STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24 CVS 16516
M.D. CLAIMS GROUP, LLC, Plaintiff, v. MATTHEW BAGLEY, individually, and BAGLEY CONSULTING, LLC, Defendants.	**ORDER AND OPINION ON PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

1. **THIS MATTER** is before the Court on Plaintiff's Motion to Amend the Complaint (the "Motion") pursuant to Rule 15 of the North Carolina Rules of Civil Procedure ("Rule(s)"), (ECF No. 51).

2. In its Motion, Plaintiff seeks to amend its pleading a second time, this time to: (1) add additional facts, (2) remove several causes of action, (3) add a jury trial demand, and (4) clarify existing causes of action. (Pl.'s Mot. to Amend Compl. ["Mot. to Amend"], ECF No. 51; *see generally* Mot. to Amend, Exhibit, Amended Complaint ["Proposed Am. Compl."], ECF No. 51.1.)

3. Defendants object to the Motion arguing that Plaintiff has failed to correct deficiencies from prior pleadings and that the Motion is futile. (*See generally* Defs.' Br. Opp. to Pl.'s Second Mot. to Amend the First Am. Compl. ["Defs.' Br."], ECF No. 53.)

4. Having considered the Motion, the briefs filed in support of and in opposition to the Motion, the arguments of counsel at a hearing held 9 January 2025,

and other relevant matters of record, the Motion is **GRANTED in part** and **DENIED in part**.

Vector Law Group, by Ryan Smith, for Plaintiff M.D. Claims Group, LLC.

Oak City Law LLP, by Christine Mayhew, for Defendants Matthew Bagley and Bagley Consulting, LLC.

Earp, Judge.

I. FACTUAL BACKGROUND

5. The following is a summary of Plaintiff's allegations that are relevant to the Motion before the Court.

6. Plaintiff M.D. Claims Group, LLC ("M.D. Claims") is an independent adjuster firm headquartered in Louisiana. (Proposed Am. Compl. ¶¶ 1, 15.)

7. Defendant Matthew Bagley ("Bagley") is a citizen and resident of North Carolina. (Proposed Am. Compl. ¶ 3.)

8. In May 2021, M.D. Claims hired Bagley to be its Claims Manager. He was later promoted to Director of Operations. (Proposed Am. Compl. ¶ 79; Ex. P001, Employment Offer/Contract ["Employment Contract"], ECF No. 51.1.) As a condition of his employment, Bagley signed two agreements, an Employment Offer/Contract (the "Employment Agreement") and a Non-Disclosure Agreement (the "NDA"), (together, the "Agreements"). (Proposed Am. Compl. ¶¶ 62-63; Employment Agreement; Ex. P005, Non-Disclosure Agreement ["NDA"].)

9. The Employment Agreement contains the following return of property clause:

> **RETURN OF PROPERTY.** Upon termination of this Contract [Bagley] shall deliver to [M.D. Claims] all property which is [M.D. Claims'] property or related to [M.D. Claims'] business (including keys, records, notes, data, memoranda, models, and equipment) that is in [Bagley's] possession or under [Bagley's] control. Such obligation shall be governed by any separate confidentiality or proprietary rights agreement signed by [Bagley].

(Employment Agreement ¶ 11.)

10. The NDA also contains a return of property clause:

> **RETURN OF CONFIDENTIAL INFORMATION.** Upon the written request of [M.D. Claims], [Bagley] shall return to [M.D. Claims] all written materials containing the Confidential Information. [Bagley] shall also deliver to [M.D. Claims] written statements signed by [Bagley] certifying that all materials have been returned within five (5) days of receipt of the request.

(NDA § V.)

11. Further, pursuant to the NDA, Bagley promised not to disclose, modify, copy, or use M.D. Claims' confidential information. (NDA § II (A)-(D).) The NDA defines "Confidential Information" as:

> any information or material which is proprietary to [M.D. Claims], whether or not owned or developed by [M.D. Claims], which is not generally known other than by [M.D. Claims], and which [Bagley] may obtain through any direct or indirect contact with [M.D. Claims]. Regardless of whether specifically identified as confidential or proprietary, Confidential Information shall include any information provided by [M.D. Claims] concerning the business, technology and information of [M.D. Claims] and any third party with which [M.D. Claims] deals, including, without limitation, business records and plans, trade secrets, technical data, product ideas, contracts, financial information, including but not limited to compensation structure offered and/or agreements accepted, pricing structure, discounts, computer programs and listings, source code and/or object code, copyrights and intellectual property, inventions, sales leads, strategic alliances, partners, and customer and client lists. The nature of the information and the manner of disclosure are such that a reasonable person would understand it to be confidential.

(NDA § I.)

