other incentive compensation payments shall remain the property of the Company. This provision shall survive the termination of this Agreement and of Producer's employment with the Company.

(Compl., Ex. K § 3(c)–(d), ECF No. 5.11.)

327. Defendants have put forth evidence showing that Kelly's book of business exceeded the $500,000 threshold after 2019, which would have entitled him to a 27% commission rate on renewal business under the 2016 Producer Compensation Plan. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex 29, at 20.) They have also put forth evidence that he was not given notice of the change in the commission plan that occurred as of 2019.

328. Furthermore, Linthicum testified that she saw spreadsheets containing producer commission rates reflecting that Kelly's commission percentage on renewal business was, in fact, 27% in February of 2020, but that it was lowered to 25% in 2021. (Linthicum Aff. II ¶¶ 6–7.) Linthicum stated that she "distinctly remember[ed] seeing the change in the commission because [she] had never before seen a reduction in the percentage rate for a producer, especially one whose book of business had grown." (Linthicum Aff. II ¶ 8.)

329. Kelly began to suspect that his commissions paid on renewal business "looked short" at some point in the summer of 2020 but that he did not become aware

of the change until “at least one year after that[,]” when he was notified of the change in compensation rates via email from Jonathan Cooper and Kate Rager, Relation’s in-house counsel, on 10 June 2021. (Kelly Aff. I ¶ 10.)

330. For the same reasons discussed above with regard to Gurley’s NCWHA counterclaim, Relation’s Motion for Summary Judgment is also **DENIED** as to Kelly’s counterclaim under the NCWHA based on this issue.

331. Kelly also contends that he is owed an additional $10,000 to $15,000 from commissions that were earned, but not paid to him after his resignation. (Defs.’ Br. Opp. Pls.’ Mot. Summ. J., Ex. 40.) However, there is no supporting evidence in the record with respect to this allegation.

332. Therefore, to the extent that Kelly is asserting additional grounds for relief under the NCWHA in his counterclaim, Relation’s Motion for Summary Judgment is **GRANTED** as to any such other theories of recovery.

iii. Lancaster

333. Lancaster claims that “he was underpaid as a result of Relation under reporting [sic] amounts received from carriers on his book of business.” (Defs.’ Br. Opp. Pls.’s Part. Mot. Summ. J., at 24.) In connection with this claim, it appears that he is pursuing several distinct theories.

334. First, in an interrogatory response, Lancaster stated his belief that he is owed “$4,333 for the month of January 2022.” (Nelson Aff., Ex. A-1, at 51–52.) In his deposition, Lancaster testified that the amount of his underpayment for that month was actually $4,666.67. (Pls.’ Mot. Summ. J., Ex. 12, at 62–63, ECF No.

189.12.) Lancaster also contends that he is owed between $5,000 and $10,000 in commissions earned prior to his resignation, but not paid to him following his resignation. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 40.)

335. Relation argues that Lancaster's allegations are not supported by the record because "Relation provided paychecks evidencing that Lancaster was, in fact, paid $4,666.67 (his monthly draw amount) in February 2022 (prior to his termination) and in March 2022 (after his termination), as well as his remaining commissions." (Pls.' Br. Supp. Mot. Summ. J., at 12 (citing Pls.' Mot. Summ. J., Ex. 19, ECF No. 189.19; Pls.' Mot. Summ. J., Ex. 20, ECF No. 189.20; Butler Aff. ¶¶ 16–18).)

336. During his employment with Relation, Lancaster elected to be paid via "variable compensation" through which he would receive a predetermined draw in the amount of $4,666.67.

337. Ray Dobens, Relation's Vice President of Finance and Sales Operations, testified on the subject of how producers who (like Lancaster) received variable compensation were paid:

> For producers paid via variable compensation, their compensation comes in the form of commissions classified at typically two different rates—a higher rate for securing "new" policies, and a lower rate for retaining "renewal" policies. These terms, along with their compensation terms, are defined in producers' employment agreements. Typically, the commission a producer receives based on "new" or "renewal" business is paid on an account-by-account basis; that is, the producer's commission is calculated based on the revenue received by Relation for each account.
>
> For example, if a producer's "new" commission rate is 40%, and Relation receives $100 in revenue for a new policy sold by that producer, the producer is paid $40 in commission.

> The producer only receives a commission on an account if revenue is actually received by Relation. In the example above, if Relation did not receive the $100 in revenue, then the producer would not receive a commission for that policy.
>
> Producers at Relation can also be eligible for a draw, which is a set amount given each paycheck.
>
> The purpose of the draw is to provide a steady income flow to producers on a variable compensation plan. If Relation did not offer a draw, then producers would have to wait until revenue is received and their compensation would vary widely.
>
> The draw is merely an estimate; final, actual compensation is calculated based on actual revenue received.
>
> These producers always had the opportunity to request additional compensation from a remaining balance over and above the draw.
>
> Each month, producers receive an email with reports that detail the commissions they received for the previous month's pay period. This information allows producers to verify that their commissions are accurate.
>
> . . .
>
> If a producer raises a question about something in the monthly production reports, that question is investigated and analyzed by Relation's variable compensation team. If a correction needs to be made, the adjustment will be forwarded to the next month's commissions.
>
> Producers can raise these questions at any time. Anytime we receive a concern, my team does a thorough investigation.

(Dobens Aff. ¶¶ 2, 7–15, 20–21.)