12. Both Agreements include a choice of law provision specifying that Louisiana law controls. (Employment Contract ¶ 17; NDA § XII.)

13. M.D. Claims has two secure databases (Microsoft Azure/365 and The Assignment Portal ("TAP")) that house its Confidential Information. Access to these databases is limited to "authorized users" who receive a unique password. (Proposed Am. Compl. ¶¶ 56, 59.)

14. TAP is not a dedicated platform like Salesforce, but Plaintiff uses it as an "important component of their customer relations management system." (Proposed Am. Compl. ¶ 57.)

15. As Director of Operations, Bagley maintained existing clients, conducted day-to-day operations, and generated new sales. He had regular access to the Confidential Information. (Proposed Am Compl. ¶¶ 82, 94.)

16. On 19 February 2024, Bagley notified M.D. Claims that he would be resigning on 23 February 2024. (Proposed Am. Compl. ¶ 114.) Upon M.D. Claims' request, Bagley returned two laptops containing M.D. Claims' data prior to resigning. (Proposed Am. Compl. ¶ 142.) Four months later, however, Bagley sent M.D. Claims a USB drive with 80,361 files containing Plaintiff's Confidential Information. (Proposed Am. Compl. ¶ 143.)

17. M.D. Claims alleges that on 16 February 2024, while still employed by M.D. Claims, Bagley formed Bagley Consulting, LLC ("Bagley Consulting"), a North Carolina limited liability company. (Proposed Am. Compl. ¶¶ 4, 112.) When M.D.

Claims asked about Bagley Consulting, Bagley responded that it "was set up for [his] wife and her business ventures." (Proposed Am. Compl. ¶ 115.) However, Bagley is Bagley Consulting's sole member. (Proposed Am. Compl. ¶ 113.)

18. Plaintiff alleges that beginning in November 2023 and continuing until he resigned in February 2024, Bagley ignored some duties and delegated others to his subordinates. (Proposed Am. Compl. ¶ 97.) When clients became dissatisfied, Bagley cast the blame on others. (Proposed Am. Compl. ¶¶ 98-100.) Despite these problems, at weekly management meetings Bagley reported that his division was performing well and that clients were satisfied. (Proposed Am. Compl. ¶ 106.)

19. M.D. Claims alleges that after Bagley's resignation it received confirmation from several clients that Bagley had been soliciting them for his new business while still working for M.D. Claims. (Proposed Am. Compl. ¶ 124.) In addition to the allegation that Bagley solicited its clients, M.D. Claims alleges that it received an email on or about 7 April 2024 from a third-party forwarding one of Bagley Consulting's reports on a form that was identical to the one M.D. Claims developed. (Proposed Am. Compl. ¶ 125.) The software tokens used in the form indicated that it was M.D. Claims' form with Bagley Consulting's branding. (Proposed Am. Compl. ¶ 126.)

20. Plaintiff's Proposed Amended Complaint asserts claims for breach of contract and fraud against Bagley, and for misappropriation of trade secrets and unfair and deceptive trade practices against both Defendants. (*See generally* Proposed Am. Compl.)

II. PROCEDURAL BACKGROUND

21. Plaintiff commenced this action on 24 May 2024, originally stating claims for (1) breach of contract as to Bagley; (2) fraud and veil piercing as to Bagley; (3) preliminary, permanent, and mandatory injunction as to both Defendants;[1] (4) declaratory judgment as to Bagley; (5) trade secret misappropriation as to both Defendants; (6) breach of the implied covenant of good faith and fair dealing as to Bagley; (7) unjust enrichment as to Bagley Consulting; and (8) conversion as to both Defendants. (*See* Compl., ECF No. 3.)

22. On the same day, Plaintiff filed a Motion for Temporary Restraining Order and Preliminary Injunction, (ECF No. 4), amending it on 28 May 2024, (ECF No. 6).

23. On 3 June 2024 Plaintiff filed an Amended Complaint adding unfair and deceptive trade practice claims against both Defendants, among other things. (Am. Ver. Compl. ¶¶ 113-17, ECF No. 10.) The same day Plaintiff amended its motion for a TRO and preliminary injunction a second time. (Second Amended TRO Motion, ECF No. 11; Second Amended Prelim. Inj. Motion, ECF No. 12.)[2]

24. After full briefing and a hearing on the Motion for Preliminary Injunction held 25 June 2024, the Court denied Plaintiff's Preliminary Injunction Motion. (*See generally* Order Pl.'s Second Am. Prelim. Inj. Mot., ECF No. 26.)

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[1] While included in Plaintiff's pleading as a claim, this is a request for relief.

[2] Plaintiff later withdrew its Motion for a TRO but continued to pursue its Motion for Preliminary Injunction. (Br. Order, ECF No. 15.)