338. The record reflects that Lancaster was paid $4,666.67 (his predetermined draw amount) on 2 February 2022, and was paid an additional $13,095.87 in commissions on 18 February 2022 as a result of his request for an additional draw. (Butler Aff. ¶¶ 16–17.)

339. Lancaster's employment with Relation was terminated on 25 February 2022. (Butler Aff. ¶ 15.) The record shows that Relation paid Lancaster two more times after his termination. First, on 4 March 2022, he received a payment in the amount of $4,666.67. Second, on 23 March 2022, he was paid $14,140.38, which included commissions received by Relation through the date of his termination. (Butler Aff. ¶ 18.)

340. However, as explained below, evidence exists suggesting that revenue was improperly attributed to the period after Lancaster's termination, despite being received prior to his resignation.

341. The NCWHA provides as follows with respect to the payment of wages upon the discontinuance of an employee's employment:

> Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by trackable mail if requested by the employee in writing. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture.

N.C.G.S. § 95-25.7.

342. Dobens testified that a "producer only receives a commission on an account if revenue is actually received by Relation" from the insurance carrier because "the commission a producer receives based on 'new' or 'renewal' business is paid on an account-by-account basis; that is, the producer's commission is calculated based on the revenue received by Relation for each account." (Dobens Aff. ¶¶ 8, 10.)

343. Lancaster's Producer Agreement stated the following:

> Upon termination of Producer's employment with Company, (a) Producer shall no longer be entitled to payment of any commissions, and all commission payments shall remain the property of the Company, and (b) in the event that Producer then owes the Company a refund of any draws paid but not earned, the amount of any unearned draws shall be promptly repaid by Producer to the Company and such repayment may be made, at the Company's sole election, in accordance with Section 3(h) of this Agreement. This provision shall survive the termination of this Agreement and of Producer's employment with the Company.

(Compl., Ex. L § 3(e), ECF No. 5.12.)

344. The record contains some information regarding how Lancaster's last paycheck was computed. Jasmine Che, a Relation compensation analyst, sent an email to Diana Panchuck, a Relation "direct bill supervisor," stating that Relation needed to know the date when it actually received the deposits for the commission payments from two different insurance carriers in order to process the final paycheck for Lancaster. Both Dobens and Zewalk were copied on Che's email to Panchuck.

345. Panchuck responded that the commission payment from the first carrier was received by Relation on 28 February 2022, which was after Lancaster's termination. However, with respect to the second insurance carrier, multiple commission payments were received throughout February, requiring Panchuck to look further into this issue. Panchuck subsequently wrote back to Che, Dobens, and Zewalk as follows: "We'll need to do a little more research on the [second carrier's] payments. We receive multiple payments from [the second carrier] during the month, so these are not quite as straight forward [sic]." (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 7, ECF Nos. 224.8 (sealed), 231 (public).)

346. Dobens responded by email to Panchuck, Che, and Zewalk as follows: "[i]f it makes it easier, we don't need to know the exact date for the [second carrier's] policies, just if they were/were not on the 26th, 27th, or 28th." (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 7.) The significance of these three dates is that they are the only days in the month of February that Lancaster was no longer an employee and therefore no longer entitled to commissions received by Relation.

347. Panchuck responded to Dobens' email, copying Che and Zewalk, as follows:

> This one is a little more convoluted. So we receive 2 payments during the month for 1 commission statement. The majority of the funds were received on 02-09-22, with the remainder of the funds received on 02-28-22. We posted the entire $48,712.02 as of the last payment date 02-28-22.
>
> I don't think this makes your answer any easier . . .

(Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 7.)

348. Panchuck's response also included specific transaction details reflecting that a deposit was received by Relation from the second carrier for $47,428.03 on 9 February 2022 and another one for $1,283.99 on 28 February 2022. (*See* (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 7.) However, it is unclear what Panchuck was referring to when she wrote that "[w]e posted the entire $48,712.02 as of the last payment date 02-28-22." (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 7.) Nevertheless, in response to the information provided by Panchuck, Dobens wrote that "[t]his will suffice for what we need." (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 7.)

349. Although the entire amount was not internally "posted" until 28 February, as discussed previously, producers earn their commissions when they are

actually received by Relation. Therefore, Lancaster's portion of the $47,428.03 that Relation received on 9 February was "earned" by him that same day.

350. Accordingly, a jury could find that at least some commission revenue was improperly attributed to the pay period after Lancaster's termination. Therefore, Relation's Motion for Summary Judgment is **DENIED** as to Lancaster's NCWHA claim based on this theory.

351. Next, Lancaster asserts that after reviewing commission reports, he "noticed that year over [sic] year, [his] book of business had dropped by about $120,000.00, even though [he] didn't lose accounts that would generate the revenue to even come close to that amount[.]" (Lancaster Aff. I ¶ 33; Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 12, ECF No. 224.13.) As a result, he believes he is owed "27% of $96,891.00 -- totaling $26,160.57 -- which is the difference between 2020 and 2021 commissions." (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 40.) Lancaster claims that "[s]uch wages include commissions that could be calculated through a review of carrier's [sic] actual commission statements and comparing them to what Lancaster actually [was] paid." (Nelson Aff., Ex. A-1, at 51–52.)

352. In support of this theory, Lancaster asserts that "Relation did not allow [him] access to the actual insurance carrier commission statements to verify whether the data contained in the Commission Reports that Relation generated in-house (the ones [he] and other Producers received) matched the actual carrier commission statements." (Lancaster Aff. I ¶ 33.) Moreover, Lancaster testified that he and "the other producers . . . would routinely find errors" in their commission reports.

(Lancaster Aff. I ¶ 30.) Lancaster stated that he "suspect[s], based on my years of dealing with Mr. Cooper, Ascension and Relation, that the numbers don't match and that [he] ha[s] been short-changed and underpaid by Relation for a while." (Lancaster Aff. I ¶ 33.)

353. However, the Court has thoroughly reviewed the record and concludes that there is a lack of evidence supporting this argument. Accordingly, summary judgment is **GRANTED** in favor of Relation as to Lancaster's NCWHA claim based on this additional theory.

iv. Crooker

354. Like Lancaster, Crooker contends "that he was not paid for all commissions that were received from carriers prior to his termination[,]" and that "the issue is what amounts Relation received from carriers prior to his termination." (Defs.' Br. Opp. Pls.'s Part. Mot. Summ. J., at 26.)

355. First, Crooker believes he was underpaid between $10,000 and $12,000 in his last paycheck. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 40.) In his deposition, Crooker testified that he believes he should have been paid "$10,000 to $12,000" for business that he brought in during November or December 2021, "but for whatever reason somehow $10,000 turned into the $300." (Pls.' Mot. Summ. J., Ex. 11, at 281:5–9, ECF No. 189.11.) Crooker testified that Relation "tried to say that the commissions that [Crooker] made in November or December somehow paid for November." (Pls.' Mot. Summ. J., Ex. 11, at 280:7–15.)

356. Crooker, like Lancaster, was also paid via "variable compensation" with a predetermined draw in the amount of $9,166.66. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 5, ECF No. 224.6 (sealed).) On 30 November 2021, the day of his resignation, "Crooker received a paycheck from Relation, reflecting commissions for revenue previously received by Relation." (Butler Aff. ¶ 26.) He was paid $9,166.66 on 30 November 2021, his pre-determined draw amount. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 5.) Crooker's November 2021 Production Analysis reflects that he earned $9,340.79 in commissions for that month. (*See* Crooker's Production Analysis; Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 5.) Accordingly, Crooker was owed the difference between the commissions earned prior to resigning and that amount paid by draw on 30 November 2021. (*See* Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 5.) Although the record reflects that Crooker received a paycheck on 15 December 2021, it does not reflect the monetary amount of that paycheck. However, Crooker's testimony at his deposition confirms that his last paycheck was for an amount that covers what the record evidence shows he was owed.

357. In addition, Crooker also makes several unclear allegations of underpayment. For example, he states that he "was promised a book of personal line business that was never provided to [him] for the period July 5, 2020 through November 20, 2021, totaling approximately $13,500.00." (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 40.) At another point, he contends that since 5 July 2020, Relation owes him "[a]bout $9,000 a year" for that same book of personal line business. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 29, at 15.) Although there is evidence in the record

of discussions about the possibility of Relation providing additional clients to Crooker by supplying him with that book of personal line business, such clients were never actually given to him. Accordingly, these commissions were never actually earned, and, as a result, any hypothetical commissions associated therewith cannot be recovered under the NCWHA.

358. Crooker also argues that Relation "failed to pay [him] commissions for at least six (6) life insurance premiums -- totaling approximately $6,000.00." (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 40.) He additionally contends that he is owed "about $30,000 in life policies commission[.]" (Pls.' Mot. Summ. J., Ex. 11, at 294.) Crooker conceded, however, that he is "not sure how [we] prove it[,]" (Pls.' Mot. Summ. J., Ex. 11, at 294:2–6), and the Court has not found any evidence in the record supporting Crooker's contention.

359. Therefore, the Court concludes that Crooker has failed to show a genuine issue of material fact as to his claim under the NCWHA. Accordingly, Relation's Motion for Summary Judgment is **GRANTED** as to this claim.

v. **Linthicum**

360. Unlike the other Counterclaiming Former Employees, Linthicum was not a Producer compensated on a commission basis. Rather, she was an Account Manager who was a salaried employee.[24] As such, Linthicum's NCWHA claim is not based on commissions allegedly owed. Instead, she contends that she was orally

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[24] As previously discussed, Relation's Account Managers work with producers to manage client relationships and service accounts.

promised, but never paid, a 5% bonus on Smythe's accounts that were retained by Relation after Smythe's resignation. In addition, she asserts that she was entitled to an increase in pay for her promotion to a supervisory role. Linthicum claims that she is owed approximately $5,000 for the unpaid bonus and "several thousand" dollars for the increase in pay. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 34, at 171:3–9, ECF No. 224.40.)

361. However, at the hearing on the Motions, counsel for Linthicum informed the Court that she was no longer pursuing her NCWHA claim based on the allegedly promised pay increase resulting from her promotion. Furthermore, her counsel also conceded that the two-year statute of limitations applicable to NCWHA claims appeared to foreclose Linthicum's NCWHA claim with respect to her allegations regarding the bonus.

362. Therefore, summary judgment is **GRANTED** in favor of Relation as to Linthicum's NCWHA claim.[25]

B. Claims for Breach of Contract

363. In addition to their NCWHA counterclaims, Gurley, Kelly, Lancaster, Crooker and Linthicum have also asserted counterclaims for breach of contract (Countercl. ¶¶ 83–86), and argue that their "breach of contract claims for unpaid compensation survive summary judgment for the same reasons already set forth regarding their Wage and Hour claims." (Defs.' Br. Opp. Pls.'s Part. Mot. Summ. J., at 26.)