25. Thereafter, on 30 July 2024, Defendants filed a Motion to Dismiss the Amended Complaint, (ECF No. 27).[3] A short time later, Plaintiff filed its first Motion for Leave to Amend ("First Motion to Amend"), (ECF No. 29), followed by a voluntary dismissal of "each claim made in the first and second cases (sic) of action concerning only the Employment Offer/Contract's non-compete at ¶ 6[,]" but making clear that it did not dismiss its claims with respect to the NDA. (Partial Vol. Dism., ECF No. 41.)

26. The Court held a hearing on Plaintiff's First Motion to Amend on 18 September 2024. (Not. of Hr'g, ECF No. 43.) Following the hearing, the Court denied the First Motion to Amend without prejudice to Plaintiff's ability to file another motion to amend and proposed amended complaint by 18 October 2024. (Or. on Mot. to Am. Compl., ECF No. 47.) The Motion followed.

27. After full briefing the Court held a hearing on the Motion on 9 January 2025. (Not. of Hr'g, ECF No. 58.) All parties were present and represented by counsel. The Motion is now ripe for disposition.

III. LEGAL STANDARD

28. After a responsive pleading has been served, a party may amend his pleading only by leave of court or by written consent of the adverse party. N.C. R. Civ. P. 15(a). "[L]eave shall be freely given when justice so requires." *Id.* Even so, "the right to amend pursuant to Rule 15 is not unfettered." *Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *17 (N.C. Super. Ct. Dec. 22, 2021) (citing *Vaughan*

[3] The Court stayed briefing on Defendants' Motion to Dismiss pending resolution of Plaintiff's Motion to Amend. (Br. Or., ECF No. 30.)

v. Mashburn, 371 N.C. 428, 433 (2018)). Reasons to deny a motion to amend include "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment." *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 89 (2008) (quoting *Nationsbank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268 (1994)).

29. With regards to futility, the standard under Rule 15 is essentially the same standard used in reviewing a motion to dismiss under 12(b)(6), but it provides the Court with broad discretion to find that a proposed amendment is not futile. *Simply the Best Movers, LLC v. Marrins' Moving Sys.*, 2016 NCBC LEXIS 28, at **5-6 (N.C. Super. Ct. Apr. 6, 2016). "[A] motion to amend is not futile when 'the allegations of the [amendment], treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.' " *Howard v. IOMAXIS, LLC*, 2023 NCBC LEXIS 159, at **15 (N.C. Super. Ct. Nov. 29, 2023) (quoting *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987)).

30. However, "[a] motion for leave to amend is futile and appropriately denied when the 'proposed amendment could not withstand a motion to dismiss for failure to state a claim.' " *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2016 NCBC LEXIS 77, at *6 (N.C. Super. Ct. Oct. 7, 2016) (quoting *Smith v. McRary*, 306 N.C. 664, 671 (1982)). A claim should be dismissed under Rule 12(b)(6) "when one or more of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact

disclosed in the complaint necessarily defeats the plaintiff's claim." *Oates v. JAG, Inc.*, 314 N.C. 276, 278 (1985) (citing *Forbis v. Honeycutt*, 301 N.C. 699, 701 (1981)).

31. Finally, "[a] motion for leave to amend is addressed to the sound discretion of the trial judge[.]" *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 430 (1990).

IV. ANALYSIS

32. M.D. Claims seeks leave to amend its pleading to add facts regarding its confidential information, remove causes of action, and include a demand for a jury trial. (*See* Mot. Amend Compl.)

33. Defendants oppose the amendment on several grounds. First, they contend that the pleading is confusing because Plaintiff's demand for relief speaks to contract claims it has dismissed and because the pleading references attachments that are not attached. (Defs.' Br. at 8-10.) But it is clear to the Court that Plaintiff is not seeking to enforce the Employment Contract's non-compete provision or the NDA's non-circumvention provision, and the relief sought is not limited to those dismissed claims. Moreover, the Court is able to understand Plaintiff's allegations despite references to bate-stamped documents that are not attached to the proposed pleading.[4]

34. Defendants next argue that the proposed amendment is futile because the attempted claims in the proposed pleading fail as a matter of law. (Defs.' Br. at 10-20.) The Court addresses this argument below, one claim at a time.

[4] All of these documents were previously attached to the complaint or are attached to the proposed amended complaint and appear in the Court's file.

A. Breach of Contract

35. Defendants argue that, particularly given the relief sought, the NDA operates as a restraint on trade making it subject to the same Louisiana law that requires non-competition provisions to contain geographic and temporal restrictions. (Defs.' Br. at 11.) Plaintiff responds that confidentiality agreements are not subject to the limitations contained in La. R.S. § 23:921, and that the nondisclosure provisions at issue are enforceable as written.[5] (Pl.'s Supporting Br. at 5 ["Pl.'s Br."], ECF No. 52.)