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[25] However, as discussed below, the Court is denying Relation's Motion for Summary Judgment as to Linthicum's breach of contract claim based on the alleged promise of a bonus.

364. The statute of limitations for a breach of contract claim is three years, N.C.G.S. § 1-52(1), and "begins to run on the date the promise is broken." *Harrold v. Dowd*, 149 N.C. App. 777, 781 (2002) (citing *Penley v. Penley*, 314 N.C. 1, 20 (1985)).

i. Gurley and Kelly

365. As with their NCWHA claims, Gurley and Kelly's breach of contract claims are based on their contention that they are owed the 2% difference in commission rates for renewal business for the years in which their respective books of business exceeded $500,000. In response to Gurley and Kelly's breach of contract claims, Relation simply relies on its arguments (which the Court has now rejected) as to why no breach of the NCWHA occurred on this set of facts.

366. Therefore, the Court concludes that Relation's Motion for Summary Judgment should likewise be **DENIED** as to Gurley and Kelly's breach of contract claim on this theory.

ii. Lancaster

367. Lancaster's breach of contract claim is premised on the same facts as his NCWHA claim. His evidence (as discussed in detail above in connection with his NCWHA claim) that Relation improperly attributed commission revenue to the pay period after Lancaster's termination, if accepted by a jury, would constitute not only a violation of the NCWHA, but also a breach of his Employment Agreement.

368. Lancaster's Employment Agreement provides in pertinent part as follows:

> Producer's monthly draw shall be paid in accordance with the Company's usual payroll procedures . . . After the end of each month,

> the gross amount of draws paid to Producer after the Effective Date through the end of such month reflected in the Draw Account shall be compared to incentive compensation earned by the Producer after the Effective Date through the end of each month. In the event that the Company owes Producer incentive compensation in addition to the draw at the end of any month as a result of such comparison (after taking into consideration any previous payments of incentive compensation pursuant to this sentence), payment of the amount due to the Producer . . . shall be made in accordance with the Company's standard practice for the payment of incentive compensation under the Company's incentive compensation programs.

(Compl., Ex. L § 3(c).)

369. Accordingly, Relation's Motion for Summary Judgment is **DENIED** as to Lancaster's breach of contract claim based on this theory. However, to the extent that Lancaster's breach of contract claim is also based on the additional theory that the Court has rejected in connection with his NCWHA claim, summary judgment is **GRANTED** in favor of Relation on that additional theory.

iii. Crooker

370. Crooker's breach of contract claim is primarily based on his contention that he was not paid all of the commissions owed to him from payments that Relation received from carriers prior to his termination. The Court has thoroughly reviewed the record with regard to this argument as well as the other contentions raised in Defendants' brief and concludes that he has failed to offer sufficient evidence to raise a genuine issue of material fact in response to Relation's evidence that no breach of his employment agreement occurred. Accordingly, summary judgment is **GRANTED** in favor of Relation on Crooker's breach of contract claim.

iv. Linthicum

371. As noted above, Linthicum contends that Relation reneged on its oral promise that she would be paid a 5% bonus on Smythe's accounts that were retained by Relation after his resignation. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 34, at 171:3–9.)

372. Smythe resigned from Relation on 4 March 2020. Linthicum asserts that at some point after his resignation, she was promised 5% "of the commission bonus for every account of Kyle [Smythe]'s that we renewed for that year." (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 34, at 158:20–22, 159:6–23.)

373. Linthicum testified in her deposition as follows:

> Q. Who made this promise to you?
>
> A. Jill Zewalk and Jonathan Cooper.
>
> Q. When was this promise made?
>
> A. This promise was made when we were meeting and discussing moving Kyle's accounts, and that the producers were going to be paid extra commission in order to help retain those accounts, as well as in exchange for the extra work they were going to do to have to keep those accounts.
>
> We, as the account managers, were promised a [sic] 5 percent of the commission bonus for every account of Kyle's that we renewed for that year.
>
> Q. What type of additional work were you going to have to do?
>
> A. We may have to market the account, the additional work for trying to rebuild the relationship, working on the account, just making sure we did everything quicker, faster, re-marketed pricing, anything we had to do to try to retain those accounts.
>
> Q. And when was -- can you give a month and year estimate for when this discussion took place?

A. This would have happened, more than likely -- Kyle left in, I believe February of 2020, late February. So this would have happened in more than likely March of 2020, because that's when they gave us -- maybe April. I'm not sure how long it took them to decide what the producer commission bonus was going to be, because they received an override for the year.

And then, like I said, they promised the account managers 5 percent of the commission bonus for those accounts we helped retain.

Q. So the 5 percent bonus was for account managers?

A. For the account managers for the accounts we handled. I only handled one account of Kyle's that I helped keep. Others had more.

Q. So the 5 percent bonus would have been on that one account?

A. Yes, but it was a $300,000 account.

Q. And this promise was made to other account managers as well?

A. It was made to all of the account managers in Greensboro.

Q. At one time, in one room?

A. Yes. And they paid it to none of them.

Q. How do you know that?

A. Because none of us got it, and trust me, they talked about it.

Q. When you say "they," you mean who?

A. My team. None of them were paid the promised bonus and all of them were upset about it because they worked their rear ends off that year to keep what business they could.

Q. Your team, meaning the other account managers?

A. The account managers that I managed, yes.

Q. And you said the producers were also promised 5 percent?

> A. The producers got their additional commission overrides because we billed it, but we didn't get it because we were dependent upon management to honor their promise to pay us.
>
> . . .
>
> Q. So it was anyone who handled Kyle Smythe business that was offered that 5 percent?
>
> A. Yes. Well, we had to retain it at renewal. So if you didn't retain the account, just because you handled them, you didn't get them. And this account we retained.
>
> Q. When you say "we," who are you referring to?
>
> A. The producer and I, and Relation retained it.

(Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 34, at 158:11–160:24, 174:17–175:1.)

374. Linthicum stated her belief that "[t]he commission would be about $5,000, maybe more, because . . . it was about a $300,000 account[.]" (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 34, at 171:5–7.)

375. No written documentation exists regarding the alleged promise of the 5% bonus. (Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 34, at 161:11–13.) Furthermore, Zewalk expressly denies that she promised Linthicum a 5% bonus on any of Smythe's accounts that were retained. (Pls.' Mot. Summ. J., Ex. 14, at 165:13–18, ECF No. 189.14.) Zewalk also contends that no account manager at Relation was ever paid a bonus or commission for retention of any account previously serviced by Smythe. (Zewalk Aff. II ¶ 7.)

376. A conflict in the evidence exists as to whether the promise was made that cannot be resolved at the summary judgment stage. But Relation argues that summary judgment is nonetheless proper because, even assuming such a promise

was, in fact, made, "the terms were never defined—neither Linthicum nor any other staff member was told what efforts would be required to qualify for the bonus, how the bonus would be allocated among staff members, or how or when the bonus would be calculated." (Pls.' Br. Supp. Mot. Summ. J., at 13.)

377. North Carolina courts have long held that

> [t]o be enforceable, the terms of a contract must be sufficiently definite and certain. *Brooks v. Hackney*, 329 N.C. 166, 170, 404 S.E.2d 854, 857 (1991). In addition, "it is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement." *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995).

Maxwell v. Michael P. Doyle, Inc., 164 N.C. App. 319, 326 (2004).

378. These principles were applied by our Court of Appeals in *Maxwell*, which involved a dispute between two real estate brokers over the payment of a commission. *Id*. The defendant argued that the plaintiff failed to present "sufficient evidence of a breach of a valid, enforceable contract with [the defendant] for division of a commission." *Id*. The plaintiff testified as follows on this issue:

> If it materialized into a sale - and we shook hands on this in the beginning, that we were going to co-broker on a 50-50 basis - that we would work the Cambridge Arms on the same basis, because, even though he had known about them, he had not been able to make any headway, and since I know Mr. Wood, since I knew the apartments - and we shook hands and had a meeting of the minds right there - that if it materialized into a sale and there was a commission paid and a closing takes place, that I would get fifty percent of the commission and that I was to assist him by letting him go through my files . . . of all the materials.

Id. (cleaned up).

379. Our Court of Appeals found that the plaintiff's

> evidence was sufficiently definite as to the material terms of the agreement: (1) he was required to arrange a meeting with Wood and allow Doyle access to his files; and (2) if a sale resulted within a reasonable period of time, he was then entitled to a 50-50 split of any commission. Defendant has not specified any other material terms necessary to the enforcement of the contract that were missing or indefinite and, after reviewing the record, we have been unable to identify any.
>
> Since Maxwell offered evidence of the material terms of the agreement, that he performed his obligations under the agreement, and that Doyle later brokered the sale of the apartment complex and earned a sizeable commission that he failed to split with plaintiff, we hold that there was sufficient evidence of a breach of contract for this case to be submitted to the jury.

Id. at 328.

380. In reaching this conclusion, the Court of Appeals also rejected the defendant's argument that the plaintiff failed to put forth sufficient evidence of the time for performance:

> Defendant also points to the fact that there was no agreement as to the time for performance. Our courts have, however, long held that "where a contract does not specify the time of performance . . . the law will prescribe that performance must be within a reasonable time and that the contract will continue for a reasonable time, 'taking into account the purposes the parties intended to accomplish.' " *Rodin v. Merritt*, 48 N.C. App. 64, 71-72, 268 S.E.2d 539, 544 (quoting *Scarborough v. Adams*, 264 N.C. 631, 641, 142 S.E.2d 608, 615 (1965)), disc. review denied, 301 N.C. 402, 274 S.E.2d 226 (1980). *See also S & W Realty*, 274 N.C. at 254, 162 S.E.2d at 493-94 (when no time is specified in a contract for a commission, the sale must occur within "a reasonable time").
>
> The determination of what constitutes a reasonable time for performance presents a mixed question of law and fact:
>
> If, from the admitted facts, the Court can draw the conclusion as to whether the time is reasonable or unreasonable, by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or circumstances are numerous and complicated, and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when

> the facts are undisputed and different inferences cannot be reasonably drawn from them, that the question ever becomes one of law.

Id. at 327 (cleaned up).

381. More recently, in *Grub, Inc. v. Sammy's Seafood House & Oyster Bar, LLC*, 2015 N.C. App. LEXIS 330 (N.C. Ct. App. Apr. 21, 2015) (unpublished), the Court of Appeals addressed an argument regarding whether the terms of an alleged contract were sufficiently definite.