36. In Louisiana, non-competition and non-solicitation agreements must comply with the requirements of La. R.S. § 23:921(C), but "[c]onfidentiatlity agreements have been held enforceable and not subject to the prohibition (and requirements) of La. R.S. 23:921." *NovelAire Techs., L.L.C. v. Harrison*, 50 So. 3d 913, 918 (La. App. 4th Cir. 2010) (quoting *Engineered Mechanical Services, Inc. v. Langlois*, 464 So.2d 329, 334, n. 15 (La. App. 1st Cir. 1984)).

37. Defendants argue based on *O'Sullivan v. Gupta* that if an employer is attempting to craft a noncompete or non-solicitation provision through a

[5] Louisiana Revised Statute § 23:921(C) provides:

> Any person . . . who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment.

La. R.S. § 23:921(C).

confidentiality covenant, then the confidentiality covenant must itself comply with the restrictions in La. R.S. § 23:921. 2017 U.S. Dist. LEXIS 126943, at *11-12 (E.D. La. Aug. 10, 2017).

38. In *O'Sullivan*, among other restrictions included in a subpart under the heading "COVENANT NOT TO COMPETE" in the parties' agreement, the plaintiff was prohibited from "accept[ing] or engag[ing] in any business or activity that requires him to use or reveal any confidential business information." *Id.* at *8. The question before the court was whether this particular restriction in the agreement was required to comply with the restrictions of La. R.S. § 23:921. The Court held that the parties' obvious intent was to create a noncompete, and "[t]he fact that the restraint on [plaintiff's] post-RSI employment opportunities is structured around the protection of RSI's putative confidential business information does not change the objective intent." *Id.* at *11. It held, therefore, that the provision was subject to the requirements of the statute. *Id.* at *12.

39. The converse is true here. In this case, the parties intended to create an NDA, as the document's title reflects. The "non-circumvention" subpart does target job opportunities, a factor the *O'Sullivan* court mentions, but it does so to accomplish the overarching intention of the parties to prevent the disclosure of confidential information. Moreover, Plaintiff has specifically stated that it does not seek to enforce the non-circumvention provision, and case law in Louisiana allows the provision to be severed in accordance with the language in section XII of the

document.[6] *See Wied v. TRCM, LLC*, 698 So. 2d 685, 689 (La. App. 2nd Cir. 1997) ("Nullity of a provision does not render the whole contract null unless from the nature of the provision or the intention of the parties, it can be presumed that the contract would not have been made without the null provision."). Thus, the holding in *O'Sullivan* is not controlling in this case.

40. Under Louisiana law, the "central elements of a breach of contract action are the existence of a contract, the party's breach thereof, and damages." *Hercules Mach. Corp. v. McElwee Bros., Inc.*, 2002 U.S. Dist. LEXIS 16794, at *25 (E.D. La. Sept. 9, 2002). All three have been alleged here.

41. Defendants do not dispute that Bagley signed both the Employment Agreement and NDA at the commencement of his employment. (Defs.' Br. at 1-2.) Further, Plaintiff alleges that it signed the agreements at the same time as Bagley. There are no other arguments regarding contract formation. For purposes of the Motion, these allegations are sufficient to establish the existence of the contracts.[7] (Proposed Am. Compl. ¶¶ 63-67.)

42. Plaintiff alleges that Bagley breached the Agreements when he failed to return all company property—including its Confidential Information—in February

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[6] Under Section XII of the NDA, "[i]f any provision of this Agreement is held to be invalid, illegal, or unenforceable, the remaining portions of the Agreement shall remain in full force and effect and construed so as to best effectuate the original intent and purpose of this Agreement." (NDA § XII.)

[7] Defendants argue that it appears that Plaintiff's new allegation that it signed the Agreements the same day Bagley did is a "reactionary move," calling into question Plaintiff's credibility on this point. However, credibility determinations are not before the Court with respect to the Motion.

2024 and subsequently presented it with a USB drive containing 80,361 files. (Proposed Am. Compl. ¶¶ 142-43; Employment Agreement ¶ 11; NDA § V.) Plaintiff further alleges that Bagley is passing off M.D. Claims' final report form as his own. (Proposed Am. Compl. ¶¶ 125-26; Employment Agreement ¶ 11; NDA § V.) It alleges that Bagley's breaches have caused it to suffer damages including loss of business, lost revenue/profits, and loss of goodwill. (Proposed Am. Compl. ¶ 152.) Having alleged all three elements of a breach of contract claim, Plaintiff's proposed pleading with respect to this claim is not futile.

B. Fraudulent Concealment and Fraudulent Misrepresentation

43. Defendants next challenge Plaintiff's claim for fraud against Bagley. They argue that the claim fails because Plaintiff could have discovered Bagley's allegedly fraudulent acts upon reasonable inquiry and because the alleged fraud was not alleged with particularity. (Defs.' Br. at 17-20.)

44. Plaintiff responds that Bagley was a trusted employee who worked remotely, making detection of wrongdoing difficult. (Pl.'s Br. at 7.) Further, Plaintiff argues that it has sufficiently alleged that Bagley sabotaged client relationships and made affirmative misrepresentations to cover up this alleged sabotage. (Pl.'s Br. at 6.)

45. The essential elements for fraud are: "(1) [a] [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis v. Neal*, 361 N.C. 519, 526-27 (2007) (citing *Ragsdale v. Kennedy*, 286

N.C. 130, 138 (1974)). "Additionally, any reliance on the allegedly false representations must be reasonable." *Turpin v. Charlotte Latin Sch., Inc.*, 293 N.C. App. 330, 344 (2024) (citing *Forbis*, 361 N.C. at 527). "Reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Id.* (quoting *Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 26 (2003)).

46. In addition to these requirements, "[w]here the claim arises by concealment or nondisclosure, Plaintiffs also must allege that all or some of the Defendants had a duty to disclose material information to them, as silence is fraudulent only when there is a duty to speak." *Lawrence v. UMLIC-Five Corp.*, 2007 NCBC LEXIS 20, at **8 (N.C. Super. Ct. June 18, 2007). A duty to speak arises in three situations: (1) "where a fiduciary relationship exists between the parties," (2) when there is no fiduciary relationship, but "a party has taken affirmative steps to conceal material facts from the other," and (3) where there is no fiduciary relationship, but "one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence." *Turpin*, 293 N.C. App. at 345-46 (citing *Harton v. Harton*, 81 N.C. App. 295, 297 (1986)).

47. As for affirmative fraud, Plaintiff alleges that Bagley made false representations by (a) stating in weekly management meetings that his division of the company was performing properly when, in fact, customers were complaining; and (b) by telling Plaintiff that Bagley Consulting was set up for his wife's business

ventures rather than his own. (Proposed Am. Compl. ¶¶ 167, 169.) Plaintiff alleges that each of these representations was "reasonably calculated to deceive and made with intent to deceive." (Proposed Am. Compl. ¶ 170.) Plaintiff alleges it reasonably relied[8] on the misrepresentations and was actually deceived by them. (Proposed Am. Compl. ¶ 171.) Lastly, Plaintiff alleges that the misrepresentations resulted in lost business and revenue. (Proposed Am. Compl. ¶ 173.)

48. As for fraudulent concealment, Plaintiff argues that a duty to disclose arose when Bagley took affirmative steps to conceal material facts from Plaintiff.[9] Specifically, Plaintiff alleges that Bagley implemented a plan to sabotage his employer's business by shirking his duties, failing to provide guidance to his subordinates resulting in client dissatisfaction, and telling clients that the actions being taken were "Plaintiff's new policies." (Proposed Am. Compl. ¶¶ 99-101.) In addition, while still employed by Plaintiff, Bagley secretly set up a competing business and took Plaintiff's confidential information, all while telling his employer

[8] Defendants argue that Plaintiff could have discovered Bagley's misrepresentations upon reasonable inquiry, and therefore its reliance was not reasonable. They observe that Plaintiff admits that Bagley spoke to Kelly Bledsoe regarding his plan to solicit customers. However, there is no indication in the Proposed Amended Complaint regarding Ms. Bledsoe's position. Further, the proposed pleading also states that a conversation between Ms. Bledsoe and Bagley that followed his initial comment caused Ms. Bledsoe to "brush[] it off and move[] on." (Proposed Am. Compl. ¶ 121.) At this stage of the proceeding, the allegations suffice. *See e.g.*, *Donovan v. Fiumara*, 114 N.C. App. 524, 526 (1994) (under a Rule 12(b)(6) review, allegations in a complaint are construed liberally and are reviewed in the light most favorable to the pleader.).

[9] Defendants argue this case is analogous to *Langley v. Autocraft, Inc.*, 2023 NCBC LEXIS 95 (N.C. Super. Ct. Aug. 7, 2023). However, that case focused on a duty to speak arising from a fiduciary relationship, not resulting from alleged affirmative steps to conceal fraud.

that Bagley Consulting "was set up for [his] wife and her business ventures." (Proposed Am. Compl. ¶¶ 159-67, 169.)