> Contract terms are reasonably certain "if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." Restatement (Second) of Contracts § 33(2) (2012). In addition, "the law . . . does not favor the destruction of contracts on account of uncertainty, and the courts will, if possible, so construe [a] contract as to carry into effect the reasonable intent of the parties, if it can be ascertained." *Welsh v. N. Telecom*, 85 N.C. App. 281, 290, 354 S.E.2d 746, 751 (citation and internal quotation marks omitted), *disc. review denied*, 320 N.C. 638, 360 S.E.2d 107 (1987). "In the usual case, the question whether an agreement is complete or partial is left to inference or further proof. The subsequent conduct and interpretation of the parties themselves may be decisive of the question as to whether a contract has been made . . . ." *Cnty of Jackson v. Nichols*, 175 N.C. App. 196, 199, 623 S.E.2d 277, 279–80 (2005) (citations and internal quotation marks omitted).

Id. at *15–16.

382. In the present case, the Court has carefully reviewed the applicable evidence in the record and concludes that Linthicum's testimony is sufficient to raise a genuine issue of material fact with respect to this claim. Therefore, Relation's Motion for Summary Judgment is **DENIED** as to Linthicum's breach of contract claim.

C. Claim for Breach of Implied Covenant of Good Faith and Fair Dealing

383. Each of the Counterclaiming Former Employees has also asserted a claim for breach of the implied covenant of good faith and fair dealing. (Countercl. ¶¶ 78–82.)

384. It is well-settled under North Carolina law that every contract contains "an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228 (1985) (cleaned up). In other words, "there is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract." *Id.*

385. Our Court of Appeals has articulated the elements of such a claim as follows:

> "To state a valid claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must plead that the party charged took action 'which injure[d] the right of the other to receive the benefits of the agreement,' thus 'depriv[ing] the other of the fruits of [the] bargain.' " *Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc.*, ___ N.C. App. ___, ___, 805 S.E.2d 147, 158 (2017) (alterations in original) (quoting *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228-29, 333 S.E.2d 299, 305 (1985)), *disc. review denied*, 370 N.C. 695, 811 S.E.2d 596 (2018). A defendant cannot breach a covenant of good faith and fair dealing when a claimant fails to establish the defendant breached the underlying contract. *See Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 (2012).

McDonald v. Bank of N.Y. Mellon Trust Co., 259 N.C. App. 582, 586–87 (2018).

386. Moreover, "[a]s a general proposition, where a party's claim for breach of the implied covenant of good faith and fair dealing is based upon the same acts as

its claim for breach of contract, we treat the former claim as 'part and parcel' of the latter." *Cordaro v. Harrington Bank, FSB*, 260 N.C. App. 26, 38–39 (2018) (holding that defendant's claim for breach of the implied covenant of good faith and fair dealing was properly dismissed where the basis of the claim was identical to defendant's breach of contract claim, which had been dismissed).

387. Given that the Court has ruled that summary judgment should be granted in Relation's favor as to Crooker's breach of contract claim, summary judgment is likewise **GRANTED** in favor of Relation on Crooker's claim for breach of the implied covenant of good faith and fair dealing.

388. Conversely, the Court has ruled that genuine issues of material fact exist with regard to Gurley, Kelly, Lancaster, and Linthicum's breach of contract claims. Therefore, the question of whether Relation breached the covenant of good faith and fair dealing as to them is an issue to be decided by a jury. Accordingly, the Court **DENIES** Relation's Motion for Summary Judgment as to Gurley, Kelly, Lancaster, and Linthicum's claims for breach of the implied covenant of good faith and fair dealing.

D. Unfair and Deceptive Trade Practices

389. Finally, Pilot Risk asserts a counterclaim against Relation for UDTP.[26] (Countercl. ¶¶ 68–77.) In this counterclaim, Pilot Risk alleged that Relation engaged in the following unfair and deceptive acts:

[26] Originally, Pilot Benefits, Smythe, Capps, and Kinney also asserted UDTP claims against Relation. However, those parties are no longer pursuing such claims. (Defs.' Br. Opp. Pls.' Mot. Summ. J., at 27–28.)

> (a) told insurance carriers, clients, Pilot Risk and Pilot Benefits clients and others that the Former Employees' Agreements (attached to the Complaint) were enforceable; (b) told insurance carriers, clients and Pilot Risk and Pilot Benefits clients that Judge Bray's Order [in the Smythe Lawsuit]. . . was not relevant or controlling as to the Former Employees; (c) told insurance carriers, clients, Pilot Risk and Pilot Benefits clients and others that the [Pilot] Defendants breached the [11 March 2021 Settlement Agreement]; (d) offered to and did, in fact, advise customers that they would cut their commissions to zero in order to interfere with the business of Pilot Risk and Pilot Benefits; and (e) stated (and continue to state) to employees and clients that the individual Defendants or some of them were immoral, unethical, dishonest and acting illegally.

(Countercl. ¶ 70.)

390. In its summary judgment briefing, Pilot Risk primarily contends "that Relation: (a) told third-parties that the non-competition provisions were enforceable and (b) used its influence to prevent or delay Pilot from being approved by carriers." (Defs.' Br. Opp. Pls.' Mot. Summ. J., at 30–31.)

391. With regard to the latter argument, Pilot Risk asserts that "Relation has used its size and clout to prevent or delay Pilot from being approved by carriers, which has prevented it from developing business from/with those carriers[,]" by blocking appointments from those carriers,[27] and that "Relation made knowing false representations to carriers and customers concerning Defendants' legal ability to book business from those customers." (Defs.' Br. Opp. Pls.' Mot. Summ. J., at 29.)