49. Because the allegations are sufficient at this stage to state a claim for both fraudulent misrepresentation and fraudulent concealment under the Rule 12(b)(6) standard, the Court concludes that the proposed claim is not futile.

C. Misappropriation of Trade Secrets

50. A trade secret is defined as "business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that" both:

> a. [d]erives independent or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who obtain economic value from its disclosure or use; and
>
> b. [i]s the subject of efforts that are reasonable under the circumstances to maintain the secrecy.

N.C.G.S. § 66-152(3).

51. North Carolina employs six factors when determining the existence of a trade secret:

> (1) the extent to which information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; [(4)] the value of information to business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr., Inc., 125 N.C. App.174, 180-81 (1997) (citations omitted).

52. To plead misappropriation of trade secrets "a plaintiff must identify a trade secret with sufficient particularity so as to enable defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468 (2003)). "[A] complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is 'insufficient to state a claim for misappropriation of trade secrets.' " *Washburn v. Yadkin Valley Bank & Trust Co.*, 190 N.C. App. 315, 327 (2008) (quoting *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 511 (2004)).

53. In addition, "misappropriation" is defined 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). Just as a trade secret must be identified with particularity and cannot be pled in generalities, conclusory allegations of misappropriation are insufficient. *States Mortg. Co. v. Bond*, 2023 NCBC LEXIS 33, at **12 (N.C. Super. Ct. Mar. 6, 2023).

54. Defendants argue that Plaintiff has not adequately identified its alleged trade secrets among the laundry list of nouns that define Plaintiff's "Confidential Information." (Defs.' Br. at 21-23.) They further argue that the alleged misappropriation is pled in conclusory fashion without sufficient facts. (Defs.' Br. at 24.)

55. Plaintiff responds that it has adequately defined its trade secrets in the proposed amended pleading as (1) "Plaintiff's databases of adjusters used to investigate claims ('the Adjuster Roster')," and (2) "[b]usiness information concerning existing and potential Client Information and internal company material files/processes, together the preceding is the 'Company Materials.'" (Proposed Am. Compl. ¶ 17.) It alleges that this information has commercial value, it engages in reasonable efforts to maintain the secrecy of this information, it is not generally available to the public, and Plaintiff spent large amounts of time and money developing it. (Pl.'s Br. at 9.)

56. After a thorough review of the proposed pleading, the Court concludes that Plaintiff has sufficiently alleged that its Adjuster Roster may be a trade secret.[10] Plaintiff alleges that the information it has compiled as the Adjuster Roster is made up of more than just "publicly available information," that this compilation is not "available to the public, rented, resold/licensed, or traded," and that a third-party could not reverse engineer it. (Proposed Am. Compl. ¶¶ 25, 28-33, 39-41.)

57. A compilation of customer information can be a trade secret. *See* N.C.G.S. § 66-152(3) (including "compilation of information" in the definition of a trade secret); *States Mortgage Co.*, 2023 NCBC LEXIS 33, at **16; *see also State ex rel. Utilities Comm'n v. MCI Telecomms., Corp.*, 132 N.C. App. 625 (1999). Moreover, according to Plaintiff, developing and updating the Adjuster Roster requires "significant commitments of time, money, and expertise." (Proposed Am. Compl. ¶¶ 29-36.) The

[10] Whether the Adjuster Roster is, in fact, a trade secret remains to be determined.

Adjuster Roster is allegedly "vital" to Plaintiff's business because having a ready resource of pre-vetted adjusters available in each state allows Plaintiff to serve its clients quickly. (Proposed Am. Compl. ¶ 25.) Indeed, Plaintiff alleges that Bagley regularly accessed "several thousand pieces of information" in the Adjuster Roster as he needed them and that he would not be able to recall this information without the aid of the Adjuster Roster. (Proposed Am. Compl. ¶¶ 94-95.)

58. Plaintiff also alleges that the secrecy of the Adjuster Roster is carefully guarded. It is available for use by just three employees and is kept on "secured platforms" that are updated regularly to ensure data security. (Proposed Am. Compl. ¶¶ 22, 38, 56, 58.) Employees are given access only to the information necessary to perform their jobs, each employee receives a unique password, and employees who are afforded access to the information sign agreements to maintain its confidentiality. (Proposed Am. Compl. ¶¶ 59-60.) These allegations are sufficient at this stage to plead the existence of a compilation trade secret in the form of the Adjuster Roster.

59. On the other hand, Plaintiff's broad reference to "Company Materials" does not sufficiently identify a trade secret. "Company Materials" is defined by Plaintiff to include wide-ranging categories of information such as "general/administrative information," "sales trends," and "generalized customer pricing information." (Proposed Am. Compl. ¶ 51.) These descriptions do not satisfy the particularity requirements necessary to plead the existence of a trade secret. *See Analog Devices, Inc.*, 157 N.C. App. at 468 (2003) ("[A] plaintiff must identify a trade secret with sufficient particularity so as to enable defendant to delineate that which he is accused

of misappropriating and a court to determine whether misappropriation has or is threatened to occur.").