392. In response, Relation argues that the entry of summary judgment in its favor on this claim is proper because Pilot Risk has not identified any false representations actually made. (Pls.' Br. Supp. Mot. Summ. J., at 19.) Relation

[27] The term "carrier appointment" refers to an agency's ability to place coverage with a particular carrier. (Linthicum Aff. I ¶ 9.)

further contends that Pilot Risk "does not cite a single instance in which Relation told a carrier or client that Defendants were 'subject to a non-competition period.' " (Pls.' Reply Br. Supp. Mot. Summ. J., at 13.) Moreover, with respect to carrier approval, Relation asserts that it "is undisputed that insurance carriers make the decision on which brokers to appoint, not the brokers[,]" and "[t]he fact that Relation, when asked by a carrier, stated that it would prefer for carriers not to do business with a direct competitor (Pilot) is not an unfair act." (Pls.' Reply Br. Supp. Mot. Summ. J., at 14.)

393. This Court has previously stated the following with regard to UDTP claims:

> North Carolina law created a private right of action under Chapter 75 as part of its effort to protect consumers from unfair or deceptive trade practices. *See* N.C.G.S. § 75-1.1 (outlawing unfair or deceptive practices in trade); N.G.G.S. § 75-16 (creating a private right of action and authorizing treble damages); *see also Hardy v. Toler*, 24 N.C. App. 625, 630–31, 211 S.E.2d 809, 813 (1975). The protections of N.C.G.S. § 75-1.1 extend, in certain circumstances, to businesses as well. *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 710 (2001) (citing *United Labs.*, 322 N.C. at 665, 370 S.E.2d at 389). "[T]o establish a prima facie claim for unfair 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." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (citing *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460–61, 400 S.E.2d 476, 482 (1991)). "The Act does not . . . define an unfair or deceptive act, 'nor is any precise definition of the term possible.' " *Bernard v. Cent. Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 229–30, 314 S.E.2d 582, 584 (1984) (quoting *Wachovia Bank & Trust Co. v. Smith*, 44 N.C. App. 685, 690, 262 S.E.2d 646, 649 (1980)). A trade practice "is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 59, 620 S.E.2d 222, 230 (2005) (citing *Polo Fashions, Inc. v. Craftex*, Inc., 816 F.2d 145, 148 (4th Cir. 1987)).

Charah, LLC v. Sequoia Servs., LLC, 2020 NCBC LEXIS 52, at *18 (N.C. Super. Ct. Apr. 17, 2020).

394. Whether the alleged conduct constitutes an unfair or deceptive act is "a question of law for the court." *Dealers Supply Co. v. Cheil Indus.*, 348 F. Supp. 2d 579, 592 (M.D.N.C. 2004) (citing *Gray v. North Carolina Ins. Underwriting Ass'n, NC*, 352 N.C. 61, 68 (2000)). The question of "[w]hether a particular act is unfair or deceptive, depends on the facts surrounding the transaction and the impact on the marketplace." *Dealers Supply*, 348 F. Supp. 2d at 591 (citing *Concrete Serv. Corp. v. Invs. Group, Inc.*, 79 N.C. App. 678, 685 (1986)).

395. After a thorough review of the record, the Court is unpersuaded by Defendants' arguments regarding Pilot Risk's UDTP claim.

396. The statements at issue that are supported by the record were largely made by Relation's Chief Operating Officer, Jill Zewalk. (*See* Defs.' Br. Opp. Pls.' Mot. Summ. J., Ex. 28, at 206:13–16, ECF No. 224.29.)

397. As an initial matter, although there is evidence supporting Pilot Risk's contention that Relation "told third-parties that the non-competition provisions were enforceable[,]" such statements were simply an expression of its belief regarding the legal effect of an employment agreement between Relation and the Individual Defendants.

398. Our Supreme Court long ago stated that

> [a] misrepresentation to be material should be in respect of an ascertainable fact as distinguished from a mere matter of opinion. A representation which merely amounts to a statement of opinion goes for

> nothing, though it may not be true, for a man is not justified in placing reliance on it.

Cash Register Co. v. Townsend, 137 N.C. 652, 656 (1905) (cleaned up).

399. Here, Zewalk's statements amounted to nothing more than her opinion as to the validity of Relation's legal rights and falls far short of evidence sufficient to support a UDTP claim. *See Hopkins v. MWR Mgmt. Co.*, 2017 NCBC LEXIS 47, at *45–46 (N.C. Super. Ct. May 31, 2017) (holding that defendant's statements that plaintiff "wasn't allowed" to work with a competitor because of the defendant's noncompete was understood as an expression of the defendant's opinion of its legal rights and was not considered "false"); *Kingsdown, Inc. v. Hinshaw*, 2016 NCBC 15, at **38 (N.C. Super. Ct. Feb. 17, 2016) (holding that defendant's statements made about the opposing party's claims were "fairly understood as simply reflecting [defendants'] respective positions in the pending litigation and their opinions concerning the strength of their respective cases. Such statements are understood by the average reader or hearer as statements of opinion rather than of objective, verifiable facts").

400. Furthermore, Pilot Risk's contention that Zewalk made statements to insurance carriers stating her preference that they not use Pilot Risk as an insurance agency likewise fails to support its UDTP claim. Zewalk testified as follows with respect to discussions she had with carriers about Pilot Risk:

> I never asked them not to do business. They asked -- there were a couple of carriers who asked our opinion on what our feelings would be if they were appointed. And my exact words were, I would prefer it if you don't. That's not the same. It was just an opinion and a preference.