60. Plaintiff also identifies as a trade secret "Client-related information," which appears to be a subset of its Company Materials. It alleges that the Client-related information includes:

> a. Non-public individual contacts and information (i.e., meeting notes/impressions, Client preferences);
> b. Client preferences concerning Adjusters;
> c. Plaintiff's notes on Client contract/fee schedule preferences;
> d. Expenses for developing each individual contact;
> e. How many employees are required to serve each Client;
> f. Information about potential Clients (i.e., efforts/invest made in converting the lead to a client);
> g. Client billing history and preferences;
> h. Non-public Client Policy in Force documents;
> i. Client insurance practice fields;
> j. Individual contact's non-public contact information; and
> k. When a lead became a Client.

(Proposed Am. Compl. ¶ 49.)

61. Unlike the Adjuster Roster, there is no indication in the proposed pleading that "Client-related information" is an ascertainable compilation of information kept together and maintained as confidential in a secure location. To the contrary, Plaintiff states it "is not a dedicated platform like Salesforce."[11] (Proposed Am. Compl. ¶ 57.) While the Court recognizes Plaintiff's allegations regarding the effort and expense it takes to "convert leads into Clients," (Proposed Am. Compl. ¶ 48),

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[11] Salesforce is customer relationship management software. *See* What is Salesforce?, SALESFORCE, www.salesforce.com/products/what-is-salesforce (last visited Jan. 1, 2025). This Court has previously determined that compilations of data stored and capable of manipulation in Salesforce may qualify as a trade secret. *See, e.g.*, *Prometheus Grp. Enters., LLC v. Gibson*, 2023 NCBC LEXIS 42, at **34 (N.C. Super. Ct. Mar. 21, 2023).

information resulting from those efforts does not, without more, rise to the level of a trade secret. Moreover, the proposed pleading lacks facts to support Plaintiff's conclusory allegations that its Company Materials (which include the "Client-related information") are not available to the public and that they have actual independent commercial value as unique information. (Proposed Am. Compl. ¶ 54.)

62. Therefore, the only trade secret adequately pled here is the Adjuster Roster. As for its misappropriation, Plaintiff alleges that Bagley regularly accessed the information and "had the means, and opportunity, to acquire [it] without raising red flags." (Proposed Am. Compl. ¶ 96.) It alleges that in the weeks before he left, Bagley "retained and transferred the [Adjuster Roster] to [his new business], which, in turn used it to solicit the adjusters[.]" (Proposed Am. Compl. ¶ 132; *see also* ¶¶ 124, 135, 136, 141.) These allegations are sufficient to plead misappropriation. *Cf. Wells Fargo Ins. Servs. USA v. Link*, 2018 NCBC LEXIS 42, at *41 (N.C. Super. Ct. May 8, 2018) (allowing misappropriation claim even though they required a "significant inferential leap.").

63. Thus, with respect to the Adjuster Roster, Plaintiff's proposed claim for misappropriation of trade secrets is sufficiently pled, and Plaintiff's Motion is **GRANTED**. As for the Company Materials, including the Client-related information, however, the proposed pleading is futile, and Plaintiff's Motion is **DENIED.**

D. N.C.G.S. § 75-1.1 Violation

64. Under North Carolina's Unfair and Deceptive Trade Practices Act (the "UDTPA"), "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1(a).

65. Plaintiff must plead three elements to state a UDTPA claim against both Bagley and Bagley Consulting: "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) proximately causing injury to defendant or defendant business." *Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 172 (1992). The allegations against both Defendants in support of Plaintiff's misappropriation of the Adjuster Roster satisfy these elements. *See, e.g.*, *Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 659 (2009). Therefore, Plaintiff's proposed UDTPA claims are sufficiently pled, and Plaintiff's Motion with respect to these claims is **GRANTED**.

E. Veil Piercing

66. In its prayer for relief, Plaintiff requests that the Court pierce Bagley Consulting's corporate veil and treat Bagley Consulting and Bagley as one and the same. (Proposed Am. Compl. Prayer for Relief ¶ 7.)[12]

[12] It is unclear whether Plaintiff is attempting to assert traditional piercing (where the corporate veil is pierced so that recovery for the wrongful conduct of the company can be had against an individual or corporate entity that controls the company) or reverse piercing (where the corporate veil is pierced so that recovery for the wrongful conduct of the controlling individual or entity can be had against the company). In either event, the pleading requirements are largely the same.