(Pls.' Mot. Summ. J., Ex. 14, at 105:6–11.)

401. Defendants have failed to put forth any legal authority for the proposition that such statements are sufficient to support a UDTP claim.

402. The Court has carefully considered all of Pilot Risk's additional arguments in support of its UDTP claim and concludes that they are either not supported by admissible evidence in the record or are insufficient to raise a genuine issue of material fact on this issue.

403. Therefore, summary judgment is **GRANTED** in favor of Relation as to Pilot Risk's claim for UDTP.

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Plaintiffs' Motion for Adverse Inference is **GRANTED**.
2. Defendants' Motion for Summary Judgment regarding Relation's trade secrets claims under the DTSA and NCTSPA is **GRANTED** in part and **DENIED** in part. Summary judgment is **GRANTED** as to all of the Former Employees on this claim, except for King, Lancaster, and Linthicum. Accordingly, Relation's claims under the DTSA and NCTSPA against Gurley, Kelly, Crooker, and Sneed are hereby **DISMISSED**. As to King, Lancaster, and Linthicum, summary judgment is **DENIED**. The four documents that the jury may consider at trial as potential trade secrets are King's Carrier Contact List, Linthicum's Net Rate Calculations Spreadsheet, Lancaster's Production Analysis, and Lancaster's Production Report.

3. Defendants' Motion for Summary Judgment is **GRANTED** as to Relation's claim for breach of the Non-Solicitation Clauses contained in the Employment Agreements, and this claim is hereby **DISMISSED**.

4. Defendants' Motion for Summary Judgment is **DENIED** as to Relation's claim for breach of the Confidentiality Provisions contained in the Employment Agreements.

5. Defendants' Motion for Summary Judgment is **GRANTED** in favor of the Pilot Defendants on Relation's claim for breach of the Employee Solicitation Restriction Period of the Settlement Agreement, and this claim is hereby **DISMISSED**.

6. Defendants' Motion for Summary Judgment as to Relation's claims for violations of the Client Solicitation Restriction Period and of the Confidential Information Restriction Period of the Settlement Agreement is **DENIED** with respect to Smythe and Pilot Risk, but **GRANTED** as to Kinney, Capps, and Pilot Benefits.

7. Defendants' Motion for Summary Judgment is **GRANTED** as to Relation's claim for unjust enrichment, and this claim is hereby **DISMISSED**.

8. Defendants' Motion for Summary Judgment is **GRANTED** in favor of the Former Employees on Relation's computer trespass claim under the CFAA, and this claim is hereby **DISMISSED**.

9. Defendants' Motion for Summary Judgment is **DENIED** as to Relation's computer trespass claim pursuant to N.C.G.S. § 14-458.

10. To the extent that Relation's claims for tortious interference with business and contractual relations and for tortious interference with prospective economic advantage are based on contractual relationships with vendors, Defendants' Motion for Summary Judgment is **GRANTED**, and these claims are hereby **DISMISSED**.

11. To the extent that Relation's claims for tortious interference with business and contractual relations and for tortious interference with prospective economic advantage are based on interference with Relation's client relationships, Defendants' Motion for Summary Judgment is **DENIED**.

12. Defendants' Motion for Summary Judgment as to Relation's UDTP claim is **DENIED**.

13. Relation's Motion for Summary Judgment as to Gurley's counterclaim under the NCWHA is **GRANTED** in part and **DENIED** in part, as set forth above.

14. Relation's Motion for Summary Judgment as to Kelly's counterclaim under the NCWHA is **GRANTED** in part and **DENIED** in part, as set forth above.

15. Relation's Motion for Summary Judgment as to Lancaster's counterclaim under the NCWHA is **GRANTED** in part and **DENIED** in part, as set forth above.

16. Relation's Motion for Summary Judgment is **GRANTED** as to Crooker's NCWHA counterclaim, and this claim is hereby **DISMISSED**.

17. Relation's Motion for Summary Judgment is **GRANTED** as to Linthicum's NCWHA counterclaim, and this claim is hereby **DISMISSED**.

18. Relation's Motion for Summary Judgment is **DENIED** as to Gurley and Kelly's breach of contract counterclaims based on the 2% difference in commission rates as explained above.

19. Relation's Motion for Summary Judgment as to Lancaster's breach of contract counterclaim is **GRANTED** in part and **DENIED** in part, as set forth above.

20. Relation's Motion for Summary Judgment is **GRANTED** as to Crooker's breach of contract counterclaim, and this claim is hereby **DISMISSED**.

21. Relation's Motion for Summary Judgment is **DENIED** as to Linthicum's breach of contract counterclaim.

22. Relation's Motion for Summary Judgment is **GRANTED** as to Crooker's breach of the implied covenant of good faith and fair dealing counterclaim, and this claim is hereby **DISMISSED**.

23. Relation's Motion for Summary Judgment is **DENIED** as to the breach of the implied covenant of good faith and fair dealing counterclaims of Gurley, Kelly, Lancaster, and Linthicum.

24. Relation's Motion for Summary Judgment is **GRANTED** as to Pilot Risk's counterclaim for UDTP, and this claim is hereby **DISMISSED**.

SO ORDERED, this the 12th day of July, 2024.[28]

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases

[28] This Order and Opinion was originally filed under seal on 12 July 2024. This public version of the Order and Opinion is being filed on 25 July 2024. To avoid confusion in the event of an appeal, the Court has elected to state the filing date of the public version of the Order and Opinion as 12 July 2024.