67. "To pierce the corporate veil is to set aside the corporate form and the protections that go along with it." *Harris v. Ten Oaks Mgmt.*, 2022 NCBC LEXIS 62, at **5 (N.C. Super. Ct. June 20, 2022). "[V]eil piercing allows a plaintiff to impose legal liability for a corporation's obligations . . . upon some other company or individual that controls and dominates a corporation." *Id.* (quoting *Green v. Freeman*, 367 N.C. 136, 145 (2013)).

68. To pierce the corporate veil, a plaintiff must show "that the [company] is so operated that it is a mere instrumentality or alter ego of the sole or dominant [owner] and shield for his activities in violation of the declared public policy or statute of the State." *Cold Springs Ventures, LLC v. Gilead Scis., Inc.*, 2015 NCBC LEXIS 1, at *15-16 (N.C. Super. Ct. Jan. 6, 2015) (quoting *Green*, 367 N.C. at 145).

69. The Court reviews the proposed pleading for three elements:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [a] plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at *16 (internal citations omitted).

70. Pleading "complete domination" in a conclusory fashion is insufficient. Instead, the Court looks for specific allegations such as:

1. Inadequate capitalization ("thin incorporation").

2. Non-compliance with corporate formalities.

3. Complete domination and control of the corporation so that it has no independent identity.

4. Excessive fragmentation of a single enterprise into separate corporations.

East Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc., 175 N.C. App. 628, 636 (2006) (citing *Glenn v. Wagner*, 313 N.C. 450, 455 (1985)). "[T]he presence or absence of any particular factor . . . is [not] determinative. Rather, it is a combination of factors which . . . suggest that the corporate entity attacked had no separate mind, will or existence of its own and was therefore the mere instrumentality or tool of the dominant corporation." *Fischer Inv. Cap., Inc. v. Catawba Dev. Corp.*, 200 N.C. App. 644, 651 (2009) (cleaned up).

71. Here, Plaintiff's proposed pleading uses key words ("mere instrumentality," "complete domination"), but those words are not supported with facts. Plaintiff pleads that Bagley is the sole member of Bagley Consulting, (Proposed Am. Compl. ¶ 113), that the LLC has committed wrongs, (Proposed Am. Compl. ¶¶ 124-28), and that injury to Plaintiff resulted, (Proposed Am. Compl. ¶¶ 165, 173). However, even in a single member LLC where Bagley is the member, conclusory allegations that Bagley had "complete domination," standing alone are not enough. "Common ownership and management, without more, do not equate to the kind of complete domination needed to show that one entity is another's puppet." *Harris*, 2022 NCBC LEXIS 62, at **7 (citing *Richardson v. Bank of Am., N.A.*, 182 N.C. App. 531, 548

(2007)); *Cold Springs Ventures*, 2015 NCBC LEXIS 1, at *18; s*ee also Waff Bros., Inc. v. Bank of North Carolina, N.A.*, 289 N.C. 198, 210 (1976) ("The mere fact that all of the outstanding shares of stock of each of two corporations are owned by one individual, who is the chief executive officer of each corporation, does not necessarily destroy the corporate entities so as to make the two corporations and the sole stockholder one and the same person in contemplation of the law.").

72. As in *Harris*, "[m]issing are allegations of excessive fragmentation, siphoning of funds, failure to observe corporate formalities and maintain records, or any other conduct that typically characterizes abuse of the corporate form." *Id. See also Gurkin v. Sofield*, 2020 NCBC LEXIS 49, at *25 (N.C. Super. Ct. Apr. 15, 2020) (applying factors to a reverse veil piercing claim); *W&W Partners, Inc. v. Ferrell Land Co., LLC*, 2018 NCBC LEXIS 52, at *25 (N.C. Super. Ct. May 22, 2018) ("[R]ote recitation of the factors enunciated by North Carolina's appellate courts" are not sufficient to allege piercing the corporate veil.).

73. Piercing the corporate veil "is a strong step: Like lightning, it is rare and severe." *State ex rel. Cooper v. Ridgeway Brands Mfg.*, 362 N.C. 431, 439 (2008). Plaintiff has failed to allege enough for it to strike here.

74. Accordingly, the Court **DENIES** Plaintiff's Motion to the extent Plaintiff seeks the equitable remedy of veil piercing.

75. **WHEREFORE**, the Court, in its discretion, **ORDERS** as follows:

a. Plaintiff's Motion is **GRANTED in part** and **DENIED in part**.

b. Plaintiff is permitted to file a Second Amended Complaint, in form and substance consistent with this Order and Opinion, on or before 29 January 2025.

IT IS SO ORDERED, this the 22nd day of January, 2025.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases